

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Luke N. Brown, Trial Judge
The Honorable R. Markely Dennis, Jr., Post-Conviction Relief Judge

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S.C. Supreme Court

Lower Court Case No. 2005-CP-10-3313
Appellate Court Case No. 2012-213419

Wesley Max Myers, ... Respondent,

v.

State of South Carolina, ... Petitioner.

APPENDIX

VOLUME 7 of 7

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stated he clubbed his daughter to death and threw her into the lake. The confession was very consistent with what the police then knew about the crime. However, it turned out the body was stabbed and she was not clubbed to death. It also was discovered that somebody had dropped the body out of the car and dragged it through the snow. "So Garrett's confession did not match what turned out to be the facts of that case, even though there was a persuasive and vivid confession." R. 876, ll. 3-24.

Alcohol and drugs make people vulnerable to these false, "black-out" confessions. R. 862, l. 10 – 864, l. 9.

The Reid School

Dr. Kassin testified that a manual prepared in 1962 was the manual cited by the United States Supreme Court in Miranda v. Arizona.¹⁵ The Reid School had trained more than one hundred thousand law enforcement officers in these interrogation techniques. R. 864, l. 15 – 865, l. 15.

Dr. Kassin noted that there was a difference between an interview and an interrogation. An interview was used to determine whether the person being interviewed was lying or telling the truth. If the person was deemed to be lying, then interrogation began, which was a nine-step sequence. R. 865, l. 16 – 866, l. 24.

Dr. Kassin noted that behavioral studies had shown that interrogators want to increase the anxiety and deception upon an individual to make it more attractive to give a confession. "The interrogator tells a person 'You're guilty. We know you're guilty.' The suspect is basically not allowed to issue denials. They try to interrupt those denials.

¹⁵ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1968).

The key to all of that is to convince the suspect, basically to break the suspect down to a state of despair. Denial is a, is a futile exercise because we don't accept it. We don't listen to those denials." R. 867, l. 19 – 868, l. 25.

Dr. Kassin also explained that the person is encouraged to minimize moral guilt in their confession. R. 869, l. 1 – 870, l. 10.

This Case

Dr. Kassin then analyzed this case against the foundation he had laid for his testimony. Dr. Kassin noted that a review of the McHale interrogation videotape, that is on file with this Court, revealed the use of techniques appellant had told him actually occurred. R. 876, l. 25 – 878, l. 6. It was disputed whether appellant was shown photographs of the victim prior to his confession. R. 879, l. 7 – 880, l. 15. It was undisputed he was shown the victim's picture when the police asked him to apologize to the dead victim near the conclusion of their ruse.

Dr. Kassin testified that there were very strong elements of the Reid technique employed on appellant. R. 880, ll. 16-21. There was a hint that an eyewitness had seen appellant at the bar that night. R. 881, ll. 7-19. There was also a suggestion appellant had blacked out. R. 882, ll. 1-15. Then there was the minimization used that maybe the crime was not as bad as it looked, "those are classic Reid school techniques..." R. 882, l. 4 – 883, l. 12. See McHale tape.

Dr. Kassin also noted that Lt. McHale had specified to appellant the different degrees of homicides and the possible penalties. R. 883, l. 13 – 884, l. 8.

Appellant's Apology After Confessing

Dr. Kassin said appellant ultimately gave up and actually began "to wonder whether or not he committed this crime. He has no direct memory. He comes out at some point and says, 'I must have done it,' which is an interesting non-defensive concession." Appellant was confronted with this alleged evidence and his lack of memory "and a black-out suggestion is noted." R. 886, l. 13 – 887, l. 20.

Dr. Kassin also mentioned a study where college students were told they had broken a computer, even though they had not, and they apologized. They thought they hit "some key I wasn't supposed to hit." R. 887, l. 16 – 888, l. 9.

Other Cases

Dr. Kassin testified that he received hundreds of telephone calls on interrogations and had looked closely at forty or fifty and agreed to testify in about a dozen cases. R. 889, ll. 5-21. On cross-examination, Dr. Kassin said that appellant being told he was not a suspect was something he had seen in a lot of "these cases where gaining the suspect's trust and making the suspect think that he's part of the, helping in the investigation as opposed to [being] suspect, is a way to kind of impact and maximize the impact of false evidence." R. 932, ll. 5-23.

Also on cross-examination, Dr. Kassin said it did not matter whether the police knew they were presenting appellant with false evidence, it was the effect on the suspect, or appellant, that mattered. Dr. Kassin added, "I wouldn't be here if that hair was a match." R. 928, ll. 16-24.

The following day, February 27, 2001, the judge again said this case was a "comedy of errors from the very beginning," and he stated he was troubled by some of

the practices of the police, but he ruled appellant's confessions were admissible. R. 994, l. 18 – 1002, l. 16. The three inculpatory statements — apologizes — given one after another, and set-up by the police ruse are considered in issue three infra.

Testimony before the Jury

Dr. Kassin testified in the presence of the jury on March 5, 2001. The solicitor immediately objected to Dr. Kassin talking about other cases, as seen above, to illustrate his expert testimony. R. 2241, l. 13 – 2242, l. 25.

Defense counsel Kulp said that Dr. Kassin was going to mention other examples of false confessions “that he has compared this to in order to make his assessment about the circumstances.” R. 2244, ll. 17-23. The solicitor then said that was exactly what he was objecting to, and what he did not want Dr. Kassin to do. The solicitor argued, “His testimony was rife with and take the so-and-so case, you know, he'd relate the facts of that case and so on and so forth and that's got nothing to do with the case, Judge.” R. 2244, l. 24 – 2245, l. 12.

Defense counsel argued that under Rule 702, SCRE, an expert's opinion was admissible if it would help the jury understand the matter at issue. R. 2245, l. 22 – 2246, l. 24. Defense counsel also argued that an expert could rely on information received from others “if the information is the type reasonably relied on by experts in that particular field forming opinions or drawing inferences upon the subject.” R. 2247, ll. 17-25.

Defense counsel told the judge, “It's impossible for him [Dr. Kassin] to explain to the jury what an internalized false confession is if, unless he provides examples to explain what it is, and that is certainly – I was planning on.” R. 2249, ll. 2-8. The judge

said he would rule on the objection at the time they were made by the solicitor. R. 2249, ll. 17-19.

After cross-examination, and on re-direct examination, Dr. Kassin testified that he paid for his own airline ticket. He also said that he stopped recording the hours that he spent on this case, but would "say forty hours." R. 2403, ll. 1-21. The following then occurred on re-direct examination of Dr. Kassin:

Q. Now, Mr. Durant asked you in his cross-examination about anecdotal evidence of false, false confessions. Will you please tell the jury some of the more anecdotal examples of false confessions.

A. The ones in particular that again, I, I, I keep saying that this case bears such striking resemblance to other coerced internalized –

Mr. Durant: Your Honor, this is the issue we raised before.

Mr. Kulp: It's a matter on redirect. It was brought up on cross-examination.

The Court: I don't understand that. I think he volunteered that. I heard, I heard that one thing, but he volunteered that and so my original ruling stands.

Mr. Kulp: Your Honor, he asked him about case studies, about anecdotal case studies that he was familiar with.

The Court: No, sir. I'm not going to allow it, unless you got a case example like this.

Q. Do you have in mind a case of –

The Court: Well, now that's what he said. It was similar to this, in Florida.

R. 2403, l. 22 – 2404, l. 25.

During the discussion between defense counsel, the court and Dr. Kassin, Dr. Kassin said that there was a Florida case, an Indiana case, and Connecticut case that were very similar to this one. Dr. Kassin said, "I mean there's a whole litany of cases just --" The solicitor again objected. R. 2405, ll. 5-23.

The judge disagreed that the solicitor had opened the door to specific examples in his cross-examination. The judge again ruled, "I heard, I heard that one thing, but he [Dr. Kassin] volunteered that and so my original ruling stands." R. 2404, ll. 11-15.

On March 2, 2001, the McHale videotape was played for the jury. R. 2298, l. 16 – 2231, l. 4. Appellant strongly submits the facts and cases Dr. Kassin relied on during the Jackson v. Denno hearing were essential to illustrate his testimony, and for the jury to understand the significance of the McHale tape, and the ruse as a psychological ploy.

On cross-examination before the jury, McHale admitted that he would suggest the killing was "on purpose," "got mad," "did it," ... "accidental thing," "didn't mean to," [or] "didn't even know you did it." R. 1512, ll. 2-9.¹⁶

As seen, when appellant returned the next day to the police station after his interrogation by McHale, he was told that the hair matched him. It was then that appellant made his "I must have done it" confession. It is apparent that appellant's apology to the victim's mother after his confession, and the media confession or apology were merely the extended product of appellant's first confession.

¹⁶ On the videotaped interrogation between appellant and McHale, there is "dead time" where appellant is alone. McHale admitted in his testimony that he did not tell appellant he was being taped at the time. However, McHale insinuated appellant would know of this fact. R. 1473, l. 21 – 1478, l. 4.

Discussion

Rule 702, SCRE, states that "if scientific, technical or other other spe issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or other." Further, Rule 703, SCRE, states that the facts or data upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If they are of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be in evidence.

Here, Dr. Kassin – out of the presence of the jury – artfully used cases he had studied in other states to illustrate his point on how interrogation tactics could break down a witness. It is difficult for a layperson or even a lawyer to understand intuitively why a person would confess to a crime he or she did not commit regardless of the psychological ploys or tricks used by law enforcement.

Police interrogation tactics, and the Reid technique are not matters of social psychology within the common everyday understanding of the jury. The United States Supreme Court ultimately came out with the opinion in Miranda after studying the Reid technique, and other interrogation practices. Further, the solicitor had no objection to Dr. Kassin testifying as an expert in social psychology, and Dr. Kassin never sought to give his ultimate opinion to the jury on whether appellant's confession was false. R. 2256, ll. 16–19; R. 2269, ll. 1–9.

Consequently, Dr. Kassin's expertise under Rule 702, SCRE, and the data and facts he relied upon were admissible in his testimony before the jury.

The solicitor did not want Dr. Kassin to use these examples he relied on before the jury to illustrate his point because he had seen how effectively they were employed by the defense during the Jackson v. Denno hearing. Defense counsel correctly argued Dr. Kassin needed to use the underlying facts or data to effectively testify before the jury.

As stated, interrogation tactics are matters beyond the common knowledge of the jury and Dr. Kassin's expert testimony was necessary for the jury to make an intelligent interpretation of the evidence before it. See, State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990); Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (battered woman syndrome); State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991) (reliability of eye witness testimony). Dr. Kassin's foundation testimony was relevant for the jury to intelligently deliberate about whether it could conclude appellant's confession was voluntary or coerced.

It is important to note that South Carolina has always had an "assist the jury standard" on expert testimony. Our Supreme Court in State v. Council, 335 S. C. 1, 515 S.E.2d 500 (1999) noted that this state has not adopted the Frye v. United States, 293 F.2d 1013, 1014 (D.C. Cir. 1923), or the Daubert v. Merrill Dow Pharmaceutils, 509 U.S. 579, 113 S.Ct. 2786 (1983) standard.

This Court in applying the "helpful to the jury" standard has allowed testimony on complex psychological phenomenon, post-trauma stress disorder — even where an ultimate opinion was rendered by a witness with a degree in social work. Her knowledge and experience was still beyond that of the jury, and would assist them in their deliberations. See, State v. Henry, 329 S.C. 266, 499 S.E.2d 463 (Ct. App. 1997). In short, we have always allowed expert testimony — here without objection — where that

testimony would aid the jury, and have left it up to the jury to accept or reject that expert testimony. That is a standard jury charge.

Here, as stated, Dr. Kassin did not offer an ultimate opinion, and his testimony illustrated by facts and data he relied on was clearly admissible under the laws of expert testimony in this state. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1989). Experts can even base their opinions on inadmissible hearsay if they are of the type reasonably relied on by experts in the field. State v. Franklin, 318 S.C. 47, 456 S.E.2d 357, 363 (1995).

The trial court erred by refusing to allow Dr. Kassin to testify about the underlying facts and data upon which he based his testimony. The solicitor sought to display Dr. Kassin as nothing more than a hired gun for the defense in this case. The state did not have a case absent what appellant had strongly and consistently maintained was a coerced confession set up by Lt. McHale, and concluded with the lies that the hair found in the victim's hand matched appellant's hair. There was also the urging of the "blackout" scenario.

The trial court undercut appellant's entire defense in its impermissible limitations on appellant's expert testimony. Appellant should be granted a new trial.

3.

Appellant's confession should have been suppressed since it was the coerced product of coordinated police efforts to overbear his will, and it produced the "I must have done it" confession. The quick subsequent apologies to the decedent's mother and the media were all part of the same staged event. (Issues 3, 4, and 5).

Defense counsel filed a pre-trial "motion to suppress all statements of the defendant" on May 22, 2000 and attached a memorandum of law. R. 2800-2820. Appellant moved to suppress his statement to the police, to the victim's family member (her mother), and to agents of the media since they stemmed directly "from the statement obtained from the Defendant by the police when they finally overbore his will." Motion to suppress at p. 19. R. 2819.

On February 20, 2001, the defense filed a second motion to suppress all three statements, the original, the set-up apology to the victim's mother, and the "media walk" set-up outside the police station. R. 2750-2762. Counsel attached exhibits to the motion to show that reporter Karlyn Lothery had testified at the prior Jackson v. Denno hearing that Lt. Cumbee told her "we're going to walk him were the words that he used, meaning take him out of the building and put him in the police car and transport him to the jail." Page 109 of prior transcript, attachment to motion at R. 2760.¹⁷

The supplemental Jackson v. Denno hearing was held on February 26, 2001. The trial judge reminded the witnesses that "I read your Jackson-Denno hearing [testimony] two times." R. 634, ll. 1-18.

¹⁷ As seen, Judge Cottingham retired prior to the trial, and after a suppression hearing. Judge Brown held his own suppression hearing.

Detective Clayton acknowledged that photographs were placed before appellant, and Clayton believed appellant had touched them. R. 646, l. 9 – 649, l. 1. The significance of that was obviously that appellant was given an understanding of the crime scene he otherwise would not have had.

The McHale tape was a Court's exhibit, and a defense exhibit before the jury. It was considered by the trial judge at the suppression hearing, and is now on appeal before this Court. Clayton acknowledged that McHale had special expertise in interrogation and interview practices, and he knew that McHale had studied the Reid technique. R. 663, l. 13 – 666, l. 8.

After the McHale videotaped interrogation on Friday afternoon, Clayton said the interrogation of appellant began the next day, Saturday, at noon. R. 666, l. 6 – 672, l. 14.

McHale testified he took a forty hour course in the Reid technique. McHale finally acknowledged that the Reid technique, or "any technique" could be misused and produce a false confession. R. 773, l. 9 – 777, l. 25.

McHale admitted that he could get someone to confess to something that was not "serious." "People will confess to something they did not do if it was not serious, if *they perceive that the consequences of that aren't going to be as great as what they're feeling at the moment.*" R. 778, l. 2 – 779, l. 23. McHale denied that he led appellant on the tape to believe some things that were not true, but he asserted he thought there was other evidence against appellant. McHale maintained, "the guilty person really feels scared about it. An innocent person doesn't." R. 803, l. 18 – 805, l. 18.

McHale admitted he told the other police officers it was best to "let him [appellant] have a good night's sleep and go home and come back in the morning, then you hit him, he'll crack, and the confession will be admissible." R. 810, l. 8 – 811, l. 4. McHale acknowledged he used "minimizing" techniques such as McHale talking about hitting his own wife, and admitted he was "setting him up." R. 816, 24 – 818, l. 24.

McHale acknowledged he suggested to appellant that what happened may have been an accident. "A person generally does not confess to a cold-blooded murder the first thing they walk in the door. It's a lot easier to confess to people that you did something in self-defense or accident, much more palatable." McHale said once he got those type admissions, "then we go further with those kinds of admissions." R. 819, ll. 5–20.

Dr. Kassin's testimony from this Jackson v. Denno hearing, and its limitations before the jury were dealt with at length in issue two above. Dr. Kassin said his viewing of the McHale tape corroborated what appellant had told him what occurred. R. 877, l. 23 – 878, l. 6.

Dr. Kassin said McHale set into motion the "notion of an alcoholic blackout." Appellant said, "They suggested that maybe I blocked it out." Dr. Kassin testified that part of the Reid technique was to suggest that "maybe what you did isn't so bad. You know, you you did of thing that anybody might have done. You had the kind of impulse anybody might have had. Maybe you just lost control. Maybe it was an accident. In fact the word accident was used." R. 881, l. 20 – 882, l. 24.

Dr. Kassin opined during the Jackson v. Denno hearing that he saw appellant's confession as the "product of some fairly coercive set of influences." "It's the same set

of influences that will produce the follow-up apologies [to the decedent's mother and the media.]" R. 886, l. 2 - 887, l. 20. However, Dr. Kassin candidly acknowledged on cross-examination that he could not opine whether appellant's confession was true or false — that was not his purpose in testifying. R. 930, ll. 9-14.

The following day, February 27, 2001, arguments were heard on the motion to suppress. Defense counsel cited Dr. Kassin's testimony, and moved to suppress all three inculpatory statements. He argued the "I must have did it or done it then," confession was totally unreliable." Counsel said the state did not have any evidence, including the fake hair evidence, against appellant. R. 944, l. 13 - 966, l. 15. Counsel said once appellant gave his "I must have done it" confession, the police told him he needed to apologize to Teresa, and to Teresa's mother. "At that point he's broken." R. 966, l. 23 - 968, l. 1.

Counsel then noted that the press was contacted, "we didn't call that reporter as a witness. They did, and it blew up." "Well, the press are coming. You need to apologize to the world." Counsel said he thought one sealed letter from the solicitor's office to the North Charleston Police Department admonished them about their misconduct, and told them of their ethical duties surrounding trial publicity. Counsel said rather than appellant being taken out the back door, or allowed to cover his face, he was led in front of the press. R. 968, l. 7 - 971, l. 16.

Defense counsel concluded that McHale's interrogation about hitting his own wife, suggesting there was other evidence, and suggesting accident were all "a CIA kind of interrogation." Counsel also informed the trial judge that appellant's uncle was a decorated war hero in Vietnam and had been the police chief in Fountain Inn, South

Carolina. "Wes grew up thinking that man walked on water," and he respected the police. R. 980, l. 9 – 984, l. 21. Counsel urged under the highly unusual facts of this case that the statements should be suppressed. R. 975, l. 17 – 985, l. 13.

The judge ruled appellant's confession was admissible. R. 996, l. 15 – 997, l. 21. The judge then inquired if the apology to the decedent's mother and to the press should be considered part of the same confession. Defense counsel argued that it was all one matter because the entire event was staged, and there was no real time difference between the statements. Appellant never left police custody. The judge ruled it was a jury question whether appellant's will was overborne. R. 997, l. 22 – 1002, l. 16.

Appellant's confession was then admitted over objection. R. 1703, l. 2 – 1711, l. 6. After the confession appellant was asked if he wanted to talk to the victim's mother, and appellant apologized to the mother and then Detective Clayton said he "tried to contact his family to let the child know or the family know that, that he may be on the media, that he might be on T.V." Appellant then also apologized to the media. R. 1702, l. 2 – 1711, l. 6.

Discussion

A confession is not admissible unless it is voluntarily made. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989). A determination of whether a confession was voluntarily tendered requires an examination of the totality of the circumstances. Schnechloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1993).

Appellant recognizes that our Supreme Court and others have held that ploys by law enforcement may be acceptable as long as the ultimate decision to confess is the product of the suspect's own balancing of competing considerations. The pertinent

inquiry is, always, whether the defendant's will was overborne. See, State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689, 695 (1996).

A confession obtained through subterfuge is admissible *if the method used is not likely to procure an untrue statement*. State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980) (emphasis added); Frasier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420 (1969).

In State v. Von Dohlen, there was no evidence the defendant was threatened or coerced. The defendant in Von Dohlen was not fooled by a fake sketch of himself where the police sought to lead him to believe the police had an eyewitness, and VonDohlen knew guns well enough to know that the casings allegedly recovered in connection with the crime did not implicate him. VonDohlen continued to maintain his innocence. VonDohlen ultimately confessed because he knew one of the interrogating officers, who he considered a friend, told him he did not want to be remembered the same way as a vicious unremorseful murderer would be remembered. State v. Von Dohlen, 471 S.E.2d at 694.

Here, the situation is starkly different. McHale's testimony and the McHale videotape show strongly coercive tactics and psychological techniques. Further, unlike the defendant in Von Dohlen, appellant's will was overborne because he accepted the lie set-up during interrogation by McHale that he must be guilty because the hair found matched him. Moreover, McHale talked with appellant about "premeditated murder" versus a "heat of passion" homicide and planted in appellant's mind a "black-out" scenario where it appeared appellant had a serious drinking problem — he drank a case of beer the night before the interrogation.

Dr. Kassin said the alcoholic black-out possibility has appeal, particularly where McHale suggested appellant "lost control," as was then written into his statement, or that it was an accident, as appellant told the media. R. 2745. See Media tape on file. It obviously could not be both, but looking for coherence in a "black-out" coerced confession is like looking for a diamond tiara in a gutter.

Appellant's confession in this case should have been excluded under the highly unusual facts of this case. State v. Rabon, supra.

Issue 4

The apology to the decedent's mother was part and parcel of the same subterfuge. That apology statement should have been suppressed as the immediate fruit of the poisonous tree.

As seen, Detective Clayton's testimony shows the apology to the dead decedent, and the decedent's mother, and the media all happened quickly. Time for contemplation was the enemy. R. 1702, l. 2 – 1711, l. 6.

The apology statements should have been suppressed as part of the immediate fruit of poisonous tree. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963); State v. Callahan, 263 S.C. 35, 208 S.E.2d 284, 287 (1974).

Detective Melvin Cumbee, Jr. testified he telephoned the decedent's mother and told her "that Wesley wanted to apologize to her. That was also the reason that he wanted to call his [appellant's] mother. And at that point in time she was not at the station. She had to drive to the station." R. 1815, l. 6 – 1816, l. 14.

It is clear that the police wanted these quick apology statements from appellant to bolster his confession.¹⁸ It is undisputed that the Detective suggested appellant apology to the dead victim, and it is also of accord that the police telephoned the decedent's mother and the media that same afternoon day. It was all quick — they were eager for the apologies to occur.

The decedent's mother acknowledged that Lieutenant Cumbee called her and told her that appellant had confessed to the crime. She said Cumbee claimed that appellant wanted to talk to her and he wanted her to come down the police station. R. 2054, l. 6 – 2055, l. 22.¹⁹

Dixie Justice, the decedent's mother, said appellant told her that he killed the decedent. He said that he did not know why he did it. R. 2056, l. 22 – 2057, l. 11. Appellant then told her that he was going to apologize on T.V. to everyone. R. 2057, ll. 12-21.

Appellant's confession was the result tactics that overbore his will. Encouraging appellant to think an alcoholic black-out occurred, and that he just "lost it," or that the killing was "an accident" was sleazy coordinated police work. There is no way to sugar coat this case. The subsequent apology to the victim's mother should have been suppressed as the fruit of the poisonous tree. Wong Sun v. United States, supra.

¹⁸ March 1, 2001, transcript.

¹⁹ March 2, 2001, transcript.

Issue 5

Appellant's apology to the media during the "perp walk" should have been suppressed as part of the immediate fruit of the poisonous tree. The reporter acknowledged she was told the police were going "to walk" appellant, and they were contacted and given the opportunity for dramatic nightly footage of appellant apologizing to his detriment.

The media confession is also on file with this Court. In that videotape, appellant has microphones placed next to him, and is asked blunt questions by the media. Appellant tells the media that the incident was an accident. He apologized for his actions. He said he did not know how many times he hit the decedent. All of this is, of course, consistent with the defense throughout that McHale had planted these seeds of the coerced "I must have done it" confession for the next day — Saturday — the day of the perp walk.

As seen, Channel five television reporter Karlyn Lothery testified that at the first May 22, 2000, Jackson v. Denno hearing that she was told the police "were going to walk him . . . [so] we went up there and camped out where we do in those cases." Lothery said she knew what the term "perp walk" meant. R. 422, l. 13 – 424, l. 13.

Lothery was called as a witness at trial so the state could play the tape for the jury. The defense objected to the videotape being played. R. 2073, l. 19 – 2077, l. 11.

There was not any break of any substance between appellant's coerced confession and perp walk opportunity for the media. In Lauro v. Charles, 219 F.3d 202 (2d Cir 2000), the Court held that a staged "perp walk" violated the defendant's Fourth

Amendment rights.²⁰ The Second Circuit noted that perp walks are advantageous to the police who contact to media to publicize their crime fighting efforts. The media is also a willing player because the police provide them with dramatic film footage for their use. "Not surprisingly, then, police and press often cooperate to ensure that perp walks occur." *Id.*, 219 F.3d at 203-204.

Here, appellant's will was overborne by police practices that produced his confession. Appellant was then encouraged to apologize. The event was staged, not in the exact sense of Lauro, but staged nonetheless in that the media was contacted and given time to, in Lothery's words, "camp out" and wait for the event. The staged event was awkward, and although Lothery testified she did not want to engage in "mind rape," this was surely a much different walk to the jail or police car than would have occurred had the police not intentionally sought out the presence of the media. R. 2076, l. 10 - 2077, l. 11.

Appellant's apology during the staged perp walk here also cannot reasonably be determined to be an exercise of his free will where that free will had just overborne to obtain his confession. Appellant respectfully submits that this was just another example of police misconduct during this case that this Court can sanction by holding the media perp walk tape should have been excluded at trial, and should be excluded at a retrial.

Again, however, the confession itself being coerced, it was error to admit the apology to the media since it was part of the same continuing subterfuge, and therefore it

²⁰ The fact that Lauro was a civil suit or a Fourth Amendment case is of no meaningful significance. It involved police practices the Court condemned.

was the fruit of the poisonous tree. Wong Sun v. United States, *supra*. Appellant should be granted a new trial.

6.

The trial court should have granted appellant's motion to reveal the contents of letters from Solicitor David Schwacke and Assistant Solicitor Amie Clifford to the North Charleston Police Department. The defense learned during trial preparations that the solicitor's office had warned, admonished or asked for the cooperation of the police department. Police misconduct regarding the perp walk, confession, as well as their failure to investigate were critical issues in this case. The contents of these letters should have been revealed since they contained impeachment or exculpatory evidence.

Relevant Facts

At the May 22, 2000, hearing, the judge noted that defense counsel had subpoenaed a copy of a letter from Assistant Solicitor Amie Clifford to Chief Caldwell. Defense counsel also requested a copy of the December 29, 1998, letter from Solicitor David Schwacke to Chief Caldwell. The judge ruled both of the letters constituted work product and he would not release them. Both trial judges placed the letters under seal for purposes of this appeal.

Appellate counsel moved to unseal these letters so that he could argue the contents should have been revealed at trial. That motion was denied. Counsel then moved to be permitted argument on the issue, with this Court reviewing the letters in camera. That motion was granted.

At the February 26, 2001, hearing, Detective Denver Clayton admitted he was standing outside the polygraph room watching the McHale interrogation of appellant. The defense then questioned Clayton about when the solicitor's office was made aware of the videotape. This is almost four years after appellant's arrest. The defense had reviewed this

videotape prior to the February 26, 2001, hearing. The following occurred on direct examination of Detective Clayton:

Q. Okay. Let me ask you this. The day before, Friday, when you took Mr. Myers down to Mr. McHale at the polygraph room, did you stand out — the tape we've now seen and reviewed. Were you standing outside of that room, watching what transpired on the television monitor?

A. Yes, sir.

Q. Okay. When did you tell the solicitor about the recording of that videotape?

A. The recording of?

Q. The existence and the fact that Mr. Myers —

A. I called when Amie Clifford was in office, I told her about that videotape.

Q. When did you tell Mrs. Clifford about the videotape?

A. I can't recall.

Q. Okay. How far — how long after the case broke in 1997 did you tell her about the videotape?

A. I'm not sure.

Q. Did she ever look at it? Did you ever show it to her?

A. I, I can't recall.

Q. You don't recall that?

A. No, sir.

R. 653, l. 7 - 654, l. 9.

Detective Clayton admitted appellant did not know he was being videotaped at the time. R. 655, ll. 15-17. As seen supra, this videotape was obviously very beneficial to the defense on the issue of the coerced confession. The fact the videotape was not turned over to the solicitor's office or to the defense is another matter that could be involved in the issues of these letters. If the police were hiding evidence from the defense — and as unpleasant as it sounds it looks like they were — that was impeachment evidence if the solicitor's officer warned the police about such a practice. What else were they hiding?

Prior to the testimony of Dr. Saul Kassin, the trial judge again noted that these two letters had been sealed and the judge ruled they would remain sealed in the event there was this appeal. R. 2331, l. 21 - 2333, l. 1.

In the defendant's motion to suppress confessions and statements filed February 20, 2001, it noted that since the initial Jackson v. Denno hearing and ruling, the defense had been able to obtain a copy of the videotape. This motion to suppress noted that the defense had made specific and repeated requests in writing for copies of any videotapes of appellant. Despite these requests, the tape was not produced until the original Jackson v. Denno hearing. R. 2751 – 2754. Attached to the February 20, 2001, motion was a copy of a motion dated March 26, 1998, for the solicitor's office to verify that there were no audiotapes or videotapes made by the police during any interrogation of the defendant. R. 2761 – 2762.

As seen, not only did the critical hair evidence prove to be wrong, the “comedy of errors” as the trial judge called it went much deeper.

At the June 18, 1997, preliminary hearing before the Honorable James B. Gosnell, Jr., Detective Clayton admitted Dana Chapels was a suspect in this case. Clayton

acknowledged some witnesses indicated Chapels had shaved off his moustache after the tavern fire. Clayton also knew that two employees of the bar, Ms. Jensen and Mrs. Gonzalez, had told the police that Chapels had been at the tavern at the time of closing, and that he was drunk. R. 26, l. 4 – 27, l. 22.

Clayton admitted that Chapels told him that he had *not* been by the tavern. Clayton later confronted Chapels with the evidence that he had been at the tavern. Chapels wanted the police to drop a gun charge against him in exchange for his assistance in the investigation. Clayton said that Chapels offered to take a polygraph test if the charges against him were dropped. Chapels never took the polygraph because Clayton said the gun charges against him were not dropped. R. 28, l. 6 – 30, l. 15.

Clayton also testified he did not know if anyone communicated details of the investigation to Chapels before he was interviewed. Regardless, there was no need to investigate Chapels, appellant had confessed.

Clayton also acknowledged a Crime Stoppers' tip came in the day after a murder, which said, "the victim was murdered because she owed a large cocaine debt." Listed suspects were her partners and probably know about the murders. The sales took place at the Piano Lounge, and the Crime Stoppers' tip also indicates the name of Susan Edwards and Lynn Ray." Clayton acknowledged he did not recall those individuals being interviewed, and that no action was taken to pursue that Crime Stoppers' tip. R. 30, l. 16 – 31, l. 18.

On September 4, 1998, the defense made a motion for independent forensic examination of the evidence. R. 181, l. 7 – 195, l. 25. This motion was made before the Honorable A. Victor Rawl. Defense counsel informed the judge the defense had tried to

have a material witness warrant issued against Dana Chapels, but that the state opposed that motion. Counsel noted that arrest warrant listed Chapels as a suspect and that the state had requested a high bond. At the same time Chapels was stonewalling appellant was cooperating fully with the police, and had given them "blood, hair and other bodily fluid samples for examination," and he consented to a search of his truck. R. 182, l. 3 – 184, l. 8.

Defense counsel informed the judge that the police did not do anything to investigate the Crime Stoppers' tip, and he then explained the ruse with appellant over the hair found underneath the victim. R. 184, l. 9 – 187, l. 6.

Defense counsel said he understood the state would offer three pieces of evidence, the single hair (which later proved not to match appellant), the two-page confession and the media videotape. Defense counsel told the judge of his understanding at that time that there was no videotape available and that appellant was not allowed to write out his statement in his own handwriting. R. 188, l. 7 – 189, l. 12.

The solicitor offered that the state no longer had an interest in investigating Dana Chapels once appellant was arrested. R. 218, l. 9 – 220, l. 22. When discussing the contested issues and allegations of misconduct, defense counsel requested to call Assistant Solicitor Clifford as a witness. The judge refused that request. R. 221, ll. 6-23.

The judge did remark that a prosecutor had a duty to represent all citizens and not just law enforcement. R. 230, l. 3 – 236, l. 19.

The judge then told the solicitor that he was going to sign an order for the state to turn over all items the defense needed to have tested or examined in order to prepare for trial. R. 236, l. 20 – 239, l. 22. The judge told the Assistant Solicitor that she should control the police to some extent. The solicitor responded, "I wish I could." R. 240, ll. 9-16.

The following then occurred between the trial judge and the assistant solicitor about the cooperation of the police:

The Court: Well, I can help you with that, too, Amie, and you know that. If they're [the police] giving you grief or hiding stuff from you, it ain't going to be you that's dismissing the case. It's going to be me dismissing the case on their failure to provide you with information on which to make decisions.

That's as fair as I can be, as straight as I can be, and I'm saying it to folks I know that are outstanding lawyers and involved in this kind of stuff every day.

The world is going to think I cussed you out, but you know I didn't. The bottom line is let's get this going and fixed.

R. 240, l. 17 – 241 l. 3.

The intentional "comedy of errors" would continue with arguments between the North Charleston Police Department and the FBI. See Court's Exhibit #1 (FBI report), stating, "because no microscopic association between the questioned hairs and the known hair standards were made in this case, no mitochondrial DNA examination was conducted."

R. 2831. The report also stated, "no hair suitable for significant comparison purposes were found as specimens Q1 through Q3." R 2832. The affidavit of FBI Laboratory Program Director Johnny Stewart stated that all items of evidence were handled according to FBI laboratory protocols on evidence handing, and that blamed the North Charleston police for any problem with the hair evidence. R. 2833-2834.

Discussion

Police deception, misconduct, failure to turn over favorable evidence, failure to investigate, and failure to test critical evidence were each important parts of the defense case. The defendant's due process rights are violated under Brady v. Mararyl, 373 U.S.

83, 83 S.Ct. 1194 (1963), where the state suppresses favorable information. Appellant also submits it would be a due process violation under Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763 (1972), if the solicitor had been making false representations to the court in the past or the defense at any time about any of the above matters.

The North Charleston Police Department investigated this case and obtained the confession for the solicitor's office. It is apparent from the record cited above that the solicitor's office stood behind the police department in part where the police ignored additional leads about the murder at the same time Assistant Solicitor Clifford lamented her lack of control over the police. Although quite a schizophrenic posture, if there was impeachment evidence contained in either letter about police misconduct which affected this case, appellant respectfully submits he was entitled to know it.

Evidence known to investigative or police agencies would be imputed in this situation to the state or solicitor. Cf. United States v. Auten, 632 F.2d 478 (5th Cir. 1980). Any information in the possession of the solicitor's office on police misconduct — in any form — or the failure to investigate was information favorable to this appellant that should have been disclosed. See, Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987). This rule applies to impeachment as well as exculpatory evidence. State v. Bryant, 307 S.C. 458, 415 S.E.2d 806 (1982).

In State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996), the Court found no error in the failure of the state to produce undisclosed evidence for the trial court's inspection because defense counsel *did not have any idea* what impeachment or exculpatory information he was seeking. Here, defense counsel pursuant to State v. Bryant, *supra*, established a very specific claim as to what it believed were contained in the letters from

Solicitor Schwacke and Assistant Solicitor Clifford to the North Charleston Police Department. He was convinced one letter pertained to the perp walk.

Appellant submits based on the above it appears these letters have impeachment or exculpatory information. If otherwise irrelevant information was contained in these letters, redaction was an everyday available remedy for the trial court. Appellant respectfully submits a finding by this Court under its in camera inspection that any information in these letters constituted impeachment or exculpatory evidence, or evidence of police misconduct, trickery or failure to investigate warrants a new trial.

7.

The judge erred by refusing to allow the defense to call Assistant Solicitor Clifford to testify in camera where issues of withholding evidence, failure to investigate and police misconduct were at issue. The case law clearly allowed such in camera testimony by a solicitor where issues such as these are involved.

As seen, the defense strongly maintained the state was withholding evidence, not testing potentially favorable evidence to appellant and failing to investigate Dana Chapels and the cocaine debt crime stoppers tip. It is clear the state did not turn over the Lt. McHale videotape, which later proved helpful to appellant's coerced confession defense.

Judge Rawl admonished the solicitor's office about the state's failures in this case, and their need to control the police. Nonetheless, in light of the above, the judge refused to allow the defense to Assistant Solicitor Clifford as a witness in camera. R. 221, ll. 6-23.

The judge did not offer any reason for his refusal. However, it is clear the case law in South Carolina allows a criminal defendant to call a prosecuting attorney as a witness subject to the judge's discretion. See, State v. Lee, 203 S.C. 536, 28 S.Ct. 402 (1943). Here, just as in State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 111 (2000), the judge did not articulate any reason for refusing to allow appellant to examine the assistant solicitor. The judge in Quattlebaum also just said no.

Consequently, the judge's refusal to allow the defense to call the assistant solicitor in camera was an error of law and an abuse of discretion. See, State v. Quattlebaum, 527 S.E.2d at 111, citing Winchester v. United I.N.S. Co., 231 S.C. 288, 98 S.E.2d 530 (1957).

Because police misconduct, failure to turn over evidence, failure to investigate and the good faith of the solicitor's office were at issue in this case, much as they were in Quattlebaum, and the judge erroneously refused to allow the defense the opportunity to examine the assistant solicitor in camera, appellant should be granted a new trial.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Luke N. Brown, Jr., Special Circuit Court Judge

THE STATE,

RESPONDENT,

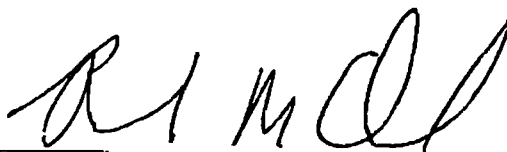
V.

WESLEY MAX MYERS,

APPELLANT

CERTIFICATE OF SERVICE

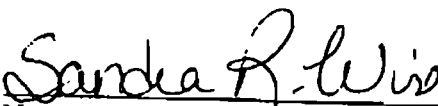
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, this 9th day of July, 2003.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 9th day of July, 2003.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: February 3, 2005

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal From Charleston County
The Honorable Luke N. Brown, Jr., Special Circuit Court Judge**

THE STATE,

Respondent,

VS.

WESLEY MAX MYERS,

Appellant.

FINAL BRIEF OF RESPONDENT

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<u>Strickler v. Greene</u> , 527 U.S. 263 (1999)	41
<u>United States v. Bagley</u> , 473 U.S. 667 (1985)	41
<u>United States v. Hall</u> , 93 F.3d 1337 (7th Cir. 1996)	11
<u>United States v. Shay</u> , 57 F.3d 126 (1st Cir. 1995)	11
<u>Wilson v. Rivers</u> , 350 S.C. 536, 567 S.E.2d 482 (Ct. App. 2002)	1

Other Authorities

Kassin, Saul M. & Katherine L. Kiechel, "The Psychology of False Confessions: Compliance, Internalization and Confabulation," AM. PSYCHOL. 227 (Mar. 1996)	13, 31
Kassin, Saul M. and Karlyn McNale, "Police Interrogation and Confessions," 15 Law and Human Behavior No. 3, 233 (1991)	13
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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly determined that the probative value of an anger management questionnaire was not substantially outweighed by its prejudicial effect.

II.

The trial judge did not abuse his discretion by ruling that defense expert Kassin could not use examples of facts in other cases supposedly involving false confessions to illustrate his opinion before the jury because the excluded inquiry was irrelevant and any probative value was substantially outweighed by its prejudicial effect.

III.

This Court must affirm the trial judge's ruling that Appellant's custodial verbal and written statements given on March 15, 1997, were freely and voluntarily made by him after he was advised of and waived his Miranda rights because these findings were supported by the record.

IV.

The apology to the victim's mother was properly admitted into evidence because it was not the fruit of a tainted confession but was the product of Appellant's own free will.

V.

Appellant's apology to the media was properly admitted because Appellant freely and voluntarily spoke with the media although advised several times that he did not have to do so and, in fact, it would be against his best interest to do so.

VI.

The trial judge did not abuse his discretion by failing to require the State to disclose letters written by the Solicitor and an Assistant Solicitor to law enforcement because Appellant made no showing that the letters contained any undisclosed material exculpatory or impeaching evidence.

VII.

Appellant cannot show how Judge Cottingham abused his discretion by refusing to allow Appellant to call Assistant Solicitor Amie Clifford to testify at a pre-trial hearing, where he did not make any proffer as to how he expected her sworn testimony to differ from her representations previously made to the court during the same hearing and Appellant has not made any claim on appeal that the State did not comply with the Order of the judge granting his various discovery requests.

STATEMENT OF THE CASE

The Charleston County Grand Jury indicted Appellant at the June 1997 term of court for murder and arson in the third degree. (97-GS-10-419 & -420). Between August 7, 1997 and May 22-23, 2000 a number of different motions hearings were held before various Circuit Court Judges. On February 26 - March 6, 2001 Appellant received a jury trial before the Honorable Luke N. Brown. The jury found him guilty as charged. On March 7, 2001, Judge Brown sentenced him to thirty years imprisonment for murder and ten years concurrent for arson in the third degree. Timothy Clay Kulp, Esquire, represented Appellant at trial. Senior Assistant Solicitor D. Bruce Durant represented the State. This appeal follows.

ARGUMENT

I.

The trial judge properly determined that the probative value of an anger management questionnaire was not substantially outweighed by its prejudicial effect.

Over Appellant's *in camera* objection that the document was "certainly more prejudicial than probative," R. p. 2260, l. 18 - p. 2261, l. 2, the trial judge allowed the State to introduce an anger management questionnaire (State's Exhibit 29) seized from Appellant's bedroom pursuant to a consensual search. R. pp. 2259-63.¹

A trial judge's decision regarding the comparative probative value and the prejudicial effect of evidence under Rule 403, SCRE, should be reversed in exceptional circumstances. Wilson v. Rivers, 350 S.C. 536, 567 S.E.2d 482 (Ct. App. 2002); State v. Hamilton, 344 S.C. 344, 357-58, 543 S.E.2d 586, 593 (Ct. App. 2001). Here, Appellant contested the voluntariness of his confession and, in fact, presented expert testimony that it was a false confession. The statements in State's Exhibit 29 are extremely probative on Appellant's intent, whether he acted with malice and the identity of the perpetrator. It is also probative

¹ He did not contend that the document was irrelevant and apparently conceded that it was probative of the *animus* between the parties. The State agrees. See State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (evidence of previous difficulty between the accused and the decedent is admissible in homicide cases to show animus of the parties and who is the probable aggressor). The State further submits that State's Exhibit 29 is admissible under Rule 404, SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), to prove identity and intent and to corroborate motive. However, Appellant did not challenge in the lower court and may not challenge on appeal whether the document is admissible, only whether its prejudicial effect outweighed any probative value. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (party may not argue one ground at trial and then an alternative ground on appeal).

of whether or not his statement was a “false confession,” or a voluntary statement by him concerning what he submits happened at the time of the crime. Moreover “unfair prejudice” under Rule 403 “means an undue tendency to suggest [a] decision on an improper basis, such as an emotional one.” State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). Unlike the evidence of an unexcused school absence in Saltz, which the Court found to be unduly prejudicial, here State’s Exhibit 29 cannot be prejudicial for a variety of reasons. First, there is nothing about State’s Exhibit 29 which would lead the jury to speculate that Appellant committed the murder simply because of problems with his anger management. Moreover, evidence of his problems managing his anger is cumulative not only to evidence presented at trial that he and the victim had a “very rocky” relationship in which they argued “all the time” about Appellant’s possessiveness and drinking, R. pp. 1091-93; 1142-43, it was cumulative to Appellant’s statements to police concerning his jealousy and how he lost control at the time of the offense. See e.g., R. pp. 1573-75; State’s Exhibit 30, R. pp. 2746-47.

Further and assuming *arguendo* that it was improperly admitted, any error must be viewed as harmless beyond a reasonable doubt based on the present record. The State presented overwhelming evidence of guilt. First, the State presented evidence that the victim’s badly beaten body was found after a fire that was the result of arson and to which firefighters responded sometime after 3:15 a.m. R. pp. 1061-65; 1071-79; 1219; 1230-36; 1853-57; 1960-70. Also, Laurie Villalobos testified that she took a taxi to the Mill Inn sometime between 1:30 and 2:30 a.m. on March 13, 1997, in order to collect some money the victim owed her. Appellant was present and let her into the bar. The victim was “clearly

distraught” and Villalobos could tell that the victim had been crying. Villalobos got her money and left. **R. pp. 2151-58.** This is well after co-workers left the victim locked inside of the bar, asleep on a pool table. **R. pp. 1103-11; 1142-50.** Thus, he was the last person seen with her while she was alive.

Also, Joseph D. Perry, the Vice President of Midland Mechanical Millwright, employed Appellant in March 1997. Appellant called Mr. Perry’s cellular phone at roughly 6:20 a.m. on March 13. Appellant, who sounded upset, told him that there had been a fire at the Mill Inn and that he thought the victim might have been inside but he was not sure. So, he asked Mr. Perry to “go by there and find out.” Mr. Perry thought that this was an odd request because Appellant did not go check, himself, since he was supposedly worried about his girlfriend. However, Perry went to the scene about ten minutes later and gave a statement to an officer. **R. pp. 1188-93.** This evidence implicated Appellant in the murder because the call to Perry occurred approximately fifteen minutes or longer before Appellant went to the scene and supposedly learned for the first time that the victim had died in the fire. **R. pp. 1418-22; 1552-55.**

More importantly, **State’s Exhibit 29** must be viewed as non-prejudicial and harmless beyond a reasonable doubt in light of Appellant’s various oral and written admissions of guilt. First, Appellant orally admitted his guilt and gave a verbal statement to police on Saturday, March 15, 1997. **R. pp. 1580-87; 1691-95; 1806-12; 1974-82.** He also gave **State’s Exhibit 30**, the written statement, on March 15. **R. pp. 1703-06.** The statements to law enforcement contained information known only to police and the killer, such as the cause of the fire (see R. p. 1979) and information known only to the killer (and

unknown to police), including the fact that Andy White had left a pink note for the victim on the bar. R. pp. 1695-99; 1812.

Additionally, the jury heard evidence that Appellant apologized and admitted his guilt to both the victim's mother and his own mother (R. pp. 1591; 1815-17; 1984-85) and that he admitted his guilt to the media. R. pp. 1591-93; 1815; 1817-18; 2067-73. The jury also viewed a videotape of the interview by the media, State's Exhibit 42. Particularly in light of the number of admissions made by him concerning his guilt, any error in the admission of State's Exhibit 29 must be viewed as harmless and non-prejudicial because it could not reasonably have affected the result of the trial. See State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (even if evidence was wrongly admitted, its admission may constitute harmless error if the evidence did not affect the outcome of the trial); State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (finding an error harmless if it could not reasonably have affected the result of the trial).

II.

The trial judge did not abuse his discretion by ruling that defense expert Kassin could not use examples of facts in other cases supposedly involving false confessions to illustrate his opinion before the jury because the excluded inquiry was irrelevant and any probative value was substantially outweighed by its prejudicial effect.

Appellant claims that the trial judge erroneously prohibited defense witness Saul Kassin, an expert in social psychology, from testifying as to the facts of other cases supposedly involving false confessions to illustrate his opinion before the jury. Despite Appellant's assertion that such testimony would have been helpful to the jury and was

admissible under Rule 702, SCRE, the State submits there was no error. Assuming *arguendo* that the trial judge properly permitted expert testimony on false confessions, the excluded line of inquiry was irrelevant. Even if marginally relevant, any probative value such testimony may have otherwise had was greatly outweighed by its prejudicial impact since (1) the excluded testimony would have averted the jury's attention from its focus on the voluntariness of Appellant's confession; (2) introduction of the excluded testimony would have required that the jury hear additional evidence concerning these other cases to determine whether, in fact, the other cases involved "false confessions;" (3) Kassin was able to testify as to his opinion concerning false confessions without the excluded testimony; and (4) the excluded testimony would have been cumulative to other examples of facts concerning false confessions to which Kassin testified without objection.

Rule 702, SCRE, allows the testimony of an expert witness qualified by knowledge, experience, skill, training, or education to assist the jury to understand the evidence or determine an issue. Even if evidence is admissible under Rule 702, however, it may be excluded under Rule 403, SCRE, if its probative value is outweighed by its prejudicial effect. State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001). The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. Payton v. Kearse, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998). "Absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (1999); State v. Jarrell, 350 S.C. 90, 101, 564 S.E.2d 362, 368-69 (Ct. App. 2002).

Before Appellant presented Mr. Kassin's testimony, the trial judge heard an *in limine* objection by the State. The State noted that the trial judge would probably allow Kassin to testify

as to general psychological principles and how those may affect the truth or falsity of a confession, but I would object to him telling the jury about other cases that don't involve this particular case . . . because . . . it's irrelevant. Unless it is exactly the same facts as we have in this case here, it's completely irrelevant to the, to the issues before this jury.

R. pp. 2241-42. The trial judge observed that this was the matter that had already been addressed in chambers and defense counsel stated that he would "deal with the witness before he takes the stand." The trial judge declined to allow Appellant to address the facts of other cases in his *voir dire* of Kassin, but ultimately decided that he would rule on any objection raised by the State at the time the objection was made. **R. pp. 2242-49.**

Kassin thereafter testified as an expert in the area of social psychology. **R. p. 2256, ll. 6-19; p. 2269, ll. 1-12.**² Kassin testified that the study of confessions draws on different areas of psychology, including social psychology and cognitive psychology. Defense counsel had asked him to review certain material provided by the defense and to examine Appellant's confession, which he did. One of the items he reviewed was the videotape of Appellant describing the interrogation process. Kassin opined that much of what Appellant described seemed to come "*verbatim* out of interrogation manuals" which Kassin knew Appellant had not read. However, apart from Det. Clayton's report, a videotape of Lt.

² The State specifically objected to his qualification as an expert in "false confessions" and the trial judge noted that Appellant had not sought to so qualify him. **R. p. 2269, ll. 1-11.**

McHale's interview of Appellant and the statement itself, there was very little upon which he could base his opinion.³ R. pp. 2269-74 .

Kassin explained that people sometimes falsely confess to crimes which they did not commit, but conceded that there was no way to determine how often this occurred "and [there is] not even a methodology for deriving an estimate." There are several ways to determine whether a confession is false. In some instances, persons confess to crimes which have not been committed or another person is subsequently apprehended and confesses to committing the crime. Also, outside exonerating evidence sometimes disproves a confession. Another method to test the truthfulness of a confession is to see if the person who confesses includes evidence only the perpetrator would know. Kassin opined that there are three different types of false confessions: voluntary false confessions, coerced compliant false confessions and, of particular importance to the present case, coerced internalized false confessions. He defined each of these for the jury. A coerced internalized false confession occurs when a person is broken down into submission (through unpleasant interrogation circumstances, a lot of stress, confusion, or social isolation), the person is not being allowed to present a defense and it is implied that the person could be prosecuted without a confession or perhaps that the long-term consequences aren't severe if the person confesses (i.e., a coerced compliant false confession), coupled with the person actually coming to believe the confession. R. pp. 2275-83; p. 2350, ll. 1-4.

³ He stated it would have been beneficial if the interview and interrogation had been videotaped or audio taped.

Kassin further opined that it is possible to make a person believe that he committed an offense even if he did not do so because memory is malleable and can be manipulated. Coerced internalized false confessions are "examples of that, suggestibility effects on memory." He opined that certain interrogation techniques which police officers are commonly taught and often use, the "Reid School Technique," provide "psychologically sophisticated techniques" that are overly aggressive in many ways and can lead to false confessions in some instances, particularly with the presentation of false evidence or when used "to the extreme."⁴ Specifically, he felt that presenting a suspect with false evidence tended to enhance the possibility of a false confession. Another technique, which is not endorsed by the Reid School but is found in virtually all coerced internalized false confession cases, is the suggestion of a "blackout period." In Kassin's opinion, many of the Reid School techniques were employed by the officers in this case when they questioned Appellant on March 14-15, 1997, and the officers also used a number of techniques which were not taught or even condoned by the Reid School. **R. pp. 2283-2330.**

Kassin listed a number of techniques supposedly used on Appellant which caused him concern: Appellant was under suspicion for three days and subjected to a number of questioning sessions; he was questioned for a number of hours prior to his confession on

⁴ Although the "Reid School" employs a nine-step process, Kassin distilled this to two steps. First, the suspect is broken down by asserting the suspect's guilt and not allowing the suspect to mount a defense, as well as interrupting any possible denials. Once the suspect is broken down, the second step is "theme development" or "development of alternative questions," whereby police offer some face-saving or moral, justifying alternative (i.e., the person is provided "an easy way out" so that confession does not seem onerous to him). **R. pp. 2287-89.**

Saturday and was clearly interrogated by Lt. McHale on Friday afternoon, as shown by the videotape of their interview; the implication was presented on Friday of "what if we had evidence" and the police actually presented him with false evidence on Saturday; and police used "the calculated ploy" of deliberately inserting an error into the written confession so that Appellant would correct it and thereby make it more difficult for him to distance himself from it. R. pp. 2283-2329.

According to Kassin, Lt. McHale ignored a number of verbal and non-verbal signals from Appellant suggesting that he was innocent because "it was clear that an impression was formed early on [that Appellant was guilty] . . . and that . . . presumption of guilt closed minds." He also found a number of other interrogation techniques taught by the Reid School. He dismissed the fact Appellant gave a detailed statement concerning the offense as well as the fact Appellant provided a motive for the killing because he stated that these occur routinely in coerced internalized false confession cases. He opined that the circumstances surrounding Appellant's confession

[g]ives me pause. It . . . bears a striking resemblance to so many false internalized confessions which at first seem hard to understand, but once you see the script that they run through, the script that the breakdown, the false evidence, the suggestion of a blackout, the confusion, the tentative language 'I must have done it' followed by a detailed statement that may or may not contain novel details, yes, it bears a striking resemblance to those cases.

What he found particularly problematic in the present case, however, "is not just that certain techniques were used that I think were extreme, and not just that it was a prolonged affair, ordeal, but as well that . . . there wasn't good record keeping." R. pp. 2283-2329.

On cross-examination by the State, the prosecutor asked a question about a blackout hypothesis and received an unsolicited response in which Kassin referenced an unrelated case in Florida as follows:

Q And what is this blackout hypothesis?

A Well, the blackout hypothesis is a way to help somebody reconcile their lack of memory with the fact that there seems to be infallible proof of their guilt. And so in cases involving coerced internalized false confessions, in all of these cases, there's one in Florida where after presenting some . . . phoney polygraph evidence and again accusatory, isolated, they finally said the hair sample came in, they told him that the hair suggested he was guilty, that made him crumble. That was the point at which he capitulated, [and] said 'that can't be. I don't remember it.'

They said, 'it looks like you must have had one of your alcoholic blackouts,' because he had had those before. In that case he says, 'Well, then I guess that's it.' At which point he concocted a confession, which turns out to be false.

R. p. 2384, l. 17 - p. 2385, l. 13.

On redirect examination, Appellant attempted to elicit further anecdotal evidence of false confessions by providing examples of unrelated cases to the jury. When the State objected because "this is the issue we have raised before," Appellant claimed it had been brought up on cross-examination.⁵ When asked by the Court if he was talking about the

⁵ Appellant makes the silly contention that the Assistant Solicitor objected because he had seen how "effective" Kassin's testimony was *in camera*. This ignores that the trial judge admitted Appellant's statement and made detailed factual findings that are inconsistent with Kassin's testimony. The State's objection to testimony concerning anecdotal cases was based upon the obvious lack of relevancy of this testimony.

Florida case which he had previously mentioned, Kassin responded affirmatively. He added that there was a case in Indiana, one in Connecticut and "I mean there's a whole litany of cases" The trial judge sustained the State's objection and ruled that Kassin had volunteered the response on cross-examination. R. p. 2403, l. 22 - p. 2405, l. 23.

There was no error. Neither this Court nor the South Carolina Supreme Court has ever held that a party may introduce expert evidence concerning false confessions. There is a split of authority on this issue in other jurisdictions. Compare Miller v. State, 770 N.E.2d 763 (Ind. 2002) (trial court erred by excluding in its entirety proffered testimony of social psychologist concerning false confessions); Boyer v. State, 825 So.2d 418 (Fla. Ct. App. 2002) (same); United States v. Shay, 57 F.3d 126 (1st Cir. 1995) (in prosecution based mainly on defendant's inculpatory statements, defendant was entitled to present otherwise admissible expert psychiatric testimony that he suffered from recognized mental disorder which caused him to make false, grandiose statements of the type being used against him by the government); United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) (district court erroneously excluded testimony of social psychologist concerning false confessions), with People v. Son, 79 Cal. App. 4th 224, 93 Cal. Rptr. 2d 871 (2000) (trial court properly excluded expert testimony of social psychologist where there was no evidence that police engaged in tactics wearing down defendant into making a false confession and proffered testimony was cumulative to testimony by defendant that confession was false and made only because he had been promised lenient sentence in exchange for it); State v. Free, 798 A.2d 83 (N.J. Super. 2002) (trial court properly excluded testimony of social psychologist on subject of coerced confessions since the opinions offered were not scientifically reliable

and proposed evidence failed to satisfy the evidentiary requirement that the nature of the expert testimony must be such as will assist the trier of fact to understand the evidence); State v. Davis, 32 S.W.3d 603 (Mo. Ct. App. 2000) (trial court properly excluded expert testimony of social psychologist on issue of false confessions). Here, the State's *voir dire* and cross-examination of Kassin clearly established that it is not possible for him as a social psychologist to perform a study that would identify the number of times false confessions occur; that he does not know how many times people confess falsely; that he doesn't know what the breakdown of voluntary false confessions as opposed to coerced internalized false confessions or coerced implied false confession cases are; and he could not say that Appellant's confession in this case was false because "[y]ou can never say that." **R. pp. 2257-69; 2333-45; 2425.** The State also was able to effectively cross-examine Kassin with respect to his opinion concerning whether the interview and interrogation by the police unduly coerced Appellant in any manner or was otherwise overbearing. **R. pp. 2345-2401; 2417-25.**

Thus, it does not appear that Kassin's testimony concerning false confessions was sufficiently reliable to be admissible under Rule 702, SCRE. See State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (barefoot insole impression evidence was not scientifically reliable and was inadmissible); State v. Council, 335 S.C. at 20; 515 S.E.2d at 518 ("[w]hen admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable"). Because Appellant failed to establish that the study of false confessions is an area of specialized knowledge which would assist the jury in reaching its decision, e.g., **R. pp.**

850; 903-04; p. 930, ll. 9-14 (Kassin admits he did not know whether Appellant's statement was true or false and he admits that he was in no better position to determine this question "than anyone else in the world"); R. pp. 2258-65; 2267-68; 2348; p. 2425, ll. 8-11; Saul M. Kassin and Karlyn McNale, "Police Interrogations and Confessions," 15 Law and Human Behavior No. 3, 233, 248 (1991) (admitting that conclusion the minimization and maximization ploys have the potential to coax innocent people into confessing to crimes they did not commit "is speculative"); Saul M. Kassin & Katherine L. Kiechel, "The Psychology of False Confessions: Compliance, Internalization and Confabulation," AM. PSYCHOL. 227, at 127 n. 16 (Mar. 1996) (recognizing inherent limitations of experimentation conducted), and there was no evidence presented that Appellant suffered from mental retardation, mental illness or other frailty beyond the comprehension of the jury, Kassin's testimony concerning false confessions did not significantly assist the jury in determining the voluntariness of Appellant's statement and should have been excluded in its entirety.⁶

Even assuming *arguendo* that the Court finds that the trial judge properly admitted testimony concerning false confessions, Appellant still cannot show an abuse of discretion resulting from the trial judge's decision to exclude testimony concerning anecdotal cases from other jurisdictions involving different facts and different individuals from Appellant in the case before the jury. First, any such testimony was irrelevant under Rule 401, SCRE. Particularly in light of the limitations Kassin's study of false confessions admittedly has and

⁶ This Court may affirm on this basis although it was not raised in the lower court. Rule 227 (C), SCACR; Cothran v. Brown, 350 S.C. 352, 566 S.E.2d 548 (Ct. App. 2002) (appellate court may affirm on a basis appearing in record).

his inability to determine better than "anyone else in the world" whether Appellant's statement was true or false, anecdotal cases involving different people and different sets of facts could not possibly be relevant. Cf. Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002).

Second, and assuming *arguendo* that the excluded evidence was somehow marginally relevant, the trial judge still properly excluded it because the probative value of this excluded testimony was substantially outweighed by its prejudicial effect under Rule 403, SCRE, and State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). It would have diverted the jury's attention away from the determination of whether Appellant's statement was admissible and focus them on the admissibility of other statements made at other times by other people under different sets of facts. It also would have been incumbent upon the State to re-litigate those various other confessions and yet even further divert the jury's attention away from its proper function. Finally, the absence of prejudice is manifest because there was overwhelming evidence of guilt (see Argument I, supra), and Kassin was able to testify to a number of anecdotal cases, including the volunteered response on cross-examination, despite the trial judge's ruling. E.g., R. pp. 2261-65; 2275-77; 2282-83; p. 2303, ll. 9-21; p. 2306, ll. 3-9; p. 2312, l. 24 - p. 2313, l. 7; p. 2319, ll. 3-9. Therefore, Appellant cannot show a reversible abuse of discretion based upon the present record.

III.

This Court must affirm the trial judge's ruling that Appellant's custodial verbal and written statements given on March 15, 1997, were freely and voluntarily made by him after

he was advised of and waived his Miranda rights because these findings were supported by the record.

Each of Appellant's next three arguments ask this Court to usurp the trial judge's role as fact-finder and substitute this Court's judgment as to the credibility of a witness for that of the trial judge. In the present argument, he maintains that the trial judge erroneously ruled that Appellant's verbal and written statements were admissible, since his statements were allegedly "the product of organized police trickery and coercion" which overbore his will. The State submits that this argument is totally without merit and this Court must affirm because the record supports the trial judge's findings that Appellant freely and voluntarily gave these statements on March 15, 1997, after he had been advised of and knowingly waived his Miranda⁷ rights.

On May 22-23, 2000, the Honorable Edward B. Cottingham held a Jackson v. Denno⁸ hearing to determine the admissibility of both oral statements and a written statement (State's Exhibit 3) which Appellant had given to police on March 15, 1997, as well as the subsequent statements he made to the victim's mother and the media. Det. Jeff Payne, of the North Charleston Police Department,⁹ was directed by one of the other detectives to take a statement from Appellant at the scene and he did so shortly before 7:00 a.m. This was a narrative statement concerning Appellant's whereabouts on the day leading up to the murder.

⁷ Miranda v. Arizona, 384 U.S. 436 (1966).

⁸ Jackson v. Denno, 378 U.S. 368 (1964).

⁹ All of the witnesses who testified at the May 22-23 hearing worked for the North Charleston Police Department.

Det. Payne was unaware of any forensic evidence and did not tell Appellant anything regarding the evidence. He then transported Appellant to the Police Department. Det. Payne advised Appellant of his Miranda rights at the station but did not interrogate him. R. pp. 321-37.

Det. George Tetanich was a sergeant in the Detective Division in March 1997 and went to the scene around 5:00 a.m. on March 13, 1997. Appellant approached him and asked questions about what had happened sometime between 6:30-6:45 a.m. When Det. Tetanich told Appellant there had been a fire, Appellant said that his girlfriend, whom he identified as Teresa Haught (the victim), worked there and sometimes slept there. Upon being told that "somebody in there" died from the fire, Appellant broke down and became upset. Within moments, however, his attitude changed. He began talking about the problems the building had with electricity and suggested that faulty wiring had started the fire. R. pp. 339-41.

One of the detectives on the scene told Det. Payne to take a statement from Appellant and Tetanich did not have any further contact with Appellant on March 13. He later told Lt. Melvin Cumbee that Appellant was acting suspicious and was probably a suspect, although he did not know who had committed the crime and admitted there were other suspects at the time. Either Lt. Cumbee or one of the other detectives had asked Appellant to come in on Friday, March 14, because Appellant "was very interested in finding the person who had done this and wanted to cooperate and help us try to locate this person." Appellant arrived between 11:00 a.m. and 12:00 p.m. Tetanich, Lt. Cumbee and Det. Denver Lee Clayton spoke to Appellant. R. pp. 341-46; 371-81.

At that point, police knew that the fire was arson and the death was a homicide, as well as the fact that hair had been found in the victim's hand. During the course of their conversation, Appellant said that if the police found the person to whom that hair belonged, "you're going to find the killer." The officers agreed and said he was probably right. Appellant had come to the police station voluntarily in order to assist. He was not questioned regarding the murder and the conversation only lasted half an hour or so before the officers went to lunch. Appellant, who had agreed to take a polygraph examination after lunch, declined their invitation to join them and said that he would wait. He was left unattended and was not told he had to stay at the police station. **R. pp. 341-46; 371-81.**

While at lunch, Lt. Cumbee received a telephone call from SLED informing him that the hair found in the victim's hand matched hair from the back of Appellant's head. Appellant was not confronted with this evidence after lunch. Instead, Det. Clayton took him for the scheduled polygraph. When a polygraph was not administered because Appellant was fatigued and said he had been out drinking the night before, Clayton brought him back to the police station. He then gave his permission for a search of his vehicle and the room at his parents' house. The officers took him to his home in Hanahan and he showed them the clothes he supposedly wore on March 12-13. Also, his parents consented to a search of the rest of the house, but the officers did not find anything of value. **R. pp. 346-48; 379-80; 384-88.**

When they left Appellant's home, arrangements were for Det. Clayton to pick him up on the morning of March 14.¹⁰ Appellant and Det. Clayton were in the Detective Division when Det. Tetanich arrived between 9:45 and 10:00 a.m. After speaking briefly, they went into an interview room. Appellant was not arrested, nor was he handcuffed. Also, he had come of his own free will. Det. Tetanich advised him of his rights from a printed form (State's Exhibit 2) at 10:20 a.m. Appellant initialed his rights and signed the waiver form, with Dets. Tetanich and Clayton acting as witnesses. He was alert, coherent and did not appear to be under the influence of alcohol or drugs. Also, he had completed high school and finished one year of college. **R. pp. 348-52; 357; 388.**

Officers then conducted a preliminary interview which lasted 1-1 ½ hours. During that interview, they acquired general information about Appellant and his relationship with the victim. He also discussed where he had been and what he had done on the day leading up to the murder. When asked about a domestic incident, Appellant said he had gotten into an argument with the victim at a bar. He was especially jealous because she tried to make him jealous and he suspected she was having an affair with another bartender at the Mill Inn, Alan White. He had seen White kiss and pinch the victim on the butt several weeks earlier, which upset him. **R. pp. 352-55; 414.**

When asked, Appellant stated that he remembered his comment about the owner of the hair probably being the murderer. At that point, Lt. Cumbee then entered the room and asked the other officers to come outside and speak with him. They did so. Upon their return,

¹⁰ Appellant had been asked not to go out drinking that night.

Cumbee asked Appellant about the hair in the victim's hand being that of the murderer and Appellant agreed. Cumbee then left the room again. When he returned several minutes later, he told Appellant that he had some bad news for Appellant: SLED had called and said that they matched the hair in the victim's hand to Appellant's head hair.¹¹ Appellant became real emotional and said, "'It can't be.' Then, he said, 'It's got to be. I must have done it.' He said something about blacking out." R. pp. 355-65; 389-90; 394-403; 411-15.

Once he had confessed, Lt. Cumbee showed him a picture of the victim (**Defendant's Exhibit 1**). Appellant then gave details concerning the crime and called his mother to apologize for it. He also led officers on an aborted trip to find the victim's purse, which police knew was missing from the crime scene.¹² Appellant was not told anything else about the evidence against him in the case, apart from the match of his hair to the hair found in the victim's hand. Also, Appellant -- and not the officers -- suggested a blackout. R. pp. 355-65; 389-90; 394-403; 411-15.

