

VOL. V OF VI

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

TAVARUS LEE ROGERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

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INDEX

INDEX	i
PRE-TRIAL HEARING (dated June 8, 2000)	1
PRE-TRIAL HEARING (dated August 17, 29, 2001)	133
PRE-TRIAL MOTIONS HEARING (dated October 4, 2001)	427
JURY TRIAL TRANSCRIPT (dated October 8-16, 2001)	507
APPLICATION FOR POST-CONVICTION RELIEF	2312
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	2317
RETURN	2342
POST-CONVICTION RELIEF HEARING TRANSCRIPT (dated September 5, 2012)	2348
ORDER OF DISMISSAL	2449
INDICTMENTS	2461
SENTENCE SHEETS	2475
FINAL BRIEF OF APPELLANT	2482
COURT OF APPEALS' OPINION	2506

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Publication of Jail Note
Jury Trial October 8-16, 2001

1486

1 ways before I crossed and I didn't see any cars coming
2 at all. But I hesitated, and I looked again. Not
3 because I thought that there were any cars coming, but
4 because what I was getting ready to do was very
5 important, so I hesitated. I hesitated to act.

6 Ladies and Gentleman, in the trial of this case,
7 and in any criminal case, if you hesitate to act in
8 your deliberations, there is a reasonable doubt; and
9 the Judge will tell you if you find a reasonable doubt,
10 it is your duty to return a verdict of not guilty.

11 And in determining whether there is a reasonable
12 doubt in this case, the most important thing you need
13 to look at is credibility and how the witnesses fit in
14 the timeframes that we've set up here.

15 Now, I'm not suggesting to you that you have to
16 make a finding, personal finding, that any of the
17 witnesses were intentionally lying to you whatsoever.
18 I'm not suggesting that at all. What I'm saying is you
19 can say something -- and these witnesses have testified
20 to things that they never said before, -- and you can
21 find, without finding that they're lying, you can say,
22 "You know what? I just don't believe that."

23 Regardless of their explanations, regardless of the
24 excuses that they give you for why their testimony has
25 changed, "I don't believe that. I don't think they're

1 lying to me. I just don't believe them."

2 Go back to the beginning of this case, and one of
3 the last things that I told you that I expected was
4 that the Solicitor was going to call the two women to
5 the stand and they were going to look over at the
6 table, like the Solicitor said, point at Tavarus
7 Rogers, and say, "That's the man." And, of course,
8 that happened. But it's important for us to determine
9 how we got there, how we got to the point where they so
10 freely used the name "Tavarus Rogers," and the way we
11 get there is to begin just after the shooting.

12 And let me say right now that I agree with the
13 Solicitor that this is a terrible case and that people
14 were killed and did not deserve to be killed, but
15 neither should the wrong person be put in prison or
16 executed for that. Because what happened immediately
17 after the shooting, as the witnesses left the scene
18 they made their first statement, and their first
19 statement was -- and I -- and the Solicitor told you,
20 and I also tell you, take this tape (Defendant's
21 Exhibit 1) and play it as often as you like. It will
22 never change.

23 "Do you know who the intruders were?"

24 "No, ma'am. Two black guys with white masks."

25 The first statement they made. Not, "The guys that

1 were there earlier," not, "Tavarus Rogers," but, "Two
2 guys, black guys, with masks."

3 Now, we also learned that five hours later, within
4 five hours of that first statement, they are
5 interviewed by police and they are asked to give
6 detailed statements, and they talk about the -- well,
7 they were asked to give descriptions of the intruders.
8 The descriptions of the intruders that they gave were,
9 "Two black guys in masks"; except that Jocelyn says,
10 "One of them was a guy named West." And she, in fact,
11 later will look at a lineup and identify a guy named
12 West. But then they say the other guy was a guy named
13 "V", and we can assume that that guy was at least "V"
14 or, as Toby Reischl says, "Maybe "B." And there's no
15 doubt that one of the intruders is this guy named "V"
16 or "B," however you choose to see it, and there's no
17 doubt about that. That was a consistent statement.
18 But the consistency, basically, ends there because we
19 need to go back to the time line now and see what the
20 evidence showed. Because, remember, I asked that you
21 not make up your mind until you have heard the entire
22 evidence, not just what the witnesses told the
23 Solicitor, but after being challenged about what they
24 said, what they really said because that's really the
25 whole picture, and this is what we know:

1 Toby Reischl was drinking and drugging -- well,
2 that's a foregone conclusion -- and he was out all
3 night, and on his way home with Paul, his brother, and
4 a fellow named Derrick, they stopped to get some
5 cocaine. They got to the trailer sometimes before 6:00
6 o'clock; absolutely no question, before dark.

7 And as he -- as they got there, some black fellows
8 came in, and one of those fellows was Tavarus Rogers.
9 Now, we know this because he identified Tavarus from
10 this picture, and it's -- and as you look at it in your
11 jury room, you will realize that there really is only
12 two clear pictures in this entire lineup. And please
13 understand that the Solicitor's slant on this is just
14 that, his slant. These are clear photographs, and,
15 absolutely, Toby Reishl didn't have any problem
16 identifying Tavarus Rogers, right there.

17 Tavarus Rogers was at the trailer at around 6:00
18 o'clock in the afternoon, before dark. The important
19 thing to remember is that Toby Reishl never, ever, when
20 identifying number six, ever refer to him as being "B",
21 or "V", or "D" or anybody. He didn't know number six's
22 name, period. You don't have to believe me when I tell
23 you that. Toby Reishl told you. And I was very clear
24 about this. I said, "Is it your testimony to this jury
25 that you told the police that this guy -- or a guy at

1 the party at 6:00 o'clock -- was named "V" or "B" and
2 he said, "Yes, I told the police that."

3 I suggest to you, Ladies and Gentleman, that you
4 believe this man, Detective Averill, because Detective
5 Averill testified to you, "No, Toby Reishl didn't tell
6 that to me, because if he had, I would have written it
7 down." Because it's not a fact that you'd forget, and
8 it's not a fact that a detective wouldn't write down in
9 a report. I suggest to you that this testimony is
10 credible. Toby Reischl's on this issue was not.

11 Nonetheless, we know at that point that Toby
12 Reishl went to sleep and he slept. He started going to
13 sleep. And we know that from 6:00 o'clock at least
14 until midnight -- well, we don't know, and that's the
15 problem. We don't know how many people came to this
16 trailer to buy drugs, do drugs, party, how many
17 different permutations of people; two black people walk
18 in at one time, another bunch of black people. All we
19 know is that at midnight, Kristal Wire and Jocelyn
20 Wendel say they arrive at the trailer and they see four
21 black guys. Now, the State wants you to believe that
22 the black guys that were there at 6:00 o'clock were
23 there six hours later, or even possibly eight hours
24 later; but there's no reliable testimony at all to
25 establish that fact. Because the very same picture

1 that Toby Reishl said was the fellow who was there at
2 6:00 was shown to these other witnesses, and these
3 witnesses said the guy at the party named "V" was from
4 me to you and he identified himself as "V," not as
5 "Tavarus", or "Tavarus Rogers". Because, as you will
6 recall from Detective Averill, Averill's testimony, I
7 said -- I said -- they never mentioned the name Tavarus
8 Rogers until Detective Averill told them the name. So
9 sometime in this period of time there were four black
10 males.

11 And we know this, also. One of the males at the
12 party was West McKinnon. And how do we know that?
13 Because Jocelyn identified him in number three. And
14 why was Jocelyn able to identify number three in a
15 lineup that is, with the exception of color, a
16 photograph, the exact same type of picture? And the
17 reason that Jocelyn was able to identify number three
18 was because West McKinnon was there at 12:00 o'clock.

19 And the reason that Jocelyn was not able to
20 identify number six was because Tavarus Rogers was not
21 there at 12:00 o'clock, and she was not able to
22 identify the person as "V" from any of these lineups
23 because "V", obviously, isn't in these lineups.

24 And, of course, it goes without saying that
25 Kristal Wire identified no one. Now, was that a result

1 of cocaine? Was that a result of the fact that she
2 really didn't see anyone? She wants you to believe her
3 now to say that, "The person at the party was "V", and
4 I saw him," and, "The person who came in was "V" and I
5 saw him." But -- Tavarus, could you come forward,
6 please?

7 THE DEFENDANT: (Complies)

8 MR. FLEMING: You have not had an opportunity to
9 get a close enough look at Tavarus Rogers. But,
10 Tavarus, would you stand there, please, and would you
11 also show the Jury your teeth? Okay?

12 THE DEFENDANT: (Complies)

13 MR. FLEMING: All right. That's fine. All
14 right. Now, so they can get sort of a schedule of what
15 your height is, and build, and everything.

16 THE DEFENDANT: (Complies)

17 MR. FLEMING: All right. Go have a seat. Thank
18 you.

19 THE DEFENDANT: (Complies)

20 MR. FLEMING: One of the things that -- and,
21 really, the problem is that Ms. Wire oversold the
22 testimony. She just -- she's trying to give you a
23 reason for why she says she can identify this man and
24 claim that he is "V". And one of the things she said
25 was, "Well, he has a distinctive nose." I don't know

1 if he has a distinctive nose or not, but what I do know
2 is that he has a big gap in his front teeth. And I do
3 know that when you say the word "V," you smile
4 (demonstrating), and I do know that when asked did she
5 ever describe this person "V" in any way, she never
6 described the teeth. Matter of fact, she didn't
7 describe this "V" (indicating defendant) in any way,
8 and that -- and that's certainly understandable.
9 It's certainly understandable that she doesn't know who
10 these people were, and it's certainly reasonable why
11 she didn't identify anybody in these lineups as the
12 intruder, because the "V" that she met that night and
13 the "V" that went and committed this offense, that came
14 back and did this stuff, isn't Tavarus Rogers. And
15 she's never had the opportunity to see a picture of
16 him.

17 Now, the -- it's important for you to understand
18 that because Toby Reishl identifies Tavarus Rogers'
19 picture, actually, is the reason that Tavarus Rogers
20 can't be this "V" person; because the State wants you
21 to believe that the only reason that these witnesses
22 didn't identify him is because the picture is bad, but
23 the State cannot have it both ways. The State can't
24 say the picture is bad for the two women but it's not
25 bad for Toby Reischl. ."

1 Then the State, knowing that the evidence -- there
2 are gaps in the evidence, and there's no question about
3 it; and there's a huge gap in the time, and it's
4 difficult to explain. And, knowing that, they do -- a
5 lot of times what happens, they try to make a piece of
6 evidence fit their version of the facts. And I think
7 the Solicitor said, "Now, I'm going to paraphrase," and
8 he went on to attempt to paraphrase what he thought it
9 said. And then he said an important thing, and I wrote
10 it down. He said, "I don't understand a lot of this,"
11 and that's the point.

12 Let's set the stage here. Toby Reishl identifies
13 Tavarus Rogers as being there that day and, after that,
14 the police arrest him, and he's taken to jail. Now,
15 he's nineteen years old. He's sitting in jail accused
16 of a crime. And then he talks with whomever it is the
17 Solicitor says he talks to, and he says, 'I'm in jail
18 because some guy says I was at a party. What am I
19 going to do?' And then he also finds out that West
20 McKinnon is in jail. Now, Tavarus Rogers can't
21 possibly know what's going on at this period of time
22 with those four black males, and he writes a letter
23 paraphrasing, says, 'I don't know what you're telling
24 these people, but you better not throw me under the
25 bus. Because West McKinnon is the fellow who came back

1 with "V", and he's in trouble. He's not on trial here,
2 but he's in trouble.'

3 And that brings me to another point. The
4 Solicitor has made reference several times to two
5 people named Collins Gadsen and Jonathan Gadsen, but
6 there hasn't been any testimony, reliable testimony,
7 about what they looked like, what their nicknames were,
8 or anything like that. All we know is that they're
9 charged with this murder, too. I mean, are they the
10 ones who came back after this thing? I don't know.

11 I don't know. But normally in a case the one
12 thing that the State usually has to bolster the weak
13 testimony of people who change their story is physical
14 evidence. Because this is a crime scene, and it was a
15 crime scene, frankly, that was handled as
16 professionally as possible. It was a crime scene that
17 these men and women secured. Within forty-five minutes
18 this crime scene was locked tight. They gathered the
19 evidence looking for the identity of "V".

20 One of the witnesses said that "V" used the phone.
21 There is a fingerprint on this phone. It is not
22 Tavarus Rogers'.

23 One of the witnesses said that "V" was playing
24 cards. Is V's fingerprints on these cards? Tavarus
25 Rogers' aren't.

1 The witnesses said "V" drank beer. There are
2 fingerprints on these beer cans. They are not Tavarus
3 Rogers'. Are they V's fingerprints?

4 There were fingerprints on the front door. Again,
5 they are not Tavarus Rogers'. Again, are they V's?

6 Every question that goes unanswered is a
7 reasonable doubt. As they come up, they sit at the
8 table, and they know where they've got to look and who
9 they've got to pick because of the chair that he is
10 sitting in. The person who left these fingerprints,
11 the person named "V" should be sitting in that chair.

12 I would remind you of one last thing. Before I
13 do, I want to ask you one thing. Please, please look
14 at this evidence critically and challenge it. If you
15 hesitate, if you find a reasonable doubt, it is your
16 sworn duty to return a verdict of not guilty.

17 And I'll leave you with this thought. You are not
18 obligated to identify anyone. It is just as important
19 to free innocent persons from suspicion as to identify
20 guilty parties.

21 Your Honor.

22 THE COURT: Madam Forelady, Members of the Jury,
23 the State of South Carolina charges the Defendant,
24 Tavarus Rogers, with numerous offenses including
25 murders, two murders, several kidnappings, a burglary

1 first, and an armed robbery.

2 Each of these Indictments have been explained to
3 you, and you will have them in your jury room with you
4 during your deliberations.

5 As I have said, the Indictments in this case
6 allege several different offenses, and each one charges
7 a separate and distinct offense. You must decide each
8 indictment separately on the evidence and the law that
9 applies to it uninfluenced by your decision as to any
10 other indictment.

11 The Defendant may be convicted or acquitted on any
12 or all of the offenses charged, and you will be asked
13 to write a separate verdict of "guilty" or "not guilty"
14 for each Indictment.

15 The Defendant has pled not guilty to each
16 indictment, and that plea puts the burden on the State
17 to prove the Defendant guilty.

18 A person charged with committing a criminal
19 offense in South Carolina is never required to prove
20 himself innocent. I charge you that it is an important
21 rule of law that the Defendant in a criminal trial, no
22 matter what the seriousness of the charge may be, will
23 always be presumed to be innocent of the crime for
24 which the Indictment was issued unless guilt has been
25 proven by evidence satisfying you of that guilt beyond

1 a reasonable doubt. This presumption of innocence does
2 not end when you begin your deliberations, but it
3 accompanies a defendant throughout the trial until you
4 reach a verdict of guilt based upon evidence satisfying
5 you of that guilt beyond a reasonable doubt. The
6 presumption of innocence is like a robe of
7 righteousness placed about the shoulders of the
8 Defendant which remains with the Defendant until it has
9 been stripped from the Defendant by evidence satisfying
10 you of the Defendant's guilt beyond a reasonable doubt.

11 The presumption of innocence is not mere legal
12 theory. It's not just a legal phrase. It is a
13 substantial right to which every defendant is entitled
14 unless you, the jury, are satisfied from the evidence
15 of the defendant's guilt beyond a reasonable doubt.

16 Members of the Jury, under the law of South
17 Carolina you are the sole judges of the evidence
18 presented in this trial. As a Judge, I'm not allowed
19 to suggest to you any opinion that I may have regarding
20 the facts or the evidence presented. But if you have
21 gathered any inference whatsoever regarding any of the
22 facts in this case from anything that I may have said
23 during this trial, you are required to disregard this
24 inference completely. You, and you alone, are the sole
25 judges of the facts of the case, the credibility of the

1 witnesses, and the weight to be given the testimony and
2 the evidence presented. In determining the credibility
3 of any witness, you have the right to take into
4 consideration the interest of the witness, the bias of
5 the witness, and the demeanor of the witness upon the
6 stand, and you may believe a portion of a witness'
7 testimony and disbelieve another portion of it.

8 And while you consider these matters, always bear
9 in mind that you should give the defendant the benefit
10 of every reasonable doubt.

11 I also tell you, Ladies and Gentleman of the Jury,
12 that the fact that the Defendant did not take the stand
13 and testify in his own behalf does not create any
14 presumption against him. You must not permit this fact
15 to weigh in the slightest against the Defendant nor
16 should this fact enter into the discussion or
17 deliberation of the Jury in any manner.

18 In a trial there are two types of evidence which
19 are generally presented during a trial, direct evidence
20 and circumstantial evidence. "Direct evidence" is the
21 testimony of a person who asserts or claims to have
22 actual knowledge of a fact, such as an eyewitness.
23 "Circumstantial evidence" is proof of a chain of facts
24 and circumstances indicating the existence of a fact.
25 The law makes absolutely no distinction between the

1 weight or value to be given to either direct or
2 circumstantial evidence, nor is a greater degree of
3 certainty required of circumstantial evidence than of
4 direct evidence. You should weigh all the evidence in
5 the case. After weighing all the evidence, if you are
6 not convinced of the Defendant's guilt beyond a
7 reasonable doubt, you must find the Defendant not
8 guilty.

9 As a Judge, the law of South Carolina makes me the
10 sole instructor of the law which applies to this case,
11 and I will instruct you on the law which you are to
12 apply to the facts as you determine them to be. You
13 are required to accept the law as I give it to you, and
14 may not reject the law because you may disagree with it
15 or think it unwise or for any other reason. I cannot
16 tell you what the facts of the case are, and you are
17 required to apply the law as I give it to you.

18 I will now define for you the offense of Murder.
19 The Defendant is charged with Murder. The State must
20 prove beyond a reasonable doubt that the Defendant
21 killed another person with malice aforethought.
22 "Malice" is hatred, ill will or hostility towards
23 another person. It is the intentional doing of a
24 wrongful act without just cause or excuse and with an
25 intent to inflict an injury or under circumstances that

1 the law will infer evil intent. Malice aforethought
2 does not require that malice exists for any particular
3 time before the act is committed, but malice must exist
4 in the mind of the Defendant just before and at the
5 time the act is committed. Therefore, there must be a
6 combination of the previous evil intent and the act.

7 Malice aforethought may be expressed or inferred.
8 The terms "express" and "inferred" do not mean
9 different kinds of malice, but merely the manner in
10 which malice may be shown to exist; that is, either by
11 direct or by inference from the facts and circumstances
12 which are proved. Express malice is shown when a
13 person speaks words which express hatred or ill will
14 for another or when the person prepared beforehand to
15 do the act which was later accomplished. For example,
16 lying in wait for a person or any other acts of
17 preparation going to show that the deed was within the
18 Defendant's mind would be express malice. Malice may
19 be inferred from conduct showing a total disregard for
20 human life. Inferred malice may arise when the deed is
21 done with a deadly weapon. A deadly weapon is any
22 article, instrument or substance which is likely to
23 cause death or great bodily harm. Whether an instru-
24 ment has been used as a deadly weapon depends on the
25 facts and circumstances of each case.

1 The following are examples of instruments which
2 may be deadly weapons: A pistol, a shotgun, a rifle,
3 a dirk, dagger, knife, metal knuckles, a fire bomb, et
4 cetera. I think that's enough examples.

5 If one intentionally kills another during the
6 commission of a felony, the inference of malice may
7 arise. If facts are proved beyond a reasonable doubt
8 sufficient to raise an inference of malice to your
9 satisfaction, this inference would simply be an
10 evidentiary fact to be taken into consideration by you,
11 along with all the other evidence in the case, and you
12 may give it the weight you decide it should receive.

13 I will next define for you the offense of First
14 Degree Burglary, of which the Defendant is charged.
15 The State must first prove beyond a reasonable doubt
16 that the defendant entered a dwelling without consent.

17 A "dwelling" is any building or portion of a
18 building in which a person ordinarily sleeps. A
19 building constructed as a dwelling that has never been
20 occupied cannot be considered a "dwelling" for purposes
21 of a burglary; but a building is a dwelling even if the
22 residents are temporarily absent from the building.

23 In order to prove that a defendant entered the
24 dwelling, the State does not have to show that the
25 defendant's entire body entered the dwelling. The

1 smallest entry is sufficient.

2 If a person enters a building by using deception,
3 artifice, trick or misrepresentation to get consent to
4 enter, this is an entry without consent.

5 Next, the State must prove beyond a reasonable
6 doubt that the defendant intended to commit a crime,
7 either a felony or a misdemeanor, at the time of entry.
8 The mere entry into a dwelling without consent is not
9 burglary. If the intent to commit a crime is formed
10 after the entry, it is not a burglary. On the other
11 hand, if the defendant intended to commit a crime at
12 the time of the entry, it is burglary even if the
13 intent was abandoned after the entry. It does not
14 matter that the intended crime was not completed.

15 Intent may be shown by acts and conduct of the
16 defendant and other circumstances from which you may
17 naturally and reasonably infer intent.

18 Finally, the State must prove beyond a reasonable
19 doubt that, one, while in the dwelling or when fleeing,
20 the defendant or an accomplice was armed with a deadly
21 weapon or explosive -- I've already defined for you
22 "deadly weapon", so I won't have to do that again.

23 Or when entering, while in the dwelling or when
24 fleeing, the defendant or an accomplice caused physical
25 injury to anyone not participating in the crime.

1 Or when entering, while in the dwelling or when
2 fleeing, the defendant or an accomplice used, or
3 threatened to use, a dangerous object.

4 Or that the Defendant entered or remained in the
5 dwelling in the nighttime. "Nighttime" is the period
6 between sunset and sunrise during which there is not
7 enough daylight to recognize a person's face except by
8 artificial light or moonlight.

9 As I have stated, there are a number of
10 indictments for Kidnaping, and I will now define the
11 offense of "Kidnaping." The State must prove beyond a
12 reasonable doubt that the Defendant knowingly and
13 unlawfully seized, confined, inveigled, decoyed,
14 kidnaped, abducted or carried away another person
15 without authority of law.

16 To do a thing unlawfully is to do it willfully and
17 against the law.

18 "Knowingly" means with knowledge, consciously, and
19 not accidentally.

20 "Seize" means to take hold of suddenly or
21 forcibly.

22 "Confine" means to limit, restrict or enclose
23 within bounds, imprison or shut or keep in.

24 "Kidnap" is to remove a person against his will by
25 unlawful force or by fraud.

1 "Abduct" means to carry off secretly or by force
2 for an illegal purpose.

3 "Carry away" means to remove.

4 The State does not have to prove that the
5 Defendant did all these things. Instead, if you find
6 beyond a reasonable doubt that the Defendant did any of
7 these things, you may find the Defendant guilty of
8 Kidnaping on one or more of the indictments charging
9 Kidnaping.

10 Something done without authority of the law is
11 something which the law does not sanction, permit,
12 allow, condone or provide justification for.

13 The Kidnaping does not have to be for any personal
14 or monetary gain or for any illegal purpose, but it may
15 be for any reason whatsoever.

16 Now, lastly, I will define for you the offense of
17 Armed Robbery. In order to prove this offense, the
18 State must first prove beyond a reasonable doubt that
19 the Defendant took personal property from the person or
20 presence of another person.

21 Property is in the presence of a person if it is
22 within the person's reach, inspection, observation or
23 control so that the person could, if not overcome with
24 violence or prevented by fear, keep possession of the
25 property.

1 The State must also prove beyond a reasonable
2 doubt that the Defendant did carry the property away
3 intending to permanently deprive the owner of the
4 property and to keep the property for the Defendant's
5 own use.

6 The slightest removal of the property or the
7 complete possession of the property, even for an
8 instant, by the defendant is sufficient to show a
9 taking and carrying away of the property.

10 The taking and carrying away of the property must
11 be done with violence or by putting the owner of the
12 property in fear of violence.

13 Finally, the State must prove beyond a doubt --
14 well, beyond a reasonable doubt that the defendant was
15 armed with a deadly weapon during the robbery. I have
16 already previously defined for you what a "deadly
17 weapon" is, so I don't believe I need to do that.

18 As fair and impartial jurors, you are sworn to
19 impartially try and determine the facts of this case.
20 When you comply with your oath, no one will have a
21 right to criticize your verdict, and you will have
22 discharged your duties as jurors.

23 You must not be influenced by any opinions about
24 this case which you may have heard on the outside. You
25 must decide this case on the testimony that you have

1 heard from the sworn witnesses, along with the other
2 evidence introduced in the trial.

3 There are two verdicts which you may find as to
4 each indictment in this case, one of Guilty, the other
5 of Not Guilty. There's no significance whatsoever in
6 the order in which I state these two possible verdicts
7 to you. It's simply that one must be stated first.

8 Your verdict must be a unanimous one as to each
9 indictment. That is, it must be the verdict of each
10 and every one of you. Madam Forelady -- do you (Mr.
11 Murdaugh) have the indictments, or do I have them?

12 MR. MURDAUGH: I think I handed them up to you.

13 THE COURT: Thank you. I'm holding the
14 Indictments in my hand, and on the back of each
15 Indictment is printed the word "Verdict," and under it
16 is several lines and a place that says "Foreman of
17 Petit Jury."

18 Madam Forelady, as you begin your deliberation and
19 as you arrive at a verdict, you may write your verdict
20 as to each Indictment and sign your name in the place
21 indicated as Foreperson.

22 I have one inquiry. The evidence that's on the
23 tape, is that the only thing that's on that tape?

24 MR. MURDAUGH: There's a -- you're talking about
25 over here, sir?

1 THE COURT: Yes, sir. The 911 tape.

2 MR. FLEMING: I believe so.

3 THE COURT: Okay.

4 MR. MURDAUGH: You're asking if anything on that
5 table is not evidence?

6 MR. FLEMING: No, no. He's saying is this -- is
7 there anything else on this tape?

8 THE COURT: On the tape other ---

9 MR. MURDAUGH: Oh.

10 MR. FLEMING: No, sir.

11 THE COURT: Okay.

12 MR. FLEMING: Just that.

13 THE COURT: Okay. Of course -- and so both
14 sides think that we can just send the recorder in the
15 jury room?

16 MR. MURDAUGH: Yes, sir.

17 MR. FLEMING: Yes, sir.

18 THE COURT: Yeah. Okay. I had not asked that
19 question, and that sometimes comes up. I wanted to
20 make sure there wasn't something from some other case
21 in there.

22 So you, of course, will take the tape. You will
23 take all the evidence in the jury room with you, and
24 you are, of course, to look at it as long as you like.
25 And, of course, the tape recorder will go with you so

1 that you can listen to the tape.

2 During your deliberations, Members of the Jury, do
3 not speak to any of the bailiffs about it. If you have
4 a question having anything to do with your
5 deliberations, Madame Forelady, it will be your job to
6 write me a note, write the question out, and then we
7 will come back in here to discuss it.

8 In other words, you just write the note, knock on
9 the door, hand it -- there will be somebody there to
10 take it, and they will bring the note down here, and
11 then we'll come back in here to discuss any questions
12 that you have.

13 Now, so far as the length of your deliberations,
14 it's entirely in your hands. You're staying. We're
15 here. We all -- so you deliberate as long as you want
16 to. If you are still deliberating at the dinner hour,
17 because it's only -- it's already -- it's 4:00 o'clock
18 now, just send a note out and tell what you're going to
19 do, or whatever, and we will leave that in your hands.
20 If you want to -- we have, of course, the bus. We can
21 take you out to dinner if that's what you want to do,
22 or we can send out for dinner, so it's strictly up to
23 you.

24 With that, before you go, let me see, are there
25 any small matters that anybody wants to -- questions

1 about my charge?

2 MR. KULP: Yes, sir. If we could approach, sir?

3 THE COURT: Madam Forelady, Members of the Jury,
4 there's a matter of law that must be taken up before
5 you begin your deliberations. I'm going to let you
6 retire to the jury room, but do not begin your
7 deliberations as yet. Yes, sir? You say you have a
8 question?

9 THE FOREPERSON: Yes, sir.

10 THE COURT: Okay.

11 THE FOREPERSON: We would like to know, once we
12 begin the deliberations if we -- do we just continue
13 indefinitely until we reach a conclusion, or -- or is
14 there some stopping point at which we say, "That's
15 enough for today and we'll start again tomorrow?"
16 We're not clear on the procedure.

17 THE COURT: Well, I -- you can deliberate as long
18 as you want to. If you want to deliberate until a
19 specified time and take a dinner break, come back
20 tomorrow, that's fine. We can do that. I'll leave
21 that to your -- at this stage, I would hope that we
22 would -- if you do not reach a verdict this evening,
23 that you would -- that we'd come back, and I'll leave
24 that pretty much to your decision. I'll not say it a
25 hundred percent because I might have a say. If you

1 were to say you wanted to come back Tuesday, I would
2 probably have something to say about that. But I'm
3 going to leave it -- what I would suggest, after you
4 get in there and get organized, and if you want to do
5 this, if you would -- and you'all have an idea of how
6 long it's going to take and how long you want to
7 deliberate until you -- for the dinner so we can make
8 the preparations, if you will just write a note to me.
9 I will read it and give it to the other one so that we
10 can prepare for your dinner. I'm going to leave it in
11 your hands. And so with that in mind, I'm going to
12 pretty much leave it up to you. So you'all work
13 tonight as late as you want to and quit when you want
14 to. You see what I'm saying?

15 THE FOREPERSON: Yes, sir.

16 THE COURT: Okay. Please retire to the jury room,
17 but do not begin your deliberations until I -- and I'll
18 bring you back in here in just a moment.

19 (JURY OUT AT 4:10 P.M.)

20 MR. MURDAUGH: If Your Honor please, we have those
21 three alternates. Do you think we should do something
22 about them now before we send them in there?

23 THE COURT: Would the alternates stay here,
24 please? Good idea.

25 MR. MURDAUGH: We can use that middle Judge's

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Publication of Jail Note
Jury Trial October 8-16, 2001

1512

1 chamber.

2 THE COURT: Or the -- well, the extra jury room.

3 MR. MURDAUGH: The other jury room.

4 THE COURT: Yeah. Okay. Members of -- the
5 Alternates, as you know, this is a bifurcated trial, as
6 I explained to you. Normally at this stage of the
7 proceeding you would be dismissed, but we need to keep
8 you together. Do not discuss the case among your-
9 selves. We're going to let you go into the jury room
10 and they'll provide refreshments and so forth for you.
11 And so if you will stay with us, and then you will
12 still be part of the jury. And, of course, when you go
13 to lunch -- go to dinner, or whatever, when they do
14 that, I'll instruct you more at that time. And, of
15 course, I will instruct them. But do not discuss the
16 case among yourselves, and please go with Mr. Dorsey
17 into the -- to the jury room.

18 BAILIFF DORSEY: Main jury room?

19 THE COURT: The different jury room. If you have
20 any of your purses or anything in that room, they'll
21 get them for you.

22 (ALTERNATE JURORS OUT AT 4:12 P.M.)

23 THE COURT: Okay. And, of course, the way I
24 picture it so far is that the alternates, when they
25 leave here -- when the jury is ready to leave here, I'm

1 going to instruct the jury to stop their deliberations
2 because they only deliberate in the jury room. The
3 alternates, of course, will go back with them. Isn't
4 that right?

5 MR. MURDAUGH: I'm not sure exactly what you said,
6 sir.

7 MR. FLEMING: Me either.

8 THE COURT: The alternates can go out to dinner
9 with the jury, and so forth?

10 MR. MURDAUGH: Oh, yeah. But they should not
11 discuss it ---

12 THE COURT: The alternates don't discuss it, ---

13 MR. MURDAUGH: That's right.

14 THE COURT: --- but neither do the jurors either.

15 MR. MURDAUGH: That's correct, sir.

16 MR. KULP: Well, I -- if they're going to be
17 separate here and away from the deliberations, I don't
18 see why they wouldn't be kept separate as well for both
19 dining purposes and otherwise.

20 THE COURT: Well, nobody discusses it -- in fact,
21 they're going to have people watching them to make sure
22 they don't deliberate when they're at dinner, anyway.
23 We'll talk about that in a minute.

24 MR. KULP: Yes, sir.

25 THE COURT: We don't -- that's not before us yet.

1 You had a question about -- is there any exception to
2 the charge?

3 MR. MURDAUGH: None from the State, sir, no
4 exceptions or additions.

5 MR. KULP: No exceptions. Just the addition we
6 talked about at sidebar, Your Honor.

7 THE COURT: And that was?

8 MR. KULP: Except to preserve our exceptions to
9 the ones that the court declined to consider.

10 THE COURT: Which have been made Court's exhibits?

11 MR. KULP: Precisely.

12 THE COURT: Okay. I understand about those.

13 MR. KULP: Overly cautious about renewing and ---

14 THE COURT: Yeah.

15 MR. KULP: --- preserving those. This will be
16 from Judge Irwin's charge book, Your Honor, 3-7,
17 "Impeachment By Inconsistent Statements Or Conduct."
18 We think that, based upon the results of the Cross
19 Examination of more than one witness, Mr. Toby Reishl,
20 and in other respects, that this would be an
21 appropriate charge to charge the jurors.

22 I made a -- tried to make a detailed list of the
23 different types of instructions that you gave to the
24 Jury from the start on down to "Unanimous Verdict," and
25 I don't recall, specifically, that being charged.

1 THE COURT: No, it wasn't in my charge, but it
2 wasn't requested. And I'm a little reluctant to stick
3 that in at the last because that would just cause --
4 and, you know, you've made that -- the argument has
5 been made. I mean, I don't know that that's a charge
6 on the -- but I've certainly instructed them to
7 demeanor of the witnesses, and so forth, and that's all
8 it is; isn't it?

9 MR. KULP: No, Your Honor. It's more than that.
10 It deals with the precise issue of inconsistent
11 statements of witnesses, and that's why I rushed up
12 here to give it to you because -- before the Jury went
13 out, because I didn't want to take any -- only to avoid
14 exactly what you're talking about. That's why I wanted
15 it done right then, Your Honor.

16 I do think it's separate and distinct, and it
17 directly relates to the evidence in the cases as that
18 unfolded through the trial.

19 THE COURT: What says the State?

20 MR. MURDAUGH: Judge, in my reading of that
21 section, I am not sure that's the law, sir, to start
22 off with. Number two, it comes at a time when it
23 places -- it should have been done earlier. It places
24 undue emphasis on it -- and (pause).

25 THE COURT: Well, it's still -- it's just about.

1 credibility of the witnesses and I ---

2 MR. KULP: That's not -- that's not correct, Your
3 Honor.

4 MR. MURDAUGH: Exactly.

5 MR. KULP: Judge, the timing of this ---

6 THE COURT: Well, I'm going to let you -- you
7 haven't actually presented the Court with a written
8 charge. I think the first duty is for you to present
9 me what you want me to charge so I can look at it
10 instead of talking about theory.

11 MR. KULP: Yes, sir.

12 THE COURT: Have you got it? Is that exactly the
13 words that you want to use?

14 MR. KULP: Yes, sir.

15 THE COURT: Okay.

16 MR. KULP: May I?

17 THE COURT: Yes, sir.

18 MR. KULP: (Tenders document)

19 THE COURT: And we'll photocopy that and make it a
20 Court's exhibit.

21 MR. KULP: Yes, sir.

22 THE COURT: I'll read it, (review). You're saying
23 3-7, "Impeachment By Inconsistent Statements," and I'll
24 read it. (Reading):

25 "The testimony of the witness may be

1 discredited or impeached by showing that he
2 previously made statements that are
3 inconsistent with his present testimony. The
4 earlier contradictory statements are
5 admissible only to impeach the credibility of
6 the witness and not to establish the truth of
7 these statements.

8 It is the province of the Jury to determine
9 the credibility, if any, to be given the
10 testimony of a witness who has been
11 impeached. Evidence of conviction of a crime
12 of moral turpitude is..." ---

13 MR. KULP: No, not that.

14 THE COURT: Okay. Stop then. The last thing,
15 "...who has been impeached."

16 MR. KULP: May I offer one thing, Your Honor, for
17 consideration? Number one, if we came back thirty
18 minutes from now after deliberations had started, I
19 would certainly understand the concern about
20 timeliness. However, we did it immediately upon the
21 Court's request as to any additional charges. And as
22 well, in terms of it coming late, when we asked -- if
23 you had even granted, Your Honor, the charge to us, or
24 any of the ones we requested, we certainly cannot
25 dictate to this Honorable Court which order you deem

1 appropriate to give the various charges, and it could
2 have very easily come as number twenty just after
3 "Unanimous Verdict."

4 THE COURT: Well, I just think that's another way
5 and a little different slant on credibility of the
6 witness, and I charged them that the credibility of the
7 witness was with them, and I do not -- I've published
8 it so that it is protected.

9 And if you want to, I would suggest that you might
10 want to make it a Court's exhibit just ---

11 MR. KULP: I'll do that right now, Your Honor.

12 THE COURT: --- to give. But I ---

13 MR. KULP: Exactly in the language that you read.

14 THE COURT: Okay.

15 MR. KULP: Yes, sir. Will do.

16 THE COURT: But your request is considered and
17 denied.

18 MR. KULP: Thank you, Your Honor. We respectfully
19 except.

20 THE COURT: Okay. Bring the Jury back.

21 MR. KULP: I wonder, do we need to bring them
22 back or just tell them to begin deliberations?

23 MR. MURDAUGH: I have no problem with sending the
24 evidence down there with the tape ---

25 THE COURT: Okay.

1 MR. MURDAUGH: --- and telling them to start.

2 THE COURT: Tell him just to hold up. Okay. Go
3 ahead and get that. Okay. Without objection, then,
4 they will just be told to begin their deliberations.

5 MR. MURDAUGH: Once they get the evidence.

6 THE COURT: Anything further?

7 MR. KULP: Nothing from the Defendant, Your Honor.

8 THE COURT: Oh, wait a minute. One thing. I
9 might give them the Indictments.

10 MR. KULP: Yes, sir. And as well, under all the
11 current concern, we would renew all of our objections
12 at this time, Motions, and exceptions in every and all
13 respects made at any time. Thank you.

14 THE COURT: Okay. Then we are at ease until we
15 have some word from the jury or something else happens.

16 MR. KULP: Yes, sir. And I'll type up that
17 request and get it marked. I'll let you read it or
18 give it to your Clerk for you to review.

19 THE COURT: Okay.

20 (JURY DELIBERATIONS BEGIN AT 4:30 P.M.)

21 (JURY SENDS NOTE TO JUDGE AT 5:35 P.M.)

22 THE COURT: We have a note from the jury. Do
23 we have a statement made by Jocelyn Shough Wendel --
24 which it doesn't matter whether there is or not, if
25 there is one, it was not offered into evidence? Is

1 that right?

2 MR. MURDAUGH: Which one did we put into evidence?
3 Didn't you put one into evidence?

4 MR. FLEMING: The ones in evidence, as I recall,
5 one is from Toby Reischl and one is from Kristal Wire.

6 THE COURT: But there is not one from Jocelyn
7 Wendel?

8 MR. FLEMING: Well, I think there is one, but it's
9 not in evidence.

10 MR. MURDAUGH: Into evidence?

11 THE COURT: Into evidence?

12 MR. FLEMING: No.

13 THE COURT: Well, of course, my usual thing is to
14 tell them that they should not speculate about --
15 they've got to decide the case from what's in evidence
16 and if it's not in evidence our Rules do not allow the
17 case be open to receive any other evidence. Do you all
18 agree with that?

19 MR. MURDAUGH: Yes, sir.

20 MR. FLEMING: Yes, sir.

21 THE COURT: And they've got to decide it from
22 whatever is there. Okay, (reading note): "Need
23 transcript from Jocelyn and Kristal and Toby, please."
24 That's some four and a half hours of testimony. I will
25 tell them that I would hope they could narrow down if

1 they want -- that's four and a half hours, I'm advised,
2 of testimony to listen to, and if they want to listen
3 to parts of it, if they'll be more specific, they can
4 certainly do that. But, Solicitor, I ought to fine you
5 \$100 right now for mentioning it.

6 MR. MURDAUGH: I think you ought to, too, sir.

7 THE COURT: Except it ought to be more?

8 MR. MURDAUGH: It ought to be more, (affirmative
9 nod).

10 THE COURT: Well, anyway, I'm going to just tell
11 them that we have it and the court reporter can either
12 read it or play it, but it's four and half hours, and I
13 think they'll change their mind.