In the course of talking to the officers, Appellant had requested to speak to the victim's mother (Dixie Justis) so, Lt. Cumbee called her to the station. Det. Tetanich was present later that day when Appellant was questioned by the media. The media had been

¹¹ Officers thought at that time that the hair was a match. SLED Agent Joseph Powell testified at trial that there was a microscopic match, meaning that the hair was consistent with Appellant's head hair. However, microscopic hair analysis does not yield positive identification, like fingerprints or D.N.A. analysis, and today SLED submits similar unknown hairs to the D.N.A. lab and does not perform microscopic comparisons. R. pp. 1371-80.

¹² Earlier in the interview, he had been asked about some cuts on his hand and he indicated he had received these at work.

tracking the progress of the case very closely. Lt. Cumbee informed them that an arrest had been made and that officers were going to transport the suspect to the county jail later that evening for a bond hearing. Officers told Appellant that the media was going to be outside and that they could not stop the media's presence or questions from the media. However, they explained that he did not have to answer any questions. When Appellant indicated he wanted to tell them because "I want everybody to know I'm sorry," Det. Tetanich advised him not to talk to the media. Still, he was adamant. After Appellant had smoked a cigarette in front of the building, Det. Tetanich again told him that it would be better if he did not answer any questions and explained that a lawyer would advise him not to do so. However, Appellant wanted to answer the questions. He then voluntarily stopped and answered questions when asked of him by the media. **R. pp. 365-69; 404-10.**

Karlyn Lothery worked for Channel 5 Television in Charleston at the time. She testified that her station made a series of "beat checks," wherein they checked all law enforcement agencies three times a day to see if arrests had been made in cases of interest. Law enforcement would call when an arrest was made. Lt. Cumbee called her on March 15 to say that an arrest had been made in the arson case they were investigating and that the police were going to talk to the suspect that evening. She was also told that a bond hearing would be held the next morning, and that the suspect had something to say, but she did not know what. She immediately grabbed a photographer and went to the North Charleston Police Department. **R. pp. 417-18; 422-24.**

Appellant came out of the building in handcuffs and voluntarily stopped in front of the media without the assistance of the police. Ms. Lothery asked Appellant if he was

remorseful and he said, "I'm really sorry. It was a terrible crime that I committed." She asked how the victim had died and police told her the victim had been beaten. When she asked Appellant how many times, he did not know. He denied being under the influence of alcohol or drugs. When asked, he explained that the incident occurred because "they were breaking up and had an argument and things got out of hand." This appeared to be a voluntary act on Appellant's part and the police did not stop Appellant for her benefit. **R. pp. 420-21.**

Det. Denver Lee Clayton was the case agent for this murder. He first came into contact with Appellant at approximately 12:00 p.m. on Friday, March 14, 1997, when Appellant entered the Detective Division of the North Charleston Police Department. Appellant was not there as a suspect. Lt. Cumbee spoke with Appellant about hair found in the victim's hand. On two occasions, Appellant said he thought that the hair would belong to the person who committed the murder. Police knew hair had been found at the time, but they were unaware that it allegedly matched Appellant. **R. pp. 429-31; 446-51.**

Appellant stayed at the police station while the officers went to lunch. While at lunch, the officers received a phone call from crime scene officer Al Halman, who said that SLED had reported a match on the head hair.¹³ When they returned to the police department, Det. Clayton took Appellant for the scheduled polygraph examination by Lt. McHale, of the Charleston County Sheriff's Department. Lt. McHale first spoke to Appellant, then administered Miranda warnings, while Det. Clayton watched on a TV monitor outside of the

¹³ Clayton now knows the hair did not have a DNA match with Appellant.

room. Appellant appeared to understand what was going on, but was not given a polygraph because he told the examiner he had consumed a lot of beer the night before and had very little sleep. So, Det. Clayton transported him back to the police department. **R. pp. 430-33; 451-52.**

No further effort was made to interview Appellant on March 14 for the same reasons that Lt. McHale had given. However, officers did secure a consent to search his bedroom. That evening, the officers discussed using the ruse of a phone call from SLED when they questioned him on Saturday. Det. Clayton picked Appellant up Saturday morning. Appellant appeared to be "good spirited" and said he felt "fine." The men stopped at Shoney's, where Clayton ate and Appellant drank coffee. They then went to the police department. Det. Tetanich was already there when they arrived. They went into an interview room and Det. Tetanich advised Appellant of his rights. Appellant said he understood his rights, initialed his various rights and signed a written waiver thereof. See State's Exhibit 2. For approximately an hour and a half, the men talked about Appellant's past relationship with the victim, what happened the day before and what occurred the next morning. Lt. Cumbee entered the room and, at his suggestion, the group went into his office. Tetanich said that police believed the hair trapped under the victim's body belonged to the person who committed the offense, and Lt. Cumbee said that Appellant agreed it would prove the person guilty. **R. pp. 433-37; 454-56; 467.**

Lt. Cumbee left briefly. When he re-entered the room, he said that he had received a phone call from SLED and SLED had matched the hair found in the victim's hand with the hair from the back of Appellant's head. While it was untrue that Cumbee had received a call

that morning, this was the only ruse used by the police. Appellant immediately said, "No, no." Appellant then became upset and said he was sorry he did it. He added that it was a "mistake" or "accident." Next, Lt. Cumbee showed Appellant a picture of the victim and asked him if he needed to say he was sorry to the victim. Appellant then gave details concerning the crime. R. pp. 437-38; 456-61.

Afterwards, officers took Appellant to the scene and asked him about the victim's purse. Appellant then took the officers to several locations where he allegedly had hidden the purse, but officers were unable to find it. After a stop at McDonald's, where Appellant received something to eat, they returned to the police department and Appellant gave a written statement, State's Exhibit 3. Appellant was given an opportunity to review State's Exhibit 3 and made a correction thereto, which he initialed. R. pp. 438-41.

Det. Clayton testified that Appellant had not been questioned regarding the murder in his presence on Friday, March 14. Also, Appellant never asked for a lawyer, he was never deprived of any food or drink, there were never any promises of leniency or threats, and he was never threatened with the death penalty. Appellant had thirteen years of education, was not under the influence of drugs or alcohol and appeared to understand what was happening. Det. Clayton did not recall suggesting a blackout, only Appellant saying he had lost control and Appellant did not recall how many times he had hit the victim. Everything Appellant told the officers was voluntary and Appellant never retracted his guilt. Neither Appellant nor his family were ever told that blood or hair had been found in his truck or on his coat. R. pp. 441-45; 468-73.

Det. Clayton heard Lt. Cumbee warn Appellant that he did not have to speak with the press. Also, Clayton first saw Dixie Justis at the station around 4:00 or 4:30 p.m. He did not know how she got there. He also saw her speak with Appellant and Appellant told her what happened. Appellant also apologized to her. With respect to Appellant's subsequent conversation with Ms. Lothery, Det. Clayton explained that he and Appellant had walked out of the police department together; Appellant paused for the media and told them what had happened. It was Appellant's decision to pause and answer their questions. Det. Clayton did not make any effort to hustle Appellant off to a car. However, both Sgt. Tetanich and Lt. Cumbee had previously advised him about speaking to the media. **R. pp. 471-77.**

Lt. Melvin R. Cumbee, Jr., testified that he was present with Appellant on March 15, 1997, around noon in his office. Appellant had been in the interview room and came into Cumbee's office at his request, along with Dets. Clayton and Tetanich. Lt. Cumbee spoke with Appellant about the hair found at the scene, and Appellant agreed that the person who owned the hair was probably the killer. Lt. Cumbee left his office for three to four minutes and then returned. Pursuant to a previous strategy, he told Appellant that he had received a phone call from SLED (which he may have described as "bad news") and that SLED had matched the hair to Appellant. Appellant then confessed. After this admission, Lt. Cumbee showed Appellant a photograph of the victim and Appellant went through the details of the crime. The telephone call was the only ruse, as the phone call had actually been received on Friday. It was after this call that Lt. Cumbee felt Appellant was a suspect. He believed and believes that the hair matched Appellant. Further, there were no threats or promises,

Appellant's family was not threatened, he was not deprived of food, water or use of the bathroom, and police did not fabricate any other evidence. **R. pp. 477-92.**¹⁴

The press had been calling since the morning of the homicide to see if an arrest had been made. While Lt. Cumbee did not remember telling the media that Appellant had confessed, he called the press and said that the police had made an arrest. Appellant had previously indicated that he wished to speak to the media, although he was advised against doing so and Lt. Cumbee told him he did not have to do so. Appellant also wanted to speak to his mother and the victim's mother. Lt. Cumbee talked to Dixie Justis and told her Appellant had been arrested, that he had confessed and that Cumbee would call her later to give her a chance to speak to Appellant. Several hours later, Appellant was asked if he was ready to speak to Ms. Justis and he said yes. Lt. Cumbee called her and she came to the police department that afternoon. **R. pp. 481-83; 493-501.**

Charles Benjamin Norris is the Chief of Fire Investigators for North Charleston, and he participated in the March 15, 1997 interview of Appellant. Appellant was not coerced, and neither he nor his family were threatened. He was not told that he could not leave or have food or drink. However, he confessed and gave details consistent with what Inv. Norris found at the scene. Inv. Norris entered the interrogation room shortly after Appellant had been shown the picture of the victim and while Appellant was describing details of the crime. Norris never told Appellant his opinion regarding how the fire started until after Appellant confessed. Appellant told him how he had set the fire and he told Appellant that

¹⁴ Appellant seemed very remorseful and Lt. Cumbee had only told Appellant to say he was sorry to the victim during their interview.

Appellant was being truthful. "It was, in fact, what I had found." Inv. Norris never heard Appellant ask for an attorney, and he did not hear the word "blackout" mentioned in his presence. Further, Appellant had said he wanted to apologize to the victim's family and asked to speak to the media.¹⁵ **R. pp. 502-08.**

Inv. Norris testified that Appellant was told the media was present but he did not have to speak to them. When told they were probably asking questions, he relied, "Good, I want to talk to the media and I want to talk to everybody." None of the officers told Appellant that he would help their case by talking to the media. Also, the media had been present most of the day. **R. pp. 508-10.**

The victim's mother, Dixie Lee Justis, testified that she went to the North Charleston Police Department and spoke with Appellant on March 15 after Lt. Cumbee had called her and said Appellant had asked to speak with her. Cumbee told her that she did not have to come up there if she did not want to, but she went. Police told her not to get upset or say anything ugly to Appellant. Appellant told her that "I killed her, Dixie. I killed Teresa, I'm sorry." When asked why, he could not tell her. He only said that he deserved the death penalty. He also told her the press was present and he was going to apologize to them. **R. pp. 512-15.**

After listening to arguments from the parties regarding admissibility of Appellant's various statements to law enforcement, Ms. Justis and the media, see R. pp. 517-19, Judge

¹⁵ Officer Dusty Poole had reviewed Appellant's truck for evidence and although something of evidentiary value was found, Inv. Norris did not recall relaying this information to Cumbee and Appellant was not told of this. **R. pp. 510-11.**

Cottingham found that the ruse employed by police did not render the statement involuntary under State v. Register, 323 S.C. 471, 478-79, 476 S.E.2d 153, 158 (1996); that the statements obtained from Appellant were freely and voluntarily given, without duress, coercion, undue influence or threat, inducements or hope of reward; that Appellant had been advised of and made a knowing and intelligent waiver of his Miranda rights; and that there was no credible evidence that he had asserted his right to counsel. Judge Cottingham further found that the statement to the press was freely and voluntarily made by him, although he was told on several occasions that he did not have to talk to the press; and that he was in his right mind when he spoke to the press. Also, there was no pressure from anybody at the time, including law enforcement, to have him make the statement. R. pp. 519-23.

The trial judge, however, agreed to permit Appellant to re-open the Jackson v. Denno hearing because a videotape of the attempted polygraph examination on March 14 had not been disclosed. R. p. 698. At the February 26, 2001 hearing, Det. Clayton, the case detective, testified that there were some photographs on Lt. Cumbee's desk on Friday. He did not know whether Appellant had seen them or not. However, to the best of his recollection, they were not shown to him. On Friday night, the officers had discussed how to approach Appellant about hair found in the victim's hand. They did not discuss showing photographs to him. R. pp. 634-44.

Although other photographs were stacked up on Cumbee's desk during the Saturday interview with Appellant, Det. Clayton did not know whether Appellant saw them. He only recalled Appellant being shown one 11" x 14" photo. While the officers began talking to Appellant around 10:30 a.m., the interrogation began around noon and concluded by 4:00

p.m. on Saturday. Lt. McHale had special expertise in the "Reid technique" of interviewing and this is why officers took Appellant to him. There was a videotape made of the attempted polygraph by Lt. McHale, and Det. Clayton watched on a monitor. Det. Clayton had told McHale details of the crime, including that a wine carafe had been involved, since a polygraph examiner needs all information about an offense that he can get. However, he did not suggest what questions Lt. McHale should ask. While Appellant did not appear to be intoxicated at the time, he was not given a polygraph because he had a case of beer to drink the night before, he was too close to the victim and he had taken some caffeine pills the night before the interview.¹⁶ R. pp. 653-61; 664-66; 686-88; 707-08; 711.

At the time Appellant made his statement, police knew that the wine carafe found at the scene was the suspected murder weapon; that the fire was arson; that the rear door of the Mill Inn was open; and that the victim's purse was missing. They also knew that Alan White, who had been interviewed, had left a message on the victim's windshield, but they were unaware that he also left a note on a pink piece of paper (which was mentioned in Appellant's statement). R. pp. 670-71. On Saturday, Det. Clayton asked Appellant how he had snuck out of his parents' house and Appellant said he went out of a side door near the laundry room. Appellant also told police the various places he allegedly had disposed of the victim's purse, but it was not found by police. Det. Clayton did not remember suggesting

¹⁶ In response to the questions asked by McHale, Appellant repeatedly professed his innocence.

that Appellant had blacked out, even though aware that Appellant had been treated for alcoholism.¹⁷ **R. pp. 670-75; 678; 683-90; 693-94; 705-06.**

Det. Charles Benjamin Norris only recalled one 11" x 14" photo being shown to Appellant, but said there were five large photographs. The photographs were in the office when he arrived and Norris did not know why the photo was shown to Appellant. Det. Norris located the point of origin of the fire late Thursday afternoon and concluded it was the result of arson because he did not find any accidental source of origin. Late Thursday or Friday, he told the other officers the fire was arson and had involved ordinary combustible materials since there was no evidence of a liquid accelerate. **R. pp. 721-34.**

Det. George Tetanich remembered seeing a series of small crime scene and autopsy photographs but did not recall when. However, Appellant was not shown any photos on Friday. While it was possible Appellant may have seen photographs if they were in the office during the interview, Tetanich believed that, on Saturday, the photos were in an envelope. He did not recall them being in a stack in front of Appellant. Also, only one photograph was shown to Appellant only after he had confessed. **R. pp. 736-40; 749-51.** Police had not discussed showing a photo to Appellant in their Friday night conversation. Also, when asked, Appellant said he had pushed or rolled his truck out of his parents' driveway to leave. **R. pp. 746; 752-54.**

¹⁷ Clayton admitted that Dana Chapels had also originally been a suspect and explained why police eliminated him as a suspect – there was no evidence Chapels committed the crime. **R. pp. 699-706; 712-14.**

Lt. Melvin Cumbee testified that he did not show any photos to Appellant on Friday. He only showed one enlarged photograph to Appellant on Saturday and only after Appellant said, "I must have did it." This photo depicted trauma to the victim's face, and Lt. Cumbee showed it to Appellant to let him know that the police knew he was telling the truth. If other photographs were visible in his office, Appellant could have seen them. Also, Lt. Cumbee had told Appellant that he needed to apologize to the victim. **R. pp. 757-63; 767-68.**

Capt. Kevin T. McHale, of the Charleston County Sheriff's Department, was a lieutenant in March 1997. Lt. McHale had extensive training and educational literature on interrogation. Also, he had received extensive training in interviewing and interrogation techniques, specifically the "Reid technique." Further, he had conducted "thousands and thousands" of interviews and interrogations. He explained that the Reid technique is designed "to basically get to the point quicker and bring someone around to getting the truth out of a person." The Reid technique has certain steps and procedural guidelines if it is strictly followed. He incorporates some of these techniques but has developed his own style over the years based on his experience and personalized training. **R. pp. 772-78; 780-82.**

Lt. McHale admitted that false confessions do occur, and can be the by-product of any interrogation. Yet, the Reid School does not warn that misuse of their techniques can result in a false confession, and he has never gotten a false confession in a murder case. Moreover, he approaches the question of false confessions from the perspective of how to avoid them. Also, persons sometimes will falsely confess to insignificant matters if they perceive the consequences less severe than what they are experiencing at the time. The problem with research in the area is that classrooms cannot reproduce what a person feels

when he or she has killed someone else. See Kassin & Kiechel, "The Psychology of False Confessions" at 127 n. 16. It is important to attempt to corroborate the veracity of a confession by establishing that the confessor provides details only the perpetrator would know, and by any physical or forensic evidence. **R. pp. 782-86.**

McHale testified that he had received a call from Det. Clayton, who informed him that there were several individuals the police wanted him to interview, "and the first and foremost was [Appellant]." At that point, he was only told the "basics" of the offense. When Det. Clayton arrived, he received more details, such as the facts the victim's purse was missing; that a wine carafe had been used as a blunt instrument; and that the victim was dead before the fire. The pre-polygraph interview was videotaped. Lt. McHale never accused Appellant of the offense but explained that he and everyone else was a suspect. **R. pp. 786-87.** Also, the questions he asked were not such that they would be troubling for an innocent person. Lt. McHale asked both Det. Clayton and Appellant about Appellant's suitability for a polygraph. Appellant appeared to be fine and "very lucid." However, because of the reasons stated elsewhere, McHale aborted the polygraph examination in order to protect Appellant's rights. **R. pp. 797-819.**

The remaining witness at the February 26 Jackson v. Denno hearing was Saul Kassin, a social psychologist and psychology professor. Appellant has thoroughly discussed much of Mr. Kassin's testimony in his brief. However, there are a number of matters that he conveniently fails to mention. For instance, Mr. Kassin admitted that there is no way to come up with a precise number of times that people falsely confess; he could only say that people sometimes falsely confess to crimes they did not commit. He later added, "I don't

pretend to be able to tell the difference between a true confession and a false. I think nobody can do that." (Sic). R. p. 850; p. 903, ll. 21-24. He believed that Appellant's statement failed to prove itself true but acknowledged that no one can ever prove a confession is false. R. p. 904, ll. 18-21. Kassin further acknowledged that he was not in any better position than anyone else to determine whether Appellant's statement was true or false. R. p. 930, ll. 9-14.

Further, Kassin admitted that Appellant received his Miranda rights from Det. Payne on the morning of the incident, from Lt. McHale on Friday and again on Saturday before he was interrogated. Appellant understood these rights; he was not a child or otherwise a vulnerable person; he had thirteen years of education; and he understood what was going on at the time he confessed. R. pp. 905-07; 927-28. Despite his attack on Lt. McHale's aborted interview on direct examination, Kassin admitted that McHale had not made any promises or threats to Appellant or his family; McHale never told Appellant that there was a witness placing him at the scene or that his hair matched that found in the victim's hand; and McHale only used some of the Reid techniques in his interview. Moreover, none of the Reid techniques were employed on Saturday when Appellant actually gave his verbal and written statements. R. pp. 907-30.

Finally, the trial judge reviewed both a videotape of the aborted polygraph interview and a transcription of that tape. After considering the arguments of the parties, R. pp. 944-92, the trial judge found by a preponderance of the evidence that Appellant (1) was an intelligent person and it would have been difficult for the police to take advantage of him; (2) that he received and understood his Miranda rights; (3) that he waived his Miranda rights; (4) that the statements were freely and voluntarily given; and (5) that no threat, promises or

rewards were “extended to him to make that statement. R. pp. 994-97.”¹⁸ He thereafter made supplemental findings and expressly stated his disagreement with Kassin’s description of the interrogation process as an ordeal. Rather, he found that the police had treated Appellant “real gentle.” (Sic). On the day of the offense, the only information was that obtained at the scene. Then, Lt. McHale “did a super job . . . in his examination. He was treated real gentle that day.” After having the opportunity to go home and rest overnight, Appellant was questioned on Saturday. The police, who thought the hair matched, told Appellant it did. “[A]pparently he thought it did, and so as the result of it, . . . this well educated person . . . confessed.” R. pp. 1000-02.

If a defendant was advised of his Miranda rights, but nevertheless chose to make a statement, the “burden is on the State to prove by a *preponderance of the evidence* that his rights were voluntarily waived.” State v. Washington, 296 S.C. 54, 370 S.E.2d 611, 612 (1988) (emphasis in original); Lego v. Twomey, 404 U.S. 477 (1972). Once a voluntary waiver of Miranda rights is made, that waiver continues until the individual being questioned indicates that he or she wants to revoke that waiver or circumstances exist which indicate his “will was impaired.” State v. Moultrie, 273 S.C. 60, 254 S.E.2d 294 (1979), citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The trial judge’s determination of voluntariness requires an examination of the totality of the circumstances, including the background, experience and conduct of the accused. State v. Doby, 273 S.C. 704, 258

¹⁸ Appellant makes a misleading reference to the trial judge’s reference to a “comedy of errors.” When viewed in proper context, it is clear that the trial judge was referring to the failure to disclose evidence (the victim’s hair), of which there is no issue on appeal. See R. pp. 583; 863.

S.E.2d 898 (1979). The trial judge's resolution of the issue will not be disturbed on appeal, unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law. State v. Goolsby, 275 S.C. 100, 268 S.E.2d 31 (1980).

In Register, the Court rejected the defendant's assertion that his statement was rendered involuntary because of police deception as follows:

[T]his Court and the United States Supreme Court have held that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible. Frazier v. Cupp, 394 U.S. 731 [] (1969) (confession voluntary despite police misrepresentation that associate had confessed); State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980) (confession voluntary despite police misrepresenting the evidence which had been accumulated). Furthermore, a defendant's will is not overborne when police misrepresent the facts leading him to believe that information of his guilt is actually greater than it is. Ledbetter v. Edwards, 35 F.3d 1062 (6th Cir. 1994), cert. denied, 515 U.S. 1145 [] (1995) (defendant's will was not overborne when police misrepresented the evidence convincing him to confess); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) . . . (record failed to establish that defendant's will was overborne by police misrepresentation of evidence rendering his confession involuntary). Although police tactics may influence the suspect's decision to confess, as long as the decision results from the suspect's balancing of competing interests, the confession is voluntary. Miller v. Fenton, 796 F.2d 598 (3rd Cir.), cert. denied, 479 U.S. 989 [] (1986).

Register, 323 S.C. at 479-79, 476 S.E.2d at 158.

Applying the above criteria to the present case, it is clear that the trial judge's finding that the statements were admissible must be affirmed despite Mr. Kassin's opinion. First, it is clear that the various findings made by the trial judge are supported by the record and its reasonable inferences. Specifically, his findings are supported by the police officers

involved in the investigation. Appellant, however, asks this Court to usurp the trial judge's role as fact-finder and hold that the statements were inadmissible based upon Kassin's testimony that some of the steps followed by police during the course of their interviews with Appellant were consistent with what he had found in false confession cases. Yet, Appellant's request is improper because an appellate court will not disturb the trial judge's factual findings that depend upon the credibility of witnesses. Morehead v. Doe, 324 S.C. 559, 479 S.E.2d 817 (Ct. App. 1996); cf. Hernandez v. New York, 500 U.S. 352, 364 (1981) (because trial judge's findings on purposeful discrimination turned largely on evaluation of credibility, "a reviewing court ordinarily should give those findings great deference").

Even if the Court were otherwise inclined to review the matter *de novo*, Kassin's testimony does not provide a basis for suppressing the statement. The best he could do was say that some of the tactics employed by law enforcement were consistent with cases that supposedly resulted in false confessions. Each of the other cases, however, obviously involved different individuals and different facts. Also, Kassin admitted that there was no way to determine a precise number of times false confessions occur and that he could not determine between a false confession and a true one. R. pp. 850; 903-04. In the end, he admitted he did not know whether Appellant's statement was true or false and that he was in no better position to determine this question "than anyone else in the world." R. p. 930, ll. 9-14.

Furthermore, Kassin opined that one manner to determine that a confession is true is to look for evidence known only to the killer. Here, Appellant provided information that was unknown to the police when he mentioned the pink note from Allen White to the victim.

See R. pp. 670-71. Also, even Kassin admitted that Appellant was an intelligent, well-educated person, that there was no evidence that Appellant was a vulnerable person, and that he would have understood what was happening at the time. Therefore, the trial judge's factual findings are supported by the record and this Court should affirm his ruling on the admissibility of Appellant's custodial statements.

IV.

The apology to the victim's mother was properly admitted into evidence because it was not the fruit of a tainted confession but was the product of Appellant's own free will.

Notwithstanding Appellant's contrary complaint, the State submits that Judge Cottingham properly ruled that the statement to the victim's mother was admissible and the trial judge properly admitted this evidence because the statement was not the fruit of a tainted confession. To the contrary, Appellant's statement was freely and voluntarily given as demonstrated in the preceding argument. Further, the testimony from fact witnesses presented at the Jackson v. Denno hearings was that Appellant voluntarily sought to speak to the victim's mother, in order to apologize to her. Also, the State never suggested that he should do so. R. pp. 365-69; 404-10; 471-72; 481-83; 493-501. Based on the present record, the State submits that the trial judge properly admitted the statement into evidence. See Rule 804 (B) (3); State v. Cheeseboro, 346 S.C. 526, 547-48, 552 S.E.2d 300, 311-12 (2001).

V.

Appellant's apology to the media was properly admitted because Appellant freely and voluntarily spoke with the media although advised several times that he did not have to do so and, in fact, it would be against his best interest to do so.

Despite Appellant's complaint, the State submits the trial judge properly admitted his admission to the media. As demonstrated in **Argument III**, he voluntarily chose to speak with the media and answer questions, although repeatedly advised that he did not have to do so and that, in fact, a lawyer would advise him that it would be against his best interest to do so. **R. pp. 365-69; 417-24; 445; 473-77; 481-83; 493-501; 508-10.** Based on the present record, it is, therefore, clear that the trial judge properly admitted this statement under Rule 804 (B) (3), SCRE and Cheeseboro.

VI.

The trial judge did not abuse his discretion by failing to require the State to disclose letters written by the Solicitor and an Assistant Solicitor to law enforcement because Appellant made no showing that the letters contained any undisclosed material exculpatory or impeaching evidence.

Appellant contends that the trial judge erroneously refused to require the State to reveal the contents of letters written by Solicitor David Schwacke and Assistant Solicitor Amie Clifford to the North Charleston Police Department. He speculates that these letters may have had some impeachment or exculpatory information related to alleged police

misconduct.¹⁹ The State submits that the trial judge's ruling must be affirmed and this Court previously correctly ruled that Appellant was not entitled to have the letters in question unsealed because he failed to make any showing in the lower court that these letters contained any undisclosed material exculpatory or impeachment evidence.

At a September 4, 1998, motions hearing before the Honorable A. Victor Rawl, Appellant asserted that the State had failed to disclose a number of items despite his repeated efforts to obtain them. R. p. 188, l. 13 - p. 212, l. 1. Not surprisingly, the Assistant Solicitor's representation as to what had been disclosed and efforts the State had made to disclose information to the defense was quite different.²⁰ She represented that Appellant had been given everything that her office had, including a copy of the incident report in an unrelated North Charleston murder in which the victim in this case was a witness and SLED reports which were provided to her on the morning of the hearing. She also explained the reasonable efforts that she had undertaken to assist Appellant in his efforts to have certain items of evidence tested, including the hair found in the victim's hand at the crime scene but asserted that it was not the State's responsibility to conduct Appellant's pre-trial investigation for him. The Assistant Solicitor maintained that the State had disclosed everything in its possession and was continuing to check on the number of matters about which Appellant had inquired. R. pp. 214-29. At the conclusion of the hearing, Judge Rawl

¹⁹ As discussed earlier in this Brief, there was no "misconduct."

²⁰ The Assistant Solicitor noted that defense counsel had not carbon copied her on the letter requesting the judge to hold a hearing and that she had not been provided a copy of the letter. R. p. 212, l. 3 - p. 214, l. 25.

directed Appellant to prepare an order requiring the State to disclose the various matters requested by him. R. p. 236, l. 20 - p. 237, l. 25; p. 239, l. 6 - p. 240, l. 7.²¹

Appellant has not made any assertion that Judge Rawl's Order was not followed, and the Record reflects compliance by the State with that Order to the extent possible despite Appellant's complaints (both *in camera* and before the jury) about the manner in which police conducted their investigation. Nevertheless, Appellant subpoenaed and attempted to discover a letter from Assistant Solicitor Amie L. Clifford to Chief Caldwell, of the North Charleston Police Department, (Court's Exhibit 1) and a January 29, 1998, letter from Solicitor David Schwacke to Chief Caldwell (Court's Exhibit 2). At a May 22-23, 2000, motions hearing, the Honorable Edward B. Cottingham ruled that neither of these letters was discloseable because they were work product of the Solicitor's Office and were not discoverable by Appellant. Judge Cottingham further ordered that the letters in question be placed under seal. R. p. 426, l. 12 - p. 427, l. 5.

On January 24, 2002, Appellant filed a Motion to Unseal Court's Exhibits, in which he asked this Court to order that the previously sealed Court's Exhibits be reviewed by the Court and unsealed so that appellate counsel could properly determine their impact upon any relevant issues on appeal. On March 13, 2002, this Court, through the Honorable William L. Howard, entered the following Order:

Appellant's motion is granted to the extent Court's Exhibits # 1 and # 2 shall be transported to this Court for an *in camera* review and further ruling regarding the motion. The time for

²¹ Judge Rawl further indicated that he would assist Appellant by granting any further orders necessary to enable him to complete his discovery in this regard.

filing the Appellant's Initial Brief and Designation of Matter shall be held in abeyance pending the resolution of this matter.

Appellant then made a Supplemental Memorandum on March 14, 2002, asserting that the letters in question were believed to be directly relevant to issues of police misconduct and that failure to investigate, where Appellant continued to maintain his confession to the crime was obtained through coercion and trickery. He further contended that the sealed exhibits were important for preparation of his appeal and asserted he could not adequately argue the documents should not have been disclosed to defense at trial without reading them. Finally, in pertinent part, he requested an opportunity for additional argument or briefing if it will assist the Court in ruling on his motion.

The State filed a Return to Supplemental Memorandum in Support of Motion to Unseal Court's Exhibits on May 13, 2002, in which it argued that the Court's Exhibits were not discoverable under either Rule 5, S.C.R.Crim.P., or the constitutional requirements of Brady v. Maryland, 373 U.S. 83 (1963). However, the State left the matter to this Court's discretion. Appellant then filed a Reply to Respondent's Return to Supplemental Memorandum in Support of Motion to Unseal Court's Exhibits dated May 17, 2002. This Court, through the Honorable Ralph King Anderson, Jr., filed an Order dated May 22, 2002, denying Appellant's request, in pertinent part, as follows:

Following an *in camera* inspection of the sealed exhibits and a full review of the filings of the parties, this Court denies the motion to unseal the exhibits and declines to have additional exhibits transported for review prior to ruling on the motion

as Appellant requests. The appeal is no longer held in abeyance.²²

The State submits that both Judge Cottingham and this Court in its prior Order properly refused to require disclosure of Court Exhibit's # 1 and # 2 because Appellant did not make any showing of materiality. Brady requires the State to disclose evidence in its possession favorable to the accused and material to either guilt or punishment. Strickler v. Greene, 527 U.S. 263 (1999); State v. Nance, 320 S.C. 501, 504, 466 S.E.2d 349, 351 (1996). In Strickler, the Court explained that "evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (Citing United States v. Bagley, 473 U.S. 667, 682 (1985)). Before the State must produce undisclosed evidence for the trial judge's inspection, the accused must first establish a basis for his claim that the evidence contains material exculpatory or impeachment evidence. Nance. The trial judge "should then rule upon the materiality of the evidence to determine whether the State must produce it for the defendant's use. Id. at 504, 466 S.E.2d at 351.

Appellant cannot satisfy his burden for several reasons. First, he acknowledges that he is not even certain there is any exculpatory or impeaching information in either of the court exhibits and merely speculates as to whether or not these letters support a claim that

²² Because the appellate pleadings concerning Appellant's request to have the Court Exhibits unsealed and this Court's Orders were not presented to the trial judge or Judge Cottingham, the State has not sought to include these matters in the Record on Appeal. See Rule 210 (C), S.C.A.C.R. ("The record shall not . . . include matter which was not presented to the lower court or tribunal."). However, this Court can obviously take judicial notice of the pleadings filed before it. See Moss v. Aetna Life Insurance Co., 267 S.C. 370, 228 S.E.2d 108, 112 (1976) (explaining parameters of judicial notice).

the prosecution violated either Brady or Giglio v. United States, 405 U.S. 150 (1972). The State submits upon information and belief that the matters contained in the letter from Solicitor Schwacke to Chief Caldwell is not discoverable either under Rule 5 or Brady because it does not contain any material exculpatory or impeaching information. Rather, it is merely work product prepared by the Solicitor. Likewise, the State submits that the letter from Ms. Clifford is also not subject to disclosure and that both this Court and Judge Cottingham properly ruled that it should remain sealed and not disclosed. This allegation is without merit.

VII.

Appellant cannot show how Judge Cottingham abused his discretion by refusing to allow Appellant to call Assistant Solicitor Amie Clifford to testify at a pre-trial hearing, where he did not make any proffer as to how he expected her sworn testimony to differ from her representations previously made to the court during the same hearing and Appellant has not made any claim on appeal that the State did not comply with the Order of the judge granting his various discovery requests.

Appellant's final contention is that Judge Rawl erroneously refused to allow him to present Assistant Solicitor Clifford as a witness in the September 4, 1998, pre-trial motions hearing since he allegedly contested police misconduct, the failure to disclose evidence or properly investigate the case as well as the "good faith of the solicitor's office." The State submits that this Court should affirm Judge Rawl's ruling because (1) Appellant did not make any proffer as to how he expected Assistant Solicitor Clifford's sworn testimony to differ from her responses to Judge Rawl as an officer of the court, and (2) Appellant has not

raised any issue on appeal relating to either the State's failure to comply with Judge Rawl's Order granting pre-trial discovery to him or the State's supposed failure to comply with Brady and Rule 5.

At the September 4, 1998, hearing, Appellant complained of the State's failure to produce independent forensic examination of a myriad of items. **R. pp. 185-211; 220-21; 231-36.** One item that he was particularly interested in was a wine carafe which had been used as a tip jar at the bar and that was allegedly used by Appellant to kill the victim. He maintained that he had never seen the tip jar and wanted it tested; he wanted to know what fingerprint examinations were made from it; and he wanted to know the results of testing on blood swabs taken from it. **R. p. 196, ll. 5-25.**²³ The Assistant Solicitor stated that the wine carafe had remained in the custody of the North Charleston Police Department. While it was not sent to SLED, swabs from it were sent there for examination. **R. p. 217, ll. 17-19.**

After the Assistant Solicitor's initial response, Appellant asked if he could call her as a witness during the motions hearing without stating any reason for doing so. Judge Rawl denied this request. **R. p. 221, ll. 21-23.** In response to further questioning by Judge Rawl, Assistant Solicitor Clifford said that there had not been any fingerprint testing of the wine carafe. "There were no fingerprints as I understand it that could be identified at all or developed from anything that was taken from the scene which had not only been subject to

²³ As discussed, the Assistant Solicitor took the position that the State had fully complied with Appellant's various discovery requests and was continuing to do so whenever discoverable information became available. It was her contention that the State was fully compliant with the various discovery requests but that Appellant wished the State to go beyond that and perform his pre-trial investigation for him, which it was not required to do. **R. pp. 215-21.**

a fire but obviously the water that put out the fire.” Therefore, the carafe itself was not submitted for testing, although swabs of blood found on it were taken and submitted. **R. p. 222, l. 22 - p. 223, l. 9.**

Appellant later clarified that his request to have Ms. Clifford testify was based on the State's failure to disclose information concerning the wine carafe:

I wasn't trying to be offensive by asking to put her on the stand, but I feel like sometimes I need to, to say, it's a simple question; where is the wine carafe?

Is it in one piece? Has there been any testing of it?

Have there been any fingerprints?

I can't get any answers. It's so confounding.

R. p. 233, ll. 3-10.

The State does not dispute that a criminal defendant has the right to call a prosecutor as a witness. State v. Quattlebaum, 338 S.C. 441, 452-53, 527 S.E.2d 105, 111 (2000). However, this right is subject to the trial court's general discretion to exclude witnesses or evidence. Id.; State v. Lee, 203 S.C. 536, ___, 28 S.E.2d 402, 404 (1943) (finding trial court's refusal to allow defendant to call prosecutor was harmless). Appellant cannot show any error in the present case for several reasons.

First, the record clearly reflects that Appellant's sole reason for calling the Assistant Solicitor was to ascertain whether or not any fingerprints had been taken from the wine carafe or whether it had otherwise been processed by law enforcement, and he wished to have it examined independently. He did not proffer how he expected sworn testimony from the Assistant Solicitor to differ from the representations she had made to the judge as an

officer of the court. In the absence of such a proffer, there is nothing for an appellate court to review on appeal. State v. China, 312 S.C. 335, 440 S.E.2d 382 (Ct. App. 1993), cert. withdrawn June 30, 1994; see also State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991). Also, because there was no proffer, the only evidence of record was that the Assistant Solicitor would have testified consistently with her representations made to the judge that no latent fingerprints were taken from the wine carafe and the wine carafe was not sent to SLED for examination because anything of any possible evidentiary value was destroyed in the fire and subsequent extinguishing of it.

Moreover, a fair reading of the record is that Appellant was satisfied with the trial judge's inquiry (R. p. 222, l. 22 - p. 223, l. 9) concerning what, if any, forensic examination had been made of the wine carafe (as well as other items of evidence seized by police), since he later indicated that his whole purpose in seeking to call her was to ascertain the results of any examination that had been made of the carafe. R. p. 233, ll. 3-10. See State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (where appellant obtained the only relief he sought at trial, appellate court had no issue to decide); State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979) (same).

In Quattlebaum, the Court found that the failure to allow the defendant to proffer testimony from the solicitor and deputy solicitor was not cumulative because the representations by the deputy solicitor as an officer of the court did not address the critical question of when the informant in that case became a government agent. Here, however, the Assistant Solicitor's comments specifically address the issues about which Appellant sought to inquire. Thus, the trial judge did not abuse his discretion by refusing to allow Appellant

to present any testimony from his adversary. See also Lee. Finally, the absence of prejudice is conclusively demonstrated by the fact that Judge Rawl ruled in Appellant's favor and Appellant has not raised any contention before this Court either that the State failed to comply with Judge Rawl's Order or that the State violated Brady or Rule 5 by failing to disclose any exculpatory impeaching information. The best he can offer is speculation and conjecture as to whether or not any material impeaching or exculpatory evidence was withheld. Under these circumstances in light of this record, Judge Rawl's ruling must be affirmed. Id.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

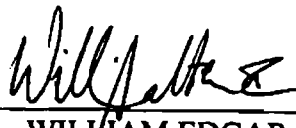
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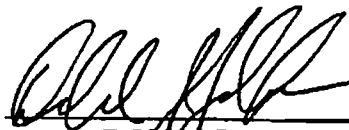
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May 20, 2003.

WES

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal From Charleston County
The Honorable Luke N. Brown, Jr., Special Circuit Court Judge**

THE STATE,

Respondent,

vs.

WESLEY MAX MYERS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Respondent complies with SCACR
211(b).



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May 20, 2003.

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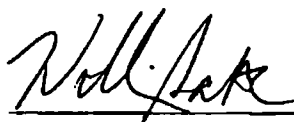
Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 20th day of May, 2003.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Luke N. Brown, Jr., Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY MAX MYERS,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

1.

The court erred by admitting an anger management questionnaire against appellant which concerned his problems with controlling his emotions. Any probative value this anger management questionnaire had was substantially outweighed by its unduly prejudicial effect.

The state argues "there's nothing about state's exhibit 29 which would lead the jury to speculate that appellant committed the murder simply because of problems with his anger management." Brief of Respondent at 2. The anger management questionnaire was admitted for one purpose: to suggest that appellant was a violent person, had a propensity for violence, and was *the type of person* that could have killed his girlfriend in a rage.

The questionnaire stated that some people were afraid of appellant's bad temper and "I felt angry enough to kill." R. 2749. Appellant said in his questionnaire people needed to "look out!" when he became angry. See Brief of Appellant at 25-29. All of this anger management evidence was essentially inadmissible propensity evidence, and any probative value it had was outweighed by its unduly prejudicial effect. See Rule 403, SCRE; Cf. In the Matter of the Care and Treatment of John Philip Corley, 353 S.C. 202, 577 S.E.2d 451 (2003) (wherein the Supreme Court held that such propensity evidence was admissible *where the issue was* whether it was likely the defendant would be dangerous in the future as a violent predator based on his past history).

The anger management questionnaire was the classic type of evidence that suggested a verdict on an improper basis. Our Supreme Court condemned such evidence in State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001).

The state then proceeds to argue that if the anger management questionnaire was improperly admitted, any error was harmless beyond a reasonable doubt because the state “presented overwhelming evidence of guilt.” Brief of Respondent at 2. Most respectfully, that assertion is ludicrous.

The state’s case depended upon a hair found in the victim’s hand. It is undisputed the ruse involving that hair sparked the strange “I must have done it” alcohol blackout scenario confession. As seen, that hair ultimately did not link appellant to this murder, and the solicitor conceded the state had no physical evidence against appellant. R. 1027, l. 6 – 1028, l. 17; Brief of Appellant at 11.

Dr. Terri Melton testified that the mitochondrial DNA analysis on the hair showed “[t]his hair simply does not appear to have the same type as Mr. Myers.” R. 2547, l. 12 – 2553, l. 14.

Taking away the “alcohol black-out” confession induced by Lt. McHale — who was unabashedly impressed with his ability to obtain confessions — the state’s case against appellant was almost nonexistent.

The surprise last minute witness, Laurie Villalobos, who had never come forward with her allegation she saw appellant at the Mill Inn on the night of the fire, was simply not credible. Her boyfriend at the time said Villalobos never said a word to him about allegedly seeing appellant at the Mill Inn on the night of the fire. The bar burning down was obviously a major event in the lives of the regular patrons of the tavern, and Villalobos’ last minute testimony — years later — when the state’s case was in trouble was highly suspect at best. Further, her assertion that she did not think anyone would believe her is sufficiently

strange that it may well be telling on how others commonly viewed her veracity. See Brief of Appellant at 22–23.

The state's attempt to argue that the evidence coincides with the appellant's confession is misleading. For example, appellant presented the expert testimony of Dr. Gerald Hurst — who had a doctorate in Chemistry from Cambridge University — to show that the state's version of how the fire allegedly started, which was supposed to be consistent with appellant's statement, was not plausible. Dr. Hurst essentially dismissed the local investigation into the fire as unprofessional. Dr. Hurst testified the cause of the fire was the use of an accelerant. "Somebody literally torched the area of this body." R. 2479, l. 15 – 2492, l. 18; R. 2503, l. 4 – 2504, l. 4. Lighting a few papers — as was placed in appellant's confession — was inconsistent with the origin of this fire. R. 268, l. 13 – 2504, l. 4.

Finally, as to the alleged Allan White "pink note" that he left at the bar, White testified "everyone" knew the note was a joke. White admitted this note had been left since Tuesday night, "all the way through Wednesday, and then this fire happened on Thursday...." White admitted he "vaguely" remembered appellant coming into the Mill Inn at lunch time, or in afternoon. R. 2095, l. 4 – 2098, l. 6. In short there was ample time for appellant, as well as "everyone" else at the bar to know of White's note and his antics. The reality is that the evidence in this case against appellant was very slim, and the state cannot seriously argue the errors in this case were harmless beyond a reasonable doubt.

2.

The court erred by ruling Dr. Saul Kassin could not use other examples or facts of interrogations from other states to illustrate his opinion before the jury. Dr. Kassin's testimony was admissible under Rule 702, SCRE, because it was helpful to the jury. Therefore, Dr. Kassin had the right to testify about facts and data he relied on.

The state now argues that the expert testimony of Dr. Saul Kassin should not have been allowed, and therefore the limitations placed on Dr. Kassin's testimony before the jury were harmless. How or why a suspect would confess to a crime he did not in reality commit is a difficult matter for jurors — and indeed attorneys — to understand. People intuitively think that a person would not confess to committing a crime unless he was guilty of that crime. Experience teaches otherwise.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1968), included empirical evidence of coercive police tactics that could produce a confession. That is also what this case is all about, and it can hardly be argued that the interrogation techniques discussed in Miranda — including the Reid technique — were matters within the common knowledge of jurors. See Miranda v. Arizona, 384 U.S. at 448–457, 86 S.Ct. at 1613–1619.

It should be beyond cavil that expert testimony on this subject was needed in this case given the strange “I must have done it” confession that admittedly was the product of an elaborate ruse. This subject is similar to others where the Supreme Court and this Court have recognized the need for expert testimony. See Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (battered woman's syndrome); State v. Pamela Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003) (battered woman's syndrome and the giving of inconsistent statements about whom the defendant thought she was shooting); State v. Whaley, 305 S.C.

138, 406 S.E.2d 369 (1991) (reliability of eyewitness testimony); State v. Henry, 329 S.C. 266, 499 S.E.2d 463 (Ct. App. 1997) (post-trauma stress disorder suffered by a stepdaughter who was having coerced sex with the defendant).¹

Further, it is clear the facts and data relied upon by the expert are admissible. See Rule 703, SCRE. It is equally clear that experts can even base their opinions on inadmissible hearsay if they are of the type reasonably relied on by experts in the field. State v. Franklin, 318 S.C. 47, 456 S.E.2d 357, 363 (1995).

Dr. Kassin was prohibited from relying on facts and data that were essential to his testimony, and his opinions on coercive police interrogation tactics. Respectfully, the trial judge acceded to the solicitor's demand that Dr. Kassin not be allowed to use the facts and examples he did in his in camera testimony —where he illustrated his points with specific evidence — because the solicitor saw the effectiveness of that expert testimony. See Brief of Appellant at 30–38 (on Dr. Kassin's in camera testimony and the limitations placed on his testimony before the jury).

The state's argument that Dr. Kassin should not have been allowed to testify, and that the limitations on his testimony were harmless, flies in the face of the well settled law

¹ Rule 702, SCRE and Rule 703, SCRE read together state that a qualified witness with specialized knowledge may testify and render his opinion even on the ultimate issue to be decided by the jury - - which Dr. Kassin did not do in this case - - if that specialized knowledge would assist the trier of fact. The state makes inconsistent statements regarding Dr. Kassin's opinion: "[A]ppellant presented expert testimony that it was a false confession." Brief of Appellant at 1. "Kassin admits he did not know whether Appellant's statement was true or false. . . ." Brief of Respondent at 13. Dr. Kassin's testimony on coercive police interrogation techniques was needed to have the jury have a sophisticated understanding of this subject, and the fact he left the ultimate opinion to the jury was to his credit. Regardless, Dr. Kassin did make it clear that he carefully screens those case in which he chooses to testify, and that he would not have testified in this case —which he did for free no less, if the hair found on the victim had matched appellant as alleged in the ruse.

on expert testimony in this state. Neutralizing Dr. Saul Kassin before the jury unfairly cut the legs out from under appellant's defense that the only real evidence against him in this case — his confession — was the result of sophisticated interrogation techniques and a ruse.

The state nonetheless argues that "appellant makes the silly contention that the Assistant Solicitor objected because he had seen how effective Kassin's testimony was *in camera*." Respondent Brief at 10, n. 5. However, the assistant solicitor undoubtedly objected to Dr. Kassin using his *in camera* data and examples before the jury because he saw how effective that testimony was in appellant's defense, and he did not want the jury to hear it. Any assertion to the contrary, even when flavored with this kind of rhetoric, is, respectfully, unconvincing. See Brief of Appellant at 30–38.

Appellant should be given a new trial.

ARGUMENTS 3, 4, & 5

The trial court erred by refusing to suppress appellant's confession as coerced given the facts of this case. The subsequent "apology confessions" were the fruit of the poisonous tree.

The "I must have done it" confession in this case was undisputedly the result of an elaborate ruse arranged by the police. Appellant was vulnerable to the alcohol-blackout scenario, and the police took full advantage of him. The state in its brief now asks this Court to ignore the clear evidence of the ruse, and Lt. McHale's manipulation of appellant, and find that they were permissible trickery and deception under the facts of this case.

Appellant offered to take a polygraph exam that he expected would have cleared him as a suspect in this case. Lt. McHale's contention that the polygraph exam was not given because appellant had been drinking the day before, and any admission made by appellant would not "stand up in court" rings hollow. McHale was an experienced interrogator, and he knew a confession would not be suppressed based on the fact of appellant's drinking on another day. Further, the ruse was in full swing at the time appellant was going to take the polygraph exam. The test was not administered because McHale wanted until the next day to spring the false hair evidence on appellant.

The state acknowledges "Lt. McHale had special expertise in the Reid technique of interviewing and that is why officers took appellant to him." Brief of Respondent at 28. The tape of the "set-up" interrogation is on file with this Court for viewing.² While police subterfuges are permissible, our Supreme Court has correctly looked upon the practice with

² There are two videotapes of the interrogation, and the long — or unedited one — only provides the needed context to understand the extent of McHale's ability to manipulate.

distaste. See State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). At some point, however, police trickery and deception becomes sufficiently coercive that a confession should not be allowed to stand. The "I must have done it" confession in this case is one such very unusual case.

The trial judge incorrectly reasoned that the "I must have done it" confession and the organized apologies to the victim's mother and the media should not be excluded as coerced under the highly unusual facts of this case. For that reason, appellant should be granted a new trial.

7.

The judge erred by refusing to allow the defense to call Assistant Solicitor Clifford to testify *in camera*. The case law clearly allows such *in camera* testimony by a solicitor, and in this case the good faith of the police agencies and the supervising solicitor's office regarding evidence and testing had become a major issue.

Just as in State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000), the good faith and integrity of the state's dealings with the defense in this case had been called starkly called into question. The state made it clear that based on appellant's confession - - however strongly appellant continued to challenge it - - that it had no intention of testing other available evidence. As seen, the defense had to resort continuously to the courts to attempt to obtain relief given the defiant attitude of the authorities in this case.

While the state purported to the trial judges in this case that it did not have to "assist the defense," appellant made it clear the integrity of the state's investigation, and what it was disclosing to the defense, were strongly at issue. Issue Six before this Court involves letters from then Solicitor David Schwacke and Assistant Solicitor Amy Clifford to the North Charleston Police Department that allegedly concern police misconduct and the conduct of its investigation.

Defendant's Exhibit 27, a copy of which is on file with this Court, shows that blood evidence from appellant and the victim were submitted to SLED for testing. This report also names Dana Chaples as a suspect. The wine carafe is referenced as the murder weapon.

The state apparently chose not to pursue forensic testing that could have implicated Chaples in this crime, even though there was no forensic evidence linking appellant to this crime, and Chaples' actions and his dealings with the police, were very suspicious.

The state writes that: "the carafe itself was not submitted for testing although swabs of blood found on it were taken and submitted." Brief of Respondent at 44. It is not clear that that is an accurate statement given Defendant's Exhibit 27, and the other defense concerns in this case. This was all the more the reason that Assistant Solicitor Clifford should have been placed under oath to testify regarding the state's testing of the carafe.

The state writes that "the record clearly reflects that appellant's sole reason for calling the Assistant Solicitor was to ascertain whether or not any fingerprints had been taken from the wine carafe or whether it had otherwise been processed by law enforcement, and he wished to have it examined independently." Brief of Respondent at 44. Whether the wine carafe referenced on the SLED laboratory forensic services request, Defendant's Exhibit 27, had been processed for fingerprint, blood or otherwise was obviously a major issue in this case because the wine carafe was listed as the murder weapon.

This was obviously no small matter. The refusal to allow defense counsel to call Assistant Solicitor Clifford as a witness was contrary to the Supreme Court's opinions in State v. Lee, 203 S.C. 536, 28 S.E. 402 (1943), and State v. Quattlebaum.

The integrity and good faith of the investigation in this case could not have been more sharply called into question. Appellant had a right under our Supreme Court's precedents to call Assistant Solicitor Clifford for this limited purpose - - out of the presence of the jury - - to obtain answers under oath on a matter of importance.

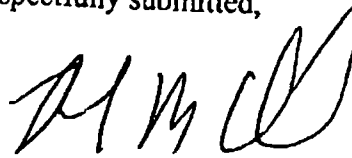
The defense in this case did an admirable job of telling the trial court what it suspected the state had in its possession that it would not turn over to the defense. Appellant wanted to know the results of what evidence had been tested, and what evidence had not been tested. That was all any defendant could do by way of a proffer in this situation.

Appellant should be granted a new trial. The refusal to allow the defense to call the Assistant Solicitor for this limited purpose, in camera, about evidence in the control of the state — where evidence was lost, destroyed, not tested, or testing results not revealed — was against clear precedent in this state.

CONCLUSION

By reason of the arguments in appellant's brief, and in this reply brief, appellant's conviction should be reversed and this case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

This 9th day of July, 2003.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.



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July 9, 2003

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Luke N. Brown, Jr., Special Circuit Court Judge

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RESPONDENT,

V.

WESLEY MAX MYERS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, this 9th day of July, 2003.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 9th day of July, 2003.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: February 3, 2005

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Wesley Max Myers,

/ Appellant.

Appeal From Charleston County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 25818
Heard April 6, 2004 - Filed May 11, 2004

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Ralph E. Hoisington, of Charleston, for Respondent.

JUSTICE PLEICONES: Wesley Myers (Appellant) was convicted of murder and arson in the third degree. Appellant was sentenced to thirty years imprisonment for murder and ten years imprisonment for arson. Appellant appealed his convictions on multiple grounds. This appeal

was certified from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

FACTS

On Thursday, March 13, 1997, at 3:15 am the fire department responded to an emergency call and found the Mill Inn Tavern on fire. A body was discovered in the bar after the fire was extinguished. The body was that of Teresa Haught (Teresa), Appellant's girlfriend and manager of the bar. Teresa had been hit in the head, and then the bar had been set on fire. During the investigation of the scene, some hairs were found in Teresa's hand.

The police interviewed Appellant three different times: at the scene of the fire (early Thursday morning), and twice at the police station (Friday and Saturday). On Thursday and Friday, Appellant was cooperative and consistently offered to help the police find the killer. During a skillfully conducted interrogation on Friday, the police sought, and obtained, Appellant's agreement that the hair found in Teresa's hand must have come from the head of the person who killed her.

At the meeting on Saturday with Appellant, the police told Appellant that South Carolina Law Enforcement Division (SLED) had matched the hair found in Teresa's hand to the hair that Appellant had given the police for testing.¹ At that point, Appellant confessed to killing Teresa. Appellant's confession stated:

On March 13th, 1997 at about 2:00am or so I drove to the Mill Inn to check on my girlfriend, Theresa (sic) Haught. I parked my truck beside her Mercury parked in front of the Mill Inn. I went to the front door and knocked. Teresa came to the door about 5-10 minutes later. It is not uncommon for me to go by and check on her at closing time. There was no one in there or I don't think there was anyone in there. While I was in the bar, I found a pink note on the bar. It was a note signed by Allen White. I think it said that "I'll see you later" and it was signed by

¹ The police actually received the call from SLED on Friday, before the interview with Appellant began.

him. I thought that they might have had something going. I had seen Allen pinch her and kiss her on the lips. I asked her about the note and she said that it was none of my business. Teresa pushed me by the chin and the chest hard. I told her "don't push me Teresa." She hit me in my chest with her fist. Then, she pushed me up against the bar. I told her not to hit on me. Teresa grabbed the glass wine craft (sic) and she told me to get away. I grabbed the wine craft (sic) from her. Then, she pushed me in the face. I struck her in the center of the head with the wine craft (sic). Both of us went down to the floor. Like a blur, I lost control. I went around the counter behind the bar. I believe I held her for a while on the floor before I went around the counter. I think I struck her twice. I was raging upset, real mad. I couldn't believe what she was saying. She called me a fool. I grabbed "closed on Sunday sign" and some papers. At that state I grabbed anything around. I piled some papers up behind the bar and lit it with a lighter. I remember I wanted to die. I wanted to burn up in there with her. I sat there and closed my eyes and the fire was getting really big. I went out the back door and went to the right. I went around front and got into my truck. I put a purse behind the seat of my truck. I don't remember what I did with the purse. I drove home. I forgot to mention that I opened the cabinet behind the bar looking for something to burn.

The hair that was found in Teresa's hand was lost when SLED sent the hair to the FBI for DNA analysis, so there is no physical evidence linking Appellant to the crime.

ISSUES

1. Did the trial court err in admitting Appellant's confession?
2. Did the trial court err in admitting into evidence an anger management questionnaire completed by Appellant, in which he acknowledged problems with controlling his emotions?
3. Did the trial judge err in sealing letters from the solicitor to the police department because the letters contained impeachment or exculpatory evidence?

4. Did the trial court err in ruling Dr. Saul Kassin, an expert in social psychology, could not use examples or facts from other states to illustrate his opinion about false confessions?

ANALYSIS

1. Confession

Appellant argues that the confession should have been suppressed because it was the product of police trickery and coercion. The totality of the circumstances does not demonstrate that Appellant's will was overcome by the police. As there is no evidence that the confession was not voluntary we therefore hold that the trial court did not err in admitting Appellant's confession.

Initially, Appellant gave a statement to a police officer on Thursday, at the scene of the fire. Before giving the statement, Appellant was advised of his rights. Appellant did not say anything incriminating in this statement.

On Friday, Appellant met with Officer McHale at the police station. When Appellant arrived at the station, the officers were leaving for lunch and invited Appellant to join them. Appellant declined. After the officers returned, McHale read Appellant his Miranda rights, and Appellant waived his rights. During Friday's interview, McHale used the "Reid Technique" of interrogation.² The Reid technique involves nine steps. The first part of the process involves "breaking the suspect down" by asserting the suspect's guilt and not allowing the suspect to deny his or her guilt. The second part of the process involves "development of alternative questions" in which the

² During the Friday interview, McHale told Appellant, among other things, that McHale sometimes thought about killing his own wife, and that he had once pushed his wife when she was pregnant. McHale testified that the purpose behind these statements was for Appellant to relate to McHale and also for McHale to gauge the reaction of Appellant. Also, McHale suggested to Appellant that the police had evidence that Appellant was in the bar the night of Teresa's murder, even though the police did not have any such evidence.

interrogator gives the suspect a "face-saving or moral-justifying alternative." For example, the interrogator would say "maybe you were provoked" or "maybe it was an accident" or "I know this isn't something that you wanted to do or planned."

Initially, Appellant agreed to take a polygraph examination, but during the interview with McHale, Appellant told McHale that Appellant had been up all night, had 24 beers to drink the night before, and had taken caffeine pills. McHale decided to send Appellant home, and asked Appellant to get a good night's rest before meeting with the police on Saturday. McHale testified that he stopped the interrogation because he wanted to make sure that if the police elicited a confession, it would be admissible in court. Appellant did not make any incriminating statements on Friday.

On Saturday, Officer Clayton took Appellant to breakfast, then Clayton took Appellant to the station for the interrogation. Appellant was again advised of his rights. During this interrogation, the officers spoke with Appellant for about an hour and a half before Lt. Cumbee arrived and asked Appellant to come into his office. Appellant agreed with the police that "the hair that was found in [Teresa's] hand belonged to the person who [murdered her]." After Appellant said this, Lt. Cumbee left the office and when he came back he "told the [Appellant] that [Lt. Cumbee] just received a phone call from SLED and that SLED said the hair that was found in [Teresa's] hand is from, came from [Appellant]...that it matched." In reality, the police had received the phone call on Friday from SLED stating that the hair matched.³ When Appellant was confronted with this information, he said "I must have did it then." Lt. Cumbee said "Well, don't you think you need to say you're sorry?" Appellant said "I'm sorry, Teresa. I didn't mean to do it. It was an accident." Then, Lt. Cumbee pulled out a photograph of Teresa, and Appellant started rubbing the photograph and saying that he was sorry. Appellant told the police the details of the murder. At this point, the police took Appellant to the park where he said he hid Teresa's purse, however, they

³ SLED had not conducted a DNA analysis on the hair, but had inspected the hair through a microscope. There was a microscopic match, meaning that the hair was consistent with Appellant's hair. However, this analysis does not yield a positive identification, like DNA.

were unable to locate the purse. They returned to the police station and Appellant signed the written statement. Appellant was placed under arrest.

After Appellant signed the written statement, Lt. Cumbee asked Appellant if he wanted to speak to Teresa's mother. He said yes, and Teresa's mother was brought into a conference room. There, Appellant told her he was sorry and that he lost control and that he had killed Teresa.

After the arrest, Lt. Cumbee called the media and informed them he had made an arrest, and that the police would be escorting Appellant to the county jail later in the afternoon. When Appellant was escorted out of the station, he told the reporters that he wanted to make a statement. Both Lt. Cumbee and Officer Tetanich testified that they advised Appellant not to talk to the media, but that Appellant told them that "I want to tell the world how sorry I am." Appellant told the reporters that he killed Teresa and that he was sorry for what he had done.

Appellant argues the initial confession was coerced, and therefore the statement to Teresa's mother and the statement to the media were inadmissible as fruit of the poisonous tree. We disagree. A confession is not admissible unless it was voluntarily made. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (quoting State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989)). A determination whether a confession was "given voluntarily requires an examination of the totality of the circumstances." Von Dohlen, 471 S.E.2d at 694-95. On appeal, the trial judge's ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion. Id. "Both this Court and the United States Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible... The pertinent inquiry is, as always, whether the defendant's will was 'overborne.'" Id.

The trial judge did not abuse his discretion in allowing the confession into evidence. Appellant was advised of his rights three different times. Not one of the interrogations lasted more than a few hours. Appellant was offered food by the police and told he was free to leave the station at any time on Friday. Also, the police made sure that Appellant was well rested and fresh

before they interrogated him on Saturday. In addition, when the police told Appellant that the hair found in Teresa's hand matched Appellant's hair, they were communicating the information that they received from SLED. Even if the information were untrue, it is not, alone, enough to render the confession involuntary. See Von Dohlen, 471 S.E.2d at 695; State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980) ("A misrepresentation, while relevant, may be insufficient to render inadmissible an otherwise valid confession"); State v. Register, 323 S.C. 471, 476 S.E.2d 153 (1996) (holding defendant's confession was voluntary and admissible when police misrepresented to defendant that he had been seen with the victim the night she was murdered, that his tires and shoe matched impressions found at the murder scene, and that the police had DNA evidence establishing defendant's guilt). Since the initial confession was voluntary, the subsequent statements were properly admitted.

While we find no fruit of the poisonous tree here, we cannot let pass without comment the police conduct in arranging media coverage of Appellant's "perp walk." Such actions were improper and reflect poorly on the professionalism of the department.

2. Anger Management Questionnaire

Appellant argues that the trial judge should have excluded an anger management questionnaire taken by Appellant because any probative value was substantially outweighed by its prejudicial effect under Rule 403, SCRE. We agree that the questionnaire should have been excluded, but affirm the trial court because its erroneous admission was harmless error.

The police found the questionnaire during a search of Appellant's house. The questionnaire was from an adult outpatient treatment program that Appellant attended for alcoholism. It is titled "Anger Questionnaire Worksheet." Appellant answered yes to both "I've gotten so angry at times, that I've become physically violent, hitting other people or breaking things" and "At times, I've felt angry enough to kill," among other questions. The State's theory of the case was that Appellant killed Teresa in a fit of rage. Appellant argued that it was unclear when Appellant filled out the questionnaire, and that it was too prejudicial to be admitted into evidence.

This Court reviews 403 rulings pursuant to the abuse of discretion standard, and gives great deference to the trial judge's decision. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). We agree with Appellant that the prejudicial value of the questionnaire substantially outweighed the probative value and should have been excluded from evidence. It is unclear when, or under what circumstances, the questionnaire was filled out. However, this error was harmless in light of Appellant's confession. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990).

3. Sealed letters

Appellant argues the trial court erred in sealing two letters as the letters contained impeachment or exculpatory evidence related to police misconduct. Judge Cottingham ruled in a pre-trial hearing that these letters were work product, and ordered the letters sealed. We have reviewed the letters and determined that the trial court did not err in sealing the letters, as one of the letters is work product and the other is not relevant.

There are two letters at issue in this case. First is a copy of a letter to Chief Caldwell of the North Charleston Police Department from David Schwacke, Solicitor, Ninth Judicial Circuit, written on January 29, 1998 (hereinafter "January letter"). The second letter is from Amie Clifford, Assistant Solicitor, Ninth Judicial Circuit, to Chief Caldwell, sent on July 15, 1999 (hereinafter "July letter"). The July letter is specifically about the case at hand, and is written to Chief Caldwell regarding numerous issues with the case.

Rule 5(a)(2) SCRCrimP, exempts from discovery work product, or "internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case...." In essence, Rule 5 SCRCrimP exempts "internal prosecution documents made in connection with an investigation." State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). The July letter clearly falls into the exemption under Rule 5. The letter was written to the North Charleston Chief of Police regarding the prosecution of the case. Thus, the July letter was an internal prosecution document and not subject to discovery. See State

v. Gill, 319 S.C. 283, 460 S.E.2d 412 (1995)(holding that a summary report prepared by police officers for the solicitor's use in prosecuting the case was not subject to discovery), vacated on other grounds, State v. Gill, 327 S.C. 253, 489 S.E.2d 478 (1997). In addition, the July letter does not contain any impeachment or exculpatory evidence. See Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

The January letter, on the other hand, was not prepared for the prosecution of the case and thus does not fall under Rule 5, SCRCrimP. However, the January letter is not relevant to the case at hand. The only paragraph regarding Appellant was about the "perp walk." The jury heard evidence that the officers called the media to let them know about the "perp walk," so although the letter might have bolstered the testimony that the police called the media, it had no independent evidentiary value. Finally, the letter does not contain any impeachment or exculpatory evidence. We affirm the trial court's ruling.

4. Dr. Kassin's testimony

Dr. Kassin is a psychology professor at Williams College and was qualified in this case as an expert in social psychology. Dr. Kassin testified about the psychology of confessions and false or coerced confessions. Appellant alleges that the trial court erred in preventing Dr. Kassin from testifying about specific case studies, in contravention of Rule 702, SCRE, because the testimony would have been helpful to the jury. We have determined there was no error, and affirm the trial court's ruling.

In the Jackson v. Denno hearing, Dr. Kassin testified about the facts of particular cases in Connecticut⁴ and Indiana⁵ in which people confessed to

⁴ The Connecticut case involved a man whose mother was killed. The police told the man he failed a polygraph examination, and that the test was infallible. The man told the police that he could not have killed his mother. But the interrogator told him that "people black out these sort of things." The man then said "Well, then I guess I must have done it."

crimes, but later were exonerated. Before Dr. Kassin testified before the jury, the solicitor objected to Dr. Kassin testifying about "cases that don't involve this particular case" because they were irrelevant. The trial judge stated "Just object to the things you want...let's try to keep it as much as you can to something that fits the facts of this case generally."

Dr. Kassin testified that he reviewed the videotape of the interview that Officer McHale conducted of Appellant on Friday, and that he was concerned that the techniques used by McHale could lead to a coerced confession. Dr. Kassin testified in great detail about coerced confessions. However, on redirect when he was asked to give "anecdotal examples of false confession" the judge stated "I'm not going to allow it unless you got a case exactly like this." Dr. Kassin went on to say "there's a case in Indiana that's very similar. There's a case in Connecticut..." The solicitor objected again.

Despite these objections, the record reflects that in fact Dr. Kassin was allowed to testify about specific cases of false confession. For example, Dr. Kassin testified that there were incidences of people confessing to a "shaken baby" case when the child died of other causes. He testified that sometimes someone confesses to a murder and some time later the victim turns up alive, so no crime was ever committed. Dr. Kassin testified about the "Innocence Project" in which DNA testing has exonerated people convicted of crimes and that 22% of the people had given false confessions. Finally, Dr. Kassin testified that people can give very detailed false confessions. For example, a man accused of killing his mother gave a reason for killing her as well as the thoughts that were going through his head as he killed her. His confession was a documented false confession.

A trial court's ruling "to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion." Mizell v. Glover, 351

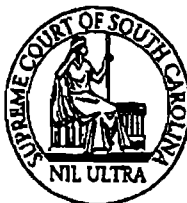
⁵ The Indiana case involved a man who was accused of killing his daughter and throwing her into a lake. The man confessed to the police that he clubbed the girl to death, which was consistent with what was known about the crime at the time. However, when the body was analyzed, it turns out she was stabbed to death, not clubbed to death. So, the actual confession did not match the facts of the case.

S.C. 392, 570 S.E.2d 176 (2002). Dr. Kassin did testify about specific cases, he just did not use names or say in which state the crime happened. In addition, the Indiana case was so dissimilar that there was no evidentiary value. See footnote 5 supra. Although the Connecticut case was similar, the trial court did not abuse its discretion in excluding the information. Dr. Kassin was able to testify at length about false and coerced confessions, and he was able to touch briefly on the Connecticut case. However, assuming error in limiting testimony about the Connecticut case, Appellant cannot show prejudice in light of Dr. Kassin's other testimony. See State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)(exclusion of evidence is harmless where cumulative).

CONCLUSION

We **AFFIRM** the trial court's rulings.

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice John W. Kittredge., concur.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 9, 2004

REMITTITUR

The Honorable Julie J. Armstrong
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: The State v. Myers, Wesley Max
1997-GS-10-04319 and 1997-GS-10-04320

Dear Ms. Armstrong:

The above referenced matter is hereby remitted to the trial court. A copy of the judgment of this Court is attached.

Very truly yours,



CLERK

DES/jjp

Enclosure

cc: Assistant Appellate Defender Robert M. Dudek
Senior Asst. Attorney General William Edgar Salter, III
Solicitor Ralph E. Hoisington

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 8, 2004

Mr. Donald John Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Wesley Max Myers
v. South Carolina
No. 04-6194

Dear Mr. Zelenka:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

ATTORNEY GENERAL'S OFFICE

RECEIVED 11-12-04

ADMINISTRATIVE INSTRUCTIONS

Wesley FILE OPEN ☒ EN

 HAVE COPIES MADE

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 ORDER: TRANSCRIPT

 PEN RECORDS CLERK RECORDS

 OTHER: *notify VS +*

close file

File # 2001-1213

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CA No.
	)	
WESLEY MAX MYERS #273328,	)	
<i>Applicant,</i>	)	
	)	APPLICATION FOR
v.	)	POST-CONVICTION RELIEF
	)	
JON OZMINT, South Carolina Director	)	
of Department of Corrections, and HENRY	)	
MCMASTER, Attorney General of South	)	
Carolina,	)	
<i>Respondents.</i>	)	
	)	

1. Place of Detention: Kirkland Correctional Institute, 4344 Broad River Road, Columbia, South Carolina, 29210.
2. Name and location of Court which imposed sentence: Charleston County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder: 97-GS-10-4319
 - (b) Arson in the Third Degree: 97-GS-10-4320
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Murder: Thirty years on March 7, 2001
 - (b) Arson in the Third Degree: Ten years on March 7, 2001
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.
 - (ii) The United States Supreme Court.

- (b) The result in each Court to which applicant appealed:
 - (i) Convictions and sentences were affirmed.
 - (ii) Petition for writ of certiorari was denied.
- (c) The date of each result:
 - (i) Convictions and sentences affirmed on May 11, 2004;
 - (ii) Petition for writ of certiorari was denied on November 8, 2004.
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004)
 - (ii) *State v. Myers*, No. 04-6194.

9. Not applicable.

10 & 11 GROUNDS FOR RELIEF WITH SUPPORTING FACTS

- 10(a) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to move for a change of venue.*
- 11(a) Criminal defendants are entitled to be judged by a fair and impartial jury of their peers, and consequently are entitled to a change of venue in circumstances where media coverage has so poisoned the jury pool as to make it impossible for the defendant to be tried by a fair and impartial jury. This case garnered a large amount of media attention. In fact, shortly after the applicant made incriminating statements to the police, three days after the murder, the media were summoned to the police station where the applicant was being interviewed. Carla Lothery, a local reporter, testified at applicant's trial, that she was summoned to the police station on that day along with numerous other members of the local media. The media were in fact present to witness the applicant's "perp walk," that is, his walk from the police department building to a vehicle to transport him elsewhere. Applicant made a public incriminating statement to these media representatives, which was videotaped and later broadcast widely in the area. Despite this saturation, trial counsel did not move for a change of venue, thus no hearing was held to determine the extent to which the jury pool may have been contaminated by the media coverage. Here, due to the content of the media coverage - a "confession" - there is a presumption of prejudice in the community, such that applicant could not receive a fair trial. *Irvin v. Dowd*, 366 U.S. 717 (1961), *Patton v. Yount*, 467 U.S. 1025 (1984).
- 10(b) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to properly handle testimony of a defense expert in pretrial hearings.*
- 11(b) Trial counsel called as a witness Dr. Saul Kassin, a psychologist who is an expert with regard

to false confessions. Prior to calling this witness during the trial, trial counsel called Dr. Kassin to testify at the *Jackson v. Denno* hearing. At that hearing, Kassin essentially testified to everything that he planned to testify to at the trial in an attempt to suppress applicant's incriminating statements. It was unlikely from that the court would have ruled to suppress said statements regardless of how Dr. Kassin testified in the pretrial hearing. The thoroughness of Kassin's hearing testimony led to two results: first, the hearing judge ruled that Dr. Kassin could not testify fully at the trial, and second the solicitors trying the case were privy to a full preview and were able to cross Dr. Kassin at trial more thoroughly than they would have been able to do. Trial counsel rendered ineffective assistance of counsel when he exposed his defense strategy to the prosecution during a pretrial hearing. *Strickland v. Washington*, 466 U.S. 668 (1984); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

- 10(c) *Applicant's right to a fair trial guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of the misconduct of the police and solicitors with regard to hair evidence.*
- 11(c) Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has an affirmative duty to make available to the defense any evidence which is exculpatory for the defendant in a criminal trial. In this case, the police recovered a hair from the crime scene that was 6-8" long. This was virtually the only piece of physical evidence that later was argued to tie Applicant to the scene for the crime. Photographs taken of the Applicant at the time he was arrested indicate that his hair was shorter than 6" long. Consequently the police must have known or reasonably suspected that the hair did not come from the Applicant's head. Although the hair did "match" the Applicant's hair after a microscopic comparative hair analysis, such tests are hardly conclusive.¹ In fact, numerous convictions that were founded on comparative microscopic hair analysis have since been overturned when DNA evidence has proven that the person convicted under the former method was innocent of the crime. The police should have immediately requested DNA testing, which was more reliable than comparative microscopic hair analysis and was available, or turned the hair over to the Applicant and his counsel so that they could arrange for DNA testing immediately. Instead, the police and solicitor refused to either have the hair tested or turn it over to the defense until a judge ordered that the hair be tested for DNA, approximately three years after the crime. Then it was found that the police had misplaced the hair. The solicitor turned over hairs to the defense for DNA testing claiming that the hair from the scene had been found, but no one has been able to affirmatively document that the hairs given to the defense are in fact the same hairs as were found at the crime scene. The solicitor should have ensured that the hair, as potentially exculpatory evidence, was safeguarded. Letters from trial counsel's files as well as some included in the court files from applicant's trial show a train of communication between applicant's trial counsel and the solicitor's office regarding this hair

¹Applicant does not concede that the found hair "matched" his hair. In addition, applicant asserts the characterization of the found hair as a "match" to his own is violative of his constitutional rights. *See infra*.

evidence. The letters reveal trial counsel's persistent attempts to convince the solicitor's office to make the hair available to the defense and the solicitor's continued refusal to do so. This conduct by the police and solicitor's office was highly improper. A hair was eventually provided to the defense team, and its results were inconclusive, but certainly were not a match to applicant's hair. If the applicant had been able to obtain DNA testing on the hair immediately after the murder instead of halfway through the trial four years later, the test could have revealed then that applicant was not a match, he might never have been arrested or tried for the crime of which he was convicted.

- 10(d) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when the court admitted evidence regarding witnesses' opinions about the defendant's demeanor because this evidence was inadmissible hearsay and character evidence.*
- 11(d) The trial court improperly admitted testimony concerning Wesley Myers' nonverbal behavior. First, Lt. Kevin McHale stated that Applicant "was trying to display a remorse and sadness and a sense of loss, but it did not—his nonverbal behaviors did not agree with what he was trying to do. He couldn't work up tears. When a person cries, I mean when it's real, they cry. They boo-hoo. Their snot runs out. You ain't stopping them." Tr. 1518–1519. Later, McHale stated that during the hour-and-a-half long interview with applicant, "his nonverbal behavior [was] screaming out." Tr. 1532. McHale claimed that applicant was "reliving" the murder of Teresa Haught, implying that Applicant's demeanor proved that he killed Ms. Haught. Tr. 1533. Another witness, Detective George Tetanich, stated that when Applicant learned that his girlfriend, Teresa Haught, may have died, Applicant "got real upset, fell down on the ground, crying, and, and really, really upset. He then, about thirty seconds later, he got back up" and spoke about problems with the electricity in the building. Tr. 1553. When asked about Applicant's reaction, Tetanich stated that "when he fell down on the ground, totally upset and, and I mean really boo-hooing, it seemed like a, a pretty typical reaction to [sic] someone who'd just found out that there was a dead person in there that was probably his girlfriend, and but it didn't last. It was only like maybe thirty second and he was back up, explaining to me in a calm voice about the fire and how it could start and the origins of it and I thought that was a little suspicious that he wouldn't still be upset in that short a period of time." Tr. 1554. Later, Tetanich described Applicant's demeanor in the police station when he allegedly confessed to killing Haught: Applicant was crying, "tears were just flowing." Tr. 1581. Asked if Applicant's reaction was different in the interrogation room, Tetanich stated that "he was definitely upset now because now he, he realized that the proof was there that he had, you know, and he himself had said that whoever's hair that is, is going to be the one that killed her." Tr. 1582. A third witness, Detective Melvin Cumbee, stated that Applicant's "hand was shaking, he was crying, and he rubbed the picture" of Teresa during the interrogation. Tr. 1808.

This evidence was inadmissible hearsay and character evidence. *See, e.g., S.C. Const. Ann. Art. I, § 14 (2004); S.C. Code Ann. § 17-23-60 (2004); Crawford v. Washington, 541 U.S. 36 (2004); Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972); State v.*

Williams, 285 S.C. 544, 548, 331 S.E.2d 354 (Ct. App.1985) (“Wordless conduct, such as the nod of the head or pointed finger, may be hearsay if it is intended as a communication.”); Rule 802, SCRE; Rule 404(b), SCRE. State and federal law prohibit the introduction of this type of evidence because such evidence allows the jury to rely on the opinions of the witnesses. It is the jury’s province to determine guilt or innocence.

- 10(e) *Applicant’s right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel’s failure to object to inadmissible hearsay and character evidence testimony regarding applicant’s demeanor.*
- 11(e) During applicant’s trial, numerous inadmissible statements were made by prosecution witnesses. As discussed above, more than one police officer testified that applicant’s behavior was not normal and they knew from that, that applicant was guilty. These statements constitute hearsay and improper lay opinion and inherently harmed applicant’s trial; therefore, trial counsel should have objected to their admissibility, which he did not do. Under the state and federal law, none of these statements should have been admissible. Trial counsel did not attempt to either object to these statements at the time they were elicited, nor did he attempt to strike the statements once made. A trial counsel’s failure to object to improper hearsay testimony constitutes ineffective assistance of counsel. *See Strickland v. Washington, supra; Sanchez v. State*, 351 S.C. 270, 569 S.E.2d 363 (2002); *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001); *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (S.C. 2002). The comments and statements were not admissible, and thus the fact that they were admitted constitutes error. Trial counsel should have objected to the admissibility of these statements, and if he was overruled, should have safeguarded the issues in the record for appeal. However, trial counsel failed to object to the admission of these prejudicial and improper statements. These statements were admitted in error, and the statements certainly prejudiced Applicant because saving criminal defendants from prejudice is the whole rationale behind the exclusionary rules that should have kept these statements out, indicating that such statements as are the targets of these rules are inherently prejudicial.
- 10(f) *Applicant’s rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law, and to confront witnesses against him, as guaranteed by the Sixth Amendment of the United States Constitution and South Carolina law, were violated when the court admitted hearsay and character evidence concerning applicant’s relationship with the victim.*
- 11(f) Several witnesses testified regarding applicant’s relationship with the victim. First, Margaret White testified that their relationship was “rocky.” Tr. 1092. Similarly, Tammy Gonzalez testified their relationship was “very rocky.” Tr. 1142. Also, Dixie Justis testified their relationship was “rocky.” Tr. 2050. Ms. Justis elaborated that the defendant and the victim had a physical altercation long before the victim’s death and that applicant stated that he was

jealous over the victim. Tr. 2051-53. Billy Gene King testified that the defendant was possessive of the victim, and he described a physical altercation between the defendant and victim, which occurred several months before the incident. Tr. 2119 - 2121. All of these statements are inadmissible hearsay and/or inadmissible character evidence. The evidence of physical altercations between applicant and victim was evidence of prior bad acts, which is inadmissible under South Carolina law. *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001); *State v. Pierce*, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997); *State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996); *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993); *State v. (Terry) Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996); *State v. (Grover Lee) Smith*, 300 S.C. 216, 218-9, 387 S.E.2d 245, 247 (1989); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); *State v. Humphries*, 346 S.C. 435, 451, 551 S.E.2d 286, 295 (Ct. App. 2001), *rev'd on other grounds*, 354 S.C. 87, 579 S.E.2d 613 (2003); *State v. Kennedy*, 339 S.C. 243, 247, 528 S.E.2d 700, 702 (Ct. App. 2000), *aff'd*, 348 S.C. 32, 558 S.E.2d 527 (2002); *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993); Rule 802, SCRE; Rule 404(b), SCRE.

- 10(g) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated when trial counsel failed to object to inadmissible hearsay and character evidence testimony concerning applicant's relationship with the victim.*
- 11(g) Despite the fact that the statements described above concerning applicant's relationship with the victim are inadmissible hearsay and character evidence, trial counsel failed to object. Trial counsel's failure was deficient because prevailing professional norms at the time required counsel to object to obvious evidentiary errors, such as these. *Strickland, supra*. As discussed above, South Carolina case law is clear evidence of prior bad acts, which places the defendant's character at issue, is inadmissible. Counsel's deficient performance prejudiced applicant. *Strickland, supra*; *Cherry, supra*.
- 10(h) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when the court admitted inadmissible hearsay and character evidence in the form of testimony from the victims' mother alleging that applicant's father slept with a gun and applicant had hit his mother.*
- 11(h) During the trial, Dixie Justis, the mother of the victim, alleged that Applicant "had hit his mother [and that] his father slept with a gun under his pillow." Tr. 2062. Trial counsel originally moved to strike the response but then reconsidered, telling the judge to "tell [the jury] nothing." Tr. 2063, 2064. This testimony was inadmissible and should have been stricken. "South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." *State v. Braxton*, 343 S.C. 629, 634; 541 S.E.2d 833 (2001)

(citing Rule 404(b), SCRE; *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923)). Even if the evidence is clear and convincing and falls within one of these exceptions, it must be excluded if the danger of unfair prejudice to the defendant substantially outweighs the evidence's probative value. *Id.* (citing Rule 403, SCRE; *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999)). Here, the state did not "set forth the logical relevance" between the incidents Ms. Justis alleged occurred between Applicant and his family and the state's version of the events that transpired the night Teresa Haught was killed. *Douglas*, 302 S.C. at 511. The testimony therefore was, like in *Braxton*, *supra*, character evidence that impermissibly suggested that the defendant "acted in conformity with that particular character or trait on a particular occasion." *Braxton*, 343 S.C. at 634. Thus, this testimony was inadmissible for the purpose of proving Applicant's intent and state of mind the night Haught was killed, and should have not been admitted. *See Douglas*, 302 S.C. at 511. Further, even if, *arguendo*, there was a link between the incidents with applicant's parents and Haught's death, the evidence should have been excluded as it was unduly prejudicial, in violation of Rule 403. *See id.*; Rule 403, SCRE.

- 10(i) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by trial counsel's failure to object to inadmissible hearsay and character evidence from the victim's mother that applicant's father slept with a gun under his pillow and applicant had hit his mother.*
- 11(i) The testimony described above is clearly inadmissible hearsay and character evidence. Trial counsel's failure to object to this evidence was deficient performance that prejudiced applicant. *Strickland, supra, Cherry, supra.*
- 10(j) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by trial counsel's failure to call applicant's mother and father to refute testimony regarding a prior assault on his mother and that his father slept with a gun under his pillow due to fear of applicant.*
- 11(j) Applicant and his parents vehemently deny the allegations lodged by the victim's mother at trial. Applicant's parents were willing and able to testify at trial that applicant never assaulted his mother and that his father did not fear applicant. Nevertheless, trial counsel did not call applicant's parents to testify to directly refute the victim's mother's statements. This failure constituted ineffective assistance of counsel. *Strickland, supra, Cherry, supra.*
- 10(k) *Applicant's rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law, and to confront witnesses against him, as guaranteed by the Sixth Amendment of the United States Constitution and South Carolina law, were violated when the court admitted hearsay evidence about why a witness waited until the trial started to tell the authorities that she saw the applicant at the scene of the murder.*

- 11(k) During the last day of the trial, the state called a last-minute witness named Laurie Villalobos. Her testimony included inadmissible hearsay statements. As a surprise witness, furthermore, Villalobos could have been excluded from the trial. *See Yates v. Yates*, 2003 WL 22328180 (Ct. App. S.C. 2003)(unpublished); *Jackson v. H&S Oil Co., Inc.*, 263 S.C. 407, 211 S.E.2d 225 (1975); *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974). On the last day of the state's case, Villalobos testified that she went to the Mill Inn sometime between 1:30 and 2:30 A.M. the night Teresa Haught was killed to ask Haught to give her the rest of the money for a check that Haught cashed for her four to seven days earlier. Tr. 2154. Villalobos claimed she knocked on the door and applicant let her in to the bar. Tr. 2150, 2155. She claimed that Haught was at the bar, drinking, and "was clearly distraught." Tr. 2155. Villalobos said she asked Haught "if there was anything [she] could do for her," and Haught replied that she would be "okay." Tr. 2156. They then talked about whether Haught would give Villalobos the money even though the check had not yet cleared. Tr. 2156. Haught gave Villalobos the money, and then Villalobos testified that she "was in the middle of a bad situation, so [she] left." Tr. 2157. Villalobos apparently told no one about the alleged conversation until she saw Tanya Gonzales, who worked with Haught and testified in the trial, at a bar. Tr. 2159-60. Gonzales told her that applicant's attorney said he was not at the bar the night Haught was killed. Tr. 2161. Villalobos said she told Gonzales that she had seen him at the bar. Tr., 2161. Gonzales gave her the solicitor's phone number and Villalobos said she planned to call the next morning. Tr. 2161. Instead, an investigator from the state called her that evening. Tr. 2162. The next day, the state called Villalobos to testify. On cross examination, Villalobos admitted that she told her boyfriend at the time that she "had just seen Teresa there" and did not mention that applicant was with her. Tr. 2170.

This testimony was inadmissible hearsay evidence and character evidence. This testimony regarding statements made out of the court denied applicant an opportunity to cross-examine the witness at the time the statements were made. The testimony also bolstered Villalobos' credibility. Her testimony regarding seeing applicant at the Mill Inn on the night of the murder was crucial because it was the only direct evidence that applicant was present at the crime scene. *See, e.g., S.C. Const. Ann. Art. I, § 14 (2004); S.C. Code Ann. § 17-23-60 (2004); Crawford v. Washington, supra; Player, supra.*

- 10(l) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated when trial counsel failed to object to inadmissible hearsay testimony concerning the reasons a witness waited until the trial started to tell authorities that she saw the applicant at the scene of the murder.*
- 11(l) As indicated above, Villalobos, a surprise witness, testified extensively regarding her reasons for speaking to authorities during the trial instead of during the investigation. All of this testimony was inadmissible hearsay. Nevertheless, trial counsel failed to object. Trial counsel's failure amounted to ineffective assistance of counsel because prevailing professional norms required counsel to object, and his failure prejudiced petitioner. *Strickland, supra; Cherry, supra.*

- 10(m) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to thoroughly and properly examine a crucial prosecution witness.*
- 11(m) The solicitor called to testify a witness named Laurie Villalobos. Ms. Villalobos was the only eyewitness who claims to have seen the applicant at the murder scene near the time of the murder. However she did not report what she saw until four years after the murder. Ms. Villalobos' testimony was extremely damaging to the applicant, but at the same time was highly suspect. Although it is not entirely clear from the record, it is likely that trial counsel was taken by surprise by this witness; if that is so, he should have requested that the judge grant a continuance in order to investigate Ms. Villalobos and her testimony. He did not make such a request. Furthermore, Ms. Villalobos had an extensive criminal record, including crimes involving an inherently dishonest nature, which are admissible for impeachment of witnesses under the South Carolina Rules of Evidence. Defendants have an absolute right under the Sixth Amendment to the United States Constitution to confront the witnesses against them. One of the roles of trial counsel is to confront witnesses against defendants on their behalf. Part of this right of confrontation is impeachment of unreliable witnesses. Trial counsel's files indicate that he was in possession of a rap sheet revealing Ms. Villalobos' multiple prior convictions, and that he was in possession of this information prior to the time that Ms. Villalobos testified. Trial counsel did not make any attempt to introduce Ms. Villalobos' prior convictions to impeach her testimony. Because Ms. Villalobos' testimony was so damaging, failure of trial counsel to adequately impeach her significantly prejudiced applicant by allowing the jury to hear the damaging testimony unchallenged.
- 10(n) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when the court admitted expert testimony about the results of hair comparison testing.*
- 11(n) Lt. Joe Powell, from South Carolina Law Enforcement Division, testified that the hair found in Teresa Haught's hand "matched" a hair taken from Applicant's head. *See, e.g.,* Tr. 1374, 1380, 1382-83. Asked if the hair was a match "[m]icroscopically," Powell replied, "[t]hat is correct." Tr. 1382. Powell further described the hair found in Haught's hand as likely dyed. Tr. 1380-81. He opined that the chance of the hair being someone else's was 1/6000. Tr. 1406-07. Finally, in the solicitor's opening statement, he stated that the hairs "matched." Tr. 1092. Reversing a conviction, the Tenth Circuit noted that "[i]t is undisputed that hair analysis, unlike fingerprint identification and DNA analysis, is not conclusive." *See Williamson v Ward*, 110 F.3d 1508, 1520 n.13 (10th Cir. 1997). Further, "the most that hair analysts are willing to state is that hair samples are 'consistent with' each other and 'could have' come from the same source." *Id. see also United States v. Brown*, 557 F.2d 541 (6th Cir. 1977) (holding that it was error to admit testimony by experts of newly developed scientific techniques of testing hair samples because there was no scientific acceptance of the techniques). Here, Lt. Powell testified that the hair found in Teresa Haught's hand

“matched” a hair taken from applicant’s head, *see, e.g.*, Tr. 1374, 1380, 1382–83, a stronger claim than the “consistent with” standard set in *Williamson*. Thus, the use of the term “matched” violated applicant’s rights to due process and was not harmless error, given importance of the hair as evidence against applicant. *See Crawford v. Washington*, 541 U.S. 36 (2004); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Illinois v. Allen*, 397 U.S. 337 (1970); *State v. Starnes*, 307 S.C. 247, 414 S.E.2d 582 (1991).

- 10(o) *Applicant’s right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by appellate counsel’s failure to appeal trial counsel’s objection to expert testimony offered by the state regarding results of hair comparison testing.*
- 11(o) Trial counsel objected to Lt. Powell’s characterization of the hair comparison testing results as yielding a “match.” Tr. 1255. Appellate counsel’s failure to appeal trial counsel’s objection to Lt. Powell’s testimony concerning the hair evidence was ineffective assistance of counsel. Lt. Powell’s characterization of the found hair as a “match” to applicant’s hair was improper testimony. As described above, microscopic hair analysis does not reveal matches, merely consistencies. Counsel’s failure to appeal trial counsel’s objection to this explosive testimony was deficient and caused applicant to suffer prejudice. *Strickland, supra*, *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Cherry, supra*.
- 10(p) *Applicant’s right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel’s failure to advise applicant to testify in his defense.*
- 11(p) Trial counsel suggested to applicant multiple times over the duration of the four-year period between the date of the murder and the beginning of applicant’s murder trial that applicant would testify in his own defense. However, trial counsel did not attempt to prepare applicant to testify in his own defense until a short time before the trial began. After spending only a few hours prepping applicant to testify in his own defense as is his right under the Fifth Amendment to the United States Constitution, trial counsel decided that he would not allow applicant to testify. It should have been applicant’s decision as to whether he should testify in his own defense or not, and it was trial counsel’s obligation to Applicant to prepare applicant to testify if it was Applicant’s decision to do so. Criminal defendants have an absolute right under the Fifth Amendment to the United States Constitution to choose whether or not to testify in their own defense. It is a well-settled matter of law and of professional responsibility for criminal defense lawyers that the decision whether a criminal defendant will testify in his own defense at his trial is a decision that is to be made by the client himself, regardless of the effect that decision has the attorney’s trial strategy. The right of the criminal defendant to choose whether to testify in his own defense rather than have his attorney make the choice for him was recognized in *United States v. Stevens*, 129 F.3d 1261

(4th Cir.1997). There the court agreed that trial counsel's coercion of the defendant into giving up his right to testify on his own behalf constituted ineffective assistance of counsel, although that court did not limit its holding to instances where the attorney threatens or coerces his criminal defendant client into not testifying against his will. Thus, trial counsel's failure to properly prepare applicant to testify and his refusal to let Applicant testify in his own defense are deficient and ineffective assistance of counsel. The *Stevens* court suggested that where an attorney provides ineffective assistance by violating his client's absolute right to testify in his own defense, the defendant might not need to show prejudice. However, if prejudice needs to be asserted, applicant was prejudiced by this deficiency by trial counsel. Trial counsel's deficiency deprived applicant of his right and ability to communicate his story to the jury. This lack of personal communication surely made it less likely for the jury to believe applicant's claims of what happened the night of the murder since they were presented through his attorney rather than from his own mouth.

- 10(q) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to thoroughly investigate or attempt to introduce evidence of the guilt of a third party.*
- 11(q) Criminal defendants may introduce evidence of guilt of a third party in order to exculpate them in limited circumstances. That is, as outlined in *State v. Mansfield*, 343 S.C. 66, 538 S.E.2d 257 (Ct. App.2000) and recently reiterated in *State v. McLeod*, 362 S.C. 73, 606 S.E.2d 215 (Ct. App.2004), if a defendant seeks to introduce evidence that another person committed the crime in question, he is limited to introducing only those facts that are inconsistent with the defendant's guilt. Trial counsel made some efforts to investigate the potential guilt of some third parties, in particular a Mr. Dana Chaples. Trial counsel did uncover some possible indications of third-party guilt. For example, trial counsel learned that Dana Chaples, who had been seen at the bar, the scene of the crime, after it had closed and was attempting to get into the bar; was last seen walking in the direction of his car a couple of hours before the murder, although no one saw him leave the scene of the crime; and was seen with scratches on his arms the day after the murder. Arrested later that day on charges of gun possession, Mr. Chaples was suspected of being involved in the crime for which applicant was arrested and convicted. This suspicion led to unusually high bail after Mr. Chaples' arrest for gun possession. Furthermore, trial counsel was aware that an ex-girlfriend described Mr. Chaples as violent. Trial counsel did not call any witnesses or otherwise attempt to introduce any of this evidence regarding Mr. Chaples. In addition, trial counsel failed uncover additional evidence that would indicate the guilt of a third party. Furthermore, trial counsel saw the police report indicating that the police had discovered a 6-8" inch blond hair at the scene. Trial counsel also knew that Applicant's hair was shorter than 6" and thus the hair found at the scene could not have come from the Applicant's head. Trial counsel failed to determine the origin of the hair and also failed to bring to the attention of the trial court and jury that the hair could not have come from Applicant's head. The solicitor's theory of the crime was that one man, Applicant, acted alone in committing the

murder and the solicitor relied heavily on the hair present on the victim's body at the scene as evidence of the identity of the killer. The hair itself only came from the head of one person. Under the solicitor's theory, the knowledge that the hair could have come from the head of Mr. Chaples is both exculpatory and inconsistent with Applicant's guilt. Therefore evidence tending to implicate Mr. Chaples in this murder, especially with regard to the hair evidence, meets the parameters set out in Mansfield for admissibility of third-party guilt. This evidence of third-party guilt therefore should have been presented at trial. Trial counsel not only failed to introduce this evidence, but failed to attempt to do so. There is no indication in the record that trial counsel made any motions or requested any hearings to move for the admission of this crucial evidence of third-party guilt.

- 10(r) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated because he is actually innocent of the charges.*
- 11(r) Considerable evidence exists to show applicant is actually innocent of Haught's murder and the arson. As described above, evidence of third party guilt existed at the time of trial and was in the possession of trial counsel. In addition, evidence of applicant's innocence has been revealed through post-trial investigations. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice and should be remedied immediately.
- 10(s) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United State Constitution and South Carolina law was violated when he was not present during critical stages of the criminal trial.*
- 11(s) Defendants are guaranteed the "right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730 (1987). A criminal defendant has the right "to be present in his own person whenever his presence has a relation, reasonably substantial to the fullness of his opportunity to defend against the charge." *Faretta v. California*, 422 U.S. 806 (1975). Similarly, the South Carolina Supreme Court has held "[a] defendant has the right to be present at any stage of the criminal proceeding that is *critical to its outcome* if his or her presence would contribute to the fairness of the procedure." *Starnes v. State*, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991). Applicant's absence from the argument and rulings regarding the admissibility of the DNA evidence violated his right to be present.

First, at applicant's trial, a hair found in the victim's hand provided crucial physical evidence. On the record, the prosecution and defense debated the admissibility of DNA analysis conducted on the hair. Tr. 1257-81. However, extensive and decisive arguments persisted off-the-record at the trial judge's direction. The record alludes to these discussions: "THE COURT: Now the two of you all go in my chambers right now and you figure out how you want to straighten this thing out." Tr. 1279. The next day, the first words on the record are by the trial judge: "You want to publish them?" Tr. 1286. It does not become apparent until later that "them" refers to letters from the Federal Bureau of Investigations, which

conducted the DNA analysis, indicating that the DNA of the found hair does not match applicant's DNA. Tr. 1291. This initial statement coupled with the trial judge's directive for the attorneys to go to his chambers clearly implies off-the record rulings regarding the admissibility of the DNA evidence. These statements also indicate the defendant was not present during these arguments or rulings.

Second, on February 26, 2001, Juror Jawana Stephens was selected as the second juror in applicant's trial. Tr. 579-80. Then, inexplicably, Juror Stephens is no longer on the jury. After jury selection, the judge takes a short recess. Tr. 598. When the judge and jury return, the judge states: "Where's Mr. Carlton? You're a full time juror now. That poor young lady, she almost had a heart attack, I think." Tr. 598-99. Although the record lacks any reference to any discussions with Juror Stephens or among the attorneys regarding Juror Stephens' dismissal from the jury, the statements of the trial judge on the record imply that an off-the-record hearing occurred because the trial judge possessed information not contained on the record. The record completely lacks any indication that applicant attended this off-the-record hearing. Another juror, Sarah Doctor, was dismissed immediately preceding jury instructions at the end of the trial. After returning to the bench from a short break, the trial judge states "We had to send Miss Doctor home. She, as you know, forgot her medicine." Tr. 2681. He then begins to instruct the jury regarding the law of the case. Again, the transcript lacks any reference to what transpired between the judge and Juror Doctor preceding her dismissal. Further, the transcript lacks any indication that applicant was present for the determination that Juror Doctor would be dismissed.

Third, post-trial interviews reveal that the jurors sent the trial judge a note indicating they were deadlocked and the trial judge provided them with additional instructions. On file with the Charleston County Clerk is the note the jurors sent the judge with the judge's initials placed on the note. However, the transcript of the proceedings lacks any reference to the jury's note or the contents of the additional instructions provided by the trial judge.

Fourth, post-trial interviews with Juror Patricia White disclosed that she informed the trial judge three different times that she knew the applicant. However, the record lacks any reference to these discussions. The record also lacks any indication that applicant was present for these discussions. Applicant's absence during this interaction between the judge and the juror violated applicant's rights. *Stincer, supra*. The error is particularly egregious in this circumstance because the juror claims she actually knew applicant. Although applicant need not prove that his assistance would have been valuable, it is apparent that applicant's presence at the hearings to determine whether Juror White could remain on the jury would have been priceless to his attorney.

- 10(t) *Applicant's right to be tried by an impartial jury as guaranteed by the United States Constitution and South Carolina law was violated as a result of the trial judge's off-the-record communications with jurors.*
- 11(t) The Sixth Amendment to the United States Constitution guarantees to criminal defendants the right to be tried by a fair and impartial jury of their peers. The trial court engaged in several instances of communicating with the jurors, both individually and as a group, off-the-

record. As discussed above, one of the reasons for requiring that such interactions be on the record is to minimize the risk of improper bias being created in the minds of the jurors due to communications with the judge. The transcript reveals at least one instance where the trial court had an in camera, off-the-record discussion with an individual juror (Tr. 1010), the contents of which was never subsequently made known. The evidence remaining from the trial contains several notes that were passed between the jury and the judge at various point throughout the trial; none of these notes were ever referenced in the transcript. Since the communications between the trial judge and the jurors are not transcribed in the record, it is impossible to know exactly what was said, but there is a high risk of unfair prejudice or bias resulting from these communications. Any interaction that made the jury less fair or impartial is inherently prejudicial to applicant as it deprived him of his right to be judged by a fair and impartial jury.

- 10(u) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law and to an impartial jury, as guaranteed by the Sixth Amendment of the United States Constitution and South Carolina law, was violated when a juror did not reveal that she knew the applicant during voir dire.*
- 11(u) During voir dire, Juror Patricia White did not reveal that she knew applicant. However, in post-trial interviews, Juror White disclosed that she knew applicant for approximately two years before the trial began. Juror White's prior knowledge of applicant and her failure to disclose this knowledge violated applicant's right to a fair and impartial jury. *See Crawford v. Washington*, 541 U.S. 36 (2004); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Illinois v. Allen*, 397 U.S. 337 (1970); *State v. Starnes*, 307 S.C. 247, 414 S.E.2d 582 (1991).
- 10(v) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United State Constitution and South Carolina law, and to an impartial jury, as guaranteed by the Sixth Amendment of the United States Constitution and South Carolina law, was violated when jurors engaged in group prayer.*
- 11(v) Jurors interviewed after the trial ended said that they prayed during the trial. Their group prayer constitutes reversible error. *See Estelle v. Williams*, 425 U.S. 501 (1976); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989) (holding trial court committed reversible error by permitting a Bible to go into the jury room during deliberations); *State v. Kelly*, 331 S.C. 132, 137–38; 502 S.E.2d 99 (1998); *People v. Harlan*, 2005 WL 697020 (Colo. 2005) (upholding trial court's decisions to vacate a death sentence and impose a sentence of life in prison because jurors used Bible passages during deliberations to support their decision to impose the death penalty); *State v. Harrington*, 627 S.W.2d 345 (Tenn. 1981). Here, like in *Jones v. Kemp*, *supra*, the jurors impermissibly engaged in group spiritual deliberations. *See Jones*, 706 F. Supp. at 1558, 1560. Unlike in *Kelly*, however, the trial court was not aware of the juror's group prayer, so he was unable to cure the prejudice that resulted. *Cf. Kelly*, 331 S.C. at 141. While *Jones* and *Kelly*

addressed penalty-phase religious guidance, group prayer during applicant's guilt phase was equally harmful. In *Kelly*, a witness described watching the defendant, her stepfather, murder her mother and her fiancé, and told the jury how the defendant shot her and stabbed her. *See id.* at 137–38. The *Kelly* court suggested that any religious taint during the guilt phase was inconsequential. *See id.* at 142. In *Kelly*, spiritual guidance was unnecessary during the guilt phase; evidence that the defendant committed the crime was clear. *See id.* at 137–38. Here, however, witnesses suggested that the hair in Teresa Haught's hand, which state agents testified was a "match" to applicant, was put there by "divine forces." Given that the witnesses suggested that the evidence was planted by the hand of God, shared prayer could be persuasive even when the jurors were in the guilt phase of the trial. Given that no other physical evidence linked applicant to the crime scene, the juror's spiritually-guided deliberations violated his due process rights. A Defendant is entitled to a jury "free from outside influences of whatever kind and nature." *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993). The jury in applicant's case was not free from outside influences due to the group prayer.

- 10(w) *Applicant's right to direct and collateral review of his conviction and sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of an inadequate record.*
- 11(w) All criminal defendants are entitled to some form of appellate review of the proceedings that led to their convictions and punishments. An appellate court cannot conduct a proper and thorough review of the lower court's proceedings if it does not have a complete record before it. The record in this case is not adequate because several crucial incidents are absent from it. The discussion and agreement regarding the admissibility of the crucial physical hair evidence, the two independent incidents of summary juror dismissals, communications between the judge and jurors, and numerous other conversations were held off-the-record, the contents of many of which remain unknown. Because of these lapses in the record from the trial, the appellate review of applicant's conviction and sentence cannot be complete. *See Hanno, supra.*
- 10(x) *Applicant's right to the presumption of innocence as guaranteed by federal and state law was violated as result of the trial court's erroneous instruction regarding the presumption of innocence.*
- 11(x) At trial, the judge instructed the jury: "And remember, I told you at the beginning of the case, I said at that table with his attorney he's just as innocent as you and I, unless and until the State of South Carolina, if indeed they can, convict - - convince twelve of you of his guilt beyond a reasonable doubt, because if you have a reasonable doubt you must find him not guilty." Tr. 2681. Although the trial judge expresses that the defendant is innocent "unless and until" the state proves his guilt, the instruction is in error because it fails to convey to the jury that a defendant's innocence persists unless the state provides competent evidence of the defendant's guilt beyond a reasonable doubt. In addition, the instruction fails to use the

familiar “presumed innocent” language. *See State v. Peden*, 157 S.C. 459, 154 S.E. 658 (1930), *State v. Danelly*, 116 S.C. 113, 107 S.E. 149 (1921).

- 10(y) *Applicant’s right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel’s failure to object to the trial court’s erroneous instruction regarding the presumption of innocence.*
- 11(y) As indicated above, the trial court incorrectly instructed the jury regarding the presumption of innocence. Trial counsel’s failure to object to the faulty instruction constituted ineffective assistance of counsel. *Strickland, supra*.
- 10(z) *Applicant’s right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution and South Carolina law was denied as a result of the trial judge’s erroneous jury instruction regarding the defendant’s right not to testify.*
- 11(z) At trial, the trial judge charged the jury as follows:
 “All of the testimony is in now, and you’ll notice that the defendant did not testify. I’ll be telling you about that because if you recall at the beginning of the case I told you neither he nor his attorney had to get up from that table if they didn’t want to. Now the state has the burden of proof. Defense doesn’t have to prove anything. So I’ll be telling you not to even consider that. Don’t even consider that. Don’t even discuss it when you go in your jury room because he’s merely exercising one of his constitutional rights.” Tr. 2561. Later, he explained “Well, in the first place, as I told you earlier, the defendant did not take the stand. Didn’t testify. You can’t use that against him because you remember at the beginning of the case I told you that he didn’t even have to get up from that table, nor his attorney. He is merely exercising one of his constitutional rights by not testifying. So when you go back in the jury room don’t even discuss the fact that he did not testify.” Tr. 2687. This instruction is in error. Since 1892, the standard jury instruction has included “no adverse inference” language. *McWee v. State*, 357 S.C. 403, 593 S.E.2d 456 (2004)(Pleicones, J. dissenting)(citing *State v. Howard*, 35 S.C. 197, 14 S.E. 481 (1892)). The trial judge’s instruction lacks any recitation that the jury cannot draw any adverse inference based on the defendant not testifying.
- 10(aa) *Applicant’s right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel’s failure to object to the trial court’s erroneous jury instruction regarding a defendant’s right not to testify.*
- 11(aa) As explained above, the jury instruction provided by the trial judge was in error and as such violated applicant’s state and federal constitutional rights. Counsel’s failure to object constituted ineffective assistance of counsel. *Strickland, supra*. In addition, counsel’s failure

to request a “no adverse inference” instruction was ineffective because the Fifth Amendment to the United States Constitution requires “a criminal trial judge [to] give a ‘no adverse inference’ jury instruction when requested to do so.” *Carter v. Kentucky*, 450 U.S. 288 (1981).

- 10(bb) *Applicant’s right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when a judge who heard motions in the case later reviewed the decision as a member of the South Carolina Supreme Court and authored the opinion affirming the defendant’s conviction.*
- 11(bb) Justice Pleicones presided over one of the pretrial motions hearings and authored the South Carolina Supreme Court opinion affirming applicant’s conviction. The hearing over which Justice Pleicones presided was not transcribed, *See, e.g.*, Tr.² 283 (Sol. Clifford: “There is no transcript . . . unfortunately available for the Pleicones hearing.”). However, the hearing is referred to throughout transcribed portions of other pretrial hearings and the trial. *See, e.g.*, Tr. 191; 216–17; 283. In a hearing held on September 4, 1998, before Judge Rawl regarding discovery matters, trial counsel Timothy Kulp mentioned the hearing before Judge Pleicones: “[I]n a meeting in the Courtroom before Judge Pleicones . . . the issue came up that it was my fault the case was going so long and that my client was sitting in jail, because I asked for examination of the hair.” Tr. 191. Later in that same hearing, the solicitor responded:

I think the issue concerning the delay in the hair DNA analysis was raised, and that Judge Pleicones said, Ms. Clifford are you ready to try the case without having the hair sent up to the FBI, and I said, yes, sir. He then turned to Mr. Kulp and said, well, then, Mr. Kulp, it’s because the Defense has requested additional testing that the delay has occurred, and I believe he also told Mr. Kulp that his accusations against the State in terms of non-compliance with the rules were not founded.

On October 28, 1998, another hearing was held before Judge Rawl. Here, the solicitor noted that the hearing before Judge Pleicones “was not going well that day” for defense attorney Kulp. Tr. 283. Judge Rawl stopped the solicitor’s characterization of the hearings and noted his intention to attach the Pleicones hearing transcript to his decision granting Mr. Kulp’s order. Tr. 283. The Solicitor responded that there was no transcript for the Pleicones hearing. Later, Justice Pleicones wrote the South Carolina Supreme Court opinion that affirmed Myers’ conviction. *See State v. Myers*, 359 S.C.40, 496 S.E.2d 488, 489 (2004). Justice Pleicones wrote that “some hairs were found in Teresa’s hand” and that Applicant agreed “that the hair found in Teresa’s hand must have come from the head of the person who killed her.” *Id.* He also wrote that the South Carolina Law Enforcement Division (SLED) “matched the hair found in Teresa’s hand to the hair that Appellant had given the police for testing.” *Id.* Defense counsel objected to this characterization at trial due to the inability of microscopic hair analysis to yield a “match.” *See infra*. Finally, he wrote that “[t]he hair that was found in Teresa’s hand was lost when SLED sent the hair to the FBI for

²“Tr.” refers to the transcript of applicant’s trial and all available pretrial hearings.

DNA analysis, so there is no physical evidence linking [applicant] to the crime.” *Id.* at 490. Testimony regarding whether the hair arrived at the FBI office, and was then returned to SLED, was inconsistent, however. *See, e.g.*, Tr. 1393.

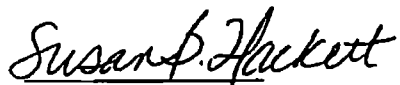
Justice Pleicones’ participation on the reviewing court in this case was a violation of state and federal law. South Carolina law clearly states that “no justice shall preside in any case or at the hearing thereof in which he may be interested or in which he may have been counsel or has presided in any court.” *See* S.C. CODE ANN. § 14-3-50 (2004). There is no decisional authority construing this statute, and appear to be none construing its predecessors. *See id.*; *see, e.g.*, S.C. CODE ANN. § 15-105 (1962); S.C. CODE ANN. § 15-105 (1952); S.C. CODE ANN. § 21 (1942); S.C. CODE ANN. § 21 (1932). The statute prohibits a justice from hearing, on appeal, a case over which he already presided. *See id.* In addition to the statutory authority, the Canons of the Code of Judicial Conduct restrict a justice from hearing a matter on appeal, which the justice presided over at a lower court proceeding. *See* SCACR, Code of Jud. Conduct, Canon 2(A)(2004); *see also* SCAR Code of Jud. Conduct, Canon 3(E)(1) and commentary (2004). Finally, public policy, as announced in *Floyd v. State*, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (S.C. 1991), also curtails a judge’s ability to review cases over which he previously presided. Justice Pleicones’ position as a member of the court reviewing a case over which he partially presided violated federal and state law. This error requires no showing of prejudice because applicant’s right to an impartial and disinterested tribunal was violated. *Johnson v. United States*, 117 S.Ct. 1544, 1550 (1997), *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991), *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir.1995).

- 10(cc) *Applicant’s right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated when appellate counsel failed to seek the recusal of Justice Pleicones.*
- 11(cc) Appellate counsel failed to move to recuse Justice Pleicones from the appellate panel that reviewed applicant’s direct appeal. As discussed above, Justice Pleicones’ position on the reviewing panel and the author of the Court’s opinion violated state and federal law. Appellate counsel’s failure to seek Justice Pleicones’ recusal was deficient performance based upon the clear and controlling state and federal law, which requires such recusal in these circumstances. *Strickland v. Washington, supra*; *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). As indicated above, prejudice is presumed when an applicant’s right to an impartial tribunal is violated. *Johnson, supra*, *Fulminante, supra*, *Porter, supra*. Therefore, applicant suffered prejudice when appellate counsel failed to seek recusal of Justice Pleicones.
12. Prior to this application have you filed with respect to this conviction:
 - (a) any petition in a State Court under South Carolina law? No

- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief?
No
 - (c) any petition in the United States Supreme Court for certiorari other than petitioners,
if any already specified in (8)? No
 - (d) any other petitions, motions or applications in this or any other Court?
13. If you answered “yes” to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - (b) the name and location of the Court in which each was filed:
 - (c) the disposition thereof:
 - (d) the date of each such disposition
 - (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed?
15. If you answered “yes” to (14) identify:
- (a) which grounds have been presented:
 - (b) the proceedings in which each ground was raised
16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea?
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes.
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
Yes.
 - (e) preparation, presentation or consideration of any petitions, motions or applications
with respect to this conviction, which you filed? Yes
18. (a) (i) Timothy Clay Kulp, of the Riesen Law Firm, 3660 West Montague Ave., North
Charleston, South Carolina 29418
- (a)(ii) Robert Dudek of the South Carolina Office of Appellate Defense, 1205 Pendleton
Street Ste. 306, Columbia, South Carolina 29201.
- (b)(i) Trial
- (b)(ii) Appeal
19. Applicant seeks relief from his convictions and sentences.
20. Applicant is not under sentence from any other court.

Respectfully submitted,



JOHN H. BLUME

SUSAN B. HACKETT

Blume & Weyble, LLC

P.O. Box 11744

Columbia, SC 29211

(803) 765-1044

July 26, 2005.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

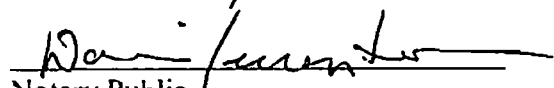
VERIFICATION

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


 WESLEY MAX MYERS

SWORN to and subscribed before me this

21st day of July, 2005.


 Notary Public

My Commission Expires: ~~My Commission Expires~~ **January 3, 2013**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF
COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Wesley Max Myers, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Wesley Max Myers
WESLEY MAX MYERS
APPLICANT

SWORN to and subscribed before me this

21st day of July, 2005.

Notary Public

My Commission Expires: My Commission Expires January 3, 2013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CA No.
	)	
WESLEY MAX MYERS,	)	
<i>Applicant,</i>	)	
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
JON OZMINT, South Carolina Director	)	
of Department of Corrections, and HENRY	)	
MCMASTER, Attorney General of South	)	
Carolina,	)	
<i>Respondents.</i>	)	

I, Susan B. Hackett, hereby certify that I have served upon the attorney for the respondent one (1) copy of applicant's post-conviction relief application in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Henry McMaster, Esq.
 South Carolina Attorney General's Office
 P.O. Box 11549
 Columbia, S.C. 29201

This the 26th day of July, 2005, in Columbia, South Carolina.

Susan B. Hackett
 SUSAN B. HACKETT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

WESLEY MAX MYERS,
Applicant,

v.

JON OZMINT, South Carolina Director
of Department of Corrections, and HENRY
MCMASTER, Attorney General of South
Carolina,
*Respondents.*IN THE COURT OF COMMON PLEAS
CA No.MOTION FOR LEAVE TO
CONDUCT DISCOVERY

Applicant, Wesley Max Myers, by and through undersigned counsel, hereby moves, pursuant to S.C. Code §17-27-150, for leave to conduct discovery in this post-conviction relief action. In support of this motion, applicant apprises the Court of the following facts and legal principles:

1. Applicant is presently serving a thirty-year sentence for Murder and a ten-year sentence for Arson in the third degree, imposed on March 7, 2001 by the Charleston County Court of General Sessions following his trial. A direct appeal was taken and the South Carolina Supreme Court affirmed the convictions and sentences on May 11, 2004. *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004). Applicant's initial application for post-conviction relief was filed at the same time as this motion.

2. Section 17-27-150 specifically authorizes discovery in noncapital post-conviction relief proceedings upon a showing of good cause. *See* §17-27-150(A) ("A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise").

almost certainly require additional time for investigation after gaining access to the information and materials he seeks, which will in turn require a continuance of the post-conviction relief proceedings. On the other hand, allowing pre-hearing discovery will facilitate full preparation by applicant and clear the way for a the presentation of all facts supporting his claims for relief to be presented at a single evidentiary hearing.

WHEREFORE, for all the foregoing reasons, applicant submits that he has presented good cause for the invocation of discovery, and therefore respectfully requests, pursuant to §17-27-150, that the Court authorize him to conduct discovery as prescribed by the South Carolina Rules of Civil Procedure.

Respectfully submitted,

Susan B. Hackett

JOHN H. BLUME
SUSAN B. HACKETT
Blume & Weyble, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

July 26, 2005.

were forced to wait until the commencement of an evidentiary hearing before being permitted access to the information he seeks.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

WESLEY MAX MYERS,
Applicant,

v.

JON OZMINT, South Carolina Director
 of Department of Corrections, and HENRY
 MCMASTER, Attorney General of South
 Carolina,
Respondents.

IN THE COURT OF COMMON PLEAS
 CA No.

CERTIFICATE OF SERVICE

I, Susan B. Hackett, hereby certify that I have served upon the attorney for the respondent one
 (1) copy of applicant's Motion for Leave to Invoke Discovery in the above-captioned case by
 depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as
 follows:

Henry McMaster, Esq.
 South Carolina Attorney General's Office
 P.O. Box 11549
 Columbia, S.C. 29201

This the 26th day of July, 2005, in Columbia, South Carolina.

Susan B. Hackett
 SUSAN B. HACKETT

COPY

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

h Wesley Max Myers, 273328,)
)
Applicant,)

05-CP-10-3113

RETURN

v.)
)

Jon Ozmint, South Carolina Director)
of Department of Corrections, and)
Henry McMaster, Attorney General)
of South Carolina,)
Respondents.)
_____)

FILED
2005 NOV -9 PM 2:28
JULIE J. ARISTRONG
CLERK OF COURT

Respondent, State of South Carolina,¹ hereby makes a Return to the Application for Post-Conviction Relief (PCR) filed on August 1, 2005 and would show this Court:

I. PROCEDURAL HISTORY

Applicant is presently confined in the Lieber Correctional Institution, of the South Carolina Department of Corrections (SCDC), pursuant to commitment orders from the Charleston County Clerk of Court. The Charleston County Grand Jury indicted him at the June 1997 term of court for murder and arson in the third degree. (97-GS-10-419 & -420). Between August 7, 1997 and May 22-23, 2000 a number of different motions hearings were held before various Circuit Court Judges. Applicant received a jury trial on February 26 - March 6, 2001, before the Honorable Luke N. Brown. The jury found him guilty as charged. On March 7, 2001, Judge Brown sentenced him to thirty years imprisonment for murder and ten years concurrent for arson in the third degree. Timothy Clay Kulp, Esquire, represented Applicant at trial. Senior Assistant Solicitor D. Bruce Durant

¹ Applicant has listed the "Henry [Dargan] McMaster, Attorney General of South Carolina" as a Respondent. The undersigned moves to strike Attorney General McMaster as an improper party because he is not Applicant's custodian.

represented the State.

A timely notice of appeal was served and filed. On July 9, 2003, Assistant Appellate Defender Robert M. Dudek filed a Final Brief Of Appellant and Final Reply Brief of Appellant on Applicant's behalf. Applicant presented the following issues for review by the South Carolina Supreme Court:

1. Whether the court erred by allowing an "anger management" questionnaire into evidence against appellant where any probative value this dated document had was substantially exceeded by its unduly prejudicial effect since it concerned appellant's temper, and therefore invited a verdict on an improper basis?
2. Whether the court erred by refusing to allow appellant's expert on interrogations, Dr. Saul Kassin, to testify about other examples of confessions or interrogations he relied on in forming his opinions in this case since these were facts or data the expert relied on, and consequently they were admissible under the South Carolina Rules of Evidence?
3. Whether the court erred in ruling appellant's confession was admissible where appellant's "I must have done it" confession was the product of organized police trickery and coercion where law enforcement undisputedly set-up appellant with what was proved to be a ruse of false evidence about an inculpatory hair found underneath the victim, where Lt. McHale suggested there was other evidence against appellant, and McHale planted different "lesser guilt" scenarios in appellant's mind, since appellant's will was overborne by this calculated police misconduct.
4. Whether the court erred by allowing evidence appellant apologized to the victim's mother after he confessed, since this apology was also set-up by law enforcement just after appellant confessed, and was part of the same continuous coerced confession?
5. Whether the court erred by allowing evidence and the videotape of appellant's apology or confession outside the police station since the "perp walk" was also set-up by law enforcement who had contacted the media, and it was the

continuing product of police trickery and coercion that garnered the first "I must have done it" confession?

6. Whether the court erred by refusing to allow the defense to inspect two letters from the solicitor's office to the police department where the defense had strong evidence these letters were relevant to issues of police misconduct, and the failure to investigate which were issues the defense had raised, since these letters were discoverable because they contained impeachment or exculpatory material?
7. Whether the court erred by refusing to allow the defense to call Assistant Solicitor Amie Clifford to testify in camera about the state's intentional failure to test evidence, failure to investigate suspects, and police misconduct since the judge erred as a matter of law by refusing this legitimate in camera request?

The State had previously filed a Final Brief of Respondent on May 20, 2003. Senior Assistant Attorney General William Edgar Salter, III represented the State. The South Carolina Supreme Court heard oral arguments in the case on February 6, 2001. On May 11, 2004, the Supreme Court filed a published Opinion affirming Applicant's conviction and sentence. *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 485 (2004). The Remittitur was sent to the Charleston County Clerk of Court on June 9, 2004.

On September 2, 2004, Applicant, through Mr. Dudek as counsel, filed a Petition For Writ Of Certiorari To The Supreme Court Of South Carolina in the United States Supreme Court. He presented the following issue for review by the United States Supreme Court:

- I. Whether police exploitation of petitioner's disability through an elaborate ruse to obtain an "I must have done it" alcoholic blackout scenario confession while falsely asserting material evidence linked petitioner to the crime was a violation of due process?

The State waived filing a Brief in Opposition. The United States Supreme Court denied certiorari on November 8, 2004. *Myers v. South Carolina*, ___ U.S. ___, 125 S.Ct. 485 (2004).

II. STATEMENT OF FACTS

The State presented overwhelming evidence of guilt. First, the State presented evidence that the victim's badly beaten body was found after a fire that was the result of arson and to which firefighters responded sometime after 3:15 a.m. **R. pp. 1061-65; 1071-79; 1219; 1230-36; 1853-57; 1960-70.** Also, Laurie Villalobos testified that she took a taxi to the Mill Inn sometime between 1:30 and 2:30 a.m. on March 13, 1997, in order to collect some money the victim owed her. Applicant was present and let her into the bar. The victim was "clearly distraught" and Villalobos could tell that the victim had been crying. Villalobos got her money and left. **R. pp. 2151-58.** This is well after co-workers left the victim locked inside of the bar, asleep on a pool table. **R. pp. 1103-11; 1142-50.** Thus, he was the last person seen with her while she was alive.

Also, Joseph D. Perry, the Vice President of Midland Mechanical Millwright, employed Applicant in March 1997. Applicant called Mr. Perry's cellular phone at roughly 6:20 a.m. on March 13. Applicant, who sounded upset, told him that there had been a fire at the Mill Inn and that he thought the victim might have been inside but he was not sure. So, he asked Mr. Perry to "go by there and find out." Mr. Perry thought that this was an odd request because Applicant did not go check, himself, since he was supposedly worried about his girlfriend. However, Perry went to the scene about ten minutes later and gave a statement to an officer. **R. pp. 1188-93.** This evidence implicated Applicant in the murder because the call to Perry occurred approximately fifteen minutes or longer before Applicant went to the scene and supposedly learned for the first time that the victim had died in the fire. **R. pp. 1418-22; 1552-55.**

Applicant orally admitted his guilt and gave a verbal statement to police on Saturday, March 15, 1997. **R. pp. 1580-87; 1691-95; 1806-12; 1974-82.** He also gave State's Exhibit 30, the written statement, on March 15. **R. pp. 1703-06.** The statements to law enforcement contained

information known only to police and the killer, such as the cause of the fire (*see R. p. 1979*) and information known only to the killer (and unknown to police), including the fact that Andy White had left a pink note for the victim on the bar. **R. pp. 1695-99; 1812.** Additionally, the jury properly heard evidence that Applicant apologized and admitted his guilt to both the victim's mother and his own mother. **R. pp. 1591; 1815-17; 1984-85.**

Respondent will provide the following documents to the PCR court on or before the date of hearing:

1. The Record on Appeal (6 volumes);
2. The Final Brief of Appellant;
3. The Final Reply Brief of Appellant;
4. The Final Brief of Respondent;
5. The Opinion of the South Carolina Supreme Court in *State v. Myers, supra*;
6. The Opinion of the United States Supreme Court in *Myers v. South Carolina, supra*;
7. The Remittitur; and
8. The Charleston County Clerk of Court's records.

III. ALLEGATIONS

Applicant raises the following grounds for relief in his PCR Application:

- 10(a) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to move for a change of venue.
- 10(b) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to properly handle testimony of a defense expert in pretrial hearings.

- 10(c) Applicant's right to a fair trial guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of the misconduct of the police and solicitors with regard to hair evidence.
- 10(d) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and South Carolina law was violated when the court admitted evidence regarding witnesses' opinions about the defendant's demeanor because this evidence was inadmissible hearsay and character evidence.
- 10(e) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to object to inadmissible hearsay and character evidence testimony regarding applicant's demeanor.
- 10(f) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and South Carolina law, and to confront witnesses against him, as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law, were violated when the court admitted hearsay and character evidence concerning applicant's relationship with the victim.
- 10(g) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated when trial counsel failed to object to inadmissible hearsay and character evidence testimony concerning applicant's relationship with the victim.
- 10(h) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and South Carolina law was violated when the court admitted inadmissible hearsay and character evidence in the form of testimony from the victims' (sic) mother alleging that applicant's father slept with a gun and applicant had hit his mother.
- 10(i) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by trial counsel's failure to object to inadmissible hearsay and character evidence from the victim's mother that applicant's father slept with a gun under his pillow and applicant had hit his mother.
- 10(j) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by trial counsel's failure to call applicant's mother and father to refute testimony regarding a prior assault on his mother and that his father slept with a gun under his pillow due to fear of applicant.
- 10(k) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth

Amendment to the United States Constitution and South Carolina law, and to confront witnesses against him, as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law, were violated when the court admitted hearsay evidence about why a witness waited until the trial started to tell authorities that she saw the applicant at the scene of the murder.

- 10(l) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated when trial counsel failed to object to inadmissible hearsay testimony concerning the reasons a witness waited until the trial started to tell authorities that she saw the applicant at the scene of the murder.
- 10(m) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to thoroughly and properly examine a crucial prosecution witness.
- 10(n) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and South Carolina law was violated when the court admitted expert testimony about the results of hair comparison testing.
- 10(o) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by appellate counsel's failure to appeal trial counsel's objection to expert testimony offered by the state regarding results of hair comparison testing.
- 10(p) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to advise applicant to testify in his defense.
- 10(q) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to thoroughly investigate or attempt to introduce evidence of the guilt of a third party.
- 10(r) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and South Carolina law was violated because he is actually innocent of the charges.
- 10(s) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and South Carolina law was violated when he was not present during critical stages of the criminal trial.
- 10(t) Applicant's right to be tried by an impartial jury as guaranteed by the United States

Constitution and South Carolina law was violated as a result of the trial judge's off-the-record communication with jurors.

- 10(u) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and South Carolina law, and to an impartial jury, as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law, was violated when a juror did not reveal that she knew the applicant during voir dire.
- 10(v) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and South Carolina law, and to an impartial jury, as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law, was violated when jurors engaged in group prayer.
- 10(w) Applicant's right to direct and collateral review of his conviction and sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of an inadequate record.
- 10(x) Applicant's right to the presumption of innocence as guaranteed by federal and state law was violated as a result of the trial court's erroneous instruction regarding the presumption of innocence.
- 10(y) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to object to the trial court's erroneous instruction regarding the presumption of innocence.
- 10(z) Applicant's right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution and South Carolina law was denied as a result of the trial judge's erroneous jury instruction regarding the defendant's right not to testify.
- 10(aa) Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to object to the trial court's erroneous jury instruction regarding a defendant's right not to testify.
- 10(bb) Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and South Carolina law was violated when a judge who heard motions in the case later reviewed the decision as a member of the South Carolina Supreme Court and authored the opinion affirming the defendant's conviction.
- 10(cc) Applicant's right to effective assistance of counsel as guaranteed by the Sixth

Amendment to the United States Constitution and South Carolina law was violated when appellate counsel failed to seek the recusal of Justice Pleicones.

IV.

Applicant's first allegation [10(a)] is that trial counsel was ineffective for not moving for a change of venue. Respondent submit that this allegation lacks merit but would request a hearing on whether counsel was ineffective in this regard.

When jurors have been exposed to pretrial publicity, a denial of a motion for a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. *State v. Caldwell*, 300 S.C. 494, 502, 388 S.E.2d 816, 821 (1990); *Patterson, III, supra*. Mere exposure to pretrial publicity, therefore, does not automatically disqualify a perspective juror. "The relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt [or sentence] of the defendant." *State v. Tucker*, 324 S.C. 155, 166, 478 S.E.2d 260, 266 (1996), quoting *Patten v. Yount*, 467 U.S. 1025, 1035 (1984). "It is sufficient if the juror can lay aside his impression or opinion and rendered a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).² The moving party bears the burden of showing actual juror prejudice as a result of such publicity. *Id*; *Caldwell, supra*. See also *Mu'Min v. Virginia*, 500 U.S. 415 (1991).

To establish that he received ineffective assistance of counsel, Petitioner must make a twofold showing. See *Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his

² Thus, there is no merit to Applicant's contention that the degree of publicity in this case created a "presumption of prejudice." As the Court in *Irvin* stated, "in these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Id*.

attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689.³

Petitioner must also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also Nixon v. Florida*, ___ U.S. ___, 125 S.Ct. 551 (2004) (reasonableness of defense counsel's performance in proceeding with a strategic choice that included conceding guilt at guilt phase of capital case, after counsel informed the defendant of the strategy and defendant was unresponsive, was to be judged in accord with *Strickland v. Washington* inquiry generally applicable to ineffective assistance of counsel claims); *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). Finally, the Court in *Strickland* held that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." 466 U.S. at 687.

When these principles are applied to the present case, Respondents submit that Applicant cannot meet his burden of proof and that counsel's conduct was neither deficient nor prejudicial. However, this allegation creates a factual issue requiring a hearing.

Applicants second allegation [**Ground 10(b)**] is that trial counsel was ineffective for presenting Dr. Saul Kassin as a witness at the *Jackson v. Denno*, 378 U.S. 368 (1964), hearing

³See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

because (1) the trial judge limited the extent of his expert testimony and (2) “the solicitors trying the case were privy to a full preview and were able to cross[-examine] Dr. Kassin at trial more thoroughly than they would have been able to do.” Respondent submits that it is entitled to judgment as a matter of law on this allegation.

Before Applicant presented Mr. Kassin’s testimony, the trial judge heard an *in limine* objection by the State. The State noted that the trial judge would probably allow Kassin to testify

as to general psychological principles and how those may affect the truth or falsity of a confession, but I would object to him telling the jury about other cases that don’t involve this particular case . . . because . . . it’s irrelevant. Unless it is exactly the same facts as we have in this case here, it’s completely irrelevant to the, to the issues before this jury.