14 MR. MURDAUGH: I hope so.

15 MR. KULP: Judge, I was just looking at the law.
16 I don't have that off the top of my head but, you know,
17 I think that if they selectively ask for portions ---

18 THE COURT: Well, we'll worry about that if
19 there's something that you'all feel like that they need
20 more of, or something, if they make a specific request.

21 MR. KULP: For balance.

22 THE COURT: They have either -- their request now
23 is for all of three of them. So I'm not going to start
24 speculating about balance at this stage, because they
25 haven't made a request. But if they want to hear all

1 of this, I'm going -- we'll play it all.

2 MR. KULP: Yes, sir.

3 THE COURT: I hope they're going to reconsider, is
4 what I'm saying. And I'm going to just let them know
5 -- I mean, very frequently, juries don't understand
6 that if it took four hours the first time, it will take
7 four hours the second time. They ask for a transcript,
8 you know, like we all do -- the O.J. trial, you know,
9 where they have the transcript.

10 MR. KULP: Uh-huh, (affirmative nod).

11 THE COURT: Well, we don't have that.

12 MR. KULP: Could we consult about this for a
13 moment, please? (Confers with Mr. Fleming). As
14 always, we -- other than excepting to something, we
15 abide by the Court's decision in every respect. With
16 all due respect to the Court, I think -- it's a death
17 penalty case, and I think if the Jury wants to hear all
18 four hours, that's ---

19 THE COURT: They didn't ask to hear all four
20 hours.

21 MR. KULP: Excuse me. What they ask -- what they
22 ask for, they ought to get. And if they -- if the
23 Court asks them if there's some way they can limit that
24 and ---

25 THE COURT: They asked for transcript. I'm going

1 to tell them that we do not have a transcript; ---

2 MR. KULP: And that if they want to hear it,
3 they'll hear the whole ---

4 THE COURT: --- but if they want to hear the
5 testimony of all or part of the witnesses' testimony,
6 we can do that. But, it just, you know, takes awhile
7 to do that. I just want them to know because I do not,
8 frankly, think they want to immediately start back and
9 re-listen to that testimony.

10 MR. KULP: And that's what -- yes, Your Honor.
11 But I think, though, then once we find out what the
12 answer to that is, then we could determine whether or
13 not if they ask for ---

14 THE COURT: Well, we'll see ---

15 MR. KULP: --- if they ask for just, you know, the
16 Direct on the issue of "X," then they've got to hear
17 the Cross on the issue of that.

18 THE COURT: Well, you can make that motion at the
19 time, but I, customarily, just play what they ask for.
20 If they ask for something else, I don't go back and
21 say, 'well' -- the lawyers say, 'Well, if they listen
22 to that, I'd like for them to hear something else.'
23 You know, I just let them ask for what they want to
24 hear.

25 MR. KULP: Well, I'm just trying to be as cautious

1 as I can, considering ---

2 THE COURT: Well, you're doing the right thing.

3 MR. KULP: Yes, sir. And let's -- I guess, with
4 your ---

5 THE COURT: Bring them on in.

6 MR. KULP: Just so we can send them back out and
7 discuss it ---

8 THE COURT: After I talk to them and get their
9 response, we might have a sidebar on it.

10 MR. KULP: Yes, sir. Yeah. I don't want --
11 exactly. I don't want to discuss my wants and wishes
12 in front of them.

13 THE COURT: That's right.

14 (JURY IN AT 5:42 P.M.)

15 THE COURT: Okay. Madam Forelady, Members of
16 the Jury, I have your message. The first question,
17 (reading): "Is there a written statement taken in
18 January of '99 from Jocelyn Shough Wendel?"

19 There is not one introduced into evidence, and so
20 if there is or there is not is irrelevant. Our Rules
21 do not allow the testimony or the record to be reopened
22 to receive additional evidence. So you, therefore,
23 must decide the case upon the testimony and evidence
24 presented in the trial.

25 Secondly, (reading): "Need transcript from

1 Jocelyn and Kristal and Toby, please." Do you mean
2 like a transcript of their testimony?

3 THE FOREPERSON: Yes, sir.

4 THE COURT: We don't have a transcript of the
5 testimony. What -- the way we customarily do it is if
6 you'all have questions about a witness' testimony, or
7 more than one witness, we would play those parts that
8 you wish to be played. If you want to listen to all of
9 that testimony -- and I understand it's about four and
10 a half hours -- it is recorded or the court reporter,
11 Ms. Garrison, can read it. You know, I don't know that
12 that's what you wanted, but we do not have written
13 transcripts to give you of the testimony.

14 If you'all know what part that you'all have
15 questions about that you can't agree on what the
16 testimony was that you think is important, if you have
17 that and want to hear special parts of it, we can
18 certainly accommodate you on that.

19 THE FOREPERSON: I think we probably need to be a
20 little bit more specific. We weren't aware of those
21 limitations.

22 THE COURT: Yes, ma'am. And that's the reason
23 I brought you in. I did not believe that this close
24 toward the end of the trial that you'all wanted to sit
25 here and listen to four and a half hours of the

1 transcript unless it was absolutely necessary.

2 THE FOREPERSON: No, sir. We can be more
3 specific, probably.

4 THE COURT: Okay. And from time to time, as
5 you reach points of the testimony that you want to be
6 heard, we can do it. It is strictly at your pleasure.
7 If you have several things you want to hear, let us
8 know and we can do it all at one time. Or if there is
9 something that you want to hear, come out and we'll
10 identify that particular portion. Just whatever your
11 pleasure is. Okay. Anything else?

12 Wait just a minute. Any exceptions to anything
13 that I said?

14 MR. MURDAUGH: No exceptions at all, sir.

15 MR. KULP: No, sir, Your Honor.

16 THE COURT: Okay. We will await further word from
17 you. You'all may retire.

18 (JURY OUT AT 5:50 P.M.)

19 (JURY SENDS NOTE TO JUDGE AT 5:58 P.M.)

20 THE COURT: Okay. This is just a status report.
21 Is the Defendant right here?

22 MR. FLEMING: Yes, sir.

23 THE COURT: Yeah. Good. (Reading): "Please have
24 dinner brought in for supper. Our intention to
25 continue deliberating until about 8:00 P.M. and then

1 adjourn until tomorrow A.M. if necessary."

2 All right. It's now approaching 6:00. I think
3 what I'm going to do is turn this over to the Clerk and
4 then excuse everybody until 7:00. If they have any
5 kind of questions, then we'll address it. We'll meet
6 back here at 7:00. How does that sound?

7 MR. MURDAUGH: I have no problem with that, sir.

8 THE COURT: In other words, we're going -- they're
9 going to -- and then they will be deliberating, and if
10 they have any questions, they will be instructed to
11 hold them and that we will reconvene at 7:00 o'clock,
12 as opposed to us staying here and then waiting on them
13 to go get their food and everything.

14 THE CLERK: Thank you, Judge.

15 THE COURT: Huh?

16 THE CLERK: Thank you. We're going to adjourn for
17 the day, or what?

18 THE COURT: No. They want to keep on
19 deliberating. They want you to go ahead and ask you
20 send out for their dinner. In fact, they've got it
21 here, and I was going to ---

22 THE CLERK: Yeah. Okay.

23 THE COURT: Exactly. And you'all can go do
24 whatever you have to do until 7:00. Don't tell them
25 anything about us. If they should come back with a

1 question for the court, another note or anything, tell
2 them that we're in recess until 7:00 o'clock.

3 THE CLERK: Yes, sir.

4 THE COURT: If they should come back with
5 another note or anything, then tell them that due to
6 their last note I excused everybody else to go to
7 dinner and that we will reconvene at 7:00 and then at
8 that time we'll address whatever they've got.

9 THE CLERK: Yes, sir.

10 THE COURT: So that everybody doesn't have to just
11 stay here, and the County is not feeding everybody so
12 that will just kind of give everybody time to go out
13 and do it. Anybody got a better suggestion?

14 MR. MURDAUGH: No, sir.

15 MR. KULP: No, sir.

16 THE COURT: So you don't need to tell them
17 anything about us, but everybody is excused -- except
18 your people with the Jury, and everything, -- and then
19 we can reconvene and come back at that time.

20 (JURY SENDS NOTE TO JUDGE AT 6:20 P.M.)

21 THE COURT: Okay. I have another note. Did you
22 see this? Anyway, the note, I'll read it, and then
23 I'll give it to you. (Reading): "Could we hear
24 Jocelyn's testimony regarding meeting four men in the
25 house and her testimony on seeing two men break into

1 the house? Dinner ordered. What's the best schedule
2 for the Court?"

3 Okay. I'll get them in, and we'll figure out
4 exactly. Is there any way to separate that testimony?
5 I wouldn't think there is. I think we'll just have to
6 play all of that. Would that -- that's not going to be
7 too bad, I don't think. And would you'all agree with
8 that?

9 MR. MURDAUGH: Yes, sir. And I think it will be
10 less than -- probably less than fifteen minutes worth.

11 MR. KULP: Would that include -- I guess that
12 would have to include, topically, Direct and Cross.

13 MR. MURDAUGH: Yeah.

14 THE COURT: Yes. I've got one other thing I want
15 to point out.

16 MR. MURDAUGH: Yes, sir.

17 THE COURT: I've just been thinking about the
18 alternates?

19 MR. MURDAUGH: Yes, sir?

20 THE COURT: What I'm going to do -- they've
21 already sent out for the food, and it hasn't come yet.

22 MR. MURDAUGH: Yes, sir.

23 THE COURT: I'm going to let them go ahead and
24 take the Alternates over to hotel and stay there.

25 But, now, when they -- and, of course, I'm going to

1 instruct them that they can't talk about the case with
2 each other or with the other ones.

3 MR. MURDAUGH: Okay.

4 THE COURT: I'm going to admonish them about that.
5 And I'm also going to -- but when they're over there
6 and they're all in their little room and all, which
7 they have a social room where all the jurors are, they
8 can mingle with the other jurors. But, of course, the
9 agents are there and they are instructed not -- to make
10 sure nobody talks about the case.

11 MR. MURDAUGH: Yes, sir.

12 THE COURT: And so when they're together, the
13 agents are with them. See what I mean? And so I'm
14 admonishing all of them. Of course, the jury, too,
15 they can't talk outside the room and -- but I'm not
16 going to leave the Alternates in that room, just there,
17 and I'm going to bring them in right now and explain to
18 them exactly how we're going to do that, as soon as we
19 can get them there. Have you got anything you want to
20 say about that?

21 MR. KULP: No, sir. I think that's -- that's
22 fine, and we have no objection. But I think -- I
23 couldn't remember when you -- when you told them before
24 -- but I guess another way of saying that you can't
25 deliberate unless you're in the jury room would include

1 you can't deliberate -- that's it. That's the only
2 place, period.

3 THE COURT: That's right. And any discussion of
4 the case is "deliberation". I mean, I'm going to be
5 very frank with them that they can't talk about the
6 case unless they're in the jury room and the jury is --
7 jury is all of them.

8 MR. KULP: So ---

9 THE COURT: And I tell them, you know, -- at the
10 first, one of them wanted to take a smoke break. I
11 said, "Well, that's fine, but the jury has to be
12 instructed, 'No deliberations until he gets back.'"
13 You know, any time -- now, I don't -- so far as using
14 the restroom, I don't -- I consider that the jury room.
15 But outside the jury room door, they have to all be in
16 there before there can be any deliberations.

17 MR. KULP*: Yes, sir.

18 THE COURT: There's no question about that being
19 the rule.

20 MR. KULP: Thank you, Your Honor.

21 THE COURT: Anything suggestions, or anything
22 else?

23 MR. KULP: Not -- no, sir.

24 THE COURT: And you'all like the idea -- and I'm
25 talking about in the morning, too. The Alternates will

1 stay at the hotel, with an agent.

2 MR. KULP: Yes, sir.

3 THE COURT: And so then they will be there, but
4 they won't be -- you know, they will be over our
5 supervision, but which we won't have to worry about
6 them. I think that's better and that it would suit
7 you'all better, too.

8 MR. KULP: Yes, sir.

9 THE COURT*: Okay. Bring the Alternates in,
10 please.

11 MR. MURDAUGH: How long would it take for them to
12 listen to that testimony. It ought not to take more
13 than fifteen minutes, maybe a little more with the
14 Cross.

15 COURT REPORTER: She was on the stand for an
16 hour.

17 THE COURT: An hour? Can you see what
18 testimony that they're talking about?

19 COURT REPORTER: Yes, sir. Reading it versus
20 playing it, I think I could probably read it in about
21 forty minutes, thirty or forty minutes.

22 THE COURT: The court reporter tells me that
23 she can tell what they're talking about. So we will
24 just play that and see if that satisfies them.

25 MR. KULP: Judge, do you think that ---

1 THE COURT: I am going to talk to the
2 alternates first.

3 MR. KULP: Yes, sir.

4 (ALTERNATE JURORS IN AT 6:25 P.M.)

5 THE COURT: Have a seat. I know you'all thought
6 you'all were forgotten about. Let me tell you the
7 purpose of Alternates. Of course, if somebody -- in
8 this case, the deliberations are going into tomorrow.
9 We all know how much time we have in it and we want to
10 make sure that if someone should become ill, or a
11 family member became very ill, we would not want to
12 lose the case. So we propose is that while you're
13 here, you will remain with us until they reach a
14 verdict. Of course, you are not to discuss the case
15 with anyone, do not allow anyone to discuss the case
16 with you. Dinner has been sent out for. As soon as
17 your dinner comes and you'all eat -- or you could,
18 actually, take it with you, as far as that goes -- I'm
19 going to let you'all return to the hotel.

20 In the morning when we begin the deliberations
21 again, you'all will be able to just stay at the hotel.
22 You won't need to come back over here, but you would
23 be available. And at all times while you're an
24 Alternate, you must do as I've told you every time
25 through. Don't discuss the case with anyone. Don't

1 read about it, or allow anybody to discuss the case
2 with you. Follow all the rules just the same as if you
3 are on the jury. I know it's been a long and trying
4 day and -- so, with that, as soon as your food comes,
5 or they can bring it to you, however the agents can
6 work that, you'all can go ahead to the hotel. Then we
7 will communicate with them when we need you and you'all
8 just be available and won't have to come back.. Kind of
9 enjoy the nice accommodations over there. Do you'all
10 have any questions? Okay.. Well, have ---

11 AN ALTERNATE: Will we be here tomorrow?

12 THE COURT: I can't hear you.

13 AN ALTERNATE: I just wanted to know if we're
14 going to be here tomorrow.

15 THE COURT: Well, the Jury has indicated that they
16 wish to deliberate until about 8:00 o'clock or
17 something, and so I -- but that's just their
18 indication. I don't know how long they're going to
19 deliberate. We are at their disposal now, and we're
20 going to stay here as long as they want to stay here.
21 But I have a feeling that, most likely, they're going
22 to want to -- they've previously expressed intention,
23 it seems like, that in about an hour they're going to
24 be coming back to the hotel, too.

25 Now, you'all have a social room or something over

1 there. When they come back over there, you'all
2 certainly can come in and socialize with them. Now,
3 the jurors, when they're out of the jury room, they
4 can't talk about the case and are not allowed to, and
5 you'all can't talk about it either. So there's no harm
6 in you'all speaking to them and talking about, you
7 know, whatever you want to talk about as long as it's
8 not about the case.

9 And, of course, the agents have been instructed
10 about all that, too, so have as good a time as you can
11 and if you -- but you'all can just go on back over
12 there. And the same way in the morning. There will be
13 somebody over there to stay with you, and then you'all
14 will be available if you're needed.

15 Hopefully, this won't last too long, you know.
16 But, you now, who knows.

17 AN ALTERNATE: Does it depend on -- is there a
18 possibility that we could go to church in the morning?
19 I was just asking about if we would be here tomorrow,
20 what the timing would be like. Would we start after
21 church, no church?

22 THE COURT: You would like to go to church?

23 AN ALTERNATE: If it's possible. If not, then it
24 -- but if we have plenty of time and you don't need us
25 in the morning.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Publication of Jail Note
Jury Trial October 8-16, 2001

1536

1 THE COURT: Well, we'll see about that. I'll talk
2 to them.

3 AN ALTERNATE: Thank you.

4 THE COURT: Any other questions? (No response
5 from alternates). Okay. Well, have a nice evening.

6 (ALTERNATE JURORS OUT AT 6:37 P.M.)

7 THE COURT: So you'all can just -- you know, as
8 best you can accommodate them with their schedule about
9 the food and everything, just go ahead and do whatever
10 is best.

11 THE CLERK: Yes, sir.

12 THE COURT: Okay. Before we brought the
13 Alternates in, we were in the midst of something,
14 and I wasn't sure.

15 MR. KULP: Yes, sir.

16 THE COURT: Would you like to come -- do you have
17 that testimony right there available?

18 COURT REPORTER: Yes, sir.

19 (SIDEBAR RE: ALTERNATE GOING TO CHURCH)

20 THE COURT: The Jury is -- let's bring the Jury
21 in. Okay. I understand that there's no objection to
22 Ms. Messer who is the Alternate Number Three being
23 taken to the -- she's Catholic and wants to go to
24 church. Any objection to that?

25 MR. KNIGHT: None from the State, Your Honor.

1 MR. KULP: No objection to that at all.

2 THE COURT: All right. I'm going to tell the
3 Jury that due to the lateness of the hour and
4 everything and the fact that the food is not here that
5 it might be more in line with their schedule about 8:00
6 o'clock if we hear this testimony in the morning and
7 have them resume their deliberations at that time.

8 MR. KNIGHT: Yes, sir. I think that's
9 appropriate, Your Honor.

10 MR. KULP: We do, as well. It's been a long day.

11 (JURY IN AT 7:25 P.M.)

12 THE BAILIFF: Your Honor, all jurors are present.

13 THE COURT: Thank you. Good evening. I'm just
14 asking for your guidance on something. I understand
15 you haven't received the food yet. It's now 7:30.

16 We were working on getting the testimony in such a
17 way that Ms. Garrison here, the court reporter, can
18 read it to you. She can read it about twice as fast as
19 if she plays it back, and she can do that in maybe
20 another fifteen minutes.

21 It occurred to me that, based upon your previous
22 note that you'all wanted to work until about 8:00
23 o'clock, with the lateness of the food that it might be
24 a better idea to stop now, go back to the hotel and
25 have your food delivered there, and then come back.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Publication of Jail Note
Jury Trial October 8-16, 2001

1538

1 Or what ---

2 VARIOUS JURORS: (Negative gestures)

3 THE COURT: You all say 'no'? You'all ready?

4 You know what you're doing now? Okay. Well, how long
5 until you'll have that?

6 COURT REPORTER: Give me about ten minutes.

7 THE COURT: Okay. She'll keep working, and in
8 about ten more minutes we will come in and we will get
9 you.

10 THE CLERK: Judge Gregory? Their food is here.

11 THE COURT: The food just came in, so when you'all
12 get through with it, we'll have the testimony ready for
13 you. Any exceptions to that?

14 MR. MURDAUGH: None from the State.

15 MR. KULP: No, Your Honor, none from the Defense.

16 THE COURT: Okay. We'll stand at ease, then.

17 (DINNER RECESS 7:27 TO 7:50 P.M.)

18 (DEFENDANT IN AT 7:48 P.M.)

19 THE COURT: Thank you. Please be seated. Okay.

20 I'm advised the Jury is ready to come in here and hear
21 that testimony, and you'all are all together with the
22 part that you're going to hear; isn't that correct?

23 COURT REPORTER: They said they wanted all of it,
24 all of the testimony of Jocelyn Wendel.

25 THE COURT: Huh?

1 COURT REPORTER: They said they wanted all of it,
2 her whole testimony. Direct and Cross.

3 THE COURT: The lawyers?

4 COURT REPORTER: You want all the testimony?

5 THE COURT: No. They just asked for a certain
6 portion of it; didn't they?

7 MR. KULP: No, we thought that they asked for
8 the entire.

9 THE COURT: The whole thing? Do you have the
10 whole thing?

11 COURT REPORTER: Yes, sir.

12 MR. KULP: No. Judge, we want -- we stridently
13 asked for the entire -- that's what she said was
14 reduced to twenty minutes. The court reporter did.

15 THE COURT: The whole thing?

16 MR. KULP: Yes, sir.

17 COURT REPORTER: Yes. I can read her whole
18 testimony in about twenty minutes, I think. Thirty
19 minutes.

20 THE COURT: Excellent. Show them in.

21 MR. MURDAUGH: Judge, my wife is on the way down
22 here. Can I tell them to let her in? You said when
23 the Jury is in here, close the doors. Can I just stick
24 her in the back, though?

25 THE COURT: Yes. And, actually, if everybody is

1 pretty much here, if there's not that many people here,
2 I'm not so -- but I was worried about that when the
3 arguments and the charge were going on.

4 MR. MURDAUGH: Yes, sir.

5 THE COURT: You don't have to -- unless it gets to
6 be a problem, you don't have to lock the back door.
7 You can let people come and go.

8 MR. MURDAUGH: Thank you, sir.

9 (JURY IN AT 7:52 P.M.)

10 THE BAILIFF: Your Honor, all jurors are present.

11 THE COURT: Okay. Ms. Garrison is going to read
12 the testimony of Jocelyn Wendel. We have decided it's
13 about twenty minutes and we're going to read all of
14 that witness' testimony -- or she is going to. Go
15 ahead -- and if you can't hear something, we'll see and
16 then -- get my attention. Go ahead.

17 (WHEREUPON REPORTER READ BACK TESTIMONY OF

18 JOCELYN SHOUGH WENDEL, concluding with

19 "Q. It is a copy of a photograph?

20 A. Yes, sir.

21 MR. MURDAUGH: Thank you, ma'am."

22 (READBACK CONCLUDED)

23 THE COURT: Very good.

24 (JURY OUT AT 8:40 P.M.)

25 THE COURT: Good job. Anything else?

1 MR. KULP: Yes, sir. There's a problem.

2 That's not all the testimony.

3 COURT REPORTER: Oh, it's not?

4 MR. KULP: No, it isn't.

5 THE COURT: What are you talking about?

6 MR. KULP: I got back up after that, and I,
7 specifically, recall asking her -- and you may remember
8 I said, "Ma'am, you looked at that photo?" "Yeah."
9 "And did you say to them that, 'I almost recognize
10 him'" ---

11 THE COURT: Well, wait just a minute. Let her
12 look.

13 COURT REPORTER: Give me just a minute. (Upon
14 review of audio tape), yes, sir, you're right. Judge,
15 I'm sorry, there is one more question.

16 THE COURT: You found it?

17 COURT REPORTER: Yes, sir. Sorry. There was
18 some colloquy and that question went over onto the next
19 page and I stopped right before it. Sorry.

20 THE COURT: Okay. Well, go ahead.

21 COURT REPORTER: Mr. Kulp asked, (reading):

22 BY MR. KULP:

23 Q. Ms. Wendel, did you say to the police
24 officers when you were looking at this,
25 "This looks like him, this might be him, do

1 you have a better photograph that I can look
2 at?"

3 And then she answered "Yes, sir."

4 Sorry, she answered "No, sir."

5 MR. MURDAUGH: We liked it better when she said
6 'yes'.

7 COURT REPORTER: Sorry, I got rattled, got it
8 backwards.

9 MR. KULP: Could we just ask the Jury to stop
10 deliberating until they hear it?

11 THE COURT: Okay. Would you bring them back in?

12 MR. KULP: Can you triple-check?

13 COURT REPORTER: Yes, sir, I can triple-check.

14 MR. MURDAUGH: Does it make any difference?

15 MR. KULP: I'm positive. I'm just positive.

16 COURT REPORTER: Okay. Well, let me look.

17 THE COURT: Well, come up here, and you can listen
18 to it. Wait just a second. Let him look. I want you
19 to satisfy yourself. Just come up here and just play
20 that part.

21 COURT REPORTER: (Plays audio recording back:

22 BY MR. KULP:

23 Q. Ms. Wendel, did you say to the police
24 officers when you were looking at this,
25 "This looks like him, this might be him,

1 do you have a better photograph that I can
2 look at?"

3 A. No, sir.

4 BY MR. KULP: Thank you. No further questions.

5 THE COURT: You may come down.

6 (Audio Tape stopped)

7 MR. KULP: Thank you. You know why I know?

8 Because she was -- and that's very important.

9 THE COURT: Okay. That's what you're talking
10 about?

11 MR. KULP: Yes, sir.

12 THE COURT: Are you going to transcribe it?

13 THE REPORTER: Yes, sir. I have it. I apologize
14 for the oversight.

15 THE COURT: All right, bring the jury in.

16 BY BAILIFF: Your Honor, they said they didn't
17 want to stop deliberating just ---

18 THE COURT: No. Tell them I'm not trying to
19 stop their deliberations. There's something that I
20 need to tell them. It doesn't have anything to do with
21 trying to cut off their deliberations.

22 BY BAILIFF: Yes, sir.

23 THE COURT: I think the Jury thinks I am trying
24 to stop their deliberations for the evening.

25 MR. MURDAUGH: Yes, sir. I think they want to

1 work and get through.

2 (JURY IN AT 8:57 P.M.)

3 THE BAILIFF: Your Honor, all jurors are present.

4 THE COURT: Thank you, Mr. Dorsey. Madam

5 Forelady, Members of the Jury, I'm not trying to put an
6 end to your deliberations tonight. I'm willing to work
7 just as long as you'all are, so no problem about that.

8 What I called you back in for, it was called to my
9 attention apparently there was another question, after
10 a break or discussion, so I didn't want to -- in
11 fairness, I wanted to make sure that you had all of
12 that. So, Madam Court Reporter, please go forward now.

13 COURT REPORTER: I apologize. I stopped
14 reading one question short. It is the recross
15 examination by Mr. Kulp, as follows:

16 "Question by Mr. Kulp:

17 Q. Ms. Wendel, did you say to the police
18 officers when you were looking at this,
19 "This looks like him, this might be him,
20 do you have a better photograph that I
21 can look at?"

22 Answer by Ms. Wendel:

23 A. No, sir."

24 BY MR. KULP: Thank you. No further
25 questions.

1 THE COURT: You may come down.

2 (WITNESS STEPS DOWN)

3 I apologize for overlooking that last question.

4 THE COURT: Okay. I'm just been trying very
5 carefully to make sure all the I's are dotted and the
6 T's are crossed, and that was left out.

7 Please continue with your deliberations, and we
8 will await further word from you.

9 (JURY OUT AT 9:02 P.M.)

10 (JURY NOTIFIES OF VERDICT AT 10:10 P.M.)

11 (DEFENDANT IN AT 10:13 P.M.)

12 THE COURT: Okay. I understand we have a verdict.
13 Wait just a second, there's some more people coming in.
14 I just want to put everybody on notice that no matter
15 what the verdict is, there will be order maintained in
16 this courtroom. And so if there's anybody who -- if
17 there's any kind of demonstration, of happiness or of
18 sadness, if anybody that feels like they're not going
19 to be able to control their emotions, now is the time
20 to leave the courtroom. Because if you're not, I would
21 suggest you best because you're probably going back
22 there (indicating holding cell area).

23 With that, bring the Jury in.

24 (JURY IN AT 10:20)

25 THE BAILIFF: Your Honor, all jurors are present.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Publication of Jail Note
Jury Trial October 8-16, 2001

1546

1 THE COURT: Madam Clerk.

2 THE CLERK: Madam Forelady, have you reached a
3 verdict?

4 THE FOREPERSON: We have, (tenders verdict forms).

5 THE COURT: Madam Clerk, would you please publish
6 the verdicts?

7 THE CLERK: Yes, Your Honor.

8 Indictment Number 99-GS-07-0222, the State of
9 South Carolina versus Tavarus Rogers, Indictment for
10 Murder of James Mitchell Riley, the verdict is Guilty.

11 Indictment Number 99-GS-07-0221, Indictment for
12 Murder of Paul Reischl, the verdict is Guilty.

13 Indictment Number 99-GS-07-0281, the State versus
14 Tavarus Rogers, Indictment for Kidnaping of Jocelyn
15 Wendel, the verdict is Guilty.

16 Indictment Number 99-GS-07-0282, Indictment for
17 Kidnaping of Kristal Wire, the verdict is Guilty.

18 Indictment Number 99-GS-07-0283, the State versus
19 Tavarus Rogers, Indictment for Kidnaping of Toby
20 Reischl, the verdict is Guilty.

21 Indictment Number 99-GS-07-0285, the State versus
22 Tavarus Rogers, Indictment for Kidnaping of James
23 Mitchell Riley, the verdict is Guilty.

24 Indictment Number 99-GS-07-0286, the State versus
25 Tavarus Rogers, Indictment for Kidnaping of Paul

1 Reischl, the verdict is Guilty.

2 Indictment Number 99-GS-070288, the State versus
3 Tavarus Rogers, Indictment for Burglary in the First
4 Degree of a dwelling, the verdict is Guilty.

5 Indictment Number 99-GS-07-0220, the State versus
6 Tavarus Rogers, Indictment for Armed Robbery, the
7 verdict is Guilty.

8 Madam Forelady, is this your verdict?

9 THE FOREPERSON: It is.

10 THE CLERK: Is it still your verdict?

11 THE FOREPERSON: It is.

12 THE CLERK: Jurors, is these are still your
13 verdicts, please indicate so by raising your right
14 hand.

15 THE JURORS: (All Jurors raise right hands)

16 THE COURT: Thank you, Madam Forelady, Members of
17 the Jury. Anything further regarding this matter from
18 the State?

19 MR. MURDAUGH: No, sir, there is nothing at this
20 time.

21 MR. KULP: Your Honor, if it please the Court, we
22 would request the Clerk individually poll the jurors as
23 to their verdicts?

24 THE COURT: Okay. Would you approach the sidebar
25 about the way we'll do it?

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

2 SIDEBAR:

3 THE COURT: We will call them by name and
4 ask them if that's their
5 verdict and if it is still
6 their verdict. Is that okay?
7 'As to each of these
8 indictments, was this verdict
9 and is it still your verdict?'

10 MR. KULP: That's fine.

11 THE COURT: Okay, then that's the way that
12 we will do it.

13 (SIDEBAR CONCLUDED)

14 THE CLERK: As I call your name, could you please
15 raise your hand and answer this question?

16 Lucille Morrison, as to these Indictments, is this
17 your verdict?

18 BY MS. MORRISON: Yes.

19 THE CLERK: Is it still your verdict?

20 BY MS. MORRISON: Yes.

21 THE CLERK: Is it still your verdict?

22 BY JUROR: June Gambla, could you raise your
23 hand, please?

24 BY MS. GAMBLE: (Complies)

25 THE CLERK: As to these Indictments, is

1 this your verdict?

2 BY MS. GAMBLA: Yes, it is.

3 THE CLERK: Is it still your verdict?

4 BY MS. GAMBLA: Yes, it is.

5 THE CLERK: Thank you. Susan Singleton, as to
6 these Indictments, is this your verdict?

7 BY MS. SINGLETON: It is.

8 THE CLERK: Is it still your verdict?

9 BY MS. SINGLETON: It is.

10 THE CLERK: Thank you. Cheryl Martin, as to these
11 Indictments, is this your verdict?

12 BY MS. MARTIN: Yes.

13 THE CLERK: Is it still your verdict?

14 BY MS. MARTIN: Yes.

15 THE CLERK: Thank you. Pamela Darden, as to these
16 Indictments, is this your verdict?

17 BY MS. DARDEN: Yes.

18 THE CLERK: Is it still your verdict?

19 BY MS. DARDEN: Yes.

20 THE CLERK: Thank you. Harvey Rutland, as to
21 these Indictments, is this your verdict?

22 BY MR. RUTLAND: Yes.

23 THE CLERK: Is it still your verdict?

24 BY MR. RUTLAND: Yes.

25 THE CLERK: Thank you. Betty Middleton, as to

1 these Indictments, is this your verdict?

2 BY MS. MIDDLETON: Yes, it is.

3 THE CLERK: Is it still your verdict?

4 BY MS. MIDDLETON: Yes, it is.

5 THE CLERK: Thank you. Janice Roeder, as to these
6 Indictments, is this your verdict?

7 BY MS. ROEDER: Yes, it is.

8 THE CLERK: Is it still your verdict?

9 BY MS. ROEDER: Yes.

10 THE CLERK: Thank you. Sam McLaughlin, as to
11 these Indictments, is this your verdict?

12 BY MR. McLAUGHLIN: Yes.

13 THE CLERK: Is it still your verdict?

14 BY MR. McLAUGHLIN: Yes.

15 THE CLERK: Thank you. Teri Derouen, as to these
16 Indictments, is this your verdict?

17 BY MS. DEROUEN: Yes.

18 THE CLERK: Is it still your verdict?

19 BY MS. DEROUEN: Yes.

20 THE CLERK: Thank you. Koren Pope, as to these
21 Indictments, is this your verdict?

22 BY MS. POPE: Yes.

23 THE CLERK: Is it still your verdict?

24 BY MS. POPE: Yes.

25 THE CLERK: Thank you. Janet Bellé-Isle, as to

1 these Indictments, is this your verdict?

2 BY MS. BELLE-ISLE: Yes.

3 THE CLERK: Is it still your verdict?

4 BY MS. BELLE-ISLE: Yes.

5 THE CLERK: Thank you.

6 THE COURT: The Jury has been polled. Anything
7 else?

8 MR. KULP: No, Your Honor. Thank you.

9 THE COURT: Okay. Madam Forelady, members of the
10 jury, there are some matters of law that must be taken
11 up at this stage, so I'm going to ask that you please
12 retire to the jury room. I'll bring you back in here
13 in just a few moments. Please retire to the jury room,
14 and we will take up a few matters.

15 (JURY OUT AT 10:33 P.M.)

16 THE COURT: Any Motions?

17 MR. KULP: Yes, Your Honor. We would renew all of
18 our previously submitted motions and exceptions and
19 objections, so forth, respectfully, to the rulings of
20 the Court regarding this case.

21 And we also would move for the hard-to-describe,
22 judgment notwithstanding, the thirteenth juror approach
23 to the decision of the Petit Jury in this case; asking
24 the Court to, in fact, set aside the verdict by the
25 Jury based upon the lack of evidence in the case.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Renewal of Motions after Verdict Received and Jury Polled
Jury Trial October 8-16, 2001

1552

1 Thank you, Your Honor.

2 THE COURT: Okay. All the Motions to set aside
3 the verdict is denied. I think all of my previous
4 rulings were correct.

5 The defendant has a right to a twenty-four hour
6 delay before the beginning of the penalty phase of
7 this. What is the Defendant's wishes in that regard?

8 MR. KULP: Your Honor, we wish to invoke that.
9 Of course, the Sloan case says that we can't waive that
10 for him, and we wouldn't. We ---

11 THE COURT: No, I don't want you to. It's up to
12 him.

13 MR. KULP: Yes, sir, I know that. I know. He's
14 just -- (defendant unresponsive to Mr. Kulp), we're
15 having trouble communicating with him right now, and
16 I'm just saying that we would -- he would invoke it.
17 And we would appreciate the Court inquiring ---

18 THE COURT: Okay. Mr. Rogers, is that clear?
19 (No response from Defendant). You wish to -- is that
20 your wishes, that you wish -- stand up, Mr. Rogers.

21 THE DEFENDANT: (Complies)

22 THE COURT: Your attorney tells me you wish to
23 exercise your right to a twenty-four hour delay before
24 the start of the penalty phase. Is that correct?

25 THE DEFENDANT: I guess so.

1 THE COURT: Is that a "yes"?

2 MR. KULP: Yes, sir.

3 THE COURT: Okay. Then we will commence this
4 trial, then, at 9:00 o'clock on Monday?

5 MR. MURDAUGH: Yes, sir. I was going to say not a
6 bit of use in coming here at 9:30 tomorrow night.

7 THE COURT: That's right. That's what I say. So
8 that's -- so we will start Monday at 9:00 o'clock.

9 MR. MURDAUGH: Let me make an inquiry (with Mr.
10 Kulp). Thank you, sir. I just wanted to be sure of
11 something.

12 THE COURT: Anything else?

13 MR. MURDAUGH: No, sir.

14 THE COURT: All right. Well, let me ask you this.

15 MR. MURDAUGH: Yes, sir.

16 THE COURT: I'm going to bring the jury back in
17 and advise them that there is a twenty-four hour delay
18 and that we will resume this case at 9:00 o'clock on
19 Monday.

20 MR. MURDAUGH: Yes, sir.

21 THE COURT: And is there anything else we need to
22 do so far as anything -- because you will then present
23 your case, and then they'll present theirs, I presume?

24 MR. MURDAUGH: That's correct. Probably, if Your
25 Honor please, if we had maybe fifteen minutes or so

1 when you excuse me, and I think it can be done in- ---

2 THE COURT: Informally?

3 MR. MURDAUGH: Yes, sir, informally. I don't
4 think it's anything that needs to be on the record.
5 We need to talk about how we're going to proceed, what
6 we need to get -- what we need to do.

7 THE COURT: Okay. You may bring the Jury back.
8 And I presume that we won't need a court reporter or
9 anything tomorrow?

10 MR. MURDAUGH: I was sort of hoping we weren't
11 going to have to come to the courthouse tomorrow.

12 THE COURT: Well, I don't think we have to.
13 That's what I'm saying.

14 MR. MURDAUGH: No, sir, I don't think so.

15 MR. KULP: I agree with you.

16 THE COURT: Well, let me ask you this. I'm going
17 -- why don't we start at 9:00 o'clock?

18 MR. MURDAUGH: That's fine, sir.

19 THE COURT: The Jury will be across the hallway,
20 and then they'll probably be just -- you'll just call
21 the roll and tell them to ---

22 MR. MURDAUGH: That's the new jury.

23 THE COURT: The new jury, (affirmative nod). And
24 what I was thinking is I could tell them to have this
25 jury panel here at 10:00. Or do you'all think we could

1 start this at 9:00?

2 MR. MURDAUGH: I'll leave that up to Mr. Kulp,
3 sir. Anytime suits me. Whatever you do, sir, will be
4 just fine.

5 THE COURT: Well, we'll work out the time in just
6 a minute.

7 MR. MURDAUGH: Okay.

8 THE COURT: Bring the jury in. Mr. Knight, I
9 can't figure -- I can't read that sign language.

10 MR. KNIGHT: The new panel, Your Honor, is due to
11 report on October 15th, 10:00 o'clock.

12 THE COURT: I know it, but they will be across the
13 hall.

14 MR. KNIGHT: Yes, sir. That's correct.

15 (JURY IN AT 10:40 P.M.)

16 THE BAILIFF: Your Honor, all jurors are present.

17 THE COURT: Okay. Madam Forelady, Members of the
18 Jury, thank you very much for your service on this
19 particular part of the case.

20 As you know, this is a bifurcated trial. The
21 penalty phase on the two murder indictments only will
22 go forward. Our law provides for a twenty-four hour
23 delay between this verdict and before we start the
24 penalty phase. So we cannot stop that until --
25 obviously, we don't want to start that at 9:30 tomorrow

1 night. So we will start on Monday morning.

2 So you, with the three alternates, will be
3 sequestered tomorrow, but I think they have some --
4 the SLED agents, and so forth, will take good care of
5 you, and they'll explain more about it. I'm not sure
6 exactly.

7 Now, that you have reached this verdict and before
8 we start into the penalty phase, you should not discuss
9 the case with anyone or allow anyone to discuss the
10 case with you because we still -- as I say, it's in
11 suspension until Monday. So do not -- now, when you
12 leave this, don't discuss -- when you leave this jury
13 room now, don't discuss the case with anyone even among
14 yourselves.

15 And with that, it's been a hard day, I hope you
16 all have a nice evening at this late time and can relax
17 and get some sleep at least. Anything else from either
18 side?

19 MR. MURDAUGH: Not from the State, sir.

20 MR. KULP: No, sir, Your Honor.

21 THE COURT: Okay. Well, you may retire at this
22 time. Good night.

23 (JURY OUT AT 10:43 P.M.)

24 THE COURT: Court is still in session. Everybody
25 else please keep your seats. Monday morning, I think

1 we've decided we want them up here at 10:00 o'clock; is
2 that right?