R. pp. 2241-42.

The trial judge observed that this was the matter that had already been addressed in chambers and defense counsel stated that he would “deal with the witness before he takes the stand.” The trial judge declined to allow Applicant to address the facts of other cases in his *voir dire* of Kassin, but ultimately decided that he would rule on any objection raised by the State at the time the objection was made. **R. pp. 2242-49.**

Kassin thereafter testified as an expert in the area of social psychology. **R. p. 2256, ll. 6-19; p. 2269, ll. 1-12.**⁴ Kassin testified that the study of confessions draws on different areas of psychology, including social psychology and cognitive psychology. Defense counsel had asked him to review certain material provided by the defense and to examine Applicant’s confession, which he did. One of the items he reviewed was the videotape of Applicant describing the interrogation

⁴ The State specifically objected to his qualification as an expert in “false confessions” and the trial judge noted that Applicant had not sought to so qualify him. **R. p. 2269, ll. 1-11.**

process. Kassin opined that much of what Applicant described seemed to come "*verbatim* out of interrogation manuals" which Kassin knew Applicant had not read. However, apart from Det. Clayton's report, a videotape of Lt. McHale's interview of Applicant and the statement itself, there was very little upon which he could base his opinion.⁵ **R. pp. 2269-74 .**

Kassin explained that people sometimes falsely confess to crimes which they did not commit, but conceded that there was no way to determine how often this occurred "and [there is] not even a methodology for deriving an estimate." There are several ways to determine whether a confession is false. In some instances, persons confess to crimes which have not been committed or another person is subsequently apprehended and confesses to committing the crime. Also, outside exonerating evidence sometimes disproves a confession. Another method to test the truthfulness of a confession is to see if the person who confesses includes evidence only the perpetrator would know. Kassin opined that there are three different types of false confessions: voluntary false confessions, coerced compliant false confessions and, of particular importance to the present case, coerced internalized false confessions. He defined each of these for the jury. A coerced internalized false confession occurs when a person is broken down into submission (through unpleasant interrogation circumstances, a lot of stress, confusion, or social isolation), the person is not being allowed to present a defense and it is implied that the person could be prosecuted without a confession or perhaps that the long-term consequences aren't severe if the person confesses (*i.e.*, a coerced compliant false confession), coupled with the person actually coming to believe the confession. **R. pp. 2275-83; p. 2350, ll. 1-4.**

Kassin further opined that it is possible to make a person believe that he committed an

⁵ He stated it would have been beneficial if the interview and interrogation had been videotaped or audio taped.

offense even if he did not do so because memory is malleable and can be manipulated. Coerced internalized false confessions are "examples of that, suggestibility effects on memory." He opined that certain interrogation techniques which police officers are commonly taught and often use, the "Reid School Technique," provide "psychologically sophisticated techniques" that are overly aggressive in many ways and can lead to false confessions in some instances, particularly with the presentation of false evidence or when used "to the extreme."⁶ Specifically, he felt that presenting a suspect with false evidence tended to enhance the possibility of a false confession. Another technique, which is not endorsed by the Reid School but is found in virtually all coerced internalized false confession cases, is the suggestion of a "blackout period." In Kassin's opinion, many of the Reid School techniques were employed by the officers in this case when they questioned Applicant on March 14-15, 1997, and the officers also used a number of techniques which were not taught or even condoned by the Reid School. **R. pp. 2283-2330.**

Kassin listed a number of techniques supposedly used on Applicant which caused him concern: Applicant was under suspicion for three days and subjected to a number of questioning sessions; he was questioned for a number of hours prior to his confession on Saturday and was clearly interrogated by Lt. McHale on Friday afternoon, as shown by the videotape of their interview; the implication was presented on Friday of "what if we had evidence" and the police actually presented him with false evidence on Saturday; and police used "the calculated ploy" of deliberately inserting an error into the written confession so that Applicant would correct it and thereby make it

⁶ Although the "Reid School" employs a nine-step process, Kassin distilled this to two steps. First, the suspect is broken down by asserting the suspect's guilt and not allowing the suspect to mount a defense, as well as interrupting any possible denials. Once the suspect is broken down, the second step is "theme development" or "development of alternative questions," whereby police offer some face-saving or moral, justifying alternative (i.e., the person is provided "an easy way out" so that confession does not seem onerous to him). **R. pp. 2287-89.**

more difficult for him to distance himself from it. **R. pp. 2283-2329.**

According to Kassin, Lt. McHale ignored a number of verbal and non-verbal signals from Applicant suggesting that he was innocent because "it was clear that an impression was formed early on [that Applicant was guilty] . . . and that . . . presumption of guilt closed minds." He also found a number of other interrogation techniques taught by the Reid School. He dismissed the fact Applicant gave a detailed statement concerning the offense as well as the fact Applicant provided a motive for the killing because he stated that these occur routinely in coerced internalized false confession cases. He opined that the circumstances surrounding Applicant's confession

[g]ives me pause. It . . . bears a striking resemblance to so many false internalized confessions which at first seem hard to understand, but once you see the script that they run through, the script that the breakdown, the false evidence, the suggestion of a blackout, the confusion, the tentative language 'I must have done it' followed by a detailed statement that may or may not contain novel details, yes, it bears a striking resemblance to those cases.

What he found particularly problematic in the present case, however, "is not just that certain techniques were used that I think were extreme, and not just that it was a prolonged affair, ordeal, but as well that . . . there wasn't good record keeping." **R. pp. 2283-2329.**

On cross-examination by the State, the prosecutor asked a question about a blackout hypothesis and received an unsolicited response in which Kassin referenced an unrelated case in Florida as follows:

Q And what is this blackout hypothesis?

A Well, the blackout hypothesis is a way to help somebody reconcile their lack of memory with the fact that there seems to be infallible proof of their guilt. And so in cases involving coerced internalized false confessions, in all of these cases, there's one in Florida where after presenting some . . . phoney polygraph evidence and again accusatory, isolated, they finally said the hair sample came in, they told him that the

hair suggested he was guilty, that made him crumble. That was the point at which he capitulated, [and] said 'that can't be. I don't remember it.'

They said, 'it looks like you must have had one of your alcoholic blackouts,' because he had had those before. In that case he says, 'Well, then I guess that's it.' At which point he concocted a confession, which turns out to be false.

R. p. 2384, l. 17 - p. 2385, l. 13.

On redirect examination, Applicant attempted to elicit further anecdotal evidence of false confessions by providing examples of unrelated cases to the jury. When the State objected because "this is the issue we have raised before," Applicant claimed it had been brought up on cross-examination.⁷ When asked by the Court if he was talking about the Florida case which he had previously mentioned, Kassin responded affirmatively. He added that there was a case in Indiana, one in Connecticut and "I mean there's a whole litany of cases" The trial judge sustained the State's objection and ruled that Kassin had volunteered the response on cross-examination. **R. p. 2403, l. 22 - p. 2405, l. 23.**

As discussed, Applicant unsuccessfully challenged both the limitations upon Dr. Kassin's testimony and the voluntariness of his statements to law enforcement on direct appeal. With respect to the voluntariness of the confession, the Court found that "[t]he totality of the circumstances does not demonstrate that Appellant's will was overcome by the police. As there is no evidence that the confession was not voluntary we therefore hold that the trial court did not err in admitting Appellant's confession." *Myers*, 359 S.C. at 44, 596 S.E.2d at 490. *See also id* at 44-47, 596 S.E.2d

⁷ Contrary to his current position, Applicant made the contention on appeal that the Assistant Solicitor objected because he had seen how "effective" Kassin's testimony was *in camera*. This, however, ignored that the trial judge admitted Applicant's statement and made detailed factual findings that are inconsistent with Kassin's testimony. The State's objection to testimony concerning anecdotal cases was based upon the lack of relevancy of this testimony.

at 490-92.

The Supreme Court also affirmed the trial judge's ruling on the admissibility of Dr. Kassin's testimony concerning examples of false confessions in other jurisdictions, finding that "Dr. Kassin did testify about specific cases, he just did not use names or say in which state the crime happened. In addition, the Indiana case was so dissimilar that there was no evidentiary value. ... Although the Connecticut case was similar, the trial court did not abuse its discretion in excluding the information. Dr. Kassin was able to testify at length about false and coerced confessions, and he was able to touch briefly on the Connecticut case." *Id* at 51, 596 S.E.2d at 494 (citation omitted). Alternatively, the Court held that "assuming error in limiting testimony about the Connecticut case, Appellant cannot show prejudice in light of Dr. Kassin's other testimony." *Id*.

Applicant's current allegation ignores the unique manner in which South Carolina handles the admissibility of confessions: both the trial judge and the jury must find that a confession is admissible. *State v. Washington*, 296 S.C. 54, 55-56, 370 S.E.2d 611, 612 (1988) (Where voluntariness of a statement is at issue the trial judge must make an initial determination based upon the preponderance standard. If the statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt). Here, Applicant's trial counsel sought to have the custodial confession and other statements suppressed. In order to be successful, counsel necessarily had to present evidence that the statement was involuntary *in camera*, and Applicant surely would be challenging the failure to have presented Kassin at the *Jackson v. Denno* hearing. Moreover, there is scant evidence of involuntariness absent Kassin's testimony.⁸

⁸ This is not a concession regarding the admissibility or credibility of his testimony, only to point out that it was practically the only evidence of involuntariness of the statements.

There is also no merit to the contention that Kassin would have been able to give further expert testimony in front of the jury if counsel had not presented him *in camera*. This contention ignores that the South Carolina Supreme Court affirmed the trial judge's ruling on the admissibility of this testimony. This claim as well as the suggestion that prosecutors could more effectively cross-examine him after his *in camera* testimony further ignores that it was Applicant's burden to establish that the evidence was admissible and that it was within the trial court's discretion to require an *in camera* proffer before allowing the testimony to be heard by the jury. *Id.* See also *State v. Patton*, 322 S.C. 408, 472 S.E.2d 245 (S.C.1996) (in all situations other than an assault on the voluntariness of a confession, the granting of a motion for a suppression hearing is a matter committed to the discretion of the trial judge), citing *United States v. Odom*, 736 F.2d 104, 110 (4th Cir.1984).

In allegation three [**Ground 10(c)**], Applicant maintains that his right to a fair trial was violated by the State's to timely comply with *Brady v Maryland*, 373 U.S. 83 (1963), since Applicant was not able to have DNA testing performed on head hair found at the crime scene "immediately after the murder," but only after a judge ordered that the DNA analysis hair be performed on the hair. Respondent submits that this allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-Conviction Relief is not a substitute for an appeal. *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised **at trial or on appeal**. *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.⁹

⁹ Even though Applicant couches **10(c)-(d)** and other allegations asserting the erroneous introduction of evidence at trial as violations of due process and/or his right to confront

In **Ground 10(d)**, Applicant alleges that his right to due process was violated because the trial judge allowed several prosecution witnesses to testify about Applicant's demeanor when being questioned by authorities about the murder. As with the preceding allegation, Respondent submits that this allegation raises a direct appeal issue that is procedurally barred by § 17-27-20(b), *Drayton v. Evatt, supra*, and *Simmons v. State, supra*, because it could have been raised at trial and on direct appeal.

In **Ground 10(e)**, Applicant alleges that trial counsel was ineffective for not objecting to testimony from several prosecution witnesses about Applicant's demeanor when being questioned by authorities about the murder. Specifically, he complains about testimony from Lt. Kevin McHale (which defense counsel elicited) (R. 1515-19; 1532; 1553); Det. George Tetanich (R. 1553-54; 1581-82) and Det Melvin Cumbee. R. 1808. Although Respondent submits that Applicant cannot show deficiency or prejudice from counsels performance because the challenged testimony was admissible to prove the voluntariness of his confession and whether Applicant's will was overborne, which was an important issue at trial,¹⁰ this allegation creates a factual issue requiring a hearing.

witnesses, his claims actually are only complaints about evidentiary law and do not implicate the United States Constitution, in any manner. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state laws.' Today we re-emphasize that it is not the province of a federal habeas court to re-examine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated Constitution, laws or treaties of the United States"). As a result, he could not obtain relief on these claims in federal habeas corpus, even if they would otherwise be properly before the court in habeas. *Id.*

¹⁰ Applicant relies upon *Crawford v. Washington*, 541 U.S. 36, 40 (2004) in support of this allegation. In *Crawford*, the Supreme Court held that the Sixth Amendment Confrontation Clause prohibits the admission of structured police interrogations of an unavailable witness unless the defendant has had a prior opportunity to cross-examine the witness. However, *Crawford* does not apply to the present case because the non-verbal "statements" at issue, to the extent any are deemed testimonial, are by Applicant. While the *Crawford* Court stated that actual statements taken during police interrogations are testimonial, the Court was clearly discussing interrogations of people other than the accused. *State v. Torres*, --- P.3d ----, 2005

Applicant alleges in **Ground 10(f)** that his rights to due process and to confront witnesses against him were violated by the presentation of evidence concerning his relationship with the victim. Again, Respondent submits that this allegation raises a direct appeal issue that is procedurally barred by § 17-27-20(b), *Drayton v. Evatt, supra*, and *Simmons v. State, supra*, because it could have been raised at trial and on direct appeal.

Applicant's **Ground 10(g)** alleges that trial counsel was ineffective for failing to object to evidence concerning his relationship with the victim. Respondent submits that this allegation lacks any plausible merit. The South Carolina Supreme Court set forth the applicable law in *State v. Braxton*, 343 S.C. 629, 636-37, 541 S.E.2d 833, 836-37 (2001):

In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide. *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996) (evidence of controversial telephone calls and loud altercations between victim and defendant were admissible to establish strained nature of parties' relationship); *State v. Clinkscale*, 231 S.C. 650, 99 S.E.2d 663 (1957) (evidence defendant shot victim six or seven weeks prior to murder was admissible); *State v. Brooks*, 79 S.C. 144, 60 S.E. 518 (1908) (evidence of previous quarrels and ill feelings between the victim and defendant arising out of child custody controversy was admissible); 22A C.J.S. *Criminal Law* § 721 (1989) (evidence of relations existing between accused and victim prior to crime are admissible). Prior disputes between the victim and defendant may be relevant to establish the accused's motive for committing the crime and motive

WL 2675051 (Kan., Oct. 21, 2005). Also, Applicant could cross-examine the officers at issue and he was not an "unavailable" witness under Rule 804(b)(3), SCRE. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000) (defendant who creates his own unavailability by invoking his fifth amendment privilege against self-incrimination is not "unavailable").

Further, the *Crawford* opinion makes clear that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law...." 541 U.S. at 68. Finally, both the trial judge and the jury could freely assess both the credibility of McHale's testimony regarding Applicant's demeanor and Applicant's demeanor, itself, because a videotape of that aborted polygraph interview (**Defendant's Ex. 34**) was played in camera and before the jury. **R. pp. 944-92; 2228-31.**

may have bearing on the identity of the accused as the perpetrator of the crime. *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990) (testimony regarding prior disputes between white defendant and family of black victim, one of which involved defendant's flying the Confederate flag on Independence Day, was relevant to motive and admissible); *State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980) (testimony concerning a verbal altercation between the victim and defendant prior to the murder was admissible as evidence of accused's motive and related to defendant's identity as perpetrator).

Applying this rule to the present case, it is clear there was no error. The evidence in question clearly tended to prove both a motive for Applicant to kill the victim and to show that animus probably existed between them at the time the homicide was committed. It, thus, constituted evidence from which the jury could infer malice. *Id.*; *State v. Taylor*, 333 S.C. 159, 167-69, 508 S.E.2d 870, 874-75 (1999) (trial judge properly allowed defendant to introduce evidence that victim hit him on head with beer bottle on prior occasion although details of that incident were properly excluded). However, this allegation creates a factual allegation requiring a hearing.

Ground 10(h) is that Applicant's right to due process was violated because testimony was introduced, on Applicant's cross-examination of the victim's mother, Dixie Justis, that Applicant had previously hit his mother and "his father slept with a gun under his pillow" because of Applicant's behavior when drinking. **R. 2062, ll. 12-21.** Again, Respondent submits that this allegation raises a direct appeal issue that is procedurally barred by § 17-27-20(b), *Drayton v. Evatt*, *supra*, and *Simmons v. State*, *supra*, because it could have been raised, if at all, on direct appeal.

In **Grounds 10(i-j)**, Applicant alleges that trial counsel was ineffective for not objecting to Mrs. Justis' testimony or failing to present his parents witnesses, to refute this testimony. The record demonstrates that trial counsel did object and, *in camera*, argued that her testimony in this regard should be struck because it was not responsive to the question. The trial judge, who listened to the

question again, ruled that the witness had merely expanded on counsel's question. However, trial counsel did not avail himself of the offer of a curative instruction when the trial judge asked what he wanted him to charge jurors. **R. 2062-64.**

This thereby waived the issue for appellate review, see *State v. Sinclair*, 275 S.C. 608, 274 S.E.2d 411 (1981) (Because the appellant obtained the only relief he sought, supreme court has no issue to decide); *State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979) (same), to the extent it was not barred as invited error. *State v. Washington*, 315 S.C. 108, 109-10, 432 S.E.2d 448, 448-49 (1992) (appellant may not be heard to complain of the admission of evidence elicited by his own counsel; thus, reference to defendant's "booking report" from previous arrest did not warrant mistrial, since reference was elicited by defendant's counsel). There is also no assurance that Applicant's parents would refute the testimony of Mrs. Justis, if placed under oath and subjected to cross-examination. However, both counsel's decision to refuse an offered curative instruction and the failure to present Applicant's parents as witnesses create factual issues which require a hearing. *But see Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial).

In **Ground 10(k)**, Applicant maintains that his right to due process and to confront witnesses was violated because testimony was introduced as to why prosecution witness Laurie Villalobos waited to come forward with evidence relevant to the prosecution's case against Applicant. Again, Respondent submits that this allegation raises a direct appeal issue that is procedurally barred by § 17-27-20(b), *Drayton v. Evatt*, *supra*, and *Simmons v. State*, *supra*, because it could have been raised, if at all, on direct appeal.

In **Ground 10(l)**, Applicant alleges that trial counsel was ineffective for not objecting to the

State's presentation of Ms. Villalobos' testimony, whom he now asserts could have been suppressed, and for not objecting to certain non-testimonial statements to which she testified that he categorizes as hearsay. Respondent respectfully requests a hearing concerning trial counsel's handling of this witness.

Next, Applicant asserts [**Ground 10(m)**] that he received ineffective assistance of counsel because counsel did not "thoroughly and properly" cross-examine Ms. Villalobos. Respondent submits that counsel's decision to cross-examine this witness in the manner that he chose was reasonable under *Strickland*. See *United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987) ("decisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature" and will not support an ineffective assistance claim); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Marzullo* not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness). Nor can Applicant prove a reasonable probability of a different result but for counsel's failure to impeach Ms. Villalobos, as now suggested by Applicant.

As discussed, Laurie Villalobos testified that she took a taxi to the Mill Inn sometime between 1:30 and 2:30 a.m. on March 13, 1997, in order to collect some money the victim owed her. Applicant was present and let her into the bar. The victim was "clearly distraught" and Villalobos could tell that the victim had been crying. Villalobos got her money and left. **R. pp. 2151-58**. This is well after co-workers left the victim locked inside of the bar, asleep on a pool table. **R. pp. 1103-11; 1142-50**. Thus, he was the last person seen with her while she was alive.

On cross-examination, defense counsel established that she had been drinking "four or five"

(or possibly more) mixed drinks on the evening of March 12;¹¹ that she did not see anything burning when she arrived at the Mill Inn between 1:30 and 2:30 a.m.; and that she could not remember the color of the victim's purse. Further, counsel inquired as to why she needed money in the early morning hours and established that she "was just going to stay out longer." Additionally, she did not remember seeing the victim's car in the parking lot, and she said that she had not come forward earlier with information about the case because "I didn't think I would be believed," since she could not "prove it." She likewise admitted that she was "not real clear on everything" but she remembered seeing the victim, the victim's purse and Applicant. **R. 2162-69.**

Counsel established that Ms. Villalobos was dating Carl Chaplin at the time, but she was in the process of separating from him at the time. She claimed that she told him that she had seen the victim on the evening of March 12. However, she did not remember mentioning seeing Applicant there, and she did not come forward because she did not think it was necessary to get involved. Counsel also inquired about her conversation with Tammy Gonzales, a witness who had previously testified and who had discussed the case with her the evening before her testimony, counsel's questions suggesting that Gonzales had told Ms. Villalobos that the prosecution's case was going badly. **R. 2169-72.**

As part of the defense, trial counsel presented Carl Chaplin, a man who testified that he was dating Ms. Villalobos in March 1997. According to Mr. Chaplin, Ms. Villalobos never mentioned going at the Mill Inn (the crime scene) and seeing Applicant there on the evening of March 12, 1997. Also, Mr. Chaplin testified that he had seen Ms. Villalobos recently, but she did not mention seeing Applicant at the Mill Inn on the evening of March 12, 1997. **R. 2224-26.** However, Respondent

¹¹ She stated that she remembered the date because it is her brother's birthday. **R. 2162.**

respectfully requests a hearing concerning trial counsel's handling of this witness' testimony because the allegation raises a factual dispute for resolution by this Court. *United States v. Rodriguez*, 53 F.3d 1439, 1449 (7th Cir. 1995) ("[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result'").

In **Ground 10(n)**, Applicant asserts that his right to due process was violated because the trial judge permitted the State to introduce expert testimony regarding the results of hair analysis on hair found clutched in the victim's hand at the crime scene. Again, Respondent submits that this allegation raises a direct appeal issue that is procedurally barred by § 17-27-20(b), *Drayton v. Evatt*, *supra*, and *Simmons v. State*, *supra*, because it was preserved by a contemporaneous objection and could have been raised, if at all, on direct appeal.

In **Ground 10(o)**, Applicant attacks appellate counsel's failure to raise as an issue on appeal that Lt. Powell (sic) was erroneously permitted to testify that he found a "match" when comparing Applicant's known head hairs with hairs found clutched in the victim's hand and on her chest at the crime scene. This allegation lacks merit.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). Where ineffective assistance of appellate counsel is alleged, to get relief the PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. *Id.*

Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

As noted, Applicant strenuously argued at trial and on appeal that his statement admitting guilt was inadmissible because it "was the product of organized police trickery and coercion where law enforcement undisputedly set-up appellant with what was proved to be a ruse of false evidence about an inculpatory hair found underneath the victim." He also objected to the testimony of Officer Albert Hallman that SLED Agent Joseph Powell, who compared head hairs found at the scene with known standards from Applicant, told Hallman he "found matching characteristics in one of the hairs." R. 1253-54. Defense counsel argued that "matching" was "not an inappropriate term because within this field there's a comparison made and similarities found ... Anyway, that's the testimony for Agent Powell." R. 1254, I. 19-1255, I. 2.

Officer Hallman then testified that the hairs "matched." He then relayed this information to investigators with the North Charleston Police Department. R. 1555-56. While Officer Hallman had testified on direct examination that Applicant had a "rat tail" hairstyle at the time of the offense, defense counsel's cross-examination elicited that Hallman "believe[d] that he did." Also, Hallman admitted that he had not measured the maximum length of his hair at the time. R. 1340-41.

SLED Lt. Joseph Powell, the supervisor of SLED's trace evidence section, subsequently testified without objection that Officer Hallman had brought several hairs lifted from the victim's

hand and body, as well as known head hairs from Dana Chaples and Applicant on March 14, 1997. He compared these hairs and found that a long "blond to brown hair" from Applicant's known head hairs was microscopically consistent (or a microscopic "match") with a similar hair found at the scene. However, he could not determine that the hair came from Applicant. **R. 1366-75; 1379-83.**

On cross-examination, defense counsel established that Lt. Powell did not take any photo micrographs of the hairs that he had examined on March 14 because his comparison microscope did not have that capability at the time. **R. 1401-02.** Further, defense counsel and the prosecutor subsequently met with Lt. Powell and he said that mitochondrial DNA or perhaps other DNA analysis could be performed on the hair found at the scene. Also, Lt. Powell testified that his section no longer performs the type of analysis done in this case because DNA testing has proven in some cases that there is no match when the hair analysis had indicated a match. **R. 1403-05.**

Defense counsel then established that, using the type of testing Lt. Powell had performed, about one in every six thousand people could provide hair consistent with the hair found at the scene. **R. 1406-07.** Lt. Powell also conceded that there was "[a] lot of controversy in the forensic community about the use of the term 'match.' The controversy arises from when you are saying 'match' are you saying 'absolutely no question about it fingerprint' or are you saying 'oh, they're close'?" The same controversy arises from use of the term "consistent." However, the term match is appropriately used in hair analysis. **R. 1407-08.**

Finally, defense counsel presented his own expert in mitochondrial DNA analysis, Dr. Terri Melton, who testified that she was originally contacted by the Solicitor's Office about performing mitochondrial DNA analysis on hair fragments. However, the prosecution did not contact her about testifying at trial. She found that the hairs submitted to her had degraded. So, she had to employ "an ancient DNA analysis." She testified that degradation can be caused by laboratory contamination

and opined that there was such contamination in the samples submitted to her. She further testified that her report showed that “if the type obtained for the reagent blank control is subtracted from the mixture of types [of DNA] in the hair sample, the sequence developed from the zero five six K. one, Wesley Myers['] type, does not match the sequence presumed to be the hair type.” She then reported that this finding would be inconclusive because she only had one site in the mixture from which she could definitively exclude someone from the mixture and she needed two sites to be conclusive. **R. 2536-47.**

She then reported that this finding would be inconclusive because she only had one site in the mixture from which she could definitively exclude someone from the mixture and she needed two sites to be conclusive, pursuant to her company’s protocol. However, she opined that the hair “simply did not appear to have the same type as [Applicant]. **R. 2547-49.**

Based upon the present record, Respondent submits that appellate counsel could not have been deficient in failing to raise as an issue on appeal that Lt. Powell (sic) was erroneously permitted to testify that he found a “match” when comparing Applicant’s known head hairs with hairs found clutched in the victim’s hand and on her chest at the crime scene. There clearly was no objection to Lt. Powell’s testimony on this basis at trial. In the absence of a contemporaneous objection, the South Carolina Supreme Court would not address the merits of such an argument on appeal. *State v. Torrence*, 305 S.C. 45, 60-69, 406 S.E.2d 315, 323-28 (1991) (Toal, J., concurring in result) (abrogating the doctrine of *in favorem vitae* review and requiring contemporaneous objection or motion in trial court to preserve issue for appellate review in capital cases); *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (issue must be presented to and passed upon by trial judge to be preserved for appellate review).

To the extent Applicant alleges appellate counsel was ineffective for not raising counsel’s

objection to Hallman's testimony, which his citation to page 1255 would suggest, then he cannot prove any prejudice from counsel's failure to raise the issue because counsel's cross-examination of Officer Hallman, the examination of Lt. Powell and the presentation of Dr. Melton's testimony clearly established the limitations of a "match" in hair analysis, and that DNA testing was inconclusive. Further, the objection raised goes to the weight Applicant feels the testimony should receive rather than its admissibility. As such, it could not serve as the basis for reversal on appeal. *State v. Carter*, 344 S.C. 419, 425 n. 8, 544 S.E.2d 835, 838 n. 8 (2001); *Seaboard Coast Line R. v. Harrelson*, 262 S.C. 43, 46-47, 202 S.E.2d 4, 5-6 (1974). Respondent therefore submits that it is entitled to summary judgment on this allegation.

In **Ground 10(p)**, Applicant contends that trial counsel was ineffective for not advising Applicant to testify in his own defense. Respondent would request a hearing on this allegation.

In **Ground 10(q)**, Applicant contends that trial counsel was ineffective for not thoroughly investigating or attempting to present evidence of third party guilt. In *State v. Gregory*, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534-35 (1941), the South Carolina Supreme Court set forth the applicable law where a defendant seeks to introduce evidence that another person may have committed the offense(s) for which he is charged:

'[T]he evidence offered by accused as to the commission of the crime by another must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.' . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by

way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is, more probably guilty.

(Citations omitted). Unless Applicant's evidence satisfies this standard, he cannot prevail on his ineffective assistance claim. However, this allegation raises a factual dispute requiring a hearing.

Applicant alleges in **Ground 10(r)** that he "is actually innocent of [Teresa] Haught's murder and the arson. Respondent, however, submits that a claim of actual innocence, standing alone, does not state a claim upon which Post-Conviction Relief may be granted, since a challenge to the insufficiency of the evidence is not a cognizable allegation. S.C. Code Ann. § 17-27-20(a)(6) ("... this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction").

The PCR Act does permit allegations that an applicant is entitled to a new trial on after-discovered evidence, see § 17-27-20(a)(4).¹² However, Applicant does not specifically allege any

¹²To prevail on a motion for a new trial based upon after-discovered evidence, a criminal defendant must establish that the after-discovered evidence:

- (1) Is such that it would probably change the result if a new trial were granted;
- (2) Has been discovered since the trial;
- (3) Could not in the exercise of due diligence have been discovered prior to trial;
- (4) Is material; and
- (5) Is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999), citing, *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993). To satisfy the first prong of this test, a criminal defendant must show that the after-discovered evidence is credible. *Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001), *cert. denied*, 535 U.S. 946 (2002) (finding that defendant was not entitled to new trial or re-sentencing proceeding based on recent affidavit by mentally ill eyewitness confessing to murder because eyewitness was not credible); *Hayden v. State*, 278 S.C. 610, 299 S.E.2d 854

after-discovered evidence which would entitle him to a new trial, apart from the conclusory statement that “evidence of his innocence has been revealed through post-trial investigations. Respondents therefore move for dismissal of this allegation.

Applicant alleges in **Ground 10(s)** that he was deprived of his right to due process because he supposedly was not present during critical stages of his trial. Specifically, he contends that he was not present when (1) counsel for the parties reached an agreement regarding the admissibility of letters from the F.B.I.;¹³ (2) Juror Jawana Stephens was dismissed (**R. 579-80; 598-99**); (3) Juror Sarah Doctor was dismissed by the trial judge (**R. 2681**); (4) supposed communications between jurors and the trial judge indicating a deadlock; and (5) communication by Juror Patricia White and the trial judge in which she admitted that she knew Applicant.¹⁴

Again, Respondent submits that this allegation raises issues that are procedurally barred by § 17-27-20(b), *Drayton v. Evatt, supra*, and *Simmons v. State, supra*, because they could have been raised, if at all, at trial and on direct appeal. Therefore, Respondent is entitled to summary judgment on this allegation.

Likewise, Applicant’s allegation that he was deprived of his right to due process because the trial

(1983) (evidence offered by defendant in support of new trial motion would not likely have changed the result if a new trial was given because it was not credible); *State v. Morrison*, 246 S.C. 575, 145 S.E.2d 15 (1965) (refusal to grant a new trial on ground of after-discovered affidavit by inmate who confessed and thought he had nothing to lose was not an abuse of discretion).

¹³ Applicant inserts that the record implies “off-the-record rulings” but the record only implies that counsel were able to reach an agreement regarding the admissibility of these documents.

¹⁴ Respondent does not concede that Applicant had the constitutional right to be present at any of the five matters enumerated above or that his presence was not waived. Rather, Respondent relies upon the procedural bar in § 17-27-20(b), *Drayton v. Evatt, supra*, and *Simmons v. State, supra*.

judge supposedly had “off-the record communications with jurors” [**Ground 10(t)**]. Again, Respondent submits that this allegation raises issues that are procedurally barred by § 17-27-20(b), *Drayton v. Evatt, supra*, and *Simmons v. State, supra*, because they could have been raised, if at all, at trial and on direct appeal. Therefore, Respondent is entitled to summary judgment on this allegation.

The only specific instance relied upon in this allegation occurs on **R. p. 1010**. It is clear, however, that the trial judge made defense counsel aware of the juror’s desire to communicate with the judge and defense counsel’s response was, “Another one?” Thus, defense counsel could have raised an objection and the issue could have been ruled upon at trial and direct appeal. Moreover, *the only reasonable inference from the response of defense counsel is that the trial judge advised counsel of prior communications between him and any other juror(s)*. All of those instances likewise could have been argued at trial and on direct appeal, to the extent counsel felt there was a good faith basis to object.

The remaining portion of **Ground 10(t)** concerns possible communications between the trial judge and jurors where nothing was transcribed. As noted, the only reasonable inference is that the trial judge would have advised defense counsel of any communication(s) and counsel could have preserved the issue(s) by objection(s). Regardless of this inference, however, it was Applicant’s burden to present an adequate record on appeal. *E.g., Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (appellant has the burden of providing court with sufficient record on which to make a decision.); *Harkins v. Greenville County*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (same). *See also* Rule 210(h), SCACR (“[T]he appellate court will not consider any fact which does not appear in the Record on Appeal”). He could have requested the Court Reporter

to transcribe all communications but, apparently, did not.¹⁵ Therefore, any complaint of this nature could have been raised at trial and on appeal, and the present allegation is thus barred in PCR by § 17-27-20(b), *Drayton v. Evatt, supra*, and *Simmons v. State, supra*.

In **Ground 10(u)**, Applicant contends that he was denied due process because Juror Patricia White did not reveal on *voir dire*, but admitted in in post-verdict interviews that she had known Applicant for two years before the trial began. Respondent submits that this allegation is barred in state PCR. If Juror White knew Appellant before the trial, it is only fair to assume that he knew her, as well. Therefore, the alleged misconduct does not appear to be something which was discovered after the trial and could not have been discovered prior to trial by exercise of due diligence; and he should have alerted the trial judge, through counsel, that additional *voir dire* of this juror was reasonably necessary.

Again, Respondent submits that this allegation raises issues that are procedurally barred by § 17-27-20(b), *Drayton v. Evatt, supra*, and *Simmons v. State, supra*, because they could have been raised, if at all, at trial and on direct appeal. Therefore, Respondent is entitled to summary judgment on this allegation.

Next, Applicant alleges that jurors committed misconduct by engaging in group prayer during the trial, thereby depriving him of due process. [**Ground 10(v)**]. However, Respondent submits that this allegation does not state a cognizable claim for relief.

It is axiomatic that the Court may not consider juror testimony as to any other “matter or statement occurring during the course of the jury’s deliberations or the effect of anything upon any . . . juror’s mind or emotions as influencing the juror to assent or dissent from the verdict . . . or

¹⁵ This argument in no way implies that trial or appellate counsel were ineffective, only that there were, allegedly, one or more communications between the trial judge and a juror(s) which are not reflected in the transcript.

concerning the juror's mental process in connection therewith." *See* Rule 606(B), SCRE. *See also* *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995) ("Normally, juror testimony involving internal misconduct is competent only when necessary to ensure due process. . .").

To the extent Applicant's allegation is that the prayer occurred during deliberations, it is clearly barred by 606(b). *State v. Johnson*, 968 S.W.2d 123, 134 (Mo.1998) (claim "that the jurors prayed and read scripture at the beginning of the guilt phase determination" was held to be "not subject to challenge. The law is clear: jurors may not impeach the verdict with testimony 'of any partiality or misconduct that transpired [in the jury room], nor speak of the motives which induced or operated to produce the verdict.' " *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984), citing *State v. Underwood*, 57 Mo. 40, 52 (1874). In sum, this Court concludes that the trial court did not abuse its discretion in failing to declare a mistrial *sua sponte* and that defense counsel was not ineffective for failing to raise objections"); *State v. Virk*, 2001 WL 210682, *1 (Wash.App. Div. 1, filed Mar. 5, 2001) (unpublished) ("Because the juror stated his belief in the verdict at the jury poll, the juror did not commit misconduct by praying"), *review denied*, 144 Wash.2d 1010, 31 P.3d 1185 (2001). Even if the prayer(s) occurred at another point(s) during the trial, Applicant is still not entitled to a hearing thereon because prayer by a juror or jurors during trial, whether individually or collectively, does not constitute extraneous prejudicial information or rise to a due process violation on which a Court may receive juror testimony or affidavits. *E.g.*, *State v. Setzer*, 136 Idaho 477, 480, 36 P.3d 829, 832 (2001) (Court disagreed with defendants characterization that "the prayer with which the jury began its deliberations was an 'outside religious influence.' The Court held that "[w]hile the prayer may have been an unconventional component of jury deliberations, it was not an 'influence' favoring either side in the trial, and none of the affidavits describe this prayer as an effort to influence juror votes in any way"); *State v. Copeland*, 530 So.2d 526, 544 (La. 1998)

(“Religious services among jurors do not constitute a substantial deprivation of constitutional rights necessary to overcome the prohibition against juror testimony”); *Allen v. State*, 21 S.W.2d 527 (Tex.Cr.App. 1929).

Applicant alleges in **Ground 10(w)** that he was deprived of his right to direct and collateral review of his conviction and sentence because he there is not a transcript of certain proceedings that allegedly occurred during his trial. His allegation ignores that the appellant has the burden of presenting an adequate record on appeal. *E.g.*, *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. at 834 (appellant has the burden of providing court with sufficient record on which to make a decision.); *Harkins v. Greenville County*, 340 S.C. at 616, 533 S.E.2d at 891(same). *See also* Rule 210(h), SCACR.

Thus, it was his burden to obtain a transcript and he could have raised the inability to do so by contemporaneous objection at trial and by argument on appeal. He did not do so. Therefore, Respondent submits that this allegation raises an issue that is procedurally barred by § 17-27-20(b), *Drayton v. Evatt, supra*, and *Simmons v. State, supra*, because it could have been raised, if at all, at trial and on direct appeal. As a result, Respondent is entitled to summary judgment on this allegation.

Applicant alleges in **Ground 10(x)** that the trial judge gave an erroneous jury instruction on the presumption of innocence. Again, Respondent submits that this allegation raises an issue that is procedurally barred by § 17-27-20(b), *Drayton v. Evatt, supra*, and *Simmons v. State, supra*, because it could have been raised, if at all, at trial and on direct appeal. Therefore, Respondent is entitled to summary judgment on this allegation.

Applicant alleges in **Ground 10(y)** that trial counsel was ineffective because he did not object to the trial judge’s erroneous jury instruction on the presumption of innocence. Respondent

submits that it is entitled to summary judgment because Applicant cannot show any prejudice from counsel's failure to object to this instruction. *See Strickland*, 466 U.S. at 687 (“[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed”).

In his opening remarks to the jury, the trial judge briefly instructed the jurors on Applicant's right not to testify, and the state's burden of proof to prove his guilt beyond a reasonable doubt and the presumption of innocence. He specifically instructed jurors as follows:

“But I tell you that sitting at that table as I told you earlier this morning or yesterday, he's just as innocent as you and I, unless and until the State, if indeed they can, convince twelve of you of his guilt beyond a reasonable doubt, because he doesn't have to prove, do anything, wouldn't have to move from that table, nor his attorney. The State has the burden of proving him guilty beyond a reasonable doubt.

So you're going to be looking at what's a reasonable doubt? I'll tell you more about it later. But it's said that a reasonable doubt is a doubt that would make a reasonable person hesitate to act in his or her most important affairs. And as I said, I'll be telling you more about it later. Just use those words “reasonable doubt” like you would in your everyday affairs.”

R. p. 1013 l. 1- 22.

The trial judge instructed jurors at the conclusion of the trial, in pertinent part, that:

“Of course by now you know that this is a case in which the State charges Wesley Myers with two offenses, murder and third degree arson. And to these indictments he pleads not guilty. And remember, I told you at the beginning of the case, I said sitting at that table with his attorney he's just as innocent as you and I, unless and until the State of South Carolina, if indeed they can . . . convince twelve of you of his guilt beyond a reasonable doubt, because if you have a reasonable doubt, you must find him not guilty.”

R. p. 2681 l. 14 - p. 2682 l. 3.

The trial judge then defined “reasonable doubt” as “a doubt which would make a reasonable person hesitate to act in his or her most important affairs.” He emphasized that a criminal case

requires “more powerful proof” than the “more likely true than not” in civil cases, and he emphasized that:

“Suspicion, however strong, does not suffice to sustain a conviction, nor is probability. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt.”

R. pp. 2682-83. *See State v. Darby*, 324 SC 114, 477 SE2d 710 (1996) (approving similar jury instructions on reasonable doubt).

Jury instructions should be considered as a whole and, if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994). The United States Supreme Court has held that the standard governing review of a supposedly ambiguous jury instruction is whether there is a reasonable likelihood the jury applied the challenged instruction in a way that violates the Constitution. *Boyde v. California*, 494 U.S. 370 (1990). *See also Estelle v. McGuire*, *supra*; *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) (same).

Applying this standard to the case at bar, it is clear that the trial judge did not give an erroneous charge on the presumption of innocence. There is simply no way in which the trial judge’s instruction can be viewed as having shifted the burden of proof to appellant, or in any way lessening the state’s burden of proof. *See State v. Copeland*, 278 SC 572, 580, 300Se2d 63, 68 (1982).

Applicant alleges in **Ground 10(z)** that the trial judge gave an erroneous jury instruction on his right not to testify, which deprived him of his privilege against self-incrimination. Again, Respondent submits that this allegation raises an issue that is procedurally barred by § 17-27-20(b), *Drayton v. Evatt*, *supra*, and *Simmons v. State*, *supra*, because it could have been raised, if at all, at trial and on direct appeal. Therefore, Respondent is entitled to summary judgment on this allegation.

In **Ground 10 (aa)**, Applicant alleges that trial counsel was ineffective for failing to object

to the trial judge's jury instruction on his right not to testify. Applicant maintains that this jury instruction erroneously deprived him of his privilege against self-incrimination because it did not include any language the jury was not to draw an adverse inference from his failure to testify. Respondent, again, submits that he is entitled to summary judgment on this allegation because Applicant cannot show any prejudice from trial counsel's failure to object to a jury instruction which did not deprive him of a constitutional right.

As discussed, jury instructions must be considered as a whole. If they are free from error, when read as a whole, isolated portions which may be misleading do not constitute reversible error. *State v. Smith, supra*. Further, the standard governing review of supposedly ambiguous jury instructions is whether there is a reasonable likelihood the jury applied the challenged charge in a way that violates the constitution. *Boyed, and Aleksey, supra*.

Here, the trial judge gave the previously-discussed jury instructions on the presumption of innocence and the definition of "reasonable doubt." He further charged jurors that he was the judge of the law and it was his deed to instruct them on it. **R. p. 2686**. Then, he instructed the jurors as follows:

"Well, what is the law that I need to tell you to apply to the facts as only you can find? Well, in the first place, as I told you earlier, the defendant did not take the stand, didn't testify. You can't use that against him because you remember at the beginning of the case I told you that he didn't even have to get up from that table, nor his attorney. He is merely exercising one of his constitutional rights by not testifying. So when you go back in the jury room don't even discuss the fact that he did not testify."

R. p. 2686 l. 24 - p. 2687 l. 13.

When the trial judge's jury instructions are reviewed as a whole, including his opening comments to the jury and his charge on the presumption of innocence, the State's burden of proof the definition of "reasonable doubt", it is clear that the jury instruction given by him did not deprive

him of his privilege against self-incrimination and in no way shifted the burden of proof to him to present any evidence. Therefore, Applicant could not have been prejudiced by trial counsel's failure to object and respondents are entitled to summary judgment on this allegation.

Applicant next asserts [Ground 10(bb)] that his right to due process was violated because Justice Costa M. Pleicones, who sat as a member of the South Carolina Supreme Court and authored the Court's Opinion on direct appeal from his conviction and sentence, also presided over a motions hearing in the trial court. As Applicant's allegation makes clear, the record reflects that Justice Pleicones presided over the hearing. Thus, a motion to recuse could have been raised by appellate counsel, to the extent counsel thought it should have been made.¹⁶ As a result, Respondent submits that this allegation raises an issue that is procedurally barred by § 17-27-20(b), *Drayton v. Evatt*, *supra*, and *Simmons v. State*, *supra*, because it could have been raised, if at all, on direct appeal. Therefore, Respondent is entitled to summary judgment on this allegation.

Applicant's final allegation [Ground 10(cc)] is that appellate counsel was ineffective for not moving to recuse Justice Pleicones from sitting as a member of the South Carolina Supreme Court on direct appeal. Respondent would request a hearing to determine if Applicant can demonstrate personal bias, which would support a recusal motion.

The Code of Judicial Conduct requires a judge to "disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned. *Christy v. Christy*, 317 S.C. 145, 452 S.E.2d 1 (Ct.App.1994). Absent evidence of judicial prejudice, a judge's failure to disqualify himself

¹⁶ Counsel would have been required to submit an accompanying affidavit in support of such a motion, since the present record, standing alone does not require recusal. Rule 224(c), SCACR.

will not be reversed on appeal. *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993). It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. *Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996); *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996). Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature. *Id* at 497, 531 S.E.2d at 566.

The current allegation does not reflect nor allege any personal bias or judicial prejudice, nor can Respondent fathom that any would exist. This is particularly true since Justice Pleicones' participation at the motions hearing was not the only time the trial court reviewed the issues raised originally. Instead, they were revisited by Judge Rawl. However, the current allegation creates a factual issue, to the extent Applicant asserts there was personal bias, and Respondent requests a hearing on this allegation.

V.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, having made its Return, Respondent, therefore, requests a hearing on Applicant's allegations 10(a), 10(e), 10(g), 10(i), 10(j), 10(m), 10(p), 10(q) and 10(cc). Respondent moves for summary judgment on all other allegations, for the reasons set forth above.

Respectfully submitted,

CHARLES M. CONDON
Attorney General

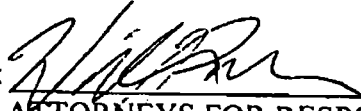
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III

Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 
ATTORNEYS FOR RESPONDENT

October 31, 2005.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Wesley Max Myers, #273328,)
 Applicant,)

05-CP-10-3113

v.)

CERTIFICATE OF SERVICE

Jon Ozmint, South Carolina Director)
 of Department of Corrections, and)
 Henry McMaster, Attorney General)
 of South Carolina,)
 Respondents.)

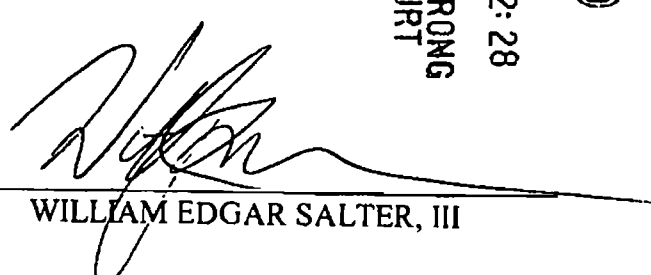
I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's Return in the foregoing action on Applicant by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Susan B. Hackett, Esquire
 P.O. Box 11744
 Columbia, SC 29211

John H. Blume, III
 P.O. Box 11744
 Columbia, SC 29211

This 31st day of October, 2005.

FILED
 2005 NOV -9 PM 2:28
 JULIE J. ARMSTRONG
 CLERK OF COURT


 WILLIAM EDGAR SALTER, III

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CA No. 05-CP-10-3113
	)	
WESLEY MAX MYERS,	)	
<i>Applicant,</i>	)	
	)	MEMORANDUM IN SUPPORT OF
v.	)	MOTION FOR LEAVE TO CONDUCT
	)	DISCOVERY
JON OZMINT, South Carolina Director	)	
of Department of Corrections, and HENRY	)	
MCMASTER, Attorney General of South	)	
Carolina,	)	
<i>Respondents.</i>	)	

Applicant, Wesley Max Myers, filed a Motion for Leave to Conduct Discovery on July 26, 2005. The motion has not yet been ruled upon. In the motion, Applicant apprized this Court why good cause allows him to conduct discovery. *See* Motion for Leave to Conduct Discovery (hereinafter Discovery Motion) ¶ 3. In this pleading, Applicant sets forth in greater detail why discovery should be permitted.

The circumstances surrounding Applicant's trial and conviction raise serious questions with respect to, *inter alia*, police evidence handling, trial counsel's representation of Applicant, juror misconduct, and presentation of evidence at trial. To adequately investigate these potentially meritorious issues, Applicant needs to utilize civil discovery procedures.

ARGUMENT IN SUPPORT OF APPLICANT'S RIGHT TO DISCOVERY

South Carolina authorizes a noncapital applicant for post-conviction relief (PCR) to conduct discovery if, in the judge's discretion, there is good cause shown. S.C. CODE ANN. § 17-27-150(A). Applicant submits that requisite good cause exists for this Court to allow discovery. Specifically, this Court should find good cause because permitting discovery would allow Applicant to: (1) narrow the contested issues at the PCR hearing; (2) gather and examine

important evidence not previously available at prior stages of Applicant's legal proceedings; (3) obtain relevant discoverable information essential to presenting a complete case at an evidentiary hearing; and (4) no state funds will be required.

A. Narrowing of Issues at PCR Hearing.

Applicant's Application for Post-Conviction Relief currently sets forth thirty-three separate grounds for relief. See Application for Post-Conviction Relief (hereinafter PCR Application) §§ 10-11. The grounds for relief are based upon undersigned counsel's review of the trial record, review of trial counsel's file, review of some documents obtained through FOIA requests and counsel's preliminary investigation. By conducting discovery, Applicant will be able to determine which grounds for relief are most viable, thereby narrowing the issues to be subsequently contested at the PCR hearing. In this same vein, "[i]nformation obtained through discovery will likely eliminate the need for a number of witnesses to be called to testify at the [PCR] hearing." Discovery Motion ¶ 3. Thus, allowing discovery will prevent unnecessary expenditure of judicial resources and court time, and it will afford Applicant more effective representation at the PCR hearing.

B. Evidence Not Available at Prior Stages of Trial.

Applicant was tried in the Court of General Sessions. As such, civil discovery procedures were not available to him during his trial or direct appeal, and Applicant was unable to invoke the full range of civil discovery devices of Rules 26-37, SCRPC. In a PCR hearing, however, "[a]ll rules and statutes applicable in civil proceedings are available." S.C. CODE ANN. § 17-27-80.

Allowing Applicant to conduct discovery would ensure that Applicant and his counsel have complete access to all relevant and admissible evidence. Not only will this enable

Applicant to present a more complete case at his PCR hearing, it will help insure justice was done given the substantial questions that have arisen regarding the fundamental fairness and accuracy of applicant's conviction.

C. Evidentiary Questions.

1. Hair Evidence.

Applicant believes that his due process rights were violated when the prosecution failed to properly preserve extremely valuable hair evidence which was gathered from the victim's body at the scene of the crime. Questions still exist as to whether the hair evidence was actually destroyed or if it was merely suppressed, but as shown *infra*, Applicant was denied due process in either case.

When there is "bad faith on the part of the police, failure to preserve potentially useful evidence . . . constitute[s] a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). If the defendant is unable to show bad faith, he may instead demonstrate that the State failed to preserve evidence, the exculpatory value of which was apparent before its destruction, and that other evidence of comparable value is not obtainable by other means. *See State v. Mabe*, 306 S.C. 355, 358-59, 412 S.E.2d 386, 388 (S.C. 1991); *State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (S.C. 2001). While the prosecution does not have an "absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance," *Youngblood*, 488 U.S. at 58, a showing of bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed," *id.* at 56.

A colorable case of bad faith exists in Applicant's case. Rather than having only marginal evidentiary value, the hair evidence in Applicant's case was virtually the *only* piece of

physical evidence used against him at trial. As such, the exculpatory or inculpatory nature of the hair was invaluable to both Applicant and the prosecution. Police knew the hair was between six and seven inches in length. Before Applicant was arrested, he met with police several times face-to-face and was photographed by the police; it would have been reasonably clear to them that, due to differences in length, the hair recovered from the victim's body could not have come from Applicant. Police knew that Applicant's hair was not as long as the hair recovered from the victim. Far from the kind of conduct which the Supreme Court held in *Youngblood* does not rise to the level of bad faith, this case potentially involves much more intentional action.

The recovered hair was certainly exculpatory evidence, and the police knew or should have known the same. Clearly, "the police themselves by their conduct indicate[d] that the evidence could form a basis for exonerating" Applicant, *id.* at 58, by refusing to have the hair DNA-tested until ordered to do so by the court and thereafter purportedly misplacing the hair. The failure to properly preserve the hair establishes a *prima facie* case of bad faith, and Applicant was denied due process. *See id.* at 56.

Applicant was also denied due process under the alternative *Mabe* analysis. As shown above, the exculpatory value of the unpreserved hair evidence was apparent. Additionally, there was no evidence of comparable value available to Applicant. The hair was the only forensic evidence believed to be from the killer which was recovered from the victim's body, and it was therefore by far the most valuable piece of potentially exonerative evidence. Under either *Mabe* test, Applicant's due process rights were violated.

When the prosecution suppresses "evidence favorable to an accused upon request" and "the evidence is material either to guilt or to punishment," a defendant's due process rights are violated. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In Applicant's case, police failed to

as well as request the production of any relevant documents in the possession of law enforcement and the Solicitor's office.

2. Destroyed Biological Evidence.

Applicant's due process rights were violated under *Cheeseboro* and *Mabe* when the prosecution failed to ensure the preservation of certain biological evidence gathered by the Medical Examiner's Office. Dr. Clay Nichols obtained various organ samples as well as oral, rectal, and vaginal swabs from the victim during an autopsy. The victim was found with her pants unbuttoned, her shirt open, and her bra torn away, suggesting that there may have been a sexual element to the murder. For this reason, any tests performed on the swabs revealing the presence of bodily fluids such as semen would have been both very important to the prosecution and potentially exonerative for Applicant. However, tests were never conducted on the swabs, and they were instead stored in a freezer at the Medical University of South Carolina. Three months thereafter, the freezer allegedly experienced a meltdown, and all the swabs were destroyed.

The potentially exonerating nature of the forensic evidence gathered by the Medical Examiner's Office was apparent to the prosecution before the evidence was lost; if the forensic evidence was tested then or now for the presence of semen or other bodily fluids, the results of the test would be highly relevant a correct determination whether applicant or someone else committed the offense in this case. Similarly, results indicating the presence of such fluids *not* matching Applicant would be highly exculpatory. Like the hair evidence, no evidence of comparable value was available to Applicant; the victim's body was cremated, and the contents of the freezer were completely destroyed. The prosecution should have immediately tested the

biological samples, and the failure to preserve the evidence violates Applicant's due process rights under *Cheeseboro* and *Mabe*.

In order for Applicant to make a fair representation of these issues at an evidentiary hearing, he will need to depose individuals from the Medical Examiner's Office and request the production of documents associated therewith.

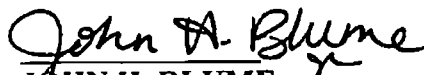
D. Counsel is Retained.

Applicant has retained counsel in this matter. For this reason, funds to conduct discovery will not be required from the Office of Indigent Defense if this Court allows discovery; any money spent on depositions or other discovery devices would be the private expenditure of Applicant and his family. To allow discovery, then, would improve the quality of Applicant's case while at the same time preserving State resources.

CONCLUSION

For the foregoing reasons, Applicant submits that he has shown good cause pursuant to S.C. CODE ANN. § 17-27-150(A) and respectfully requests that this Court grant his Motion for Leave to Conduct Discovery.

Respectfully submitted,



JOHN H. BLUME

Blume, Weyble, & Norris LLC

P.O. Box 11744

Columbia, SC 29211

(803) 765-1044

July 30th, 2007.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WESLEY MAX MYERS,)

Applicant,)

v.)

JON OZMINT, South Carolina Director
of Department of Corrections, and HENRY
MCMASTER, Attorney General of South
Carolina,)*Respondents.*)IN THE COURT OF COMMON PLEAS
CA No. 05-CP-10-3113

CERTIFICATE OF SERVICE

I, Jill A. Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of applicant's Memorandum in Support of Motion to Conduct Discovery in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Jeanette Van Ginhoven, Esquire
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29201

This the 30th day of July, 2007, in Columbia, South Carolina.


JILL A. RIDER

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WESLEY MAX MYERS,
Applicant,)

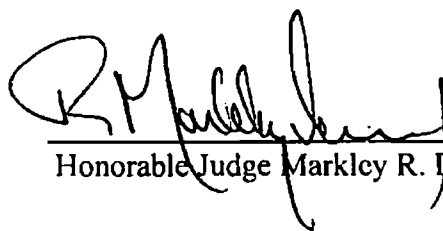
v.)

JON OZMINT, South Carolina Director
of Department of Corrections, and HENRY
MCMASTER, Attorney General of South
Carolina,)
Respondents.)IN THE COURT OF COMMON PLEAS
CA No. 05-CP-10-3113

ORDER

Applicant, Wesley Max Myers, has moved for access to evidence for the purpose of conducting DNA testing. Specifically, applicant requests access to Defendant's exhibit 29, a bloody dollar bill. On August 20, 2007, a motions hearing was held. For the reasons set forth by counsel for Applicant at the hearing, this Court grants his motion for access to the evidence. Counsel for Applicant and the Respondents shall confer and establish an agreed upon procedure for preserving the chain of custody of the item.

IT IS SO ORDERED.



Honorable Judge Markley R. Dennis, Jr.

August 11, 2007.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WESLEY MAX MYERS #273328,)

Applicant,)

v.)

JON OZMINT, South Carolina Director
of Department of Corrections, and HENRY
MCMASTER, Attorney General of South
Carolina,)*Respondents.*)IN THE COURT OF COMMON PLEAS
CA No. 05-CP-10-3113AMENDED
APPLICATION FOR
POST-CONVICTION RELIEF

1. Place of Detention: Kirkland Correctional Institute, 4344 Broad River Road, Columbia, South Carolina, 29210.
2. Name and location of Court which imposed sentence: Charleston County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder: 97-GS-10-4319
 - (b) Arson in the Third Degree: 97-GS-10-4320
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Murder: Thirty years on March 7, 2001
 - (b) Arson in the Third Degree: Ten years on March 7, 2001
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.

(ii) The United States Supreme Court.

- (b) The result in each Court to which applicant appealed:
 - (i) Convictions and sentences were affirmed.
 - (ii) Petition for writ of certiorari was denied.
- (c) The date of each result:
 - (i) Convictions and sentences affirmed on May 11, 2004;
 - (ii) Petition for writ of certiorari was denied on November 8, 2004.
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004)
 - (ii) *State v. Myers*, No. 04-6194.

9. Not applicable.

10 & 11 GROUNDS FOR RELIEF WITH SUPPORTING FACTS

- 10(a) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to move for a change of venue.*
- 11(a) Criminal defendants are entitled to a fair trial before twelve and impartial jurors. Consequently, they are entitled to a change of venue under circumstances where media coverage has poisoned or inflamed the jury pool and the defendant's right to a fair trial before a fair and impartial jury has been compromised. Applicant's case garnered a large amount of media attention. In fact, shortly after applicant made incriminating statements to the police, three days after the murder, the media were summoned to the police station where the applicant was being interviewed. Carla Lothery, a local reporter, testified at applicant's trial that she was summoned to the police station on that day along with numerous other members of the local media. The media were called by the police to witness applicant's "perp walk;" i.e., his walk from the police department building to a vehicle waiting to transport him to the jail. Applicant made a public incriminating statement when questioned by these media representatives, which was videotaped and later broadcast widely in the area and reported in the print media, as were reports that applicant had "confessed" during custodial interrogation. Despite this media saturation, trial counsel did not move for a change of venue. Thus no hearing was held to determine the extent to which the jury pool may have been contaminated by the media coverage. Here, due to the content of the media coverage - a "perp walk" and a "confession" - a presumption of prejudice in the community, arose such that applicant could not receive a fair trial. *Irvin v. Dowd*, 366 U.S. 717 (1961), *Patton v. Yount*, 467 U.S. 1025 (1984).

- 10(b) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to properly handle testimony of a defense expert in pretrial hearings.*
- 11(b) Trial counsel called as a witness Dr. Saul Kassin, a psychologist who is an expert with regard to false confessions. Trial counsel initially called Dr. Kassin to testify at the *Jackson v. Denno* hearing. At that hearing, Kassin testified to everything that he planned to testify to before the jury in an attempt by trial counsel to suppress applicant's incriminating statements. It was extremely unlikely that the court would have suppressed applicant's statement based on Dr. Kassin's testimony at the pretrial hearing because the testimony went to the reliability of the statement, not whether it was obtained in violation of the Fifth, Sixth or Fourteenth Amendments. In fact, it would have been unprecedented had the court determined that the statement was not admissible. Calling Dr. Kassin at the pretrial hearing had two adverse consequences: (1) the judge substantially limited Dr. Kassin's testimony at trial; and, (2) the solicitors trying the case, having been privy to a full preview of Dr. Kassin's testimony, were able to cross-examine Dr. Kassin more effectively. Given that there was no potential benefit to calling Dr. Kassin at a pre-trial hearing, trial counsel rendered ineffective assistance of counsel when he exposed his defense strategy to the prosecution during a pretrial hearing. *Strickland v. Washington*, 466 U.S. 668 (1984); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).
- 10(c) *Applicant's right to a fair trial guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of the misconduct of the police and solicitors with regard to hair evidence.*
- 11(c) Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has an affirmative duty to make available to the defense any evidence which is exculpatory. In this case, the police recovered a hair from the crime scene that was 6-8" long. This was virtually the only piece of physical evidence that "linked" applicant to the scene of the crime on the night of the crime. Photographs taken of applicant at the time he was arrested demonstrate that his hair was shorter than 6" long. Consequently the police must have known (or reasonably suspected) that the hair did not come from applicant's head. Although the hair did allegedly "match" applicant's hair after a microscopic comparative hair analysis, such tests are hardly conclusive.¹ In fact, numerous convictions founded on comparative microscopic hair analysis have since been overturned when DNA evidence has proven that the person convicted under the former method was innocent of the crime. The police should have immediately requested DNA testing, which was available and more reliable than comparative

¹Applicant does not concede that the found hair "matched" his hair. In fact, the FBI concluded that there was no microscopic comparison between applicant's hair and the hair found in the victim's hand. In addition, applicant asserts the characterization of the found hair as a "match" to his own is violative of his constitutional rights. *See infra*.

microscopic hair analysis, or turned the hair over to applicant and his counsel so that they could arrange for DNA testing immediately. Instead, the police and solicitor refused to either have the hair tested or turn it over to the defense until a judge ordered that the hair be tested for DNA, approximately three years after the crime. Then it was found that the police had misplaced the hair. The solicitor turned over hairs to the defense for DNA testing claiming that the hair from the scene had been found, but no one has been able to affirmatively document that the hairs given to the defense were in fact the same hairs as those found at the crime scene. The solicitor's office should have ensured that the hair, as potentially exculpatory evidence, was safeguarded. Letters from trial counsel's files as well as some included in the court files from applicant's trial show a train of communication between applicant's trial counsel and the solicitor's office regarding this hair evidence. The letters reveal trial counsel's persistent attempts to convince the solicitor's office to make the hair available to the defense and the solicitor's office continued refusal to do so. This conduct by the police and solicitor's office was improper. A hair was eventually provided to the defense team, and the DNA results were argued by the prosecution to be inconclusive, but, interpreted properly, it clearly was not applicant's hair. If applicant had been able to obtain DNA testing at a reasonable point in the proceedings, instead of halfway through the trial four years later, the testing likely would have revealed that applicant was not the perpetrator and he may never have been arrested or tried for this offense.

- 10(d) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when the court admitted evidence regarding witnesses' opinions about the defendant's demeanor because this evidence was inadmissible hearsay and character evidence.*
- 11(d) The trial court improperly admitted testimony concerning applicant's nonverbal behavior. First, Lt. Kevin McHale stated that applicant "was trying to display a remorse and sadness and a sense of loss, but it did not—his nonverbal behaviors did not agree with what he was trying to do. He couldn't work up tears. When a person cries, I mean when it's real, they cry. They boo-hoo. Their snot runs out. You ain't stopping them." Tr. 1518–1519. Later, McHale stated that during the hour-and-a-half long interview with applicant, "his nonverbal behavior [was] screaming out." Tr. 1532. McHale claimed that applicant was "reliving" the murder of Teresa Haught, implying that Applicant's demeanor proved that he killed Ms. Haught. Tr. 1533. Another witness, Detective George Tetanich, stated that when applicant learned that his girlfriend, Teresa Haught, may have died, applicant "got real upset, fell down on the ground, crying, and, and really, really upset. He then, about thirty seconds later, he got back up" and spoke about problems with the electricity in the building. Tr. 1553. When asked about applicant's reaction, Tetanich stated that "when he fell down on the ground, totally upset and, and I mean really boo-hooing, it seemed like a, a pretty typical reaction to [sic] someone who'd just found out that there was a dead person in there that was probably his girlfriend, but it didn't last. It was only like maybe thirty seconds and he was back up, explaining to me in a calm voice about the fire and how it could start and the origins of it and I thought that was a little suspicious that he wouldn't still be upset in that short a period of

time.” Tr. 1554. Later, Tetanich described applicant’s demeanor in the police station when he allegedly confessed to killing Haught: applicant was crying, “tears were just flowing.” Tr. 1581. Asked if applicant’s reaction was different in the interrogation room, Tetanich stated that “he was definitely upset now because now he, he realized that the proof was there that he had, you know, and he himself had said that whoever’s hair that is, is going to be the one that killed her.” Tr. 1582. A third witness, Detective Melvin Cumbee, stated that applicant’s “hand was shaking, he was crying, and he rubbed the picture” of Teresa during the interrogation. Tr. 1808.

The testimony referenced above was inadmissible hearsay, character and improper lay opinion evidence. *See, e.g.*, S.C. Const. Ann. Art. I, § 14 (2004); S.C. Code Ann. § 17-23-60 (2004); *Crawford v. Washington*, 541 U.S. 36 (2004); *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972); *State v. Williams*, 285 S.C. 544, 548, 331 S.E.2d 354 (Ct. App.1985) (“Wordless conduct, such as the nod of the head or pointed finger, may be hearsay if it is intended as a communication.”); Rule 802, SCRE; Rule 404(b), SCRE. State and federal law prohibit the introduction of this type of evidence because such evidence allows the jury to rely on the opinions of the witnesses. It is the jury’s province to determine guilt or innocence. Furthermore, it is almost always wrong. Police officers are not any better than any other witnesses at assessing guilt or innocence based on behavior, and numerous studies indicate the type of behavioral assessments of guilt engaged in by the police in applicant’s case are grossly unreliable.

- 10(e) *Applicant’s right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel’s failure to object to inadmissible hearsay and character evidence testimony regarding applicant’s demeanor.*
- 11(e) During applicant’s trial, numerous inadmissible statements were made by prosecution witnesses. As discussed above, more than one police officer testified that applicant’s behavior was not normal and they knew from that, that applicant was guilty. These statements constitute hearsay and improper lay opinion. Under state and federal law, none of these statements should have been admissible. Trial counsel did not object to these statements at the time they were elicited, nor did he move to strike the statements once made. Trial counsel’s failure to object to improper hearsay testimony constitutes ineffective assistance of counsel. *See Strickland v. Washington, supra; Sanchez v. State*, 351 S.C. 270, 569 S.E.2d 363 (2002); *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001); *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (S.C. 2002).
- 10(f) *Applicant’s rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law, and to confront witnesses against him, as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law, were violated when the court admitted hearsay and character evidence concerning applicant’s relationship with the victim.*

- 11(f) Several witnesses testified regarding applicant's relationship with the victim. Margaret White testified that their relationship was "rocky." Tr. 1092. Similarly, Tammy Gonzalez and Dixie Justis also both testified applicant's and Haught's relationship was "very rocky." Tr. 1142; 2050. Ms. Justis elaborated that the defendant and the victim had a physical altercation long before the victim's death and that applicant stated that he was jealous over the victim. Tr. 2051-53. Billy Gene King testified that the defendant was possessive of the victim, and he described a physical altercation between the defendant and victim, which occurred several months before the incident. Tr. 2119 - 2121. All of these statements were inadmissible hearsay (or based on inadmissible hearsay, i.e., what they were told by the victim), and/or inadmissible character evidence. The evidence of physical altercations between applicant and victim was evidence of prior bad acts, which is inadmissible under South Carolina law. *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001); *State v. Pierce*, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997); *State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996); *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993); *State v. (Terry) Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996); *State v. (Grover Lee) Smith*, 300 S.C. 216, 218-9, 387 S.E.2d 245, 247 (1989); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); *State v. Humphries*, 346 S.C. 435, 451, 551 S.E.2d 286, 295 (Ct. App. 2001), *rev'd on other grounds*, 354 S.C. 87, 579 S.E.2d 613 (2003); *State v. Kennedy*, 339 S.C. 243, 247, 528 S.E.2d 700, 702 (Ct. App. 2000), *aff'd*, 348 S.C. 32, 558 S.E.2d 527 (2002); *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993); Rule 802, SCRE; Rule 404(b), SCRE.
- 10(g) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated when trial counsel failed to object to inadmissible hearsay and character evidence testimony concerning applicant's relationship with the victim.*
- 11(g) Despite the fact that the statements described above concerning applicant's relationship with the victim was inadmissible hearsay and character evidence, trial counsel failed to object. Trial counsel's failure to do so was deficient performance. *Strickland, supra*. As discussed above, South Carolina case law is clear that evidence of prior bad acts, which places the defendant's character at issue, is inadmissible, as, of course, is hearsay. Counsel's deficient performance also prejudiced applicant. *Strickland, supra*; *Cherry, supra*.
- 10(h) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when the court admitted inadmissible hearsay and character evidence in the form of testimony from the victims' mother alleging that applicant's father slept with a gun and applicant had hit his mother.*
- 11(h) During the trial, Dixie Justis, the mother of the victim, alleged that Applicant "had hit his mother [and that] his father slept with a gun under his pillow." Tr. 2062. Trial counsel originally moved to strike the response but then reconsidered, telling the judge to "tell [the jury] nothing." Tr. 2063, 2064. This testimony was inadmissible and should have been

stricken. "South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." *State v. Braxton*, 343 S.C. 629, 634; 541 S.E.2d 833 (2001) (citing Rule 404(b), SCRE; *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923)). Even if the evidence is clear and convincing and falls within one of these exceptions, it must be excluded if the danger of unfair prejudice to the defendant substantially outweighs the evidence's probative value. *Id.* (citing Rule 403, SCRE; *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999)). Here, the state did not "set forth the logical relevance" between the incidents Ms. Justis alleged occurred between Applicant and his family and the state's version of the events that transpired the night Teresa Haught was killed. *Douglas*, 302 S.C. at 511. The testimony therefore was, like in *Braxton*, *supra*, character evidence that impermissibly suggested that the defendant "acted in conformity with that particular character or trait on a particular occasion." *Braxton*, 343 S.C. at 634. Thus, this testimony was inadmissible for the purpose of proving s applicant's intent and state of mind the night Haught was killed, and should have not been admitted. *See Douglas*, 302 S.C. at 511. Further, even if, *arguendo*, there was a link between the incidents with applicant's parents and Haught's death, the evidence should have been excluded as it was unduly prejudicial, in violation of Rule 403. *See id.*; Rule 403, SCRE.