3 MR. MURDAUGH: I thought that it at 9:00.

4 THE COURT: Oh, you want the Jury up here at 9:00
5 and we'll go ahead and get started at 9:00?

6 MR. MURDAUGH: No. I said I would let Mr. Kulp
7 decide, you and Mr. Kulp.

8 MR. KULP: I just think, you know, that things
9 always arise, and rather than having the Jury -- I
10 think that's what you're thinking, too, Your Honor.
11 We can make sure we have everything out of the way and
12 start right then at 10:00.

13 THE COURT: Well, I'll tell you what. I'd like to
14 start not at 10:00, because the other jury is reporting
15 at 10:00 and I don't want to wait until they're out of
16 here. We will start at 9:30, and then they will -- as
17 that other jury comes, they will be able to receive
18 them over there. What about all of your defendants,
19 when are they coming?

20 MR. KNIGHT: I'll put them in Courtroom Number 2,
21 Your Honor, or Courtroom Number 3. All we can do on
22 Monday with the panel is call the roll, give them the
23 instructions that you give me of when they're to come
24 back. That's what we're planning, and that's what we
25 can do.

1 THE COURT: All right. How long, Solicitor, do
2 you think the penalty trial will take?

3 MR. MURDAUGH: My part of it is short, it probably
4 will take an hour.

5 THE COURT: Okay. How long do you think, Mr.
6 Kulp?

7 MR. KULP: (No response).

8 THE COURT: Well, anyway, let's try to start this
9 at -- I'm going to ask the Jury to be here at 9:30.
10 I'd like for them to be situated. They'll be ready to
11 go. And, that way, they'll be in the room before all
12 the jurors start accumulating.

13 MR. MURDAUGH: Yes, sir.

14 THE COURT: 9:30.

15 MR. KULP: You want the parties here at 9:00,
16 Your Honor?

17 THE COURT: Yes, please.

18 MR. MURDAUGH: Judge, this is a different
19 situation than just about any other kind of trial. I
20 have prepared three sentencing recommendations and I'll
21 show them to Counsel, and I think -- I think rather
22 than have them write on the Indictment, I think we need
23 to have this sentencing form.

24 THE COURT: Which they sign and everything?

25 MR. MURDAUGH: Yes, sir. I've got it prepared.

1 In addition to that, if Your Honor please, it has been
2 the practice of just about every Judge that I've run
3 across to submit to the Jury in writing the aggravating
4 circumstances and the mitigating circumstances.

5 THE COURT: Yes. That's in this form book, I
6 noticed.

7 MR. MURDAUGH: Yes, sir. I have lost my
8 aggravating circumstances. I reckon I can find them
9 before Monday but -- (pause).

10 THE COURT: You forgot to find out what they are?

11 MR. MURDAUGH: No, sir. I know what they are.

12 THE COURT: Oh, I mean, where you wrote them up,
13 you mean?

14 MR. MURDAUGH: No, sir. I had Judy Rutland type
15 them for me, ---

16 THE COURT: That's what I'm talking about.

17 MR. MURDAUGH: --- and she sent them, and I just
18 can't find that. But I'll have one for you Monday
19 somehow.

20 THE COURT: Okay. Well, what I have here some
21 opening -- okay.

22 MR. KULP: I agree, though, it should be a form,
23 and we can probably ---

24 MR. FLEMING: We need to look at it.

25 MR. KULP: --- we'll look at it, and we'll

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Renewal of Motions after Verdict Received and Jury Polled
Jury Trial October 8-16, 2001

1 collaborate, but we acknowledge that it needs to be a
2 form -- a form verdict that considers all the
3 possibilities. We should be able to handle that.

4 MR. MURDAUGH: With that, sir, I'm ready to go
5 home.

6 THE COURT: Well, both of you agree, I presume,
7 that there's no reason to have two separate verdicts in
8 this case, is that correct, even though you have two
9 murder indictments?

10 MR. MURDAUGH: Well, I think the verdict, whatever
11 it may be, would apply to both cases. I mean, I ---

12 THE COURT: I can't see any reason for that
13 either. Can you?

14 MR. KULP: Well, I -- (pause).

15 MR. MURDAUGH: You can't get but one death
16 penalty.

17 MR. KULP: Well, I know that, but they could --
18 you know, I'm not the one to judge, but, I mean, they
19 could decide -- logically, they could decide one
20 decision as to one indictment for murder and the other
21 for the other. I mean, it's a logical possibility, and
22 I think -- (pause).

23 THE COURT: Think about it.

24 MR. KULP: Yes, sir. I think I can hammer that
25 out and get with the Solicitor --

1 THE COURT: Okay.

2 MR. KULP: --- in a timely fashion, so there
3 aren't any delays on Monday.

4 THE COURT: That shouldn't be a delay. Okay.
5 So you'all want -- you say you want the lawyers to meet
6 back here for a few minutes?

7 MR. MURDAUGH: No, sir. That took care of what I
8 was talking about.

9 THE COURT: Okay. Well, that's good because you
10 might want to speak to your client.

11 MR. KULP: Thank you, Your Honor.

12 THE COURT: All right. Court is now adjourned
13 until 9:00 o'clock on Monday.

14 (COURT ADJOURNED AT 10:55 P.M.)
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17
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21
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23
24
25

STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF BEAUFORT	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	99-GS-07-221 thru 222
	)	99-GS-07-281 thru 288
TAVARUS ROGERS	)	
	)	
Defendant,	)	

JURY TRIAL - PENALTY PHASE
OCTOBER 15-16, 2001 - Volume 7 of 7 Volumes

The penalty phase of the within Jury Trial was held before the Honorable Jackson V. Gregory, on October 15-16, 2001, in Courtroom No. 1 of the Beaufort Government Center, Beaufort, South Carolina; attended by counsel, as follows:

Randolph Murdaugh, Solicitor
 Steven Knight, Deputy Solicitor
 Angie McCall, Deputy Solicitor
 Appearing for State of South Carolina

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-and-

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 Post Office Box 901
 Johns Island, South Carolina 29457
 (843) 768-1438
www.CourtReporting@aol.com

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1 OCTOBER 15, 2001

9:00 A.M.

2 (DEFENDANT PRESENT)

3 THE COURT: Are we ready for the Jury?

4 MR. MURDAUGH: The State is, sir.

5 MR. FLEMING: Yes, sir.

6 MR. KULP: Yes, Your Honor.

7 (BAILIFF STARTS TO BRING JURORS IN)

8 MR. KULP: Your Honor, while they are coming,
9 if the court reporter is ready, we just want to make a
10 brief objection at this time ---

11 THE COURT: Just a minute. Stop the jury from
12 coming in. It's probably better to hold the jury up.

13 MR. KULP: Five seconds, Your Honor. Probably
14 less. Sorry. We've read the cases, Your Honor, and
15 we just think that it is appropriate to interpose an
16 objection to any photographs during this phase of the
17 proceeding based on the fact that they are prejudicial
18 and inflammatory. We have read the cases, Judge. We
19 are just making the Motion.

20 THE COURT: Okay. Motion is overruled.

21 MR. KULP: Thank you, Your Honor.

22 THE COURT: Anything else?

23 MR. KULP: No.

24 THE COURT: You can bring the jury in.

25 MR. KULP: I apologize.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase
Jury Trial of October 8-16, 2001

1564

1 (JURY IN @ 9:10 A.M.)

2 BAILIFF DORSEY: Your Honor, all jurors are
3 present.

4 THE COURT: Thank you. Good morning, Ladies
5 and Gentlemen. I hope everyone has a restful day
6 yesterday.

7 The Defendant, Tavarus Rogers, was convicted on
8 Saturday October 13, 2001, of two counts of murder as
9 well as a number of other serious crimes such as
10 kidnaping, armed robbery and burglary. You are not
11 concerned with the sentencing on the cases other than
12 the two counts of murder. But it therefore becomes
13 necessary for us to determine if this -- to hold this
14 additional proceeding which will determine the
15 punishment that the Court is to impose upon the
16 Defendant.

17 Code Section 16-3-20 of our South Carolina Code of
18 Laws, as amended, provides in part as follows: "A
19 person who is convicted of or pleads guilty to murder
20 must be punished by death or by imprisonment for life."

21 That section, as amended, also provides, in part:
22 "Upon conviction of a defendant of murder, the court
23 shall conduct a separate sentencing proceeding to
24 determine whether the defendant should be summoned to
25 death or to life imprisonment."

26 So our purpose in conducting this proceeding in

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase
Jury Trial of October 8-16, 2001

1565

1 which we are now engaged is to determine whether the
2 Defendant, Tavarus Rogers, should be sentenced to death
3 to life imprisonment.

4 With respect to your particular role in this
5 proceeding, you will be asked to decide whether the

6 Defendant, Tavarus Rogers, should be sentenced to death
7 or to life imprisonment.

8 During this sentencing procedure, the State and
9 the Defendant will have an opportunity to introduce
10 additional evidence in aggravation, extenuation or
11 mitigation. And both sides will have an opportunity to
12 present arguments for and against the death penalty.

13 After the last argument has been made to you
14 concerning the punishment that should be imposed upon
15 the defendant, the Court will give you certain
16 instructions and you will then retire to determine
17 whether it is a death sentence or a life sentence for
18 the Defendant.

19 Mr. Murdaugh.

20 MR. MURDAUGH: May I make a brief opening
21 statement, Your Honor?

22 THE COURT: Yes, sir.

23 MR. MURDAUGH: Madame Foreman, Ladies and
24 Gentlemen of the jury, we went through all of this
25 before the trial and I think you probably know what I
26 am fixing to tell you, but I think it's incumbent upon

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase
Jury Trial of October 8-16, 2001

1566

1 me to tell you what your considerations are now. One
2 of two things, death penalty or life imprisonment.

3 I told you'all at questioning -- most of you, I
4 think, and maybe all of you but I'm just not sure
5 because we have talked to so many people and it's hard
6 to remember everything. What you must do is, from the
7 testimony that you have heard and from any testimony
8 that you may hear, you must determine:

9 Number one, is there in existence an aggravating
10 circumstance? If you find that there is no aggravating
11 circumstances, then your deliberations are over with.
12 The aggravating circumstances that the State relies on
13 in this case are four:

14 A murder while in the commission of a
15 kidnaping;

16 A murder while in the commission of a
17 burglary;

18 A murder while in the commission of an armed
19 robbery; or the fourth,

20 The killing of two people in a common scheme
21 or plan. In other words, that during the
22 commission of one or two of these things that
23 two people got killed.

24 You have, in essence, even though you have to
25 affirmatively do it during your consideration, you have
26 in essence found each of those aggravating

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase
Jury Trial of October 8-16, 2001

1567

1 circumstance. You're found him guilty of both murders,
2 you've found him guilty of manslaughter (sic) -- uh, of
3 kidnaping, and you've found him guilty of armed
4 robbery. So you have done that, even though you to
5 have to make an affirmative finding of those facts.

6 If you find that there is an aggravating
7 circumstance, you go to the next step. In that next
8 step you can give him life imprisonment with the
9 finding of an aggravated circumstance or you can give
10 him life imprisonment with the existence of an
11 aggravating circumstance. Or you can just say, 'The
12 heck with it, we'd rather go home and we find life
13 imprisonment for no reason whatsoever.' And this is
14 what you've got to consider. I just wanted you to
15 understand what your duties were in that regard.

16 Thank you.

17 MR. KULP: May it please the Court, Your
18 Honor.

19 THE COURT: Mr. Kulp.

20 MR. KULP: Solicitor. Ladies and Gentlemen,
21 we met one on one last week. And during those
22 proceedings, during jury qualification, you took an
23 oath, each of you, and you took the stand and you
24 testified. You testified in response to questions from
25 both the State the Defense that no matter what that you
26 could impose a punishment at this stage of the

State vs. Tavarus Rogers.
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase
Jury Trial of October 8-16, 2001

1568

1 proceedings of life in prison.

2 Now, each of you have spoken your verdicts,
3 individually and collectively. We accept those
4 verdicts and we respect those verdicts. That part of
5 the process is over. The next decision is much more
6 important.

7 These tragic events are exactly that, they are
8 tragic. From this point on what we will be asking you
9 to do is to punish him. We're asking you to punish him
10 by locking him away until he draws his last breath.
11 Then he can be returned to his family for burial.

12 As the Solicitor said, you can make this decision
13 because you believe it to be the right thing to do.
14 You can decide that the right thing to do, the
15 appropriate punishment, is to send him away for the
16 rest of his entire life and, in effect, throw away the
17 key.

18 Now, you found him guilty of those crimes that
19 establish aggravating circumstances. Since we do not
20 challenge your verdict, and wouldn't, we do not
21 challenge and will not challenge the issue of the
22 aggravating circumstances or facts. Consider that
23 issue to be decided.

24 When finding those aggravating circumstances are
25 factors, as the Solicitor himself told you and as the
26 Judge will tell you, you can still send him to spend

1 the rest of his life in jail. And you can make that
2 decision for any reason.

3 While you may find a statutory mitigating factor,
4 you need not to be able to do that to send him to
5 prison until he dies.

6 You can consider anything that would lead you to
7 decide that he should be punished by being sent to
8 prison and dying there. You may decide, each and every
9 one of you and collectively, in this stage of the
10 proceeding that spending over 20,000 days in jail --
11 which would be probably his expected life, it may be
12 less in prison -- and then dying there behind the bars
13 is appropriate punishment. You may find that to be a
14 greater punishment than a quick execution.

15 Still, something is so important that it must be
16 said. Your findings -- again, your findings of
17 aggravating factors do not require you to decide that
18 Tavarus should be executed. You may find aggravating
19 factors and sentence him to spend the rest of his life
20 in prison.

21 Now there are some photos that are coming in. The
22 State is going to show you photographs of the victims.
23 The law says that they are allowed to do that during
24 this proceeding.

25 Now, everyone in this courtroom clearly saw how
26 diligent, how committed each and every one of you are

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase
Jury Trial of October 8-16, 2001

1 to doing your job as a juror under the oath that you
2 took. I sat there and, for one reason or another,
3 watched my wristwatch and I think that it took
4 seventeen minutes for each of you to read the note that
5 was passed around. You took the time to adhere to your
6 duty to examine the evidence.

7 But the photos are something different. They are
8 as graphic as you would expect them to be, considering
9 the description of the wounds that you were told about
10 already.

11 Now the question is, and with all respect to him,
12 does the Solicitor have to show you these photographs?
13 No. Your decision could be made without seeing those
14 photographs. The State wants you to see the photos for
15 one reason and only one reason, that is their side of
16 the courtroom and they take the perspective that
17 they're taking as the prosecution. They want to fuel
18 your emotions even though they know that your decision
19 between life imprisonment, until death, and execution
20 cannot be made on an emotional level, just as your
21 decision as to the verdicts in this case during the
22 guilt phase was not based on emotion either but careful
23 calculation of the law and your duties and your
24 consideration of this tragic event.

25 Your decision cannot be based on revenge or anger.
26 It must be a careful and individual decision. A

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase
Jury Trial of October 8-16, 2001

1571

1 collected decision that meets what goal? The goal of
2 punishing this young man for the tragedy that occurred
3 in 1999 when he was a teenager.

4 We will present you with witnesses.

5 Mr. Jim Aiken will tell you what prison is like.

6 And when he testifies, you will get the immediate
7 impression, I respectfully submit to each and every one
8 of you, that this man knows what he is talking about.
9 He is not here to seek to evoke or invoke your
10 emotions. He is here because he knows what he is
11 talking about and he has critical information to aid
12 you in making your decision. He will tell you how a
13 young, slightly inmate fares in a prison environment.
14 He will tell you that any notion that you have, from
15 whatever source, of what prison is like is a fraction
16 of what it really is.

17 You will hear from Mr. Jeff Youngman. He is an
18 expert in the field of forensic social work and psycho
19 social assessment. He will tell you about his
20 assessment of Tavarus and the critical factors in the
21 positive development of children, something all of us
22 once were and little of which Tavarus experienced.

23 You will hear from members of Tavarus' family.
24 They will tell you how he grew up and not that he
25 simply had a hard life, like many of us, but that he

1 was beaten, and he terrorized by his own father. You
2 will hear that the boy, starving for a father's love,
3 found the opposite: beatings with objects that the
4 father designed for that purpose, to inflict the most
5 pain. Please, please understand that this information
6 in this phase is not offered to you as an excuse for
7 what happened because it is not. We're simply offering
8 this information about him because we feel that anyone
9 who had to make the individual and collective decision
10 that you have to make in this proceeding would want to
11 know about these things.

12 You will hear that all of the children suffered
13 this terror. Some of them escaped the fear and the
14 violence and made something of themselves. Some did
15 not. Some remain so scared of the father that they
16 find themselves in yet another nightmare, the choice
17 between coming here and appearing on behalf of the
18 sibling they love, appearing here to help their brother
19 by coming to tell of the beatings, yet risking the
20 return to that from which they escaped, the father's
21 rule of physical terror. Again, many of us as children
22 were spanked. I was. Maybe you were. That's not what
23 we are talking about here.

24 Ladies and Gentlemen, lock him up behind a razor-
25 wired fencing and big steel doors that bang when they

1 close. Lock him up in that world far away from our
2 world, where any night is filled with screams and yells
3 and cries, with nowhere to go, nowhere to hide, where
4 every day and night for 20,000, more or less, days
5 every day will be a reminder of what he did to put

6 himself where he is and where he will die.

7 Thank you.

8 MR. MURDAUGH: If it please the Court.

9 THE COURT: Mr. Murdaugh?

10 MR. MURDAUGH: If Your Honor please, at this
11 time I reintroduce all testimony from the original
12 trial, in the first phase.

13 THE COURT: Any objection?

14 MR. KULP: Subject to the preservation of all
15 our prior objections.

16 THE COURT: Okay. Please proceed with the
17 evidence.

18 MR. MURDAUGH: With that, I call Matt Averill.

19 (WITNESS TAKES STAND)

20 MATTHEW AVERILL, being
21 duly sworn to tell the truth, the whole truth and
22 nothing but the truth, testified as follows:

23 EXAMINATION

24 BY MR. MURDAUGH:

25 Q. Mr. Averill, you have already been sworn and

1 you're still under oath.

2 A. Yes, sir.

3 Q. Mr. Averill, I ask you whether or not during the
4 course of the investigation you took a number of
5 pictures that night?

6 A. I did.

7 Q. I think that you took State's Exhibits 1, 2, 3 and
8 4, which are four of those of the house.

9 A. Yes, sir, I did.

10 Q. In addition to that, did you take a myriad of
11 other pictures?

12 A. I did.

13 Q. I show you five pictures and ask you if you can
14 identify them?

15 A. Yes, sir. That's a picture of Paul Reischl's
16 body.

17 MR. MURDAUGH: If Your Honor please, I would offer
18 this as an exhibit.

19 MR. KULP: Subject to our objection.

20 MR. MURDAUGH: This will be our Exhibit 16.

21 (SO ENTERED AS STATE'S EXHIBIT 16)

22 EXAMINATION CONTINUED

23 BY MR. MURDAUGH:

24 Q. I show an item that is marked as State's Exhibit
25 17 for identification and ask you if you can identify

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Matt Averill
Jury Trial of October 8-16, 2001

1575

1 that?

2 A. Yes, sir, that's a photograph of James Mitchell
3 Riley's body.

4 MR. MURDAUGH: If Your Honor please, I would offer
5 that exhibit.

6 MR. KULP: Subject to our prior objection.

7 (SO ENTERED AS STATE'S EXHIBIT 17)

8 EXAMINATION CONTINUED

9 BY MR. MURDAUGH:

10 Q. I show you one marked State's Exhibit 18 for
11 identification and ask if you can recognize that, sir.

12 A. Yes, sir. Once again, that is a photograph of
13 James Mitchell Riley, more close up, of the actual shot
14 to the skull.

15 MR. MURDAUGH: Did I offer that? I offer Exhibit
16 18, sir.

17 MR. KULP: Subject to our prior objection.

18 (SO ENTERED AS STATE'S EXHIBIT 18)

19 EXAMINATION CONTINUED

20 BY MR. MURDAUGH:

21 Q. And I show you Exhibit 19 for identification and
22 ask you if you can identify that, sir?

23 A. Yes, sir. Once again, that is another photograph,
24 a closeup photograph of the wounds that James Mitchell
25 Riley sustained.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Matt Averill
Jury Trial of October 8-16, 2001

1576

1 MR. MURDAUGH: I offer that as Exhibit 19, sir.

2 MR. KULP: Subject to our prior objections.

3 (SO ENTERED AS STATE'S EXHIBIT 19)

4 EXAMINATION CONTINUED

5 BY MR. MURDAUGH:

6 Q. I show you State's Exhibit 20 for identification
7 and ask you if you can identify that, sir.

8 A. Yes, I can. This is a photograph that was taken
9 after Mr. Riley's body was removed from the kitchen
10 area. I took that photograph.

11 MR. MURDAUGH: If Your Honor please, I would offer
12 State's Exhibit 20 for identification.

13 MR. KULP: Subject to our prior objection,
14 Your Honor.

15 (SO ENTERED AS STATE'S EXHIBIT 20)

16 MR. MURDAUGH: I have no further questions.

17 MR. KULP: Nothing from the Defense.

18 THE COURT: You can come down.

19 (WITNESS STEPS DOWN)

20 MR. MURDAUGH: I call Curt Copeland. If Your
21 Honor please, I would assume that both of these
22 witnesses are still under oath from the prior trial?

23 THE COURT: Any objection?

24 MR. KULP: I think the Coroner has a clear
25 understanding of his duties, and I believe that he was
26 placed under oath.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Matt Averill
Jury Trial of October 8-16, 2001

1577

1 MR. MURDAUGH: And is still under oath?

2 MR. KULP: Yes, sir.

3 THE COURT: I officially remind you that you
4 are still under oath.

5 MR. COPELAND: Yes, sir.

6 (WITNESS TAKES STAND)

7 CURT COPELAND, being
8 duly reminded of his oath to tell the truth, the whole
9 truth and nothing but the truth, testified as follows:

10 EXAMINATION

11 BY MR. MURDAUGH:

12 Q. Mr. Coroner, I asked you earlier and I believe
13 that you have been the coroner since 1981?

14 A. Yes, sir.

15 Q. Continuously?

16 A. Yes, sir.

17 Q. Mr. Coroner, I had asked you earlier whether or
18 not you'd had an opportunity to go into the house at
19 Coffin Point on the night of January 2nd, 1999.

20 A. I did.

21 Q. And I asked you if you'd had an opportunity to
22 examine the bodies that were found therein?

23 A. I did. I examined both bodies.

24 Q. I show you State's Exhibit 16 and ask you if you
25 recognize that, sir.

26 A. That would be the body of Mr. Reischl with the two

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Matt Averill
Jury Trial of October 8-16, 2001

1578

1 gunshot wounds to the abdomen, or abdomen and chest
2 area, side chest area.

3 Q. Mr. Coroner, you had testified earlier regarding
4 the proximity of the gun to the body. Can you tell us
5 what you said and why you said it?

6 A. Well, both of these were close range simply
7 because of the size of the wound. The shotgun, the
8 farther away that one is the bigger the hole. Of
9 course, this hole is not particularly large; which
10 means that it was close range.

11 MR. MURDAUGH: May I publish this to the jury?

12 THE COURT: Yes, sir.

13 MR. MURDAUGH: (Tenders State's Exhibit 16 to jury
14 for review).

15 EXAMINATION CONTINUED

16 BY MR. MURDAUGH:

17 Q. Coroner, I show you State's Exhibit 17 and ask you
18 if you can identify that, sir?

19 A. Yes, sir, that's Mr. Riley as he was found in the
20 kitchen area of the residence.

21 Q. Is that the position that the body was in when you
22 arrived there, sir?

23 A. Yes, it is.

24 Q. I ask you, at the mid-top, left-hand side of that
25 picture, if there is anything on that wall?

26 A. That wall has blood splatter which would,

1 typically in a gunshot wound there is backsplatter.
2 That's what that would appear to be from where the
3 force of the -- in this case the shotgun -- caused it
4 to splatter back, which is what that would imply there,
5 that it was -- he is reasonably close to the position
6 -- the position that he is in is reasonably close to
7 where the, uh, -- to where he was when he was shot.

8 Q. So what you're saying is that the head would have
9 been in close proximity to those blood spots?

10 A. Yes, sir.

11 Q. Showing you State's Exhibit 18, I ask you if that
12 is a closeup picture of the same thing?

13 A. That's a closeup picture of the same thing. Of
14 course, the -- the amount of blood to the left took
15 minutes to occur, but the blood splatter on the wall
16 there, whatever, the partition in that particular case,
17 is the blood splatter from the impact.

18 MR. MURDAUGH: May I publish Exhibit 17 and
19 Exhibit 18 to the jury, sir.

20 THE COURT: Yes, sir. They are already in
21 evidence, aren't they?

22 MR. MURDAUGH: Yes, sir.

23 THE COURT: Yes, sir.

24 MR. MURDAUGH: (Tenders Exhibit 17 and Exhibit 18
25 to jury for review).

26 EXAMINATION CONTINUED

1 BY MR. MURDAUGH:

2 Q. Exhibit 19, sir. Can you identify that and
3 explain it to the jury?

4 A. That is a closer closeup view of the head showing
5 the size of the hole that was made. And, of course,
6 there is brain matter around it but that's just
7 indicating the size of the hole that was caused.

8 Q. I show you State's Exhibit 20 and ask if you can
9 identify that, sir.

10 A. That is basically the pool of blood that you see
11 above the head of the body, showing the blood and the
12 brain matter that came out at the time of the gunshot.

13 Q. What do you mean "came out", sir?

14 A. Well, the force of the impact caused an exit hole
15 and that's the brain matter that came out when the
16 gunshot was fired.

17 Q. Could you come ---

18 MR. MURDAUGH: May I take him down and let
19 him explain this to the jury?

20 THE COURT: Yes, sir.

21 EXAMINATION CONTINUED

22 BY MR. MURDAUGH:

23 Q. Again, Exhibit 19, Mr. Coroner, is what?

24 A. This is the hole (indicating).

25 MR. MURDAUGH: If Your Honor please, the
26 Alternates on the back, if they need to, may they come

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Matt Averill
Jury Trial of October 8-16, 2001

1581

1 down closer?

2 THE COURT: Yes, sir. If they can't see it,
3 they can come down. And you can show it to them in
4 three groups or however.

5 MR. COPELAND: This is the hole that was
6 caused by the gunshot wound.

7 THE COURT: You're going to need to use the
8 microphone or speak loud enough so that the ---

9 MR. COPELAND: I will speak louder, sir.

10 THE COURT: Very good. Thank you, Mr.
11 Copeland.

12 MR. COPELAND: Yes, sir. This is the hole that
13 was caused by the gunshot wound to the head.

14 MR. MURDAUGH: Are all of you able to see?
15 (Various juror nod affirmatively).

16 EXAMINATION CONTINUED

17 BY MR. MURDAUGH:

18 Q. Mr. Coroner, State's Exhibit 20?

19 A. This basically is just where the blood pooled over
20 a period of moments after the gunshot took place. This
21 darker is blood, it tends to dry up after a period of
22 time. This lighter color is brain matter that can out
23 as a result of the wound.

24 Q. Move on down there so that they can see, too.

25 A. This is blood and this lighter part right here is
26 brain matter.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Curt Copeland
Jury Trial of October 8-16, 2001

1 Q. Thank you, sir. You can retake your seat.

2 A. Yes, sir (returns to witness stand).

3 MR. MURDAUGH: Thank you, Mr. Coroner. Answer any
4 questions that these gentlemen may have.

5 MR. KULP: No questions. Thank you.

6 THE COURT: You may come down.

7 (WITNESS STEPS DOWN)

8 MR. MURDAUGH: With that, sir, the State rests.

9 THE COURT: Are you ready to proceed or do you
10 want to ---

11 MR. KULP: If we could just have a few
12 moments, Your Honor.

13 THE COURT: Madame Forelady, members of the
14 jury, please retire to the jury room -- excuse me, go
15 ahead and pass those (exhibits) around. Just stay
16 where you are. I didn't realize that you were still
17 reviewing those.

18 MR. MURDAUGH: May Mr. Copeland be excused?

19 MR. KULP: Without objection.

20 THE COURT: You are excused, Mr. Copeland.
21 Thank you.

22 (JURY REVIEWING STATE'S EXHIBITS 16-20)

23 MR. MURDAUGH: If Your Honor please, I think that
24 they have now concluded.

25 THE COURT: Just pass it down to Mr. Dorsey.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Curt Copeland
Jury Trial of October 8-16, 2001

1583

1 You may now retire to the jury room.

2 (JURY OUT @ 9:45 A.M.)

3 THE COURT: You need a few minutes?

4 MR. KULP: Yes, sir, and there are a few other
5 issues that we need to address. One is, I can't recall

6 Your Honor whether you polled the jury as a whole
7 whether they have been subjected to any influences as a
8 result or review of media or any other person.

9 THE COURT: Thank you for reminding me.

10 MR. KULP: Yes, sir. And the other thing I
11 think we need to do, Your Honor, is that you need to
12 voir dire the defendant as to whether or not he chooses
13 to testify in this proceeding and whether or not he
14 wishes to make an address on his behalf in this
15 proceeding.

16 THE COURT: Thank you.

17 MR. KULP: Yes, sir.

18 THE COURT: Mr. Rogers, would you please stand?

19 DEFENDANT: (Complies)

20 THE COURT: You, of course, are fully aware
21 that you have a right to testify in your own behalf and
22 that you also have a right to address the jury, just
23 make remarks to them that's not under oath. Do you
24 understand both of these rights?

25 DEFENDANT: Yes, sir.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Curt Copeland
Jury Trial of October 8-16, 2001

1584

1 THE COURT: Have you talked this over with your
2 attorneys?

3 DEFENDANT: No, sir.

4 THE COURT: You haven't talked to them about
5 whether you would testify or not testify?

6 DEFENDANT: Right.

7 THE COURT: Do you want the opportunity to
8 discuss that with them?

9 DEFENDANT: Yes, sir.

10 THE COURT: Well, then, I will give the
11 opportunity to testify. Of course, the choice is
12 yours. They can advise you but you, of course, must
13 make the ultimate decision as to whether you'll testify
14 and also as to whether you will make a statement to
15 them. Of course, the statement is similar to the one
16 in the guilt phase. You know what I am talking about,
17 don't you? Where you can just go down there and talk
18 to them, stand up there just like the lawyers do and
19 address them.

20 DEFENDANT: Yes, sir.

21 THE COURT: Okay, I will come back -- we will
22 address that after you've had a chance to talk to your
23 lawyers. And, of course, if you wish you may talk to
24 your family members about that, too, if you want to --
25 or anyone else that you want to.

1 MR. KULP: Beg the Court's indulgence.

2 THE COURT: Okay. Before we start, or
3 sometime, I want to go over these forms and also the
4 charges on the case, too. I would suggest that I meet
5 with the attorneys after you've had a chance to -- when
6 you get ready, if you'all would please come down to my
7 office and we'll discuss these matters.

8 MR. KULP: Yes, sir.

9 THE COURT: How long do you need?

10 MR. FLEMING: I have no idea right now. We
11 didn't expect that but we will ---

12 THE COURT: I mean before you'll come down to
13 my office?

14 MR. KULP: I will come down and tell you how
15 long that it's going to be as soon as I can make that
16 determination.

17 THE COURT: What sort of break do you want to
18 take now?

19 MR. KULP: I'd say ten or fifteen minutes but
20 I will come down and -- I think we probably need ---

21 THE COURT: Okay. We will in recess for twenty
22 minutes, which would be about twenty-five minutes until
23 11:00.

24 MR. KULP: Thank you, sir.

25 (RECESS 9:50 to 10:55 A.M.)

1 (CONFERENCE WITH JUDGE IN CHAMBERS)

2 THE COURT: Did you'all get things worked out
3 about the verdict form?

4 MR. MURDAUGH: Did we ultimately decide if we were
5 going to submit one set of forms or one for each
6 verdict?

7 THE COURT: There are so many of them, I hope
8 that we can do -- did you get the murder indictment
9 numbers?

10 LAW CLERK, MS. RHODE: I gave them to Gloria.

11 THE COURT: I was just putting the two murder
12 indictments only on there, I am not putting the others
13 on there.

14 MR. MURDAUGH: I agree with that.

15 THE COURT: What do you'all say about that?

16 MR. KULP: One set is fine, Your Honor.

17 THE COURT: One set. I think that's a much
18 better idea.

19 MR. KNIGHT: Your Honor, we've resolved that.
20 We have no problem -- just like I've got it here,
21 kidnaping and burglary.

22 THE COURT: That's good.

23 MR. KULP: Your Honor, I have no problem with
24 that.

25 THE COURT: Like that that. Okay. That would

1 be Form 1?

2 MR. KULP: Yes, sir.

3 THE COURT: Solicitor, do you want to look at
4 this?

5 MR. MURDAUGH: (Upon review), no problem.

6 THE COURT: Wait a minute now, if you put "if
7 any", they'd be signing that they have some. Why are
8 you putting "if any" on there? I am just going to
9 take out that "if any".

10 MR. KNIGHT: I am going to -- (reviewing verdict
11 request form).

12 THE COURT: I think that's good, that's
13 potentially confusing. Okay.

14 MR. MURDAUGH: Because they will have found that
15 if ---

16 THE COURT: We don't need this discussion on
17 the record.

18 (OFF RECORD REVIEW OF VERDICT FORMS)

19 THE COURT: Okay. Mr. Rogers need to go on the
20 record as to what his wishes are. I am going to ask
21 him in detail -- well, that's right, we will be
22 concluding so all the statements and all the testimony
23 made, except depending on the thing, he could -- go
24 ahead. We might address this again if you want to, but
25 we don't have to. I will leave it up to you.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Curt Copeland
Jury Trial of October 8-16, 2001

1588

1 So, Mr. Rogers, what you're telling me is subject
2 -- I am telling you that if you want to change your
3 mind, up until the end, I will allow you the
4 opportunity to change your mind about this. Do you
5 understand that?

6 DEFENDANT: Yes.

7 THE COURT: I asked you earlier if you wish to
8 take the stand and testify. In other words, if you
9 testify, you're sworn in. But you can also -- and you
10 can also make an unsworn statement. I first said that
11 you'd stand down there like the lawyers. You can do it
12 that way or you can also sit up here in the witness
13 box, even though you're not sworn, and make your
14 statement there.

15 If you testify, of course you are sworn in and the
16 Solicitor will be given the opportunity to cross-
17 examine you.

18 If you make an unsworn statement, he is not given
19 that opportunity.

20 Have your lawyers told you basically the same
21 thing?

22 DEFENDANT: Yes, sir.

23 THE COURT: And you understand all that?

24 DEFENDANT: Yes, sir, I do.

25 THE COURT: What is your wish at this time?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Curt Copeland
Jury Trial of October 8-16, 2001

1589

1 DEFENDANT: I will not make a statement, don't
2 want to be sworn in.

3 THE COURT: You do not want to testify under
4 oath and be subject to cross-examination, whatever?

5 DEFENDANT: Correct.

6 THE COURT: All right. Do you wish to make an
7 unsworn statement?

8 DEFENDANT: At the present time, I'm not sure
9 but I don't think that I would.

10 THE COURT: Your present inclination is that
11 you will not but I will give you the opportunity to
12 change your mind at the close and before -- any time up
13 until the jury takes the matter and they leave to go in
14 there and begin their deliberations. Do you understand
15 that?

16 DEFENDANT: Yes, sir.

17 MR. MURDAUGH: Up until you begin your charge.

18 THE COURT: That's right. Until I begin my
19 charge, it will up to you to decide, up until then.
20 When I give my charge, you won't be allowed to do
21 anything after that. But any time prior to that you
22 will be able to change your mind, if you want to.

23 Anything else before the jury comes back in?

24 MR. KULP: Just a minute, Your Honor.

25 THE COURT: Mr. Rogers, one last thing. When I

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Curt Copeland
Jury Trial of October 8-16, 2001

1590

1 was asking you about that, did you make that decision
2 of your own freewill and accord?

3 DEFENDANT: Yes, sir.

4 THE COURT: Did anybody -- did you have ample
5 opportunity to talk to your lawyers before making that
6 decision?

7 DEFENDANT: Yes, sir. I had previously talked
8 to them. When I said that I didn't, there was a little
9 misunderstanding.

10 THE COURT: Oh, okay. As if you decide -- as I
11 say, you can change your mind on that. But that is
12 your decision and you make it of your own freewill and
13 accord, and you've had ample opportunity to talk to
14 your lawyers about it as long as you wanted to?

15 DEFENDANT: Yes, sir.

16 THE COURT: I find that the Defendant is
17 freely, knowingly and voluntarily exercising his right
18 to remain silent. And in accordance with his wishes,
19 he will not take the stand. Now, I will of course, if
20 you wish, charge the jury that they may not hold his
21 failure to take the stand or to testify against him.
22 Do you wish me to charge that again?

23 MR. KULP: We would hold off on that.

24 THE COURT: You will let me know?

25 MR. KULP: I will make a note right now about

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1591

1 that.

2 THE COURT: All right. I also find that the
3 Defendant's present intention is not to testify or to
4 make an unsworn statement, and that he makes that
5 decision of his own freewill and accord and fully
6 understands that he will be given the opportunity, if
7 he changes his mind, to make it. You'all let me know
8 if he wishes to make any statement, at any time up
9 until the court begins the charge.

10 MR. KULP: Yes, sir.

11 THE COURT: You may bring in the jury.

12 (JURY IN @ 11:20 A.M.)

13 BAILIFF DORSEY: Jurors are all present, Your
14 Honor.

15 THE COURT: We will now continue with the
16 Defendant's case. Before we do, one thing that I
17 neglected to ask you since we resumed, has anybody had
18 anything of any significance told you -- throughout the
19 trial I've told you 'don't discuss the case with
20 anyone, don't allow anyone to discuss the case with you
21 or read anything about it' and 'if anyone should
22 attempt to discuss the case with you, please report it
23 to the court.' Just for the record, has anyone got
24 anything to report, anything out of the ordinary that
25 has happened that you feel is of such significance that
26 you need to report to the Court? (No response from

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1592

1 Jurors). Very good. Ready to proceed?

2 MR. KULP: If it may please the Court, Your
3 Honor.

4 THE COURT: Mr. Kulp.

5 MR. KULP: The Defense calls Mrs. Connie
6 Rogers to the stand.

7 (WITNESS TAKES STAND)

8 CONNIE ROGERS, being
9 duly sworn to tell the truth, the whole truth and
10 nothing but the truth, testified as follows:

11 EXAMINATION

12 BY MR. KULP:

13 Q. Good morning. Please be sure to speak up or into
14 the microphone, Mrs. Rogers, so that the ladies and
15 gentlemen of the jury can hear you, and the court
16 reporter, as well.