- 10(i) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by trial counsel's failure to object to inadmissible hearsay and character evidence from the victim's mother that applicant's father slept with a gun under his pillow and applicant had hit his mother.*
- 11(i) The testimony described above is clearly inadmissible hearsay and character evidence. Trial counsel's failure to object to this evidence was deficient performance that prejudiced applicant. *Strickland, supra, Cherry, supra.*
- 10(j) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by trial counsel's failure to call applicant's mother and father to refute testimony regarding a prior assault on his mother and that his father slept with a gun under his pillow due to fear of applicant.*
- 11(j) Applicant and his parents deny the allegations lodged by the victim's mother at trial. Applicant's parents were willing and able to testify at trial that applicant never assaulted his mother and that his father did not sleep with a gun under the pillow. Nevertheless, trial counsel did not call applicant's parents to testify to directly refute the victim's mother's statements. This failure constituted ineffective assistance of counsel. *Strickland, supra, Cherry, supra.*
- 10(k) *Applicant's rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law, and to confront*

witnesses against him, as guaranteed by the Sixth Amendment of the United States Constitution and South Carolina law, were violated when the court admitted hearsay evidence about why a witness waited until the trial started to tell the authorities that she saw the applicant at the scene of the murder.

- 11(k) On the last day of trial, the state called a surprise witness named Laurie Villalobos. Her testimony included inadmissible hearsay statements. As a surprise witness, Villalobos' testimony could have been excluded from the trial. *See Yates v. Yates*, 2003 WL 22328180 (Ct. App. S.C. 2003)(unpublished); *Jackson v. H&S Oil Co., Inc.*, 263 S.C. 407, 211 S.E.2d 225 (1975); *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974). Villalobos testified that she went to the Mill Inn sometime between 1:30 and 2:30 A.M. the night Teresa Haught was killed to ask Haught to give her the rest of the money for a check that Haught cashed for her four to seven days earlier. Tr. 2154. Villalobos claimed she knocked on the door and applicant let her in to the bar. Tr. 2150, 2155. She claimed that Haught was at the bar, drinking, and "was clearly distraught." Tr. 2155. Villalobos said she asked Haught "if there was anything [she] could do for her," and Haught replied that she would be "okay." Tr. 2156. They then talked about whether Haught would give Villalobos the money even though the check had not yet cleared. Tr. 2156. Haught gave Villalobos the money, and then Villalobos testified that she "was in the middle of a bad situation, so [she] left." Tr. 2157. Villalobos apparently told no one about the alleged conversation until she saw Tamyra Gonzales, who worked with Haught and testified in the trial, at a bar. Tr. 2159-60. Gonzales told her that applicant's attorney said he was not at the bar the night Haught was killed. Tr. 2161. Villalobos said she told Gonzales that she had seen him at the bar. Tr., 2161. Gonzales gave her the solicitor's phone number and Villalobos said she planned to call the next morning. Tr. 2161. Instead, an investigator from the state called her that evening. Tr. 2162. The next day, the state called Villalobos to testify. On cross examination, Villalobos admitted that she told her boyfriend at the time that she "had just seen Teresa there" and did not mention that applicant was with her. Tr. 2170.

This testimony was inadmissible hearsay evidence and character evidence, and thus applicant was denied the opportunity to cross-examine the witness at the time the statements were made. The testimony also bolstered Villalobos' credibility. Her testimony regarding seeing applicant at the Mill Inn on the night of the murder was crucial because it was the only direct evidence that applicant was present at the crime scene. *See, e.g., S.C. Const. Ann. Art. I, § 14* (2004); *S.C. Code Ann. § 17-23-60* (2004); *Crawford v. Washington, supra*; *Player, supra*.

- 10(l) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated when trial counsel failed to object to inadmissible hearsay testimony concerning the reasons a witness waited until the trial started to tell authorities that she saw the applicant at the scene of the murder.*
- 11(l) As noted above, Villalobos testified extensively regarding her reasons for speaking to authorities during the trial instead of during the investigation. All of this testimony was

inadmissible hearsay. Nevertheless, trial counsel failed to object. Trial counsel's failure amounted to ineffective assistance of counsel because prevailing professional norms required counsel to object, and his failure prejudiced petitioner. *Strickland, supra, Cherry, supra.*

- 10(m) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to thoroughly and properly examine a crucial prosecution witness.*
- 11(m) As noted above, Laurie Villalobos was the only witness who claimed to have seen applicant at the murder scene near the time of the murder. However she did not report what she saw until four years after the murder. Ms. Villalobos' testimony was extremely damaging to the defense, but at the same time was highly suspect. It appears that trial counsel was taken by surprise by this witness; if that is so, he should have requested that the judge grant a continuance in order to investigate Ms. Villalobos and her testimony. He did not make such a request. Furthermore, Ms. Villalobos had an extensive criminal record, including crimes involving an inherently dishonest nature, which were admissible impeachment evidence under the South Carolina Rules of Evidence.² Defendants have an absolute right under the Sixth Amendment to the United States Constitution to confront the witnesses against them. Part of the right of confrontation is impeachment of unreliable witnesses. Trial counsel's files indicate that he was in possession of a rap sheet revealing Ms. Villalobos' multiple prior convictions, and that he was in possession of this information prior to the time that Ms. Villalobos testified. Trial counsel did not make any attempt to impeach Ms. Villalobos with her prior convictions. Because Ms. Villalobos' testimony was a critical component of the state's case, trial counsel's failure to impeach her was also prejudicial.
- 10(n) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when the court admitted expert testimony about the results of hair comparison testing.*
- 11(n) Lt. Joe Powell, from South Carolina Law Enforcement Division, testified that the hair found in Teresa Haught's hand "matched" a hair taken from Applicant's head. *See, e.g.,* Tr. 1374, 1380, 1382-83. Asked if the hair was a match "[m]icroscopically," Powell replied, "[t]hat is correct." Tr. 1382. Powell further described the hair found in Haught's hand as likely dyed. Tr. 1380-81. He opined that the chance of the hair being someone else's was 1/6000. Tr. 1406-07. Finally, in the solicitor's opening statement, he stated that the hairs "matched." Tr. 1092. Reversing a conviction, the Tenth Circuit noted that "[i]t is undisputed that hair analysis, unlike fingerprint identification and DNA analysis, is not conclusive." *See*

²It also appears that some of the convictions may not have been provided to applicant's counsel. If true, then the prosecution's suppression of favorable, material information violated the Due Process Clause of the Fourteenth Amendment. *Giglio v. United States*, 405 U.S. 150 (1972). This would be a separate and independent ground for post-conviction relief.

Williamson v Ward, 110 F.3d 1508, 1520 n.13 (10th Cir. 1997). Further, “the most that hair analysts are willing to state is that hair samples are ‘consistent with’ each other and ‘could have’ come from the same source.” *Id.* see also *United States v. Brown*, 557 F.2d 541 (6th Cir. 1977) (holding that it was error to admit testimony by experts of newly developed scientific techniques of testing hair samples because there was no scientific acceptance of the techniques). Here, Lt. Powell testified that the hair found in Teresa Haught’s hand “matched” a hair taken from applicant’s head, see, e.g., Tr. 1374, 1380, 1382–83, a stronger claim than the “consistent with” standard set in *Williamson*. Thus, the use of the term “matched” violated applicant’s rights to due process and was not harmless error, given importance of the hair as evidence against applicant. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Illinois v. Allen*, 397 U.S. 337 (1970); *State v. Starnes*, 307 S.C. 247, 414 S.E.2d 582 (1991).

- 10(o) *Applicant’s right to the effective assistance of appellate counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by appellate counsel’s failure to appeal trial counsel’s objection to expert testimony offered by the state regarding results of hair comparison testing.*
- 11(o) Trial counsel objected to Lt. Powell’s characterization of the hair comparison testing results as yielding a “match.” Tr. 1255. Appellate counsel’s failure to appeal trial counsel’s objection to Lt. Powell’s testimony concerning the hair evidence was ineffective assistance of counsel. Lt. Powell’s characterization of the found hair as a “match” to applicant’s hair was improper testimony. As described above, microscopic hair analysis does not reveal matches, merely consistencies. Counsel’s failure to appeal trial counsel’s objection to this explosive testimony was deficient and caused applicant to suffer prejudice. *Strickland*, *supra*, *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Cherry*, *supra*.
- 10(p) *Applicant’s right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel’s failure to thoroughly investigate or attempt to introduce evidence of the guilt of a third party.*
- 11(p) Criminal defendants may introduce evidence of guilt of a third party both as a matter of South Carolina law and as a matter of federal constitutional law. See *State v. Mansfield*, 343 S.C. 66, 538 S.E.2d 257 (Ct. App.2000); *State v. McLeod*, 362 S.C. 73, 606 S.E.2d 215 (Ct. App.2004); *Holmes v. South Carolina*, 547 U.S. 319 (2006). Some evidence was presented tending to implicate Dana Chaples, i.e., Chaples was seen at the bar the night of the crime, drunk and trying to enter after closing. He also had scratches on his arm the next day and had shaved off a mustache between the fire and when he was questioned by the police. Other evidence which could have been presented more effectively includes the fact that a 6-8" inch blond hair was found at the scene. Trial counsel knew that applicant’s hair was shorter than

6" and thus the hair found at the scene could not have come from applicant's head. Trial counsel failed to determine the origin of the hair and also failed to bring to the attention of the trial court and jury that the hair could not have come from applicant's head. The solicitor's theory of the crime was that one man, applicant, acted alone in committing the murder and the solicitor relied heavily on the hair present on the victim's body at the scene as evidence of the identity of the killer. The hair itself only came from the head of one person. Under the solicitor's theory, the knowledge that the hair could have come from the head of Mr. Chaples is both exculpatory and inconsistent with applicant's guilt. Therefore evidence tending to implicate Mr. Chaples or others, was admissible evidence of third party guilt. In addition to Mr. Chaples, there was evidence available that other persons could have committed this offense. A man covered in soot was seen by witnesses near the Mill Inn soon after the fire and he made incriminating statements. This and other evidence of third party guilty should have been presented to the jury for its consideration.

- 10(q) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated because he is actually innocent of the charges.*
- 11(q) Considerable evidence exists to show applicant is actually innocent of Haught's murder and the arson. As described above, evidence of third party guilt existed at the time of trial and was in the possession of trial counsel. In addition, other evidence of applicant's innocence, including DNA evidence and evidence of other perpetrators, has been revealed through post-trial investigations. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice.
- 10(r) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United State Constitution and South Carolina law was violated when he was not present during critical stages of the criminal trial.*
- 11(r) Defendants are guaranteed the "right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730 (1987). A criminal defendant has the right "to be present in his own person whenever his presence has a relation, reasonably substantial to the fullness of his opportunity to defend against the charge." *Faretta v. California*, 422 U.S. 806 (1975). Similarly, the South Carolina Supreme Court has held "[a] defendant has the right to be present at any stage of the criminal proceeding that is *critical to its outcome* if his or her presence would contribute to the fairness of the procedure." *Starnes v. State*, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991). Applicant's absence from the argument and rulings regarding the admissibility of evidence, the excusal (or retention) of jurors and a supplemental jury instruction after the jury indicated it was deadlocked violated applicant's right to be present.

First, at applicant's trial, a hair found in the victim's hand provided crucial physical evidence. On the record, the prosecution and defense debated the admissibility of DNA

analysis conducted on the hair. Tr. 1257-81. However, extensive and decisive arguments persisted off-the-record at the trial judge's direction. The record alludes to these discussions: "THE COURT: Now the two of you all go in my chambers right now and you figure out how you want to straighten this thing out." Tr. 1279. The next day, the first words on the record are by the trial judge: "You want to publish them?" Tr. 1286. It does not become apparent until later that "them" refers to letters from the Federal Bureau of Investigations, which conducted the DNA analysis, indicating that the DNA of the found hair does not match applicant's DNA. Tr. 1291. This initial statement coupled with the trial judge's directive for the attorneys to go to his chambers clearly implies off-the record rulings regarding the admissibility of the DNA evidence. These statements also indicate the defendant was not present during these arguments or rulings.

Second, on February 26, 2001, Juror Jawana Stephens was selected as the second juror in applicant's trial. Tr. 579-80. Then, inexplicably, Juror Stephens was no longer on the jury. After jury selection, the judge took a short recess. Tr. 598. When the judge and jury returned, the judge stated: "Where's Mr. Carlton? You're a full time juror now. That poor young lady, she almost had a heart attack, I think." Tr. 598-99. Although the record lacks any reference to any discussions with Juror Stephens or among the attorneys regarding Juror Stephens' dismissal from the jury, the statements of the trial judge on the record imply that an off-the-record hearing occurred because the trial judge possessed information not contained on the record. The record completely lacks any indication that applicant attended this off-the-record hearing. Another juror, Sarah Doctor, was dismissed immediately preceding jury instructions at the end of the trial. After returning to the bench from a short break, the trial judge stated "We had to send Miss Doctor home. She, as you know, forgot her medicine." Tr. 2681. He then instructed the jury regarding the law of the case. Again, the transcript lacks any reference to what transpired between the judge and Juror Doctor preceding her dismissal. Further, the transcript lacks any indication that applicant was present for the determination that Juror Doctor would be dismissed.

Third, post-trial interviews reveal that the jurors sent the trial judge a note indicating they were deadlocked and the trial judge provided them with additional instructions. On file with the Charleston County Clerk is the note the jurors sent the judge with the judge's initials placed on the note. However, the transcript of the proceedings lacks any reference to the jury's note or the contents of the additional instructions provided by the trial judge.

Fourth, post-trial interviews with Juror Patricia White disclosed that she informed the trial judge multiple times that she knew the applicant. However, the record lacks any reference to these discussions. The record also lacks any indication that applicant was present for these discussions. Applicant's absence during this interaction between the judge and the juror violated applicant's rights. *Stincer, supra*. The error is particularly egregious in this circumstance because the juror claims she actually knew applicant. Although applicant need not prove that his assistance would have been valuable, it is apparent that applicant's presence at the hearings to determine whether Juror White could remain on the jury would have been valuable to his attorney.

10(s) *Applicant's right to be tried by an impartial jury as guaranteed by the United States*

Constitution and South Carolina law was violated as a result of the trial judge's off-the-record communications with jurors.

- 11(s) The Sixth Amendment to the United States Constitution guarantees to criminal defendants the right to be tried by a fair and impartial jury of their peers. The trial court engaged in several instances of communicating with the jurors, both individually and as a group, off-the-record. As discussed above, one of the reasons for requiring that such interactions be on the record is to minimize the risk of improper bias being created in the minds of the jurors due to communications with the judge. The transcript reveals at least one instance where the trial court had an in camera, off-the-record discussion with an individual juror (Tr. 1010), the contents of which was never subsequently made known. The evidence remaining from the trial contains several notes that were passed between the jury and the judge at various point throughout the trial; none of these notes were ever referenced in the transcript. Since the communications between the trial judge and the jurors are not transcribed in the record, it is impossible to know exactly what was said, but there is a high risk of unfair prejudice or bias resulting from these communications. Any interaction that made the jury less fair or impartial is inherently prejudicial to applicant as it deprived him of his right to be judged by a fair and impartial jury.
- 10(t) *Applicant's right to direct and collateral review of his conviction and sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of an inadequate record.*
- 11(t) All criminal defendants are entitled to some form of appellate review of the proceedings that led to their convictions and punishments. An appellate court cannot conduct a proper and thorough review of the lower court's proceedings if it does not have a complete record before it. The record in this case is not adequate because several crucial incidents are absent from it. The discussion and agreement regarding the admissibility of the crucial physical hair evidence, the two independent incidents of summary juror dismissals, communications between the judge and jurors, and numerous other conversations were held off-the-record, the contents of many of which remain unknown. Because of these lapses in the record from the trial, the appellate review of applicant's conviction and sentence cannot be complete. See *Hanno, supra*.
- 10(u) *Applicant's right to the presumption of innocence as guaranteed by federal and state law was violated as result of the trial court's erroneous instruction regarding the presumption of innocence.*
- 11(u) At trial, the judge instructed the jury: "And remember, I told you at the beginning of the case, I said at that table with his attorney he's just as innocent as you and I, unless and until the State of South Carolina, if indeed they can, convict -- convince twelve of you of his guilt beyond a reasonable doubt, because if you have a reasonable doubt you must find him not guilty." Tr. 2681. Although the trial judge expresses that the defendant is innocent "unless

and until" the state proves his guilt, the instruction failed to convey to the jury that a defendant's innocence persists unless the state provides competent evidence of the defendant's guilt beyond a reasonable doubt. In addition, the instruction fails to use the familiar "presumed innocent" language. *See State v. Peden*, 157 S.C. 459, 154 S.E. 658 (1930), *State v. Danelly*, 116 S.C. 113, 107 S.E. 149 (1921).

- 10(v) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to object to the trial court's erroneous instruction regarding the presumption of innocence.*
- 11(v) As indicated above, the trial court incorrectly instructed the jury regarding the presumption of innocence. Trial counsel's failure to object to the faulty instruction constituted ineffective assistance of counsel. *Strickland, supra*.
- 10(w) *Applicant was denied his Sixth Amendment right to the effective assistance of counsel as a result of trial counsel's failure to obtain a psychological evaluation to determine if there was a psychological explanation as to why applicant would be more likely than other individuals to falsely confess to a crime he did not commit.*
- 11(w) While trial counsel did call an expert in false confessions, counsel did not call a psychologist or psychiatrist to testify that applicant had any particular psychological traits that would make him more suggestible and/or more likely to confess falsely. Applicant will present such expert testimony at the PCR hearing.
- 10(x) *Applicant was denied his Sixth Amendment right to the effective assistance of counsel as result of trial counsel's failure to secure an independent pathologist to testify regarding deficiencies in the autopsy including, but not limited to, the failure to determine whether the victim had been sexually assaulted and the failure to gather fingernail scrapings. Furthermore, applicant was denied the right to the effective assistance of counsel as a result of trial counsel's failure to impeach the SLED hair examiner with a report from the FBI finding no similar microscopic characteristics between applicant's known hair and the hair found in the victim's hand.*
- 11(x) The ground for relief states the relevant facts.
- 10(y) *Applicant was denied his right to a fair trial conducted in conformity with due process as a result of the police and prosecution's failure to pursue leads of other potential suspects, to preserve evidence and to disclose all exculpatory, material evidence.*
- 11(y) The police and prosecution failed to pursue leads that may have led to evidence exculpating applicant and/or incriminating other potential suspects. For example, the police had blood from Mr. Chaples, but failed to do any DNA testing to determine if the hair found on the

victim's body or DNA found on a dollar bill in the victim's pocket may have been consistent with his DNA profile. Blood taken from Mr. Meyers could also have been tested to determine if he had elevated CO2 levels. CO2 testing was conducted on the victim's blood, but not on Mr. Meyers. Had his CO2 levels been normal, it would have tended to exculpate him. Furthermore, pubic swabs and other evidence taken at the time of autopsy were lost when the refrigerator at MUSC failed and the evidence was subsequently destroyed. Had that evidence been preserved, it could have been (and still could be) tested for relevant biological evidence.

- 10(z) *Newly discovered evidence material to applicant's guilt demonstrates that he was wrongfully convicted of this offense and that he is entitled to a new trial.*
- 11(z) Newly discovered evidence, specifically DNA test results on evidence obtained from the crime scene, establish that applicant was not the perpetrator of this offense. Therefore, applicant is entitled to a new trial at which a jury may hear all evidence relevant to his guilt-or-innocence.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina law? No
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief?
No
 - (c) any petition in the United States Supreme Court for certiorari other than petitioners, if any already specified in (8)? No
 - (d) any other petitions, motions or applications in this or any other Court?
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - (b) the name and location of the Court in which each was filed:
 - (c) the disposition thereof:
 - (d) the date of each such disposition

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed?

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

- (a) which grounds have been presented:
- (b) the proceedings in which each ground was raised

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

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

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

18. (a) (i) Timothy Clay Kulp, of the Riesen Law Firm, 3660 West Montague Ave., North Charleston, South Carolina 29418

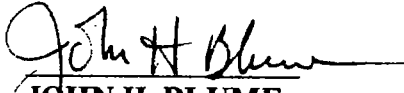
(a)(ii) Robert Dudek of the South Carolina Office of Appellate Defense, 1205 Pendleton Street Ste. 306, Columbia, South Carolina 29201.

(b)(i) Trial

(b)(ii) Appeal

19. Applicant seeks relief from his convictions and sentences.
20. Applicant is not under sentence from any other court.

Respectfully submitted,


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December 15, 2011.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
WESLEY MAX MYERS,)
)
Applicant,)
)
v.)
)
JON OZMINT, South Carolina Director)
of Department of Corrections, and HENRY)
MCMASTER, Attorney General of South)
Carolina,)
)
Respondents.)
)
_____)

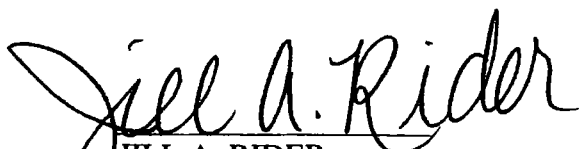
IN THE COURT OF COMMON PLEAS
CA No. 05-CP-10-3113

CERTIFICATE OF SERVICE

I, Jill A. Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of applicant's Amended Application for Post-Conviction Relief in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Matthew Friedman, Esquire
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29201

This the 15th day of December, 2011, in Columbia, South Carolina.


JILL A. RIDER

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CA No. 05-CP-10-3113
	)	
WESLEY MAX MYERS #273328,	)	SECOND
<i>Applicant.</i>	)	AMENDED
	)	APPLICATION FOR
v.	)	POST-CONVICTION RELIEF
	)	
JON OZMINT, South Carolina Director	)	
of Department of Corrections, and HENRY	)	
MCMASTER, Attorney General of South	)	
Carolina,	)	
<i>Respondents.</i>	)	

1. Place of Detention: Kirkland Correctional Institute, 4344 Broad River Road. Columbia, South Carolina, 29210.
2. Name and location of Court which imposed sentence: Charleston County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder: 97-GS-10-4319
 - (b) Arson in the Third Degree: 97-GS-10-4320
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Murder: Thirty years on March 7, 2001
 - (b) Arson in the Third Degree: Ten years on March 7, 2001
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.

- (ii) The United States Supreme Court.
- (b) The result in each Court to which applicant appealed:
 - (i) Convictions and sentences were affirmed.
 - (ii) Petition for writ of certiorari was denied.
- (c) The date of each result:
 - (i) Convictions and sentences affirmed on May 11, 2004;
 - (ii) Petition for writ of certiorari was denied on November 8, 2004.
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004)
 - (ii) *State v. Myers*, No. 04-6194.

9. Not applicable.

10 & 11

GROUND FOR RELIEF WITH SUPPORTING FACTS

- 10(a) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to move for a change of venue.*
- 11(a) Criminal defendants are entitled to a fair trial before twelve and impartial jurors. Consequently, they are entitled to a change of venue under circumstances where media coverage has poisoned or inflamed the jury pool and the defendant's right to a fair trial before a fair and impartial jury has been compromised. Applicant's case garnered a large amount of media attention. In fact, shortly after applicant made incriminating statements to the police, three days after the murder, the media were summoned to the police station where the applicant was being interviewed. Carla Lothery, a local reporter, testified at applicant's trial that she was summoned to the police station on that day along with numerous other members of the local media. The media were called by the police to witness applicant's "perp walk:" i.e., his walk from the police department building to a vehicle waiting to transport him to the jail. Applicant made a public incriminating statement when questioned by these media representatives, which was videotaped and later broadcast widely in the area and reported in the print media, as were reports that applicant had "confessed" during custodial interrogation. Despite this media saturation, trial counsel did not move for a change of venue. Thus no hearing was held to determine the extent to which the jury pool may have been contaminated by the media coverage. Here, due to the content of the media coverage - a "perp walk" and a "confession" - a presumption of prejudice in the community, arose such that applicant could not receive a fair trial. *Irvin v. Dowd*, 366 U.S. 717 (1961), *Patton v. Yount*, 467 U.S. 1025 (1984).

- 10(b) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to properly handle testimony of a defense expert in pretrial hearings.*
- 11(b) Trial counsel called as a witness Dr. Saul Kassin, a psychologist who is an expert with regard to false confessions. Trial counsel initially called Dr. Kassin to testify at the *Jackson v. Demmo* hearing. At that hearing, Kassin testified to everything that he planned to testify to before the jury in an attempt by trial counsel to suppress applicant's incriminating statements. It was extremely unlikely that the court would have suppressed applicant's statement based on Dr. Kassin's testimony at the pretrial hearing because the testimony went to the reliability of the statement, not whether it was obtained in violation of the Fifth, Sixth or Fourteenth Amendments. In fact, it would have been unprecedented had the court determined that the statement was not admissible. Calling Dr. Kassin at the pretrial hearing had two adverse consequences: (1) the judge substantially limited Dr. Kassin's testimony at trial; and, (2) the solicitors trying the case, having been privy to a full preview of Dr. Kassin's testimony, were able to cross-examine Dr. Kassin more effectively. Given that there was no potential benefit to calling Dr. Kassin at a pre-trial hearing, trial counsel rendered ineffective assistance of counsel when he exposed his defense strategy to the prosecution during a pretrial hearing. *Strickland v. Washington*, 466 U.S. 668 (1984); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).
- 10(c) *Applicant's right to a fair trial guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of the misconduct of the police and solicitors with regard to hair evidence.*
- 11(c) Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has an affirmative duty to make available to the defense any evidence which is exculpatory. In this case, the police recovered a hair from the crime scene that was 6-8" long. This was virtually the only piece of physical evidence that "linked" applicant to the scene of the crime on the night of the crime. Photographs taken of applicant at the time he was arrested demonstrate that his hair was shorter than 6" long. Consequently the police must have known (or reasonably suspected) that the hair did not come from applicant's head. Although the hair did allegedly "match" applicant's hair after a microscopic comparative hair analysis, such tests are hardly conclusive.¹ In fact, numerous convictions founded on comparative microscopic hair analysis have since been overturned when DNA evidence has proven that the person convicted under the former method was innocent of the crime. The police should have immediately requested DNA testing, which was available and more reliable than comparative

¹Applicant does not concede that the found hair "matched" his hair. In fact, the FBI concluded that there was no microscopic comparison between applicant's hair and the hair found in the victim's hand. In addition, applicant asserts the characterization of the found hair as a "match" to his own is violative of his constitutional rights. See *infra*.

microscopic hair analysis, or turned the hair over to applicant and his counsel so that they could arrange for DNA testing immediately. Instead, the police and solicitor refused to either have the hair tested or turn it over to the defense until a judge ordered that the hair be tested for DNA, approximately three years after the crime. Then it was found that the police had misplaced the hair. The solicitor turned over hairs to the defense for DNA testing claiming that the hair from the scene had been found, but no one has been able to affirmatively document that the hairs given to the defense were in fact the same hairs as those found at the crime scene. The solicitor's office should have ensured that the hair, as potentially exculpatory evidence, was safeguarded. Letters from trial counsel's files as well as some included in the court files from applicant's trial show a train of communication between applicant's trial counsel and the solicitor's office regarding this hair evidence. The letters reveal trial counsel's persistent attempts to convince the solicitor's office to make the hair available to the defense and the solicitor's office continued refusal to do so. This conduct by the police and solicitor's office was improper. A hair was eventually provided to the defense team, and the DNA results were argued by the prosecution to be inconclusive, but, interpreted properly, it clearly was not applicant's hair. If applicant had been able to obtain DNA testing at a reasonable point in the proceedings, instead of halfway through the trial four years later, the testing likely would have revealed that applicant was not the perpetrator and he may never have been arrested or tried for this offense.

- 10(d) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when the court admitted evidence regarding witnesses' opinions about the defendant's demeanor because this evidence was inadmissible hearsay and character evidence.*
- 11(d) The trial court improperly admitted testimony concerning applicant's nonverbal behavior. First, Lt. Kevin McHale stated that applicant "was trying to display a remorse and sadness and a sense of loss, but it did not—his nonverbal behaviors did not agree with what he was trying to do. He couldn't work up tears. When a person cries, I mean when it's real, they cry. They boo-hoo. Their snot runs out. You ain't stopping them." Tr. 1518–1519. Later, McHale stated that during the hour-and-a-half long interview with applicant, "his nonverbal behavior [was] screaming out." Tr. 1532. McHale claimed that applicant was "reliving" the murder of Teresa Haught, implying that Applicant's demeanor proved that he killed Ms. Haught. Tr. 1533. Another witness, Detective George Tetanich, stated that when applicant learned that his girlfriend, Teresa Haught, may have died, applicant "got real upset, fell down on the ground, crying, and, and really, really upset. He then, about thirty seconds later, he got back up" and spoke about problems with the electricity in the building. Tr. 1553. When asked about applicant's reaction, Tetanich stated that "when he fell down on the ground, totally upset and, and I mean really boo-hooing, it seemed like a, a pretty typical reaction to [sic] someone who'd just found out that there was a dead person in there that was probably his girlfriend, but it didn't last. It was only like maybe thirty seconds and he was back up, explaining to me in a calm voice about the fire and how it could start and the origins of it and I thought that was a little suspicious that he wouldn't still be upset in that short a period of

time.” Tr. 1554. Later, Tetanich described applicant’s demeanor in the police station when he allegedly confessed to killing Haught: applicant was crying, “tears were just flowing.” Tr. 1581. Asked if applicant’s reaction was different in the interrogation room, Tetanich stated that “he was definitely upset now because now he, he realized that the proof was there that he had, you know, and he himself had said that whoever’s hair that is, is going to be the one that killed her.” Tr. 1582. A third witness, Detective Melvin Cumbee, stated that applicant’s “hand was shaking, he was crying, and he rubbed the picture” of Teresa during the interrogation. Tr. 1808.

The testimony referenced above was inadmissible hearsay, character and improper lay opinion evidence. *See, e.g.*, S.C. Const. Ann. Art. I, § 14 (2004); S.C. Code Ann. § 17-23-60 (2004); *Crawford v. Washington*, 541 U.S. 36 (2004); *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972); *State v. Williams*, 285 S.C. 544, 548, 331 S.E.2d 354 (Ct. App. 1985) (“Wordless conduct, such as the nod of the head or pointed finger, may be hearsay if it is intended as a communication.”); Rule 802, SCRI; Rule 404(b), SCRE. State and federal law prohibit the introduction of this type of evidence because such evidence allows the jury to rely on the opinions of the witnesses. It is the jury’s province to determine guilt or innocence. Furthermore, it is almost always wrong. Police officers are not any better than any other witnesses at assessing guilt or innocence based on behavior, and numerous studies indicate the type of behavioral assessments of guilt engaged in by the police in applicant’s case are grossly unreliable.

- 10(c) *Applicant’s right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel’s failure to object to inadmissible hearsay and character evidence testimony regarding applicant’s demeanor.*
- 11(c) During applicant’s trial, numerous inadmissible statements were made by prosecution witnesses. As discussed above, more than one police officer testified that applicant’s behavior was not normal and they knew from that, that applicant was guilty. These statements constitute hearsay and improper lay opinion. Under state and federal law, none of these statements should have been admissible. Trial counsel did not object to these statements at the time they were elicited, nor did he move to strike the statements once made. Trial counsel’s failure to object to improper hearsay testimony constitutes ineffective assistance of counsel. *See Strickland v. Washington, supra; Sanchez v. State*, 351 S.C. 270, 569 S.E.2d 363 (2002); *Mathews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001); *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (S.C. 2002).
- 10(d) *Applicant’s rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law, and to confront witnesses against him, as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law, were violated when the court admitted hearsay and character evidence concerning applicant’s relationship with the victim.*

- 11(f) Several witnesses testified regarding applicant's relationship with the victim. Margaret White testified that their relationship was "rocky." Tr. 1092. Similarly, Tammy Gonzalez and Dixie Justis also both testified applicant's and Haught's relationship was "very rocky." Tr. 1142; 2050. Ms. Justis elaborated that the defendant and the victim had a physical altercation long before the victim's death and that applicant stated that he was jealous over the victim. Tr. 2051-53. Billy Gene King testified that the defendant was possessive of the victim, and he described a physical altercation between the defendant and victim, which occurred several months before the incident. Tr. 2119 - 2121. All of these statements were inadmissible hearsay (or based on inadmissible hearsay, i.e., what they were told by the victim), and/or inadmissible character evidence. The evidence of physical altercations between applicant and victim was evidence of prior bad acts, which is inadmissible under South Carolina law. *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001); *State v. Pierce*, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997); *State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996); *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993); *State v. (Terry) Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996); *State v. (Grover Lee) Smith*, 300 S.C. 216, 218-9, 387 S.E.2d 245, 247 (1989); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); *State v. Humphries*, 346 S.C. 435, 451, 551 S.E.2d 286, 295 (Ct. App. 2001), *rev'd on other grounds*, 354 S.C. 87, 579 S.E.2d 613 (2003); *State v. Kennedy*, 339 S.C. 243, 247, 528 S.E.2d 700, 702 (Ct. App. 2000), *aff'd*, 348 S.C. 32, 558 S.E.2d 527 (2002); *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993); Rule 802, SCRE; Rule 404(b), SCRE.
- 10(g) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated when trial counsel failed to object to inadmissible hearsay and character evidence testimony concerning applicant's relationship with the victim.*
- 11(g) Despite the fact that the statements described above concerning applicant's relationship with the victim was inadmissible hearsay and character evidence, trial counsel failed to object. Trial counsel's failure to do so was deficient performance. *Strickland, supra*. As discussed above, South Carolina case law is clear that evidence of prior bad acts, which places the defendant's character at issue, is inadmissible, as, of course, is hearsay. Counsel's deficient performance also prejudiced applicant. *Strickland, supra*; *Cherry, supra*.
- 10(h) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when the court admitted inadmissible hearsay and character evidence in the form of testimony from the victims' mother alleging that applicant's father slept with a gun and applicant had hit his mother.*
- 11(h) During the trial, Dixie Justis, the mother of the victim, alleged that Applicant "had hit his mother [and that] his father slept with a gun under his pillow." Tr. 2062. Trial counsel originally moved to strike the response but then reconsidered, telling the judge to "tell [the jury] nothing." Tr. 2063, 2064. This testimony was inadmissible and should have been

stricken. "South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." *State v. Braxton*, 343 S.C. 629, 634; 541 S.E.2d 833 (2001) (citing Rule 404(b), SCRE; *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923)). Even if the evidence is clear and convincing and falls within one of these exceptions, it must be excluded if the danger of unfair prejudice to the defendant substantially outweighs the evidence's probative value. *Id.* (citing Rule 403, SCRE; *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999)). Here, the state did not "set forth the logical relevance" between the incidents Ms. Justis alleged occurred between Applicant and his family and the state's version of the events that transpired the night Teresa Haught was killed. *Douglas*, 302 S.C. at 511. The testimony therefore was, like in *Braxton*, *supra*, character evidence that impermissibly suggested that the defendant "acted in conformity with that particular character or trait on a particular occasion." *Braxton*, 343 S.C. at 634. Thus, this testimony was inadmissible for the purpose of proving s applicant's intent and state of mind the night Haught was killed, and should have not been admitted. *See Douglas*, 302 S.C. at 511. Further, even if, *arguendo*, there was a link between the incidents with applicant's parents and Haught's death, the evidence should have been excluded as it was unduly prejudicial, in violation of Rule 403. *See id.*; Rule 403, SCRE.

- 10(i) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by trial counsel's failure to object to inadmissible hearsay and character evidence from the victim's mother that applicant's father slept with a gun under his pillow and applicant had hit his mother.*
- 11(i) The testimony described above is clearly inadmissible hearsay and character evidence. Trial counsel's failure to object to this evidence was deficient performance that prejudiced applicant. *Strickland, supra. Cherry, supra.*
- 10(j) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by trial counsel's failure to call applicant's mother and father to refute testimony regarding a prior assault on his mother and that his father slept with a gun under his pillow due to fear of applicant.*
- 11(j) Applicant and his parents deny the allegations lodged by the victim's mother at trial. Applicant's parents were willing and able to testify at trial that applicant never assaulted his mother and that his father did not sleep with a gun under the pillow. Nevertheless, trial counsel did not call applicant's parents to testify to directly refute the victim's mother's statements. This failure constituted ineffective assistance of counsel. *Strickland, supra, Cherry, supra.*
- 10(k) *Applicant's rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law, and to confront*

witnesses against him, as guaranteed by the Sixth Amendment of the United States Constitution and South Carolina law, were violated when the court admitted hearsay evidence about why a witness waited until the trial started to tell the authorities that she saw the applicant at the scene of the murder.

- 11(k) On the last day of trial, the state called a surprise witness named Laurie Villalobos. Her testimony included inadmissible hearsay statements. As a surprise witness, Villalobos' testimony could have been excluded from the trial. *See Yates v. Yates*, 2003 WL 22328180 (Ct. App. S.C. 2003)(unpublished); *Jackson v. H&S Oil Co., Inc.*, 263 S.C. 407, 211 S.E.2d 225 (1975); *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974). Villalobos testified that she went to the Mill Inn sometime between 1:30 and 2:30 A.M. the night Teresa Haught was killed to ask Haught to give her the rest of the money for a check that Haught cashed for her four to seven days earlier. Tr. 2154. Villalobos claimed she knocked on the door and applicant let her in to the bar. Tr. 2150, 2155. She claimed that Haught was at the bar, drinking, and "was clearly distraught." Tr. 2155. Villalobos said she asked Haught "if there was anything [she] could do for her," and Haught replied that she would be "okay." Tr. 2156. They then talked about whether Haught would give Villalobos the money even though the check had not yet cleared. Tr. 2156. Haught gave Villalobos the money, and then Villalobos testified that she "was in the middle of a bad situation, so [she] left." Tr. 2157. Villalobos apparently told no one about the alleged conversation until she saw Tamya Gonzales, who worked with Haught and testified in the trial, at a bar. Tr. 2159-60. Gonzales told her that applicant's attorney said he was not at the bar the night Haught was killed. Tr. 2161. Villalobos said she told Gonzales that she had seen him at the bar. Tr. 2161. Gonzales gave her the solicitor's phone number and Villalobos said she planned to call the next morning. Tr. 2161. Instead, an investigator from the state called her that evening. Tr. 2162. The next day, the state called Villalobos to testify. On cross examination, Villalobos admitted that she told her boyfriend at the time that she "had just seen Teresa there" and did not mention that applicant was with her. Tr. 2170.

This testimony was inadmissible hearsay evidence and character evidence, and thus applicant was denied the opportunity to cross-examine the witness at the time the statements were made. The testimony also bolstered Villalobos' credibility. Her testimony regarding seeing applicant at the Mill Inn on the night of the murder was crucial because it was the only direct evidence that applicant was present at the crime scene. *See, e.g., S.C. Const. Ann. Art. I, § 14* (2004); *S.C. Code Ann. § 17-23-60* (2004); *Crawford v. Washington, supra*; *Player, supra*.

- 10(l) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated when trial counsel failed to object to inadmissible hearsay testimony concerning the reasons a witness waited until the trial started to tell authorities that she saw the applicant at the scene of the murder.*
- 11(l) As noted above, Villalobos testified extensively regarding her reasons for speaking to authorities during the trial instead of during the investigation. All of this testimony was

inadmissible hearsay. Nevertheless, trial counsel failed to object. Trial counsel's failure amounted to ineffective assistance of counsel because prevailing professional norms required counsel to object, and his failure prejudiced petitioner. *Strickland, supra*. *Cherry, supra*.

- 10(m) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to thoroughly and properly examine a crucial prosecution witness.*
- 11(m) As noted above, Laurie Villalobos was the only witness who claimed to have seen applicant at the murder scene near the time of the murder. However she did not report what she saw until four years after the murder. Ms. Villalobos' testimony was extremely damaging to the defense, but at the same time was highly suspect. It appears that trial counsel was taken by surprise by this witness; if that is so, he should have requested that the judge grant a continuance in order to investigate Ms. Villalobos and her testimony. He did not make such a request. Furthermore, Ms. Villalobos had an extensive criminal record, including crimes involving an inherently dishonest nature, which were admissible impeachment evidence under the South Carolina Rules of Evidence.³ Defendants have an absolute right under the Sixth Amendment to the United States Constitution to confront the witnesses against them. Part of the right of confrontation is impeachment of unreliable witnesses. Trial counsel's files indicate that he was in possession of a rap sheet revealing Ms. Villalobos' multiple prior convictions, and that he was in possession of this information prior to the time that Ms. Villalobos testified. Trial counsel did not make any attempt to impeach Ms. Villalobos with her prior convictions. Because Ms. Villalobos' testimony was a critical component of the state's case, trial counsel's failure to impeach her was also prejudicial.
- 10(n) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated when the court admitted expert testimony about the results of hair comparison testing.*
- 11(n) Lt. Joe Powell, from South Carolina Law Enforcement Division, testified that the hair found in Teresa Haught's hand "matched" a hair taken from Applicant's head. See, e.g., Tr. 1374, 1380, 1382-83. Asked if the hair was a match "[m]icroscopically," Powell replied, "[t]hat is correct." Tr. 1382. Powell further described the hair found in Haught's hand as likely dyed. Tr. 1380-81. He opined that the chance of the hair being someone else's was 1/6000. Tr. 1406-07. Finally, in the solicitor's opening statement, he stated that the hairs "matched." Tr. 1092. Reversing a conviction, the Tenth Circuit noted that "[i]t is undisputed that hair analysis, unlike fingerprint identification and DNA analysis, is not conclusive." See

³It also appears that some of the convictions may not have been provided to applicant's counsel. If true, then the prosecution's suppression of favorable, material information violated the Due Process Clause of the Fourteenth Amendment. *Giglio v. United States*, 405 U.S. 150 (1972). This would a separate and independent ground for post-conviction relief.

Williamson v Ward, 110 F.3d 1508, 1520 n.13 (10th Cir. 1997). Further, “the most that hair analysts are willing to state is that hair samples are ‘consistent with’ each other and ‘could have’ come from the same source.” *Id.* see also *United States v. Brown*, 557 F.2d 541 (6th Cir. 1977) (holding that it was error to admit testimony by experts of newly developed scientific techniques of testing hair samples because there was no scientific acceptance of the techniques). Here, Lt. Powell testified that the hair found in Teresa Haught’s hand “matched” a hair taken from applicant’s head. see, e.g., Tr. 1374, 1380, 1382–83, a stronger claim than the “consistent with” standard set in *Williamson*. Thus, the use of the term “matched” violated applicant’s rights to due process and was not harmless error, given importance of the hair as evidence against applicant. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Illinois v. Allen*, 397 U.S. 337 (1970); *State v. Starnes*, 307 S.C. 247, 414 S.E.2d 582 (1991).

- 10(o) *Applicant’s right to the effective assistance of appellate counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated by appellate counsel’s failure to appeal trial counsel’s objection to expert testimony offered by the state regarding results of hair comparison testing and failure to raise on appeal that the admission of the anger management questionnaire violated the Fourteenth Amendment’s Due Process Clause.*
- 11(o) Trial counsel objected to Lt. Powell’s characterization of the hair comparison testing results as yielding a “match.” Tr. 1255. Appellate counsel’s failure to appeal trial counsel’s objection to Lt. Powell’s testimony concerning the hair evidence was ineffective assistance of counsel. Lt. Powell’s characterization of the found hair as a “match” to applicant’s hair was improper testimony. As described above, microscopic hair analysis does not reveal matches, merely consistencies. Counsel’s failure to appeal trial counsel’s objection to this explosive testimony was deficient and caused applicant to suffer prejudice. *Strickland*, *supra*; *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Cherry*, *supra*.
- 10(p) *Applicant’s right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel’s failure to thoroughly investigate or attempt to introduce evidence of the guilt of a third party.*
- 11(p) Criminal defendants may introduce evidence of guilt of a third party both as a matter of South Carolina law and as a matter of federal constitutional law. See *State v. Mansfield*, 343 S.C. 66, 538 S.E.2d 257 (Ct. App.2000); *State v. McLeod*, 362 S.C. 73, 606 S.E.2d 215 (Ct. App.2004); *Holmes v. South Carolina*, 547 U.S. 319 (2006). Some evidence was presented tending to implicate Dana Chaples, i.e., Chaples was seen at the bar the night of the crime, drunk and trying to enter after closing. He also had scratches on his arm the next day and had shaved off a mustache between the fire and when he was questioned by the police. Other

evidence which could have been presented more effectively includes the fact that a 6-8" inch blond hair was found at the scene. Trial counsel knew that applicant's hair was shorter than 6" and thus the hair found at the scene could not have come from applicant's head. Trial counsel failed to determine the origin of the hair and also failed to bring to the attention of the trial court and jury that the hair could not have come from applicant's head. The solicitor's theory of the crime was that one man, applicant, acted alone in committing the murder and the solicitor relied heavily on the hair present on the victim's body at the scene as evidence of the identity of the killer. The hair itself only came from the head of one person. Under the solicitor's theory, the knowledge that the hair could have come from the head of Mr. Chaples is both exculpatory and inconsistent with applicant's guilt. Therefore evidence tending to implicate Mr. Chaples or others, was admissible evidence of third party guilt. In addition to Mr. Chaples, there was evidence available that other persons could have committed this offense. A man covered in soot was seen by witnesses near the Mill Inn soon after the fire and he made incriminating statements. This and other evidence of third party guilty should have been presented to the jury for its consideration.

- 10(q) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated because he is actually innocent of the charges.*
- 11(q) Considerable evidence exists to show applicant is actually innocent of Haught's murder and the arson. As described above, evidence of third party guilt existed at the time of trial and was in the possession of trial counsel. In addition, other evidence of applicant's innocence, including DNA evidence and evidence of other perpetrators, has been revealed through post-trial investigations. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice.
- 10(r) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United State Constitution and South Carolina law was violated when he was not present during critical stages of the criminal trial.*
- 11(r) Defendants are guaranteed the "right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730 (1987). A criminal defendant has the right "to be present in his own person whenever his presence has a relation, reasonably substantial to the fullness of his opportunity to defend against the charge." *Faretta v. California*, 422 U.S. 806 (1975). Similarly, the South Carolina Supreme Court has held "[a] defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his or her presence would contribute to the fairness of the procedure." *Starnes v. State*, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991). Applicant's absence from the argument and rulings regarding the admissibility of evidence, the excusal (or retention) of jurors and a supplemental jury instruction after the jury indicated it was deadlocked violated applicant's right to be present.

First, at applicant's trial, a hair found in the victim's hand provided crucial physical evidence. On the record, the prosecution and defense debated the admissibility of DNA analysis conducted on the hair. Tr. 1257-81. However, extensive and decisive arguments persisted off-the-record at the trial judge's direction. The record alludes to these discussions: "THE COURT: Now the two of you all go in my chambers right now and you figure out how you want to straighten this thing out." Tr. 1279. The next day, the first words on the record are by the trial judge: "You want to publish them?" Tr. 1286. It does not become apparent until later that "them" refers to letters from the Federal Bureau of Investigations, which conducted the DNA analysis, indicating that the DNA of the found hair does not match applicant's DNA. Tr. 1291. This initial statement coupled with the trial judge's directive for the attorneys to go to his chambers clearly implies off-the record rulings regarding the admissibility of the DNA evidence. These statements and others in the record also demonstrate that applicant was not present during these arguments, conferences and hearing.

Second, on February 26, 2001, Juror Jawana Stephens was selected as the second juror in applicant's trial. Tr. 579-80. Then, inexplicably, Juror Stephens was no longer on the jury. After jury selection, the judge took a short recess. Tr. 598. When the judge and jury returned, the judge stated: "Where's Mr. Carlton? You're a full time juror now. That poor young lady, she almost had a heart attack, I think." Tr. 598-99. Although the record lacks any reference to any discussions with Juror Stephens or among the attorneys regarding Juror Stephens' dismissal from the jury, the statements of the trial judge on the record imply that an off-the-record hearing occurred because the trial judge possessed information not contained on the record. The record completely lacks any indication that applicant attended this off-the-record hearing. Another juror, Sarah Doctor, was dismissed immediately preceding jury instructions at the end of the trial. After returning to the bench from a short break, the trial judge stated "We had to send Miss Doctor home. She, as you know, forgot her medicine." Tr. 2681. He then instructed the jury regarding the law of the case. Again, the transcript lacks any reference to what transpired between the judge and Juror Doctor preceding her dismissal. Further, the transcript lacks any indication that applicant was present for the determination that Juror Doctor would be dismissed.

Third, post-trial interviews reveal that the jurors sent the trial judge a note asking for access to evidence and for evidence to be replayed and, more significantly, a note indicating they were deadlocked. The trial judge provided them with additional instructions. On file with the Charleston County Clerk is the note the jurors sent the judge with the judge's initials placed on the note. However, the transcript of the proceedings lacks any reference whatsoever to the jury's note or the contents of the additional instructions provided by the trial judge.

Fourth, post-trial interviews with Juror Patricia White disclosed that she informed the trial judge multiple times that she knew the applicant. However, the record lacks any reference to these discussions. The record also lacks any indication that applicant was present for these discussions. Applicant's absence during this interaction between the judge and the juror violated applicant's rights. *Sincere, supra*. The error is particularly egregious in this circumstance because the juror claims she actually knew applicant. Although applicant need not prove that his assistance would have been valuable, it is apparent that

applicant's presence at the hearings to determine whether Juror White could remain on the jury would have been valuable to his attorney.

10(s) *Applicant was denied his right to the effective assistance of trial and appellate counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law as a result of counsel's failure to insure that applicant was present at all critical stages of the proceedings and the failure to raise the abridgement of applicant's right to be present on direct appeal.*

11(s) The ground for relief states the relevant facts.

10(t) *Applicant's right to be tried by an impartial jury as guaranteed by the United States Constitution and South Carolina law was violated as a result of the trial judge's off-the-record communications with jurors.*

11(t) The Sixth Amendment to the United States Constitution guarantees to criminal defendants the right to be tried by a fair and impartial jury of their peers. The trial court engaged in several instances of communicating with the jurors, both individually and as a group, off-the-record. As discussed above, one of the reasons for requiring that such interactions be on the record is to minimize the risk of improper bias being created in the minds of the jurors due to communications with the judge. The transcript reveals at least one instance where the trial court had an in camera, off-the-record discussion with an individual juror (Tr. 1010), the contents of which was never subsequently made known. The evidence remaining from the trial contains several notes that were passed between the jury and the judge at various point throughout the trial; none of these notes were ever referenced in the transcript. Since the communications between the trial judge and the jurors are not transcribed in the record, it is impossible to know exactly what was said, but there is a high risk of unfair prejudice or bias resulting from these communications. Any interaction that made the jury less fair or impartial is inherently prejudicial to applicant as it deprived him of his right to be judged by a fair and impartial jury.

10(u) *Applicant's right to direct and collateral review of his conviction and sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of an inadequate record.*

11(u) All criminal defendants are entitled to some form of appellate review of the proceedings that led to their convictions and punishments. An appellate court cannot conduct a proper and thorough review of the lower court's proceedings if it does not have a complete record before it. The record in this case is not adequate because several crucial incidents are absent from it. The discussion and agreement regarding the admissibility of the crucial physical hair evidence, the two independent incidents of summary juror dismissals, communications between the judge and jurors, and numerous other conversations were held off-the-record, the contents of many of which remain unknown. Because of these lapses in the record from

the trial, the appellate review of applicant's conviction and sentence cannot be complete. *See Hanno, supra.*

- 10(v) *Applicant's right to the presumption of innocence as guaranteed by federal and state law was violated as result of the trial court's erroneous instruction regarding the presumption of innocence.*

- 11(v) At trial, the judge instructed the jury: "And remember, I told you at the beginning of the case, I said at that table with his attorney he's just as innocent as you and I, unless and until the State of South Carolina, if indeed they can, convict - - convince twelve of you of his guilt beyond a reasonable doubt, because if you have a reasonable doubt you must find him not guilty." Tr. 2681. Although the trial judge expresses that the defendant is innocent "unless and until" the state proves his guilt, the instruction failed to convey to the jury that a defendant's innocence persists unless the state provides competent evidence of the defendant's guilt beyond a reasonable doubt. In addition, the instruction fails to use the familiar "presumed innocent" language. *See State v. Peden*, 157 S.C. 459, 154 S.E. 658 (1930). *State v. Danelly*, 116 S.C. 113, 107 S.E. 149 (1921).

- 10(w) *Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of counsel's failure to object to the trial court's erroneous instruction regarding the presumption of innocence.*

- 11(w) As indicated above, the trial court incorrectly instructed the jury regarding the presumption of innocence. Trial counsel's failure to object to the faulty instruction constituted ineffective assistance of counsel. *Strickland, supra.*

- 10(x) *Applicant was denied his Sixth Amendment right to the effective assistance of counsel as a result of trial counsel's failure to obtain a psychological evaluation to determine if there was a psychological explanation as to why applicant would be more likely than other individuals to falsely confess to a crime he did not commit.*

- 11(x) While trial counsel did call an expert in false confessions, counsel did not call a psychologist or psychiatrist to testify that applicant had any particular psychological traits that would make him more suggestible and/or more likely to confess falsely. Applicant will present expert testimony at the PCR hearing that applicant has psychological characteristics which make him especially vulnerable to police interrogation.

- 10(y) *Applicant was denied his Sixth Amendment right to the effective assistance of counsel as result of trial counsel's failure to secure an independent pathologist to testify regarding deficiencies in the autopsy including, but not limited to, the failure to determine whether the victim had been sexually assaulted, the failure to gather fingernail scrapings, the erroneous and misleading matching of the victim's injuries to a broken carafe found at the crime scene*

*and the erroneous conflation of liver alcohol with blood alcohol. Furthermore, applicant was **denied** the right to the effective assistance of counsel as a result of trial counsel's failure to impeach the SLED hair examiner with a **report from** the FBI finding no similar microscopic characteristics between applicant's **known hair** and the hair found in the victim's hand.*

11 (y) The ground for relief states the relevant facts

10 (z) *Applicant was **denied** his right to a fair trial conducted in conformity with due process as a result of the police and prosecution's failure to pursue leads of other potential suspects, to preserve evidence and to disclose all exculpatory, **material** evidence.*

11 (z) The police and prosecution failed to pursue leads that may have led to evidence exculpating applicant and/or incriminating other potential suspects. For example, the police had blood from Mr. Charles, but failed to do any DNA testing to determine if the hair found on the victim's body or DNA found on a dollar bill in the victim's pocket may have been consistent with his DNA profile. Blood taken from Mr. Meyers could also have been tested to determine if he had elevated CO2 levels. CO2 testing was conducted on the victim's blood, but not on Mr. Meyers. Had his CO2 levels been normal, it would have tended to exculpate him. Despite the presence of defensive wounds on the victim's hands, fingernail scrapings were not taken at the time of autopsy. Furthermore, despite evidence that the victim may have been sexually assaulted, a full examination to determine if she had been raped was not conducted. While some pubic swabs were taken, the swabs and other evidence was lost when the refrigerator at MUSC failed and the evidence was subsequently destroyed. Had that evidence been preserved, it could have been (and still could be) tested for relevant biological evidence.

10(aa) *Newly discovered evidence material to applicant's guilt demonstrates that he was wrongfully convicted of this offense and that he is entitled to a new trial.*

11(aa) Newly discovered evidence, specifically DNA test results on evidence obtained from the crime scene, establish that applicant was not the perpetrator of this offense. Therefore, applicant is entitled to a new trial at which a jury may hear all evidence relevant to his guilt-or-innocence.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina law? No

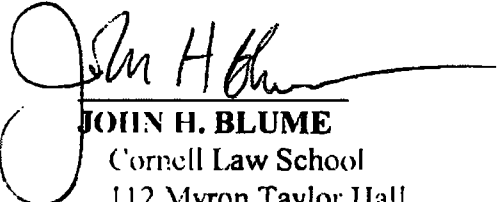
(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief?

No

- (c) any petition in the United States Supreme Court for certiorari other than petitioners, if any already specified in (8)? No
 - (d) any other petitions, motions or applications in this or any other Court?
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - (b) the name and location of the Court in which each was filed:
 - (c) the disposition thereof:
 - (d) the date of each such disposition
 - (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed?
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
 - (b) the proceedings in which each ground was raised
16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
16. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea?
 - (b) your trial, if any? Yes

- (c) your sentencing? Yes.
- (d) your appeal, if any, from the judgment of **conviction** or the imposition of sentence?
Yes.
- (e) preparation, presentation or consideration of **any** petitions, motions or applications
with respect to this conviction, which you filed? Yes
18. (a) (i) Timothy Clay Kulp, of the Riesen Law Firm, 3660 West Montague Ave., North
Charleston, South Carolina 29418
- (a)(ii) Robert Dudek of the South Carolina Office of Appellate Defense, 1205 Pendleton
Street Ste. 306, Columbia, South Carolina 29201.
- (b)(i) Trial
- (b)(ii) Appeal
19. Applicant seeks relief from his convictions and sentences.
20. Applicant is not under sentence from any other court.

Respectfully submitted,


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

December 28, 2011.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

WESLEY MAX MYERS,

Applicant.

v.

JON OZMINT, South Carolina Director
of Department of Corrections, and HENRY
MCMASTER, Attorney General of South
Carolina.

Respondents.

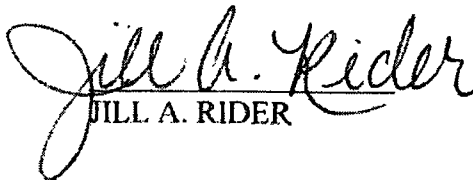
IN THE COURT OF COMMON PLEAS
CA No. 05-CP-10-3113

CERTIFICATE OF SERVICE

I, Jill A. Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of applicant's Amended Application for Post-Conviction Relief in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Matthew Friedman, Esquire
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29201

This the 28th day of December, 2011, in Columbia, South Carolina.


JILL A. RIDER



Report of Laboratory Examination

February 14, 2008
Supplemental - Y07-0073-C

Jill Rider
Blume, Weyble & Norris LLC
1247 Sumter Street
Suite 201
Columbia, SC 29201

SUBJECT: Teresa Haught
SUSPECTS: Wesley Myers; Dana Chapels
(Chappels)
William MacKinnon

ORCHID CELLMARK NO: Y07-0073
AGENCY CASE NO: OCN/MDx #00-112-099

EXHIBITS

Client Item	OC Item	Received	Item Description	Screened	PCR
Defendant's Exhibit 29	Y07-0073-01.01	9/25/2007	Dollar Bill	Y	Y
00-112-099-A1	Y07-0073-02.01	11/16/2007	DNA Extract : Dollar Bill	N	Y
00-112-099-Blank	Y07-0073-03.01	11/16/2007	DNA Extract : Reagent Blank	N	Y
OCN/MDx #00-112-099	Y07-0073-04.01	1/18/2008	Cigarette Butt : under work table (allegedly from Dana Chapels)	N	Y
OCN/MDx #00-112-099	Y07-0073-04.02	1/18/2008	Cigarette Butt : under work table (allegedly from Dana Chapels)	N	N
OCN/MDx #00-112-099	Y07-0073-05.01	1/24/2008	Buccal Swab - Wesley Myers	N	Y
OCN/MDx #00-112-099	Y07-0073-05.02	1/24/2008	Buccal Swab - Wesley Myers	N	N
OCN/MDx #00-112-099	Y07-0073-06.01	2/1/2008	Cigarette Butt : allegedly from William MacKinnon	N	Y
OCN/MDx #00-112-099	NOT EXAMINED	1/18/2008	Ziplock Bag : cigarette butts (driveway)	N	N
OCN/MDx #00-112-099	NOT EXAMINED	1/18/2008	Ziplock Bag : cigarette butt (shores)	N	N
OCN/MDx #00-112-099	NOT EXAMINED	1/18/2008	Ziplock Bag : "Budweiser" beer can	N	N
OCN/MDx #00-112-099	NOT EXAMINED	1/24/2008	Swab Wrapper : Wesley Myer's buccal standard	N	N
OCN/MDx #00-112-099	NOT EXAMINED	2/1/2008	Ziplock Bag : #2-Cigarette Butt allegedly from William MacKinnon	N	N
OCN/MDx #00-112-099	NOT EXAMINED	2/1/2008	Ziplock Bag : #3 - white tissue	N	N

SEROLOGY RESULTS

Y07-0073-01.01.1: Presumptive testing for blood was positive on the swabbing of the left half of the face of the dollar bill.

Y07-0073-01.01.2: Presumptive testing for blood was negative on the swabbing of the right half of the face of the dollar bill. No further testing was performed on this portion of the dollar bill.

Y07-0073-01.01.3: Presumptive testing for blood was negative on the swabbing of the left half of the back of the dollar bill. No further testing was performed on this portion of the dollar bill.

Y07-0073-01.01.4: Presumptive testing for blood was positive on the swabbing of the right half of the back of

Y07-0073-C

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the dollar bill. A swabbing of the right half of the back of the dollar bill was collected for DNA analysis. This swabbing was processed as sample Y07-0073-01.01.5.

RESULTS

DNA testing using the polymerase chain reaction (PCR) and the Yfiler™ Amplification Kit was performed on the indicated exhibit(s). The loci tested and the results obtained for each tested sample are listed in Table 1. This report supplements Orchid Cellmark's Laboratory Report Y07-0073-B dated January 31, 2008.

CONCLUSIONS

Y07-0073-01.01.5

A single Y-STR result was obtained from the swabbing of the right half of the back of the dollar bill. The donor of the male DNA detected from the cigarette butt (allegedly Dana Chapels) (Y07-0073-04.01.1) cannot be excluded as a contributor of the single Y-STR result obtained from this sample. However, Wesley Myers (Y07-0073-05.01.1) and the donor of the male DNA detected from the cigarette butt (allegedly William MacKinnon) (Y07-0073-06.01.1) are excluded as contributors of the male DNA detected from this sample.

Y07-0073-02.01.1

A Y-STR profile was obtained from the dollar bill DNA extract. The donor of the male DNA detected from the cigarette butt (allegedly Dana Chapels) (Y07-0073-04.01.1), Wesley Myers (Y07-0073-05.01.1), and the donor of the male DNA detected from the cigarette butt (allegedly William MacKinnon) (Y07-0073-06.01.1) are excluded as contributors of the male DNA detected from this sample.

The contributor of the male DNA detected from the dollar bill DNA extract (Y07-0073-02.01.1) cannot be excluded as a possible contributor of the single Y-STR result obtained from the swabbing of the right half of the back of the dollar bill (Y07-0073-01.01.5).

Y07-0073-03.01.1

A reagent blank is generated during the DNA extraction process to monitor for the presence of contamination. Male DNA was not detected from the reagent blank DNA extract.

STATISTICAL ANALYSIS

The single Y-STR result obtained from the swabbing of the right half of the back of the dollar bill (Y07-0073-01.01.5) was compared to Applied Biosystems' database of 3,561 males. The frequency of occurrence of this single Y-STR result in Applied Biosystems' database of several racial groups is as follows:

POPULATION DATABASE	FREQUENCY
Caucasian	579 in 1276
African American	253 in 985
Asian	98 in 330
Filipino	24 in 105
Hispanic	229 in 597
Native American	38 in 106
Sub-Saharan African	3 in 59
Vietnamese	41 in 103

DISPOSITION

In the absence of specific instruction, evidence will be returned to the submitting agency by Federal Express or another appropriate carrier.

TECHNICAL REVIEW

The results described in this report have been reviewed by the individuals below.

Reviewer:

Cassie Johnson
Cassie Johnson / Supervisor - Forensics

Reviewer:

Rick W. Staub
Rick W. Staub, Ph.D. / Laboratory Director

Procedures used in the analysis of this case adhere to the standards adopted by the DNA Advisory Board. Orchid Cellmark is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board. This test is performed pursuant to licensing arrangements with Roche Molecular Systems, Inc. and Applied Biosystems. The results in this report relate only to the items tested.

February 14, 2008

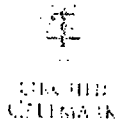


ORCHID
CELLMARK

Accredited by the American Society of Crime Laboratory Directors / Laboratory Accreditation Board
Dallas, TX • Nashville, TN

Y07-0073-C

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Report of Laboratory Examination

Orchid Cellmark - Dallas

2/14/2008

Supplemental - Y07-0073-C

ORCHID CELLMARK NO: Y07-0073

AGENCY CASE NO: OCN/MDx #00-112-099

Table 1 Y-Filer

Sample Name	DYS456	DYS389I	DYS390	DYS389II	DYS458	DYS19	DYS385a/b	DYS393	DYS391	DYS439	DYS635	DYS392	Y GATA H4	DYS437	DYS438	DYS448
Dollar Bill (right half of back) ++ Y07-0073-01.01.5	NR	NR	NR	NR	NR	NR	NR	NR	11	NR	NR	NR	NR	NR	NR	NR
DNA Extract:Dollar Bill Y07-0073-02.01.1 00-112-099-A1	16	13	25	28	18	14	11, 14	13	11	11	23	13	12	15	12	19
DNA Extract:Reagent Blank Y07-0073-03.01.1 00-112-099-Blank	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR
Cigarette Butt:allegedly from Dana Chapels Y07-0073-04.01.1 OCN/MDx #00-112-099	15	13	24	29	16	14	11, 15	13	11	13	23	13	11	15	12	19
Wesley Myers Y07-0073-05.01.1 OCN/MDx #00-112-099	17	13	25	29	16	17	11, 14	13	10	11	23	11	12	14	11	20
Cigarette Butt:allegedly from William MacKinnon Y07-0073-06.01.1 OCN/MDx #00-112-099	17	14	25	31	15	15	11, 14	13	10	10	23	11	13	14	11	20

NR = No Result

++ = This sample may contain additional alleles below threshold

The results listed in the table do not depict intensity differences.

3208

Supplemental - Y07-0073-C

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STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF CHARLESTON	)	COURT OF COMMON PLEAS
Wesley Max Myers,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 05-CP-10-3113
	)	
State of South Carolina,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing was held on January 12-13, 2012, before The Honorable R. Markley Dennis, Jr. in Courtroom 4B of the Charleston County Courthouse, 100 Meeting Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

John H. Blume, Esq.
 (No information provided)
 Appearing for Applicant

Matthew J. Friedman, Esq.
 OFFICE OF ATTORNEY GENERAL
 P O Box 11549
 Columbia, SC 29211-1549
 Appearing for State of South Carolina

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
 Post Office Box 901
 Johns Island, South Carolina 29457
dGarrison@sccourts.org

Wesley Max Myers v State of South Carolina

Case No. 05-BP-10-3113

Hearing of January 12-13, 2012

Before The Honorable R. Markley Dennis, Jr.

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Wesley Max Myers v State of South Carolina

Case No. 05-BP-10-3113

Hearing of January 12-13, 2012

Before The Honorable R. Markley Dennis, Jr.

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Before The Honorable R. Markley Dennis, Jr.

23 THE COURT: I understand. Mr.
24 Blume, good morning, sir, are you ready to
25 proceed?

Wesley Max Myers v State of South Carolina

Case No. 05-BP-10-3113

Hearing of January 12-13, 2012

Before The Honorable R. Markley Dennis, Jr.

1 MR. BLUME: Yes, sir.

2 THE COURT: You may call your first
3 witness?

4 MR. BLUME: Yes, sir, we would call
5 Sarah Doctor.

6 (WITNESS TAKES STAND)

7 SARAH DOCTOR, being duly sworn to tell
8 the truth, the whole truth and nothing but the
9 truth, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. BLUME:

12 Q. Good morning, Ms. Doctor.

13 A. Good morning.

14 Q. Thank you very much for coming in this
15 morning. We know this is an imposition on you,
16 that it is not fun, and we appreciate you being
17 here. Ms. Doctor, were you selected as a juror
18 in the case of the State versus Wesley Max
19 Myers?

20 A. I was.

21 Q. And did you sit through the evidence phase
22 of the trial?

23 A. Yes.

24 Q. Did you remain on the jury throughout the
25 trial, until the end of the trial?

Wesley Max Myers v State of South Carolina

Case No. 05-BP-10-3113

Hearing of January 12-13, 2012

Before The Honorable R. Markley Dennis, Jr.

1 A. Basically, yes.

2 Q. At some point, though, after the closing
3 arguments, you came to the court and -- did
4 you realize that you had forgotten your heart
5 medication?

6 A. Yes.

7 Q. When you realized that you had forgotten
8 your heart medication, what did you do then?

9 A. I spoke to the judge.

10 Q. How did you speak to the judge? How did
11 this happen?

12 A. I -- we were in -- we were taken into one
13 of the little rooms and I told -- there was a
14 man outside the door that I told I had to speak
15 to the judge, that I'd forgotten my heart
16 medication. At that point he said that I
17 couldn't go home but he offered to give me some
18 of his heart medication. But he didn't offer
19 to let somebody go to my house for me, and he
20 didn't excuse me at the time.

21 Q. But you spoke with the judge?

22 A. Yes.

23 Q. And at the time that you spoke with the
24 judge, who was present?

25 A. There wasn't a whole lot of people. We

Wesley Max Myers v State of South Carolina

Case No. 05-BP-10-3113

Hearing of January 12-13, 2012

Before The Honorable R. Markley Dennis, Jr.

1 were inside the courtroom at that time when I
2 speak with him.

3 Q. All right. More to the point, was Mr.
4 Myers present at that time?

5 A. No, he was not.

6 Q. He was not present at that time?

7 A. No.

8 Q. But there were a few other people in the
9 courtroom when this happened?

10 A. Yes.

11 Q. And then -- so you informed the judge of
12 this and he offered you his medication but
13 there was never any offer to send someone to
14 your house to get your medication?

15 A. Right, the man did.

16 Q. And at that time where did you live?

17 A. I lived at [REDACTED], North
18 Charleston.

19 Q. And this trial, this was over in the old
20 courtroom over in North Charleston?

21 A. Yes, sir.

22 MR. BLUME: Thank you very much,
23 Ms. Doctor. Please answer any questions that
24 Mr. Friedman may have.

25 THE COURT: You may cross-examine.

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1 MR. FRIEDMAN: Thank you, Your
2 Honor.

3 CROSS EXAMINATION

4 BY MR. FRIEDMAN:

5 Q. Ms. Doctor, when you spoke to the judge,
6 were the attorneys present?

7 A. I don't recall, but I think that there was
8 an officer in the court.

9 Q. Was there anybody else present?

10 A. There were some people there.

11 Q. You recall that there were some people
12 there?

13 A. (Affirmative nod).

14 Q. But you don't recall who they were?

15 A. (Negative gesture).

16 MR. FRIEDMAN: No further
17 questions.

18 THE COURT: Redirect, Mr. Blume?

19 MR. BLUME: No, thank you. We would
20 ask that Ms. Doctor be excused if there are no
21 objections from the Attorney General?

22 THE COURT: So you have any
23 objection to her being excused?

24 MR. FRIEDMAN: No, sir.

25 THE COURT: Ms. Doctor, you may step

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1 down. You are free to leave.

2 (WITNESS STEPS DOWN)

3 THE COURT: Call your next witness.

4 MR. BLUME: Jawana Stephens.

5 (WITNESS TAKES STAND)

6 JAWANA STEPHENS, being duly sworn to
7 tell the truth, the whole truth and nothing but
8 the truth, testified, as follows:

9 DIRECT EXAMINATION

10 BY MR. BLUME:

11 Q. Good morning, Ms. Stephens.

12 A. Good morning.

13 Q. Thank you for coming. I know that it is
14 an imposition. I have just a few questions for
15 you. Were you selected as a juror in the case
16 of the State versus Wesley Max Myers?

17 A. Yes.

18 Q. After you were selected to be a juror in
19 the case, did you ask to see the judge?

20 A. Yes, sir.

21 Q. Why did you ask to see the judge?

22 A. I didn't feel comfortable being on the
23 trial.

24 Q. After you spoke to the judge, what
25 happened?

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1 A. I spoke to the judge in chambers, because
2 I was crying and couldn't stop, -- because
3 something similar to that happened to a family
4 member of mine. So the judge told me that I
5 should have come up sooner and said something,
6 then he dismissed me.

7 Q. At the time that you talked to the judge,
8 where were you?

9 A. In his chambers.

10 Q. In his chambers?

11 A. Yes, sir.

12 Q. And at the time that you spoke to the
13 Judge, was Mr. Myers present? The defendant?

14 A. No, sir.

15 Q. He was not there?

16 A. No, sir.

17 Q. Do you recall who was there?

18 A. I wasn't by myself. I believe that it was
19 the bailiff who walked me in there.

20 Q. So at the end of this discussion, you were
21 excused as a juror in this case?

22 A. Yes, sir.

23 MR. BLUME: Thank you, Ms. Stephens.
24 Please answer any question that Mr. Friedman
25 may have.

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1 THE COURT: Cross-examine.

2 MR. FRIEDMAN: Thank you, Your
3 Honor.

4 CROSS EXAMINATION

5 BY MR. FRIEDMAN:

6 Q. Ms. Stephens, why was it that you did not
7 feel comfortable serving on the jury?

8 A. Because something -- I had a family member
9 that that happened to, the same/similar.

10 Q. At the time that you met in the judge's
11 chambers, do you remember if any of the
12 attorneys were present?

13 A. I don't remember. I believe that there
14 was another man in there but I really can't say
15 for sure. It's been awhile.

16 Q. So there was more than just you and the
17 judge in the room, though?

18 A. Yes, sir.

19 Q. Do you remember about how many people were
20 in there?

21 A. It could have been three. I'm not sure.

22 MR. FRIEDMAN: Nothing further.

23 THE COURT: Redirect?

24 MR. BLUME: No, sir, Your Honor.

25 THE COURT: You may step down.

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1 (WITNESS STEPS DOWN)

2 THE COURT: Do you wish the witness
3 to be excused?

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

5 THE COURT: Any objection?

6 MR. FRIEDMAN: No objection.

7 THE COURT: You are also free to
8 leave, Ms. Stephens. Thank you very much.

9 MR. BLUME: Your Honor, our next
10 witness is Dr. Arden. He is the witness who
11 will testify telephonetically.

12 THE COURT: All right. We will get
13 him on the phone.

14 CLERK: (Places phone call on
15 speaker phone).

16 DR. ARDEN: Hello, this Dr. Arden.

17 CLERK: Dr. Arden, this is the
18 Charleston County Clerk's Office. This is in
19 the case of Wesley Max Myers, a PCR matter.
20 You are on the record right now.

21 DR. ARDEN: Thank you.

22 THE COURT: Good morning, Dr. Arden.
23 This is Judge Dennis. I am presiding over this
24 proceeding. I appreciate you attending by
25 telephone. Can you hear me all right?

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1 DR. ARDEN: Yes, I can. I am just
2 trying to adjust my volume right now to make
3 sure that I can be heard, as well.

4 THE COURT: That's fine. Mr. Blume
5 will now commence his examination. If at any
6 point you need a break, if you will just ask
7 me, I will stop. We can disconnect and return
8 to you, if that becomes necessary. Mr. Blume,
9 you may proceed, sir -- would you give me your
10 full name, spelling your name, please, for us.

11 DR. ARDEN: Yes. My name is Dr.
12 Jonathan Arden, J-o-n-a-t-h-a-n and A-r-d-e-n.

13 THE COURT: Very well, thank you,
14 sir. You may proceed.

15 DIRECT EXAMINATION

16 BY MR. BLUME:

17 Q. Dr. Arden, can you hear me?

18 A. Yes, sir.

19 Q. Dr. Arden, how are you currently employed?

20 A. I currently have a consulting practice. I
21 am president of my practice, which is Arden
22 Forensics, P.C. In addition to my consulting
23 work in forensic pathology and medicine, I also
24 have a part-time appointment under the title
25 of Forensic Pathologist with the Office of the

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1 Medical Examiner for the State of West
2 Virginia.

3 Q. And, Dr. Arden, would you please provide
4 the Court with your experience in the area of
5 forensic pathology?

6 A. I have twenty years experience as a
7 fulltime government-employed medical examiner,
8 beginning with about two years working Suffolk
9 County, New York; three years for the State of
10 Delaware; and nine years working for the office
11 of the Chief Medical Examiner with the City of
12 New York during which time I rose through
13 several titles, including Deputy Chief Medical
14 Examiner, acting as the First Chief Deputy
15 Medical Examiner and then finally as the Chief
16 Deputy Medical Examiner. Following that I
17 spent five and a half years as the Chief
18 Medical Examiner in Washington, D.C.

19 That takes me to about October of 2003, at
20 which point I left government service and
21 opened the consulting practice that I described
22 to you or mentioned earlier. While so engaged,
23 I had a part-time appointment in the Medical
24 Examiners system for Virginia, for about a year
25 and a half, and then for almost the past four

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1 years I've had the part-time appointment in
2 West Virginia. But primarily since late 2003,
3 I've had a consulting practice.

4 Q. Okay. Dr. Arden, what is your educational
5 background?

6 MR. FRIEDMAN: Your Honor, I am
7 sorry to interrupt but I don't believe that
8 this witness was sworn.

9 THE COURT: Very good point. Thank
10 you very much. Dr. Arden, do you swear or
11 affirm that the testimony that you will give
12 in this matter will be the truth, and nothing
13 but the truth, so help you God?

14 DR. ARDEN: Yes, I do.

15 THE COURT: Very well. With respect
16 to the responses to the questions just
17 previously given, do you wish to modify any of
18 those responses?

19 DR. ARDEN: No, Your Honor.

20 THE COURT: Do you stand by those
21 responses as being consistent with the oath
22 that you just took?

23 DR. ARDEN: Yes, sir.

24 THE COURT: Very well. You may
25 continue, Mr. Blume. Thank you, Mr. Friedman.

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1 DIRECT EXAMINATION CONTINUED

2 BY MR. BLUME:

3 Q. Dr. Arden, I just asked you about your
4 educational background. Where did you receive
5 your education?

6 A. I attended college for two years at the
7 John Hopkins University, then for two years at
8 the University of Michigan where I received my
9 bachelor of science degree with high
10 distinction in 1976.

11 I then attended and graduated from the
12 University of Michigan Medical School, received
13 my M.D., doctorate of medicine, in 1980.

14 Then following that, I served in specialty
15 training programs, what we call residency
16 programs. I have a three-year training program
17 in the field of anatomic pathology, which took
18 place at the New York University Medical Center
19 in New York City.

20 I followed that with one additional year
21 of training in the field of forensic pathology.
22 That took place in the offices of the Chief
23 Medical Examiner for the State of Maryland,
24 located in Baltimore.

25 Q. Are you licensed to practice?

1 A. Yes, I am. I have active licenses in five
2 states. I'm licensed in Virginia, West
3 Virginia, Maryland, Delaware and New York.

4 Q. Are you board-certified in any areas?

5 A. Yes, I am Board-certified by the American
6 Board of Pathology in anatomic and forensic
7 pathology.

8 Q. Have you held any academic appointments
9 throughout your career?

10 A. Yes, during my time in New York City and
11 in Washington, D.C., I had formalized medical
12 appointments in New York City -- and, by the
13 way, all those appointments had the same title,
14 Clinical Assistant Professor.

15 I had such appointments in New York at the
16 New York University Medical School and also at
17 the New York State Medical School in Brooklyn.

18 Then in Washington, I had similar appoint-
19 ments at the George Washington University
20 School of Medicine.

21 Q. Have you ever been qualified as an expert
22 witness in the area of forensic pathology?

23 A. Yes. I have not kept an exact count
24 during my twenty years of medical service been
25 qualified to testify as an expert in forensic

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1 pathology somewhere on the order of five to six
2 hundred times in my entire career.

3 Q. And in most of those cases, were you a
4 witness for the prosecution or for the defense?

5 A. Actually over the twenty years of my
6 fulltime service, most of my testimony was in
7 criminal matters where I was called by the
8 prosecution. I did some consulting those days.
9 In my current consulting practice, I appear in
10 both civil matters and criminal. The criminal
11 matters nowadays, I more often am retained by
12 the defense and appear at trials for the
13 defense, although I do get retained by the
14 prosecution. And I get involved in trials,
15 cases in New York where I still get called by
16 the prosecution.

17 MR. BLUME: Your Honor, at this
18 point I would move to qualify Dr. Arden as an
19 expert in Forensic Pathology.

20 THE COURT: Very well. Do you care
21 to examine him as to qualifications, Mr.
22 Friedman?

23 MR. FRIEDMAN: No, Your Honor.

24 THE COURT: I will permit the
25 witness to render opinions in the area of

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1 forensic pathology.

2 DIRECT EXAMINATION CONTINUED

3 BY MR. BLUME:

4 Q. Dr. Arden, what materials did you review
5 in connection with the case of Wesley Max
6 Myers?

7 A. I reviewed the autopsy report -- excuse
8 me. The subject of that autopsy was -- I'm
9 sorry -- Teresa Howell -- excuse me. So I
10 reviewed the report and the photographs from
11 the autopsy. I was also provided with some
12 portions of police reports, particularly
13 pertaining to the death, the discovery of the
14 body. Finally I have reviewed the transcript
15 of the testimony of Dr. Nichols, the medical
16 examiner.

17 Q. Do you believe that you have sufficient --
18 that you reviewed sufficient materials to
19 render your opinion on matters related to this
20 case?

21 A. Yes, sir, I have.

22 Q. And are these opinions that we are going
23 to discuss in a minute to a reasonable degree
24 of medical certainty?

25 A. Yes, sir.

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1 Q. Dr. Arden, are you familiar with Dr.
2 Nichols' testimony that the victim's injuries
3 in this case were made by a broken carafe' /
4 glass found at The Mill End?

5 A. Yes, I am familiar with that.

6 Q. And as a forensic pathologist, do you
7 agree or disagree with that testimony?

8 A. I disagree with that testimony.

9 Q. Can you tell the Court why?

10 A. Well, first of all, the types of wounds
11 that Dr. Nichols purportedly matched to the
12 broken carafe were what is commonly called
13 sharp forced injuries; in other words, stabbing
14 and/or cutting injuries.

15 You really cannot match a specific
16 implement, whether it is a broken glass or a
17 knife, for instance, to a specific sound.

18 The characteristics of stabbing or cutting
19 wounds do not permit, under almost any
20 circumstances, a physical matching with a
21 particular wound. This is very well-known in
22 forensic pathology and an accepted principle.

23 Just as an example, for instance if you
24 had a cut across the surface, you would well
25 imagine that an eight inch long butcher knife

1 could cause an eight inch cut, an a one inch
2 long surgical scalpel could cause an eight inch
3 cut. You would have no way of differentiating
4 or identifying one instrument versus the other
5 simply by the size, shape and length of a cut
6 or a stab wound.

7 So the principle of truly matching -- and
8 I believe that Dr. Nichols used that term on
9 several occasions, that he had "matched" a
10 particular broken carafe to some of the
11 particular injuries on the left side of Ms.
12 Howell's face, that concept is scientifically
13 and medically flawed and is not reliable.

14 Q. At the time that his testimony was given,
15 were these principles established?

16 A. Yes, absolutely.

17 Q. Okay. Are you familiar with the fact that
18 a meat cleaver was also found at the crime
19 scene?

20 A. Yes, I am familiar that there was another
21 implement, a cleaver, hatchet or something was
22 also found at the crime scene. Yes.

23 Q. Due to the nature of the injuries, could
24 this also have been used?

25 A. Yes. Actually given the nature of the

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1 injuries to Ms. Howell, in that she had -- she
2 had a combination of several different -- not
3 only several different injuries but several
4 different times for modalities for causation of
5 injury. The fact that she had some sharp
6 injuries, that are cutting or stabbing, and the
7 fact that she had some blunt injuries that are
8 impact type injuries, certainly raises the
9 question of a clever type of implement because
10 that would be capable of delivering --
11 depending on how you wield it -- both blunt and
12 sharp injuries.

13 Q. Not to be hypertechnical about it, but the
14 injuries during the testimony of Dr. Nichols
15 were described as lacerations. Were they in
16 fact lacerations?

17 A. Well, some of the injuries that he
18 described in testimony and in his autopsy
19 report were actually lacerations. Some of
20 them, based on my observations of the
21 photographs and his own testimony, were not.

22 To be very clear about this, the injuries
23 related to sharp implements, anything that
24 would be characterized as a cutting or stabbing
25 wound cannot be a laceration and should never

1 be described as a laceration by a forensic
2 pathology. The reason is that words like "cut"
3 or "stab" versus "laceration" are terms of art
4 in pathology and by their definition a "cut" is
5 something caused by a sharp implement such as a
6 knife or broken glass. And a "laceration",
7 again by definition, is a blunt impact injury
8 where the tissues are actually split or torn,
9 not cut.

10 In his autopsy report and in various part
11 of his testimony, he equates the concept and
12 terminology of cutting and laceration. He
13 describes the large wound across the back of
14 the head as a laceration. I remember that he
15 said that it was caused by a sharp implement.
16 He described matching the sharp broken glass of
17 the carafe to the injuries in front of the left
18 ear, which he then calls lacerations. So this
19 is a -- again, not to get hypertechnical, but
20 this is really very basis in terms of not just
21 words but concept and the medical judgment in
22 pathology that lacerations and cuts should
23 never be confused.

24 Q. Dr. Arden, let me move on to another topic
25 here. Are you familiar with Dr. Nichols'

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1 testimony that based on liver alcohol levels
2 that the victim's blood alcohol level was below
3 the legal limit for intoxication?

4 A. Yes, sir. I recall that testimony.

5 Q. As a forensic pathologist, do you agree or
6 disagree with that?

7 A. I disagree with that.

8 Q. Can you tell the Court why?

9 A. Yes. Because the alcohol that was
10 measured was in the specimen of the liver.
11 So it is not a blood alcohol, it's a liver
12 alcohol concentration.

13 While the measurement of alcohol in liver
14 may not be entirely without value, there may be
15 some circumstances where it is the only choice
16 that you have, but the literature clearly shows
17 that the liver alcohol is generally lower than
18 blood alcohol in corresponding time in a
19 person. That the relationship is not uniform
20 or linear such that you can -- you cannot
21 reliably extrapolate blood alcohol accurately
22 from a given liver alcohol measurement. The
23 contents of liver alcohol is not only lower
24 than blood alcohol but the relationship is not
25 uniform and predictable. That is the reason

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1 that I disagree with his interpretation of the
2 liver alcohol and trying to -- to extrapolate
3 from that to a blood alcohol.

4 Q. In your many years of experience, have you
5 ever seen anyone attempt to extrapolate blood
6 alcohol from liver alcohol?

7 A. No. Actually this is the first time I've
8 ever seen anybody try to make that kind of
9 judgment.

10 Q. Based on your review of the records and
11 the documents, was there blood from the victim
12 that could have been tested for blood alcohol?

13 A. Yes, there was. In fact, blood was used
14 for testing for carbon monoxide, and blood was
15 used for testing for drugs. So it is entirely
16 puzzling to me why the blood was not tested for
17 alcohol when it clearly was available.

18 Q. If blood was available to the State to
19 test, Mr. Myers' blood, could carbon monoxide
20 testing been done on his blood?

21 A. Yes. If they had his blood sample, then
22 it would easy, in terms of laboratory testing,
23 to test his blood for alcohol as well.

24 Q. So, Dr. Arden, let me turn to another area
25 here. In this case the victim was found with

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1 hairs in her hand, that the police believe
2 belonged to the perpetrator. She also had an
3 injury to one of her fingers that both the
4 police officers and Dr. Nichols described as a
5 defensive wound. Her hands were in fact bagged
6 at the crime scene.

7 Given those facts, in your opinion would a
8 reasonable, prudent pathologist have done
9 fingernail scrapings to determine if there was
10 any biological evidence that might help
11 identify the perpetrator?

12 A. Yes. In fact, in my opinion and in my
13 practice that would be a standard procedure --
14 especially under the circumstances as you have
15 laid them out, based on the facts of this case.

16 Q. Can you explain ---

17 A. Scrapings and/or clippings definitely
18 should have been done.

19 Q. Why is that?

20 A. Well, there is -- of course when you have
21 a person-to-person struggle that -- and, by the
22 way, let me interrupt myself here. I have some
23 construction going on over my head. Are you
24 able to hear my all right?

25 Q. Yes, we can.

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1 A. Okay. I am going to continue on. If you
2 hear any noise in the background that gets out
3 of hand, just let me know. Unfortunately,
4 there is some construction going on and I'm
5 sorry to have interrupted the answer.

6 But the long and the short of this is,
7 without belaboring it, the fact the victim had
8 someone's hairs in her hand, having had the
9 injured finger that required direct or person-
10 to-person contact, namely with the blunt and
11 sharp injuries, those area all part of a
12 circumstance where the victim and the assailant
13 would have been in close personal contact.
14 Under those circumstances, one could easily get
15 biological materials -- be it blood, hair or
16 skin -- under the fingernails. That would be a
17 direct link between the victim and assailant.

18 It might even be a way of identifying the
19 assailant specifically, particularly if you
20 could do DNA analysis of the material recovered
21 under the fingernails.

22 So the possibility of demonstrating what
23 happened and possibly even who was involved,
24 besides the victim, are the critical reasons
25 for taking fingernail scrapings or clippings of

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1 the fingernails. Same concept, would be the
2 same evidence that you are receiving.

3 You know, you don't know when you take
4 that evidence whether you are going to get
5 positive results, whether it will -- pardon
6 the language -- pan out or not. But you only
7 have one first chance to do that. If you don't
8 take that evidence, then it will be lost
9 forever. That's very bad forensic practice to
10 allow something to be lost simply because you
11 didn't collect it.

12 Q. Just to be clear on this, based on your
13 review of the materials, no fingernail
14 scrapings were taken in this case; correct?

15 A. That's correct. As far as I know, no
16 fingernail scrapings were taken. The hands
17 were bagged and the opportunity was clearly
18 available to the medical examiner.

19 Q. And ---

20 A. And if I could just supplement my prior
21 answer. One last thing.

22 Q. Yes, sir.

23 A. You don't know for sure that you will get
24 positive results. There were times -- I've
25 practicing forensic pathology now for almost

1 thirty years. Earlier in my career, forensic
2 DNA analysis was not available. What you could
3 derive from fingernail scrapings was more
4 limited in those days. Yes, we now know that
5 some evidence that has been preserved from
6 autopsies many years ago can be subject to
7 further testing that wasn't developed at the
8 time. This is happening all the time with
9 DNA in this era. So part of collecting the
10 specimen is that if you do not do it, you lose
11 the opportunity. Part of that is that at a
12 later date if a newer test or better test
13 becomes available, sometimes you can get
14 information from some of the evidence that you
15 didn't even envision at the time of collection.

16 Q. And, Dr. Arden, was it standard practice
17 in 1997 to do fingernail scrapings in a
18 situation such as this?

19 A. Yes, it absolutely was.

20 Q. So, Dr. Arden, let me turn to one final
21 area with you. The victim in this case was
22 found with her shirt and bra torn, her breast
23 exposed and her pants unbuttoned. Despite
24 these facts, Dr. Nichols did not conduct a rape
25 protocol or conduct an examination to confirm

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1 that the victim had been sexually assaulted.

2 In your opinion, should he have done so?

3 A. Yes. In my opinion, understand those
4 circumstances he absolutely should have
5 conducted the complete examination and evidence
6 collection for any sort of sexual assault,
7 sexual activity.

8 Q. Can you tell the Court why?

9 A. Well, when you have a circumstance of a
10 person who is dead under conditions of violence
11 and where there is any kind of indication that
12 there may have been some kind of sexual
13 activity or sexual involvement, sexual
14 motivation, then part of investigating it and
15 examining it fully is to provide any evidence
16 that you provide any evidence that you can that
17 addresses the question of sexual activity
18 and/or sexual assault.

19 Now, most commonly when I see victims
20 where this is an issue or where -- commonly it
21 would be any kind of victim where there has
22 been an injury that suggests activity related
23 to sexual motivation or assault, such as
24 strangulation, -- I realize that is not the
25 case here, but I am just offering that as an

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1 example. Another broad area that would
2 immediately bring this to mind is anything
3 where a victim appears to be in some state of
4 undress, clothing disturbed, breasts of
5 genitals exposed, anything of that sort;
6 and, in fact, that's what we do have here.

7 A. And what potential evidence might have
8 been gleaned from this?

9 A. First of all, the general concept is that
10 you'd discover any evidence that indicates
11 sexual activity or sexual assault, and then you
12 would have a better understanding of what
13 happened to this victim.

14 Similar to the discussion earlier about
15 the fingernail scrapings, the kind of evidence
16 that you are seeking in the sexual assault or
17 rape work-up, uh, would be evidence of semen of
18 seminal fluids. In this day and age, DNA
19 evidence; which would potentially indicate or
20 confirm sexual activity or assault and
21 specifically identify or exclude any given
22 assailant.

23 Q. Is there any potential evidence that might
24 have been gleaned from that now lost forever?

25 A. I'm sorry, I didn't hear the question.

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1 Q. Just to follow up on this, although I
2 think it is pretty obvious, that any potential
3 evidence that might have been discovered in
4 that regard -- along the lines that you've
5 suggested -- has at this point in time been
6 lost forever?

7 A. That's correct. Anything that might have
8 been collected or used, at this point it's lost
9 forever due to the fact that it was not
10 collected at the time.

11 Q. Dr. Arden, thank you very much. Please
12 answer any questions that the attorney general
13 might have.

14 A. Yes, sir.

15 THE COURT: You may cross-examine,
16 Mr. Friedman.

17 MR. FRIEDMAN: Thank you, Your
18 Honor.

19 CROSS EXAMINATION

20 BY MR. FRIEDMAN:

21 Q. Good morning, Dr. Arden.

22 A. Good morning.

23 Q. This is Matt Friedman with the Attorney
24 General's Office. Dr. Arden, are you familiar
25 with Dr. Clay Nichols?

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1 A. I am not personally familiar with him. I
2 had seen his name before but I don't know him
3 personally.

4 Q. Do you know if he has a good reputation in
5 the medical community?

6 A. Honestly, I don't know. I have no reason
7 to believe otherwise but I don't know,
8 specifically, his reputation.

9 Q. Isn't it true that he only found one wound
10 that was consistent with being caused by a
11 broken wine carafe?

12 A. I'm sorry? I think you're going to have
13 to speak up. Was your question whether he only
14 identified one point relating to the broken
15 glass? Is that the question?

16 Q. Yes, sir.

17 A. Yes. My recollection is that he
18 specifically said that he, quote, unquote,
19 "matched" one wound -- one of the wounds in
20 front of the left ear with the broken carafe.

21 Q. Would you agree with Dr. Nichols that the
22 cause of death was due to blunt force trauma to
23 the head?

24 A. Yes, sir.

25 Q. Do you recall Dr. Nichols' testimony that

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1 the injuries were also consistent with the
2 victim's head being plummeted into the ground?

3 A. Yes, sir.

4 Q. Would you agree with that testimony?

5 A. In terms of the fatal injury, yes, I would
6 agree with that. That opinion does not explain
7 all of the injuries but I agree as to that
8 portion; yes, sir.

9 Q. How long does carbon monoxide remain in a
10 person's blood?

11 A. Well, it would depend on primarily what
12 happens after you absorb the carbon monoxide.
13 Are you asking me how long in a living person
14 or in a dead person?

15 Q. In a living person?

16 A. In a living person if you absorb carbon
17 monoxide by breathing and you continue to
18 survive and breathe, it will dissipate as you
19 continue to breathe oxygen with no more carbon
20 monoxide. It depends on how much carbon
21 monoxide was absorbed in your system and also
22 whether you were breathing room air or oxygen
23 thereafter. If you had a small amount of
24 carbon monoxide, you could probably remove it
25 in a short period of -- I am only estimating

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1 here, not making a scientific calculation, in a
2 short period of time like half an hour or an
3 hour. If you had absorbed a large amount such
4 that your concentration was very high and you
5 did not breathe pure oxygen thereafter, it
6 could be a period of hours before it
7 dissipated.

8 Q. Do you recall if the victim had a tampon
9 or a sanitary napkin in when she died?

10 A. My recollection is there was a sanitary
11 napkin. But if you will bear with me one
12 second, I have the autopsy report in front of
13 me and -- (pause). Sorry, I'm just thumbing
14 through.

15 Q. I believe that it is Page 185, if you have
16 that in front of you.

17 A. I apologize, I actually did have it in
18 front of me. It says sanitary napkin, not a
19 tampon.

20 MR. FRIEDMAN: Beg the court's
21 indulgence.

22 THE COURT: Yes, sir.

23 CROSS EXAMINATION CONTINUED

24 BY MR. FRIEDMAN:

25 Q. Dr. Arden, does smoking affect carbon

1 monoxide levels in a living person?

2 A. Sorry? Did you ask if smoking affects
3 carbon monoxide levels in a living person?

4

5 Q. Yes, sir.

6 A. If one is a smoke, then one does absorb
7 carbon monoxide. So at the time that a person
8 is actually smoking there will be carbon
9 monoxide absorbed. When you stop smoking, it
10 will dissipate over time.

11 A great deal of smokers, chronic smokers,
12 can walk around an elevated carbon monoxide
13 routinely -- usually to what we'd think of a
14 low to moderate level of carbon monoxide.
15 But, yes, you can certainly have a chronically
16 elevated level of carbon monoxide based on
17 smoking.

18 Q. Thank you, Dr. Arden.

19 THE COURT: Redirect?

20 MR. BLUME: Yes, sir, Your Honor.
21 Just one question.

22 THE COURT: Sure.

23 REDIRECT EXAMINATION

24 BY MR. BLUME:

25 Q. Dr. Arden, does the fact that a sanitary

1 napkin was found eliminate the possibility that
2 the victim had been sexually assaulted?

3 A. No, not at all. A sanitary napkin doesn't
4 block the anal or genital openings. It doesn't
5 prevent or eliminate sexual assault or sexual
6 activity. In fact, it might even be another
7 source of potential evidence in a sexual
8 assault or rape work-up.

9 MR. BLUME: Thank you.

10 THE COURT: Recross, Mr. Friedman?

11 MR. FRIEDMAN: Nothing, Your
12 Honor.

13 THE COURT: Dr. Arden, thank you
14 very much for appearing by telephone. This
15 concludes your examination. Have a good day,
16 sir.

17 (TELEPHONE CONNECTION TERMINATED)

18 THE COURT: Call your next witness,
19 please.

20 MR. BLUME: We call Dr. Susan
21 Knight.

22 (WITNESS TAKES STAND)

23 SUSAN KNIGHT, being duly sworn to tell
24 the truth, the whole truth and nothing but the
25 truth, testified, as follows:

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DIRECT EXAMINATION

1

2 BY MR. BLUME:

3 Q. Dr. Knight, good morning. What is your
4 current occupation?

5 A. I am a forensic psychologist.

6 Q. Where are you currently employed?

7 A. At the Medical University of South
8 Carolina.

9 Q. What is your position there?

10 A. I am an assistant professor of Forensic
11 Psychiatry. I'm also the Associate Director
12 of the Forensic Psychiatry Fellowship training
13 program. In addition to that, I am adjunct
14 faculty at the Charleston School of Law where
15 I teach one seminar on psychiatry and the law.

16 Q. What are your responsibility at the
17 Medical University of South Carolina?

18 A. Primarily to conduct clinical forensic
19 evaluations on various topic, civil and
20 criminal, for courts, attorneys, different
21 organizations.

22 I am also responsible for a large part of
23 the training and supervision of residents/
24 students, fellows that rotate through our
25 program.

1 As well, I provide clinical therapeutic
2 evaluation to a patient population when
3 necessary.

4 Q. You also do competency to stand trial and
5 criminal responsibility evaluations for the
6 South Carolina Department of Mental Health?

7 A. I do. That's a large part of my criminal
8 practice as a state examiner for the Department
9 of Mental Health. These are evaluations on
10 competency to stand trial, criminal
11 responsibility issues, for eight counties in
12 the lowcountry.

13 Q. Prior to coming to the Medical University
14 of South Carolina, where were you employed?

15 A. I've been at MUSC for about four years.
16 Prior to that I was in private practice in
17 Raleigh, North Carolina.

18 Prior to that I was a forensics psycholo-
19 gist through the Keck School of Medicine in Los
20 Angeles with the Department of Mental Health
21 and I was also a clinical psychologist for the
22 Los Angeles County jail for several years.

23 Prior to that I was a clinical
24 psychologist in various correctional
25 institutions.

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1 Q. Can you briefly provide the court with
2 your education and training?

3 A. Sure. I have a bachelor of arts degree in
4 psychology from Shea University in San Antonio.
5 I have a masters degree in clinical psychology
6 from the University of Louisville.

7 I have a PhD doctorate in clinical psychology
8 from the University of Louisville, and prior to
9 that I'd attended a year-long pre-doctoral
10 internship in forensic psychology at the
11 federal prison in Butner, North Carolina,
12 through the Department of Justice. After that,
13 I completed a post-doctoral fellowship in
14 forensic psychology at the Keck School of
15 Medicine in Los Angeles.

16 Q. Are you board-certified in any areas?

17 A. I am. I am board-certified in forensic
18 psychology.

19 Q. And are you licensed as a psychologist?

20 A. Yes, in South Carolina and North Carolina.

21 Q. Have you ever been qualified as an expert
22 witness before in the field of forensic
23 psychology?

24 A. I have.

25 Q. In what courts?

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1 A. In South Carolina and Federal courts.

2 MR. BLUME: Your Honor, at this
3 point I would move to qualify Dr. Knight as
4 an expert in forensic psychology.

5 THE COURT: Do you care to examine
6 her as to qualifications?

7 MR. FRIEDMAN: Your Honor, I would
8 just ask Dr. Knight how many times have you
9 testified as an expert in South Carolina
10 courts?

11 THE WITNESS: Approximately five
12 or six times.

13 MR. FRIEDMAN: I have nothing
14 further.

15 THE COURT: Very well. I will
16 permit her to render opinions in the area of
17 forensic psychology.

18 DIRECT EXAMINATION CONTINUED

19 BY MR. BLUME:

20 Q. Dr. Knight, can you please tell the court
21 what you were asked to do in Mr. Myers' case?

22 A. In Mr. Myers' case, I was asked to conduct
23 a psychological evaluation to see if he had any
24 psychological characteristics that would make
25 him more vulnerable of susceptible during

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1 police interrogation.

2 Q. How did you go about doing this?

3 A. I reviewed available collateral data in
4 the case, which included prior psychological
5 reports and test data, trial transcripts of
6 several of the officers involved, I reviewed a
7 videotape of an interrogation session between
8 Mr. Myers and one of the officers. I reviewed
9 Dr. Saul Kassin's testimony and report on --
10 reviewed his opinions on why he believed that
11 the confession was of questionable reliability.

12 Q. Dr. Kassin testified in Mr. Myers' trial?

13 A. That's my understanding, (affirmative
14 nod).

15 Q. Dr. Kassin is an expert in the area of
16 false confessions? Is that what his area of
17 expertise is?

18 A. He's a recognized expert in false
19 confession in the field of psychology; yes.

20 Q. And in addition to reviewing these
21 materials, what else did you do?

22 A. I interviewed Mr. Myers for over four
23 hours on two separate occasions. I
24 administered a variety of psychological
25 measures to assess the referring issue.

1 I interviewed Mr. Myers' mother, gave her a
2 psychological assessment to fill out, as well.

3 Q. Can you summary briefly what you found?
4 Then we will go through it in more detail.

5 A. Sure. Overall, I found that Mr. Myers did
6 have psychological vulnerabilities that may
7 predispose him to making unreliable statements
8 in the context of police interrogation.

9 This included high levels of interrogative
10 suggestibility, high levels of compliance, high
11 anxiety levels, low self-esteem and at that
12 time an inherent distrust of law enforcement
13 personnel.

14 Q. So before we go this in more detail as to
15 why you reached these conclusions, you just
16 used a term, "interrogative suggestibility."

17 A. (Affirmative nod).

18 Q. Can you explain to the court what
19 interrogative suggestibility is?

20 A. Sure. Suggestibility is a psychological
21 construct where someone is more predisposed to
22 believe or accept what somebody is telling them
23 or proposing to them. It's a psychological
24 construe that, like all constructs, is found in
25 varying degrees in individuals. A more

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1 specific form of suggestibility in forensic
2 context is interrogative suggestibility. So
3 the formal definition of that is that within a
4 closed social interaction, the subject goes
5 through a formal questioning procedure where
6 things are suggested to him and he tends to
7 accept those suggestions, culminating in a
8 behavior response. For example, a confession.

9 Q. You at one point told me that interroga-
10 tive suggestibility is a dynamic variable?

11 A. (Affirmative nod).

12 Q. So that's a fairly high dollar word. What
13 does that mean, really?

14 A. It simply means that it is a variable that
15 is comprised of a person plus environment. So
16 it is an underlying personality construct but
17 it can be modulated by environmental variables.
18 It can be diminished or enhanced based on the
19 situation or variables present. So we look at
20 four situational variables that are present to
21 make up the construct of interrogative
22 suggestibility.

23 Q. What are those four variables?

24 A. Those are interpersonal trust of the
25 interviewer, in this case the officers; an

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1 expectation that the interviewee knows the
2 correct answer; being made to feel uncertain
3 that they are giving the correct response;
4 while at the same time they are being made to
5 feel uncertain through various interview
6 techniques such as repeated questioning,
7 negative feedback, being told that they are
8 wrong, these sorts of things.

9 Q. And is there, in the field of psychology,
10 a recognized method for evaluating interroga-
11 tive suggestibility?

12 A. There is. There is a certain
13 psychological assessment measure called the
14 Godjonsson Suggestibility Scales or GSS. It is
15 a measure developed by a psychologist who was a
16 prior law enforcement officer. In his work as
17 a police officer, he noticed that some subjects
18 would change their responses in response to
19 certain interrogation techniques. So he became
20 a psychologist, decided to study this. In his
21 career, he developed this scale. The purpose
22 of this scale is to measure the level of
23 suggestibility in interrogation situations to
24 see who is vulnerable to that. It is a measure
25 that has been around since the early 1980's.

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1 It's been normed on various populations:
2 general populations, adult populations,
3 juveniles, various forensic populations.

4 Q. So it has been used by others, mental
5 health professionals and psychologists?

6 A. Yes, absolutely. It has been subject to
7 peer review in multiple articles. It's been
8 subject to research in different countries,
9 has appeared in a variety of different
10 journals.

11 Q. And are there procedures in place to
12 ensure the reliability of the administration
13 of the tests?

14 A. There are. There is a manual that
15 outlines the standardized administration
16 practices that the clinician should follow
17 when they give this measure. That's clearly
18 outlined in the manual. There have also been
19 reliability studies looking at its interrelated
20 reliability, its test reliability. Those are
21 both strong.

22 Q. Did you follow those procedures to ensure
23 the reliability in administering the GSS -- the
24 scales in this case?

25 A. Absolutely, yes.

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1 Q. And you mentioned another word -- in
2 addition to suggestibility, you mentioned the
3 term "compliance." Can you explain to the
4 court what compliance means in this context?

5 A. Sure. So compliance is a related
6 psychological construct meaning to yield to
7 others. It's a related construct to
8 interrogative suggestibility. They are
9 frequently researched together.

10 There is a key difference, though. The
11 suggestible person will come to accept and
12 privately internalize or believe the suggestion
13 while the compliant person may just go along
14 with it, in a situation, without a private
15 acceptance of the suggestibility.

16 So if we apply that to an interrogation
17 situation, the compliant person who is easy
18 to please, who wants to avoid conflict and
19 confrontation, may confess at the officer's
20 suggestion but they don't come away believing
21 that suggestion. Whereas the suggestible
22 person may also be compliant but they are more
23 likely to accept and believe that confession or
24 statement.

25 Q. Does the GSS test compliance?

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1 A. Not the GSS. There is a related measure
2 called the compliance scale which is
3 administered. I administered it as well in
4 this case but it is a different assessment
5 measure.

6 Q. So let's now discuss in more detail your
7 conclusions and opinions regarding your
8 evaluation of Mr. Myers. You were just
9 discussing the GSS. What were the results of
10 the GSS that you administered to Mr. Meyers?

11 A. Sure. So the GSS is a range of scores
12 from zero to thirty-five. The general
13 population example scores about a mean score
14 of seven-point-five. Mr. Myers' score was
15 eighteen, so he was two standard deviations
16 away from the mean. That means that he has
17 a much higher level of interrogative
18 suggestibility than the general population.

19 He was also -- when you look at samples of
20 alleged false confessors and examples of
21 resistors, his score was much more in line than
22 those individuals that had confessed, who have
23 confessions now in dispute, than those
24 individuals who had resisted and now confessed
25 during interrogation.

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1 Q. So he was high in suggestibility?

2 A. He was, yes.

3 Q. Two standard deviations above the normal,
4 I believe you said.

5 A. Yes.

6 Q. And what were the results from the GCS,
7 the compliance scale?

8 A. The compliance scale indicated that he had
9 higher levels of compliance than the general
10 population, as well. Again, when you look at
11 samples of individuals whose confessions are in
12 dispute, his compliance scores were much more
13 in line with those samples than individuals
14 that resisted and not confessed during
15 interrogation.

16 Q. So, Dr. Knight, in addition to the GSS and
17 GCS, you've mentioned other tests that you
18 administered. The other tests that you
19 administered and reviewed, did you find any
20 correlating cognitive variables or any
21 supporting data in the other testing which
22 would further opinions regarding
23 suggestibility?

24 A. I did. The construct of interrogative
25 suggestibility is related -- shown through

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1 research to be related -- to other variables,
2 either positively correlated with them or
3 negatively correlated with them. I found some
4 of these variables primary due to personality
5 testing that I administer to Mr. Myers through
6 interviews with him, interviews with his
7 mother. I'll go over three of them.

8 Q. Okay.

9 A. For example, anxiety was high in the
10 interview. With interrogative suggestibility,
11 they generally have higher anxiety levels and
12 this was reflected on two personality tests
13 that I gave him -- the Minnesota Multiphasic
14 Personality and the Torrent personality
15 assessment inventory.

16 The second variable is poor memory. So
17 those that have been shown to be high in
18 interrogative suggestibility have poor memory
19 recall in general. I did find that with Mr.
20 Myers. On the GSS, there is memory testing
21 involved and his memory scores were much lower
22 than the general population.

23 Then the third variable is low esteem. So
24 research tells us that if someone is higher in
25 interrogative suggestibility, they generally

1 have lower levels of self-esteem as well. This
2 was reflected not only in the historical
3 reports and his mother confirmed this but also
4 on the scale of MMPI and ego strength, he was
5 very low on this scale.

6 Q. Dr. Knight, in any criminal matter, in any
7 forensic case, it has to be taken into account
8 whether the person might be trying to -- the
9 person who you are evaluating might be trying
10 to manipulate the testing data in order to
11 achieve a favorable outcome. With that in
12 mind, what did you do to try and assure
13 yourself that these were accurate results?

14 A. The term that we use would be "malingering".
15 Malingering is always a consideration
16 in forensic evaluation. It is always something
17 that we try to assess along with the referring
18 issue.

19 With Mr. Myers there were three sources
20 of data that I used. I administered a
21 psychological measure that is designed to
22 assess malingering. It assess for effort.
23 It is called the test for malingering memory or
24 the TOMM. It's a wide-range used for forensic
25 assessment measure that is used in forensic

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1 evaluations to see if somebody is trying to
2 fake cognitive impairment, trying to appear
3 more impaired than they are -- for example in
4 memory or other cognitive processes.

5 The test results for Mr. Myers showed that
6 he was not -- that there was no indication on
7 that test that he was attempting to exaggerate
8 any sort of impairment and that he was putting
9 forth good effort. That's what the test
10 showed.

11 The other source of data, on the two
12 personality measurers that I mentioned, there
13 are built in validity scales. These scales are
14 not apparent to the test taker. They are very
15 subtle. They can tell you if somebody is
16 trying to distort their responses on these
17 measures. For example, if the person trying to
18 look more impaired than they are. Or are they
19 going in the other direction, are they trying
20 to minimize impairment. On all of the validity
21 scales, both personality measures, it reflects
22 that Mr. Myers was putting forth an open and
23 forthright effort in that testing.

24 Then the third source would be my
25 background as a forensic psychologist that has

1 received training in malingering, assessment
2 and technique. There are certain overt signs
3 that we look for in the interview itself, such
4 as inconsistencies, exaggeration.

5 Mr. Myers was very consistent across the
6 interviews. He was fully engaged in the
7 process. He didn't seem to over report or
8 exaggerate. So I didn't feel that I saw any
9 overt signs, as well.

10 Q. So both the testing that you gave and
11 through your own evaluation of the situation,
12 there was no situation of malingering at all?

13 A. That would be my opinion, yes.

14 Q. What information did you gather from your
15 clinical interview with Mr. Myers that you
16 determined to be relevant to your opinion?

17 A. So I interviewed Mr. Myers for over four
18 hours regarding a range of topics, historical
19 functioning and his experiences with the police
20 questioning and those sorts of things.

21 One thing stood out to me and that was his
22 history with his maternal uncle. Mr. Myers at
23 a very early age, I believe that he was around
24 four, his father suffered a very serious
25 accident and was confined to a wheelchair after

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1 that. So Mr. Myers' maternal uncle at this
2 time stepped in as a father figure to him. He
3 took him hunting, fishing, did outdoor
4 activities with him and fulfilled a paternal
5 figure in his life. This individual, Keith,
6 was a Viet Nam veteran and he was also a law
7 enforcement officer in South Carolina for many
8 years. So Mr. Myers, and his mother, described
9 this individual as extremely honest, upright,
10 and kind. It appeared that Mr. Myers idolized
11 him at an early age and really formed his
12 impression of law enforcement as an adolescent
13 on into adulthood.

14 Mr. Myers, from my interviews and what I
15 could tell, had very little other interaction
16 with law enforcement prior to being arrested
17 for the current crime. So this experience with
18 Keith formed his impression of law enforcement,
19 which I believe played a role in the
20 interrogation process.

21 Q. You said "arrest" but you meant
22 interrogation?

23 A. (Affirmative nod), interrogation.

24 Q. So is it fair to say that the high scores
25 that you found on the scales, GSS and GCS, were

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1 supported by the other psychological results
2 and the collateral data that you received?

3 A. Yes. So the other psychological testing
4 converged with the construct of interrogative
5 suggestibility, showing that Mr. Myers was high
6 or low. In coordinating variables that were
7 consistent with the research and the
8 information from the interview regarding the
9 trust of his uncle also fits into the model of
10 interrogation suggestibility.

11 Q. In putting this all together on the
12 question of interrogative suggestibility, what
13 opinions did you come to?

14 A. Well, I found that he was high in
15 interrogative suggestibility as compared to the
16 norm samples, consistent with forensic samples.
17 He was high in compliance. We know that these
18 are variables. We look at the whole confession
19 but we know that these variables are more
20 present in those that have been -- confessions
21 that have been shown to be false. He would be
22 more vulnerable to these types of variables
23 than someone would not have high levels of
24 these variables.

25 In addition, the other psychological

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1 variabilities, the anxiety, the low self-
2 esteem, the poor memory, would all place him
3 at a higher risk as well.

4 Q. And did you review the testimony regarding
5 Mr. Myers interrogation in this case?

6 A. I did, yeah.

7 Q. Were the components -- you earlier in your
8 testimony mentioned some of the components of
9 interrogation. Were the components of his
10 interrogation consistent with the construct of
11 interrogation suggestibility, which would have
12 increased his risk for a false confession?

13 A. They were. So he was engaged in a closed
14 social interaction. He was subjected to a
15 formal questioning procedure in the form of an
16 interrogation over two or three days. This
17 interrogation was done with -- he was told that
18 he made a confession, that officers believed --
19 they took a guilty assumptive approach with
20 him. They also used tactics that have been
21 psychologically-oriented, sometimes
22 psychological force including minimization and
23 relaying -- staging a phone call, presenting
24 false evidence to him. These are all shown to
25 be coercive from a psychological standpoint.

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1 At some point he came to accept their
2 suggestions on the behavior response of an
3 incriminating statement.

4 This occurred all within the context of
5 Mr. Myers implicitly trusting these offices to
6 be straight with him. His anxiety level was
7 high, his self-esteem was low, he was being
8 made to feel that the answers that he was
9 giving were not correct, the negative feedback
10 -- so he looked to his environment for external
11 cues because he was doubting his own memory,
12 recall. He was doubting his own experiences.
13 This culminated when he was given what the
14 officers said was conclusive evidence of his
15 guilt with the presentation of the hair
16 evidence. That culminated in his statement.

17 Q. Dr. Knight, in this case, during the
18 State's closing argument at trial the following
19 statement was made, "*You've got a thirty-seven*
20 *year old man, twelve years of high school, one*
21 *year of college, six years in the military, a*
22 *big strapping guy and there's no way that he is*
23 *vulnerable when he goes there.*" - to the police
24 station. Based on the results of your
25 evaluation, is that statement about Mr. Myers

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1 correct?

2 A. Not in line with my findings from my
3 evaluation. I found that he did possess
4 certain psychological vulnerabilities that
5 would predispose him to making an unreliable
6 statement in the context of police
7 interrogation using psychologically-oriented
8 techniques. So, no.

9 Q. And those vulnerabilities are what you
10 have been discussing throughout: the result of
11 your testing, your interviewing and the other
12 data you received?

13 A. That's correct.

14 Q. Thank you, Dr. Knight. If you could,
15 please answer any questions that Mr. Friedman
16 may have.

17 THE COURT: Cross-examine?

18 MR. FRIEDMAN: Thank you.

19 CROSS EXAMINATION

20 BY MR. FRIEDMAN:

21 Q. Dr. Knight, have you read Mr. Myers
22 confession in this case?

23 A. I have, yes.

24 Q. Would you agree that the confession is
25 very detailed?

1 A. It provided some detail, yes.

2 Q. Would you agree that some of those details
3 were not known to the police?

4 A. I cannot agree with that.

5 Q. Did you find that the Applicant was
6 mentally deficient?

7 A. Pardon?

8 Q. Do you find that Mr. Myers is mentally
9 deficient?

10 A. Not in the sense that he meets criteria
11 for mental retardation or a mental illness. I
12 believe that he was tested prior to my
13 evaluation and at the time of his trial that he
14 had a low average IQ.

15 Q. And you can't give an opinion whether the
16 confession was true or false, can you?

17 A. No.

18 Q. Dr. Knight, when did you interview Mr.
19 Myers?

20 A. I interviewed Mr. Myers several months ago
21 on two separate occasions, a couple of weeks
22 apart.

23 Q. Would that have been in 2011?

24 A. Yes.

25 MR. FRIEDMAN: Nothing further,

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1 Your Honor.

2 THE COURT: Redirect?

3 MR. BLUME: No, sir.

4 THE COURT: You may step down.

5 (WITNESS STEPS DOWN)

6 THE COURT: Do you wish for her to
7 be excused?

8 MR. FRIEDMAN: Yes, sir.

9 THE COURT: Any objection?

10 MR. FRIEDMAN: No objection.

11 THE COURT: You are also free to
12 leave. Let's take about a ten-minute break.
13 Thank you.

14 (BRIEF RECESS)

15 (APPLICANT PRESENT)

16 THE COURT: Mr. Blume, you may
17 proceed?

18 MR. BLUME: Yes, Your Honor. Before
19 we call the next witness, I have one or two
20 housekeeping measures.

21 THE COURT: Sure. I have marked as
22 Applicant's Exhibit 1 a series of letters back
23 and forth between the FBI and myself. The
24 reason for that is that because one of the
25 experts that we have retained in an attempt to

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1 make sense of forensic information was a former
2 FBI agent and examiner named Fred Wiggerts
3 (phonetic). After reviewing the documents, Mr.
4 Wiggerts informed us that he believes that the
5 FBI has additional information in this case
6 that they have not given us. So under the
7 Freedom of Information Act, I've been involved
8 -- actually for several years -- in trying to
9 obtain this. In fact, it is still an ongoing
10 process.

11 This is not really of any legal
12 consequence to any of these issues in the
13 application but I want this to be part of the
14 record in case at some point they disclose
15 something to me. I didn't want there to be an
16 allegation that I wasn't trying to obtain this
17 information.

18 THE COURT: So you are not offering
19 this -- at this point it is not evidentiary but
20 merely to show what you have done or attempted
21 to do?

22 MR. BLUME: Right.

23 THE COURT: I will make it Court's
24 Exhibit 1. It's just a part of the record,
25 with the understanding that I am not relying on

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1 the contents for any decision that I have to
2 make.

3 MR. BLUME: Yes, sir. Thank you.

4 THE COURT: That's fine. I
5 understand the purpose and I don't fault that.
6 I concur with that.

7 MR. BLUME: We discussed in chambers
8 that one of the witnesses that we intended to
9 call has had a death in her immediate family
10 and will not be able to testify.

11 THE COURT: Who is that witness?

12 MR. BLUME: Her name is Patricia
13 White. She was a juror in this case.

14 THE COURT: Okay.

15 MR. BLUME: Mr. Friedman and I
16 discussed the matter and we have agreed among
17 ourselves, and I believe that the court
18 approved this, that we will take her testimony
19 via deposition sometime in the future, as
20 reasonably promptly as we can get that done.

21 THE COURT: Very well. The court
22 has approved that and I do authorize that for
23 the purposes of this proceeding. I think that
24 is a more appropriate way of dealing with that
25 witness. Certainly I will be happy to receive

1 a copy of that deposition, if you'd just file
2 the original with the Clerk of Court.

3 MR. BLUME: Then the final business,
4 and this is purely administerial, I would move
5 to amend the title of the application. When I
6 filed this application it was a different
7 style, Myers v. Osmond.

8 THE COURT: Yes.

9 MR. BLUME: Since then the Chief
10 Justice has become quite animated that she
11 wants all PCRs to be versus the State. I guess
12 for regularity (sic). So I move to amend the
13 caption in this matter to Myers versus the
14 State of South Carolina.

15 THE COURT: Any objection?

16 MR. FRIEDMAN: No objection, Your
17 Honor.

18 THE COURT: It is so noted and will
19 be that. We will just -- subsequent
20 documentation may be filed in that -- styled in
21 that manner.

22 MR. BLUME: Thank you.

23 THE COURT: Just make sure that you
24 put the case number on it, because the case
25 number will stay the same. Thank you.

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1 MR. BLUME: We call Rose Marie
2 Myers.

3 THE COURT: Okay.

4 (WITNESS TAKES STAND)

5 ROSE MARIE MYERS, being duly sworn to
6 tell the truth, the whole truth and nothing but
7 the truth, testified, as follows:

8 DIRECT EXAMINATION

9 BY MR. BLUME:

10 Q. Ms. Myers, you are the Applicant's mother?

11 A. Yes, I am.

12 Q. And did you testify at your son's trial?

13 A. I did.

14 Q. Do you recall, did you testify before or
15 after the victim's mother in this case, Ms.
16 Justice?

17 A. Before.

18 Q. Were you present during Ms. Justice's
19 testimony?

20 A. Yes, I was.

21 Q. During that testimony she testified that
22 your son had attacked you on one occasion. Is
23 that true?

24 A. Not at all. Never happened. Ever.

25 Q. Never.

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1 A. Never.

2 Q. She also testified that our husband slept
3 with a gun under his pillow because you were
4 afraid of Wes. Is that true?

5 A. Not at all.

6 Q. You're certain of that?

7 A. I am very certain of that.

8 Q. If you had been recalled as a witness at
9 the trial, would you have testified at that
10 time consistent with the testimony that you
11 gave today?

12 A. I certainly would.

13 Q. Was your son living at home at the time of
14 the fire at The Mill Inn?

15 A. Yes, he was.

16 Q. At that time did he have a rat tail?

17 A. No, and never has had one.

18 Q. All right. Let me show you what has been
19 marked -- well, let me first show it to
20 counsel.

21 MR. BLUME: (Tenders to Mr.
22 Friedman).

23 MR. FRIEDMAN: (Review).

24 DIRECT EXAMINATION CONTINUED

25 BY MR. BLUME:

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1 Q. Let me show you what has been marked as
2 Plaintiff's Exhibit 1, which was also the -- do
3 you recognize that photograph?

4 A. I certainly do. This is when they were
5 looking for any marks on his body that would
6 have perhaps bled, finding none. As you will
7 note, his hair is short.

8 Q. When you say "they", you're referring ---

9 A. The police.

10 Q. --- the police?

11 A. (Affirmative nod).

12 MR. BLUME: Your Honor, we would
13 move to have this admitted as an exhibit in the
14 post conviction relief.

15 THE COURT: Let's mark it as
16 Applicant's Exhibit 2.

17 COURT REPORTER: Applicant's Exhibit
18 1.

19 THE COURT: I thought we had one.

20 COURT REPORTER: That was marked as
21 a Court's Exhibit.

22 THE COURT: Right. Thank you.
23 Applicant's Exhibit 1 is a photograph.

24 (SO ENTERED AS APPLICANT'S EXHIBIT 1)

25 DIRECT EXAMINATION CONTINUED

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1 BY MR. BLUME:

2 Q. Does this -- do these photographs
3 accurately portray what your son, Wesley Max
4 Myers, looked like at the time of the fire at
5 The Mill End?

6 A. Yes, it does.

7 Q. Ms. Myers, did you have a brother by the
8 name of Keith?

9 A. Yes.

10 Q. Did Wes know your brother?

11 A. Very well, yes.

12 Q. Can you describe his relationship with
13 Keith, what you observed?

14 A. It was very much a hero worship, he loved
15 him dearly. He depended upon him. Keith was
16 honest, of high integrity. He was a police
17 chief. We trusted and counted on him in many
18 ways, the entire family but Wes in particular.

19 Q. Why?

20 A. Because they related. Wesley needed a
21 male figure to relate to and Keith was there
22 after he returned from Viet Nam.

23 Q. You said that he was a law enforcement
24 officer?

25 A. (Affirmative nod).

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1 Q. Where was he a law enforcement officer?

2 A. In Florence and then in a small town in
3 the upper part of the state.

4 Q. And based on what you observed as the
5 mother, did Mr. Myers', your son, relationship
6 play a role in how he viewed police officers?

7 A. Absolutely.

8 Q. In what way?

9 A. Trust. Trust and belief that they would
10 tell him the truth. In fact, all of us were
11 affected with that because of our experience
12 with Keith. That's all that we had ever had,
13 so it was all that Wes had ever had.

14 Q. At the investigative stage of this, before
15 your son was arrested, did you cooperate with
16 anything that the police asked you to do?

17 A. Oh, yes.

18 Q. Did you allow them to search your house?

19 A. We certainly did. Closets. Bureau
20 drawers, everything.

21 Q. Did you ever not consent to anything ---

22 A. No, we did not.

23 Q. --- that the police asked before Mr. Myers
24 was arrested?

25 A. (Negative gesture).

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1 Q. Thank you very much.

2 MR. BLUME: Nothing else.

3 THE COURT: Cross?

4 MR. FRIEDMAN: Just briefly, Your
5 Honor.

6 THE COURT: Sure.

7 CROSS EXAMINATION

8 BY MR. FRIEDMAN:

9 Q. Ms. Myers, you testified that you testifi-
10 ed before Mrs. Justice; is that right?

11 A. Right.

12 Q. After her testimony, did you ever tell Mr.
13 Kulp that what she testified to was not true?

14 A. He knew that at the time.

15 Q. How did he know that?

16 A. For the longest time that we had
17 discussing all areas of this case and our
18 lives.

19 Q. Did you ever tell him that you wanted to
20 get back on the stand and testify?

21 A. No. Please understand, laypeople who have
22 never been in a courtroom before do not
23 necessarily know what to expect, or what they
24 should expect. We were trusting in Mr. Kulp at
25 that time.

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1 Q. I understand.

2 MR. FRIEDMAN: Nothing further,
3 Your Honor.

4 THE COURT: Redirect?

5 MR. BLUME: No, sir, Your Honor.

6 THE COURT: You may come down, Ms.
7 Myers. Thank you.

8 (WITNESS STEPS DOWN)

9 THE COURT: Call your next witness.

10 MR. BLUME: Yes, we would call Pete
11 Skidmore.

12 (WITNESS TAKES STAND)

13 PETER SKIDMORE, being duly sworn to
14 tell the truth, the whole truth and nothing but
15 the truth, testified, as follows:

16 DIRECT EXAMINATION

17 BY MR. BLUME:

18 Q. Mr. Skidmore, how are you employed?

19 A. I am a licensed private investigator.

20 Q. Where do you reside?

21 A. Fort Mill, South Carolina.

22 Q. And do you have a business in Fort Mill?

23 A. I do.

24 Q. What is that business called?

25 A. Skidmore & Associates.

1 Q. Mr. Skidmore, did I retain you to render
2 private investigative services in this case?

3 A. Yes, you did.

4 Q. In that capacity, you conducted a number
5 of interviews?

6 A. I have.

7 Q. Did I ask you to interview a gentleman by
8 the name of Dana Chappel. I am not sure how to
9 pronounce it.

10 A. (Affirmative nod), you did.

11 Q. Mr. Chappel, had he been seen near the
12 scene of the crime at the time of the fire?

13 A. Yes, he had.

14 Q. And in addition, did you try and speak
15 with Mr. Chappel?

16 A. I did. I went to his residence.

17 Q. And would he agree to talk to you?

18 A. No, he would not talk to me at all.

19 Q. Did I also ask you, since we were doing
20 DNA testing in this case, to ask Mr. Chappel if
21 he would give us a biological sample for us to
22 do DNA testing, to determine whether he was the
23 source of DNA found on certain items?

24 A. Yes, you did.

25 Q. And did you make this request?

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1 A. I did.

2 Q. Did you make the request of him that I
3 made of you?

4 A. (Affirmative nod), and he said "no."

5 Q. Is that a quote?

6 A. Pretty much, yes.

7 Q. Thank you, Mr. Skidmore.

8 THE COURT: Cross examine?

9 MR. FRIEDMAN: No questions, Your
10 Honor.

11 THE COURT: You may come down, Mr.
12 Skidmore. Do you wish the witness to be
13 excused?

14 MR. BLUME: Yes, Your Honor.

15 THE COURT: Any objection?

16 MR. FRIEDMAN: No objection, Your
17 Honor.

18 THE COURT: You are also free to
19 leave, sir.

20 (WITNESS STEPS DOWN)

21 MR. BLUME: Your Honor, as we
22 discussed -- it moved a little quicker this
23 morning than we anticipated, so we don't have
24 other witnesses coming until 1:30. I believe
25 what we've agreed to do is that the State if

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1 going to call some witnesses out of order.

2 THE COURT: You may.

3 MR. BLUME: Just in order to

4 expedite the ---

5 THE COURT: Call your first witness.

6 MR. FRIEDMAN: The State would

7 call Amy Clifford.

8 (WITNESS TAKES STAND)

9 AMY CLIFFORD, being duly sworn to tell
10 the truth, the whole truth and nothing but the
11 truth, testified, as follows:

12 DIRECT EXAMINATION

13 BY MR. FRIEDMAN:

14 Q. Good morning, Ms. Clifford.

15 A. Good morning.

16 Q. Were you formerly employed with the 9th
17 Circuit Solicitor's Office?

18 A. Yes.

19 Q. When were you employed there?

20 A. I was employed there from December of 1991
21 through sometime in July 1999.

22 Q. Were you assigned to prosecute the
23 Applicant's case?

24 A. Yes, I was.

25 Q. Do you remember when that was opened?

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1 A. I do not. I don't remember if it came to
2 me first, because at some point I began
3 handling the domestic violence cases, any crime
4 that had sort of that sort of tint. A lot of
5 cases were transferred to me, so I don't know
6 if I was the first one to have this or not.

7 Q. Do you remember handling any pretrial
8 matters in this case?

9 A. Yes.

10 Q. Do you remember that there were some
11 hearing regarding discovery?

12 A. Yes.

13 Q. Tim Kulp represented Defendant Myers; is
14 that right?

15 A. Yes, he did.

16 Q. Do you recall that there was some hair
17 evidence in this case?

18 A. Yes. Apparently there was hair found in
19 the victim's hand, which was under her body at
20 the scene. North Charleston Police Department
21 recovered that hair and I believe that it was
22 sent to SLED for microscopic examination. Then
23 -- that was done and those results were given
24 to North Charleston. At the time SLED didn't
25 do mitochondrial DNA, so they were not able to

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1 perform DNA tests on the hair.

2 There were efforts made to get the hair
3 sent to the FBI. That was finally done and
4 North Charleston worked on it, SLED worked on
5 it, our office worked on it. The hairs were
6 reportedly sent by North Charleston to the FBI.
7 The FBI, when we tried to contact them,
8 initially indicated that they had never
9 received the hairs. They went back and looked
10 and at some point they told me that they had
11 received of the slide with some hairs on it but
12 it was crushed and the hairs were small pieces.
13 At that point, I believe they sent what they
14 had back to North Charleston.

15 This is based on my memory. I haven't had
16 a chance to go through the file. It's been a
17 long time.

18 At that point, up until the time that I
19 left the solicitor's office -- in fact, one of
20 the last things that I did was work on this
21 case, trying to get North Charleston to look
22 for the hair. While we opposed the defense, we
23 didn't necessarily want the trial court to make
24 us turn the hair over to the defense so that
25 they would take it and test it. We wanted to

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1 test it ourselves once we learned that thought
2 that it had evidentiary value. We were trying
3 to find it.

4 Q. Was there any evidence that you
5 deliberately withheld from Mr. Kulp?

6 A. No, he received everything that we
7 received, everything that we had. The
8 frustration with this case was that there was
9 a lot of information that was not contained
10 within the police reports and it was given to
11 us in pieces as we met with the police officers
12 trying to prepare the case. But as soon as we
13 learned of information, we provided that to Mr.
14 Kulp.

15 Q. I believe that you testified that you left
16 the solicitor's office in July of 1999; is that
17 correct?

18 A. Yes.

19 Q. Was that prior to the start of this trial?

20 A. Yes.

21 MR. FRIEDMAN: I have nothing
22 further, Your Honor.

23 THE COURT: Cross examine, Mr.
24 Blume.

25 MR. BLUME: Just briefly.

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1 CROSS EXAMINATION

2 BY MR. BLUME:

3 Q. Good morning, Ms. Clifford.

4 A. Good morning.

5 Q. In this case, you're saying you are
6 testifying from memory.

7 A. (Affirmative nod).

8 Q. So the transcript of course would be a
9 better indicator of what the State's position
10 was than your memory?

11 A. I have read the transcripts from the
12 hearings, that the Attorney General's office
13 gave me.

14 Q. In this case -- were you also familiar, do
15 you recall that there was another person that
16 was just mentioned in the last testimony by the
17 name of Dana Chappel?

18 A. I remember him. I honestly, without
19 reading the transcript, don't remember why he
20 was ever looked at by the police but I do know
21 that he was somehow brought up and that Mr.
22 Kulp focused on him and was trying to get
23 information about him.

24 Q. Right. And, so, do you recall that Mr.
25 Chappel was seen at The Mill Inn very late in

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1 the evening before the morning of the fire
2 occurred?

3 A. I actually don't. I did not read the
4 trial transcript since I did not try the case.
5 And I have not reviewed the police reports.

6 Q. And, so, -- then if you don't recall that
7 he had actually change his appearance between
8 the night of the -- he'd shaved off his
9 mustache between the night before and the day
10 of ---

11 A. I don't remember that.

12 Q. Do you also remember in the police report
13 that Mr. Chappel appeared highly nervous when
14 he was questioned by the police the next day?

15 A. I don't remember that. I remember that he
16 was stopped by the police, they talked to him
17 and that there was a knife recovered from him
18 or his car but that he was let go.

19 Q. Do you recall that law enforcement did
20 obtain from Mr. Chappel at the time of the
21 trial a blood sample?

22 A. No, I didn't know that. I wasn't involved
23 in the trial.

24 Q. Well, that law enforcement obtained
25 shortly around the time that we are talking

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1 about, obtained a blood sample from Mr.
2 Chappel?

3 A. I don't recall that. Sorry.

4 Q. And that even though they had his blood
5 that they never tested it or developed a DNA
6 profile from it? Do you recall that?