17 A. Yes, sir.

18 Q. Is this your son?

19 A. Yes, sir.

20 Q. How old are you?

21 A. Forty-one, sir.

22 Q. Where were you born?

23 A. Fort Lauderdale, Florida.

24 Q. Where do you now reside?

25 A. Here in Beaufort, South Carolina.

26 Q. What is your occupation?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 283
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1593

- 1 A. I am a desk clerk.
- 2 Q. Where do you work?
- 3 A. Ladys Island Post Office.
- 4 Q. You work for the United States Postal Service?
- 5 A. Yes, sir.
- 6 Q. You have been here throughout this trial?
- 7 A. Yes, sir.
- 8 Q. Who is your husband?
- 9 A. Mr. Benjamin -- Mr. Benjamin Rogers.
- 10 Q. Is he present in the courtroom?
- 11 A. Yes, sir.
- 12 Q. Can you identify him for the jury?
- 13 A. That's my husband sitting over with the glasses
- 14 on, with the red shirt and dark blue suit.
- 15 Q. Seated next to the young lady with the white shirt
- 16 on?
- 17 A. Which is my daughter, yes, sir.
- 18 Q. Your daughter?
- 19 A. (Affirmative nod).
- 20 Q. What is your daughter's name?
- 21 A. Her name is Nikki Rogers.
- 22 Q. How many children do you have, Mrs. Rogers?
- 23 A. Well, our family -- his, mine, ours -- altogether
- 24 we have nine children, altogether.
- 25 Q. Let me ask you -- I draw your attention to this
- 26 chart, a family tree diagram that might assist us.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1594

- 1 Now, you are currently married to Mr. Rogers?
- 2 A. Yes, sir.
- 3 Q. When did you marry him?
- 4 A. June 20th, 1988.
- 5 Q. How old were you then?
- 6 A. Twenty-five.
- 7 Q. Had you known him prior to that?
- 8 A. Yes, sir.
- 9 Q. How long had you know him prior to your marriage?
- 10 A. Approximately twenty years.
- 11 Q. Who is Cheryl Ricks Rogers?
- 12 A. That is the mother of my stepchildren, which was
- 13 his first wife.
- 14 Q. Who is Gloria Daniels?
- 15 A. That is the mother of my stepdaughter.
- 16 Q. And Mr. Rogers Ms. Daniels were never married?
- 17 A. No, sir.
- 18 Q. And, as indicated here, you were married in June
- 19 of '86. 1986 or 1988?
- 20 A. 1986. I'm sorry.
- 21 Q. That's fine. I understand. And of that marriage
- 22 your children are Tavarus, Nikki, and Jarvis.
- 23 A. Yes, sir.
- 24 Q. And you also have two children from a prior
- 25 relationship, Johnny and Quinton.
- 26 A. Yes, sir.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1595

1 Q. Of Mr. Roger's relationship with Cheryl Ricks,
2 there was -- and can you testify that your recollection
3 is or knowledge is that they were married in December
4 of 1978?

5 A. Yes, sir.

6 Q. And they were divorced in April of 1986?

7 A. Yes, sir.

8 Q. Now, of that union two children were born:

9 Benjamin, Jr. and James.

10 A. Yes, sir.

11 Q. And Mrs. Rogers, Cheryl Rogers, had a prior
12 relationship with a gentleman and Tonya was the child
13 born of that union?

14 A. Right.

15 Q. Now, among all these children, as you mentioned
16 just a few minutes ago, who -- do you consider them all
17 to be your children?

18 A. Yes, sir.

19 Q. Let me ask you a few questions if I may regarding
20 the circumstance of Tavarus' birth. When you were
21 pregnant with him, how far from term of the pregnancy
22 were you when you found that you were pregnant?

23 A. I didn't find out that I was pregnant with Tavarus
24 until I was about six months pregnant and then I -- I
25 didn't carry Tavarus full-term. He was premature.

26 Q. And not knowing that you were pregnant until the

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1596

1 sixth month, you weren't able to seek and obtain any
2 prenatal care?

3 A. No, sir. I only had one prenatal care with
4 Tavarus. I was so small that I didn't -- I didn't show
5 at all.

6 Q. So he was premature, he was born in the seventh
7 month of your pregnancy?

8 A. Yes, sir.

9 Q. So he was born about a month after you find out
10 that you were pregnant?

11 A. Yes, sir.

12 Q. Do you recall that his birth weight at birth being
13 3 pounds, 11 ounces?

14 A. Yes, sir.

15 Q. Do you recall any problems that Tavarus had
16 medically after he was born prematurely?

17 A. Yes, sir, he was in the hospital four or five
18 weeks. And they told me that he had a hernia. By him
19 being so small and fragile, they kept him in there for
20 observation.

21 Q. You were eighteen at the time of his birth?

22 A. I believe so, yes, sir.

23 Q. And at that time you had two other children,
24 before him?

25 A. Yes, sir.

26 Q. And what were their names?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1597

- 1 A. Johnny Davis and Quinton Davis.
- 2 Q. And we identified them there on the family tree..
- 3 A. Correct.
- 4 Q. How old were you when you had your first baby?
- 5 A. Sixteen, sir.
- 6 Q. Yes, ma'am. Now, at that time were those two
- 7 other children, Johnny and Quinton, living with you
- 8 when you took Tavarus home?
- 9 A. Yes, sir.
- 10 Q. Where were you living?
- 11 A. I was living with my grandmother.
- 12 Q. What was her name?
- 13 A. Leora Shealy.
- 14 Q. Where was that house, where was your grandmother's
- 15 house?
- 16 A. In Ft. Lauderdale, Florida.
- 17 Q. Who else lived in that house?
- 18 A. My grandfather and my aunts.
- 19 Q. How many aunts?
- 20 A. Two.
- 21 Q. Did they have children, as well?
- 22 A. One did. She had three children.
- 23 Q. And in that house what were the living
- 24 arrangements like? You were there with three small
- 25 children -- how many rooms were there in the house?
- 26 A. There were three rooms.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1598

1 Q. How many rooms did you and your children occupy in
2 that house?

3 A. One.

4 Q. Now, the next year you had a daughter, Nikki;
5 right?

6 A. Yes, sir.

7 Q. And you were still living in that location?

8 A. Yes, sir.

9 Q. So now you're staying in one room with four
10 children?

11 A. Yes, sir.

12 Q. Did you get any Government assistance during that
13 time period?

14 A. Yes, sir.

15 Q. You were forced to?

16 A. Yes, sir.

17 Q. Now, at the time that Tavarus -- at the time of
18 Tavarus' birth, was his father married -- his father,
19 Ben, was he married to anyone else?

20 A. No, sir.

21 Q. Did he later marry someone else?

22 A. Yes, sir.

23 Q. So after Tavarus was born he married a woman and
24 that woman was Cheryl Ricks Rogers?

25 A. Yes, sir.

26 Q. Did you continue to see him after he married

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1599

1 Cheryl Ricks?

2 A. Yes, sir,

3 Q. Did you have any other children with Mr. Rogers?

4 A. After Tavarus, yes, sir.

5 Q. And who were -- oh, Nikki?

6 A. Yes, sir.

7 Q. Did Tavarus see his father, Ben, on a regular
8 basis before and after Mr. Rogers' marriage to Cheryl
9 Ricks?

10 A. Yes, he did, sir. He was there with the children
11 every day. And when Tavarus was in the hospital, he
12 was right there with him spending the nights with him.
13 He was there.

14 Q. And did he visit him at home?

15 A. Yes, sir. Daily.

16 Q. What were the lengths of his visits?

17 A. He would come in after he worked and he would be
18 with them and then he would leave.

19 Q. Did all the children know each other as brothers
20 and sisters?

21 A. Yes, sir.

22 Q. Regardless of the families they were from?

23 A. Yes, sir.

24 Q. Whose homes did they all see each other in?

25 A. They would see each other in each other's homes.
26 Their father would pick them up and take them to his

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Corinne Rogers
Jury Trial of October 8-16, 2001

1600

1 home and he'd bring them back to my place. We kept
2 them all entwined so that they would know who their
3 brothers and sisters was.

4 Q. Yes, ma'am. Now, Mr. Rogers -- in April of '86,
5 Mr. Ben Rogers divorced Cheryl?

6 A. Correct.

7 Q. Then in June you married him?

8 A. Correct.

9 Q. Where did you live after you were married in June
10 of 1986, with Ben?

11 A. We lived in Fort Lauderdale, Florida.

12 Q. What type of house did you have?

13 Was it a large house, a small house or ---

14 A. No, we started out in a project.

15 Q. Was it an apartment?

16 A. Yes, sir.

17 Q. Who'all lived in that apartment?

18 A. Me, my husband and our children.

19 Q. Okay. How many children were living there with
20 you at that time?

21 A. At that time it was Johnny, Quinton, Tavarus,
22 Nikki, Tenille and James -- and Ben, Jr.

23 Q. How many, total, people?

24 A. Altogether in the house?

25 Q. Yes, ma'am.

26 A. Nine at that point.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1601

1 Q. Was Ben, your husband, was he injured in 1988?

2 A. Yes.

3 Q. How was he injured?

4 A. He was injured by -- on the job.

5 Q. How did that affect the family?

6 A. Well, when my husband first got injured he had
7 chronic back pain which kept him in excruciating pain
8 most of the time. The children normally used to be
9 with us and we'd be together as a whole, but after that
10 period my husband's patience grew shorter and -- the
11 kids didn't understand, and he couldn't do with them as
12 much as he used to because he didn't want to say or do
13 anything that would -- you know, they didn't understand
14 that he was in so much pain. So there was a change and
15 I'd just try to keep them from bothering him most of
16 the time so that everybody, you know, could have peace.

17 Q. And the problem was that if you didn't keep him
18 away from them that, because of those issues that you
19 mentioned, he might react in a way that you didn't want
20 to happen.

21 A. No, sir. I didn't mean it to sound that way. No,
22 sir, that's not what I meant.

23 Q. How did you get to South Carolina from Florida?

24 A. Well, we started out just going on a family trip.
25 And when he came down here, I told my husband that I
26 liked it and I -- I just wanted to move my children

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1602

1 from the city to the country, more or less.

2 MR. KULP: I beg the Court's indulgence just
3 one second.

4 THE COURT: Yes, sir.

5 MR. KULP: May I approach the witness, Your
6 Honor, with the Court's permission.

7 THE COURT: Yes, sir.

8 EXAMINATION CONTINUED

9 BY MR. KULP:

10 Q. I hand you what has been marked as Defendant's
11 Exhibit 17 for identification at this time.

12 MR. MURDAUGH: Just one second, (review). No
13 objection, if Your Honor please.

14 MR. KULP: Thank you, Solicitor. We would
15 move this into evidence at this time, Your Honor. It
16 is marked as Defendant's Exhibit 17 for the record.

17 THE COURT: Without objection.

18 (SO ENTERED AS DEFENDANT'S EXHIBIT 17)

19 MR. KULP: If I may approach the witness, Your
20 Honor. I want to go over these photos. Can all the
21 jurors see? (Affirmative nods from jurors). And can
22 you see from there?

23 MS. ROGERS: Yes, sir.

24 EXAMINATION RESUMED

25 BY MR. KULP:

26 Q. Ms. Rogers, this photo here in the corner, do you

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1603

1 recognize what the photo depicts?

2 A. Yes, sir.

3 Q. And what does that photo depict?

4 A. That is me holding Tavarus at five months old. It
5 was his first Christmas in the world.

6 Q. And let me ask you -- I draw attention to this
7 photograph, who is depicted in that photograph?

8 A. That is Tavarus his first day at kindergarten.

9 Q. Let me draw your attention to this photograph, do
10 you recall who is depicted in the upper photograph?

11 A. That is Tavarus.

12 Q. That was him when he was a little boy?

13 A. Yes, sir.

14 Q. He was just starting kindergarten?

15 A. Yes, sir.

16 Q. And is that a picture of his kindergarten class?

17 A. That's correct.

18 Q. And where is Tavarus?

19 A. There's Tavarus.

20 Q. And there's one?

21 A. And there is Tavarus.

22 Q. Let me draw your attention to this photo and ask
23 if you can identify who is depicted therein?

24 A. That is me, Tavarus and one of his aunts, 'Ree,
25 and I think her son. We were in Lake City, South
26 Carolina were we were on my husband's heritage land.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1604

1 We were clearing the land off at that time.

2 Q. Who is that?

3 A. That is Tavarus.

4 Q. That is your son?

5 A. Correct, sir.

6 Q. Is that you?

7 A. Yes, sir.

8 Q. And this is your -- this is Marie, your sister?

9 A. No, she's not my sister. She is, uh, -- was like
10 a family member. She was my sister-in-law's sister,
11 which we all were raised together and we come up in the
12 neighborhood culture of calling each other Aunt and
13 Uncle.

14 Q. Like family?

15 A. Yes, sir.

16 Q. And let me draw your attention to this photograph
17 and ask if you can depict -- who is in that photograph?

18 A. This is Tavarus, his sister Tenille and Johnny.
19 We are on our trip coming to Beaufort, South Carolina.
20 We're on our family picture and here, in this picture,
21 they're showing their go-carts. My husband purchased
22 one for the girls and one for the boys.

23 Q. That's Tavarus in the red jeans?

24 A. Yes, sir.

25 Q. Let me ask you to examine this additional
26 photograph right here. Who are the children in that

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1605

1 photograph?

2 A. This is my daughter, Nikki; my son, Tavarus; and
3 my daughter, Tenille. That is an Easter picture -- we
4 used to love to dress the kids similarity-like and
5 those were my three youngest at the time.

6 Q. And that's Tavarus?

7 A. Yes, sir.

8 Q. At age?

9 A. I believe he was about eight years old at that
10 time when that picture was made.

11 Q. Now, this photograph -- can you see that from
12 there?

13 A. Yes, sir.

14 Q. What does that depict and who is in that
15 photograph?

16 A. That's Tavarus in a hog pen. When we came here,
17 we was from the city, so we didn't really actually know
18 what we were doing. My husband was building a pig pen
19 and Tavarus was right there assisting him. We all was
20 right there. We decided to take a shot so that he
21 could remember working on what we called "the farm".
22 We were from the city and we had no idea, really, of
23 what we were doing.

24 Q. That was up in this location?

25 A. No, that's where we live now.

26 Q. I draw your attention to that photograph, is that

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1606

1 Tavarus?

2 A. Yes, sir.

3 Q. What age or grade?

4 A. He was in the sixth grade -- first grade. Sorry,
5 he was six years old in the first grade.

6 Q. How about this photograph here? Who is in that
7 photograph?

8 A. That's another Easter picture, another picture of
9 Tavarus and his baby brother, Minor. Tavarus was
10 holding his brother, Minor, to keep him still for the
11 picture.

12 Q. How long was Minor then?

13 A. Minor was about -- a little after he -- about
14 two.

15 Q. How about running back through the people up here,
16 what is depicted in this photograph?

17 A. That is Tavarus. We were at DisneyWorld and we
18 took pictures of them with -- DisneyWorld.

19 Q. Do you recall who that is?

20 A. That's my godson, that's our godson.

21 Q. How about this photograph with the Christmas tree,
22 who is at the top of the ladder?

23 A. That's Tavarus decorating the tree along with his
24 brother, his baby brother.

25 Q. What happened to his leg?

26 A. He went to school one day and when he came home he

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1607

1 said that his leg was bothering him. Took him to the
2 doctor and they found out that he had a cracked bone.

3 Tavarus used to love to race and run.

4 Q. And who is this over here?

5 A. That is Jarmie, which he always followed Tavarus,
6 his big brother.

7 Q. Same little boy, right here?

8 A. Yes.

9 Q. And that is Tavarus?

10 A. That is Tavarus.

11 Q. How old was he there?

12 A. Tavarus was about twelve years old.

13 Q. Who is the lady that got caught in bed with the
14 kerchief?

15 A. That's me, sir.

16 Q. Was that a special day?

17 A. Yes, it is. That was my birthday, my 30th
18 birthday, I believe. My husband baked a cake and
19 Tavarus decorated it and was serving me in bed,
20 something that he'd always do for my birthday.

21 Q. Thank you, ma'am. Now, how about school? Was
22 Tavarus -- how was he at school work, did he have any
23 problems?

24 A. Tavarus was very smart in school. From
25 kindergarten on he always made straight S's. In school
26 he always made A's and B's. He was just very smart.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1608

1 He always would become the teacher's pet.

2 Q. But did the teacher think that he was quiet and
3 kind of a loner?

4 A. They did.

5 Q. Now, Tavarus has a little boy?

6 A. Yes, sir.

7 Q. How old is he?

8 A. Tavarus, Jr. is two now.

9 Q. Was he born while Tavarus was in jail?

10 A. Yes, sir.

11 Q. When he learned that his girlfriend was pregnant,
12 did Tavarus get excited about it?

13 A. Oh, yes, sir.

14 Q. Did he talk about it?

15 A. Well, Tavarus -- when she called, me and my
16 husband and Tavarus were sitting there in the front
17 room when we got the call. And when she called she
18 made the statement -- she must have been telling
19 Tavarus that she was pregnant, she was calling from the
20 doctor's office. And he looked at us -- he didn't know
21 how to tell us that she was pregnant. He looked at us
22 and he said, "She's -- she's -- I'm going to be a
23 daddy. She's pregnant." And we just looked at him.

24 Q. Was the baby's birth difficult or were there any
25 unusual circumstances of his son's birth?

26 A. Yes, sir.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1609

1 Q. What were those?

2 A. The mother was in labor -- tended to be in labor a
3 little longer than was necessary.

4 Q. Did she have to have a caesarean?

5 A. Yes, sir.

6 Q. And, of course, you have indicated that Tavarus
7 was in jail when the baby was born?

8 A. (Affirmative nod).

9 Q. Was he allowed to speak to his girlfriend by
10 telephone during the labor?

11 A. Yes, sir. They made arrangements for him to be
12 able to call her.

13 Q. Was he upset because he could not be with the baby
14 and the mother?

15 A. Yes, sir.

16 Q. Do you think that it is important for a child to
17 know his father?

18 A. Oh, yes, sir.

19 Q. Do you think that it is important for Tavarus and
20 his son to have the opportunity to know each other?

21 A. Yes, sir.

22 MR. KULP: Could you mark this, please -- oh,
23 (tenders to Mr. Murdaugh)?

24 MR. MURDAUGH: No objection. What number?

25 MR. KULP: They are 15 and 16.

26 (SO ENTERED AS DEFENDANT'S EXHIBIT 15)

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1610

1 (SO ENTERED AS DEFENDANT'S EXHIBIT 16)

2 MR. KULP: Your Honor, without objection we
3 would offer Defendant's Exhibit 15 and 16 into the
4 record in this case.

5 EXAMINATION RESUMED

6 BY MR. KULP:

7 Q. Mrs. Rogers, I am handing you Defendant's Exhibit
8 16 and am asking you if you can identify the little boy
9 in that photograph?

10 A. Yes, sir, that's my grandson, Tavarus Jr.,
11 learning to walk.

12 Q. And Defendant's Exhibit 15, who is the little boy
13 in that photograph?

14 A. That is also my grandson, Tavarus Jr., learning to
15 walk. He reminds me of his father when he was that
16 age. He'd just fell.

17 MR. KULP: One more photograph, (tendering to
18 Mr. Murdaugh).

19 MR. MURDAUGH: This one will be 18?

20 MR. KULP: Yes, sir. We would offer Defendant's
21 Exhibit 18 without objection.

22 MR. MURDAUGH: No objection.

23 (SO ENTERED AS DEFENDANT'S EXHIBIT 18)

24 EXAMINATION RESUMED

25 BY MR. KULP:

26 Q. Let me hand you that photograph and see if you can

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1611

1 identify that photograph.

2 A. Yes, sir, this is my grandson, Tavarus Jr.

3 Q. What do they call him?

4 A. Sir?

5 Q. What do you call him?

6 A. We call him "T.J.", for Tavarus, Jr.

7 Q. Mrs. Rogers, you have been here this whole time.

8 You've been watching what is going on?

9 A. (Affirmative nod).

10 Q. You have?

11 A. Yes, sir.

12 Q. And you know what this proceeding is all about?

13 A. Yes, sir.

14 Q. Do you understand the decision that has to be made
15 today?

16 A. Yes, sir.

17 Q. And are you aware of the two possible decisions
18 that could be made?

19 A. Yes, sir.

20 Q. Mrs. Rogers, do you love your son?

21 A. Yes, sir.

22 Q. Have you cared for him since he was a little baby?

23 A. Yes, sir.

24 Q. Do you want to still be able to see him?

25 A. Yes, sir.

26 MR. KULP: Thank you, ma'am. Please answer

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Connie Rogers
Jury Trial of October 8-16, 2001

1612

1 any questions that the Solicitor might have.

2 EXAMINATION

3 BY MR. MURDAUGH:

4 Q. Mrs. Rogers, how are you doing? I shouldn't ask
5 you that. Mrs. Rogers, as I understand, Tavarus is
6 your son.

7 A. Yes, sir.

8 Q. And you love him?

9 A. Yes, sir.

10 Q. His son is named T.B. -- T.J.?

11 A. T.J., sir. That's the nickname that we gave him
12 for Tavarus, Jr.

13 Q. Like Tavarus was named "V", nicknamed "V".

14 A. I don't know about that, no.

15 MR. MURDAUGH: Thank you, ma'am.

16 THE COURT: You may come down.

17 (WITNESS STEPS DOWN)

18 MRS. ROGERS: May I, Your Honor?

19 THE COURT: The witness asked to say something
20 else.

21 MR. MURDAUGH: If Your Honor please, I think that
22 she has to respond to an answer -- I mean a question.

23 THE COURT: Approach the sidebar.

24 SIDEBAR:

25 THE COURT: I think may we should let her
26 -- we don't need this on the

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase
Jury Trial of October 8-16, 2001

1613

1 record.

2 (SIDEBAR CONCLUDED)

3 THE COURT: All right.

4 MR. KULP: Mrs. Rogers, would you like to say
5 anything to the families of these men?

6 MRS. ROGERS: Yes, sir.

7 MR. KULP: What would you like to say?

8 MRS. ROGERS: I would like to say to the families
9 of the victims that we, the Rogers, we understand --
10 we're really sorry for all the situation, and we have
11 no animosity towards either one of you. And we're very
12 sorry that this occurred in our lives, all our lives.

13 MR. KULP: All right.

14 MRS. ROGERS: Thank you.

15 THE COURT: Anything further?

16 MR. MURDAUGH: Yes, sir. Mrs. Rogers, from what I
17 understand from what you just said, you're telling the
18 family that you're sorry that your son killed their
19 sons?

20 MRS. ROGERS: No, sir, I am not saying. I am
21 saying that I am very sorry that we're all in this

22
23 situation together, this position today.

24 MR. MURDAUGH: Did your son kill their sons?

25 MRS. ROGERS: Sir, I wasn't there.

26 MR. MURDAUGH: Thank you.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of William Damude
Jury Trial of October 8-16, 2001

1 MR. KULP: Thank you, Mrs. Rogers.

2 THE COURT: You may come down.

3 (WITNESS STEPS DOWN)

4 MR. FLEMING: William Damude, Your Honor.

5 MR. MURDAUGH: What is his name?

6 MR. FLEMING: William Damude. Come forth and be
7 sworn, sir.

8 (WITNESS TAKES STAND)

9 WILLIAM DAMUDE, being
10 duly sworn to tell the truth, the whole truth and
11 nothing but the truth, testified as follows:

12 EXAMINATION

13 BY MR. FLEMING:

14 Q. You are William Damude?

15 A. Yes, sir.

16 Q. Better known as "Coach"?

17 A. Right.

18 Q. Explain to the jury what I mean by that. Where do
19 you work?

20 A. I teach at Beaufort High, coach wrestling and
21 teach high school.

22 Q. How long have you been at Beaufort High?

23 A. Thirteen years now.

24 Q. And where did you grow up, where did you come
25 from?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of William Damude
Jury Trial of October 8-16, 2001

1615

- 1 A. Ohio.
- 2 Q. Ohio State?
- 3 A. Yes, sir.
- 4 Q. A big Ohio State fan?
- 5 A. Yeah.
- 6 Q. Graduated and you basically came to Beaufort?
- 7 A. Right, right after college.
- 8 Q. And you've got family here in Beaufort?
- 9 A. I do.
- 10 Q. In your role as coach and teacher at Beaufort High
- 11 School did you have an occasion to be the coach of
- 12 Tavarus?
- 13 A. I did, sir.
- 14 Q. What did you coach him in?
- 15 A. Wrestling.
- 16 Q. Could you tell the jury, if you would, your
- 17 observations in your relationship with Tavarus at
- 18 Beaufort High School when he was in high school?
- 19 A. Sure. I taught Tavarus social studies and kind of
- 20 coached him to come out for the wrestling team. I saw
- 21 something in him that I knew would make him a good
- 22 wrestler. He was a good student.
- 23 Q. He was -- what was it that you thought would make
- 24 him a good wrestler?
- 25 A. First of all, it was his weight class. We needed

1 somebody in that weight class, size. And just the type
2 person that he was.

3 Q. Is it a physically demanding and mentally
4 demanding sport?

5 A. It is.

6 Q. And you thought that he could handle it?

7 A. Sure.

8 Q. Describe how he did beginning -- obviously he had
9 never wrestled before?

10 A. No, he'd never wrestling before. It's not a sport
11 that you pick up and play like basketball, baseball and
12 that stuff. A lot of kids when they first come out say
13 that it is tough on them because they're not winning
14 right away and they've never done that sport before, so
15 we have to teach them all kinds of moves and everything
16 about the sport.

17 Q. Did he dramatically improve?

18 A. He did. Other the course of the season he made
19 quite an improvement where he was beating some kids
20 that were probably better than he was, but he was able
21 to beat them towards the end of the season.

22 Q. Now, this is a sport of strength, strategy,
23 endurance?

24 A. Right.

25 Q. But it is not a sport of violence, is it?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of William Damude
Jury Trial of October 8-16, 2001

1 A. Not at all.

2 Q. In fact, in your entire time that you knew
3 Tavarus, did you ever know him to be violent?

4 A. No, not in practice and not in school, in classes.

5 Q. In fact, he was well behaved?

6 A. Yes, he was.

7 Q. Have you ever met his parents before?

8 A. Not to my recollection, no.

9 Q. Did you ever seen them at any one of his meets?

10 A. No.

11 MR. FLEMING: Thank you for what you have offered
12 for us today, Coach. That's all the questions that I
13 have for you. The Solicitor may have some questions
14 for you.

15 EXAMINATION

16 BY MR. MURDAUGH:

17 Q. Coach, how are you doing?

18 A. Very well, thanks.

19 Q. The killing of two people at close range with a
20 shotgun is an act of violence; is it not?

21 A. I would agree.

22 MR. MURDAUGH: I have nothing further.

23 THE COURT: You may come down.

24 (WITNESS STEPS DOWN)

25 MR. FLEMING: May the witness be excused, Your

1 Honor?

2 MR. MURDAUGH: I have no objection.

3 THE COURT: You are excused.

4 MR. KULP: Your Honor, may we approach while
5 the Solicitor is walking by?

6 MR. MURDAUGH: I have got something that I've got
7 to attend to.

8 (OFF RECORD SIDEBAR)

9 THE COURT: Madame Forelady, members of the
10 jury, we will take a recess at this time before we take
11 the next witness. I'm going to try to get your lunches
12 over here soon. We will try to coordinate that. We'll
13 see. Anyway, you may retire to the jury room at this
14 time. We will be in recess for about fifteen minutes
15 if the lunches are not ready and we'll be a lot longer
16 if they are.

17 (JURY OUT @ 12:15 P.M.)

18 THE COURT: Are you going to try to get him so
19 that we can bring them back before lunch or. ---

20 MR. KULP: It may be best if we can find out
21 from Pete if lunch is on the way. It's probably be
22 better to go again and eat and then we'll crank up that
23 project after a short lunch.

24 THE COURT: Okay. If that is the way it works,
25 then we will be in recess for about an hour then.

1 (LUNCH RECESS 12:40 - 1:15 P.M.)

2 BAILIFF: The jury is ready to go, sir.

3 (DEFENDANT PRESENT)

4 THE COURT: Very good. Before we do -- Madame
5 Clerk, pass this down to the attorneys and let them
6 look over that.

7 THE CLERK: Yes, sir. If you would, look
8 through it. This is, to my thinking, what we
9 previously agreed on. I didn't bring your notes, Mr.
10 Kulp, but if you need that we can get those for you,
11 too. But I think this is it.

12 MR. MURDAUGH: Are these the same thing -- it says
13 that they've found aggravating circumstances, and then
14 they have found life imprisonment. Then the last one
15 says, "We recommend life imprisonment understanding
16 that this would be our decision even if we had found
17 one or aggravating" -- that seems like it is somewhat
18 confusing to me, sir.

19 THE COURT: Well, I think the one -- I know
20 that we need the one that had -- (pause). Well, I know
21 that we need the one of just the finding of aggravated
22 circumstances because that's in case they find
23 aggravating circumstances but can't agree on a verdict
24 of life imprisonment or the death penalty.

25 MR. MURDAUGH: That's number one. That's correct,

1 sir.

2 THE COURT: So you need that one. Then to my
3 mind, that number seven goes with that one if they're
4 going to find aggravating circumstances.

5 But then you've got another one that says the same
6 thing.

7 MR. MURDAUGH: Yes, sir, says the exact same
8 thing. It says, "We find aggravating circumstances of"
9 such and such.

10 THE COURT: Now, number six says the death
11 penalty.

12 MR. MURDAUGH: Well, I may have ---

13 THE COURT: Look on the bottom, it says Form 4.

14 MR. MURDAUGH: Oh, yes, sir. Yes, sir.

15 THE COURT: I think you're right. What do you
16 say?

17 MR. MURDAUGH: There ought to be that 'We can't
18 reach a decision between life and death.'

19 THE COURT: That is the aggravating
20 circumstances. Let's see.

21 MR. MURDAUGH: Finding:

22 Aggravating circumstances, death penalty.

23 Aggravating circumstance, life imprisonment.

24 Cannot find or decide on aggravating
25 circumstance or cannot reach a decision on

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Discussion re Verdict Forms
Jury Trial of October 8-16, 2001

1 aggravating circumstance.

2 Also, can't reach a decision life or death.

3 It makes sense but sometimes when you're talking
4 it don't make sense.

5 MR. KULP: I agree.

6 THE COURT: Well, ---

7 MR. KULP: I understand exactly what the
8 Solicitor is saying and agree. One that says ---

9 THE COURT: All right, then let's take it that
10 way. Okay, number two is okay: "We, the jury, find
11 the following aggravating circumstances."

12 MR. KULP: Yes, sir.

13 THE COURT: "We find no aggravating circumstances."

14 MR. MURDAUGH: Yes, sir. And then one, "Unable
15 to decide on aggravating ---

16 THE COURT: That's number four, "We, the jury,
17 are unable to unanimously agree on the existence of any
18 aggravating circumstance.

19 MR. MURDAUGH: Yes, sir. Two, three and four are
20 fine, sir.

21 MR. KULP: But we need one after five that
22 says, "Having found one or more aggravating
23 circumstances, we are unable to agree on a recommended
24 punishment."

25 MR. MURDAUGH: But, then -- well, two, three and

1 four, we need nothing else that I see on that. Then
2 you get to five, six and seven and you've got --

3 "We find aggravating circumstances and are giving
4 life", on number five.

5 "We find aggravating circumstances and we have
6 given death", on number six.

7 And seven, it seems like to me, is the same as
8 number five. We need one that says, "We cannot reach a
9 decision either way, life or death."

10 THE COURT: I think you're right because even
11 if you have found -- all right.

12 MR. KULP: I am writing it out.

13 THE COURT: So we are going to change seven.
14 Go ahead and write it up, then.

15 MR. KULP: (Tendering).

16 MR. MURDAUGH: I should have done all this before,
17 and I apologize, sir. I whole-heartedly admit it's my
18 fault.

19 MR. KULP: (Tenders document to Judge).

20 THE COURT: Okay. In other words, "We cannot
21 agree on the recommended punishment" as number seven?

22 MR. MURDAUGH: Yes, sir.

23 THE COURT: That's fine?

24 MR. MURDAUGH: Yes, sir.

25 THE COURT: Would each of you give me your page

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Discussion re Verdict Forms
Jury Trial of October 8-16, 2001

1 seven ---

2 MR. KULP: I just did.

3 THE COURT: You did. Or you can just keep them
4 and throw them away in a minute. Take this back to
5 Gloria and tell her to do another page seven. All
6 right, that takes care of that. Do you want these
7 things back, Solicitor? These are the ones that you
8 prepared.

9 MR. MURDAUGH: No, sir.

10 THE COURT: Then throw them away. One of them
11 was a notice where you've given them a notice. I guess
12 that one was filed or something?

13 MR. MURDAUGH: That was only for the purpose of
14 showing what I wanted the aggravating circumstance ---

15 THE COURT: All right, then. Seven changes.
16 With that in mind, is there anything else? What about
17 your call?

18 MR. KULP: Yes, sir, we would like at this
19 time to move into evidence the family tree chart that
20 was identified.

21 MR. MURDAUGH: No objection.

22 MR. KULP: Also, Your Honor, what we would
23 like to do is get him on the telephone before we bring
24 the jury in and then -- just tell him to sit tight,
25 then bring the jury in. I would like the opportunity

1 to publish these photographs to them and let them pass
2 them around.

3 THE COURT: Are you ready for the jury? What
4 you want to do is fine.

5 MR. KULP: Well, let me him get on the phone.

6 THE COURT: Who is it that you're ---

7 THE COURT: One thing about these jury forms
8 and things, after we get them together, I presume that
9 we will take a break before we go into the closing, I
10 intend to make sure that we're together and make one of
11 them a court's exhibit showing that everybody approves
12 of these as an appropriate thing.

13 With that, you go ahead with your case.

14 MR. KULP: (Attempts telephone call to
15 Benjamin Rogers, Jr. in Okinawa -- line busy).

16 THE COURT: What do you'all want to do about
17 the Alternates, do you want to keep them here?

18 MR. MURDAUGH: I hate to, Judge, I hate to
19 inconvenience them but they ought to stay.

20 THE COURT: Okay.

21 LAW CLERK, MS. RHODE: (Returns forms to Judge).

22 THE COURT: Okay, I am going to put on there
23 under the recommendation of sentence that "Life
24 Imprisonment, Jury cannot agree as to unanimous verdict
25 as to sentence." Okay.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Discussion re Verdict Forms
Jury Trial of October 8-16, 2001

1 MR. KULP: Yes, sir.

2 MR. KULP: (Redials number to Benjamin Rogers,
3 Jr. -- busy signal.) Your Honor, it has been busy
4 twice, I am not sure what the problem is. I need to
5 make sure that he gets by the phone. Maybe we could
6 use this opportunity for the jury to -- to publish some
7 photographs to the jury and they can be looking at them
8 while I am doing that.

9 MR. FLEMING: And when they get finished, I can
10 come out and get you for the phone call.

11 MR. KULP: Let's me just run and see if I can
12 clarify this.

13 MR. FLEMING: We just called him, Your Honor, so
14 we don't know what it isn't working.

15 THE COURT: Okay. Let's make one of these
16 copies a Court's exhibit. I want you'all to examine it
17 carefully and make sure that it is just exactly the way
18 that the other ones are.

19 If you would, pass that down.

20 (SO ENTERED AS COURT'S EXHIBIT 16)

21 THE COURT: Make sure that they are all the
22 same thing because this is what the jury is going to
23 have. Of course, you keep yours for your arguments,
24 whatever.

25 MR. KNIGHT: (Upon review), yes, sir.

1 MR. FLEMING: (Upon review), yes, sir.

2 MR. MURDAUGH: If we don't hurry, we're going
3 to be running into tomorrow.

4 THE COURT: I was thinking the same thing
5 but I don't know what to do otherwise. Mr. Fleming,
6 could one of your staff people go in there and try to
7 get that call and we could go ahead with the evidence?
8 I mean, is Mr. Kulp the only one who can place that
9 call?

10 MR. FLEMING: No, I think ---

11 THE COURT: And we can break whenever he gets
12 connected, we can break into it. But we need to start
13 taking some testimony, whatever.

14 MR. FLEMING: Yes, sir.

15 (FLEMING EXITS/RETURNS TO COURTROOM)

16 MR. FLEMING: We have got him, Your Honor.

17 THE COURT: Excellent. We are ready for the
18 jury, then.

19 MR. FLEMING: No, sir, let's get him on the
20 phone. He's standing right by the phone and we just
21 hung up but we need to get him on the phone in here.
22 I can't do that because I don't have the magic code.

23 MR. MURDAUGH: Your Honor, could I call my wife
24 while we're waiting? I'm sure that she doesn't believe
25 I've been in trial this long!

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Ben Rogers, Jr. (via telephone)
Jury Trial of October 8-16, 2001

1 MR. KULP: (Places call to Benjamin Rogers,
2 Jr.)
3 BEN ROGERS, JR. Camp Guard, Rogers speaking.
4 MR. KULP: Ben?
5 BEN ROGERS, JR. Yeah.
6 MR. KULP: This is Tim.
7 BEN ROGERS, JR. How you doing?
8 MR. KULP: I want you to just stand there on
9 the phone. I don't have a Hold button on this phone --
10 well, yeah, I do. Just stand tight there and standby
11 until I call you. It may be a few minutes.
12 THE COURT: You can just leave him on there
13 and leave the line open, if you want to.
14 MR. KULP: Well, it has got a Mute button.
15 THE COURT: All right.
16 MR. KULP: Just don't get off the phone,
17 whatever you do. Okay?
18 BEN ROGERS, JR. Okay.
19 MR. KULP: He's on the line.
20 THE COURT: Are you ready for the jury.
21 MR. KULP: Bring the jury in, we will publish
22 the pictures and get right to him. Thank you, Your
23 Honor.
24 THE COURT: Bring the jury in.
25 (JURY IN @ 2:05 P.M.)

1 BAILIFFS: All jurors present, Your Honor.

2 THE COURT: Thank you. Madame Forelady,
3 members of the jury. I am sorry that we're a little
4 delayed. We are now ready to proceed. Mr. Kulp?

5 MR. KULP: May it please the Court, Your
6 Honor. Your Honor, we would request permission to
7 publish the photographic exhibits admitted into
8 evidence to the jury.

9 THE COURT: Yes, sir.

10 MR. KULP: (Tenders photographs, Defendant's
11 Exhibits 15, 16, 17 and 18, to jury for review).

12 Your Honor, if it please the Court, we call the
13 next witness, Ben Rogers, Jr., who is on the telephone
14 from Okinawa.

15 THE COURT: Mrs. Smith, would you please swear
16 in Mr. Rogers.

17 THE CLERK: Mr. Rogers, this is Elizabeth
18 Smith, the Clerk of Court for Beaufort County. Can you
19 please raise your right hand? Do you solemnly swear or
20 affirm that you shall tell the truth, the whole truth
21 and nothing but the truth, so help you God?

22 BEN ROGERS, JR.: I do.

23 MR. KULP: May it please the Court, Your
24 Honor.

25 THE COURT: Mr. Kulp.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Ben Rogers, Jr. (via telephone)
Jury Trial of October 8-16, 2001

1 MR. KULP: Thank you, Your Honor.

2 BENJAMIN ROGERS, JR.,
3 being duly sworn to tell the truth, the whole truth and
4 nothing but the truth, testified as follows:

5 EXAMINATION

6 BY MR. KULP:

7 Q. Please state your full name for the record, Mr.
8 Rogers.

9 A. Benjamin A. Rogers, Jr.

10 Q. And what is your current address, if you can tell
11 us?

12 A. 7Com Battalion, Unit 35611 at

13 Q. What time is it there in Okinawa?

14 A. Right now it is 3:05 in the morning.

15 Q. A.M.?

16 A. Yes.

17 Q. Were you sleeping when I called to get you on the
18 telephone?

19 A. Yes, I was.

20 Q. What is your occupation, Mr. Rogers?

21 A. I am Sergeant of the Guard for Camp Guard.

22 Q. Be sure to speak slowly and as clearly as you can
23 -- I know that you're tired -- so that we can hear you
24 here over the speakerphone and so that the court
25 reporter can understand you, as well. Thanks.

1 A. Okay.

2 Q. What is your rank?

3 A. Sergeant.

4 Q. What is duty -- you gave us your address but your
5 duty assignment location is what?

6 A. 7Com Battalion.

7 Q. In Okinawa?

8 A. Yes.

9 Q. Is there base name there?

10 A. Camp Hansen.

11 COURT REPORTER: The name of the Base again,
12 please?

13 EXAMINATION CONTINUED

14 BY MR. KULP:

15 Q. Camp Hanson? H-a--s-o-n.

16 A. H-a--s-e-n.

17 Q. Would you please tell us your date of birth?

18 A.

19 Q. Could you please tell us your Social Security
20 number?

21 A.

22 Q. Are you currently located in the location that
23 you've described?

24 A. Yes, I am.

25 Q. You understand that you are under oath?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Ben Rogers, Jr. (via telephone)
Jury Trial of October 8-16, 2001

- 1 A. Yes, I do.
- 2 Q. Do you know what that means?
- 3 A. Yes.
- 4 Q. Have you ever been assigned to Beaufort Air
5 Station or did you complete basic training at Parris
6 Island?
- 7 A. I completed basic training at Parris Island.
- 8 Q. When did you enter the United States Marine Corps?
- 9 A. August 7, 1974 (sic). Sorry, September 7th, 1974
10 (sic).
- 11 Q. 1974?
- 12 A. I'm sorry -- 1994. I'm tired.
- 13 Q. Ask someone to bring you some coffee. That would
14 be very nice. Have you had any other duty assignments
15 other than the Beaufort area or Okinawa?
- 16 A. Yes.
- 17 Q. What duty assignments were those?
- 18 A. I was stationed in North Carolina in '95. I was
19 stationed in Okinawa in '95, and I was stationed in
20 North Carolina from '96 to '99.
- 21 Q. Where in North Carolina?
- 22 A. Camp Lejune.
- 23 Q. Are you married?
- 24 A. Yes, I am.
- 25 Q. Do you have any children?