7 A. I don't remember hearing that they did.
8 I didn't know they had the blood, so I don't
9 remember that.

10 Q. Now, let me ask you about ---

11 MR. BLUME: Could I have this
12 marked?

13 COURT REPORTER: Applicant's Exhibit
14 2.

15 CROSS EXAMINATION

16 BY MR. BLUME:

17 Q. Ms. Clifford, this is a document that was
18 actually Exhibit 27 at the trial. Are you
19 familiar with this?

20 A. (Upon review), I don't -- I mean, I am
21 sure that if it was in our file that I saw it,
22 but I don't have any independent recollection
23 of the form. But it is a SLED form.

24 Q. A SLED form that you produced during
25 discovery. I am not suggesting that it wasn't

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1 produced. Does that form indicate, it lists
2 victim and subject?

3 A. Yes.

4 Q. And it indicates on the form that at least
5 they believe that the subject was bleeding?

6 A. (Upon review), yes.

7 Q. So the subjects that they had in this, and
8 they are listed here, are Mr. Myers and Mr.
9 Chappel; correct?

10 A. Yes.

11 Q. Given that, isn't it true that had Mr.
12 Chappel's blood been tested, it is possible
13 that there could have been evidence developed
14 that linked him to this crime?

15 A. I mean, I have no way of knowing.

16 Q. Well, we don't know because it wasn't
17 done. I am not saying that it would have but
18 it could have yielded evidence ---

19 A. If he was involved.

20 Q. Right.

21 A. But we don't know if he was involved.

22 Q. Right. But one of the reasons that we
23 don't know is because there was no testing done
24 on Mr. Chappel's blood?

25 A. You are assuming that testing would have

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1 revealed that he was involved?

2 Q. No, I am assuming that it ---

3 THE COURT: Mr. Blume, I think I'm
4 capable of making that deduction. Thank you,
5 sir.

6 MR. BLUME: All right.

7 THE COURT: I don't need her to
8 verify that to get to that point. Thank you.

9 MR. BLUME: All right. I will stop
10 beating the dead horse.

11 THE COURT: Thank you, sir. This
12 witness is probably not going to answer that
13 question, and I understand why. It's a
14 question that, obviously, -- you know, there is
15 a logical conclusion for that and there is
16 support for what she is saying. I understand.

17 MR. BLUME: With that, I will pass
18 to Mr. Friedman.

19 MR. FRIEDMAN: I have no further
20 questions, Your Honor.

21 THE COURT: Do you want Ms. Clifford
22 to be excused?

23 MR. FRIEDMAN: She may be excused.

24 THE COURT: Any objection, Mr.
25 Blume?

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1 MR. BLUME: No objection, Your
2 Honor.

3 THE COURT: Ms. Clifford, thank you
4 very much. You are welcome to remain, but you
5 are free to leave if you like.

6 (WITNESS STEPS DOWN)

7 MR. FRIEDMAN: Your Honor, our
8 next witness will be Bruce Durant.

9 (WITNESS TAKES STAND)

10 BRUCE DURANT, being duly sworn to tell
11 the truth, the whole truth and nothing but the
12 truth, testified, as follows:

13 DIRECT EXAMINATION

14 BY MR. FRIEDMAN:

15 Q. Good morning, Mr. Durant.

16 A. Good morning.

17 Q. Where are you currently employed?

18 A. The 9th Circuit Solicitor's Office.

19 Q. How long have you been employed there?

20 A. About seventeen, eighteen years in two
21 different periods of time.

22 Q. Were you involved with the prosecution of
23 Mr. Myers?

24 A. I was. I became involved, looking back
25 over the transcript and stuff, not initially

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1 because Amy had the case. I was on a couple of
2 hearings and I think that I became involved in
3 1998 sometime.

4 Q. Do you have any recollection of the hair
5 evidence in this case?

6 A. Yes.

7 Q. What happened pretrial with the hair?

8 A. To the best of my recollection, and I made
9 some notes as I was looking at this yesterday,
10 as Ms. Clifford stated, in March when -- about
11 the 17th, I believe, or the 13th of 1997, the
12 date the crime occurred it was discovered --
13 the victim was turned over and the hair was
14 discovered.

15 It was described as longish hair, anywhere
16 from six to eight inches long, and then some
17 shorter hairs, in the victim's left hand that
18 was tucked under her body and had not gotten
19 burned.

20 The evidence tech bagged the hands there.
21 Later at the autopsy that day, the hairs were
22 collected.

23 The next day, the 14th of March, he took
24 those hairs to Joe Powell at SLED for a
25 microscopic examination.

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1 A microscopic comparison was done and it
2 was determined that the longish hair was
3 consistent with Mr. Myers' hair because the
4 standards for Mr. Myers had been taken up there
5 at that time.

6 Subsequent to that, I believe that SLED
7 did not have -- it was not sufficient, there
8 was not a root to the hair, so regular DNA
9 testing could not be done. Steve Lambert
10 indicated that mitochondrial DNA testing could
11 be done. I think at that time the only place
12 doing mitochondrial testing was the FBI lab and
13 maybe one or two private labs.

14 I think that -- it's my recollection that
15 Steve Lambert had originally sent the thing up
16 there but the FBI were claiming that they
17 didn't receive anything.

18 Then in December of 1998, Hallman was
19 contacted by Lambert and asked to look for this
20 hair. He went and found it. Then the evidence
21 room in North Charleston FedEx'ed it up to the
22 FBI laboratory. At that time they claimed that
23 all they got was some broken glass and never
24 received any hair. They returned everything
25 back to Powell at SLED.

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1 In August of '99, Hallman went up
2 there and looked at what was sent back from the
3 FBI. He could not locate the hairs at that
4 time either, I don't think. Sometime after
5 that -- and then after that, North Charleston
6 lost the box, couldn't find the box, couldn't
7 find the hairs.

8 So we were getting ready to go to
9 trial in 2000 and -- I distinctly remember this
10 because I think it was the Saturday before the
11 Monday we were supposed to go to trial. I get
12 a call from Al Hallman saying 'we found the
13 sample.' So at that point the case was
14 continued. I had the hairs sent to a private
15 lab for testing. It was tested and those
16 results were available when the case was tried
17 in 2001.

18 Q. Do you remember the results of that test?

19 A. The results of the test were official, and
20 this is the testimony that came out, the
21 analyst testified that officially the results
22 were inconclusive. It was her opinion that the
23 hair did not belong to Mr. Myers. That was
24 testified to in front of the jury.

25 Q. Did that change the State's theory of the

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1 case, that the didn't belong to ---

2 A. I argued to the jury then, just as I think
3 now, that I don't think it make any difference
4 in the guilt or innocence of Mr. Myers. The
5 fact that the hair may belong to Mr. Myers did
6 not prove him guilty of murder. He was the
7 victim's boyfriend, saw the victim frequently.
8 The fact that it was not his hair would not
9 prove his innocence because she was beaten down
10 on a floor in a seedy bar in North Charleston,
11 crawling around on her hands and knees and had
12 all kinds of hairs on her hands, chest and
13 everywhere. That is essentially how I argued
14 it to the jury.

15 Q. Do you recall the police pursuing any
16 other leads in this case?

17 A. I am aware of the Dana Chappel thing if
18 that is what you are alluding to. I believe
19 that her initial involvement or her interest in
20 Mr. Chappel was the fact that two of the people
21 that worked in the building where this occurred
22 had provided statements saying that Mr. Chappel
23 was the last person in the bar that night
24 before they closed it and he was intoxicated.
25 It was for that reason that he was initially a

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1 suspect, was because he was the last person,
2 essentially, at the bar. That was like at 1:30
3 in the morning.

4 The victim, I believe, had slept at the
5 bar that night on a pool table. I can't
6 remember what time that the fire was reported
7 but it was several hours later.

8 Q. Was there any evidence linking Mr. Chappel
9 to the crime?

10 A. None that I am aware of. Also the thing
11 that he liked to say was that he was initially
12 a suspect but that was the -- I think the fire
13 was Thursday morning and by Saturday morning
14 Mr. Meyers had confessed to it and, therefore,
15 Mr. Chappel was not longer a suspect.

16 Q. Do you remember any pretrial discussions
17 about the issue of third-party guilt?

18 A. We had plenty of discussion regarding
19 third party guilt. It was raised at trial.
20 We didn't believe then, and I don't believe
21 now, that these allegations regarding Mr.
22 Chappel arose to the level of third party
23 guilt.

24 I recall Tim Kulp never abandoned that
25 argument or pretty much conceded the argument,

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1 or didn't at the time. Whether or not that was
2 the case, all of that pretty much came down to
3 the trial anyway and was argued by Mr. Kulp.
4 So once again that was an issue that was before
5 the jury. I am pretty sure -- I am not
6 positive about that, but I am pretty sure Tim
7 argued that in his closing.

8 Q. Do you recall that Dr. Kassin testified at
9 the *Jackson v. Denno* hearing?

10 A. Yes.

11 Q. And he testified at trial?

12 A. Yes.

13 Q. Did the fact that he testified at the
14 *Jackson v. Denno* help you more effectively
15 cross examine him at trial?

16 A. I don't believe so. I don't think that he
17 had anything to do with it. I think basically
18 Tim was trying to convince the judge in the
19 *Jackson v. Denno* hearing that there was a false
20 confession involved.

21 Tim and I may have had some disagreements
22 on this case and disagreements over time, but
23 I've been doing this for a long time and I
24 don't think that he could have done a better
25 job trying this case than he did. I've tried

1 a lot of cases with a lot of defense attorneys
2 and Tim left no stone unturned in this case.

3 I think the record pretty much reflects that.

4 Q. Do you recall a State's witness named Lori
5 Villalobos?

6 A. I do.

7 Q. Do you remember how you found out about
8 her?

9 A. I do, indeed. It's probably one of the
10 things that I will never forget. We were in
11 the middle of the trial -- I don't remember
12 which particular day. But one of the girls
13 that worked in the bar, I think her name was
14 Tammy Gonzales, if I am not mistaken, Tanya
15 Gonzales or something like that. She comes up
16 to me and Matt Casey and says, 'You know, I was
17 out drinking last night and I ran into this
18 friend of mine.' I don't even think that she
19 knew the woman's name at that time. She may
20 have known her by a nickname. 'I was telling
21 her that I was involved in this case as a
22 witness and she told me that she had been at
23 the bar the night that this happened, had
24 walked in on the defendant and the victim and
25 they were having some argument.' That this was

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1 after the bar had closed. She had gone to the
2 bar to get a check cashed or to get some money
3 that Teresa Haught (phonetic) owed her, or
4 something like that. Had walked into the bar
5 or had gone into the bar and the defendant and
6 victim were in there and obviously had been in
7 some sort of argument.

8 So that was the information that we had
9 from Ms. Gonzales. That night I had my
10 investigator and Benjamin Norris, the fire
11 chief for the City of North Charleston, and
12 Denver Clayton, lead detective for the case,
13 out shaking down every juke joint in North
14 Charleston to try to find this woman. Lo and
15 behold, they found her. Got her name, got her
16 identifying information, told her why we needed
17 to be in touch with her and got her to come to
18 the court the next day.

19 I talked to her. We immediately told Tim
20 and told Judge Brown what had transpired. Tim
21 was given the opportunity to interview her. He
22 interviewed her in the conference room in our
23 office, I believe. Based on that, the judge
24 did allow her to testify. Like I said, that's
25 exactly how it came about. It wasn't as if she

1 was someone we'd known about for a long time.
2 It just was very fortuitous that she came to
3 light at all.

4 Q. Did you hear the two jurors who testified
5 this morning?

6 A. I did.

7 Q. Do you remember any in chambers meeting
8 between you and Mr. Kulp regarding ---

9 A. I'll tell you the same thing that I told
10 Mr. Blume when he asked me about that. I have
11 no, absolute no recollection of why jurors were
12 excused. I know that as a matter of practice
13 at the time that a juror would generally send a
14 note to the judge, the judge would bring the
15 attorneys in to tell us what the note said,
16 what the problem was. Generally the discussion
17 would go, *'do you want to keep her, get rid of*
18 *her?'* If we got rid of her, we would get rid
19 of her. If not, we would go forward. I have
20 no independent recollection of what went on
21 with either one of the jurors in that case.

22 But I know this, that -- I think that if
23 we had started out with jurors and we just
24 ended up with a couple less than we started
25 with that that probably would have raised a red

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1 flag with me as to what happened with the
2 juror. At least I would inquire. Which makes
3 me believe that we had a conference with the
4 judge in chambers when these things came up.

5 Q. Do you recall any irregularities with
6 jurors being excused in the case?

7 A. I do not. I honestly do not.

8 Q. In your experience are defendants usually
9 present for in chambers conferences regarding
10 jurors?

11 A. No. I think that's one of the things that
12 may have changed somewhat now. Routinely, back
13 eleven years ago, it was not unusual for a
14 judge to bring the lawyers back in his chambers
15 to discuss something like that rather than to
16 do it on the record. I think it is done on the
17 record more frequently now.

18 Q. Do you recall a note that the jury
19 indicated it was deadlocked?

20 A. No, I do not.

21 Q. Do you recall about how long it took to
22 reach a verdict?

23 A. According to the times in the transcript,
24 the entire deliberation was less than five
25 hours. It went out shortly after 3:00 p.m.

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1 and came back shortly after 8:00 p.m. I don't
2 remember the Allen charge or anything like
3 that.

4 Q. Do you recall if the jurors were polled
5 individually after the verdict?

6 A. They were.

7 Q. Mr. Blume has raised some DNA results.
8 Have you see that?

9 A. I have.

10 Q. Do you have a copy of that?

11 A. Not with me.

12 MR. FRIEDMAN: May I approach,
13 Your Honor?

14 THE COURT: You may.

15 MR. FRIEDMAN: (Tenders document
16 to witness).

17 MR. DURANT: Thank you.

18 DIRECT EXAMINATION CONTINUED

19 BY MR. FRIEDMAN:

20 Q. Have you had a chance to review those
21 results?

22 A. I have.

23 Q. Does it look like there was a dollar bill
24 that was tested?

25 A. Yes.

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1 Q. Was that tested before the trial?

2 A. Yes. It was tested by one of Mr. Kulp's
3 experts. I think his name was Gugliano
4 (phonetic).

5 Q. Do you remember the results at the time of
6 the trial?

7 A. As I recall, he indicated that he tested
8 it and there was a mixture of DNA on the dollar
9 bill. The primary contributor was the victim,
10 presumably the victim's blood. There was a
11 male component and as I recall the mixture was
12 insufficient to actually develop a profile, but
13 there was a mixture involving a male.

14 I think he also tested the meat cleaver
15 referenced by Mr. Blume. That was determined
16 to have no DNA profile on it.

17 I think he also tested some potential
18 blood spatter on the carafe believed to have
19 been used as the weapon, which I believe came
20 back as matching the victim's DNA.

21 Q. On this new DNA report, it looks like
22 there was also a sample submitted from Dana
23 Chappel.

24 A. I see that on the report. I don't know
25 where that came from or whether it belonged to

1 Dana Chappel for that matter. There is some
2 indication that they picked it up off the floor
3 somewhere, I believe under a table.

4 Also there is no indication from this DNA
5 testing that that male component on that dollar
6 bill belonged to Dana Chappel. As a matter of
7 fact, it is probably more likely from the
8 results that Dana Chappel was not a contributor
9 to the DNA on that dollar bill because there
10 were two profiles -- one full profile
11 developed, which was not Dana Chappel, was not
12 Wes Myers, was not whoever the heck this other
13 guy was, William McKinnon.

14 Then there was another -- I guess his
15 expert would call it a partial profile
16 developed, which involved a finding at one
17 loci out of sixteen. The other fifteen loci
18 there were no results. Although his expert
19 categorized that as possibly Dana Chappel's.
20 I would note that at the same loci that -- and
21 that's because there was one loci that he did
22 get a result at -- Dana Chappel's cigarette
23 butt, that cigarette butt did in fact come from
24 Dana Chappel.

25 But also the other DNA for the other male

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1 profile developed from the dollar bill also
2 matched at that same loci. So I think that it
3 would be more likely that there was just one
4 profile on there that came from an unknown
5 individual.

6 But the biggest issue about that, what I
7 raised with Gugliano is that the testing for
8 DNA is not substance specific. In other words,
9 they are just testing for DNA. They don't have
10 DNA as a result of blood, saliva, semen,
11 epithelials. As Dr. Gugliano acknowledged on
12 the stand, dollar bills are something that is
13 subject to being passed from one person to
14 another. People count money licking their
15 thumb. DNA could be deposited on there anytime
16 from the time that it was minted to the time
17 that it was tested.

18 In terms of being a prosecutor, whether or
19 not -- whoever's DNA profile was on that dollar
20 bill was irrelevant because I guess your theory
21 as defense would be that whoever killed her
22 went in there, beat her death, stuffed a dollar
23 bill in her pants, set the place on fire and
24 left. I did not think that was a reasonable
25 explanation of what happened.

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1 Q. Do you think the results would change the
2 State's' theory at trial?

3 A. Would these results have changed the
4 State's theory at trial?

5 Q. (Affirmative nod).

6 A. I don't believe that offers anything more
7 than what was offered at trial, that there was
8 a mixture on the dollar bill and one of them
9 was a male.

10 MR. BLUME: I have nothing further,
11 Your Honor.

12 THE COURT: Cross examine, Mr.
13 Blume.

14 MR. BLUME: Thank you, Your Honor.

15 THE COURT: Yes, sir.

16 CROSS EXAMINATION

17 BY MR. BLUME:

18 Q. It's still morning. Good morning, Mr.
19 Durant.

20 A. Good morning, Mr. Blume.

21 Q. I believe that we have a son about the sam
22 age, graduates of the same fine institution.

23 A. We do, indeed. Thank goodness he's
24 graduated.

25 Q. As one father to another, I do appreciate

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1 that as well.

2 THE COURT: I will echo and say Amen
3 to that.

4 CROSS EXAMINATION CONTINUED

5 BY MR. BLUME:

6 Q. So, let me go over a few things, in no
7 particular order.

8 A. Okay.

9 Q. The last comment that you made about the
10 DNA, that was in fact the jury argument, that
11 the DNA being positive -- it's a replay of some
12 of what you told the jury.

13 A. Sure.

14 Q. Indicates in this matter. Let me go to
15 the *Jackson Denno* hearing. Mr. Friedman asked
16 you about the *Jackson v. Denno* hearing. And,
17 uh, Mr. Kulp called a number of witnesses in
18 the *Jackson v. Denno* hearing.

19 A. Right.

20 Q. How many *Jackson v. Denno* hearings do you
21 think you've participated in?

22 A. A bunch. I have to say that this was the
23 longest one that I ever participated in.

24 Q. And have you ever had a judge exclude a
25 confession on the basis of testimony that the

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1 confession was false?

2 A. No, but I have had psychiatric testimony
3 and things like that in a *Jackson v. Denno*
4 hearing, psychological testimony.

5 Q. All right.

6 A. Oftentimes bearing on the issue of
7 voluntariness. I think that generally is where
8 we go with that.

9 Q. And you argued, you said, '*This is all*
10 *interesting but it doesn't mean anything*
11 *because the only way, Judge, you need to*
12 *suppress the confession is if it was taken in*
13 *violation of Miranda --' ---*

14 A. Right.

15 Q. '*--- and no evidence was taken in*
16 *violation of Miranda.'* So then, as a matter
17 of fact, there was no possible potential gain.

18 A. Then, again, I don't know that it was a
19 gain to me.

20 Q. Pardon me?

21 A. I don't think that it was a gain to me.

22 Q. You don't believe as a prosecutor or as
23 a lawyer that you can more effectively cross-
24 examine someone if you've actually heard the
25 exact testimony that is going to be given than

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1 if you haven't?

2 A. I'd rely more on *Google*.

3 Q. *Google*?

4 A. You learn more about an expert, what
5 they've testified to, what their opinions are,
6 who disagrees with their opinions, whether
7 their opinions may be sound or whether their
8 opinions may not be sound by other sources.
9 By people who have dealt with them before, who
10 are critiquing their work, things of that
11 nature.

12 Q. And, so, ---

13 A. That is generally how I prepare for an
14 expert.

15 Q. Well, in this case, after hearing Dr.
16 Kassin's testimony, isn't it true that you made
17 a motion in limine based upon what you heard to
18 limit his testimony in regards to the sample,
19 and that the judge granted your Motion to limit
20 testimony?

21 A. I would have made the same Motion had he
22 tried to do that at trial. I think -- I mean,
23 you know, -- and I've done that also not in the
24 sphere of false confessions but with the
25 identification experts thing. I'd have no

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1 problem with the psychological principles
2 involved, their testimony concerning that but
3 if they get up there and they start talking
4 about 'well, in this case there was a
5 misidentification', 'in this case there was a
6 misidentification', and they are not factually
7 similar to my case, that's just testifying by
8 anecdote and not on the basis of scientific
9 theory. I objected on relevance.

10 Q. And on ---

11 A. Relevance in other areas, too.

12 Q. --- appeal to the State Supreme Court, you
13 know that they concluded that there was no
14 prejudice, they said that the judge should not
15 have restricted Dr. Kassin's testimony. Are
16 you familiar with that?

17 A. Yeah, just as in the case of Mr. Chappel,
18 that's is what Mr. Kulp wanted but it came in
19 anyway.

20 Q. So I won't go into the detail about Mr.
21 Chappel that I went into with Ms. Clifford,
22 since she was actually involved in the case at
23 that time. I won't ask you about that.

24 A. Okay.

25 Q. She did mention Lori Villalobos.

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1 A. (Affirmative nod).

2 Q. You are aware, I assume, that Ms.
3 Villalobos had a criminal record?

4 A. I really don't know. I mean, I assume
5 that she probably did.

6 Q. And in fact she had a number of prior
7 convictions; do you recall that?

8 A. I know as a matter of course -- though I
9 have no independent recollection in this case
10 -- that we run rap sheets on every witness.

11 Q. And you ---

12 A. And generally provide it to the defense
13 too.

14 Q. And you mentioned her testimony, what she
15 testified to at trial, ---

16 A. Right.

17 Q. It is also true, is it not, that she --
18 that it had been four years since the time of
19 the fire, at trial?

20 A. Right.

21 Q. You learned of her possible -- of the
22 substance of her testimony during the trial
23 itself?

24 A. Right.

25 Q. But at no point during that four years had

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1 she herself approached law enforcement and
2 given a statement that she was at The Mill Inn
3 that night and had seen Mr. Myers there.

4 A. That is absolutely the truth.

5 Q. And also she had a boyfriend at the time.
6 Do you recall that he testified?

7 A. I understand that he testified.

8 Q. Right. He testified that Ms. Villalobos
9 had described the incident to him but that she
10 never mentioned that Mr. Myers was present?

11 A. I understand that her former boyfriend
12 testified that she had never mentioned that to
13 him. But she did, I believe, testify as to why
14 that happened.

15 Q. And ---

16 A. If I may explain, ---

17 THE COURT: You may.

18 THE WITNESS: She said primarily
19 that up until the time that Ms. Gonzales
20 approached her -- because in this case, Mr.
21 Myers confessed to the police, he confessed to
22 the victim's mother, he confessed to all three
23 TV stations which had been broadcast over the
24 county. She assumed from that that there was
25 no question concerning Mr. Myers guilt or

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1 innocence and she did not even realize, until
2 she'd seen Tammy Gonzales in the bar that
3 night, that he was contesting his guilt or that
4 there was even a trial going on. That's why
5 she had mentioned seeing him that night.

6 CROSS EXAMINATION CONTINUED

7 BY MR. BLUME:

8 Q. That is what she said. On the other hand,
9 Mr. Myers' confession didn't take place for
10 three days. It was three days after the event.

11 A. Sure.

12 Q. So she knew that this person that she
13 described, this wonderful friend of hers, had
14 been killed, died in the fire, and during that
15 three-day period she never thought to call up
16 the police and tell them, 'You know, I was at
17 *The Mill End last night, I was in a weird*
18 *situation and Wes Myers was there.*' She never
19 that, did she?

20 A. She did not in that three-day period.
21 There is no question about what. Also there is
22 no question that that is not very unusual.

23 Q. It's not very unusual for a friend of
24 yours to be killed?

25 A. To not ---

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1 Q. To not ---

2 THE COURT: Hold on a second, Mr.
3 Durant. Let him finish answering the question.

4 THE WITNESS: Yes, sir.

5 CROSS EXAMINATION CONTINUED

6 BY MR. BLUME:

7 Q. To be killed and you are not going to pick
8 up the phone and ---

9 A. I don't -- if you're not finished, excuse
10 me. I don't know how friendly they were with
11 one another, to begin with. Like I say, as I
12 recall, there was some issue of some check,
13 money that the victim owed her for some sort of
14 check. She was going there to get the money
15 and -- but, in other words, I don't know how
16 close friends that they were, if at all.

17 Q. Based on her own testimony, he was someone
18 that she was close to.

19 A. Okay. Then I will take you at your word
20 on that.

21 Q. There was some discussion during your
22 direct examination about DNA testing that was
23 done at trial on the hair and on the two-dollar
24 bill. Obviously we will hear more testimony
25 about that tomorrow.

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1 A. Right.

2 Q. But based on the testing that was done at
3 the time of trial, it is true, is it not, that
4 there was no biological material recovered that
5 was Mr. Myers?

6 A. True. That is the truth.

7 Q. And throughout the investigation, Mr..
8 Myers was cooperative with the police?

9 A. True.

10 Q. He consented to searches, he consented to
11 being viewed, he consented to giving samples,
12 he did anything that he was asked to do?

13 A. That is correct.

14 Q. And the FBI, do you recall that there were
15 some -- let me show you what has been marked as
16 Applicant's Exhibit 3.

17 A. Um-humm.

18 THE COURT: Is that a "yes"?

19 THE WITNESS: Yes, sir. I'm as
20 bad as any other witness.

21 THE COURT: That's okay. I just want
22 to make sure for the purpose of the record.

23 THE WITNESS: "Yes." Yes, Mr.
24 Blume, I have seen this.

25 CROSS EXAMINATION CONTINUED

1 BY MR. BLUME:

2 Q. This is -- what happened is that this was
3 initially sent to the FBI?

4 A. Yes.

5 Q. And at that point, is it true that this
6 report indicates that they didn't do DNA
7 testing because their hair comparison analyses
8 indicated that it was not Mr. Myers' hair?

9 A. I don't know that I'd read it like that.
10 It -- I'm trying to see the place where ---

11 Q. Because it says, "*No microscopic*
12 *associations between the questioned hair and*
13 *the known head hair standards of Mr. Myers was*
14 *made in this case. No mitochondrial DNA*
15 *examinations were conducted.*"

16 A. That's what it says but I don't know if
17 that meant that they didn't make the
18 microscopic associations or what. In other
19 words, I don't know what they mean by that.
20 But if you were -- that is one way to interpret
21 it for sure.

22 Q. Is that what -- did I quote the FBI
23 accurately?

24 A. I agree that you quoted it accurately.

25 Q. Thank you.

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1 MR. BLUME: I have nothing further.

2 THE COURT: Redirect?

3 MR. FRIEDMAN: Briefly, Your
4 Honor.

5 THE COURT: Sure.

6 CROSS EXAMINATION

7 BY MR. FRIEDMAN:

8 Q. Mr. Durant, do you recall asking Ms.
9 Villalobos if she had a 1990 conviction for
10 possession of a stolen vehicle?

11 A. I don't remember that but I think that the
12 transcript would probably speak for itself.
13 And usually -- speaking once again of my
14 practice, if I have a witness, I run the rap
15 sheet, I provide it to the defense. If there
16 is anything that I believe is impeachable, I
17 bring that up on direct examination myself
18 rather than wait for the defense counsel to
19 bring it up.

20 Q. Do you remember if Mr. Kulp called Ms.
21 Villalobos' ex-boyfriend as a witness at trial?

22 A. He did. I believe that the jury heard the
23 exboyfriend's testimony, that she had never
24 told him anything about seeing him at the bar.

25 MR. FRIEDMAN: Nothing further.

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1 THE COURT: Recross?

2 MR. BLUME: No, sir.

3 THE COURT: Thank you. Mr. Durant,
4 you may step down, sir.

5 (WITNESS STEPS DOWN)

6 THE COURT: Does the State have any
7 additional witnesses that they wish to present
8 at this time?

9 MR. FRIEDMAN: Not at this time,
10 Your Honor.

11 THE COURT: Thank you very much.
12 Nothing further, then, Mr. Blume, let's recess
13 until 2:00 o'clock. I will give you -- how
14 many witnesses do you anticipate this
15 afternoon? I assume that all those witnesses
16 will be available and ready to go.

17 MR. BLUME: They have been subpoena-
18 ed and been instructed to be here.

19 THE COURT: Very well.

20 MR. BLUME: So there will be,
21 I think, three. Three relatively short
22 witnesses. Then Mr. Kulp.

23 THE COURT: Thank you very much.
24 We will be in recess until 2:00 o'clock. Thank
25 you.

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1 (LUNCH RECESS)

2 (DEFENDANT PRESENT)

3 MR. BLUME: Your Honor, we have
4 three witnesses who were subpoenaed and told
5 to be here at 2:00. We know that they are on
6 the way but they are not here. We know that
7 they are on the way. We've had specific
8 conversation with them.

9 THE COURT: We will wait a few
10 minutes then. Let the record reflect that
11 Mr. Myers is present.

12 (BRIEF RECESS)

13 THE COURT: Ready, Mr. Blume?

14 MR. BLUME: Yes, sir.

15 THE COURT: Call your next
16 witness.

17 MR. BLUME: The Applicant calls
18 Elizabeth Meeks.

19 (WITNESS TAKES STAND)

20 ELIZABETH MEEKS, being duly sworn to
21 tell the truth, the whole truth and nothing
22 but the truth, testified, as follows:

23 DIRECT EXAMINATION

24 BY MR. BLUME:

25 Q. Ms. Meeks -- and if I call you Ms.

1 Babcock, I apologize. I've known you as Ms.
2 Babcock throughout this entire proceeding.
3 At the time of Mr. Myers' trial, you went by
4 the name of "Babcock"?

5 A. That's right.

6 Q. And you were selected as a juror in this
7 case?

8 A. Yes.

9 Q. And did the judge designate you to be
10 the foreperson of the jury?

11 A. Yes.

12 Q. Did you serve on the jury throughout the
13 entire trial of the State versus Wes Myers?

14 A. Yes.

15 Q. During the jury deliberations, at some
16 point did the jury appear to be deadlocked?

17 A. Yes.

18 MR. FRIEDMAN: Your Honor, I
19 would object to any testimony about the jury
20 deliberations.

21 THE COURT: Sustained.

22 MR. BLUME: Well, ---

23 THE COURT: If you can show me
24 some law that allows us to invade what the
25 jury does, -- I understand that there are

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1 some limitations when it deals with certain
2 issues that are Constitutional protections,
3 but this isn't one.

4 MR. BLUME: Well, Your Honor, I
5 think -- I don't intend to ask her why they
6 ---

7 THE COURT: I will let you say
8 that and that's as far as we're going,
9 because we are going to ask question because
10 what were the problems or any of those
11 things.

12 MR. BLUME: I understand. I just
13 ---

14 THE COURT: Then rephrase your
15 question.

16 DIRECT EXAMINATION CONTINUED

17 BY MR. BLUME:

18 Q. At some point in the proceedings, did
19 the jury believe that it was not going to be
20 able to reach a verdict?

21 A. Yes.

22 Q. And as a result of that, what did you
23 do?

24 A. I contacted the judge.

25 Q. And I am going to show you what was in

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1 the record as Court's Exhibit 2 and ask you
2 if you can identify that?

3 A. Yes. I wrote it.

4 Q. You wrote that?

5 A. (Affirmative nod).

6 Q. And this note says, "Your Honor, we feel
7 that we cannot agree on a decision." It's
8 signed by you, is that correct?

9 A. Yes.

10 Q. And after you wrote this note, what
11 happened?

12 THE COURT: Hold on before you
13 answer that question. You need knew to
14 rephrase that. That's too broad and general,
15 I am not going to allow that question.

16 DIRECT EXAMINATION CONTINUED

17 BY MR. BLUME:

18 Q. After you sent this note, were you
19 called into the judge's chambers?

20 A. Yes.

21 Q. And when you got into the judge's
22 chambers, who was present?

23 A. To the best of my recollection, both
24 attorneys and the judge.

25 Q. But Mr. Myers was not present?

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1 A. No.

2 Q. And at that point, did you tell the
3 judge -- what did the judge ask you? A
4 question?

5 A. I think so.

6 Q. Did he ask you how the jury was divided?

7 MR. FRIEDMAN: I object, Your
8 Honor.

9 THE COURT: The attorneys are
10 present then. That is not invading the
11 province of the jury. The judge is asking
12 the question and everybody is there. So I am
13 not -- at least from what she's testified to.
14 I am going to allow it.

15 THE WITNESS: Honestly, I can't
16 recall if he asked that or not.

17 DIRECT EXAMINATION CONTINUED

18 BY MR. BLUME:

19 Q. You don't recall if he asked?

20 A. What the numbers were. I can't be
21 certain.

22 Q. At the conclusion of this, your meeting,
23 what did the judge tell you?

24 A. Basically to take some more time to
25 deliberate.

1 Q. Then you went back to the jury room?

2 A. Right.

3 Q. And did you -- I am not asking you about
4 any deliberations. Did you inform the other
5 jurors what the judge told you?

6 A. Yes.

7 Q. So, Ms. Meeks, let me ask you a few more
8 questions. There is another note in here,
9 which says "I need to see the judge, please."
10 Is that your handwriting?

11 A. Yes.

12 Q. Do you recall today what this was based
13 -- this note.

14 A. No. Was it even the same day?

15 Q. I don't know.

16 THE COURT: What's the Court's
17 exhibit number?

18 MR. BLUME: These are all
19 together, Your Honor.

20 THE COURT: So it doesn't have a
21 separate number?

22 MR. BLUME: No, they were all --
23 it's just the way that they were all found
24 when I reviewed the file several years ago.

25 MR. FRIEDMAN: I haven't seen

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1 these notes.

2 THE COURT: Help yourself. They
3 are part of the record.

4 MR. BLUME: Yes, sir. Court's
5 Exhibit 4.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. BLUME:

8 Q. Again, I understand that it's been a
9 long time, Ms. Meeks. The reason that I am
10 having to ask you a lot of this is that
11 nothing in the transcript that reveals any of
12 these things happened and you are the one
13 person who may have any information about
14 this. So that's why I am asking these
15 questions.

16 This is a note signed by -- I just want
17 to make sure that it is your handwriting.

18 A. It is.

19 Q. And this note asks the judge for a
20 calendar?

21 A. Right.

22 Q. Do you recall if you subsequently
23 obtained a calendar from the judge?

24 A. I can't recall.

25 Q. Let me show you what was also in there,

1 actually in the court's exhibit file, and see
2 if that refreshes your recollection.

3 A. (Upon review), I am looking at it but I
4 could be wrong.

5 Q. You would agree that this is a calendar
6 of March 1997, the month in question?

7 A. Yes.

8 Q. It is a calendar that appears to have
9 handwriting on it?

10 A. Right.

11 Q. Just so that the record can be clear ---

12 THE COURT: Has that been marked?

13 MR. BLUME: It was in with these
14 notes.

15 THE COURT: Court's Exhibit 4?

16 MR. BLUME: Just stuck in there.

17 What I showed you was a printout, looks like
18 a Xerox copy of a calendar for March 1997; is
19 that right?

20 THE WITNESS: Yes.

21 DIRECT EXAMINATION CONTINUED

22 BY MR. BLUME:

23 Q. Now, let me show you another note and
24 ask you if you can review that?

25 A. Yes, I wrote it.

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1 Q. And this note indicates that the jurors
2 would like to get a TV to watch the video,
3 one juror needs to use the phone, and a few
4 would like to smoke. Do you recall whether
5 or not as a result of this note that you were
6 given a TV?

7 A. Yes, we were.

8 Q. And you did watch the videotape?

9 A. Right.

10 Q. Is this also your handwriting?

11 A. Yes.

12 Q. Is this a note that you sent to the
13 judge during deliberations asking for
14 transcripts of the trial?

15 A. Yes.

16 Q. I believe that the judge apparently
17 responded in writing.

18 A. Right.

19 Q. Said that if there was testimony that
20 you wanted to hear that it could be played
21 back as necessary?

22 A. Right.

23 Q. So when you would -- these notes, would
24 you give them to a bailiff?

25 A. If I recall correctly, I believe that I

1 would knock on the door and somebody would
2 come, it wasn't the judge but they would then
3 take the note to the judge. Then they would
4 bring it back to me.

5 Q. With the writing on it?

6 A. Right, or would come and get me.

7 Q. Then, if you could, review that and tell
8 me if you're familiar with that?

9 A. I guess. I signed this.

10 Q. This is your signature?

11 A. I really don't recall this person having
12 a sickness, I don't remember anything.

13 Q. This is your signature?

14 A. I signed that. Right.

15 MR. BLUME: Just so that the
16 record is clear, this is another part of
17 Court's Exhibit 4 and what it states is, "I
18 have a nonrefundable airfare ticket for
19 Thursday and need to know how to handle the
20 situation. Sandra Burnette." Who was
21 another juror. Signed by Ms. Babcock.

22 THE COURT: Okay.

23 DIRECT EXAMINATION CONTINUED

24 BY MR. BLUME:

25 Q. So you do recall this situation?

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1 A. No. I'm sure I don't remember a lot
2 from ten years ago.

3 Q. And you don't recall whether as a result
4 of this note there was any meeting in
5 chambers between the judge and Juror
6 Burnette?

7 A. I don't remember.

8 Q. Then I -- I think that I was clear on
9 this but on the note where you indicated
10 "can't make a decision", apparently that was
11 around 7:20 that evening.

12 A. Yes.

13 MR. BLUME: Again, all of these
14 are part of Court's Exhibit 4. Your Honor,
15 I guess my questions -- I don't know if for
16 purposes of clarity of the record whether it
17 should be marked as a separate exhibit for
18 this or if we should just keep them as a part
19 of this ---

20 THE COURT: You've identified them
21 by publishing the contents. I think that's
22 fine.

23 MR. BLUME: Okay. Court's Exhibit
24 4. Thank you very much, Ms. Meeks. Please
25 answer any questions that the Attorney

1 General may have.

2 THE COURT: You may cross-examine
3 if you have any questions.

4 MR. FRIEDMAN: Thank you, Your
5 Honor.

6 CROSS EXAMINATION

7 BY MR. FRIEDMAN:

8 Q. The jury ultimately found the defendant
9 guilty; is that right?

10 A. Yes.

11 Q. Do you remember being polled
12 individually after the verdict was announced?

13 A. Yes.

14 Q. Do you know how long the jury
15 deliberated before you sent that note about
16 being deadlocked?

17 A. My feeling is that it was -- three
18 hours? Maybe.

19 Q. Do you know how long that the jury
20 deliberated overall?

21 A. I think around four'ish.

22 MR. FRIEDMAN: Nothing further.

23 THE COURT: Redirect, Mr. Blume?

24 MR. BLUME: No, Your Honor.

25 THE COURT: Do you wish the

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1 witness to be excused?

2 MR. BLUME: Yes, sir.

3 THE COURT: Any objection?

4 MR. FRIEDMAN: No objection,
5 Your Honor.

6 THE COURT: Thank you very much.
7 You are free to leave.

8 (WITNESS STEPS DOWN)

9 THE COURT: Call your next
10 witness.

11 MR. BLUME: Yes. We call Carrie
12 Shockley.

13 (WITNESS TAKES STAND)

14 CARRIE SHOCKLEY, being duly sworn to
15 tell the truth, the whole truth and nothing
16 but the truth, testified, as follows:

17 DIRECT EXAMINATION

18 BY MR. BLUME:

19 Q. Ms. Shockley, did you previously work
20 near The Mill Inn?

21 A. Yes.

22 Q. In 1997, at the time of the fire at The
23 Mill Inn, did you work near there during that
24 time?

25 A. I am not sure. My mother-in-law owns a

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1 restaurant right there, so I was there.

2 Q. You were there?

3 A. (Affirmative nod).

4 Q. You remember the morning after -- I
5 guess that it would be technically the
6 morning of the fire, but the morning after
7 the fire at The Mill Inn?

8 A. Yes.

9 Q. At approximately 7:30 or 8:00 that
10 morning, did you see anyone?

11 A. Yes.

12 Q. Can you describe the person that you
13 saw?

14 A. A man approached me. He was real dirty,
15 covered in soot and he had some burn marks on
16 his arm. He had dark hair. I can't remember
17 a whole lot about him, but it was -- he was
18 very dirty.

19 Q. And did he have a smell about him?

20 A. Like soot, like smoke. Yes.

21 Q. Smoke?

22 A. (Affirmative nod).

23 Q. And did this person say anything to you?

24 A. He told me that he had come down from
25 out of town to get back with his exwife ---

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1 MR. FRIEDMAN: I object to
2 hearsay.

3 THE COURT: Sustained.

4 DIRECT EXAMINATION CONTINUED

5 BY MR. BLUME:

6 Q. Was the person at that time -- at that
7 time, did the person appear to be agitated?

8 A. Yes. He wanted money.

9 Q. He wanted money?

10 A. (Affirmative nod), he wanted money to
11 leave.

12 Q. Did he appear to be excited or agitated
13 at that point?

14 A. Yes.

15 Q. And also did he indicate that he had
16 done something bad?

17 A. No. He indicated that he just needed to
18 leave.

19 MR. FRIEDMAN: Objection to
20 hearsay, Your Honor.

21 THE COURT: I will allow that one
22 but that's as far as -- because you're going
23 to have -- if you are trying a statement
24 against interest, you're going to have to
25 prove why he's unavailable. I don't know

1 where we are going with that. You'd have to
2 do that first.

3 MR. BLUME: Well, I think that
4 this might also qualify, based on her
5 testimony, as an excited utterance.

6 THE COURT: No, sir. Not until
7 you establish what was the reason for the
8 excitement, sir, and how long it was. Thank
9 you very much. I would sustain the objection
10 and note that you're raising the exception.
11 Thank you.

12 DIRECT EXAMINATION CONTINUED

13 BY MR. BLUME:

14 Q. Just to be clear then, by the person's
15 appearance they appeared to be covered in
16 soot, smelled like smoke and appeared to have
17 burn marks on their arms.

18 A. Yes.

19 MR. BLUME: Thank you very much.

20 THE COURT: Any questions?

21 MR. FRIEDMAN: Just briefly,
22 Your Honor.

23 CROSS EXAMINATION

24 BY MR. FRIEDMAN:

25 Q. Ms. Shockley, had you ever seen this man

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1 before?

2 A. No.

3 Q. Have you seen him since?

4 A. NO.

5 Q. Did you tell anybody at the time about
6 seeing him?

7 A. Yes.

8 Q. Who did you tell?

9 A. There were other people who came up the
10 street who had also seen him and asked where
11 he went. I told them that he went to the bus
12 stop, supposedly.

13 Q. Did you ever tell the police about
14 seeing him?

15 A. I was never questioned.

16 MR. FRIEDMAN: Nothing further.

17 THE COURT: Redirect?

18 MR. BLUME: No, sir, Your Honor.

19 THE COURT: Thank you. You may
20 step down. Do you wish the witness to be
21 excused?

22 MR. BLUME: Yes, sir.

23 THE COURT: Any objection?

24 MR. FRIEDMAN: No objection,

25 Your Honor.

1 THE COURT: Thank you very much.

2 You are free to leave.

3 (WITNESS STEPS DOWN)

4 THE COURT: Call your next
5 witness.

6 MR. BLUME: Applicant calls Carol
7 Frock.

8 (WITNESS TAKES STAND)

9 CAROL FROCK, being duly sworn to
10 tell the truth, the whole truth and nothing
11 but the truth, testified, as follows:

12 DIRECT EXAMINATION

13 BY MR. BLUME:

14 Q. Ms. Frock, did you previously -- you
15 currently still have a business establishment
16 near The Mill Inn?

17 A. Yes, sir, I do.

18 Q. What is that?

19 A. It is Idle Hour Restaurant.

20 Q. And the person that testified previous-
21 ly, are you related to that person?

22 A. That is my daughter-in-law; yes, sir.

23 Q. So approximately at 7:30 or 8:00 in the
24 morning after the fire at The Mill Inn, did
25 you also see this man?

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1 A. Yes, sir. I was inside my business,
2 walking toward -- I had big windows in the
3 front of it. I was walking towards the
4 cooler, to get something out of it, and I saw
5 a man with dirty clothes go by. I did not
6 see his face or anything. I just figured
7 that he was a homeless person, as dirty as he
8 was. That was all that I seen (sic).

9 Q. And this was around the same time as the
10 person that Ms. Shockley saw?

11 A. Yes, sir.

12 Q. The same person she saw?

13 A. Yes, sir, it probably is.

14 Q. Did you communicate this information to
15 anyone?

16 A. I told the lady, whoever came to ask
17 about the fire again -- recently. That I
18 had seen somebody go by who was dirty.

19 Q. Okay. That would have been an
20 investigator from my office?

21 A. Yes, sir.

22 Q. At the time that this happened, did you
23 communicate this with anyone?

24 A. No, sir. Nobody came and talked to me.

25 MR. BLUME: Thank you very much.

1 THE COURT: Cross?

2 MR. FRIEDMAN: No, sir.

3 THE COURT: You may come down. Do
4 you wish the witness to be excused?

5 MR. BLUME: Yes, sir.

6 THE COURT: Any objection?

7 MR. FRIEDMAN: No objection,
8 Your Honor.

9 THE COURT: Thank you very much.
10 You are free to leave.

11 (WITNESS STEPS DOWN)

12 THE COURT: Call your next
13 witness.

14 MR. BLUME: The Applicant calls
15 Tim Kulp.

16 (WITNESS TAKES STAND)

17 TIMOTHY KULP, being duly sworn to
18 tell the truth, the whole truth and nothing
19 but the truth, testified, as follows:

20 DIRECT EXAMINATION

21 BY MR. BLUME:

22 Q. Good afternoon, Mr. Kulp.

23 A. Good afternoon, Mr. Blume.

24 Q. Did you serve as retained counsel for
25 Mr. Myers in this matter?

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1 A. I did.

2 Q. And you took the case to trial?

3 A. I did.

4 Q. So what I'd like to do -- I am just
5 going to go through a number of issues that
6 are in the PCR application and ask you some
7 questions on those.

8 One, there's been testimony today, the
9 allegation, that there were a number of
10 conference in chambers with the judge at
11 which Mr. Myers was not present. I just
12 wanted to ask you. At that time that you had
13 these meetings, did you advise Mr. Myers of
14 his right to be present?

15 A. I do not recall that I did.

16 Q. Do you recall at any point, in any of
17 these in-chambers meetings, whether the judge
18 advised Mr. Myers of his right to be present
19 and secured a waiver for Mr. Meyers to be
20 present?

21 A. I do not recall that that happened.

22 Q. Okay. Then let me move on to some other
23 issues/topics. This case, as you may -- I am
24 sure that you do recall, or maybe you don't.
25 There was -- you made and filed several

1 Motion based on what you perceived to be
2 misconduct in what we call the perp walk.

3 Do you recall that?

4 A. I do.

5 Q. So there were a number of Motions about
6 this, how it was prejudicial to Mr. Myers.
7 And also the statements that he produced were
8 played on the local TV stations. Do you
9 recall this?

10 A. I do.

11 Q. So I just wanted to ask you about that.
12 Given that, can you tell me why you recall
13 that you didn't file a Motion for a chance of
14 venue?

15 A. I don't recall a specific reason. The
16 best response that I can think of is that the
17 trial occurred three to four years after the
18 event. I didn't know -- I don't recall that
19 it became an issue at the time, for me.

20 Q. Presently you don't have a specific
21 recollection, today, why?

22 A. I don't.

23 Q. Let me ask you -- moving into another
24 topic. In this case, you called Dr. Kassin
25 at the *Jackson v. Denno* hearing.

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1 A. Yes, sir.

2 Q. Can you tell me why you did that?

3 A. I called him as the primary witness in
4 support of my Motion to suppress any
5 confession or incriminating statements made
6 by my client.

7 Q. What was the legal theory under which
8 you were asking the judge to suppress the
9 statement?

10 A. The basic theory was that the confession
11 was false. That was the result of my
12 consultation with Dr. Kassin, my research in
13 the area, and the record of discovery.

14 Q. At that time Dr. Kassin was one of the
15 leading experts in the country in the area of
16 false confessions?

17 A. My research revealed that, (affirmative
18 nod), and that's why I contacted him. I was
19 happy to obtain his services.

20 Q. He testified both at the pretrial
21 hearing and at the trial?

22 A. That's correct. That's what I recall.

23 Q. And the essence of his testimony was
24 that there were a number of factors in this
25 case which were indicative of a false

1 confession?

2 A. Yes, that was his testimony in both of
3 those proceedings.

4 Q. Now, in this case there was a great deal
5 -- I said a 'great deal', I don't want to
6 characterize it. In this case there was
7 testimony from police officer regarding their
8 opinion as to Mr. Myers guilt of this
9 offense. I was asking if you recall today
10 why you did not object to any of this
11 evidence -- testimony.

12 A. If you could give me a specific example.
13 I've read the petition but I haven't read in
14 a few weeks. I'd be happy to respond to that
15 if you could ---

16 Q. Well, for example, there was testimony
17 from several of the officers that they had no
18 absolutely no doubt in their mind that Mr.
19 Myers was guilty.

20 A. To the best of my recollection, if --
21 and I am sure it does if I did not object.
22 My best concept of that is that it was on
23 ludicrous on cross-examination that I felt
24 that the jury was -- the jury was an
25 intelligent group of people and I thought

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1 that they would certainly know that it was
2 impossible for someone to make that kind of
3 assessment or form that opinion. I can't
4 cite the questions on cross examination to
5 support that, as to the questions that I
6 asked him about that and the followup, but I
7 hope that I did.

8 Q. Let me ask it more generally, and this
9 might cover several of the grounds for
10 relief. Is it generally your practice to
11 object to evidence that you think is
12 inadmissible?

13 A. It is. But I -- after years of
14 practicing, I don't always find myself
15 jumping out of the chair like I did when I
16 first started.

17 Q. Now, do you recall in this case a man by
18 the name of Dana Chappel?

19 A. I certainly do.

20 Q. He was, at least in your defense theory,
21 a person of interest?

22 A. More than a person of interest.

23 Q. Do you recall why that was?

24 A. I can't recall whether it was a result
25 of our learning that he was arrested either

1 that day of the discovery of the fire or --
2 nearby the area -- or just the discovery of
3 general information in the course of looking
4 at every possible aspect of the case.

5 Q. Do you remember an issue about them
6 finding a watch at the crime scene?

7 A. Absolutely.

8 Q. What do you recall about that?

9 A. That is kind of an interesting story
10 which is hard to imagine that it happened,
11 but it did. Either in the video of the crime
12 scene when the body of the victim was turned
13 over, I could the watch there or it was the
14 result of the fact that in the course of
15 obtaining the Circuit Judge's Order to
16 independently take possession of or
17 independently examine evidence in possession
18 of the North Charleston Police Department,
19 one of the items was determined to be a
20 watch.

21 Since it was found under the body of the
22 deceased, we certainly thought that it was
23 relevant, worth pursuing. And it is kind of
24 hard to believe but I had some sort of -- we
25 took a picture of the watch. I was working

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1 in North Charleston there and frequently I
2 would carry it with me. I actually went into
3 a Walmart, about the eighth place of just
4 flashing and showing, and they told me that
5 they had in fact sold that watch before,
6 that they didn't carry it anymore. Pushing
7 that further, they contacted their supplier
8 in Hong Kong and had them find or make me an
9 exemplar of that watch and send it to me.
10 I bought it for use in the case.

11 After that, hoping to get results from
12 that, we photographed the watch, enlarged it
13 and put it on placards which said "Lost
14 Watch, Sentimental Value, Please Call" this
15 number. That number was a private quiet line
16 that I had set up in my office, attached to a
17 "Hello" answering machine. I personally,
18 along with the help of an investigator, went
19 to the entire area of East Montague there,
20 covering the area between the crime scene and
21 the deceased's home and tacked those up on
22 trees, poles, stop signs, hoping that someone
23 would call and provide us some information in
24 that regard. Unfortunately they never did,
25 but we were able to determine that there was

1 no prosecutorial evidence, or otherwise, to
2 suggest that the watch itself belonged to
3 either the deceased or Mr. Myers.

4 Q. Had the watch stopped at a particular
5 time, do you recall?

6 A. My recollection is -- I still have the
7 watch. My recollection is that the watch
8 stopped at a time that was approximate to or
9 within the window of the fire and the
10 incident.

11 Q. There's been testimony previously in
12 this proceeding concerning Ms. Lori
13 Villalobos. Are you familiar with Ms.
14 Villalobos?

15 A. I recall that name and the person, yes.

16 Q. She was a witness for the prosecution at
17 trial?

18 A. Yes, sir.

19 Q. Would it be fair to say that there would
20 not have been -- that you would not have had
21 a strategic reason for not attempting to use
22 her prior convictions to impeach her?

23 A. I don't recall that there would have
24 been a reason for me not doing that.

25 Q. I mean, she was someone whose

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1 credibility you were attempting to impeach?

2 A. Absolutely.

3 Q. And ---

4 A. But let me say -- primarily, yes. Not
5 so much the goal of impeaching her
6 credibility before the jury with her prior
7 record but moreso with the substance of her
8 testimony. The primary reason for disbelief
9 was her delay in coming forward with this
10 very important information.

11 Q. Right.

12 A. And a few other factors, as well,
13 including her propensity to drink to excess
14 and other things.

15 Q. I agree with that. But there would have
16 been no strategic downside to using her prior
17 convictions as part of the overall strategy
18 of impeachment?

19 A. No, there would not have been. But I'm
20 not sure if Mr. Durant in prosecuting the
21 case wouldn't have brought that out.
22 Prosecutors are wont to do, to defuse the
23 introduction of that when the prosecution
24 does it and tries to make them out as
25 concealing that. I don't recall specifically

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1 if he eliminated one of more of those
2 offenses that were impeachable. I don't
3 recall -- considering that, what remained
4 after what he did bring out, it wasn't, uh,
5 that which could be used for impeachment.
6 I am just not sure.

7 Q. But if there had been offenses that
8 could have been used or impeachment which
9 were not brought out, there would not have
10 been a strategic reason for not using them?

11 A. No.

12 Q. Now, as we talked previously, you did
13 call Saul Kassin at trial?

14 A. I did.

15 Q. And he was one of the main witnesses for
16 the defense?

17 A. He and another expert, Dr. Gerald Hurst,
18 an arson expert from Austin Texas.

19 Q. And Dr. Hurst contradicted the State's
20 theory on the origin of the fire?

21 A. Yes.

22 Q. Now, Dr. Kassin's testimony was based on
23 some of his research. Do you recall -- at
24 that time were you familiar with something
25 called the GSS scales, the Godjonsson

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1 Suggestibility Scales?

2 A. No, I was not.

3 Q. Did you consider retaining a psycholo-
4 gist to evaluate Mr. Myers to determine
5 whether or not he had traits himself which
6 made him susceptible to police interrogation?

7 A. No, I did not. I turned to Dr. Kassin
8 for most of -- mostly in terms of input
9 regarding false confessions. Dr. Kassin did
10 not suggest to me that there was the need to
11 employ a psychiatrist for any testing
12 regarding that aspect or any other. I think
13 that if in fact he had that I would have.

14 Q. So you were relying on Dr. Kassin?

15 A. Yes.

16 Q. Did you retain an independent patholo-
17 gist to review the autopsy report in this
18 case?

19 A. I do not recall that I did.

20 Q. Now, you did do DNA testing in this
21 case; correct?

22 A. I recall that we did, yes.

23 Q. And you did the DNA testing using the
24 techniques that were available at the time of
25 the trial?

1 A. Of course.

2 Q. And you did this in an effort to find
3 evidence exculpating Mr. Myers?

4 A. Absolutely.

5 Q. And you presented that evidence at
6 trial?

7 A. I recall that we did. If I recall
8 correctly, it was over the speakerphone with
9 the consent of the State -- or maybe not; it
10 was a long time ago. We did present evidence
11 or our expert and he did examine what
12 remained of the sample.

13 Q. Based upon the testing that was done at
14 the time, there was nothing which implicated
15 Mr. Myers?

16 A. No.

17 Q. To the extent that they contained
18 results, the results were favorable to Mr.
19 Myers?

20 A. In that regard, of course.

21 MR. BLUME: I don't think that I
22 have anything else for you, Mr. Kulp. If you
23 could, please answer any questions that Mr.
24 Friedman might have for you. It is possible
25 that I may have some redirect but we will

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1 wait and see how it goes. Thank you, sir.

2 THE COURT: Cross.

3 MR. FRIEDMAN: Thank you, Your
4 Honor.

5 CROSS EXAMINATION

6 BY MR. FRIEDMAN:

7 Q. Mr. Blume asked you about the in-
8 chambers meetings that you had with the
9 judge. Do you recall if Mr. Durant was
10 present at any of those?

11 A. Mr. Durant and I both are experienced
12 trial lawyers. I do not believe that I would
13 have been in the judge's chambers without
14 him, vice-versa. That's my recollection.

15 Q. Do you recall if you advised Mr. Myers
16 of the substance of those in-chambers
17 meetings?

18 A. Without question. Absolutely,
19 (affirmative nod).

20 Q. Mr. Blume asked you about some of the
21 police officers testifying about Mr. Myers
22 behavior. Do you recall the interview with
23 Mr. Michel, Detective Michel, on video?

24 A. Do I ---

25 Q. The assertions that he made during the

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1 attempted polygraph?

2 A. Yes, I do.

3 Q. Was that video shown to the jury?

4 A. Yes, it was.

5 Q. You testified briefly that Dana Chappel
6 was a person to be explored in terms of your
7 investigation?

8 A. To an extraordinary degree, including
9 tracking him down by my private investigators
10 in Summerville, South Carolina, and confront-
11 ing him at his mobilehome; interviewing the
12 lady who'd loaned him the car that he was
13 found driving when he was arrested; a back-
14 ground investigation. We tried to find out
15 everything that we could about him, in every
16 way.

17 Q. Do you remember anything about him
18 having burn marks on his arm(s)?

19 A. I don't recall that.

20 Q. Do you recall arguing in your closing
21 arguments, mentioning his name and arguing
22 that he was a possible suspect?

23 A. Absolutely, (affirmative nod).

24 Q. Do you remember the note from the jury
25 indicating that they were deadlocked?

1 A. I must say that when I first learned of
2 that was when I read the petitioner's
3 petition from the clerk's office two, two-
4 and-a-half or so years ago when I was noticed
5 about the possible -- I was flabbergasted by
6 that because I have no recollection of that
7 at all. I mean, I just don't.

8 Q. Mr. Blume asked you about the State's
9 witness, Lori Villalobos.

10 A. Yes.

11 Q. Do you recall her testimony?

12 A. I do.

13 Q. Were you able to speak with her before
14 she testified at trial?

15 A. I believe that the State made her
16 available for interview.

17 Q. Do you recall asking her why she waited
18 so long to contact the police?

19 A. I did then and also on the stand, as
20 well, when she testified, (affirmative nod).

21 Q. Do you recall asking her why she waited
22 that long?

23 A. I imagine that I did. Well, that night
24 -- the night of the incident, I am sure that
25 I did.

1 Q. Do you remember tracking down her ex-
2 boyfriend, the one that she said that she'd
3 stayed with on the night of the incident?

4 A. We may have. We scrambled that morning.
5 Of course, the State did not find out about
6 her until that Thursday, the first week of
7 trial, and they brought my attention to her
8 testimony on Friday morning when we convened
9 court at the old Melbourne, Leeds Avenue,
10 courthouse. We did everything we could to --
11 both my investigator and my office -- to run
12 every obvious lead that we could about her:
13 relatives, any information provided subject
14 to being attacked to undermine her
15 credibility about the core part of her
16 testimony.

17 Q. I believe that his name was Carl
18 Chaplain, do you remember calling him as a
19 witness at trial?

20 A. I don't recall that name, to be honest,
21 at this point in time. Nor do I remember
22 calling him.

23 Q. Mr. Blume asked you did you retain an
24 independent pathologist and your answer was
25 'no'; is that correct?

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1 A. That's right.

2 Q. Is that something that you considered
3 doing?

4 A. No. I interviewed Dr. Nichols, who
5 I had worked with other cases extensively
6 before, his office, about the case, theories,
7 approaches to forensic considerations.
8 I knew him to be a rather dry, honest,
9 straight-forward fellow. I knew that I
10 could pin him down on certain things that
11 weren't done in the case, some of which he
12 attributed the responsibility for to the
13 police, but I felt that I could get him to
14 say what I wanted him to say to prove the
15 points before the jury that I thought were
16 beneficial to my client without the need for
17 an expert.

18 Q. Were you able to cross-examine Dr.
19 Nichols?

20 A. Yes, I recall that specifically.

21 Q. Do you recall testimony from the
22 victim's mother, Dixie Justice, I believe
23 during your cross-examination that Mr. Myers
24 had bit his mother in the past and that his
25 father slept with a gun under his pillow?

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1 A. I do recall that testimony.

2 Q. Do you recall whether or not you
3 discussed that with Mr. or Mrs. Myers after
4 that testimony came up?

5 A. I certainly did. I am sure that during
6 a break, (affirmative nod). They were in the
7 audience and I am sure that we discussed when
8 the court took a break or when the jury was
9 sent out on break, whatever.

10 Q. Is there any reason why you decided not
11 to call the Applicant's mother back to the
12 stand after that?

13 A. I am sure that there was a reason. I
14 don't recall exactly what it was. I think --
15 in trying to recall, as best I could at that
16 point in the trial there were a number of
17 issues that'd come out, obviously, in the
18 State's presentation of their case. It may
19 have been because I didn't think that it
20 would be favorable to my client for her to be
21 exposed to whole host of things on cross
22 examination in addition to that aspect just
23 mentioned.

24 Q. Can you tell the court about the hair
25 evidence in this case, some issues with

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1 discovery and getting the hair tested?

2 A. We -- I will be to be as succinct as

3 possible. There was a hair found, a human

4 hair, a strand of human hair, found in the

5 deceased's hand when she was examined at the

6 crime scene. As the record reflects, this

7 used -- the purported examination of that

8 hair was used in the course of the

9 interrogation of the defendant as a ruse to

10 suggest to him that SLED had positively

11 matched that suspect hair to head hair that

12 he had readily provided.

13 It also came up because we sought it for

14 independent testing and -- and this is where

15 I'd have to review the record. What I recall

16 is that we provided it to our DNA expert but

17 there was a problem with the hair because the

18 hair had been sent to the FBI laboratory and

19 at some point, either in testing or in

20 packaging, the hair -- the slide mounted

21 hair, the hair was broken and damaged. That

22 resulted in me writing a fairly strong letter

23 to the then Director of the FBI as to how the

24 hair was handled. As I recall, it impacted

25 our expert and the degree to which she could

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1 examine it with DNA protocols that were
2 available at that time.

3 Q. Do you remember a dollar bill that was
4 found in the victim's pocket in this case?

5 A. I do.

6 Q. Was that something that was tested
7 before the trial?

8 A. I don't recall that. In speaking with
9 you yesterday, I heard that but I don't
10 recall.

11 MR. FRIEDMAN: I have nothing
12 further, Your Honor.

13 THE COURT: Redirect, Mr. Blume?

14 MR. BLUME: Nothing.

15 THE COURT: Thank you, sir. You
16 may come down, Mr. Kulp.

17 (WITNESS STEPS DOWN)

18 THE COURT: Do you wish the
19 witness to be excused?

20 MR. BLUME: Yes, sir.

21 MR. FRIEDMAN: No objection.

22 THE COURT: You are free to leave
23 if you wish, sir. Thank you, sir.

24 MR. BLUME: Your Honor,
25 Plaintiff's Exhibit 4 contains certified

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1 copies of Ms. Villalobos' prior convictions
2 in this matter.

3 THE COURT: Okay.

4 MR. BLUME: And we would offer
5 these as Plaintiff's Exhibit 4, matters which
6 we covered with Mr. Kulp, uh, that arguments
7 could have at least been made on these as
8 impeachment evidence. There is a conviction
9 for grand theft auto, and this is the one
10 that Mr. Durant did bring out during the
11 testimony. In addition to that she had a
12 conviction for forgery in Berkeley County,
13 a conviction for breach of trust with
14 fraudulent intent in Berkeley County, a
15 conviction for larceny in Berkeley County,
16 and a conviction for financial transaction
17 card theft also in Berkeley County.

18 THE COURT: When were they?

19 MR. BLUME: Pardon me?

20 THE COURT: When were they?

21 MR. BLUME: Well, I was going to
22 bring that up next. Most of these actually
23 would have been more -- to lay this out, many
24 of them would have been more than ten years.
25 Nevertheless, there could have been the

1 attempt to use them and asked the judge
2 permission to use them in this case. I do
3 think that under the circumstances and I do
4 think that in this case, arguably, he would
5 have given leeway to use them.

6 THE COURT: I appreciate that.
7 This is argument, no evidence.

8 MR. BLUME: I offer these.

9 THE COURT: I understand. Any
10 objection?

11 MR. FRIEDMAN: No, sir.

12 THE COURT: Very well, they are
13 admitted without objection.

14 (SO ENTERED AS APPLICANT'S EXHIBIT 4)

15 MR. BLUME: With that, with the
16 exception of Dr. Colabroy, who will testify
17 in the morning, that's the Applicant's case.

18 THE COURT: Very well. Are there
19 any additional witnesses that the State has
20 at this point?

21 MR. FRIEDMAN: No other
22 witnesses from the State.

23 THE COURT: All right. Then we
24 will take a recess. The witness is scheduled
25 to be here at what time?

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1 MR. BLUME: The witness is
2 scheduled to arrive tonight.

3 THE COURT: All right.

4 MR. BLUME: And I ---

5 THE COURT: Let's plan to resume
6 this -- we have a matter scheduled, a civil
7 matter, at 9:30. So let's reconvene at 9:45.
8 Thank you very much. Have a good evening.

9 (COURT IN RECESS)

10 (TRANSCRIPT CONTINUED NEXT PAGE)

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1 JANUARY 13, 2012 9:45 A.M.

2

3 (DEFENDANT PRESENT)

4 THE COURT: Good morning, Mr.

5 Myers.

6 APPLICANT: Good morning.

7 THE COURT: Let the record reflect
8 that Mr. Myers is present. We are ready to
9 continue.

10 MR. BLUME: We call Dr. Colabroy.

11 (WITNESS TAKES STAND)

12 KERI COLABROY, being duly sworn to
13 tell the truth, the whole truth and nothing
14 but the truth, testified, as follows:

15 DIRECT EXAMINATION

16 BY MR. BLUME:

17 Q. Good morning.

18 A. Good morning.

19 Q. Dr. Colabroy, where are you currently
20 employed?

21 A. At Muhlenberg College in Allentown,
22 Pennsylvania.

23 Q. What do you do that?

24 A. I am an associate professor of
25 chemistry.

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1 Q. How long have you been so employed?

2 A. Six and a half years.

3 Q. And what courses do you teach at
4 Muhlenberg College?

5 A. I teach organic chemistry as well as
6 experimental biochemistry and advanced
7 biochemistry.

8 Q. What are your research interests?

9 A. My research interests are in the
10 molecular systems, biological systems
11 studying organic chemistry and molecular
12 biology.

13 Q. Please provide the court with your
14 educational background.

15 A. I have a bachelor's of science in bio-
16 chemistry from Forsythe College, a masters
17 and a PhD in chemical biology from Cornell
18 University.

19 Q. And are you familiar with the scientific
20 principles underlying DNA testing and
21 analysis?

22 A. Yes.

23 Q. And is this part of your training and
24 education?

25 A. Yes.

1 Q. Can you elaborate on that?

2 A. The principles underlying DNA analyses
3 and testing are fundamental, integral to
4 everything that I teach and the research that
5 I conduct. I'd say that I deal with them day
6 in and day out in my job as a professor and
7 as a biochemist.

8 Q. And it is something that you teach
9 students about?

10 A. Yes. While I do not teach any forensic
11 chemistry courses, because we do not have
12 those at Muhlenberg College, DNA principles
13 underlie everything that I teach.