- 1 A. No, I don't.
- 2 Q. What is your wife's name?
- 3 A. Cynthia.
- 4 Q. Please name your brothers and sisters?
- 5 A. James, Johnny, Quinton, Tavarus, Jarvis and my
6 sister as Latonya, Tenille and Nikki.
- 7 Q. What is your mother's name?
- 8 A. My stepmother's name is Connie Rogers.
- 9 Q. What is your father's name?
- 10 A. Benjamin Rogers, Sr.
- 11 Q. Is Tavarus Rogers your brother?
- 12 A. Yes, he is.
- 13 Q. Are you aware that he is on trial here in
14 Beaufort?
- 15 A. Yes, I do.
- 16 Q. Are you aware that you're testifying in a
17 punishment or penalty phase of his trial?
- 18 A. Yes, I am aware.
- 19 Q. Who is the oldest child in your family?
- 20 A. I am.
- 21 Q. Can you give us the ages or rather the order of
22 children in the family? You're the oldest, how does it
23 go down from there?
- 24 A. I am the oldest.
- 25 Johnny is the next oldest.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Ben Rogers, Jr. (via telephone)
Jury Trial of October 8-16, 2001

- 1 Then you have James.
- 2 You have Quinton.
- 3 You have Tavarus.
- 4 You have Jarvis.
- 5 Those are the males, in order.
- 6 Q. Okay. Now I'd like to sk you a few questions
- 7 about your family history, Ben.
- 8 A. Sure.
- 9 Q. Did your parents fight?
- 10 A. Yes, they did.
- 11 Q. Please describe them in that regard.
- 12 A. Well, mostly they would fight -- they would go in
- 13 other rooms but you'd hear a lot of yelling and
- 14 screaming, banging around in the other rooms.
- 15 Q. Where would this fights occur?
- 16 A. Anywhere in the house.
- 17 Q. Would Tavarus, your brother, ever be present?
- 18 A. Yes, we would all be present.
- 19 Q. Did you ever try to break up these fights?
- 20 A. No, none of us ever got involved.
- 21 Q. Did you have a special assignment from your father
- 22 regarding your brothers and sisters?
- 23 A. Yes.
- 24 Q. What was that assignment?
- 25 A. It was my job to take care of my brothers and

1 sister.

2 Q. Did you father ever suggest that you do this and
3 say, "I don't give a damn if you kill them", meaning
4 other people?

5 A. The way that we were grown is that when we fought
6 that it was either to draw blood or to give someone,
7 and we were never supposed to lose fights.

8 Q. If you didn't completely fight someone, would your
9 father threaten to beat you?

10 A. Oh, he would. And he would take us back to fight
11 again.

12 Q. On that point, did your father ever send you out
13 to beat up on someone who had jumped your earlier?

14 A. Yes, he did.

15 Q. Did your Dad beat you and Tavarus and the other
16 children?

17 A. Yes, he did.

18 Q. What did he use to do so, to beat you? Please
19 describe those objects or items.

20 A. Well, one object was a paddle that he made with
21 holes in it. He would beat us with that until it
22 broke. And he used an industrial extension cord to
23 beat me once when I got in trouble.

24 Q. How was that extension cord configured?

25 A. It was an orange industrial extension cord like

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Ben Rogers, Jr. (via telephone)
Jury Trial of October 8-16, 2001

1 carpenters and electricians use and he wrapped it up
2 and taped the middle with tape.

3 Q. Did he ever have occasion to use a weightbelt or
4 like a -- like a gym weightlifter uses in a gym?

5 A. Sometimes.

6 Q. When you were ten years old, did your Dad bring
7 drugs home?

8 A. Yes, he did.

9 Q. Did he give any of you children any of the drugs?

10 A. Yes, he did. He gave us marijuana.

11 Q. Did he show you how to roll marijuana cigarettes?

12 A. Yes, he did.

13 Q. How old would Tavarus have been at that time?

14 A. Tavarus would have been about seven or eight at
15 that time.

16 Q. Did your father ever let any of you drink beer?

17 A. Yes.

18 Q. At what age?

19 A. As early as I can recall. I was about six.

20 Q. What is your natural mother's name? Cheryl?

21 A. Cheryl.

22 Q. Did your father ever beat your mother, Cheryl?

23 A. Yes, he did.

24 Q. Did he do so in your presence?

25 A. Yes, he did.

- 1 Q. Did he ever break her leg?
- 2 A. Yes, he did.
- 3 Q. Was that fight in that instance over your Dad's
- 4 relationship with Tavarus' mother, Connie?
- 5 A. My mother, she knew about their relationship.
- 6 Q. Did Tavarus observe this fight wherein Cheryl's
- 7 leg was broken?
- 8 A. Yes, he was there.
- 9 Q. How did he react?
- 10 A. He was crying. Most of the little kids, they was
- 11 crying.
- 12 Q. Would you describe your father's family, his own
- 13 family, as being violent?
- 14 A. Well, all the family, they would fight and shoot
- 15 at each other and when we were little we'd always be
- 16 witnesses to that.
- 17 Q. Did you ever see your father beat Connie, Tavarus'
- 18 mother?
- 19 A. Yes.
- 20 Q. What would she do about those beatings?
- 21 A. She would try to run, get away from him.
- 22 Q. Was she scared of your father?
- 23 A. Yes, she was. She still is.
- 24 Q. Did your father ever make you and your brother
- 25 James move in with him when he married Connie, Tavarus'

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Ben Rogers, Jr. (via telephone)
Jury Trial of October 8-16, 2001

- 1 mother, and do so against your will?
- 2 A. He treated us. In a better word, he tricked us.
- 3 Q. Please explain that.
- 4 A. James had always wanted to go with my father but I
- 5 didn't. So we were supposed to only stay the summer
- 6 and if I'd stay the summer he would get all clothes --
- 7 and he got all my clothes and moved them into the
- 8 house. I told him that I didn't want to stay. He went
- 9 to court about it and because I was too young at that
- 10 time the judge gave him custody. I told the judge then
- 11 that I did not want to stay with him.
- 12 Q. Did Tavarus live with you then, once you said that
- 13 you'd been tricked into living with your father?
- 14 A. Yes, he did. That was when I met the rest of my
- 15 sisters.
- 16 Q. Did you call Connie "Mom"?
- 17 A. No, not at first.
- 18 Q. Why not?
- 19 A. Because she wasn't my mother.
- 20 Q. Did your father want you to call her "Mom"?
- 21 A. He did.
- 22 Q. Did he insist that you call her "Mom"?
- 23 A. Yes, he did.
- 24 Q. Did he threaten you if you didn't?
- 25 A. Yes, he did.

1 Q. What did he tell you that he would do if you
2 didn't call her "Mom"?

3 A. He said that if I didn't call her "Mom" that he
4 was going to kill me.

5 Q. When you turned thirteen, Ben, what did your
6 father tell you about getting a job?

7 A. His words were -- his words were, "Get a damn
8 job."

9 Q. Or what?

10 A. Uh, that -- because we needed help and stuff and
11 because I was the oldest, he told me to "get a damn
12 job".

13 Q. Did you get a job at age fifteen?

14 A. Yes, I did.

15 Q. What job?

16 A. I went to work at Winn-Dixie.

17 Q. Where was that located?

18 A. It was in Florida.

19 Q. Where you lived then?

20 A. Yes.

21 Q. Did you have occasion to get hurt on the job?

22 A. Yes, I did get hurt on the job.

23 Q. And did you get paid for the injuries sustained?

24 A. No.

25 Q. What happened to the case?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Ben Rogers, Jr. (via telephone)
Jury Trial of October 8-16, 2001

1 A. Well, when I got hurt, my father took me to the
2 chiropractor and all this stuff and -- and he told the
3 manager at the store that I had quit. I was like, 'No,
4 I didn't.' And then I found out later that he got the
5 settlement.

6 Q. Who got the settlement?

7 A. He did.

8 Q. He, who?

9 A. My father did.

10 Q. What did he do with the money?

11 A. He bought me a car, a used car, and with the rest
12 of the money him and the little ones, they went on
13 vacation to Washington.

14 Q. What kind of car was that?

15 A. It wasn't an expensive car, it cost about \$700.

16 Q. Do you know how much the settlement was?

17 A. I think it was like -- I think that it was \$3,700.

18 Q. Did he invite you or take you on that trip to
19 Washington?

20 A. No, by that time me and my father we were having
21 problems.

22 Q. Now, please des--, -- after the accident, did your
23 father's beatings of the children stop? Well, excuse
24 me, let me go back. Did your father have an accident
25 in 1988 on the job?

1 A. Yes, he did.

2 Q. After that accident, did the beatings of the
3 children stop?

4 A. No.

5 Q. Did your father ever beat up your brother James,
6 when he was twelve or thirteen?

7 A. Yes, he did. Him and James did get into a fight.

8 Q. Where and how did your father hit James?

9 A. He was beating him up and James broke free, pushed
10 him. He just starting punching him.

11 Q. Punching him with his fists?

12 A. Yes.

13 Q. About this timeframe, would you describe your
14 brother Tavarus as quiet.

15 A. He was very quiet.

16 Q. Did he rebel at all?

17 A. Not at that time, no. No, he didn't.

18 Q. Did you eventually move out of your father's home?

19 A. Yes, I did.

20 Q. How old were you then, Ben?

21 A. I was sixteen.

22 Q. Why did you move out?

23 A. Because me and my father didn't get along. I told
24 him that he wasn't going to beat me anymore.

25 Q. Where did you go?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Ben Rogers, Jr. (via telephone)
Jury Trial of October 8-16, 2001

- 1 A. At that time I went to stay with my mother.
- 2 Q. Was this when the family was living in Florida?
- 3 A. Yes.
- 4 Q. After that, did you go back to the family home one
- 5 day during that time period and find something
- 6 surprising?
- 7 A. I went home to visit and I found out that they
- 8 were gone, they have left and were gone.
- 9 Q. Did your father tell you that he was moving the
- 10 family?
- 11 A. No, he didn't. He just left.
- 12 Q. And where did they move?
- 13 A. They went to South Carolina.
- 14 Q. And your father didn't tell you that?
- 15 A. No.
- 16 Q. Does your brother Quinton have a learning
- 17 disability?
- 18 A. Yes, he does.
- 19 Q. Does he fear your father?
- 20 A. Yes, he does.
- 21 Q. And among the boys of you -- among the boys in the
- 22 family, who was beaten the most?
- 23 A. It would be me and James.
- 24 Q. Ben, do you have a sister named Tenille?
- 25 A. Yes, I do.

1 Q. Where does she live?

2 A. Somewhere in Florida.

3 Q. Is she frightened of or scared of your father?

4 A. We all are.

5 MR. KULP: Thank you, Ben. Please answer any
6 questions that the Solicitor may have for you.

7 EXAMINATION

8 BY MR. MURDAUGH:

9 Q. Mr. Rogers, how you are doing, sir?

10 A. Fine. Yourself?

11 Q. I am Randolph Murdaugh. I am the Prosecutor up
12 here. I need to ask you some questions.

13 A. Okay.

14 Q. You tell me that you father beat you.

15 A. Yes, he did.

16 Q. Have you ever committed a murder?

17 A. No, I haven't.

18 Q. You tell me that your father beat your brother
19 James. Has your brother, James, ever committed a
20 murder?

21 A. Right now he is in prison for three counts.

22 Q. For what?

23 A. Murder.

24 Q. So he has murdered somebody?

25 A. To the best of my ability, I guess so.

- 1 Q. Okay, sir. Your next oldest brother or sister is
2 who?
3 A. My next oldest sister is Tonya but she doesn't
4 live with my family.
5 Q. Latonya?
6 A. Yes.
7 Q. She was beaten?
8 A. Yes, she was.
9 Q. Has she ever committed a murder?
10 A. No, she hasn't.
11 Q. Has not?
12 A. No, she has not.
13 Q. And your next brother or sister?
14 A. Johnny.
15 Q. Has he ever committed a murder?
16 A. I have no idea.
17 Q. You don't know?
18 A. Johnny is my stepbrother and we haven't seen each
19 other for a long time.
20 Q. Okay, sir. And your next brother or sister?
21 A. Quinton.
22 Q. Has Quinton ever committed a murder?
23 A. No, he hasn't.
24 Q. And your next brother or sister?
25 A. Tavarus.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Ben Rogers, Jr. (via telephone)
Jury Trial of October 8-16, 2001

1644

1 Q. We know about that. The next one?

2 A. Jarvis.

3 Q. Has Jarvis ever committed a murder?

4 A. Jarvis is still a teenager.

5 Q. Has he committed a murder?

6 A. No, he hasn't.

7 Q. Is that the youngest?

8 A. Yes, it is.

9 Q. Okay, sir. How old is Jarvis?

10 A. About thirteen or fourteen.

11 MR. MURDAUGH: Thank you, sir. I have no further
12 questions.

13 MR. KULP: Just one further question. Ben,
14 this is Mr. Kulp again. The Solicitor asked you about
15 your brother James.

16 BEN ROGERS, JR.: Yes.

17 MR. KULP: He is serving a life sentence,
18 isn't he?

19 BEN ROGERS, JR.: Thank you, no further
20 questions.

21 MR. MURDAUGH: No questions.

22 THE COURT: Okay, turn the phone off. Thank
23 you, sir.

24 MR. KULP: Thank you, sir. Goodnight.

25 Your Honor, at this time we would call Jeff

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1 Youngman to the stand. Would you come around and be
2 sworn?

3 MR. KULP: May it please the Court, Your
4 Honor.

5 THE COURT: Mr. Kulp.

6 (WITNESS TAKES STAND)

7 JEFFREY YOUNGMAN, being
8 duly sworn to tell the truth, the whole truth and
9 nothing but the truth, testified as follows:

10 EXAMINATION

11 BY MR. KULP:

12 Q. Please state your full name for the record.

13 A. Jeffrey Youngman.

14 Q. Mr. Youngman, what is your occupation?

15 A. I am a social worker, forensic social worker.

16 Q. And where do you reside, what city?

17 A. Mount Pleasant, South Carolina.

18 Q. And do you have office space?

19 A. In my second job or my other -- my first job, I
20 guess, is with Crisis Ministries, a homeless shelter in
21 Charleston, and I have an office there.

22 Q. I think that most people know but Crises
23 Ministries is an organization that deal with the
24 homeless and the poor?

25 A. Yes, we serve about anywhere from a hundred and

1 twenty to a hundred and fifty people a night, providing
2 shelter and services.

3 Q. What is your educational background, please?

4 A. I have a Bachelors in Sociology from Ohio State
5 and I have two Masters degrees from two other
6 universities, a Masters in Social Worker and a Masters
7 in Public Health.

8 Q. What is your work history or can you tell the
9 ladies and gentlemen of the jury a summary of your work
10 experience?

11 A. Well, I have been a social worker for twenty years
12 so it is rather long. I worked seven years as a child
13 protection -- in child protection in Louisiana, first
14 as an investigator of child protection referrals and
15 then as a supervisor of the unit and then as a
16 supervisor of the entire parish -- the county, here.

17 I also worked at the School Board in Charleston.

18 I did some consulting work with the Department of
19 Youth Services in New Orleans.

20 And I worked at Covenant House, it's a shelter for
21 homeless and runaway youths in New Orleans.

22 When I moved to Charleston, I worked for the
23 Health Department in Berkeley County as a social worker
24 dealing mostly with high-risk infants and mothers.

25 Then I went to Carolina Youth Development Center
26 and I worked six years as the Program Director there,

1 directing programs for abused and emotionally disturbed
2 kids.

3 And I am currently at Crises Ministries as the
4 Mental Health Coordinator.

5 Q. Can you share your pre-Masters work history with
6 the jury?

7 A. Well, in June of this year I finished the post-
8 Master certification program in Forensic Social Work at
9 Tulane. It's the first one of its kind in the country.

10 Q. At Tulane University?

11 A. Yes, sir.

12 Q. In New Orleans?

13 A. Yes, sir.

14 Q. Are you licensed?

15 A. Yes, sir, I am.

16 Q. Licensed in what respect?

17 A. In South Carolina there's three different kinds of
18 licenses for social workers. There's -- I have a LISW,
19 which is a licensed independent social worker. Of the
20 three, that's the highest classification.

21 Q. And how long have you held that license or that
22 professional designation?

23 A. I was licensed originally in Louisiana, but I've
24 had the LISW since I moved to South Carolina in 1990.

25 Q. What is forensic social work? Can you explain

1 that to the jury?

2 A. The main difference or the thing about forensic
3 social work is that it deals with social workers who
4 deal mostly with the law or the legal field rather than
5 -- there's hospital social work, geriatric social work,
6 and forensic deals with legal aspects.

7 Q. What is the definition, generically, of the social
8 worker that -- what is the nature of the social worker
9 apart from a forensic social worker?

10 A. Well, social workers in general work with people
11 that have identified problems and deal with those folks
12 and try to help them resolve their problems whereas
13 other fields, like psychology or psychiatry, deal
14 almost exclusively with the individual.

15 Social work takes in the community that the person
16 lives in, the different eco systems: family education.
17 And it not only tries to identify what problems that
18 are in that system that affect the individual but also
19 ways to resolve those problems in the community as an
20 advocate as well as a therapist, I guess you could say.

21 Q. As a part of social work, is there a procedure
22 that is routinely accepted by the court system?

23 A. Well, one of the -- sort of the building block or
24 basis for social work is a psychosocial assessment. In
25 social work, sort of the adage is you have to find out

1 where the client is at before you can start working
2 with that person. So a psychosocial assessment is what
3 you'all do in the field, depending on the population
4 that you're dealing with, but we all do that to sort of
5 determine what is going on with the individual and
6 where they need the assistance.

7 Q. Do you have to have special training to do
8 psychosocial work?

9 A. Well, anybody can try to do them. But in social
10 work, I also do field supervision for Master's student
11 at the University of South Carolina and I was amazed at
12 the new folks that come to me -- and although it seems
13 like an easy thing to figure out what is going on with
14 an individual, it takes time to learn what questions to
15 ask and how to ask them to elicit the appropriate
16 responses.

17 There are also, certainly, classes on the Gestalt
18 social assessment and workshops on that.

19 Q. How many psychosocial assessments have you done?

20 A. A few thousand, I guess, over the years.

21 Q. Therefore, would you say that this is an area of
22 specialization for you?

23 A. I would say that. Yes, sir.

24 Q. How do you go about conducting a psychosocial
25 assessment?

1 A. Well, it is sort of different depending on, again,
2 what field of social work that you're in. But at the
3 homeless shelter or in the work that I do with the
4 courts, I meet with the individual and get information
5 and then I have to verify that information from other
6 sources -- either other people, records, other
7 agencies, something. It's a system of getting
8 information, confirming that information and then
9 getting more information. And it just keeps going like
10 that until you have a pretty clear picture of the
11 person that you're dealing with.

12 Q. How do you validate your assessments or stages of
13 conclusions and determinations?

14 A. By getting information from others that can
15 confirm what that individual is saying.

16 Q. How long does it take and how many hours does it
17 usually take for you to do a psychosocial assessment?

18 A. Well, we have quite a population at the homeless
19 shelter, so I usually take about two hours initially
20 and then over time work with them some more.

21 When I worked with the court system, I have taken
22 sixty, seventy, eighty hours to do one.

23 Q. For assessing purposes, what insights do social
24 workers bring to psychosocial assessments?

25 A. As I said earlier, we look at the whole system

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1 that an individual is in. We don't just look at the
2 individual. We look at his education, his mental
3 health, his substance abuse history, his family
4 history. Anything that in any way -- his religious
5 history. Anything that could affect that individual in
6 the way that they -- to sort of explain why a person
7 behaves the way that they explain (sic) -- or the way
8 that they behave. Excuse me.

9 Q. How many capital sentence cases have you been
10 worked on and over what period of time?

11 A. I started doing these kind of cases in 1997 and
12 I've handled -- I was trying to think on the way down
13 this morning -- twenty-three. I think.

14 Q. Capital cases?

15 A. Murder cases, (affirmative nod).

16 Q. Meaning where the sentence that you're assessing
17 or reviewing could include either life imprisonment or
18 the death penalty?

19 A. Yes.

20 Q. Now, how many times or cases have you actually
21 testified in court for?

22 A. This is the sixth time that I have testified.

23 Q. In your career, have you testified for both the
24 prosecution for the State as well as for the defense?

25 A. Well, certainly I have -- prior to going to this

1 course in social work at Tulane, I was a police officer
2 in New Orleans. So I generally testified for the state
3 in those cases. In child protection, I testified for
4 the State. And last year, in a Federal case in
5 Winston-Salem, I testified for the Federal prosecution.

6 Q. What types of cases among that spectrum have you
7 testified in?

8 A. Well, currently in cases, I deal with -- the death
9 penalty cases, you know, I work with individuals who
10 are on trial for their life.

11 I have also testified in child abuse cases, I
12 can't even guess how many times in the seven years that
13 I was a child abuse person.

14 The case in Winston-Salem involved child
15 pornography over the internet, involving some of the
16 people at the homeless shelter that I work with.

17 Q. You mentioned South Carolina and North Carolina,
18 have you testified in other states?

19 A. I have testified in Georgia and in Florida, as
20 well.

21 Q. And in those states, including South Carolina,
22 have you been qualified as an expert witness in
23 conducting psychosocial assessments and qualified,
24 therefore, to offer opinions based on your findings?

25 A. Yes, sir.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1 Q. And in this case, the State versus Tavarus Rogers,
2 were you asked to draw conclusions or to render
3 opinions as to how the information that you have
4 gathered about the defendant related to his situation
5 and issue of sentencing?

6 A. Yes, sir, I did.

7 MR. KULP: If Your Honor please, I would ask
8 and move that Mr. Youngman be qualified as an expert
9 witness in the field of social work, forensic social
10 work, and in the conducting of psychosocial
11 assessments.

12 MR. MURDAUGH: I do not care to ask any questions,
13 sir.

14 THE COURT: Well, let me ask you this. A
15 forensic social workers, I would presume, would it not
16 -- would that not be someone who has the right to give
17 those opinions? To make those assessments?

18 MR. YOUNGMAN: Yes, sir.

19 THE COURT: Okay. All right. I find that the
20 witness is qualified to testify as an expert in the
21 field of forensic social work.

22 MR. KULP: Thank you, Your Honor.

23 EXAMINATION RESUMED

24 BY MR. KULP:

25 Q. Now, you brought some exhibits with you today.

1 A. Yes, sir.

2 Q. As I ask you questions, would these aid you in
3 your testimony?

4 A. Yes, sir, they would.

5 Q. Mr. Youngman, in this case were records reviewed?

6 A. Yes, sir, I reviewed a number of different
7 records.

8 Q. What records did you review?

9 A. I reviewed Tavarus Rogers' school records from
10 Broward County, Florida, from 1985 to 1993;

11 I reviewed Tavarus Rogers' records from the South
12 Carolina Department of Corrections from 10/97 to 6/98;
13 Tavarus Rogers' records from the Department of
14 Corrections, Youthful Offender Intensification Program,
15 from 1998, along with the other one.

16 Tavarus Rogers' records from the Coastal Empire
17 Community Health Center from 1999; the medical records
18 from Broward General Medical Center in Florida for both
19 Connie Fields Rogers and Tavarus Rogers from '77 to
20 '86; and the Department of Health youth service records
21 for James Rogers from '91 to '94.

22 Q. And, as well, what interviews did you conduct in
23 this case?

24 A. Interviews were conducted on:

25 Connie Rogers;

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1 Ben Rogers, Sr;
2 Ben Rogers, Jr.;
3 James Rogers;
4 Willie and Gwen Rogers, an uncle and aunt;
5 Marie Smith, who is known as an aunt;
6 Shamara Holmes, who is the mother of
7 Tavarus's child;
8 Gloria Daniels, who is Tenille's mother;
9 Tenille Rogers,
10 Latonya Rogers, who is his half-sister,
11 William Damude, a wrestling coach and
12 Jimmy Ray, a former employer of Tavarus
13 Rogers.

14 And there were some other relatives that were
15 spoken to, but that was done by another staff member
16 and not done by me.

17 Q. Did you interview his father, Mr. Ben Rogers?

18 A. Yes, I did.

19 Q. Do you see him in the courtroom?

20 A. Yes, sir, I do.

21 Q. Did anything unusual happen when you were
22 interviewing Mr. Rogers, his father?

23 A. I've interviewed, over my lifetime in social work,
24 maybe five thousand people. Both times that I
25 interviewed Mr. Rogers, he stood over me and took his

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1656

1 shirt off and sort of -- as if he was trying to
2 intimidate me. I don't know what that was. It just
3 seemed way -- it seemed very strange to me, is what I
4 felt like. Not just the first time, but both times.

5 And the second time, he was very unwilling to give
6 me the information that I needed for his son. I
7 wanted some directions to some of the family members so
8 that I could do some further interviews with them and
9 he refused to give me that information.

10 Q. Did you tell him how important that information
11 was?

12 A. I stressed more than once the importance of how
13 important it was.

14 Q. In conducting your psychosocial assessment, were
15 you able to obtain some information on Ben Rogers, Sr.,
16 Tavarus' father?

17 A. Yes. You know, psychosocial assessment, in
18 general, don't deal with just one generation level. It
19 is good to go back a generation or two generations to
20 try to get an understanding of what the person who you
21 are working with is -- what went on before.

22 In Mr. Rogers' case, a number of things about him,
23 about his childhood as he was growing up, that I
24 thought were important in understanding Tavarus.

25 His mother was eight months pregnant with him when

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1 his father passed away and when she heard that ---

2 Q. When you say "he", please say ---

3 A. Oh, -- Ben Rogers. Excuse me. When Ben Rogers'
4 father passed away, his mother was so distraught that
5 she fell and landed on her abdomen and reportedly
6 injured herself.

7 After Mr. Rogers -- after Ben Rogers was born, his
8 mother, because there was no father present, split up
9 the children amongst various family members. Ben
10 Rogers was raised by his grandmother and his Aunt
11 Pompei. Reportedly Aunt Pompei was physically abusive
12 to Mr. Ben Rogers.

13 Willie Rogers reported to me that in one instance
14 that he was hiding under the porch at his aunt's house,
15 which was made of wood slats, and would not come out,
16 so his aunt poured scalding water on him to get him out
17 from under the porch.

18 At age thirteen, Ben Rogers stole a long kitchen
19 knife from a grocery store and stabbed, seven times, a
20 nineteen-year-old acquaintance who was allegedly
21 bullying him. Mr. Rogers spent three or four months in
22 a detention center and then was released when it was
23 decided that it was a matter of self-defense.

24 In 1978, Mr. Rogers was arrested for DUI and in
25 the course of the arrest he began fighting with the

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1658

1 police and he was then arrested for multiple resisting
2 arrest charges. He reportedly was badly beaten by the
3 police during that incident.

4 In '83, as Ben Rogers, Jr. just mentioned, Tavarus
5 and some other siblings witnesses Mr. Rogers break the
6 leg of his first wife, Cheryl Ricks. They observed Mr.
7 Rogers standing over his wife as she lay on a bed. He
8 pulled her leg at a right angle such that it caused her
9 body to twist and it caused the bone to break. That
10 was the same year that Mr. Rogers was also arrested for
11 disorderly conduct and carrying a concealed weapon.
12 According to the police report, they responded to a
13 domestic disturbance call at an ex-girlfriend's house
14 where he was and in front of the police he struck the
15 woman and threatened to kill her.

16 He's had two more arrests that I was able to find
17 from the records. In 1986 he was arrested for
18 obstructing justice and resisting arrest, and in 1990
19 he was arrested for carrying a concealed weapon and
20 possession of a firearm by a convicted felon.

21 In addition to the violence, all the older
22 siblings in the Rogers family were able to tell me
23 instances where drugs were in the house. James said
24 that he would watch his father pack drugs to be sold.
25 Ben, as he just said in the phone call, reported that

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1 at ten years old his father brought home marijuana and
2 taught the kids how to roll joints.

3 This behavior certainly could impact on a child's
4 life as the father -- and from what I have been able to
5 find out about the entire Rogers family, that
6 generation, Ben Rogers' generation, all of his brothers
7 and half-brothers had fairly dysfunctional upbringings
8 or lives. Seven of them -- he has seven brothers or
9 half-brothers and six of them have had problems with
10 substance abuse and six have had problems with law
11 enforcement. All of the siblings reported to me that
12 when the family gets together that there are these
13 fights.

14 One fight that Ben told me about was where they
15 fell into some cactus while fighting and were all
16 bloody and this brothers/uncles just continued fighting
17 until they just quit.

18 Ben, Jr. recalled an uncle shooting at their car
19 as they drove away once from a family information.

20 So that was information that I found out about Ben
21 and it certainly me to understand more about Tavarus
22 and his upbringing and what he must have gone through.

23 Q. Did you also find, collect, review and assess
24 information regarding Tavarus Rogers?

25 A. Yes, I did.

1 Q. Will this charts aid you in explaining ---

2 A. Yes, I can explain.

3 Q. --- your area of specialization and how you
4 assessed the issues that are important here today?

5 A. Let me get my glasses on so that I can see.
6 Certainly, the development or department therapists,
7 like Erickson, Freud and Pier Auge, have all come up
8 with different developmental theories, milestones,
9 things that kids are supposed to gain in their life as
10 they move from infant to adulthood.

11 What I have done is taken the psychoanalytical
12 work of Freud, the identify of Erickson and the
13 cognitive work and have developed it into one sort of
14 format which I -- this column here are the factors that
15 you would expect or want a child to have as they are
16 growing up, actually pre-birth and post-birth.

17 In pre-birth, you would like for there to be a
18 lack or alcohol or drug use, proper prenatal care,
19 you'd like for the baby to be wanted, and no physical
20 or emotional trauma to the mother of the child during
21 pregnancy.

22 In post-birth, you would look for adequate food,
23 sheltering and clothing; bonding with both parents,
24 especially the mother at birth; affection, nurturing
25 and care; a nonviolent environment, a safe and secure

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1661

1 environment; a consistent environment; fair treatment
2 of all siblings; positive role models for the child to
3 emulate; accepted value and reasonable expectations;
4 balanced values and priorities taught; independence
5 encouraged; and mentally and emotionally stable care
6 givers. This is what -- you would expect a child who
7 had these things to grow up "normal", if I could use
8 that term loosely.

9 Then as you see in the second column is what the
10 impact would be if the child experienced these things.
11 Just a few examples. If the child gets adequate
12 shelter, food and clothing, they don't have to worry
13 about surviving because they are got that. They're
14 free to go on and develop then.

15 If they have affection, nurturing and care, they
16 can show that care and sensitivity to others.
17 Children learn from their parents, they emulate their
18 parents -- and they emulate good things and they
19 emulate bad things.

20 If they are safe and secure, they're generous and
21 less fearful, more trusting.

22 If they have a consistent environment they have a
23 sense of family and belonging, they feel secure and
24 they establish relationships.

25 If they have positive role models, they develop

1 acceptable, healthy and responsible behaviors.

2 So there are certain positive impacts that you
3 would expect if these things existed in a child's life.

4 Q. And of course no child's life is perfect?

5 A. No, not by any means.

6 Q. Now, applying these critical factors to the
7 information that you reviewed and assessed and
8 analyzed, can you offer any testimony about how these
9 critical factors played a role or impacted Tavarus
10 Rogers' life?

11 A. Well, they impacted on the lives of all the
12 children in the Rogers family. Tavarus was a little
13 unique in a couple of ways. One, all the siblings made
14 it clear to me that the boys, the males in the family,
15 were held to a higher level of expectation than the
16 females. So right away Tavarus, the expectations for
17 him were greater. The siblings all said that the boys
18 were the ones that were beaten more regularly by Mr.
19 Rogers, the ones who were held accountable, the ones
20 that if something went wrong they were the ones that
21 received the beatings more than the females.

22 Tavarus was unique in another way in that
23 everybody older than Tavarus in the family had a family
24 member of a parent outside the Ben Rogers/Connie Rogers
25 family that they could go to when things got too

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1663

1 intolerable at the house. Tavarus didn't have that.
2 He was the oldest of that -- well, we don't have that
3 graph up anymore. He was the oldest of the line of the
4 family, so he had nowhere to go. All the others had
5 someplace else to go when things got bad, but Tavarus
6 had to stick it out.

7 In looking at Tavarus' life as to whether those
8 positive factors existed, let me (arranging file).

9 Okay.

10 Was there a lack of alcohol and drug use during
11 Connie Rogers' pregnancy with Tavarus? No. Ms. Rogers
12 admitted to me that she smoked cigarettes and drank
13 beer while she was pregnancy with Tavarus. As she
14 herself said, she didn't know that she was pregnant
15 until five and half or six months. So she did those
16 things without her knowledge that she was pregnant.

17 Prenatal care. She didn't know that she was
18 pregnant, so she only had one prenatal visit prior to
19 Tavarus being born.

20 Was he a wanted baby? I say no. That's sort of
21 unknown. She was unmarried at the time and this was
22 her third child and she was eighteen years old. Most
23 eighteen-year-olds aren't looking forward to being
24 unmarried and having another baby.

25 Was there any physical or emotional trauma to the

1 mother of the child during pregnancy? That would be
2 something that I wouldn't know. I assume that there
3 wasn't, but I have no idea -- I have no knowledge of
4 that.

5 Was there adequate food, shelter and clothing?
6 Ms. Rogers herself that after she had Tavarus that she
7 moved into a house with her grandmother, two cousins,
8 two aunts and her three children and slept in a one-
9 bedroom -- her room was one bedroom where they all
10 slept on the same bed. That condition continued after
11 she had her next child, Nikki. Then later, after she
12 married Mr. Rogers and they moved into a house, in '88
13 when he became injured, from '88 to '89 when he got his
14 settlement, their financial situation was very bad.
15 They were -- they went to relatives to get food. They
16 had a lot of hardships financially during that period
17 of time. Of course, his being injured was nothing that
18 he did on purpose but, still, during the formative
19 years of Tavarus' life he did not have adequate food,
20 shelter and clothing.

21 Was there a bonding at birth? Again, for the
22 first four weeks he was in the hospital, as Mrs. Rogers
23 said, because of the fact that he was born at seven
24 months gestation and weighed only three pounds. It
25 certainly wasn't her fault that she didn't have the

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1665

1 opportunity to bond with him but it is much more
2 difficult to -- it can be done, but it is much more
3 difficult when the child is in the hospital rather than
4 at home with the mother.

5 About a month after Tavarus was born is when his
6 father was arrested for DUI and resisting arrest, so he
7 spent some time in jail right Tavarus' birth. I think
8 that it was five months after he was born that Mr.
9 Rogers married Cheryl Ricks, so he went -- he was with
10 another family for a period of time.

11 Affection, nurturing and care? Again, that didn't
12 seem to exist in the Rogers family. Every sibling that
13 I talked to said that they were physically and verbally
14 abused. The word they all used was the word
15 "beatings". They didn't say "spankings", they did say
16 "whoopings", they didn't say "chastisements", they said
17 "beatings". Every time it was "beatings".

18 And they all told me about the tools that Mr.
19 Rogers made for the beatings. He made a paddle which
20 he drilled holes in. My understanding is that it hurts
21 more when there are holes, that there is less
22 resistance as it comes closer. And Tavarus told me
23 about being in the house when Mr. Rogers made this
24 paddle and that Mr. Rogers was bragging on what this
25 was going to do to the kids when he got this done.

1 He also made, as Ben, Jr said and as Tavarus told
2 me and as some of the other siblings have told me, he
3 also made a special sort of "tool" out of an extension
4 cord, a construction heavy-duty orange extension cord,
5 where he wrapped it in the middle with tape so that he
6 would have a handle to strike the children with.

7 He would use those kinds of instruments.

8 In 1991 when Mr. Rogers got home and found that
9 the children were fighting, he accused Tavarus of being
10 the instigator. He whipped Tavarus and he whipped
11 James for being the one fighting. The next day Tavarus
12 was sore and went to school and showed the sores and
13 the welts and bruises to the school there and the HRS
14 and -- it's DSS here, it's HRS there in Florida -- the
15 police and they got involved. Tavarus went to live
16 with his grandmother. All the kids -- there are so
17 many kids, I am not sure which ones were ---

18 Q. So that would have been when Tavarus was age
19 twelve, in 1991?

20 A. Yes. Benjamin and James went to live with Cheryl
21 Ricks; Johnny went to live with his father; Tenille
22 went to live with her mother, Gloria Daniels; and only
23 Quinton, Nikki and Jarvis were home during that period
24 of time after the allegation of abuse -- or when they
25 saw the marks.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1667

1 Q. So it was ---

2 A. Right. So there was no affection of nurturing or
3 caring. Tenille told me how she would -- how the kids
4 would be in another room while fights between the
5 parents went on, that they would just look at the walls
6 and wait for the fight to stop.

7 Tavarus also related to me a time when he wet the
8 bed -- let me go back a second. When Mr. Rogers
9 married Connie Rogers, although he had regular contact
10 with all the kids prior to marrying Mrs. Rogers, when
11 they got married, the first time, the kids lived under
12 a house. Tavarus and Nikki lived under the house with
13 Ben Rogers.

14 Mr. Rogers posted rules on the refrigerator and
15 these rules, according to all the children, changed at
16 the drop of a hat. The rule was whatever it was
17 because Mr. Rogers wanted it, and that's the way the
18 rule was. If they didn't follow the rule, they got a
19 beating.

20 This became so stressful that both Nikki and
21 Tavarus started wetting the bed at ages where they
22 hadn't wet the bed prior to that. Tavarus told me that
23 he would stay up to 2:00 or 3:00 in the morning to wait
24 to go to the bathroom rather than risk wetting his bed.
25 The one time that he can recall that he did wet his

1 bed, he got up and tried to hide the sheets. His
2 mother found the sheets, she showed them to Mr. Rogers
3 and he asked him if he'd wet the bed. He said that he
4 didn't. He said, "Are you calling your mother a liar?"
5 And Tavarus said, "I guess so." So he beat him.
6 Tavarus said, "He beat me, I feared I was going to
7 die."

8 It was this sort of situation that the kids were
9 living in, definitely not an affection, nurturing,
10 caring type of family.

11 The next one, I think that -- a nonviolent
12 environment. I think that I have touched on that more
13 times already than I need to. He was physically
14 abusive to both his wives, all the children have said
15 that. They were building a house and I mentioned that
16 the father and uncles would fight on a regular basis
17 and shooting went on when they were together.

18 Safe and secure? It is hard to be safe and secure
19 in this kind of environment. As Ben mentioned, the
20 older kids were sort of tricked into coming to live
21 with him.

22 Tavarus, at age eight, was being cared for by two
23 uncles who got him drunk. Got him drunk to the point
24 where he passed out and had to be rushed to the
25 hospital where they had to pump his stomach, and the

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1669

1 report said that he thought that it could have killed
2 him had it not been taken care of.

3 So he couldn't have felt safe and secure when the
4 people who were responsible for watching him were not
5 incapable of providing proper care for him.

6 Consistent environment? They had a lot of -- the
7 family moved frequently. There was no consistent
8 environment. I wish that I had the list of -- I forgot
9 to bring the list of the number of schools that Tavarus
10 attended over time. There was also a sort of sudden
11 move from Florida to South Carolina. I know what Mrs.
12 Rogers said, but they -- they moved and left everything
13 behind. It was rather sudden. Tenille -- there was
14 conjecture, nothing that I could prove, that there were
15 some other reasons why they had to leave the state.

16 Q. Was there an occasion during a move when Tavarus
17 was taken and not allowed to tell his mother goodbye?

18 A. Yes, that was a different time. He moved up here
19 and he had just finished the wrestling season, he was
20 doing good in school and his father told him that he
21 had to go find a job -- similar to what Ben, Jr
22 mentioned in his testimony.

23 They were living on St. Helena's Island. He rode
24 his bike into town, into Beaufort, and applied for two
25 jobs. Then he went over to Marie Smith's house, who he

1 considered his aunt, and he called his dad to tell him
2 that 'I've come into town, I've applied for two jobs.'
3 He dad reportedly got irrate, came to the house --
4 Quinton followed in a van and he came in his car. He
5 took off his belt, starting whipping Tavarus with the
6 belt, saying that he was disrespecting his mother, then
7 threw him in the car, with his clothes in the car, and
8 drove him back to Florida. He never got the
9 opportunity to say goodbye to his mother, he was just
10 taken to Florida.

11 This seemed to be the one incident that had the
12 most impact on Tavarus' life. Prior to that point,
13 even through all this that I have already mentioned, he
14 was a good student, he seemed to be trying hard in
15 school, he was actually a very bright student, was
16 considered for the gifted program when he was young.
17 He won a mathematician award when he was young. He
18 still, with all this chaos and all this abuse going on,
19 was trying to a go of things and this incident was sort
20 of the "last straw". His whole attitude, from
21 everybody that I've talked to, just changed to where he
22 didn't care anymore.

23 Consistent environment? As I mentioned, the boys
24 were held more accountable than the girls and that the
25 rules always changed whenever Mr. Rogers felt that they

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1671

1 needed to be changed. So the kids could not act one
2 way one day and the same the next day and be sure that
3 they were not going to get a beating for it.

4 Tavarus related an incident where there was a bag
5 of onions and somebody stuck some holes in the onions,
6 so Mr. Rogers lined up all the kids. Nobody would
7 admit to it, so he beat them all. Then he beat them
8 again and I think on the third time one of them, James,
9 admitted to sticking the holes in the onions. That was
10 the kind of behavior that Tavarus and his siblings
11 faced on a regular basis, daily.

12 Fair treatment? No. I think that I've mentioned
13 that.

14 Positive role models? There were no positive role
15 models in the family, given the way that his uncles and
16 his father acted. He did have a grandfather, "Pop",
17 who he was quite close to but Pop died when he was --
18 he was still living in Florida then. That was
19 something that devastated Tavarus from all reports.
20 He was his one positive role model.

21 Accepted value and realistic expectations? As Ben
22 mentioned on the phone and as all the other siblings
23 told me, there was a family tradition in the Rogers
24 home that if you didn't defend yourself or didn't
25 defend your siblings then you were drug back to defend

1 yourself against those people or you would be beaten
2 yourself. The one instance that all the kids
3 remembered, were telling me, was Ben and James (sic)
4 and Latonya were walking home when Benjamin was jumped
5 -- Ben, Jr. -- excuse me -- by another boy. Johnny
6 (sic) ran home for help and Mr. Rogers returned with
7 James, who was required to fight the boy who had jumped
8 Benjamin. Tonya reported that Mr. Rogers told James,
9 "If you don't whip the boy's ass, I will whip yours."
10 She said that James beat the boy until the boy had
11 blood flowing out of his mouth, with Mr. Rogers
12 standing over him urging him on.

13 That was sort of the mindset, that you did not
14 mess with the Rogers family and that if you did that
15 you were going to pay for it. And if you were a Rogers
16 child and didn't stand up for the Rogers' name, then
17 you paid for it.

18 Q. In terms of that fact or aspect, did you determine
19 whether or not when he was becoming successful, say, in
20 sporting activities such as the wrestling at Beaufort
21 High, did his father support him and attend those
22 practices and meets?

23 A. No. As Coach Damude said and as Tavarus told me,
24 his family never came to one of his wrestling matches
25 and they also never took an interest in his school work

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1 although, from all reports, he was a very good student.
2 They just didn't seem interested although there was
3 also that expectation that all the kids had that they
4 were supposed to help and support the family.

5 Balance of values and priorities taught? The
6 father's violent behavior, the father's multiple
7 arrests, the father being married to another woman
8 while he was having children by a different woman, all
9 conflicted with the father's insistence that the family
10 have Bible study every Monday through Thursday at 5:30.
11 They said that the kids were expected to come home, do
12 their homework and then have Bible study where they had
13 to read something from the Bible and then discuss it.
14 That's -- you can't get those kind of mixed messages as
15 a child and then sort out what you're supposed to think
16 and what you're supposed to believe.

17 Independence encouraged? It was just the opposite
18 in the Rogers family. Mr. Rogers was very controlling,
19 very smothering. Independence was not something that
20 was expected. You were supposed to do what Mr. Rogers
21 told you to do.

22 Q. What is the impact of that?

23 A. If you don't have an opportunity to exercise your
24 own judgment, then when you do have to make a judgment
25 the chances are that you will make a poor judgment. If

1 you don't have an opportunity to learn over past
2 judgments -- as a kid, you can make some decisions that
3 good, at times, but if you have a family that allows
4 you to say 'that was probably not something that you
5 should have done, and this is what you could do next
6 time.' Children learn by that. But if you have
7 somebody that was controlling and won't let you make
8 decisions, then when you happen to make a bad decision
9 you haven't learned and the next time the chances are
10 that you may make a bad decision.

11 Q. I see.

12 A. And, last, mentally and emotionally stable care
13 givers? From reports, we know that Mr. Rogers was
14 abused as a child himself. During the time that he was
15 injured he suffered from depression and was taking
16 anti-depression and anti-anxiety medication. He still
17 takes some pain relievers and some muscle relaxers.
18 The first time that I went to interview him he told me
19 that he did.

20 The last column is Tavarus' -- because these
21 things weren't present, this is sort of how Tavarus
22 felt about himself.

23 As I said, if you don't have adequate food,
24 sheltering and clothing, you're occupied with survival.

25 If you don't have bond at birth there's a sense of

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1675

1 abandonment.

2 All of these things point to Tavarus' thinking as
3 he grew up.

4 Q. Now, with all the information that you've gathered
5 from the interviews that you have conducted, were you
6 able to arrive at or develop some conclusions or
7 opinions about Tavarus Rogers?

8 A. Yes, I was. I had five sort of working hypothesis
9 or things that I was looking for as I did the
10 psychosocial assessment.

11 One, I wanted to find if there was evidence of
12 Tavarus Rogers' social and emotional functioning as a
13 child and as an adult was affected by childhood trauma
14 and family dysfunction.

15 And, two, was there evidence that Tavarus Rogers's
16 social environment played an adverse role in his social
17 and emotional functioning. By these charts, I believe
18 those both to be true. He certainly was affected --
19 his social and emotional functioning was definitely
20 affected by his upbringing and the childhood trouble
21 that he suffered, the childhood trauma that he
22 suffered.

23 On the third one, was there evidence that Tavarus
24 Rogers has significant history of mental illness or
25 substance abuse? Remarkably, given all this, I did not

1 find any evidence of mental illness in Tavarus Rogers.
2 He admitted to me that he used alcohol and that he
3 smoke marijuana. He did not feel that he had a
4 substance abuse problem, though he did use it on
5 occasion. He was evaluated while incarcerated by
6 Alcohol and they found that he did not need treatment,
7 so I would have to -- and I couldn't find any, so he
8 did not have a significant history or mental illness or
9 substance abuse.

10 There was evidence that Tavarus suffered any
11 significant head trauma? I always check for that in
12 case there is any possible brain damage. While other
13 members of the family told me that while he suffered
14 trauma to his body that there was no head trauma, no
15 injuries that could be reported by anybody. No car
16 accidents, no falling out of trees, falling off the
17 roof of the house or anything like that. I could not
18 find evidence of any significant head trauma.

19 And was there evidence that Tavarus Rogers had a
20 significant history of prior criminal convictions of
21 crimes of violence against other persons, according to
22 his family, according to Tavarus, and I checked the
23 criminal records, he had been arrested on such charges
24 as burglary, loitering, auto theft, criminal leadership
25 and petty larceny, possession of marijuana, possession

1 of crack cocaine, -- all these in those years after his
2 father had taken him back to Florida and said 'you
3 can't see your mother again.'

4 But nowhere could I find anything about any
5 conviction of a violent crime against another person by
6 Tavarus.

7 Q. And during the course of all the work and the
8 investigation that you did to gather this information
9 and make these assessments, would you be of the opinion
10 that his father, Mr. Ben Rogers, went out of his way to
11 assist you in gathering information to try to help this
12 defense team be prepared to save him.

13 A. Did you ask me if he went out of his way?

14 Q. Yes.

15 A. No, he did not go out of his way to help him at
16 all.

17 Q. Did you have any understanding that Mr. Ben Rogers
18 didn't understand the seriousness or gravity of these
19 charges?

20 A. No, I am sure that he understood the gravity of
21 the proceedings.

22 MR. KULP: Thank you, sir. Please answer any
23 questions that the Solicitor might have for you.

24 EXAMINATION

25 BY MR. MURDAUGH:

1 Q. Do I gather from listening to you that Tavarus had
2 a bad life and that as a result of the bad life did bad
3 things?

4 A. No. What I've said is that Tavarus had a bad life
5 and, because of those, that he could have made -- well,
6 I was going to say "decisions". It could have led him
7 to behaviors that were not good. Yeah.

8 Q. In other words, because of his bad life he went
9 out and killed some people?

10 A. I don't know that to be a fact.

11 Q. Did you ask him?

12 A. No, I don't deal with anything about the crime.

13 Q. Well, isn't it important, sir, if you're telling
14 these people what kind of fellow and whether he ought
15 to live or die, did you ask him, "Did you kill them?"

16 A. No.

17 Q. Why didn't you ask him, sir?!!

18 A. That's not the point of the psychosocial
19 assessment, sir.

20 Q. It's not the point, but isn't that important?
21 Isn't it important to them?!

22 MR. KULP: We object to the nature of the
23 question. He can ask questions of the witness just
24 like I have of the State and we don't need to have
25 histrionics. He can ask questions and the witness can

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1 answer it -- and be given a chance to answer the
2 question. Thank you.

3 THE COURT: Your objection is noted. The
4 witness can answer the question.

5 EXAMINATION RESUMED

6 BY MR. MURDAUGH:

7 Q. If I have offended you, I apologize. But don't
8 you think that's important?

9 A. As I have explained, ---

10 Q. Just 'yes' or 'no' and then you can explain.

11 A. Well, -- no.

12 Q. It is not important that he did or did not kill
13 these people and that you knew it at the time that you
14 were assessing him?

15 A. It is not important for me to do a psychosocial
16 assessment. That's not my role.

17 Q. So what you're telling me, sir, is that 'I
18 examined him and I made all these determinations, but
19 whether he killed people or whether he didn't kill
20 people is of no importance in reaching your decision.'
21 Is that correct, sir?

22 A. You want to say that again, please?

23 Q. Yes, sir. In making your assessments, you do not
24 feel that the fact that he either did or did not kill
25 one or two people makes any difference in the outcome

1 of your decision? Just 'yes' or 'no', sir, and then
2 you can explain it any way that you want to.

3 A. Well, no, the way that you asked the question.

4 Q. The answer to my question is that it does not make
5 any difference; is that correct, sir?

6 A. You asked if it would make any difference on
7 decisions that I made and the answer to that is 'no.'

8 Q. I have no further questions.

9 MR. KULP: I do.

10 EXAMINATION RESUMED

11 BY MR. KULP:

12 Q. Mr. Youngman, who in our system decides if someone
13 has committed murder? Is it these people, a jury?

14 A. Sure.

15 Q. Do you understand that this jury has made that
16 decision?

17 A. Yes, sir, I do.

18 Q. And that they did so Saturday night?

19 A. Yes, sir.

20 Q. You're not on the jury, are you?

21 A. No, sir.

22 Q. It is not your decision?

23 A. My role is to do a psychosocial assessment. I'm
24 hired in cases where somebody is on trial on murder. I
25 know that going into it. My role is not to determine

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of Jeff Youngman
Jury Trial of October 8-16, 2001

1681

1 whether they did the crime or not. My role is to
2 determine what led up to that moment, not whether that
3 crime did or did not occur. That's two different
4 areas. It's the guilt/innocent and then it's the
5 penalty phase. I am only interested in what happened
6 in that person's life that may or may not have caused
7 them to commit that crime. It is not part of my duties
8 in this role to determine whether that crime occurred
9 or not. I already know that he is on trial, that's why
10 I am here.

11 Q. Let me ask you just one last question. Would
12 anything that you've told this jury today under oath be
13 any different if these jurors had concluded otherwise?

14 A. No, I'd find the same things no matter what.

15 MR. KULP: Thank you.

16 THE COURT: Come down.

17 (WITNESS STEPS DOWN)

18 MR. FLEMING: Your Honor, may the witness be
19 excused?

20 MR. MURDAUGH: I certainly don't have an
21 objection.

22 THE COURT: Without objection, the witness is
23 excused.

24 MR. FLEMING: The Defense calls Jim Aiken to the
25 stand.

1 (WITNESS TAKES STAND)

2 JAMES EVANS AIKEN,

3 being duly sworn to tell the truth, the whole truth and
4 nothing but the truth, testified as follows:

5 EXAMINATION

6 BY MR. FLEMING:

7 Q. Your full name for the record, please.

8 A. James Evans Aiken. A-I-k-e-n.

9 Q. Mr. Aiken, would you please tell the jury what
10 your educational background is?

11 A. I was educated in the school systems of Camden,
12 South Carolina. Kershaw County. I received my
13 undergraduate degree from Benedict College, and I
14 received a Master's degree in Criminal Justice from the
15 University of South Carolina.

16 Q. What has been your life's work?

17 A. I have been employed in the profession of
18 Corrections since 1971.

19 Q. Can you summarize for the jury your work history
20 and also your qualifications concerning your work
21 history?

22 A. Yes. As I stated before, I started in
23 Corrections in 1971 as a social worker with the South
24 Carolina Department of Corrections at the Manning
25 Correctional Institution, which was a medium security

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of James Alken
Jury Trial of October 8-16, 2001

1683

1 facility located in Columbia, South Carolina. That
2 means that inmates could move from one section of the
3 prison to other sections of the prison without
4 necessarily the scrutiny of a maximum security prison,
5 but the external part of the prison was maximum
6 security. That is, we had electric wire fences, we had
7 detection systems, we had gun towers was lethal weapons
8 on them, we had dogs, etc.

9 From there I was promoted to Deputy Warden of that
10 same facility. Manning Correctional Institution was
11 what is called as a youthful offender facility. Not
12 juvenile but youthful offenders, persons anywhere
13 between the ages of eighteen to their mid-twenties.

14 I moved to Administrative Assistant of that
15 facility, then Deputy Warden of that facility.

16 From there I became Deputy Warden of the Cental
17 Correctional Institution in the State penitentiary,
18 better known as CCI. It was the most maximum-security
19 prison in the state of South Carolina and housed the
20 more predator-type inmate population, the most
21 disruptive inmate population within the system.

22 Then from there, I became the Warden of the womens
23 prison, located also in Columbia, South Carolina, where
24 we house all levels of security of female offenders.

25 Then from there I became Warden of CCI, the State

1 penitentiary where, as I just stated, we housed the
2 most dangerous predator inmate population. That
3 population included death row population, it included
4 inmate population that involved gang activities,
5 subversive activities within the facility. They were
6 the most dangerous people, the most dysfunctional
7 people within the correctional system, to say less
8 about the community.

9 Then from there I became the Deputy Regional
10 Administrator where I supervised sixteen prisons within
11 the state of South Carolina. I supervised wardens, I
12 made security evaluations, I made decisions as it
13 relates to the management and interpreting policies
14 over the Department of Corrections for the State of
15 South Carolina.

16 Then from there I was selected to become
17 Commission of Corrections with the Indiana Department
18 of Corrections, where I was the chief executive officer
19 for parole services, juvenile services, adult
20 corrections, and community corrections. I was a member
21 of the Governor's cabinet and I was the chief executive
22 officer and policymaker for the entire correctional
23 system of the State of Indiana.

24 Then from there I became the Director of
25 Corrections for the United States Virgin Islands. In

1 that position, I operated not only prisons but operated
2 jails also in that jurisdiction, similar to the one
3 that I just described to you as it related to the state
4 of Indiana.

5 By the way, also back in 1986 when I was Warden of
6 the State Penitentiary here in South Carolina, I began
7 my consulting career. I became a consultant for the
8 United States Justice Department, National Institute
9 and National Academy of Corrections, and I still
10 provide consulting services for them at this particular
11 time.

12 Those consulting services include, but are not
13 limited to, Correctional Leadership where I provide not
14 only on-site leadership training for those Criminal
15 Justice professionals but also have participated in the
16 development of that curriculum.

17 I also provide technical assistance in
18 relationship to providing or preparing staff for prison
19 disturbances and riots, hostage situations and that
20 sort. As well, I evaluate system productivities, not
21 only on an institutional level but on also an agency
22 level. And this is throughout the United States.

23 Also, I evaluate cost containment, ensuring
24 accountability.

25 Also, I teach people who are managing the violent

1 youthful offender in adult facilities; gang management;
2 security threats; terrorist containment.

3 Also, I teach new wardens. I teach wardens that
4 are experienced. Also I teach wardens of maximum and
5 super maximum security prisons.

6 I not only develop classification systems, I also
7 have classified literally thousands of inmates. What
8 that means is putting the right inmate in the right
9 level of security, in the right level of management, so
10 that this individual can be properly maintained.

11 Also, I do staffing analyses on the requirements
12 of security staff.

13 Also, I teach on avoidance and critical events
14 that occur in prisons. And I just completed a one-
15 year study on managing the hard-to-manage or violent
16 inmate.

17 I not only provide these services throughout the
18 United States, I also provide services for Canada,
19 Costa Rica, the Dutch Kingdom and Puerto Rico.

20 Q. Have you also been called to testify in various
21 courts throughout the United States?

22 A. Yes. I have provided expert testimony in the
23 state of South Carolina, the state of Georgia, the
24 state of Louisiana, the state of Missouri, the state of
25 Virginia and I've also provided expert testimony in the

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of James Aiken
Jury Trial of October 8-16, 2001

1 United States Federal Courts in the Districts of
2 Alabama and Connecticut.

3 Q. And in what field and specialty do you testify as
4 an expert?

5 A. An expert in Corrections and classification.

6 MR. FLEMING: Your Honor, at this time I would
7 move to have Mr. Aiken identified and admitted as an
8 expert to give his opinions concerning the issues of
9 corrections, classification and the adaptability to
10 prison.

11 MR. MURDAUGH: I do not care to voir dire.

12 THE COURT: Very well. I will find that he
13 meets the qualification to testify on those subjects.

14 WITNESS: Thank you very much.

15 EXAMINATION CONTINUED

16 BY MR. FLEMING:

17 Q. Mr. Aiken, in your involvement in this matter, you
18 were asked to do an analysis of Mr. Tavarus Rogers as
19 it relates to the Department of Corrections for the
20 State of South Carolina. Have you done that, sir?

21 A. Yes, I have, sir.

22 Q. Can you tell the jury what steps that you took to
23 do this and what your conclusions were?

24 A. I evaluated this individual by reviewing materials
25 as relates to his behavior not only in the community

1 but also in the course of a correctional environment
2 and will render a decision as relates to that.

3 As I stated to you before, I have classified,
4 evaluated and re-evaluated inmates thousands of times
5 in a maximum security environment as well as a minimum
6 security environment. In local terms or in layman's
7 terms, 'The buck stops with me.' I am the last
8 decision maker that puts their name on a piece of paper
9 as to whether a person should or should not be managed
10 or housed within a correctional environment.

11 And it is my opinion that this individual can be
12 housed in the South Carolina Department of Corrections
13 for the remainder of his life without causing an undue
14 risk of harm to staff, other inmates, nor to the
15 general community.

16 Q. In that regard, what is it like -- what does it
17 mean to be in prison in the state of South Carolina, in
18 maximum security?

19 A. Well, I might add also that this individual will
20 remain in maximum security.

21 Q. Why is that?

22 A. The reason why is because of the fact of what he
23 has done in the community.

24 Q. His conviction?

25 A. That's correct. Nothing that he can do will

1 reduce his level of security so that he will not be in
2 front of gun towers and fences and direct supervision
3 by staff on a continual basis. What was your question
4 again?

5 Q. Regarding it is like, what does it mean to be in
6 prison, in maximum security, in the South Carolina
7 Department of Corrections?

8 A. Prisons are dangerous. Prisons are places in
9 which very violent people are housed. And I am not
10 talking about violence from the standpoint of what a
11 person has done in the community.

12 I have had people to kill other people, multiple
13 times, but when they enter a prison environment they
14 are victimized. You have what is called predators
15 within prisons, those people that systematically --
16 systematically and continuously -- inflict violence
17 against other inmates as well as staff.

18 In a prison environment, you're constantly
19 evaluated and documentation is made as a result of your
20 behavior within a prison environment. You're told what
21 time to go to bed, you're told what time to get up,
22 you're told who you can talk to, you're told what time
23 you're going to eat and what you're going to eat. You
24 are told when you can go to medical. And everything
25 that you have is no longer private, it is public.

1 Your cell is evaluated and searched at any time the
2 staff deems appropriate. You are told what kind of
3 clothes that you can wear and, oftentimes, you have to
4 disrobe and become completely naked to be searched.
5 There is no privacy within a prison environment.

6 Some people may say, 'Oh, it's comfortable. You
7 get medical, you can go pray or you can -- sometimes
8 you can watch TV.' But South Carolina is one of the
9 roughest systems in the United States. A lot of things
10 that maybe other inmates enjoy, you don't enjoy in this
11 system.

12 The point is, you're constantly around people that
13 resolve their issues through predator violence.
14 Predator violence is those individuals, those
15 individuals that invoke power and control over
16 individuals within a prison. And I am not talking
17 about just taking a knife and killing someone with it.
18 I'm talking about sexual activities, like homosexual
19 activities. You've heard about that. It is not for
20 gratification. It's for power and control. And
21 people do this day-in and day-out within the prison
22 system.

23 And it's my job to ensure that people come out
24 alive, especially staff. We have staff that is
25 trained, trained to use lethal force if necessary;

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of James Alken
Jury Trial of October 8-16, 2001

1691

1 trained in defensive tactics; trained in how to search
2 a cell; trained in use of gas and restraints upon
3 inmates. We have facilities that are special designed
4 to minimize dysfunction within the prison, hostage
5 situations and other things that can occur within the
6 correctional system.

7 Also, we have enforced laws. They don't have the
8 same rights that you have. We can invade their
9 privacy, without undue process.

10 But the scariest part of being in a correctional
11 environment is that you're around people that don't
12 value life. And it's continuous.

13 Q. In your evaluation of Tavarus Rogers, were you to
14 classify him in the South Carolina Department of
15 Corrections, where would he fall in the predatory line?

16 A. Looking at his background, he would fall very low
17 on the predator standpoint. He would not be
18 considered, in the experience that I have as well as
19 the fact of inmate populations that we have in our
20 systems, he would not be classified or evaluated as a
21 prison predator.

22 Q. What would he be?

23 A. He would be in maximum custody and, to be very
24 frank and honest with you, I would have concerns about
25 him being a victim.

1 Q. He would be the subject of that predatory ---

2 A. Yes.

3 Q. I think that you have already said this but I want
4 to wrap this up. In your evaluation, do you believe
5 that he posed an undue risk to any staff members at the
6 South Carolina Department of Corrections?

7 A. No, he does not. As I stated before, I've made
8 these decisions thousands of time. This person can be
9 housed in my prison for the remainder of his life
10 without causing an undue risk of harm to staff, inmates
11 or the general community.

12 I can say that in my thirty years that I have
13 never lost a staff member as a result of my
14 classification decisions.

15 MR. FLEMING: Thank you, Mr. Aiken. I have no
16 more questions.

17 EXAMINATION

18 BY MR. MURDAUGH:

19 Q. Mr. Aiken, you work in the Department of
20 Corrections now?

21 A. No, I am a consultant now.

22 Q. How long has it been since you've been with
23 Corrections in South Carolina?

24 A. I have -- since employment or providing technical
25 assistance?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Testimony of James Aiken
Jury Trial of October 8-16, 2001

- 1 Q. Employment.
- 2 A. Employment, I left in 1989, if I am not mistaken,
- 3 sir.
- 4 Q. Approximately eleven or so years ago?
- 5 A. Yes, sir.
- 6 Q. My understanding is that you're telling me that
- 7 Tavarus Rogers will be placed in maximum security
- 8 because of what he's been convicted of?
- 9 A. That's correct, sir.
- 10 Q. And because of his dangerousness?
- 11 A. To the community, yes.
- 12 Q. And there are people within the prison system who
- 13 are dangerous to the community and who are also
- 14 dangerous to the other people in prison; are there not,
- 15 sir?
- 16 A. That's correct, sir.
- 17 Q. Peewee Gaskins killed Rudolph Tyner; didn't?
- 18 A. He sure did.
- 19 Q. Both of them being -- almost cellmates?
- 20 A. Not exactly.
- 21 Q. Well, excuse me. They were in adjoining cells, I
- 22 believe that it was?
- 23 A. They were in the same cellblock.
- 24 Q. Adjoining cells?
- 25 A. Not adjoining cells but the same cellblock.

1 Q. Are you sure of that?

2 A. Unless my memory mistakes me.

3 Q. It really makes no difference. And Peewee Gaskins
4 killed Rudolph Tyner, didn't he?

5 A. Yes, he did, sir.

6 Q. And Peewee was in there for what? Several
7 murders?

8 A. A number of murders, that's correct.

9 MR. MURDAUGH: Thank you, sir.

10 WITNESS: Thank you, sir.

11 THE COURT: You may come down.

12 WITNESS: Thank you, sir.

13 MR. FLEMING: May the witness be excused, Your
14 Honor?

15 THE COURT: Without objection?

16 MR. MURDAUGH: I have no problem with it, Your
17 Honor. Sorry, I was sitting here not paying any
18 attention.

19 THE COURT: Any other witnesses?

20 MR. KULP: No, Your Honor, the Defense rests.

21 THE COURT: Madame Forelady, members of the
22 jury, please retire to the jury room. We will take a
23 recess at this time. A fifteen-minute recess, and then
24 we will finish up after that.

25 (JURY OUT @ 3:50 P.M.)

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase
Jury Trial of October 8-16, 2001

1 THE COURT: Anything else that we need to do?

2 MR. MURDAUGH: Not that I am aware of, sir.

3 MR. KULP: Judge, you asked me to remind you
4 of two things. One is that if you found it necessary
5 to -- first, there's been no change in Mr. Roger's
6 decision to make a statement to the Court, as earlier
7 expressed to the Court. He in fact does not wish to
8 exercise his statutory right to address the Court.

9 THE COURT: Thank you.

10 MR. KULP: And you asked me to remind that if
11 in fact that decision changed, to bring it to your
12 attention. We did not do so before the jury was just
13 excused, because I thought that decision remained as
14 previously made. In fact, that is the fact. I just
15 confirmed it by consulting with Mr. Rogers, just a
16 second ago, again, and that is in fact the case.

17 THE COURT: In other words, he does want to
18 testify and he does not want to address the jury?

19 MR. KULP: That's correct, Your Honor.

20 THE COURT: Is that right, Mr. Rogers?

21 DEFENDANT: Yes, it is, sir.

22 THE COURT: Anything else that you want to say
23 about that? In other words, you are clear on that and
24 that is your decision?

25 DEFENDANT: Yes, sir.

1 THE COURT: Thank you, you (Mr. Rogers) may be
2 seated. And thank you (Mr. Kulp) bringing that up.

3 MR. KULP: And the second thing that you
4 wanted me to mention, Your Honor, is whether or not we
5 want to go forward on the Defendant's silence and I
6 think that we certainly will.

7 THE COURT: Okay.

8 MR. KULP: We (indicating Mr. Fleming) might
9 need to consult on that.

10 THE COURT: Do you have any other requests to
11 charge?

12 MR. FLEMING: Yes, Your Honor. Pursuant to the
13 recent case of *Shaffer v. South Carolina*, a United
14 States Supreme Court case, and I have an opinion
15 without the cite, but I have a copy of it here, we
16 would ask that Your Honor charge the following language
17 -- and I have it written, and I can pass it up,
18 (reading):

19 "When defining life in prison "imprisonment"
20 means until the death of the offender. No
21 person sentenced to life imprisonment
22 pursuant to this section is eligible for
23 parole, community supervision or any early
24 release program. Nor is the person eligible
25 to receive any work credit, education credit,

1 good conduct credit or any other credits that
2 would reduce the mandatory life imprisonment
3 required by this statute."

4 That is from 16-3-20(a), and we would ask that
5 that be charged to the jury.

6 THE COURT: Any objection?

7 MR. MURDAUGH: No, sir. I concur with that,
8 except I think that you have to tell the jury that with
9 the finding of an aggravated circumstances that is
10 correct. Because without the finding of an aggravating
11 circumstance, you could serve thirty years.

12 MR. FLEMING: I agree with the Solicitor, Your
13 Honor, that is the state of the law.

14 THE COURT: Are you going to write me out a
15 charge on that?

16 MR. KULP: Yes, sir.

17 THE COURT: If you will, just write it out and
18 give it to the clerk. I'm come back and look at that.
19 If you'all will just write that charge out, I will
20 certainly charge that.

21 MR. KULP: I will do it right now, Judge.

22 THE COURT: We are in recess for fifteen
23 minutes.

24 (BRIEF RECESS 4:00 - 4:25 P.M.)

25 (DEFENDANT PRESENT)

1 THE COURT: (Reviewing proposed charges), this
2 says something about *Griffon*, and I am not going to
3 charge that.

4 MR. KULP: Not *Griffon*?

5 THE COURT: We don't have circumstantial
6 evidence. It is just not needed.

7 MR. KULP: Correct, that's right. Thank you.

8 (JURY IN @ 4:25 P.M.)

9 BAILIFF DORSEY: Your Honor, all jurors are
10 present.

11 THE COURT: Madame Forelady, members of the
12 jury, we will have arguments from each side. The
13 Solicitor has the first argument and one of the
14 attorneys, probably Mr. Kulp, will have the argument
15 for the Defendant.

16 MR. MURDAUGH: May it please the Court.

17 THE COURT: Solicitor Murdaugh.

18 MR. MURDAUGH: Ladies and Gentlemen of the jury, I
19 am going to bore you to death for just a minute because
20 have got to explain to you a number of forms that you
21 will have in the jury room with you. There are some
22 seven forms.

23 Number one is a form entitled "Statutory
24 Instructions". Statutory Instructions contain two
25 things. They contain what the State alleges are

1 aggravating circumstance and you will see, "In
2 determining whether to recommend the Defendant, Tavarus
3 Rogers, be sentenced to life imprisonment, you may
4 consider the following aggravating circumstances", and
5 it lists four of them. Same thing that I told you
6 earlier, that the murder of Paul Reischl and James
7 Mitchell Riley were (reading): "committed in the
8 commission of kidnaping and that the murders of Paul
9 Reischl and James Mitchell Riley were committed while
10 in the commission of burglary; that the murders of Paul
11 Reischl and James Mitchell Riley were committed while
12 in the commission of armed robbery with a deadly
13 weapon; and, four, that two persons were murdered by
14 the same Defendant by one act or pursuant to one scheme
15 or course of conduct."

16 You will have that form in there, which isn't
17 numbered by the way, entitled "Statutory Instructions".
18 That is merely a guideline for you'all to use in making
19 a determination.

20 Now, in addition to those forms -- I reckon that
21 is number one.

22 THE COURT: It is number one.

23 MR. MURDAUGH: Sorry, it is numbered one. It's
24 written on the second page, "Form 1".

25 You will then have a form -- and remember the line

1 that I said you could be required to sign, where
2 everybody's name was listed? But this still doesn't
3 get to sentence, yet. It is merely to the issue of
4 whether or not there is in fact an aggravating
5 circumstance.

6 Form 2, (reading): "We, the jury in the above-
7 entitled case, unanimously find beyond a reasonable
8 doubt the following aggravating circumstances."

9 You'all should consider each of the four
10 aggravating circumstances listed on Form 1, which you
11 have already found by virtue of the verdicts which you
12 brought in but it is necessary that you affirmatively
13 do it again. Write those out, Madame Foreman, on
14 these lines if you so find them beyond a reasonable
15 doubt and then each of you'all sign them. That still
16 hasn't gotten to sentencing. This is only the
17 aggravating circumstances.

18 Then you have four -- or five -- five additional
19 forms. The first one is a unanimous finding of no
20 aggravating circumstances. If you'all decide that
21 there aren't any aggravating circumstances, you need to
22 sign Form 3.

23 The fourth one is that you'all are unable to agree
24 as to whether or not there are any aggravating
25 circumstances.

1 So you understand that? One form setting forth
2 what the aggravating circumstances are, and then Forms
3 2, 3 and 4 are forms where you either find the
4 aggravating circumstances, you do not find the
5 aggravating circumstances or can't decide on the
6 aggravating circumstances.

7 Do you follow me?

8 FORELADY: Yes, sir.

9 MR. MURDAUGH: Okay. Then once you get to that,
10 if you'all have decided that there is an aggravating
11 circumstance, then we come to the part where we talked
12 about -- many days ago, almost too long for me to
13 remember -- Form 5. This is the form that we talked
14 about, "Recommendation of Sentence, Life Imprisonment"
15 with places for twelve people to sign, (reading):

16 "We, the jury in the above case, having
17 unanimously found beyond a reasonable doubt the
18 existence of the following aggravating circumstances"
19 -- and it is important that if you decide on this
20 sentence that you write out on that Form 5 what the
21 aggravating circumstances are. That would be if you
22 want to give life imprisonment but find aggravating
23 circumstances.

24 Form 6 is the one that I talked to you all about.
25 That is the one that says, (reading):

1 "We find the following aggravating circumstances"
2 -- and, again, it is important that you write them out
3 on this form -- then it says, "and now recommend to the
4 Court that the Defendant, Tavarus Rogers, be sentenced
5 to death." That's number six.

6 Then there is a seventh form that says -- what
7 does it say? Oh, it says that you'all can't decide
8 what to do, either death penalty or life imprisonment.

9 You can read them when you get in there. They are
10 self-explanatory.

11 Let me say to you this, Ladies and Gentlemen of
12 the jury, it is somewhat difficult to argue to you
13 about a finding if you're going to give life
14 imprisonment because that is not what I am asking you
15 to do. But it is important under either circumstance.
16 With the death penalty, you cannot go forward unless
17 you have found one of the four aggravating -- or all of
18 the four -- circumstances. You cannot go forward with
19 that.

20 But even if you'all decide that there are
21 aggravating circumstances, you want to give life
22 imprisonment, it is extremely important that on that
23 form, whichever one that it was, written out the
24 aggravating circumstances.

25 Now, I told you that some of the things that you

1 could consider, some of what you had already heard,
2 ninety-nine percent of what you'd already heard, and --
3 and that was the case. You had found him guilty of
4 burglary, murder committed while in the course of a
5 burglary is an aggravating circumstance.

6 You have found him guilty of five counts of
7 kidnaping. Murder while in the commission of a
8 kidnaping is an aggravating circumstance.

9 You had found him guilty of armed robbery. Murder
10 while in the commission of armed robbery is an
11 aggravating circumstance.

12 You have found him guilty of two murders, two
13 murders by a common scheme or plan is an aggravating
14 circumstance.

15 So I would --- and I not telling you'all what to
16 do because, God knows, you've got a hard enough job as
17 it. But it would appear that you have already reached
18 that decision, even though you've got to do it again.
19 Do you all follow what I am saying?

20 It is important that if you think that there are
21 aggravating circumstances that you write it down.

22 I told you'all also that in considering whether or
23 not to give the death penalty that you should look at
24 the circumstances of the crime, the character of the
25 defendant. Let's talk about that a little bit. We

1 know from talking to the -- whatever he was, the fellow
2 with the mustache, social worker? Social worker.

3 We know from talking with him that Tavarus has a
4 prior record of burglary, that's what he said, and some
5 other stuff. I don't remember what all that it was.
6 He had already broken to somebody else's house or
7 store. It could be either one, because I know nothing
8 about whose place that he broke into.

9 We know from talking with the social worker --
10 and, you know, I am really not so sure what he told
11 you'all except that he told you'all that Tavarus has
12 led a terrible life; that he had gotten beat by a
13 paddle -- well, my daddy beat me a lot of time with a
14 paddle with holes in it. And I deserved every one of
15 them that I got, but I haven't killed anybody.

16 And I was sort of surprised when we were talking
17 to the brother, what was the brother's name? Ben.
18 When I was talking to the brother, Ben, on the
19 telephone and I said, 'Now, you got beat by your daddy
20 and you never committed a murder.' Then I went to the
21 next one and when I got to the third one, I said
22 whatever that boy's name was and I said, 'He hadn't
23 committed a murder.' And he said, 'yeah, he's in
24 prison for three right now.' I was sort of surprised
25 about that.

1 But what it boils down to is that you have to
2 judge everybody on their individual merits. You have
3 got people in this family that are good people. You
4 have got people that run filling stations, and some of
5 them are trifling and some of them are good. You've
6 got people that run banks, some of them are good and
7 some of them steal and some of them are trifling.
8 You've got lawyers, some of them are good and some of
9 them are trifling. It is like every family, every
10 business, every community affair, there are some people
11 that are good and some that are bad.

12 If you go by what the social worker said, that if
13 you get beaten and treated bad and not provided for
14 that you're going to be bad. Well, I don't believe
15 that. I believe that everybody grows up in this
16 country on their own merits. It is real nice to have
17 mama and daddy sitting there helping, but I don't
18 believe that because mama and daddy don't give you the
19 things and nurture you and all this kind of stuff, I
20 don't believe that that makes you a bad person.

21 But if it does, what different does it make?

22 We know that on that date, Tavarus Rogers
23 committed two murders. One, we know that he shot a
24 fellow in the back bedroom twice in the abdomen and he
25 chest at close range. You can look at the holes. You

1 know, if you shoot a shotgun, Madame Forelady, Ladies
2 and Gentlemen of the jury, -- if I shoot you from back
3 here, when those pellets come out of that gun they get
4 bigger and bigger and bigger. I don't know if any of
5 you'all hunt or not but it gets bigger and bigger and
6 bigger. They don't get big enough for me to hit a
7 dove, but they do get bigger and bigger.

8 On the other hand, if I shoot you from this
9 distance the hole, because it travels such a short
10 distance, is smaller.

11 So look at that picture, Exhibit 16. It is
12 evident that the wounds were in close proximity.
13 That, Ladies and Gentlemen, is bad enough but then --
14 and you realize, it just dawned on me, you'all remember
15 the testimony that the man is in the back room saying,
16 'I will give you what you want' or words to that
17 effect, 'don't do it, don't kill me.' BAM! BAM! He's
18 dead.

19 That's bad enough but he comes out into, I think,
20 the kitchen and he says, "Where's Mitch?" And Mitch
21 says, "Man, I just putting my cigarette out." He
22 kicked him and he beat him, knocked him to the floor
23 and West McKinnon, who is his codefendant, it holding
24 the gun on these people who are on the ground, said,
25 "Man, V, don't it!" Mitch says, "Man, don't shoot me.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Closing Argument by Mr. Murdaugh on behalf of the State
Jury Trial of October 8-16, 2001

1 Don't do it!" And what happened? BAM! He's dead.

2 Let's look at where it was (displaying State's
3 Exhibit 17. If that is not an execution-style killing,
4 there has never been one.

5 You will have in the jury room with you, State's
6 Exhibits 17 and 18. That's the pictures you'all saw
7 earlier.

8 As you look at those blood splatters, when a
9 bullet goes into somebody splatters are going to be in
10 the direction of the projectile. So he had to be on
11 his hands or knees to have gotten killed and -- not
12 standing up! Not even a chance of fighting him, but on
13 his hands and his knees begging for his life! Saying,
14 "Don't kill me!" And West McKinnon saying, "Don't do
15 it, V! Don't do it, V!!" While he is on his hands and
16 knees, he shoots and kills him.

17 I could sit here and talk to you'all a long time
18 that you'all are the conscience of this community and
19 you need to send a message.