14 In particular in my advanced biochemistry
15 classes we deal with the variabilities in
16 human DNA that make DNA testing a viable
17 method for discriminating amongst human
18 beings.

19 Q. Dr. Colabroy, let me show you what has
20 been marked as petitioner's exhibit --
21 Plaintiff's Exhibit 6. Is that your current
22 curriculum vitae?

23 A. Yes.

24 MR. BLUME: Your Honor, we would
25 offer that as an exhibit.

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1 THE COURT: Any objection?

2 MR. FRIEDMAN: No objection. ,

3 THE COURT: Without objection, it
4 is admitted.

5 (SO ENTERED AS APPLICANT'S EXHIBIT 6)

6 MR. BLUME: Your Honor, at this
7 time I move to qualify Dr. Colabroy as an
8 expert in chemical biology.

9 THE COURT: So you care to examine
10 her as to qualifications?

11 MR. FRIEDMAN: Yes, sir.

12 THE COURT: Very well. You may
13 proceed.

14 MR. FRIEDMAN: Dr. Colabroy,
15 have you ever testified as an expert in
16 chemical biology?

17 THE WITNESS: No.

18 MR. FRIEDMAN: Do you have any
19 qualifications concerning DNA testing?

20 THE WITNESS: I do not conduct
21 the DNA testing, no.

22 MR. FRIEDMAN: Nothing further.

23 THE COURT: Very well. I will
24 allow her to render opinions which are
25 consistent with her expertise of chemical

1 biology. I will allow her to render opinions
2 in that area. That does not expand to
3 forensic ---

4 MR. BLUME: No, this is just
5 straight DNA testing.

6 THE COURT: I figured it was
7 probably to analyze the test and tell me what
8 it says.

9 MR. BLUME: (Affirmative nod),
10 that's all.

11 THE COURT: You may continue.

12 DIRECT EXAMINATION CONTINUED

13 BY MR. BLUME:

14 Q. Dr. Colabroy, what were you asked to do
15 in this case?

16 A. You asked me to review the DNA evidence
17 presented at the original trial and to advise
18 as to whether or not additional DNA testing
19 could be performed; if so, to explain the
20 results of those tests to you.

21 Q. And I understand that the last part of
22 that could be quite challenging to you.

23 A. Not too bad.

24 Q. What materials did you review?

25 A. I reviewed the original testimony from

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1 the original trial, the reports of the DNA
2 testing that came with that testimony, as
3 well as the data that was used to generate
4 those reports.

5 Q. After reviewing those materials, what
6 did you suggest to me that we should do?

7 A. I suggested that you pursue additional
8 DNA testing based on new methods.

9 Q. Methods which did not exist at the time
10 of Mr. Myers' trial?

11 A. (Affirmative nod), they were not being
12 us. Yes, DNA tests.

13 Q. What, specifically, did you believe
14 could be retested with beneficial results?

15 A. The dollar bill found on the victim's
16 body.

17 Q. Why not the hair that was found in the
18 victim's hand?

19 A. That hair was consumed by the original
20 test for trial.

21 Q. So there's nothing there to test?

22 A. Nonexisting.

23 Q. Based on your recommendation, was
24 additional DNA testing done?

25 A. It was.

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1 Q. Who did that testing?

2 A. Scientists at Orchid Cellmark
3 Laboratories.

4 Q. Did you recommend Orchid Cellmark?

5 A. I did.

6 Q. Why was that?

7 A. They're an established leader in the
8 field of DNA testing. They actually helped
9 develop some of the analyses for DNA testing.

10 Q. Dr. Colabroy, let me show you what has
11 been marked as Plaintiff's Exhibit 5 and ask
12 if you are familiar with this.

13 A. (Upon review), yes, I am.

14 Q. Is that -- does that exhibit contain the
15 results of DNA testing conducted by Orchid
16 Cellmark?

17 A. It does.

18 MR. BLUME: Your Honor, I would
19 move that this be admitted.

20 THE COURT: Any objection?

21 MR. FRIEDMAN: No objection.

22 THE COURT: Plaintiff's Exhibit 5
23 is admitted without objection.

24 (SO ENTERED AS APPLICANT'S EXHIBIT 5)

25 DIRECT EXAMINATION CONTINUED

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1 BY MR. BLUME:

2 Q. So, Dr. Colabroy, I would now like to
3 discuss the results of the DNA testing
4 conducted by Orchid Cellmark. First, did
5 they test to determine if the red substance
6 on the dollar bill was in fact blood?

7 A. They did.

8 Q. What were the results of that testing?

9 A. It was confirmed to be blood.

10 Q. So it was confirmed as blood?

11 A. (Affirmative nod).

12 Q. Was Orchid Cellmark able to obtain a DNA
13 profile from that?

14 A. Yes, they were.

15 Q. What profile did they -- profile or
16 profiles did they obtain from that testing?

17 A. The DNA profile that they obtained is --
18 the type of analyses that I asked them to run
19 was a Y-STR analysis. This analysis looks
20 exclusively at male DNA, so it only saw the
21 male contributor to the sample. They found a
22 profile of a male from examination of that
23 dollar bill.

24 Q. Why did you suggest that we do Y-STR
25 testing only for male DNA?

1 A. At the original trial the type of DNA
2 analysis conducted looked at markers on the
3 DNA to all human beings, male and female.
4 The results of that analysis revealed a
5 mixture or a male and the female victim.

6 An analysis of mixtures is difficult and
7 that difficulty was evident at the trial. I
8 recommended a Y-STR analysis so that we could
9 get a clear, interpreable conclusive result
10 about the male contributor to that sample.

11 Q. Did they obtain a male profile?

12 A. Yes, a single male profile.

13 Q. Single male?

14 A. (Affirmative nod).

15 Q. So it is clear that the biological --
16 that the DNA profile was of one person, one
17 person only?

18 A. That's correct. There was only one man.

19 Q. So how can you be sure of that?

20 A. Well, all men have one Y chromosome.
21 This analysis looks specifically at that Y
22 chromosome. When you look very closely at
23 the Y chromosome, at sixteen positions, one
24 male will have one chromosome that gives you
25 one sequence at each of the sixteen

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1 positions. Those positions are called
2 alleles. So one man, one Y chromosome, one
3 allele. When we look at the analysis given
4 to us by Orchid Cellmark, we see sixteen
5 positions. There is one sequence found at
6 each position. That is consistent with one
7 man. If there had been two men in that
8 sample, you would have been two sequences at
9 some positions.

10 Q. So there is absolutely no doubt in your
11 mind about this?

12 A. No, sir.

13 Q. Were you able to determine who was the
14 male contributor to this DNA profile?

15 A. I was not.

16 Q. Were you able to determine who was not
17 the male contributor to this DNA profile?

18 A. The male contributor was not your
19 client, Mr. Myers.

20 Q. How did you know this?

21 A. Orchid Cellmark obtained a DNA sample
22 from Mr. Myers and conducted the same Y-STR
23 analysis. When they compared his DNA
24 sequence with the Y chromosome with that, the
25 male contributor to the dollar bill, they did

1 not match. In fact, they did not
2 conclusively at nine positions and this
3 conclusively eliminates Mr. Myers as the
4 contributor.

5 Q. At trial the prosecution argued that the
6 DNA contributor on this dollar bill mixture
7 could be contributed through casual contact,
8 specifically used the example of touching;
9 yesterday he said, for example, someone who
10 licks their fingers and touches a dollar bill
11 or some other type of casual contact in that
12 regard. Given the results, in your opinion is
13 that likely?

14 A. No, I do not believe that it is likely.
15 The quality and purity of the DNA profile
16 that we obtained could not have been given by
17 casual contact. Casual contact would have
18 deposited very tiny amounts of DNA. It would
19 not generate that type of profile.

20 Q. In your opinion, -- I understand that
21 DNA testing is not substance specific.

22 A. (Affirmative nod).

23 Q. But in your opinion, did the male
24 profile developed by Orchid Cellmark generate
25 from the blood that was found on this dollar

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1 bill?

2 A. That is the most obvious of my
3 conclusions.

4 Q. Can you explain to the court why that is
5 the case?

6 A. Well, if we were to -- we actually have
7 additional evidence from our Orchid Cellmark
8 analyses that supports this assertion.
9 Orchid Cellmark actually swabbed the dollar
10 bill's region adjacent to the primary blood
11 stain. They were unable to obtain a DNA
12 profile from that region of the dollar bill.
13 So when they actually analyzed the blood
14 stain they got the DNA profile. So the most
15 logical conclusion is that the DNA came from
16 the blood.

17 Q. Given that it wasn't anywhere else, that
18 they developed the profile from the blood and
19 we know that blood contains DNA ---

20 A. Correct.

21 Q. So, Dr. Colabroy, at Mr. Myers' trial
22 there was testimony about DNA results
23 obtained from the hair found in the victim's
24 hand. Are you familiar with that testimony?

25 A. I am.

1 Q. Did you also go back and look at the
2 underlying data that was generated after the
3 testing was done?

4 A. I did.

5 Q. After reviewing that data that was
6 generated, do you have an opinion as to
7 whether or not that was Mr. Myers' hair that
8 was found in the victim's hand?

9 A. I do not believe that it was Mr. Myers'
10 hair. No.

11 Q. Why do you not believe that?

12 A. During the original trial there was a
13 single hair examined. During the course of
14 that analysis, the sample became contaminated.
15 This was very unfortunate but not
16 determinative. The scientist subtracted the
17 contaminate from her analysis and was
18 therefore able to obtain a profile of the
19 hair itself. When she did that, the DNA
20 profile of the hair was different from Mr.
21 Meyers at three positions. While that may
22 seem insufficient, a difference at three
23 positions means that he could not have
24 contributed the hair. The actual contributor
25 would have matched at all positions.

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1 Q. Dr. Colabroy, thank you. Please answer
2 any questions that Mr. Friedman might have.

3 THE COURT: You may cross-examine.

4 MR. FRIEDMAN: Thank you, Your
5 Honor.

6 CROSS EXAMINATION

7 BY MR. FRIEDMAN:

8 Q. You are not involved in DNA testing, is
9 that right?

10 A. I did not conduct the DNA testing, no.

11 Q. DNA testing is not substance specific;
12 is that correct?

13 A. Could you please ---

14 Q. In other words, we don't know if the
15 profile is from blood, saliva, semen or ---

16 A. The DNA tests themselves do not reveal
17 if the source of the DNA was blood or semen.

18 Q. In looking at the results reported from
19 Orchid Cellmark Laboratories, do you have a
20 copy of that?

21 A. I do.

22 Q. On the last page, page four, do you see
23 that chart?

24 A. My pages aren't numbered. The final
25 part?

1 Q. Yes.

2 A. Um-humm.

3 Q. Can you explain that first column where
4 it says "dollar bill, right half of back" and
5 then proceeding left to right there are a
6 series of columns. Can you explain -- like
7 fifteen of the sixteen columns says "NR" and
8 then there is an "11" at the other one -- can
9 you explain what that means?

10 A. Yes. The "right half of back" refers to
11 the region of the dollar bill where Cellmark
12 swabbed. It was adjacent to the primary
13 blood stain, the primary blood stain having
14 been cut out of the dollar bill.

15 The "NR" means no result, which means no
16 DNA sequence was obtained when the scientist
17 examined or looked for DNA. The eleven is a
18 small signal at that one position. Because
19 there is only one sequence obtained or one
20 allele that was examined, that is
21 insufficient to generate a profile. We would
22 not call that a profile.

23 Q. You testified that this sample was
24 definitely was not from Mr. Myers; is that
25 correct?

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1 A. I testified that the male contributor to
2 the DNA profile was not Mr. Myers. Correct.

3 Q. Did you also give an opinion as to
4 whether or not it was Mr. Dana Chappel?

5 A. I cannot, because I did not have a
6 sample of Mr. Chappel's DNA. So I cannot
7 say.

8 Q. Did you develop a profile from a
9 cigarette butt that alleged belonged to Dana
10 Chappel?

11 A. Yes.

12 Q. Did the male component of the DNA on
13 that cigarette butt match the profile for --
14 did it match the profile from that cigarette
15 butt?

16 A. It did not.

17 Q. Can you conclude from that that Mr.
18 Chappel was not a contributor to this ---

19 A. I can conclude that the male that used
20 the cigarette butt is not a contributor. I
21 have no evidence that the cigarette butt
22 belonged to Mr. Chappel.

23 Q. The cigarette butt was the only sample
24 that you had, allegedly, from Mr. Chappel?

25 A. Correct.

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1 Q. Reviewing the trial transcript, are you
2 aware that the expert in that case also
3 concluded that Mr. Myers was not the
4 contributor?

5 THE COURT: Of what?

6 CROSS EXAMINATION CONTINUED

7 BY MR. FRIEDMAN:

8 Q. Of the male profile on the dollar bill?

9 A. I am aware of that, yes.

10 Q. That was testified to at trial in front
11 of the jury, eleven years ago; is that
12 correct?

13 A. That's correct.

14 MR. FRIEDMAN: Thank you.

15 THE COURT: Redirect?

16 MR. BLUME: Nothing further.

17 THE COURT: You may step down. Do
18 you wish the witness to be excused?

19 MR. BLUME: Yes, sir.

20 THE COURT: Any objection?

21 MR. FRIEDMAN: No objection.

22 THE COURT: Thank you, Doctor.

23 You're free to leave, as well.

24 (WITNESS STEPS DOWN)

25 MR. BLUME: Your Honor, with the

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1 exception of the juror that we -- that Mr.
2 Friedman and I talked about again today, that
3 we hope to get that (deposition) done within
4 the next couple of weeks, that is the
5 Applicant's case.

6 THE COURT: Very well. Any
7 additional testimony from the State?

8 MR. FRIEDMAN: No other
9 witnesses from the State.

10 THE COURT: I understand that we
11 will receive some testimony that the Court
12 will consider. Do you wish to make any
13 closing remarks now or do you wish to
14 reconvene for that purpose after the
15 deposition. That is up to y'all.

16 MR. BLUME: Your Honor, I think
17 that we could -- it's really up to you. We
18 probably could -- the last witness could be
19 important and I'd be happy to reconvene after
20 that and just have arguments if you want to
21 do that. I'll be here the entire month of
22 March. So if you would prefer that we do
23 proposed briefs or Orders, we could do that.
24 It's really at your discretion.

25 THE COURT: Why don't we do it

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1 this way? Once that has been submitted, I
2 think the easiest thing to do is to submit
3 your respective positions and proposed Order.
4 You need to exchange those and then if there
5 is anything that you wish to address, in
6 writing or orally, then we can reconvene to
7 deal specifically with those areas. If there
8 aren't any, then I'll make the decision based
9 on the evidence.

10 MR. BLUME: Okay. So should be
11 set a timetable for -- after we do the
12 deposition.

13 THE COURT: You all can set one
14 for yourselves. I am not going to call time
15 on you.

16 MR. BLUME: That's fine. Mr.
17 Friedman and I seem to get along.

18 THE COURT: Do you agree with
19 that, Mr. Friedman?

20 MR. FRIEDMAN: Yes, sir.

21 THE COURT: Thank you very much.
22 I appreciate it. We will retain everything
23 and I -- I need the copies of the exhibits.
24 I will retain those until I get the
25 deposition and proposed Orders, and I will

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1 return them after I make my ruling.

2 COURT REPORTER: Yes, sir.

3 (HEARING CONCLUDED)

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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the post-
conviction relief hearing held before The
Honorable R. Markley Dennis, Jr., on January
12-13, 2012;

I further certify that I am neither kin
nor counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

Charleston, South Carolina

March 9, 2013

In The Matter Of:
Wesley Max Myers v
The State of South Carolina

Patricia White
February 10, 2012

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1 STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

2 COUNTY OF CHARLESTON

3
4 WESLEY MAX MYERS,

5 Applicant,

6 vs.

CASE NO. 2005-CP-10-3113

7 THE STATE OF SOUTH CAROLINA,

8 Respondent.
9

10
11 DEPOSITION OF: PATRICIA WHITE

12 DATE: February 10, 2012

13 TIME: 11:05 AM

14 LOCATION: Uricchio, Howe, Krell,
15 Jacobson, Toporek, Theos & Keith
16 17 1/2 Broad Street
Charleston, SC

17 TAKEN BY: Counsel for the Applicant

18 REPORTED BY: LORA L. McDANIEL,
Registered Professional Reporter

19
20 A. WILLIAM ROBERTS, JR. & ASSOCIATES

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18 (INDEX AT REAR OF TRANSCRIPT)
19
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25

1 PATRICIA WHITE

2 being first duly sworn, testified as follows:

3 MS. HITCHCOCK: This is a deposition of
4 Patricia White. Mrs. White was unable to testify at
5 the PCR hearing due to a recent death in the family.
6 Judge Dennis agreed with the consent of the parties
7 to taking her testimony by deposition.

8 Present today are Mrs. White, the court
9 reporter, Ms. McDaniel, and myself, Attorney Mallary
10 Hitchcock. Also joining us by telephone, Keir
11 Weyble, another attorney in my office, and the
12 assistant attorney general, Matt Friedman.

13 EXAMINATION

14 BY MS. HITCHCOCK:

15 Q. Mrs. White, I would like to advise you
16 that you do have the right to review the testimony
17 here today before it becomes a part of the record.

18 A. Thank you.

19 Q. You do not have to; you can waive that
20 right, if you wish.

21 MS. HITCHCOCK: If everybody is ready,
22 I'll go ahead with my questions.

23 MR. WEYBLE: Okay.

24 MR. FRIEDMAN: Okay.

25 BY MS. HITCHCOCK:

1 Q. Mrs. White, did you serve as a juror in
2 the trial of Wesley Max Myers?

3 A. Yes.

4 Q. Did you remain on the jury until the end
5 of the trial?

6 A. Yes.

7 Q. Did you know the Defendant, Mr. Myers,
8 before the trial?

9 A. Yes.

10 Q. When during the trial did you realize that
11 you may have known Mr. Myers?

12 A. At the beginning. It probably was on
13 the -- the jury was sent back to the jury room and,
14 at that time, I was able to glance at him firmly and
15 knew that I had -- that I did know him.

16 Q. The first time that you said you may have
17 known him --

18 A. Yes.

19 Q. -- what did you do when you realized?

20 A. When I realized, we were dismissed. The
21 following morning I gave the bailiff a note
22 requesting to speak to the judge.

23 Q. What did the judge do in response?

24 A. The judge called me into the small room,
25 which was his chambers. I disclosed to him that I

1 thought that I did know Mr. Myers. He asked me to
2 cease speaking and called in the other two attorneys
3 and asked me not to speak again until they were in
4 their presence.

5 Q. Just to reiterate, who was present during
6 this?

7 A. It would be the judge and the two
8 attorneys. I don't believe there was anyone else,
9 but I'm not positive.

10 Q. Was Mr. Myers present?

11 A. No.

12 Q. Did you later realize for sure that you
13 knew Mr. Myers?

14 A. Yes, the following day I gave another note
15 to the bailiff who gave it to the judge. And at that
16 time I was -- when I was escorted into the room, the
17 two attorneys were there.

18 Q. It was just the judge and the two
19 attorneys?

20 A. Yes.

21 Q. Was Mr. Myers present?

22 A. No.

23 Q. Did you participate in the deliberations
24 in the trial?

25 A. Please clarify that for me.

1 Q. You stayed on --

2 A. Yes.

3 Q. -- the trial until the end and
4 deliberated?

5 A. Yes. The judge had spoke with both
6 attorneys and felt that I could give an unbiased
7 opinion. And there was no objection with either
8 attorney.

9 Q. Mr. Myers was not present during either of
10 those conferences?

11 A. That is correct.

12 MS. HITCHCOCK: That ends my questions.

13 Matt, do you have anything?

14 MR. FRIEDMAN: Just a few.

15 EXAMINATION

16 BY MR. FRIEDMAN:

17 Q. Good morning, Ms. White.

18 A. Good morning.

19 Q. Matt Friedman from the Attorney General's
20 office. Could you tell us how you knew Mr. Myers.

21 A. Yes. Mr. Myers was an employee of a firm
22 that did business with our business. And Mr. Myers
23 would come into -- we had a contractor supply rental
24 and concrete cutting store. And he would come in on
25 behalf of his employer and purchase items through the

1 store. And if I was up front, I was not -- there
2 were other employees that handled the front store.
3 If I was ever up front, then I would speak to him.

4 Q. Did you know the victim in this case?

5 A. No.

6 Q. And you testified that, during this
7 chambers meeting with the judge, is it correct that
8 the only people that were present were you, the judge
9 and the two attorneys?

10 A. I believe so. I'm not sure if there was
11 another person standing or sitting. It was a very,
12 very small room. And I really don't have a clear
13 memory whether if there was an additional person
14 there or not.

15 Q. Do you remember what questions the judge
16 or the attorneys asked you during the chambers
17 meeting?

18 A. Not specifically other than perhaps how I
19 knew the gentleman and did I feel that I could give
20 an unbiased opinion.

21 Q. Do you remember if you told him that you
22 could give an unbiased opinion?

23 A. That I could or could not, sir?

24 Q. Did you tell them that you could?

25 A. That I could give an unbiased, that is

1 correct.

2 Q. So you remained on the jury; is that
3 right?

4 A. Yes, sir.

5 Q. Did the jury ultimately find Mr. Myers
6 guilty?

7 A. Yes, we did.

8 Q. Do you remember if the judge polled the
9 jury individually after the verdict was read?

10 A. Yes, we did.

11 MR. FRIEDMAN: I don't think I have
12 anything further.

13 MS. HITCHCOCK: I would just like to ask
14 one more, if that's okay.

15 MR. FRIEDMAN: Sure.

16 EXAMINATION

17 BY MS. HITCHCOCK:

18 Q. You're not sure if anyone else was in the
19 room during the deliberations; might have been the
20 bailiff?

21 A. It's possible the bailiff was still
22 standing there. It's possible there was another
23 individual in the room; the room was about half the
24 size of this. It was very small.

25 Q. That individual was not Mr. Myers?

1 A. No, no, definitely not.

2 MS. HITCHCOCK: That's all I have.

3 MR. FRIEDMAN: I don't have anything else.

4 MS. HITCHCOCK: That ends the deposition.

5 Thank you all for your time.

6 (The witness, after having been advised of
7 her right to read and sign this transcript, does
8 waive that right.)

9 (The deposition was concluded at 11:14
10 a.m.)

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1 CERTIFICATE OF REPORTER

2
3 I, Lora McDaniel, Registered Professional
4 Reporter and Notary Public for the State of South
5 Carolina at Large, do hereby certify that the
6 foregoing transcript is a true, accurate, and
7 complete record.

8 I further certify that I am neither related
9 to, nor counsel for, any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 16th day of February, 2012 at
13 Charleston, Charleston County, South Carolina.
14
15
16
17
18
19
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21

22 _____
23 Lora L. McDaniel,
24 My Commission expires:
25 September 18, 2016

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AT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CA NO: 05-CP-10-3113
WESLEY MAX MYERS,	)	
<i>Applicant,</i>	)	
v.	)	ORDER GRANTING
STATE OF SOUTH CAROLINA,	)	POST-CONVICTION RELIEF
<i>Respondent.</i>	)	

FILED
2012 SEP 20 PM 12:44
JULIE ANN STONG
CLERK OF COURT

This matter is before the Court pursuant to an application for post-conviction relief filed by the Applicant, Wesley Max Myers. Applicant contends that he is entitled to post-conviction relief on a number of different grounds, including violations of his constitutional right to be present at all relevant stages of his trial and the right to the effective assistance of trial and appellate counsel. Having examined the parties' submissions, the trial record and having considered the evidence and testimony presented at the post-conviction relief hearing (hereinafter "PCR Hearing"), and a deposition taken by agreement after the PCR hearing, this Court concludes that Applicant is entitled to a new trial, and thus grants post-conviction relief. The Court's findings of fact and conclusions of law are set forth below.

I. Factual and Procedural Background.

During the early morning hours of March 13, 1997, a police officer spotted a fire at the Mill Inn, a local bar in North Charleston, South Carolina. Trial Tr. 1064. The fire department was notified, responded and extinguished the fire. Trial Tr. 1073. After the fire was put out, the fire fighters discovered the body of Teresa Haught, the owner and manager of the Mill Inn. Trial Tr. 1077. According to the pathologist who conducted Haught's autopsy, Dr. Clay Nichols, the cause of death was blunt force trauma to the head. Trial Tr. 2201. Due to the CO levels derived

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from the victim's blood samples, Nichols also concluded that Haught was killed prior to the ignition of the fire. Two pieces of physical evidence secured by law enforcement included a hair found in Haught's hand and a stained dollar bill taken from her back pocket. Trial Tr. 1232; 2184-85. Applicant was an immediate suspect because he was Haught's boyfriend at the time of her death. Trial Tr. 1454.¹

After being interrogated for approximately fifteen to twenty hours over a three day period, Applicant made an incriminating statement. Trial Tr. 2301-02. The interrogating officers admitted that they lied to Applicant about the hair found in the victim's hand, a "ruse" they called it, as part of their planned strategy to obtain a confession. Trial Tr. 1804. Applicant was arrested and charged with the murder of Teresa Haught and the arson of the Mill Inn.² Applicant retained Timothy Kulp, of the Charleston County Bar, to represent him.

Applicant's trial began on February 26, 2001. Myers was represented at trial by Mr. Kulp; Assistant Solicitor Bruce Durant prosecuted the case. The State's case rested heavily on Myers' confession. However, the State also called a witness they located near the end of the trial, Laurie Villalobos. Villalobos testified that she went to the Mill Inn sometime between 1:30 a.m. and 2:30 a.m. the night of the incident to collect funds remaining from the total balance of a

¹ Another early suspect was Dana Chaples. Chaples was seen in the Mill Inn parking lot in the early morning hours the day of the homicide. He was described as being very intoxicated and as acting inappropriately towards several female employees of the bar. Trial Tr. 1145. When questioned by the police the next day, the officers noted he was uncooperative and "very nervous." Trial Tr. 1208-09. Chaples had also changed his appearance (i.e., he had shaved off a mustache he had the night before, and he also lied to the police about being at the Mill Inn. *Id.* Law enforcement obtained a blood sample from him but, for reasons which are not clear from the record, the blood was never tested and a DNA profile was never developed.

² After obtaining the statement, the police contacted the press and arranged for Applicant's "perp walk." The South Carolina Supreme Court condemned this practice in its direct appeal opinion in Applicant's case. *State v. Myers*, 359 S.C. 40, 47, 596 S.E. 2d 488, 492 (2004).

check Haught had cashed for her a few days earlier. She also maintained that both Applicant and the victim were present at the Mill Inn that night. The defense called Saul Kassin, a false confession expert. Kassin, opined that the circumstances surrounding Applicant's interrogation, including the interrogative techniques used by law enforcement, created a significant risk of a false confession and had been recognized to lead to false confessions in other cases. Trial Tr. 2329-30. Additionally, the defense called Dr. Terri Melton, an expert in mitochondrial DNA analysis, who testified that the hair found in the victim's hand may not have been Applicant's hair. Trial Tr. 2546, 2549. Michael DeGuglielmo, another expert in DNA analysis, testified that he believed that there were two DNA profiles on the dollar bill found in the victim's pocket, one male and one female. Trial Tr. 1924-26. He further testified that the victim's DNA was in the mixture on the dollar bill, and that the other DNA profile was not consistent with Applicant's DNA profile. Trial Tr. 1926-27. Applicant's mother also testified that he was home the entire night of the incident.

Applicant was convicted and sentenced to thirty years for murder and ten years for arson. Applicant appealed his conviction on various grounds. He was represented by Robert M. Dudek on direct appeal. The Supreme Court of South Carolina affirmed applicant's conviction on May 11, 2004. *State v. Myers, supra*.

Applicant filed a timely Application for Post-Conviction Relief on August 1, 2005. An amended Application was filed on December 16, 2011, and a second amended application was filed on December 30, 2011. This Court convened a PCR hearing on January 12-13, 2012, in Charleston, South Carolina. Additional testimony was taken by agreement at a deposition on February 10, 2012, also in Charleston County, and the deposition has been made part of the record.

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II. Findings of Fact and Conclusions of Law.

The Court will discuss each of Applicant's specific grounds for relief.

A. Applicant was deprived of his Constitutional right to be present during all critical stages of his criminal trial (Ground 10(r)).

Applicant alleges that he was denied his Sixth and Fourteenth Amendment right to be present at each and every critical stage of his trial due to the fact that a number of conferences and hearings were held at which he was not present and did not waive his right to be present. This Court agrees.

The testimony at the PCR hearing established that two seated jurors, Mrs. Stephens and Mrs. Doctor, were excused following hearings which Applicant did not attend. Mrs. Stephens, the first juror to be excused, testified that after being selected she determined that she was not comfortable serving as a juror in a case of this magnitude. Thus, she asked to speak with the judge. Ms. Stephens testified that Mr. Myers was not present during her meeting with the judge, nor was his attorney. The judge asked her questions about her willingness and ability to serve and then he excused her. Mrs. Doctor, the second juror excused, also testified at the post-conviction relief hearing. She explained that she forgot to bring her heart medication to court one day near the end of the trial. After asking to see the judge, Ms. Doctor was brought into the courtroom. She was not sure whether Mr. Myers' attorney was present during this conference, but she testified unequivocally that Mr. Myers was not present. After being questioned by the judge, Mrs. Doctor was excused and replaced with an alternate juror even though she had already sat through the entire evidentiary portion of the trial.

Another juror, Patricia White, testified by deposition that after the trial commenced, she realized that she may know Mr. Myers. She wrote a note to the judge asking to speak with him. White Depo. 4:20-22. According to juror White, the judge called her into his chambers to discuss

the matter, and then determined that due to her uncertainty she could continue to serve. *Id.* at 4:24-25. The next day, Mrs. White concluded that she definitely knew Mr. Myers and thus she wrote another note to the judge. *Id.* at 5:12-15. Another conference was conducted in the judge's chambers. *Id.* at 5:14-17. At this conference, which like the others described above was also not transcribed, the judge and the attorneys discussed Mrs. White's ability to remain unbiased and on the jury. *Id.* at 6:5-8. Juror White's recollection was clear that Mr. Myers was not present during either hearing concerning her continued impartiality. *Id.* at 5:10-11; 5:21-22; 6:9-11. Mrs. White was ultimately allowed to remain on the jury.

During jury deliberations, the foreperson, Elizabeth Babcock, wrote a note to the judge indicating that the jury could not reach a verdict. Trial Court's Exh. 1. Ms. Babcock testified at the post-conviction relief hearing that, as a result of the note, the judge called her into his chambers, where another off-the-record conference occurred. The judge then instructed her to tell the jury to continue deliberating; she conveyed the judge's instructions to the jury. Mrs. Babcock testified unequivocally that Mr. Myers was not present during this conference.³

These five hearings occurred off the record and without Mr. Myers being present.⁴ Mr. Myers attorney at trial, Tim Kulp, testified at the PCR hearing that he did not inform Mr. Myers

³ Furthermore, a note in evidence indicates that during deliberations another juror needed to discuss with the court a non-refundable plane ticket she had purchased. Trial Court's Exh. 1. Another conference with this juror almost certainly occurred, but the juror could not be located to testify to the substance of the discussion.

⁴ Other off the record conferences and hearings were held in Applicant's absence during the trial. During many of these hearings, decisions were made about the admissibility of evidence. For example, the record indicates five off-the-record conferences that occurred during the testimony of Officer Hallman. *See* Trial Tr. 1257, 1302, 1327, 1334, 1248. During one of the conferences, the judge told Kulp and Durant to reach an agreement about the admissibility of certain hearsay testimony regarding the hair evidence. Trial Tr. 1257. A stipulation was apparently reached, but there is no record of what transpired. *Id.* Other off the record conferences occurred during the direct examination of Officer Clayton. *See* Trial Tr. 1664. During his direct, Clayton mentioned a polygraph test. *Id.* An off the record conference occurred

of his right to be present during these hearings and conferences, and that no waiver was obtained of the right to be present. Nor does any waiver of the right to be present appear anywhere in the trial record.

A defendant in a criminal proceeding has the right to be present at every phase of his or her criminal trial. This right is rooted in the Confrontation Clause of the United States Constitution and the corresponding sections of the South Carolina Constitution. U.S. Const. Amend. VI.; S.C. Const. Art. I, Sec. 14. The right to be present is also protected by the Due Process Clause. The Due Process Clause expands the right to be present to situations that do not involve confronting witnesses or evidence against the defendant if the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" and where a fair and just hearing would be prevented by his absence. *Snyder v. Massachusetts*, 291 U.S. 97, 105-08 (1934). A defendant also has the right to be present at any critical stage of the proceeding if his presence "would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

A critical stage of a proceeding is any portion of the trial where there is at least a reasonable probability of prejudice. *State v. Williams*, 263 S.C. 290, 294-95 (1974). Courts have specifically held that a number of stages are by definition critical. Jury selection is a critical stage of the proceedings. *United States v. Rolle*, 204 F. 3d 133 (4th Cir. 2000). Judicial voir dire of a jury (or juror) after the jury is sworn to determine continued impartiality after if an issue of bias or contamination arises is a critical stage of a trial. *State v. Rivers*, 294 S.C. 123, 363 S.E.2d 105 (1987). Conversations between a judge and jury foreperson while the jury is out, and without the

and the parties apparently agreed to tell the jury about the circumstances surrounding the polygraph. *See id.*

defendant's or counsel's presence, also constitute a critical stage. *See State v. Ashley*, 121 S.C. 15, 113 S.E. 305 (1922). A modified or supplemental charge to a jury in response to a jury's note is a critical stage. *Norris v. South Carolina*, 2001 WL 34085161 (D.S.C. 2001) (order vacated on other grounds, *Norris v. South Carolina*, 18 Fed. Appx. 171 (4th Cir. 2001); *see also State v. James*, 116 S.C. 243, 107 S.E. 907 (1921).

The South Carolina Supreme Court has specifically noted that "*nothing* can be done by the court in a trial for felony, after the jury is sworn and impaneled, unless the defendant is personally present." *State v. James*, 107 S.E. at 908 (emphasis added). Furthermore, the denial of a defendant's right to be present during a critical stage of a trial mandates reversal. In *Rivers*, for example, the Court determined that the defendant's absence during the continued voir dire of a juror to ensure impartiality was a deprivation of his right to be present and reversed the conviction. In *James*, the Court concluded that the defendant's absence from additional jury instructions given by the trial judge in response to a note from the jury violated the defendant's right to be present and reversed the conviction. During Mr. Myers trial, two jurors were excused and two additional hearings concerning Juror White's ability to continue to serve as an unbiased juror were conducted without Mr. Myers being present. Furthermore, in response to the jury's note that it was deadlocked, the judge gave instructions to the jury foreperson to continue deliberating, also in the absence of Mr. Myers.⁵ The South Carolina Supreme Court has unequivocally stated that a defendant has the right to be present at everything that happens in a criminal case, especially when a juror's potential bias is being explored. *See State v. Rivers*, 363 S.E. 2d. at 125; *State v. James*, 107 S.E. at 908. Applicant was denied that right in this case.

⁵ As noted above, there are also indications that other off-the-record conferences and hearings occurred, including one that involved a juror's note to the judge regarding a non-refundable plane ticket.

Furthermore, the Court notes that when one juror, Mrs. Stephens, was excused, not only was Mr. Myers not present but neither was his attorney.

A defendant may waive the right to be present during a criminal trial under certain limited circumstances. *See State v. Wright*, 304 S.C. 529, 405 S.E. 2d 825 (1991). A waiver of the right to be present, like the waiver of other constitutional rights, must be knowing, voluntary and intelligent. *State v. Patterson*, 367 S.C. 219, 229, 625 S.E. 2d 239, 244 (Ct. App. 2006); *State v. Rich*, 354 S.E.2d 909, 292 S.C. 75, 76 (1987). Furthermore, a finding of waiver must be clear from the record. *Rich, supra*. Mr. Myers attorney testified that he did not advise Mr. Myers of his right to be present during any of the hearings or conferences that occurred during Applicant's trial. Mr. Kulp also testified that no waivers to the right to be present were secured by the trial judge. This testimony is confirmed by this Court's review of the trial record.⁶

This Court thus finds that Applicant was denied his right to be present at all critical stages of his trial, a right protected by the Sixth Amendment, the Due Process Clause, and South Carolina law. Mr. Myers' absence from the conferences and hearings at trial was error and, as a result, Applicant is entitled to post conviction relief.⁷

⁶ A complete record of the criminal trial is a due process component of the right to an appeal. *Chem-Nuclear Systems, LLC v. South Carolina Bd. Of Health and Environ. Control*, 374 S.C. 201, 648 S.E. 2d 601 (2007). This is so because the record is the appellate court's source of information as to what transpired at trial. *South Carolina Hwy. Dep't v. Meredith*, 241 S.C. 306, 128 S.E. 2d 179 (1962). The lack of a complete record is prejudicial if an appellate court cannot determine whether the trial court committed or may have committed, reversible error. The failure to transcribe the conferences and hearings at issue in Applicant's case was prejudicial because significant legal rulings, including rulings resulting in juror disqualifications, juror retention following a question of potential bias, supplemental jury instructions and the exclusion and admission of evidence were not memorialized. For example, we do not know the substance of Mrs. White's testimony regarding her relationship with Applicant or the precise content of the judge's instructions to Juror Babcock. Appellate counsel was unaware of these issues as a result of the incomplete transcript and could not raise any issues related to these events on appeal.

⁷ This Court determines that Applicant was denied the right to be present at critical stages of the proceedings against him and grants relief on that basis. Given that it is clear from

B. Newly discovered evidence of Applicant's innocence (Ground 10(z)).

S.C. Code § 17-27 (20)(a)(4) states that an Applicant is entitled to post-conviction relief if "there exists evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence in the interest of justice." Applicant alleges that such evidence exists in his case. This Court agrees.

At the PCR Hearing, Applicant called Dr. Keri Colabroy, an expert in chemical biology. Dr. Colabroy reviewed the DNA evidence presented at Applicant's trial and suggested that further DNA testing be conducted using technology which did not exist at the time of Applicant's trial. Dr. Colabroy analyzed the DNA results obtained from the hair found in the victim's hand. At trial, the defense presented an expert who could not conclusively say that the hair was not Mr. Myers' hair. Trial Tr. 2549. Dr. Colboray reviewed the DNA results and testified at the PCR hearing that the DNA profile identified in the hair found at the scene was definitely not Mr. Myers' profile thus he was definitively excluded as the source of the hair. This is especially significant because the hair was thought by law enforcement to belong to the perpetrator, and that fact, communicated to Applicant, was used to obtain the confession. Trial Tr. 1804. Its significance is further enhanced by the fact that a SLED hair examiner, Joseph Powell, testified at Applicant's trial that based on microscopic hair comparison the hair was a "match" with hair taken from Mr. Myers. Trial Tr. 2184-85; 2195. The DNA test results have conclusively refuted that testimony.

the testimony that: multiple hearings and conferences took place during Applicant's trial; Applicant was not present at those hearings and conferences; Applicant was not advised of his right to be present and he did not knowingly and intelligently waive his right to be present, it is not necessary for this Court to assign blame or fault. However, the Court notes that Applicant's counsel testified unequivocally that he did not advise Applicant of the right to be present or ask that the trial judge do so. Thus, in this respect, trial counsel's performance was both unreasonable and prejudicial.

Dr. Colabroy also recommended that additional DNA testing be conducted on the dollar bill found on the victim's body. The defense tested the dollar bill prior to trial. An expert testified at trial that there was a mixture of DNA on the dollar bill, one male, one female. Trial Tr. 1926-27. The State minimized the significance of this evidence pointing out that there was no proof that the substance on the dollar bill was in fact blood, and that the male DNA could have been deposited on the dollar bill through casual contact. Due to advances in DNA science since the trial, Dr. Colabroy believed that additional testing could produce more probative results. The testing was ordered by this Court and was conducted by Orchard CellMark. Dr. Colabroy testified that the testing revealed that the substance on the dollar bill was in fact blood, a proposition the State contested at trial. Additionally she testified that two DNA profiles were present on the dollar bill; one male and one female that matched the victim. Orchard CellMark performed a Y-STR test that looked solely for male DNA. By doing so they were able to obtain a clear, strong DNA profile of the male contributor, and that the source of the DNA profile was the blood. Dr. Colabroy testified that Mr. Myers was definitely not the male contributor, and also that the State's contention at trial that the DNA could have been placed on the dollar bill through casual contact was scientifically unsound. Thus, the combination of the fact that a hair found in the victim's hand believed to belong to the perpetrator was not Myers hair, but rather was the hair of an unknown male, and the fact that the dollar bill found on the victim's person had blood belonging to an unknown male, (again not Mr. Myers) is significant newly discovered evidence that requires vacation of the conviction in the interest of justice.⁸ Thus this Court finds that this

⁸ At the PCR hearing, Applicant called a private investigator, Pete Skidmore, to testify regarding his attempts to obtain a DNA sample from Mr. Chaples, who was, as previously discussed, a suspect in the case. Chaples refused to provide Mr. Skidmore with biological material (i.e., a cheek swab) which could be used to develop a DNA profile for comparison purposes. Several other witnesses testified at the PCR hearing that they saw a man, who they

is an additional basis for post-conviction relief.

C. Other claims for relief.

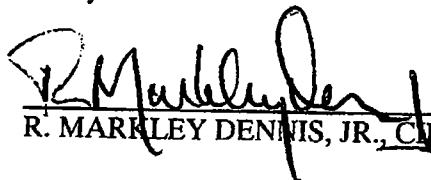
Applicant raised several other grounds for relief, including claims that: a) trial counsel was ineffective for failing to move for a change of venue (Ground 10(a)); counsel was ineffective for calling Dr. Kassin at a pretrial suppression hearing (Ground 10(b)); the trial court should not have admitted and counsel was ineffective for failing to object to inadmissible demeanor, character and hearsay evidence (Grounds 10(d),(e),(f),(g)(i), (j)); (counsel was ineffective for failing to object to improper jury instructions (Grounds 10(v),(w)). Assuming, without deciding, that trial counsel's performance was deficient in any of the above respects, this Court concludes that Applicant has failed to demonstrate prejudice, i.e., that the outcome of the proceeding would have been different. Additionally, Applicant alleged that the trial court's ruling that an anger management questionnaire deprived him of the right to a fundamentally fair trial protected by the Due Process Clause. This Court finds that this claim was raised and addressed on direct appeal and thus is barred in post-conviction proceedings by the doctrine of *res judicata*.

III. Conclusion.

WHEREFORE, for the reasons stated in this order, the Court hereby grants post-conviction relief to the Applicant, Wesley Max Myers.

IT IS SO ORDERED.

September 18, 2012
Moncks Corner, South Carolina


R. MARKLEY DENNIS, JR., CIRCUIT JUDGE

described as dirty, with soot on him, and with what appeared to be burns on his arms near the Mill Inn the morning of the homicide. Applicant attempted to elicit testimony regarding statements made by this man, but this Court determined that the statements were inadmissible hearsay.



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

WESLEY MAX MYERS, #273328

Plaintiff(s)

vs.

State of South Carolina

Defendant(s)

Submitted By: Ashleigh R. Wilson

Address: P.O. Box 11549, Columbia, SC 29211-1549

3408
IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2005-CP - 10- 3113

SC Bar #: 100269

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Other:

E-mail: ARWilson@scag.gov

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20____-CP-_____ ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstatement Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature:

Ashleigh R. Wilson

Date: 9/28/12

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2005-CP-10-3113
COUNTY OF CHARLESTON	)	
	)	
WESLEY MAX MYERS,	)	
S.C.D.C. No. #273328,	)	
	)	
Applicant,	)	
	)	MOTION TO ALTER OR AMEND
v.	)	THE ORDER PURSUANT TO SCRCP 59(E)
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

TO: JOHN H. BLUME, ESQUIRE, ATTORNEY FOR APPLICANT

Respondent, by and through undersigned counsel, making a Motion to Alter or Amend, would respectfully show this Court:

1. This matter is before the Court by way of a post-conviction relief action;
2. An evidentiary hearing was convened on January 12-13, 2012 at the Charleston County Courthouse;
3. Applicant was present at the hearing and was represented by John H. Blume, Esquire. Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Timothy Kulp, Esquire, Bruce Durant, Esquire, Amie Clifford, Rose Maree Myers, Pete Skidmore, Dr. Jonathan Arden, Dr. Susan Knight, Dr. Keri Colabroy, Sarah Doctor, Jwana Stephens, Elizabeth Meeks (formerly Elizabeth Babcock), Carrie Shockley, and Carol Frock. Patricia White, a juror, testified by deposition after the hearing;
4. After a full review of the evidence presented at the evidentiary hearing, the post-conviction relief court issued an order dated September 18, 2012 granting Applicant's application for post-conviction relief. Respondent received this order on September 20, 2012;

5. Respondent moves this Court to alter or amend the final order of dismissal due to the following:

a. The State asks this Court to reverse its earlier decision and deny post-conviction relief when the Applicant failed to meet the Strickland v. Washington standards and when Counsel's conduct fell within the realm of reasonable representation, specifically in relation to the following:

i. Respondent submits that the Court's finding that the Applicant was deprived of his Constitutional right to be present during all critical stages of his criminal trial was not supported by factual testimony or evidence presented by the Applicant. "A defendant has the right to be present at any stage of the criminal proceeding that is *critical to its outcome* if his or her presence would contribute to the fairness of the procedure." Starnes v. State, 307 S.C. 247, 250, 414 S.E.2d 582 (1991) (citing Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 90 L.Ed.2d 631 (1987)). A defendant's exclusion, or absence, will be reviewed in light of the whole record. Id. (citing State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1991)).

The Respondent submits that the testimony submitted by the Applicant at the evidentiary hearing did not show that the discussions between the judge and jurors were critical to the outcome of the Applicant's trial or that the Applicant's presence would have contributed to the fairness of his trial. In addition, the South Carolina Supreme Court has stated that "although the right to be present is a substantial one, no presumption of prejudice arises from a defendant's exclusion". State v. Bell, 293 S.C. 391,

360 S.E.2d 706 (1987). The Respondent submits that the Court has failed to address the Applicant's failure to prove that prejudice resulted from his absence at in-chambers hearings where his attorney was present.

ii. Respondent submits that the Court's findings as to each of the witnesses presented by the Applicant and factual recitation of their testimony needs to be altered or amended as follows¹:

1. **Jwana Stephens-** p. 4 - *Ms. Stephens testified that Mr. Myers was not present during her meeting with the judge nor was his attorney. The judge asked her questions about her willingness and ability to serve and then he excused her.*

Respondent submits that Ms. Stephens also testified that she did not recall if the attorneys were present during the meeting and that she believed there were three people in the room at the time of the meeting. Respondent submits that Ms. Stephens testified to this and that this portion of her testimony should be included in the Order to fairly represent her testimony at the hearing.

2. **Sarah Doctor-** p. 4 – *After asking to see the judge, Ms. Doctor was brought into the courtroom. She was not sure whether Mr. Myers' attorney was present during the conference, but she testified unequivocally that Mr. Myers was not present.*

Respondent submits that Ms. Doctor testified that she did not

¹ Respondent has noted the passages that should be altered or amended in italics and any specific areas that need to be altered or amended are underlined.

recall whether the attorneys were present during the conference, but that there were some people present she just did not recall if they were the attorneys. Respondent submits that Ms. Doctor testified to this and this portion of her testimony should be included in the Order to fairly represent her testimony at the hearing

3. **Patricia White-** p.5-4 – *According to juror White, the judge called her into his chambers to discuss the matter, and then determined that due to her uncertainty she could continue to serve. Id. at 4:24-25. ... Another conference was conducted in the judge's chambers. Id. at 5:14-17. At this conference, which like the other described above was also not transcribed, the judge and the attorneys discussed Mrs. White's ability to remain unbiased and on the jury. Id. at 6:5-8. Juror White's recollection was clear that Mr. Myers was not present during either hearing concerning her continued impartiality. Id. at 5:10-11, 5:21-22, 6:9-11.*

Respondent submits that Ms. White testified that “the judge called me into the small room which was his chamber. I disclosed to him that I did know Mr. Myers. He asked me to cease speaking and called in the other two attorneys and asked me not to speak again until they were in their presence.” Depo. T. 4:25 -5:4. White testified further that “the following day I

gave another note to the bailiff who gave it to the judge. And at that time I was – when I was escorted into the room, the two attorneys were there.” Depo. T. 5:14-17. White also testified that “I’m not sure if there was another person standing or sitting. It was a very small room. And I really don’t have a clear memory whether if there was an additional person there or not.” Depo. T. 7:10-14. Respondent submits that Ms. White testified to this and this portion of her testimony should be included in the Order to fairly represent her testimony at the deposition.

4. **Elizabeth Meeks** (formerly Elizabeth Babcock)- p. 5 – *Ms. Babcock testified at the post-conviction relief hearing that, as a result of the note, the judge called her into his chambers, where another off-the-record conference occurred. The judge then instructed her to tell the jury to continue deliberating; she conveyed the judge's instructions to the jury. Mrs. Babcock testified unequivocally that Mr. Myers was not present during this conference.*

Respondent submits that Ms. Meeks also testified that she recalled the attorneys being present during this conference. Respondent submits that Ms. Meeks testified to this and this portion of her testimony should be included in the Order to fairly represent her testimony at the hearing.

5. **Timothy Kulp-** p. 8 – Mr. Myers attorney testified that he did not advise Mr. Myers of his right to be present during any of the hearings or conferences that occurred during Applicant's trial. Mr. Kulp also testified that no waivers to the right to be present were secured by the trial judge.

p. 8-9 Footnote 7: *However, the Court notes that Applicant's counsel testified unequivocally that he did not advise Applicant of the right to be present or ask that the trial judge do so. Thus, in this respect, trial counsel's performance was both unreasonable and prejudicial.*

Respondent submits that Mr. Kulp testified that he did not recall if he advised the Applicant of his right to be present or whether the judge advised the Applicant of his right to be present. Respondent also submits that Mr. Kulp testified that he would have advised the Applicant of the substance of the in-chambers meetings. Respondent submits that Mr. Kulp testified to this and this portion of his testimony should be amended and included in the order to fairly represent his testimony at the hearing.

6. Respondent submits that Bruce Durant testified at the hearing that the practice at the time was for the judge to bring in the attorneys to tell them the problem and then they would discuss it in-chambers. He also testified that it was not the practice at

the time to have defendants in-chambers during conferences regarding juror issues. Respondent submits that this testimony should also be included in the Order to fairly represent the testimony presented at the hearing.

7. p. 7 Footnote 5: *As noted above, there are also indications that other off-the-record conferences and hearings occurred, including one that involved a juror's note to the judge regarding a non-refundable plane ticket.*

Respondent submits that this statement is not supported by any evidence present in the record. The Order does not reflect that any testimony was given at the evidentiary hearing or made a part of the record indicating that other off-the record conferences and hearing occurred. Respondent submits that the Order should be amended to omit this footnote or in the alternative specify where in the record this testimony is present.

- iii. Respondent also submits that the Court's findings as it relates to the newly discovered evidence was not supported by factual testimony or evidence presented by the Applicant. An applicant requesting a new trial based on after-discovered evidence must show that the evidence (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue

of guilt or innocence; and (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). The Applicant presented no evidence establishing that the Applicant was not the perpetrator of these offenses. The Respondent also submits that the Applicant presented no testimony or evidence showing that the DNA testing presented at the evidentiary hearing would have changed the result if a new trial was granted. As to the testimony of Dr. Colabroy, the Respondent submits that the testimony presented at the evidentiary hearing was merely cumulative and that it did not establish any new exculpatory DNA findings that had not already been presented to the jury at trial. Respondent submits further that the Applicant failed to present competent evidence showing that prejudice resulted.

iv. Respondent submits that the Court's findings as to each of the witnesses presented by the Applicant and factual recitation of their testimony needs to be altered or amended as follows:

1. p. 9- *At trial, the defense presented an expert who could not conclusively say that the hair was not Mr. Myers' hair. Trial Tr. 2549.*

Respondent submits that at trial Joe Powell, an expert in trace examination of hair, testified that "I cannot say at the exclusion of everyone else in the world it came from him. I can say that the characteristics of the hairs that I looked at from his standard fall or are consistent with the unknown hairs, so thus it could

have come from him. It could have come from someone else.”

T. 1382: 6-12. Respondent submits that this statement should be cited to p. 1382 of the trial transcript and not p. 2549 as cited in the Order. Respondent submits that this change should be made to accurately reflect the trial record.

2. p. 9- *Its significance is further enhanced by the fact that a SLED hair examiner, Joseph Powell, testified at Applicant's trial that based on microscopic hair comparison the hair was a "match" with hair taken from Mr. Myers. Trial Tr. 2184-85; 2195.*

Respondent submits that Powell testified that he determined that one of the hairs found in the victims hand was a microscopic match to one that came from the rear of the defendant's head. T. 1381:2-6. Respondent submits that this statement should be cited to p. 1381 of the trial transcript and not p. 2184-2185 or 2195. Respondent submits that his change should be made to accurately reflect the trial record.

3. p. 10- *An expert testified at trial that there was a mixture of DNA on the dollar bill, one male, one female. Trial Tr. 1926-27.*

Respondent submits that Michael Deguglielmo, an expert in DNA analysis testified at trial that “the DNA which we obtained from the dollar bill gave us a result that showed more

than one type of DNA. In essence it showed us what we would consider to be a mixture.” T. 1924:21-25. He testified that “[o]n the sample from the dollar bill, we did see a mixture of DNA. One of those two that we’re looking at is in essence consistence with the profile that we would see from the victim. And what I mean by that is that the, DNA profile of the victim is contained in this mixture of DNA that we saw from the dollar bill. There was also a second DNA profile that is not from the victim, but that we know is from someone who is male.” T. 1926: 17-25-1927:1-2. He testified that “this second DNA profile that we’ve looked at is also not consistent with the DNA profile of Wesley Myers. In other words, it’s a DNA sample that is from someone other than him.” T. 1927:13-17. Respondent submits that this portion of the order should be amended to include this portion of Deguglielmo’s testimony. His testimony indicates that at trial the jury was aware that the DNA mixture found on the dollar bill did not come from the Applicant. Respondent submits that the DNA analysis on the dollar bill by Deguglielmo and Dr. Colabroy had the same result- Myers was eliminated as the contributor of the male DNA. Since the testimony about DNA analysis at trial and at the Applicant’s evidentiary hearing are the same, the Respondent submits that this portion of the order should be

amended to show that the testimony given at the evidentiary hearing by Dr. Colabroy could not be considered significant newly discovered evidence but rather cumulative testimony.

4. p. 10- *Thus, the combination of the fact that a hair found in the victim's hand believed to belong to the perpetrator was not Myers' hair, but rather the hair of an unknown male, and the fact that the dollar bill found on the victim's person had blood belonging to an unknown male, (again not Mr. Myers) is significant newly discovered evidence.*

Respondent submits that this portion of the order should be amended to reflect that testimony and evidence presented a trial did not reflect the presence of newly discovered evidence.

6. Respondent submits that this Motion to Alter or Amend should be granted.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:



Attorneys for Respondent

Columbia, South Carolina

September 28, 2012

BLUME NORRIS & FRANKLIN-BEST, LLC**ATTORNEYS AT LAW**

JOHN H. BLUME
TERESA L. NORRIS
Elizabeth Franklin-Best
KEIR M. WEYBLE *OF COUNSEL*
DAVID I. BRUCK *OF COUNSEL*

900 Elmwood Avenue, Suite 101
COLUMBIA, SOUTH CAROLINA 29201
PHONE: (803) 765-1044
FAX: (803) 765-1143

October 1, 2012

The Honorable Julie Armstrong
Clerk of Court , Charleston County
100 Broad Street, Suite 106
Charleston, S.C. 20401-2258

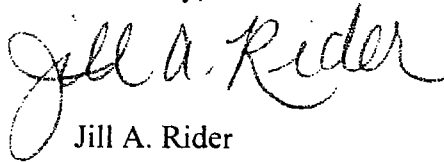
RE: Wesley Max Myers v. The State of South Carolina
CA No. 05-CP-10-3113

Dear Ms. Armstrong:

Please find enclosed for filing the original, and one copy of Applicant's Return to Respondent's Motion to Alter or Amend along with certificate of service. Please clock in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you have any questions, or need any additional information, please do not hesitate to contact our office.

Sincerely,



Jill A. Rider
Paralegal

Enclosure

cc: Honorable Judge R. Markley Dennis
Ashleigh Wilson, Esquire
Wesley Myers
Mrs. Rose Maree Myers

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CA No. 05-CP-10-3113
	)	
WESLEY MAX MYERS, 273328	)	
<i>Applicant,</i>	)	
	)	RETURN TO RESPONDENT'S
v.	)	MOTION TO ALTER OR AMEND
	)	
	)	
STATE OF SOUTH CAROLINA	)	
<i>Respondent.</i>	)	
	)	

Applicant, though undersigned counsel, files the following response to Respondent's motion to alter or amend the judgment in the above captioned matter.

1. This Court granted post-conviction relief on two different grounds: 1) the denial of applicant's right to be present at all critical stages of the proceedings; and, 2) newly discovered evidence.

2. As to the first ground, respondent asks the Court to alter or amend the judgment based on purported errors or omissions in descriptions of several witnesses' testimony. Applicant submits that this Court's order accurately characterized the witnesses' testimony and a review of respondent's pleading so establishes. In many instances undersigned counsel cannot even discern, taking respondent's pleading on its own terms, the difference between what is stated in the order and the changes respondent would like the Court to make to the order. While the order does not include everything that every witness says – no order does – the relevant facts are accurately stated with no material omissions.

3. More significantly, respondent does not contest, nor can it based on the record evidence

that: a) Applicant was not present at a number of critical stages of the proceeding; b) was not advised of his right to be present; and, c) the trial judge did not obtain a knowing and intelligent waiver of Mr. Myers' right to be present at critical stages of the proceeding. Thus, the facts establishing the violation are all uncontested.

4. Respondent also contends that Applicant did not satisfy the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice standard. However, *Strickland* governs ineffective assistance of counsel claims. This Court granted post-conviction relief finding a denial of the constitutional right to be present. Thus *Strickland* is inapposite to the core of Applicant's claim.¹ But, even if Applicant was required to show that "his presence would have contributed to the fairness of his trial" (Respondent's motion at 2) or, that the "discussions between the judge and jurors were critical to the outcome," (*Id.*), he can easily do so. Just a few examples will suffice. Juror Patricia White, for example, was excused following a hearing applicant did not attend. The subject of the hearing, and the basis on which she was excused, was that she realized that she knew Mr. Myers. Certainly Applicant's presence could have materially contributed to this hearing as he had first hand knowledge of the relationship. Additionally, the PCR hearing testimony conclusively established that the jury concluded that it was unable to reach a verdict, i.e., that it was "hung." The judge met with the foreperson of the jury, again without applicant being present, and instructed her, *inter alia*, that deliberations should continue. This hearing had a clear effect on the outcome of the trial as the continued deliberations resulted in the jury finding applicant guilty.

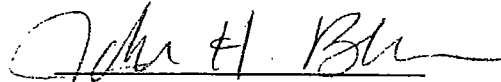
¹In fn 7, on p. 8 and 9, this Court did determine, as an alternative basis for relief, that trial counsel's performance was both unreasonable and prejudicial, but the Court clearly stated "[t]his Court determines that Applicant was denied the right to be present at critical stages of the proceedings against him and grants relief on that basis."

5. Finally, regarding this claim, respondent's motion ignores the cases decided by the South Carolina Supreme Court granting new trials on similar facts, *see, e.g., State v. James*, 116 S.C. 243, 107 S.E. 907 (1921); *State v. Rivers*, 294 S.C. 123, 363 S.E.2d 105 (1987), and their clear holdings that "nothing can be done by the court in a trial for a felony after the jury is sworn and impaneled, unless the defendant is personally present." *James*, 107 S.E. at 908.

6. As for this Court's determination that applicant is entitled to a new trial based on newly discovered evidence, respondent simply repeats the same arguments which it made, and which this Court rejected, in its proposed order. That in and of itself is sufficient basis to deny the motion. Furthermore, the fact of the matter is that Dr. Colabroy's testimony at the PCR hearing was based on advances in DNA technology which did not exist at the time of applicant's trial. She testified, without contradiction, that: a) the hair found in the victim's hand was definitely not applicant's hair; and, b) that a dollar bill found in the victim's clothing was i) blood stained and ii) contained a mixture of male and female DNA; c) applicant was excluded as the source of the male DNA on the dollar bill, and, d) the male DNA could not have been deposited through casual contact. These were all facts which either the jury did not hear, or which the State benefitted from contesting based on deficiencies in the DNA technology available at the time of applicant's trial. This evidence is, therefore, newly discovered and material as it strongly suggests that someone other than applicant was the perpetrator. At a minimum, the evidence would have materially increased the likelihood that the jury would have found that the State had not demonstrated his guilty beyond a reasonable doubt.

WHEREFORE, for the reasons set out in this return, the Court should dismiss or deny Respondent's motion.

Respectfully Submitted,



JOHN H. BLUME

158 Myron Taylor Hall
Cornell Law School
Ithaca, NY 14853
(607) 255-1030

October 1, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WESLEY MAX MYERS, 273328)

Applicant,)

v.)

STATE OF SOUTH CAROLINA)

Respondent.)

IN THE COURT OF COMMON PLEAS

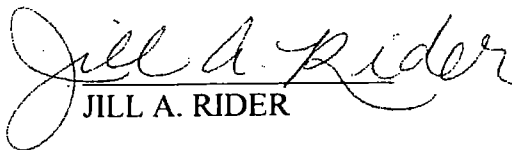
CA No. 05-CP-10-3113

CERTIFICATE OF SERVICE

I, Jill A. Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of applicant's Return to Respondent's Motion to Alter or Amend in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Ashleigh R. Wilson, Esquire
 South Carolina Attorney General's Office
 P.O. Box 11549
 Columbia, S.C. 29201

This the 1st day of October, 2012, in Columbia, South Carolina.


 JILL A. RIDER

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WESLEY MAX MYERS)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

CA No. 05-CP-10-3113

ORDER DENYING
RULE 59(e) MOTIONFILED
2012 NOV 16 PM 12:26
JULIE J. ARMSTRONG
CLERK OF COURT

This matter is before the Court pursuant to Respondent's Motion to Alter or Amend the Judgment, filed pursuant to SCRCivP 59(e). On September 18, 2012, this Court entered an Order granting the Applicant, Wesley Max Myers, post-conviction relief on two different grounds: denial of applicant's right to be present at all critical stages of the proceedings; and, newly discovered evidence. Respondent filed a timely Motion to Alter or Amend the judgment. Having fully considered the arguments made by Respondent, the motion is hereby denied.

Respondent first asks the Court to alter or amend the judgment alleging purported errors and omissions in descriptions of several witnesses' testimony. Having reviewed the Order and both parties' submissions, this Court concludes that the Order accurately characterized the witnesses' testimony. It is true that the order does not include everything that every witness said, no order does, but the facts relevant to the pertinent claims are accurately stated with no material omissions.¹

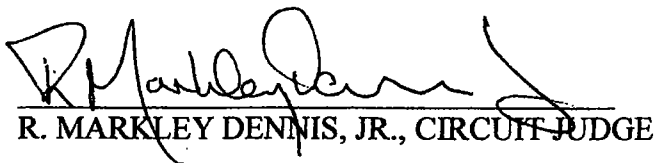
Second, Respondent also contends that Applicant did not satisfy the *Strickland v.*

¹ More significantly, Respondent does not contest that: a) Applicant was not present at a number of critical stages of the proceeding; b) Applicant was not advised of his right to be present; and, c) the trial judge did not obtain a knowing and intelligent waiver of Mr. Myers' right to be present at critical stages of the proceeding. Thus, the facts establishing the violation are all uncontested.

discovered evidence, Respondent simply repeats the same arguments which it made, and which this Court previously rejected when determining to grant post-conviction relief. That is a sufficient basis to deny Respondent's Motion to Alter or Amend the Judgment. Furthermore, as this Court set forth in its prior Order, Dr. Colabroy's testimony at the PCR hearing, which was based on advances in DNA technology which did not exist at the time of Applicant's trial, established that the hair found in the victim's hand, which SLED examiners testified at trial was a "match" with Applicant's hair using microscopic comparison techniques, was definitely not Applicant's hair based on the post-trial DNA testing. Dr. Colabroy also testified, again without contradiction, that a dollar bill found in the victim's clothing was i) blood stained and ii) contained a mixture of male and female DNA. The DNA testing conducted using the new techniques excluded Applicant as the source of the male DNA on the dollar bill. Furthermore, Dr. Colabroy testified that given the strength of the male profile, the male DNA could not have been deposited through casual contact. These were all facts which either the jury did not hear, or which the State benefitted from contesting based on deficiencies in the DNA technology available at the time of Applicant's trial. This evidence is, therefore, newly discovered and would have materially increased the likelihood that the jury, had it heard this testimony, would have found that the State had not proven Applicant's guilt beyond a reasonable doubt.

WHEREFORE, for the reasons stated above, the Court hereby denies Respondent's Motion to Alter or Amend the Judgment.

IT IS SO ORDERED.


R. MARKLEY DENNIS, JR., CIRCUIT JUDGE

November 13, 2012.

KMDJF/3

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2005-CP-10-3113

WESLEY MAX MYERS, #273328.....Respondent,

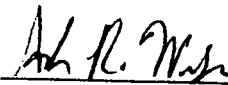
v.

THE STATE OF SOUTH CAROLINA.....Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Order of Dismissal of the Honorable R. Markley Dennis, Jr. dated September 18, 2012 and the Order Denying Rule 59(e) Motion dated November 13, 2012. Petitioner received written notice of entry of this order on November 16, 2012.

November 19, 2012


Ashleigh R. Wilson
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-4037
SC Bar #100269
Attorney for the Petitioner

Other Counsel of Record:
John H. Blume, Esquire
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
Attorney for Respondent

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2005-CP-10-3113

Wesley Max Myers, 273328, ... Respondent,

v.

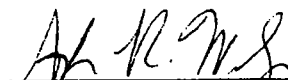
State of South Carolina, ... Petitioner.

PROOF OF SERVICE

I, Ashleigh R. Wilson, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

John H. Blume, Esquire
900 Elmwood Avenue; Suite 101
Columbia SC 29201

I further certify that all parties required by Rule to be served have been served this 19th day of November, 2012.



Ashleigh R. Wilson
Assistant Attorney General
SC Bar #100269

ATTORNEY FOR THE PETITIONER

SWORN to before me this 19th day of November, 2012.



Notary Public for South Carolina.
My Commission Expires: May 11, 2014



ALAN WILSON
ATTORNEY GENERAL

November 19, 2012

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Wesley Max Myers, #273328, Respondent v. State, Petitioner
Case No. 2005-CP-10-3113

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Ashleigh R. Wilson
Assistant Attorney General

cc: John Blume, Esquire
South Carolina Department of Corrections
Charleston County Clerk of Court
Solicitor Scarlett A. Wilson
Office of Appellate Defense
Trisha Allen, Victim Services



ALAN WILSON
ATTORNEY GENERAL

November 19, 2012

Deborah Garrison, Court Reporter
Post Office Box 901
John's Island SC 29457

**Re: Wesley Max Myers, 273328 v. State of South Carolina
2005-CP-10-3113**

Dear Ms. Garrison:

Please prepare a transcript of the Post-Conviction Relief hearing of the above named individual taken the week of January 12-13, 2012 before the Honorable R. Markley Dennis, for the term of the Court of Common Pleas in Charleston County.

Please note that Rule 243(f)(3), SCACR, requires as detailed an index for PCR hearings as for trial transcripts filed in the Supreme Court. The index should include all exhibits. If exhibits were not introduced, then please note that no exhibits were submitted at the hearing.

If the cost of this transcript will exceed \$500, please inform me in writing before you complete the transcript. Please prepare the transcript in accordance with the format requirements as set forth in the Court Reporter Manual. If you will prepare this transcript and forward it to me along with your statement, I will arrange for payment. Please note that all statements are to be signed.

Sincerely,


FOR Anne R. Henley
Legal Assistant

cc: Desiree R. Allen, Court Administration