20 MR. KULP: I'm sorry, Your Honor. I have to
21 interpose an objection on that as an instruction.

22 THE COURT: Yes, sir. I think so, Solicitor.

23 MR. MURDAUGH: Yes, sir. You need to look at this
24 case. As I say, you are the conscience of the
25 community.

1 MR. KULP: I object again, and ask for ---

2 MR. MURDAUGH: The law says -- that is the law,
3 sir. No question about that.

4 THE COURT: I think that he can use that, the
5 conscience of the ---

6 MR. KULP: Please note my objection.

7 MR. MURDAUGH: I will be glad to give you the
8 cite. I know that's the law, sir.

9 And you must do what your feelings are in this
10 case. If you all think that he deserves to live, find
11 him guilty of life imprisonment after finding an
12 aggravating circumstance.

13 If you think that he is entitled, because of the
14 accidents that he committed, an execution-style killing
15 of two or more people at the same time, then find him
16 guilty and give him the death penalty.

17 Give him the same consideration that he gave these
18 two people. He has come in and begged for his life
19 before you, through his witnesses. Do what you think
20 is right, that's all I ask. That's all that the
21 families ask, that you reach a verdict -- and "verdict"
22 is derived from the Latin phrase veredictum, which
23 means to "speak the truth". Whatever your verdict be,
24 let it speak the truth in this case; the truth being
25 that he took lives without any thought, without any

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Closing Argument by Kulp on behalf of Defendant
Jury Trial of October 8-16, 2001

1 conscious effort to do anything except steal the dope.

2 Thank you, Ladies and Gentlemen.

3 THE COURT: Did you have a curative instruction
4 that you wanted on that other thing.

5 MR. KULP: We will find it.

6 THE COURT: Sir?

7 MR. KULP: We will find it, Your Honor. I
8 don't have it handy.

9 THE COURT: You don't want anything?

10 MR. KULP: Well, I do. I just don't have it
11 handy at this time.

12 THE COURT: Well, Madame Forelady and members
13 of the jury, when the Solicitor said something to the
14 effect about "send a message", please disregard that
15 and do not -- do not consider that in any way in your
16 deliberations.

17 MR. KULP: Thank you, Your Honor. May it
18 please the Court.

19 THE COURT: Mr. Kulp.

20 MR. KULP: Ladies and Gentlemen, I apologize
21 for interrupting the Solicitor but I'm required to make
22 that objection. That was improper because your
23 decision in this case does not have anything to do with
24 that issue of the conscience of the community. That is
25 not the standard by which you will make this difficult

1 decision. Again, I apologize for the interruption but
2 the law requires that I stand up there and object.

3 My name is Tim Kulp, I will tell you again. I
4 don't live around here, I live in Charleston, I live on
5 Johns Island. I am from Columbia. I left there in
6 1978, went into the FBI, went to Miami for a couple of
7 years and then I came to Charleston and I was the
8 Solicitor, like Mr. Murdaugh. I did that for a while
9 and then I went into private practice. The more cases
10 that I handled, more of them were cases taking me into
11 criminal court. All of my experience has been in
12 criminal court. So that's what I do.

13 I started a little late, 49. I started a little
14 late but I've got two little boys. One is named Jack,
15 he's about four, and the other one is seven and his
16 name is Will. I haven't seen them now in about eight
17 days. My wife came down a couple of times to check on
18 me but I haven't seen them. The reason that I mention
19 that is simply because I have to tell you, I am just a
20 lawyer and just a man. I can't explain any of this to
21 you. I am not sure that anybody can. It's a
22 nightmare, it's terrible.

23 But when I think of my boys, I can't help but
24 think how we get from that little boy in the picture to
25 Coffin Point Road on the evening of this nightmare.

1 And while we can't explain anything, something has got
2 to play a role to some degree on how you go from
3 kindergarten to Coffin Point Road.

4 I want my little boys, like any father, to grow up
5 in my image, what I think is important. I want them to
6 be honest, I want them to be fair, I want them to be
7 peaceful, I want them to fear God, I want them to be
8 kind, I want them to be smart, everything that
9 everybody wants their children to be and I am hell-bent
10 on accomplishing that the best that I can. That's my
11 duty as a parent.

12 We presented witnesses to you knowing that you'd
13 promised, taken an oath, to consider all the
14 information. It is clear, and you should know, that
15 those witnesses were not for the purpose of trying to
16 excuse this conduct. It can't be excused. Those
17 witnesses were to try to help you and to help me try to
18 submit to you how you get from kindergarten to Coffin
19 Point Road. How that happened -- all of you have been
20 following this, so you may have your own ideas or
21 assessment -- not from a professional point but a
22 humanistic point of view.

23 Does that mean that it is okay? No.

24 Is that an excuse? No.

25 But how else do you explain that?

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State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Closing Argument by Kulp on behalf of Defendant
Jury Trial of October 8-16, 2001

1712

1 Do you take a child and let the years past and on
2 his own he become capable of a decision such as that
3 which was made that evening at Coffin Point Road?
4 No.

5 And does that relate to what the appropriate
6 punishment in this case is? I would respectfully say
7 to you that it does.

8 Connie, his mother, loves him. And Connie, to use
9 that all old expression, is "between a rock and a hard
10 place", being squeezed to the hilt taking that stand
11 today. When she took that stand, you could see the
12 love that she had for her son even in this situation.
13 And I hope you could see the reticence, based on the
14 fear that she had within her of her husband.

15 Now, when we were going over all those instances
16 and we heard the voice of the son who got out of the
17 nightmare, who went in the Marines and got out of this
18 nightmare, a lot of things were said about the dad. I
19 submit to you that everything that Ben said over the
20 phone was true. And how do you know that?

21 There's two ways that you know that. One is
22 because you didn't see Ben, the father, go to the
23 witness stand and beg for the life of his son. Ask
24 anyone, my four-year-old and seven-year-old, your
25 children. Were you waiting for him to get up there and

1 beg for the life of his son? Did you expect to see
2 him or by then had you already figured out what we were
3 trying to present to you? The problem was that while
4 we were doing that, he was smirking and smiling. I
5 can't explain that either. I can't even imagine it.

6 We put Jeff up here, the sociologist, not for a
7 "Twinkie defense", we're not here saying that he ate a
8 Twinkie and this is why it happened. We're not here
9 saying that he watched some shows on TV and this is why
10 it happened. We're not saying that he took Prozac and
11 had a bad reaction. Did Ben get up here and deny that?
12 Did he get up here and say, 'My sons are lying.
13 They're just lying to try to save the life of the
14 other.' No. It wasn't challenged. What Jeff told
15 you, and it was slow and it was important, and he
16 reviewed it, he told you that those other things do
17 cause an effect. And that one of the key notes is in
18 decision making.

19 That doesn't mean that it is okay. That doesn't
20 mean anything other than that you have to take that
21 into consideration in trying to figure out how you get
22 from kindergarten to Coffin Point Road.

23 Then you heard Mr. Fleming examine Jim (Aiken) who
24 told you, in terms of the issue of punishment, what
25 prison is like from a thirty-year voice of experience.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Closing Argument by Kulp on behalf of Defendant
Jury Trial of October 8-15, 2001

1714

1 And how it may include more harm than simply being
2 caged and locked up until you die.

3 Jim, being honest, complete, full and candid,
4 mentioned Tavarus having arrests as a juvenile. You
5 heard that. The Solicitor made a big deal out of it.
6 But he said that they were arrests. He didn't say that
7 they were convictions. And I ask you this, was that
8 back down in Florida when he made that reference, when
9 he was a teenager, a juvenile. And was there anyone
10 down there supervising him? Was anyone being a parent
11 to him? Was anyone being a guardian over and looking
12 out for him?

13 The judge has told you, and it is important to
14 tell you again, that it is a two-part process. The
15 Solicitor reviewed forms that you need to use in making
16 your consideration, and they're an important -- they
17 are designed to logically take you through the decision
18 making process to arrive at the decision as to the
19 appropriate punishment of that young man in this case.

20 I told you in the opening part of this phase of
21 the proceedings that we are not -- that the issue of
22 aggravating factors, you found that. You debated, you
23 injected and presented your individual findings and
24 collective decisions in that regard and, I've told you,
25 we don't take issue with that. You've decided that

1 already, so I am not addressing the aggravating
2 factors.

3 But it is important, I think, for me to remind you
4 that if you find all the aggravating circumstances that
5 you have a next decision to make and that is what the
6 appropriate punishment would be even if you have
7 aggravating circumstances.

8 And when you're deciding that, it is important,
9 and the judge will tell you, that you must make the
10 decision individually -- and we went through that in
11 *voir dire* when we had you on the witness stand, under
12 oath. Can you think about it? Can you consider the
13 appropriate aspect? Have you not made your mind up
14 already? Even in the worst situation that you can
15 imagine, could you still consider life imprisonment
16 until the person dies? Each and every one of you said
17 'yes', and that's why you went into the pool the jury
18 was picked from.

19 The question is, what is the appropriate
20 punishment. Is life imprisonment enough? Is life
21 imprisonment sufficient? Is taking him from here to a
22 facility and locking him up forever, until he draws his
23 last breath, sufficient punishment?

24 For some, they think that would be worse than
25 dying. Under his current life expectancy, every day he

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Closing Argument by Kulp on behalf of Defendant
Jury Trial of October 8-16, 2001

1716

1 awakens, every night in prison when he goes to bed, he
2 knows why he is there and the other thing that he knows
3 is that he never, ever, ever leave.

4 Your decision is not to be based on vengeance or
5 anger, your decision it to be based coolly and
6 collectively on what the appropriate punishment would
7 be and that the ends of that punishment will be met by
8 that decision.

9 Deciding that he should die will not accomplish
10 many things. Unfortunately, it will not bring back
11 those who have died, who were murdered. It will not
12 ensure that murder never takes place again.

13 There are some who said that the death penalty is
14 not punishment, that it is what it is. It's an
15 execution.

16 You know, you're going to be able to take all the
17 evidence back with you for review. Those are going to
18 include these pictures that I told you what they were
19 before you were asked to review them carefully. The
20 pictures of that young boy long before Coffin Point.

21 As I was looking through those photos and you were
22 handed them, as we call "published" them for your
23 review, I got them back and I looked at them and
24 noticed something that I didn't notice prior to that
25 time. What I noticed -- and maybe you did when you

1 were looking at these -- I noticed this picture of this
2 little boy and that young man. I turned the photo over
3 and I saw on the back of it something that I had not
4 seen, the words that this little boy who no one ever
5 intended to be over there in that chair, to have done
6 what he did that night, that no one imagined, who was
7 trained by his father in ways that no child -- forget
8 just beatings, spankings. You heard it, nobody denied
9 it. And that man? Where is he? He is not even here.

10 THE COURT: Now, you're speaking outside the
11 record when you go beyond the bar. So don't do that,
12 please, sir.

13 MR. KULP: Yes, Your Honor. He said, when he
14 was five years old, in a child's scrawl, "I love you,
15 Mommy." And his mother sat right here, under the
16 glare of her husband Ben, and she said the same thing,
17 "I love you, Tavarus, no matter what. And if you're
18 going to die for this thing that you've done" -- she
19 didn't say it, "put him in a cage, lock him down, let
20 him live in irons" -- she is not responsible. I am not
21 saying that his father is responsible. But I am saying
22 that all of this relates to the issue of execution, for
23 the rest of his life in prison, separate and apart from
24 harming anyone else, ever.

25 THE COURT: Madame Forelady, members of the

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Judge's Charge to Jury
Jury Trial of October 8-16, 2001

1718

1 jury, you've heard the testimony, the evidence and the
2 arguments of both the State and the Defendant. Now I
3 will explain to you the law that applies to this case.

4 Under the constitution and the laws of South
5 Carolina, you are the finders of the facts in this
6 case. As the judge, I don't have a right to pass upon
7 the facts, or express any opinions that I may have as
8 to them.

9 You also are the judges, the sole judges, of the
10 credibility and believability of the witnesses who have
11 testified. In passing upon their credibility you have
12 the right to take into consideration such things as the
13 demeanor or manner of testifying, whether the witness
14 had reason to be biased or prejudiced, whether a
15 witness' testimony was contradicted or supported and
16 corroborated on the other hand. You certainly do
17 determine this credibility or believability by counting
18 witnesses for either side.

19 You may believe a portion of a witness' testimony
20 and disbelieve another portion of it, or vice-versa.
21 You may believe one witness against several or several
22 against one. And in all these things, bear in mind
23 that you should give the Defendant the benefit of a
24 reasonable doubt.

25 You have heard the testimony of expert witnesses.

1 This is a person who has special knowledge or education
2 or experience in a particular field. You should
3 consider expert testimony in the same manner as you do
4 any other testimony, and you may give it such weight as
5 you believe that it deserves when considered with all
6 the evidence in the case.

7 By the same Constitution and laws that make you
8 the finder of the facts and the evidence, makes me as
9 the judge the sole and only instructor in the law. You
10 must accept as correct the law which I have charged and
11 apply it to the evidence as you find it and reach your
12 verdict.

13 And finally I charge you in this regard that you
14 should not be concerned about what you think the law
15 ought to be but, rather, what I charge you the law to
16 be.

17 Members of the jury, it now becomes your duty to
18 decide what punishment that you recommend this Court
19 impose upon the Defendant. There are two verdicts that
20 you are to consider in this case. One is the death
21 penalty, which in this state is by electrocution or by
22 lethal injection. The other is life imprisonment.

23 I further charge you that if you find beyond a
24 reasonable doubt one or more statutory aggravating
25 circumstances and a recommendation of death is not

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Judge's Charge to Jury
Jury Trial of October 8-16, 2001

1 made, I instruct you that this court must impose a
2 sentence of life imprisonment. Life imprisonment means
3 imprisonment to the death of the offender. No person
4 sentenced to life imprisonment pursuant to this section
5 is eligible for parole, community supervision or any
6 early release programs. Nor is the person eligible to
7 receive any work credits, education credits, good
8 conduct credits or any other credits that would reduce
9 the mandatory life imprisonment.

10 Please understand your sentencing recommendation
11 will be followed by this Court.

12 Now, the order in which I explained these two
13 sentences to you is in no way a recommendation by this
14 Court as which sentence you should choose to recommend.
15 It is simply that one must be stated first. In fact,
16 the order in which I present these or explain these to
17 you is not in the same order in which I'm going to give
18 them to you with the verdict forms which I have
19 prepared.

20 I will first explain to you the death penalty,
21 which is actually Form 6 in the forms which I am
22 handing to you. By this recommendation, the sentence
23 form, which is what I am holding in my hand and which
24 you will have in the jury room with you, you the jury
25 may recommend that this court sentence the Defendant to

1 death. Please observe that immediately below the body
2 of the recommendation that there are twelve lines.
3 Right here it says, "Foreperson" and then eleven lines
4 under that. This is where you, should you decide to
5 recommend the death penalty, each of you, would sign
6 your name.

7 Is it the law in this state, Madame Forelady and
8 members of the jury, that a recommendation for the
9 imposition of the death penalty must be a unanimous
10 recommendation and that each and every juror sign his
11 or her name to the recommendation form. Also, please
12 remember that your sentencing recommendation will be
13 followed by this Court.

14 I will now read you the text of this form,
15 (reading): "We, the jury in the above entitled case,
16 having unanimously found beyond a reasonable doubt the
17 existence of the following statutory aggravating
18 circumstances, to-wit:" -- and then there are lines for
19 you to write those. And on the statutory instructions,
20 which are in the packet with the possible verdict
21 forms, Form 1 is the statutory instructions, and which
22 I have signed. There are four possible aggravating
23 circumstances which are, as follows:

24 One, the murders of Paul Reischl and James
25 Mitchell Riley were committed while in the commission

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Judge's Charge to Jury
Jury Trial of October 8-16, 2001

1 of kidnaping.

2 Two, the murders of Paul Reischl and James Riley
3 Mitchell were committed while in the commission of
4 burglary.

5 Three, the murders of Paul Reischl and James
6 Mitchell Riley were committed while in the commission
7 of a robbery while armed with a deadly weapon.

8 Four, two persons were murdered by the said
9 Defendant by one act or pursuant to one scheme or
10 course of conduct.

11 And of course this form goes on to say, "now
12 recommend to the Court that the Defendant, Tavarus
13 Rogers, be sentenced to death." And as I said, there
14 is a place for each of you to sign if that be your
15 recommendation. And as I said, your recommendation
16 will be followed by the Court no matter what your
17 recommendation is.

18 Now, for this recommendation be made, that is that
19 the Defendant be sentenced to death, you must first
20 find that a statutory aggravating circumstance existed
21 beyond a reasonable doubt, at least one of them.

22 What is a statutory aggravating circumstance? It
23 is a fact, an incident, a detail or an occurrence which
24 the South Carolina General Assembly has declared by
25 statute would "make worse", that is, aggravate, the

1 offense of murder when the two occur together. In
2 other words, it is something which increases the
3 enormity or adds to the injurious consequences of the
4 offense.

5 And, of course, this is all on the statutory
6 instructions which I am holding up. On this sheet of
7 paper that I hold in my hand are the words "Statutory
8 Instructions" and you will have this paper in the jury
9 room with you during your deliberations. I have
10 already told you from that what is a statutory
11 aggravating circumstance.

12 Let me emphasize to you that these are the only
13 circumstances that you may consider as aggravating
14 circumstances. Should you find, and it must a
15 unanimous finding, that is a finding by each and every
16 one of you, that the State has proven beyond a
17 reasonable doubt the existence of one or more
18 circumstances listed on this sheet of paper, then you
19 would be authorized, which is say "permitted", to
20 consider recommending to this Court that the Defendant
21 be sentenced to death.

22 And please pay particular attention to this. You
23 are never required to recommend the death penalty, even
24 if you find one or more of the statutory aggravating
25 circumstances existed at the time that the offense

1 occurred. However, if you find that the existence of a
2 statutory aggravating circumstance, please list that
3 circumstance on the form entitled "Aggravating
4 Circumstances", and all twelve jurors will sign this
5 form. That's actually Form 2, which is what I am
6 holding before you.

7 I instruct you further that should you find that
8 the State has not proven that an aggravating
9 circumstance existed. That is to say that you find
10 that you still have a reasonable doubt as to the
11 existence of such a circumstance, then you would not be
12 authorized to recommend the death penalty or life
13 imprisonment. This simply means that if the jury does
14 not unanimously find the existence of any statutory
15 aggravating circumstance, beyond a reasonable doubt, it
16 shall not make a sentencing recommendation. You will
17 then sign the form which I have provided which simply
18 states that the jury has been unable to unanimously
19 agree upon the existence of any aggravating
20 circumstance or circumstances. The foreperson would
21 sign this form and, thereupon, your deliberations would
22 end. That is Form 4, (reading): "We, the jury, in
23 the above-entitled case are unable to unanimously agree
24 on the existence of any aggravating circumstances."

25 Now, should you find beyond a reasonable doubt

1 that one of the aggravating circumstances listed on the
2 sheet of statutory instructions existed at the time of
3 the murder and should you then decide, after
4 considering the evidence in favor of a recommendation
5 of life imprisonment, about which I will instruct you
6 later, that if the recommendation of the jury is to be
7 that the Defendant be sentenced to death, then it would
8 be your duty, Madame Forelady, to write on the
9 Recommendation of Sentence form the statutory
10 aggravating circumstance or circumstances which you
11 have found. Then, Madame Foreperson, you and each and
12 every juror would sign your names in the places
13 provided.

14 I am now holding up a Recommendation of Life
15 Imprisonment form which says, (reading): "We, the jury
16 in the above-entitled case have unanimously found a
17 reasonable doubt as to" -- excuse me. To say the
18 least, these forms are confusing. Explaining them is
19 confusing but I think that you will understand them
20 when you get them.

21 All right. The Recommendation of Life
22 Imprisonment form, (reading): We, the jury in the
23 above-entitled case, having unanimously found beyond a
24 reasonable doubt the existence of the following
25 aggravating circumstances, to-wit, now recommend" --

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Judge's Charge to Jury
Jury Trial of October 8-16, 2001

1 and, of course, you list the aggravating circumstances
2 that you found unanimously. (Reading): "...now
3 recommend to the Court that the Defendant, Tavarus
4 Rogers, be sentenced to life." Then each of you would
5 sign that. Of course, there are twelve lines.

6 This is where you should -- if you decide to
7 recommend life imprisonment, and each of you would --
8 you're not required to recommend -- excuse me.

9 Sign the form which states that you're -- well,
10 excuse me.

11 I will go on to this form. And should you find
12 beyond a reasonable doubt that one of the aggravating
13 circumstances listed on this sheet existed at the time
14 of the murder and then should you decide, after
15 considering the elements, in favor of a recommendation
16 of life imprisonment -- wait just a minute. I'm
17 confused about it myself.

18 All right. If you find an aggravating
19 circumstance and wish to give life imprisonment, of
20 course you can do that because you're never required to
21 give, no matter if there are aggravating circumstances
22 or not, you may still give a life imprisonment.

23 There is another form in here which says,
24 (reading): "We, the jury in the above-entitled case,
25 having unanimously found one or more of the aggravating

1 circumstances" -- on this form which is Form 2 --
2 "cannot unanimously agree on the recommended
3 punishment." So basically you will use the forms and
4 follow those.

5 Let me instruct you on the mitigating
6 circumstances, too, and I think that's about it.

7 You must also consider mitigating circumstances.

8 First, were the existence of statutory mitigating
9 circumstances supported by the evidence?

10 Second, were the existence of any other non-
11 statutory mitigation circumstance supported by the
12 evidence?

13 That is also listed on the Statutory Instructions
14 which are signed by me. You can therefore tell that
15 they are separate from the -- (pause).

16 Mitigating circumstances which have been submitted
17 are, as follows:

18 First, the defendant has a significant history of
19 prior criminal convictions involving the use of
20 violence against another person; and

21 Second, the age of mentality of the defendant at
22 the time of the crime.

23 You may also consider any non-statutory mitigation
24 circumstance in addition to any other factor. The non-
25 statutory mitigation circumstance listed was, "The

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Judge's Charge to Jury
Jury Trial of October 8-16, 2001

1728

1 Defendant was subjected to physical abuse as a child."

2 As I say, you should consider whether the
3 existence of a statutory mitigating circumstance was
4 supported by the evidence and, secondly, whether the
5 existence of any other statutory mitigating
6 circumstances was supported by the evidence.

7 What is a statutory mitigating circumstance. It
8 is a fact, an incident, a detail or an occurrence which
9 the South Carolina General Assembly has declared by
10 statute which would reduce the severity of the offense
11 of murder. In other words, it is a circumstance
12 recognized by statute as one which, in fairness and
13 mercy, may be considered as extenuating or as reducing
14 the degree of moral culpability for the commission of
15 the act of murder. Mitigating circumstances are
16 neither justification or an excuse for the murder, it
17 simply lessens the degree of one's guilt. That is, it
18 makes him less blameworthy or less culpable.

19 What are the mitigating circumstances that you
20 should consider in this case? As I say, I have read
21 them to you and I refer you once again to the paper
22 entitled "Statutory Instruction", which you will have
23 in the jury room with you.

24 As I say, you may also consider any statutory
25 mitigating circumstances.

1 A non-statutory mitigating circumstance is one
2 which is not provided for by statute but which is one
3 which the defendant claims serves the same purpose,
4 that is to reduce the degree of his guilt in the
5 offense.

6 There must be some evidence that would support a
7 finding by you that a statutory or non-statutory
8 mitigating circumstance exists, and it is not necessary
9 for you to find the existence of such a circumstance
10 unanimously or beyond a reasonable doubt.

11 In reaching your decision as to which sentence to
12 recommend, you will consider the aggravating and the
13 mitigating circumstances.

14 While an aggravating circumstance must be found
15 before you can even consider recommending the death
16 penalty or life imprisonment, once such a finding is
17 made beyond a reasonable doubt, you may recommend the
18 death penalty even though you find the existence of a
19 statutory mitigating circumstance or a non-statutory
20 mitigation circumstance, or both.

21 In other words, the existence of an alleged
22 statutory mitigating circumstance and an alleged non-
23 statutory mitigating circumstance are both -- that it
24 is not a bar to the imposition of the death penalty.

25 In any instance, should you choose to recommend

1 life imprisonment you must still find the existence of
2 a statutory aggravating circumstance or circumstances.
3 Your decision must be a unanimous one and each and
4 every juror would be required to find the
5 recommendation form.

6 I will summarize this to you. You will have in
7 the jury room during your deliberations these different
8 forms. There is a recommendation of life imprisonment
9 form, a recommendation of death form, statutory
10 instructions, aggravating circumstances and a "no"
11 finding as to the existence of aggravating
12 circumstances. And, lastly, a form that says that the
13 jury cannot agree on a unanimous verdict as to
14 sentence.

15 The Statutory Instruction state and include that
16 the only aggravating circumstances you shall consider
17 in this case. Should you fail to find, beyond a
18 reasonable doubt, that one of the circumstances existed
19 at the time that the murders were committed, then you
20 would go no further and the foreperson would execute
21 the form indicating an inability of the jury to
22 unanimously agree upon the existence of an aggravating
23 circumstance.

24 Should you find beyond a reasonable doubt the
25 existence of an aggravating circumstance or

1 circumstances, you would then be authorized to consider
2 recommending the death penalty.

3 In your deliberations you will consider any
4 statutory or non-statutory mitigating circumstances
5 which are supported by the evidence.

6 You will consider the aggravating circumstances
7 you found and the mitigating circumstances and you will
8 then decide whether you will recommend the death
9 penalty or life imprisonment.

10 You may also consider any other factor that you
11 wish in mitigation of the offense.

12 If you decide to recommend the death penalty, you
13 will complete the proper form. You must write out the
14 aggravating circumstance or circumstances that you
15 found and all twelve jurors must sign the
16 recommendation.

17 Should you decide to recommend life imprisonment,
18 you must write out the aggravating circumstance or
19 circumstances that you have found and all twelve jurors
20 must sign the recommendation.

21 Whatever your recommendation is, it must be a
22 unanimous one. That is to say that it must be the
23 verdict of each and every juror.

24 As I said earlier, please remember your sentencing
25 recommendation will be followed by this Court. In

1 considering whether to recommend the defendant is to be
2 sentenced to death or to life imprisonment, I charge
3 you that as jurors that you must decide the issue
4 involved in this proceeding without bias and without
5 prejudice to any party. You have been selected as fair
6 and impartial jurors, sworn to impartially try and
7 determine the facts of this case. And when you comply
8 with your oath to do so, then no one will have a right
9 to criticize your verdict and you will have fully
10 discharged your duties as jurors.

11 You are to decide this case according to the
12 testimony that you have heard from the sworn witnesses,
13 along with the other evidence in the case. I charge
14 you that as jurors that you must decide the issues in
15 this proceeding without bias and without prejudice to
16 any party. You cannot allow yourself to be governed by
17 sympathy, by prejudice, by passion, by public opinion
18 or other arbitrary factors. Both the State and the
19 Defendant have the right to expect that each of you
20 will carefully and impartially consider all the
21 evidence of the case and that you will follow the law
22 as I have explained it to you.

23 Are there any exceptions to my charge before I
24 send the jury out?

25 MR. MURDAUGH: Not at this time -- no, sir.

1 MR. KULP: No, sir, Your Honor.

2 THE COURT: At this time, Ladies and Gentlemen,
3 I will ask that the Alternate Jurors keep their seats.
4 The rest of you, please retire to the jury room. I
5 will send word when the evidence is all brought into
6 you so that you may begin your deliberations.

7 A couple of important things. It is now ten after
8 5:00 and we will --- it is in your hands. You still
9 have your rooms if you need them or if you don't need
10 them. It's entirely up to you. If you get ready for
11 dinner to be sent out, just write a note and say what
12 you want to do about dinner. In fact, I would think
13 that would be a good thing to do to start with, to go
14 ahead and get some dinner if you want to deliberate.

15 You can deliberate as long as you want to. When
16 you decide that you've done all that you want to, if
17 you should decide that, we'll stop. We will wait here
18 with you and -- it is entirely within your control as
19 to how long and what we do tonight, whether we come
20 back tomorrow or whatever.

21 Of course, if you have any questions during your
22 deliberations, please write me a note.

23 I would ask you to retire to the jury room and the
24 evidence will be brought in there.

25 (JURY OUT @ 5:12 P.M.)

1 THE COURT: Ladies, Alternates, I am still
2 going to have to keep you available just in case
3 something should happen. The bailiffs will have
4 arrangements made for you. Please wait with them.
5 When we see -- we will know soon what the jury is going
6 to do and then we will -- we will just wait and see and
7 we will be in touch with you shortly. And, of course,
8 when we send out for dinner we will be in touch with
9 you. You can go with the bailiff, Mr. Green.

10 Again, I tell you again that it is important that
11 you'all don't talk anything about the case, even among
12 yourself, or anything dealing with the case because you
13 are still subject to being called as jurors in this
14 case.

15 So while you're in there, talk to each other but
16 don't talk about the case. You can talk about anything
17 else. Thank you very much.

18 (ALTERNATES OUT AT 5:17 P.M.)

19 THE COURT: Would the attorney come forward and
20 go over the evidence with the court reporter?

21 MR. MURDAUGH: Yes, sir. No exceptions or
22 additions from the State, sir.

23 MR. KULP: As well from the Defense.

24 THE COURT: I'm sorry that I got confused but
25 this forms are just hard to explain.

1 (EVIDENCE & FORMS SENT TO JURY @ 5:22 P.M.)

2 (RECEIVED NOTE FROM JURY @ 6:50 P.M.)

3 THE COURT: We received a note from the jury
4 saying that "We are still undecided, we would like to
5 deliberate a little longer tonight. If we can't reach
6 a decision by 8:00, at the latest, we will reconvene
7 tomorrow morning."

8 (SO ENTERED AS COURT'S EXHIBIT 18)

9 (RECEIVED NOTE FROM JURY @ 7:25 P.M.)

10 THE COURT: Okay, I will publish the latest
11 message from the jury, "We need to hear what happens if
12 we cannot reach a unanimous decision but agree on the
13 aggravating circumstances. Who determines the
14 sentence, and what is the mandated sentence?"

15 What I am going to do is that I am going to first
16 ask them if they executed Form 2, signed that
17 unanimously, if they have done that. Then I am going
18 to ask them if they need any more time or ---

19 MR. MURDAUGH: If Your Honor please, I think in
20 reading that note a second time, sir, I think that you
21 need to tell them that there are two considerations:
22 death or life. And who does the sentencing or what the
23 sentence will be, I don't think that you ought to tell
24 them. Even though you've done it, by the first part.

25 THE COURT: Well, I tell you what -- excuse me.

1 Go ahead.

2 MR. KULP: Your Honor, our position is that
3 you should answer their question by asking them if they
4 have in fact signed the form that indicates alone that
5 they've found aggravating circumstances; which is what
6 the Court just said.

7 THE COURT: All right.

8 MR. KULP: And that therefore they should be
9 further charged or recharged as to what the law is, and
10 the law is that if they are unable to reach a verdict
11 as to the appropriate sentence then ---

12 THE COURT: Well, I think, the closer that I
13 read this -- this is the question, "Who determines the
14 sentence, and what is the mandated sentence?"

15 They are asking a very specific question.

16 MR. KULP: Yes, sir. I would suggest that
17 when you recharge, "I further charge you that if you
18 are unable to reach a decision that our law states that
19 it is the Court's decision to sentence and that the
20 mandatory sentence that the Court must impose is life
21 imprisonment." That is what the law is.

22 THE COURT: I think that's right.

23 MR. MURDAUGH: I don't disagree with that. No,
24 sir.

25 THE COURT: Sir?

1 MR. MURDAUGH: I don't disagree with that. But I
2 also think that you need to inquire of them as to
3 whether there is any possibility that they will be able
4 to reach ---

5 THE COURT: That they will reach a unanimous
6 verdict?

7 MR. MURDAUGH: Yes, sir.

8 MR. KULP: I just don't think that it is
9 appropriate at this point, for two reasons. One, it's
10 early in deliberations. Number two, I think that it is
11 a unique animal in the sense that under no
12 circumstances in this Court here are they given a
13 charge on hanging up.

14 THE COURT: Well, they haven't told me that
15 they are hung up.

16 MR. KULP: Well, that's the way that I read
17 the note.

18 THE COURT: If they are asking -- if they
19 cannot reach a verdict -- if they cannot reach a
20 verdict, they've found aggravating circumstances, the
21 sentence is life imprisonment.

22 MR. MURDAUGH: Yes, sir.

23 MR. KULP: Yes, sir.

24 THE COURT: That is what they have asked. And
25 if they have -- I take it that they have executed this

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Jury Deliberations
Jury Trial of October 8-16, 2001

1 form and filled it out and each juror has signed it.
2 If they find that they cannot reach a unanimous
3 decision, then the foreperson then executes the form
4 and it is settled.

5 MR. KULP: Yes, sir.

6 THE COURT: And then that's it. But, now, the
7 law determines the sentence and the law says that if
8 there are aggravating circumstances and the jury does
9 not reach a verdict that it is life imprisonment.

10 MR. KULP: Yes, sir.

11 THE COURT: And it would be up to me to
12 pronounce that sentence.

13 MR. MURDAUGH: Yes, sir.

14 THE COURT: Is there anything wrong with that?

15 MR. MURDAUGH: No, sir.

16 THE COURT: Well, I will come back to you and
17 give you an opportunity. Show the jury in, please.

18 And if they should say that they've found that and they
19 haven't executed that form, I am going to tell them
20 that they haven't made that finding yet until they sign
21 that form.

22 MR. MURDAUGH: Correct.

23 MR. KULP: Also it will give you the
24 opportunity to answer their question.

25 THE COURT: I am, (affirmative nod).

1 MR. KULP: Respectfully, I would request, Your
2 Honor..

3 (JURY IN @ 7:35 P.M.)

4 BAILIFF DORSEY: Your Honor, the jurors are
5 present.

6 THE COURT: Madame Forelady, members of the
7 jury, I have your note and I will read it, "We need to
8 hear what happens if we cannot reach a unanimous
9 decision but agree on the aggravating circumstances."

10 All right, I presume that you have reached a
11 unanimous decision as to the aggravating circumstances.

12 FORELADY: Yes, sir,

13 THE COURT: And by that, you mean that you have
14 executed Form 3 or stand ready to where each one of you
15 have signed -- you've listed the ones.

16 FORELADY: Yes, sir. I don't know that
17 it is Form 3 but we have ---

18 THE COURT: It's not Form 3. I believe that it
19 is Form 2, where you've listed the aggravating
20 circumstances and each person has signed it?

21 FORELADY: Correct.

22 THE COURT: Okay. Moving on, (continues
23 reading note): "Who determines the sentence and what
24 is the mandated sentence?"

25 The law determines the sentence. If you have

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Jury Deliberations
Jury Trial of October 8-16, 2001

1740

1 reached an agreement as to unanimously finding
2 aggravating circumstance, the law says that that is a
3 life sentence. That is the mandated sentence, that it
4 is a life imprisonment sentence if you cannot reach a
5 unanimous decision which would be required for the
6 death penalty.

7 Now, if -- I would hope that you could reach a
8 unanimous decision either for a life sentence or the
9 death sentence. But if you can't -- when you reach the
10 point that you're unable to unanimously agree on the
11 sentence, whether it is a life sentence or a death
12 sentence, there is a form, being Form 7, I believe, let
13 me see ---

14 FORELADY: Yes, sir. We are familiar with the
15 form. We just wanted a clarification on that point
16 because some of us heard it and some didn't.

17 THE COURT: Okay.

18 FORELADY: I believe that we have decided that
19 we probably are not going to reach a decision this
20 evening. A number of people want to have a prayerful
21 good night's sleep on it, and we'd like to reconvene in
22 the morning and continue to deliberate.

23 THE COURT: That is fine. Well, let me ask you
24 this, did I fully answer your question?

25 FORELADY: I believe so.

1 THE COURT: Okay. What time would you like to
2 come back tomorrow morning?

3 FORELADY: 9:00 o'clock, 9:30, whatever is
4 your normal time.

5 THE COURT: Well, since it is so late now, why
6 don't you just come back at 9:30? That will be fine.
7 Are you ready to adjourn for the evening now.

8 FORELADY: Well, it's twenty of 8:00 now.
9 Give us a few minutes to discuss it.

10 THE COURT: Okay. And if you get in there and
11 -- we will stay as long as you want to stay. Whenever
12 you get ready to do one thing or another, let us know.
13 Is there anything else that I can tell you? Did that
14 explain what ---

15 FORELADY: I believe that's all that we needed
16 to know. We just wanted to be clear on what would be
17 the results if sometime tomorrow we decided that there
18 was no point in proceeding further, that we're not
19 going to be unanimous. We just wanted to be very clear
20 on that.

21 THE COURT: Okay. Well, if you have found the
22 aggravating circumstance, then ---

23 FORELADY: We have.

24 THE COURT: Then if you cannot reach a verdict,
25 the effect of that is a life sentence. All right.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 283
Penalty Phase - Jury Deliberations
Jury Trial of October 8-16, 2001

1 Any exception to that, Solicitor?

2 MR. MURDAUGH: None. None whatsoever, sir.

3 MR. KULP: None, Your Honor. And I think
4 that you said that you said that you would instruct
5 that that would be what you would impose.

6 THE COURT: Absolutely. That's exactly right.
7 Okay, retire to the jury room and advise you of
8 whatever your wishes are.

9 (JURY OUT @ 8:50 P.M.)

10 MR. MURDAUGH: You don't have to put this on the
11 record. In regard to sentencing, there are two
12 indictments that I am of the opinion that you cannot
13 issue a sentence on, and that is the kidnaping of Paul
14 Reischl and James Mitchell Riley, by law. With your
15 permission, sir, I am going to pull them out and stick
16 them in my pocket and then give them back to the Clerk
17 after the other sentencing, just out of an abundance of
18 caution.

19 THE COURT: Okay.

20 MR. MURDAUGH: Thank you, sir.

21 THE COURT: By you doing that, you don't want
22 me to just to write on there that those sentences were
23 imposed ---

24 MR. MURDAUGH: Yeah, I am going to give them back
25 to you at sentencing but I just didn't want them to get

1 mixed up and us have to go through. We will take care
2 of that at the end.

3 THE COURT: That's fine. Okay, we will stay
4 here as long as the jury wants to work.

5 (RECESS 8:00 - 8:20 P.M.)

6 THE COURT: Okay, the jury did not take long to
7 give us a note of their intentions. The Solicitor is
8 not here but you're present for this?

9 MR. KNIGHT: Yes, sir..

10 THE COURT: (Reading): "We are concluded for
11 tonight, to reconvene at 9:30 A.M. Thank you, Your
12 Honor." Please show the jury in. Of course, I am
13 going to instruct them to stop their deliberations
14 until we reconvene in the morning.

15 MR. KNIGHT: Yes, sir. And, of course, your
16 same standard instruction not to read any newspapers or
17 television, or any of that stuff? Excuse me, Your
18 Honor, I didn't mean "all that stuff".

19 THE COURT: Yes, sir.

20 (JURY IN @ 8:20 P.M.)

21 BAILIFF DORSEY: Your Honor, all jurors are
22 present.

23 THE COURT: Thank you, sir. I got your last
24 message, "We are concluded for tonight, to reconvene at
25 9:30 A.M.", signed by the foreperson. That's fine.

1 I wish to instruct you again that you are in the middle
2 of your deliberations. Now that you are -- officially
3 the deliberations have stopped, so you cannot discuss
4 the case among yourself or with anyone else until
5 tomorrow when you reconvene in the jury room. Now, when
6 you get in the jury room, you can't discuss it then
7 either. What will happen is that the evidence will be
8 brought back in to you and then you will be told to
9 start, by the bailiffs, after the evidence is brought
10 in to you. You'll be given explicit instructions when
11 to do that. So for that reason, you must not discuss
12 the case among yourselves. And of course you must not
13 discuss it with anyone else either. Do not read
14 anything or listen to any media reports or any of the
15 other things that I have told you about. If anything
16 should happen over the evening, please report it to me
17 in the morning when you get back. We will then
18 continue with this tomorrow at 9:30. Hope you'all have
19 a nice evening, and we will see you tomorrow.

20 Leave all the evidence and the forms in the jury
21 room and we will give it back to you tomorrow.

22 MR. MURDAUGH: Judge, you've got to address the
23 Alternates.

24 THE COURT: Yes, sir. For your information, I
25 sent the Alternates back over to the hotel after the

1 pizzas arrived. In the morning when they begin their
2 deliberations, I don't know how long we are going to
3 keep the alternates but it going to reach a point of
4 diminishing return so far as keeping them here.

5 So I would think -- it is up to you, Solicitor, of
6 course. Obviously it is not -- but after they start
7 deliberating tomorrow, I wouldn't think that we would
8 have much use for them. But, anyway, think about that.
9 They are being kept separate this evening, completely
10 apart from the jury. And it will not be necessary to
11 bring them back over here.

12 MR. MURDAUGH: I do not disagree with that at all,
13 sir. Fact is, I do agree with it.

14 THE COURT: And what was that?

15 MR. MURDAUGH: Doing what you just said, sir,
16 keeping them over there.

17 THE COURT: Then when it gets into the middle
18 of the morning we'll see where we are.

19 MR. MURDAUGH: Yes, then we can reassess it.

20 THE COURT: All right. Then we will reconvene
21 -- I presume the jury will be on time, so let's be back
22 here at 9:15 so that if they get here early we can
23 start earlier. I don't want to keep them waiting.
24 See you at 9:15.

25 MR. KULP: Yes, sir, Your Honor.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Examination of Report by Juror Rutland
Jury Trial of October 8-16, 2001

1 (COURT IN RECESS @ 8:40 P.M.)
2 (TRANSCRIPT CONTINUED NEXT PAGE)
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21 OCTOBER 16, 2001

9:20 A.M.

22 Courtroom No. 2

23 Outside Presence of Jury

24 (DEFENDANT PRESENT)

25 THE COURT: We have a juror that wants to

1 tell us about something that happened last night, so I
2 told him that we'd put it on the record outside of the
3 open courtroom. Mr. Mears told me about it and I
4 haven't talked with him, I wanted to do that with you
5 present. I believe that it is Mr. Rutland.

6 (AGENT MEARS ENTERS COURTROOM)

7 THE COURT: I am going to put you under oath.
8 Do you solemnly swear or affirm that the testimony that
9 you're about to give is the truth, the whole truth and
10 nothing but the truth?

11 MR. MEARS: Yes, sir.

12 THE COURT: Have a seat, Mr. Mears. How do
13 you'all want to do this?

14 MR. MURDAUGH: We talked about that, sir, and we
15 think that the Court -- well, really on this it doesn't
16 make any difference, I don't reckon. Why don't you
17 make the inquiries and if we have any questions of the
18 officers we can -- with the jurors, if we interview any
19 of them, we think that the Court should do it

20 THE COURT: Okay, I think that's a good way to do
21 it. I will go ahead and ask the questions and then
22 give you an opportunity. Then with the jurors
23 themselves, I will ask them a few questions and then we
24 can have a sidebar and I will try to get it out that
25 way. Is that your preference?

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Examination of Report by Juror Rutland
Jury Trial of October 8-16, 2001

1 MR. MURDAUGH: Yes, sir.

2 MR. KULP: Yes, sir, Your Honor.

3 KENNETH M. MEARS, being
4 duly sworn to tell the truth, the whole truth and
5 nothing but the truth, testified as follows:

6 EXAMINATION

7 BY THE COURT:

8 Q. State your full name, Mr. Mears.

9 A. Kenneth M. Mears, M-e-a-r-s.

10 Q. And of course you're a SLED Agent?

11 A. I am a SLED Agent.

12 Q. And your assignment this week is what?

13 A. Is to be with the jury in this jury trial, with
14 the sequestered jury.

15 Q. And of course you have been with us all week?

16 A. I came down Thursday.

17 Q. I believe that there was an incident last evening
18 with a juror named Mr. Rutland, I believe.

19 A. Yes, sir.

20 Q. Would you tell everybody about that?

21 A. Last night, on the 15th, Mr. Rutland, a juror came
22 to me and asked if he could talk with me in private.

23 I took him, took him into my room. He said that he had
24 a concern that he would like to address. At that time

25 I stated to him that as long as it was not in reference

1 to the trial or the deliberation, that I would listen.

2 And he stated at that time, Mr. Rutland, that it
3 did not relate to the deliberations, it was not
4 personal, it was nothing against the SLED agents but it
5 was a concern that he thought that should be brought to
6 somebody. At that time, I stopped him and told him not
7 to tell me what the concern was. At that time, I
8 called Special Agent Rick McLeod and, Your Honor, we
9 got in touch with you over the phone.

10 Q. Right, and you called me like something to ---

11 A. 9:45, exactly.

12 Q. 9:45, and I spoke to Rick McLeod. And, of course,
13 we met with you and Mr. McLeod and with the attorneys
14 involved in this case just a few minutes ago.

15 A. Yes, sir.

16 THE COURT: Is there anything else that you' all
17 wanted to ask?

18 MR. MURDAUGH: No, sir.

19 MR. KULP: No, sir, Your Honor.

20 (WITNESS STEPS DOWN)

21 THE COURT: Okay, please bring Mr. McLeod in.

22 (AGENT MCLEOD ENTERS COURTROOM)

23 THE COURT: Agent McLeod, put your left hand on
24 the Bible and raise your right hand. Do you solemnly
25 swear or affirm that the testimony you are about to

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Examination of Report by Juror Rutland
Jury Trial of October 8-16, 2001

1 give be the truth, the whole truth and nothing but the
2 truth, so help you, God?

3 AGENT McLEOD: I do.

4 RICHARD McLEOD, being
5 duly sworn to tell the truth, the whole truth and
6 nothing but the truth, testified as follows:

7 EXAMINATION

8 BY THE COURT:

9 Q. You, along with Agent Mears, have been in charge
10 of this jury detail; is that correct?

11 A. That's right.

12 Q. And tell us exactly the circumstances or anything
13 that you know about specifically Mr. Rutland
14 approaching Agent Mears.

15 A. Approximately 9:00 last night, I was in my room
16 and I got a knock on the door with Agent Boone,
17 Retired, telling me that we might have a problem.
18 And I go down to Agent Mears' room and Chip, Mr.
19 Rutland, is in there.

20 I said, "What seems to be the problem?" And I
21 said, "Before you answer, if it is about deliberation
22 or the fact of the case, we can't go into it."
23 And he says, "It not about the facts of the case or
24 deliberation, it's about something that happened in the
25 courtroom."

1 I said, "Okay, sir. Now, be careful how you
2 answer this, but concerns you?" And he said, "Well, it
3 is not me as much as a couple of the female jurors and
4 it's about fear and safety concerns."

5 I said, "Whoa. Was this expressed or was it
6 perceived." He said, "it was expressed."

7 I said, "I don't want to know what they said" but
8 this point he just said that it was something the felt
9 obligated to do with his oath, that he needed to come
10 to us, which the judge instructed him to come to us and
11 let us know of anything that was bothering them. And I
12 said, "Well, at this point, without going too much
13 further into any discussion, let me go call the Judge
14 and advise him that we have this concern."

15 THE COURT: Any questions of Mr. McLeod?

16 MR. MURDAUGH: No, sir, I have none.

17 MR. KULP: No, sir. None from me.

18 THE COURT: Thank you, you can come down.

19 (WITNESS STEPS DOWN)

20 THE COURT: Bring in Mr. Rutland, the juror.
21 Do you'all think that I need to swear him in? He's
22 already been put under oath.

23 MR. MURDAUGH: I don't think that you need to,
24 myself.

25 MR. KULP: At most a reminder.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Examination of Report by Juror Rutland
Jury Trial of October 8-16, 2001

1 THE COURT: I think that's right. I don't want
2 to overdo it because he is still a juror until he is
3 removed.

4 (JUROR RUTLAND ENTERS COURTROOM)

5 THE COURT: How are you, Mr. Rutland?

6 JUROR RUTLAND: Fine, sir.

7 THE COURT: I have been contacted, of course
8 last night and then we discussed it this morning, that
9 you had some concerns about safety issues or something
10 that may have happened in the courtroom, sir. And I
11 remind you, sir, that of course you're under oath from
12 the jury and all.

13 JUROR RUTLAND: Yes, sir.

14 THE COURT: Tell us what you specifically --
15 what's going on?

16 JUROR RUTLAND: Your Honor, late yesterday
17 afternoon, yesterday evening before the deliberations
18 were finalized in the jury room, I witnessed several
19 jurors express concerns for their fear and safety,
20 their personal fear and safety.

21 THE COURT: In general, or did they receive --
22 well, tell me just exactly what they said first.

23 JUROR RUTLAND: Would Your Honor want me to be
24 specific regarding where the concerns come from?

25 THE COURT: Well, I think you ought to go ahead

1 and tell us the name of the juror and exactly what they
2 said, the best you can recall.

3 JUROR RUTLAND: Your Honor, I don't know that
4 I can specifically name each of the jurors. I do
5 remember a few who expressed concerns and the primary
6 concern that they had was over the Defendant's father,
7 the glares that they were receiving from the
8 individual, the smirks and things of that. They felt
9 very intimidated and threatened.

10 THE COURT: How many jurors were these that
11 felt ---

12 JUROR RUTLAND: Your Honor, I know of three
13 who specifically said something and then there were
14 others who agreed with that who I just didn't capture a
15 name with a face.

16 THE COURT: So that's it? The glares and the
17 smirks, and they just felt -- do you think -- did they
18 feel like it was an intentional thing or did they just
19 feel like they were feeling threatened by that, by his
20 actions while he was sitting in the courtroom?

21 JUROR RUTLAND: I think that it was a
22 combination of both. I think that some felt that it
23 was intentionally done as an intimidation factor but
24 that several sincerely felt concerns for their personal
25 safety after the trial concluded and, you know, life

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Examination of Report by Juror Rutland
Jury Trial of October 8-16, 2001

1754

1 went on.

2 THE COURT: And that's the extent of it?

3 JUROR RUTLAND: Yes, sir.

4 THE COURT: Keep your seat and let me consult
5 with the lawyers.

6 SIDEBAR:

7 MR. MURDAUGH: No questions.

8 MR. KULP: No, sir, no questions.

9 (SIDEBAR CONCLUDED)

10 THE COURT: You can retire to your jury room.
11 Thank you.

12 JUROR RUTLAND: Thank you, Your Honor.

13 THE COURT: And I appreciate your concern in
14 bringing that to the Court's attention, Mr. Rutland.

15 (WITNESS STEPS DOWN)

16 AGENT McLEOD: Do you need anybody else?

17 THE COURT: Not right now. Let us talk about
18 it. Solicitor?

19 MR. MURDAUGH: My suggestion at this point is,
20 sir, that we bring the entire jury in, including
21 Alternates, I would think, and ask them if anybody has
22 such a concern that would cause them not to be able to
23 deliberate fairly and impartially in this case. Then
24 address whatever is said.

25 THE COURT: What do you'all think -- how do you

1 think I ought to ask it, about persons in the courtroom
2 -- person or persons?

3 MR. MURDAUGH: I don't think you should do that,
4 sir. I think that you should ask them the simple
5 generic question, "Has anybody sitting on this jury
6 such a concern that would cause them not to be able to
7 reach a fair and just verdict?"

8 THE COURT: Have concerns about their personal
9 safety?

10 MR. MURDAUGH: Just concerns. And I am not wed to
11 that.

12 THE COURT: "Is there anybody sitting on this
13 jury that has concerns that might interfere ---

14 MR. MURDAUGH: What are your thoughts, Cory? Tim?

15 MR. KULP: I don't ---

16 MR. MURDAUGH: Should it be expanded -- what I am
17 really saying is, should that question be expanded or
18 should we leave it generic?

19 MR. KULP: Let me think a second.

20 THE COURT: Let me read what I have written
21 and see what you'all say about this. "Has anybody
22 sitting on this jury have any concerns that might
23 interfere with your deliberations to reach a fair and
24 just verdict to both the State and the Defendant?"

25 MR. MURDAUGH: That's fine with the State, sir.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Examination of Report by Juror Rutland
Jury Trial of October 8-16, 2001

1 THE COURT: Have you got any improvements that
2 you want to suggest?

3 MR. KULP: I do not, Your Honor.

4 MR. MURDAUGH: Next step. If nobody says
5 anything, let's send them out and let them deliberate.
6 If somebody says something, then I think we will ---

7 THE COURT: We would have to address it
8 individually. I am not going to hear them. I am going
9 to ask them to please indicate by raising their hand
10 and I will get their name and then we will send the
11 rest of them out.

12 MR. MURDAUGH: All right, sir. That is what I was
13 going to suggest, sir.

14 MR. KULP: Then the only other thing, which I
15 think is unlikely based on Mr. Rutland's testimony, is
16 that no one raises their hand; in which event, we have
17 a problem.

18 THE COURT: What's the problem?

19 MR. KULP: The problem is that we have one
20 juror saying that other jurors feel threatened and
21 intimidated about their physical safety after trial and
22 then they don't express it to you when the Court
23 inquires of them in a group.

24 MR. MURDAUGH: It is not whether they feel
25 threatened or intimidated. It is whether or not their

1 feelings of threat and intimidation would affect their
2 ability to reach a fair and impartial trial.

3 THE COURT: Then what I am going to do is --
4 before we do it, I am going to bring the Alternates in.
5 Then if nobody says anything, I will ask them the same
6 thing, and then sent them back over to the hotel.

7 MR. MURDAUGH: Don't send them too far yet,
8 sir. Oh, afterwards? Yeah.

9 THE COURT: To wait there.

10 MR. MURDAUGH: Yes, sir.

11 THE COURT: Bring the whole jury panel in.

12 MR. MURDAUGH: That would be the twelve.

13 AGENT MEARS: The Alternates were notified this
14 morning that they might have to come up.

15 AGENT McLEOD: They're on the way. They were a
16 little bit behind us because we had to ---

17 THE COURT: If they're not on the way yet, call
18 and stop them, tell them that we don't need them.
19 Well, don't do anything until we check with -- but if
20 they are not here, we won't need to talk to them unless
21 we seat them.

22 MR. MURDAUGH: That's right. We can get this
23 group deliberating and then we can talk to them.

24 THE COURT: But not if we don't need to seat
25 them.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Examination of Report by Juror Rutland
Jury Trial of October 8-16, 2001

1 MR. MURDAUGH: Correct.

2 (JUROR PANEL ENTERS COURTROOM AT 9:50 A.M.)

3 THE COURT: Madame Forelady, members of the
4 Jury, good morning. The reason that I have you in here
5 in this smaller courtroom is that I wanted to make sure
6 that there was no fear or safety concerns that might
7 interfere with your deliberations, so -- therefore, I
8 have a question to ask. If anybody has a response to
9 this question or if they know anything about this, then
10 just please raise your hand and then I will talk to you
11 individually.

12 Is there anybody sitting on this jury that has any
13 concern that might interfere with their deliberations
14 to reach a fair and just verdict to both the State and
15 the Defendant? If so, just please raise your hand.

16 (No response). Very good.

17 Anything else?

18 MR. MURDAUGH: No, sir.

19 MR. KULP: Nothing at this time, Your Honor.

20 THE COURT: Then you may begin your
21 deliberations as soon as the evidence is brought to you
22 in the jury room, and the verdict forms. You may
23 continue at that time. Thank you very much. We will
24 await word from you. We will be here to hear from you
25 if you have any questions or whatever.

1 Hope everybody had a nice evening last night.

2 (JURY IN DELIBERATIONS @ 10:00 A.M.)

3 MR. KULP: Your Honor, we have a Motion at
4 this time. We respectfully move for a mistrial at this
5 time. We believe that one juror has come in here under
6 oath and has expressed that there are at least three or
7 more jurors who feel that they cannot continue to
8 deliberate absent a fear of physical safety or
9 intimidation or harm, apparently from the Defendant's
10 father, at some time after their duty and their job as
11 jurors is done.

12 Now, I had no idea that that was going to happen.
13 I sound ---

14 THE COURT: Let me just say this. That was
15 your tactic. You made him into the meanest guy in the
16 world, since Charles Manson or something, or Osama Bin
17 Laden, in your argument. So I don't see that.

18 I asked them, I voir dired them, I was able to
19 have asked them any questions you had and -- and he
20 wasn't concerned for himself, it was perceived from
21 other people. I have absolutely no evidence that
22 anybody is under any intimidation or fear or anything.

23 MR. KULP: Then we have one of two problems.
24 Either Mr. Rutland is misrepresenting something, which
25 I don't think is the case, or -- which I think is the

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Examination of Report by Juror Rutland
Jury Trial of October 8-16, 2001

1 case -- those individuals don't feel comfortable about
2 answering that out in that setting. Obviously
3 something is a-kilter here. We have a situation where
4 at least at this point we have a suspicion and probable
5 cause, or better than probable cause, to believe that
6 three ladies' decisions in this case are going to be
7 affected by what Mr. Rutland told us. And I think that
8 there is no -- regardless of what they say in this
9 setting, had we not had the information from Mr.
10 Rutland, then of course -- for example, if you had been
11 just making sure they hadn't feel anything in terms of
12 fear and intimidation, you'd done the standard morning
13 check with them and no one responded, that's one thing.
14 But to have a juror come in and be so concerned about
15 it that he contacts the Special Agents guarding the
16 jury and have them call you, and they're so concerned
17 about it that they call you at 10:00 o'clock at night.

18 THE COURT: ... Well, you're protecting the record.
19 I appreciate your doing that and anything else that you
20 want to put on the record. But the weakness of what
21 that whole position is is Mr. Rutland perceived it but
22 -- you know, it is just like me trying to read what
23 that jury is going to do. I guess and I think and I'm
24 wrong most of the time, you know? I can't read minds,
25 and I doubt that he can either.

1 MR. KULP: I think he said and the record will
2 reflect that they expressed to him. It wasn't that he
3 got the impression from body language or whatever but
4 that they expressed to him concerns over the glares and
5 smirks that led them to feel intimidated. Three
6 specifically said something and others expressed
7 opinions, as well. Some felt that it was an
8 intentional act and felt concerns for their safety
9 after the trial. That taints the entire panel, Judge.

10 THE COURT: I think the Solicitor stated it
11 correctly. Even if they had some fear, was it anything
12 that would affect their ability to give both sides, the
13 State and the Defendant, a fair and impartial trial.
14 Nobody responded to that questions, and I think that
15 with that -- is there anything else that you want to
16 put on the record?

17 MR. KULP: I beg the Court's indulgence, Your
18 Honor (consulting with Mr. Fleming).

19 THE COURT: Would you check and see if the
20 Alternates are here? If they are, that's fine. If
21 they are not here, you can tell them they can stay at
22 the hotel or you can take them on back.

23 MR. KULP: Nothing further from the Defense,
24 Your Honor. Thank you very much for inquiring.

25 MR. MURDAUGH: Thank you, sir.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Examination of Report by Juror Rutland
Jury Trial of October 8-16, 2001

1 THE COURT: Then this Hearing is closed.

2 AGENT McLEOD: Do you want to send them back?

3 They are here.

4 THE COURT: Wait just a second. What do you
5 want to do? Do you want to ask the Alternates the same
6 question or do you want to wait and see if we need
7 them.

8 MR. KULP: I think if Mr. McLeod will
9 indicate, as I think he will say, that they were kept
10 separate from any of this ---

11 AGENT McLEOD: Yes, sir.

12 MR. KULP: Then I don't see that there is a
13 need to do.

14 MR. MURDAUGH: We can address that if we ---

15 MR. KULP: Right, no need to address it if
16 they never got together.

17 THE COURT: Yes, they can go back to the
18 Hampton Inn, they don't have to stay here. They can
19 wait over there. But they're still subject to being
20 called. All right. We're in recess until we hear
21 from the jury.

22 MR. KULP: Thank you, Your Honor.

23 (DELIBERATIONS CONTINUE)

24 (11:40 NOTIFIED JURY HAS REACHED VERDICT)

25 (DEFENDANT PRESENT)

1 THE COURT: I am advised that we have a
2 verdict, that the jury has reached a verdict. I
3 caution everybody who is here that no matter what the
4 verdict is, there will be no demonstrations of
5 happiness or sadness tolerated. Anyone who should not
6 be in control of themselves is advised that they better
7 exit the courtroom.

8 Are we ready for the jury?

9 MR. MURDAUGH: Yes, sir.

10 MR. KULP: Yes, sir, Your Honor.

11 THE COURT: You may bring them in. And, of
12 course, now the sentence and verdict is reached the gag
13 Order is lifted.

14 MR. MURDAUGH: Yes, sir..

15 (JURY IN AT 11:43 A.M.)

16 BAILIFF: Your Honor, all jurors are present.

17 THE COURT: Madame Clerk?

18 CLERK: Madame Forelady, have you all reached a
19 verdict?

20 FORELADY: Yes, we have.

21 CLERK: Would you pass it to the bailiff?

22 FORELADY: (Complies)

23 BAILIFF: (Tenders verdict to Judge).

24 THE COURT: All right, (tenders to Clerk)
25 please read this -- and if you would, publish this one

State vs. Tavaris Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Verdict
Jury Trial of October 8-16, 2001

1 first and then the second one.

2 CLERK: (Reading): In Indictment 99-GS-07-221
3 and 222, we the Jury in the above-entitled case
4 unanimously find beyond a reasonable doubt the
5 following statutory aggravating circumstances:

6 One, the murders of Paul Reischl and James
7 Mitchell Riley were committed while in the commission
8 of kidnaping.

9 Two, the murders of Paul Reischl and James Riley
10 were committed while in the commission of burglary.

11 Three, the murders of Paul Reischl and James Riley
12 were committed while in the commission of burglary
13 while armed with a deadly weapon.

14 Four, two persons were murdered by the said
15 Defendant by one act or pursuant to one scheme or
16 course of conduct."

17 (Reading): In Indictment 99-GS-07-221-222, we
18 the jury in the above-entitled case have unanimously
19 found one or more aggravating circumstance and cannot
20 unanimously agree on the recommended punishment."

21 Signed by the forelady.

22 THE COURT: Okay. The form as to the
23 aggravating circumstance, I am going to read now and
24 get each person to acknowledge that that was their
25 verdict and that is it still your verdict.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Verdict
Jury Trial of October 8-16, 2001

1765

1 Susan Singleton, Foreperson, were both of these
2 verdict and are they still your verdict?

3 MS. SINGLETON: Yes.

4 THE COURT: Koren Pope, was this your verdict
5 and is it still your verdict?

6 MS. POPE: Yes.

7 THE COURT: Pamela Darden, was this your
8 verdict and is it still your verdict?

9 MS. DARDEN: Yes.

10 THE COURT: Teri Derouen, was this your verdict
11 and is it still your verdict?

12 MS. DEROUEN: Yes.

13 THE COURT: June Gambla, was this your verdict
14 and is it still your verdict?

15 MS. GAMBLA: Yes, it is.

16 THE COURT: Janet Belle-Isle, was this your
17 verdict and is it still your verdict?

18 MS. BELL-ISLE: Yes.

19 THE COURT: Betty Middleton, was this your
20 verdict and is it still your verdict?

21 MS. MIDDLETON: Yes.

22 THE COURT: Samuel McLaughlin, was this your
23 verdict and is it still your verdict?

24 MR. McLAUGHLIN: Yes.

25 THE COURT: Janice Roeder, was this your

1 verdict and is it still your verdict?

2 MS. ROEDER: Yes.

3 THE COURT: Lucille Morrison, was this your
4 verdict and is it still your verdict?

5 MS. MORRISON: Yes, sir.

6 THE COURT: Cheryl Martin, was this your
7 verdict and is it still your verdict?

8 MS. MARTIN: Yes, sir.

9 THE COURT: And Mr. Rutland, was this your
10 verdict and is it still your verdict?

11 MR. RUTLAND: Yes, Your Honor.

12 THE COURT: Anything further before the jury is
13 discharged? And I will let you'all look at it first.

14 MR. MURDAUGH: If Your Honor please, there is
15 something that I would like to state for the record
16 prior to the jury being dismissed.

17 Both counsel for the Defendant and I want to thank
18 them for their consideration. I need for them to know
19 that while it was inadmissible at trial that the
20 Defendant did in fact give a confession I which he
21 mirrored testimony that was heard from the witness
22 stand. That testimony -- that confession was not
23 admissible in court because of technical reasons, but I
24 just thought that may have some play in the way you all
25 think.

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State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Penalty Phase - Verdict
Jury Trial of October 8-16, 2001

1 THE COURT: Anything further?

2 MR. MURDAUGH: And no -- not meant as a
3 criticism, by any means.

4 THE COURT: Madame Forelady, members of the
5 jury, thank you very much for your service in this
6 case. Obviously it was tough case and you didn't
7 volunteer, but having been chosen you did your work --
8 you worked as hard as any jury could possibly work in
9 the past eight or nine days.

10 If you would, please pass these around. While Mr.
11 McLeod is passing that out, I will just tell you what
12 it is. It's something that I have prepared to
13 basically -- which basically says that you have a right
14 to discuss your verdict with anyone, if you want to,
15 but that you don't have to. If anyone should in any
16 way harass you or try to put pressure on you to discuss
17 this case or your deliberations and you don't want to,
18 if you're harassed in any way, I have put my name,
19 address and telephone number there. I would appreciate
20 it, if you would, contact me and I will take
21 appropriate action. Anyway, keep them for your file.

22 As I say, I know that it has been hard -- I think
23 that it is one of the most amazing things how people
24 from all walks of life can come together and work to
25 bring about justice. You have. I hope that this is

1 something that you will, and I think you should, look
2 back on with pride because you have worked hard. I
3 think it's one of the many great things about our
4 country, the -- that people, the citizens, decide the
5 guilt or innocence of persons charged with crimes.

6 I hope you'all have nice day. If any of your need
7 a statement for your job, the Clerk's Office will get
8 that for you.

9 With that, I don't have anything else. Thank you
10 very much. Go out with them, and they'll take care of
11 the statements for you. And you, of course, will be
12 receiving a check for your services. I don't think
13 that it will be sufficient amount for you to take much
14 of a vacation, which you so richly deserve, but I hope
15 that you have a nice day today. I know you're glad to
16 get this over with.

17 The agents will take care of you, get you back,
18 get your clothes and get you checked out of the hotel
19 and all that. Mr. Mears, Mr. McLeod and the other are
20 here to help you with that.

21 We will be proceeding into the sentencing phase.
22 If you want to, you're welcome to stay but you're not
23 obligated-to.

24 Thank you very much, you are excused.

25 MR. MURDAUGH: If Your Honor please, I have a

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Sentence
Jury Trial of October 8-16, 2001

1 number of people from the family that have talked to me
2 about wanting to speak to the court. Before you do the
3 actual sentencing, can you give me five minutes and let
4 me go discuss that with them?

5 THE COURT: Yes, sir. We will be at-ease for
6 five minutes. You might make that a court's exhibit
7 since I gave them copies.

8 (SO ENTERED AS COURT'S EXHIBIT 21)

9 (BRIEF RECESS)

10 MR. KULP: Your Honor, a couple of things I
11 wanted to mention for the record.

12 THE COURT: Okay.

13 MR. KULP: Your Honor, first off -- and we
14 have just consulted, Mr. Fleming and I, and we -- based
15 on some of the issues that have arisen this morning in
16 this regard, we did not ask the Defendant's father, Mr.
17 Rogers, to leave the courtroom. That wasn't part of
18 our strategy, and I just wanted to put that on the
19 record. Secondly, ---

20 THE COURT: I have always though -- and, in
21 fact, I have seen our present Solicitor's dad use it
22 very effectively, words and phrases, he had thousands
23 of them, that to pick out somebody in the audience,
24 that's off the record as far as I am concerned and
25 that's not proper. That's the reason, and that is just

1 the way that I have always thought it to be, that that
2 is not the record.

3 You know, if you wanted to call him up, ask him
4 questions, put him on the stand, then it would be on
5 the record.

6 MR. KULP: I understand, Your Honor, but it
7 wasn't a scheme.

8 THE COURT: I understand, but that's the reason
9 that I said that. I am of the opinion that would not
10 be in the record.

11 MR. KULP: But, secondly, we did not ask that
12 same gentleman to make any nonverbal communication with
13 anybody in this courtroom. That was not part of our
14 strategy. And I am not saying this because the
15 Solicitor suggested it. I am just saying that we need
16 to do that, clarify that.

17 Then, lastly, that particular person that I am
18 referring to, the Defendant's father, has done a great
19 deal to the contrary, hampering our efforts to
20 represent his son -- unfortunately. Thank you.

21 THE COURT: Solicitor?

22 MR. MURDAUGH: If Your Honor please, I have
23 discussed with members of the family, and there are
24 three members that would like to speak to the Court
25 before sentencing.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Sentence
Jury Trial of October 8-16, 2001

1771

1 THE COURT: Yes, sir.

2 MR. MURDAUGH: Mrs. Duncan, Melissa and David.

3 You'all come on up. If Your Honor please, this is

4 Linda Duncan, Melissa Waddell (sic) and David Reischl.

5 If you will, when you speak to the judge give your
6 name and your relationship.

7 THE COURT: Also speak loud enough so that they
8 can hear you over here, too. Go ahead, Ms. Duncan.

9 MS. DUNCAN: My name is Linda Duncan and I'm the
10 mother of James Mitchell Riley. And I just want to
11 say, Tavarus, that I don't hate you. I hate the act
12 that was done that took my son, because he was very,
13 very precious. I forgive you and I find that you find
14 it in your heart to ask God to forgive you, as well.
15 May God be with you.

16 THE COURT: Thank you, Ms. Duncan.

17 MS. WENDEL: I am Melissa Wendel, Mitch's
18 sister, baby sister. I just want to understand that
19 James Mitchell Riley was my twenty-five-year-old
20 brother. He had a complicated life also. My mother
21 almost died, along with Mitchell, at birth during her
22 eleven days of hard labor. But God knew his importance
23 to her and to our family and brought them through.

24 He had an abusive father that turned him away. My
25 mom was his mom, his dad and his best friend. You have

1 taken something from my mom that can never be given
2 back. I hope and pray that you realize this and that
3 you will, in turn, with your little son keep him from
4 ever doing anything like this to anybody.

5 She didn't deserve to lose Mitchell, none of us
6 did. He didn't deserve to die. He died. He was able
7 to put away his childhood aggravations and start a
8 life, a happy life.

9 I personally was to grow old with my brother, I
10 took baths with my brother, I played with my brother.
11 My brother defended me.

12 I hope you know what you have done and that you do
13 find peace within yourself somehow for our act.

14 He had just discovered another family to love, and
15 that was Kristal and her two children. That's
16 something else that you took away for us, because just
17 four hours before you did this we were celebrating
18 their engagement to be married on February 14th. That
19 would have been an addition to our family. Again, we
20 lost something else and not just my brother.

21 You cut my brother's life short, way too short.
22 He didn't do anything to you. He was not a drug
23 dealer. No, he wasn't perfect, nobody is, but you had
24 no right to do what you did to him.

25 My daughter has dropped out of school. You've

State vs. Taverus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Sentence
Jury Trial of October 8-16, 2001

1773

1 ruined her entire life. She had a 3.8 grade point
2 average. She was very intelligent, she is very
3 intelligent but you've damaged her for the rest of her
4 life and I want you to live with that.

5 Before I even come, I wasn't for life, I wasn't
6 for death. I had put it in God's hands because I knew
7 that he knew you and he knew what you did, he knew what
8 you were capable of, he knows what you're capable of
9 now, and I hope that you find faith with him because he
10 is the only one who is ever going to give you peace.

11 DAVID REISCHL: My name is David Reischl.
12 Paul's brother, his older brother. I speak here for
13 myself, not for the rest of my family. I heard today
14 or yesterday in court that you have a son. Well, my
15 brother had a son, too, who will never get to see his
16 father again.

17 I don't know why you had to kill Paul and Mitch.
18 I never knew Mitch, and I'm sorry that he was killed
19 along with Paul. The way Paul was, all you had to do
20 was ask. You didn't have to kill him. He would have
21 gave it up, that's the way Paul was.

22 Earlier that day, if I am not mistaken, you guys
23 were over there partying with them. That's got nothing
24 to do with it, really.

25 You went from one room, killed my brother, you

1 went to another room and you killed Mitch. By right,
2 you should also have to die. But I'm not God. By
3 taking your life, it is not going to bring them back.

4 They should put you away in a prison in the United
5 States -- I am not saying here in South Carolina,
6 because there's a bunch of bad prisons all over the
7 United States, but they should put you someplace where
8 you don't have any -- any fun, you know. You don't get
9 to watch no damn TV, you work on a chain gang. I don't
10 care. But every day that you sit in prison you're
11 going to remember why you're in there and you can think
12 about what you've done and what you have taken.

13 When you meet your Maker he will know what you
14 have done, too. You are a disgrace to this family,
15 Mitch's family and you're also a disgrace to your own.

16 I'm sorry for your family. I have nothing against
17 your family. I really -- I don't have no disrespect
18 for them.

19 You should pay for what you did. Was it worth it?
20 Was it worth spending the rest of your life in prison,
21 taking some money, some drugs, killing some people, was
22 it worth it? In my book, it is not. It is not.

23 Paul was not an angel but he had a good heart.
24 He'd done a lot of bad things and I know that he was
25 dealing, but that's no reason to take a life. The

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Sentence
Jury Trial of October 8-16, 2001

1 Bible says an eye for eye. Taking a life ain't going
2 to bring them back, so "an eye for an eye" won't work.
3 You're the one that has got to spend the rest of your
4 life thinking about this.

5 I came here from Wisconsin just to say this piece,
6 and -- so that I can go on with my life. There's
7 fifteen kids in my family. Now there's fourteen.

8 THE COURT: Solicitor, anything else?

9 MR. MURDAUGH: No, sir, except to state to the
10 Court that the only prior record is juvenile court
11 records.

12 THE COURT: Have you got the sentence sheets?

13 MR. MURDAUGH: No, sir. I've got copies of them.
14 Oh, excuse me, I do -- sorry, (tenders to Court).

15 I understand that he is also on YOA.

16 THE COURT: These are just blank ones. You
17 need to fill those out and then I will come back to it.
18 We will stand at-ease and then I will come back in here
19 and hear from the Defendant, as to whatever you'all
20 have got to say, but I want those sheets filled out
21 before I sign off on them.

22 MR. KULP: I agree, sir.

23 MR. MURDAUGH: Yes, sir, and there is a YOA -- I
24 told you that he didn't have an adult record but that's
25 not correct. He's got apparently a distribution of

1 crack that he is on YOA parole for.

2 THE COURT: I don't have anything to do with
3 that.

4 MR. MURDAUGH: Okay, I will fill this out, sir.

5 THE COURT: Fill them out and then just let me
6 know. I will be in my office. Let's take about
7 fifteen minutes. So we are going to stand at-ease for
8 about fifteen minutes until the sentence sheets are all
9 filled out and then I will hear from the Defendant.

10 MR. KULP: Yes, sir, Your Honor.

11 (BRIEF RECESS)

12 THE COURT: All right. Have the attorneys all
13 signed them?

14 MR. KNIGHT: I don't think that we have to sign
15 on verdict by jury.

16 THE COURT: Okay. And I would only have to
17 fill out all those other forms if the death penalty had
18 been given.

19 MR. MURDAUGH: I would assume that's correct. I
20 apologize for not having those ready for you. We were
21 into the trial and I hadn't thought about the
22 sentencing sheets, to be honest with you. I apologize.

23 THE COURT: No problem. Now, what about the
24 kidnaping on the two murder cases?

25 MR. MURDAUGH: My understanding of the law, sir,

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Sentence
Jury Trial of October 8-16, 2001

1 is that you cannot sentence him on those kidnappings.

2 THE COURT: We don't have a sentence sheet, at
3 all?

4 MR. MURDAUGH: No, sir.

5 THE COURT: I thought that there was just the
6 sentence sheet and you'd just say "Sentence Deferred"
7 because of the ---

8 MR. MURDAUGH: I don't understand the law and I
9 all I know is what the ---

10 THE COURT: We know that he can't get any time
11 for it.

12 MR. MURDAUGH: That's right.

13 THE COURT: But he was convicted. I would
14 think that you would do a sentence sheet and just say
15 that there is no sentence. What do you all say on
16 that?

17 MR. KULP: I know, Judge, since the Department
18 of Corrections is their own entity ---

19 THE COURT: Well, it doesn't matter.

20 MR. KULP: My guess is that it would be
21 subject to their rules and interpretation.

22 THE COURT: And kidnapping carries what?

23 MR. KNIGHT: Fifteen to life.

24 THE COURT: What? Thirty years, isn't it?

25 MR. KNIGHT: Thirty, yeah.

1 THE COURT: And Burglary 1st is life.
2 MR. KNIGHT: Fifteen to life.
3 THE COURT: And armed robbery is twenty-five?
4 MR. MURDAUGH: That's correct.
5 THE COURT: Okay. Do you'all have anything?
6 MR. KULP: No, Your Honor.
7 THE COURT: How about jail time credit?
8 MR. KULP: We would ask that that be applied.
9 MR. MURDAUGH: He is entitled to that, by law.
10 THE COURT: For whatever it means since ---
11 MR. KULP: Yes, sir.
12 MR. MURDAUGH: There is no parole and he's go to
13 serve life, so I don't know what good that it is going
14 to do him but he is entitled to it.
15 THE COURT: What was the date of
16 incarceration?
17 MR. FLEMING: January 6, 1999.
18 THE COURT: Okay, and I will be sure to put
19 that on the other ones. So you have nothing to say?
20 MR. KULP: Your Honor, our position is that
21 in a case of this nature where the penalty phase
22 allowed us to go into such great detail about the
23 profile and the history and all the different aspects,
24 I think that we would offer that without a repetition
25 of it at this point.

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Sentence
Jury Trial of October 8-16, 2001

1779

1 THE COURT: Okay.

2 MR. MURDAUGH: If Your Honor please, there is one
3 thing that I would like to say. In doing your
4 sentencing, there are two categories, two murders,
5 which the penalty is fairly obvious. You have no
6 discretion in that. In the other counts, whether you
7 run it concurrent or consecutive to the life
8 imprisonment doesn't really make any difference to me.
9 But if you can, make them consecutive with each other.
10 If something should happen to the murder cases, that
11 would at least satisfy the family that he will have a
12 substantial period of time to serve.

13 MR. KULP: And with all respect, Your Honor, I
14 think it is incumbent on us to ask you to run them
15 concurrent as you might well imagine to expect us to
16 request.

17 THE COURT: I think I am ready to proceed with
18 the sentencing. The sentence of the Court is that the
19 Defendant, Tavarus Rogers, be committed in Indictments
20 99-GS-07-222 and 221, being the two murder indictments,
21 as to each of these indictments the Defendant is
22 committed to the State Department of Corrections for a
23 term of life imprisonment.

24 As to Indictment 99-GS-07-288, which is burglary
25 in the first degree, the sentence of the Court is that

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Sentence
Jury Trial of October 8-16, 2001

1780

1 the defendant, Tavarus Rogers, be committed to the
2 State Department of Corrections for a term of life
3 imprisonment.

4 As to Indictments 99-GS-07-281, 282 and 283, the
5 three kidnaping indictments, the sentence of the Court
6 is that the defendant, Tavarus Rogers, be committed to
7 the State Department of Corrections for a term of
8 thirty years on each indictment. Those indictments are
9 consecutive to each other, and concurrent to all other
10 indictments.

11 Lastly, the armed robbery, Indictment 99-GS-07-
12 220, the sentence of the Court is that the defendant,
13 Tavarus Rogers, be committed to the State Department of
14 Corrections for a term of twenty-five years and that is
15 concurrent with all other indictments.

16 Good luck to you, sir.

17 MR. KULP: Thank you, Your Honor. I think
18 that it is incumbent upon us, out of an abundance of
19 caution, to renew at this time all of our Motions and
20 note all of our exceptions.

21 THE COURT: Okay. And one last thing, as I am
22 sure that you will advise, and I am sure that -- I want
23 to put on the record that the Defendant is hereby
24 advised that he has the right to appeal the guilty plea
25 (sic) and sentence of the court -- not guilty plea but

State vs. Tavarus Rogers
99-GS-07-221 thru 222 and 99-GS-07-281 thru 288
Sentence
Jury Trial of October 8-16, 2001

1 the trial and the sentence. He has ten days and you,
2 as his attorneys, or he must file this within ten days
3 from today.

4 MR. KULP: Yes, sir, Your Honor. We
5 understand, as does he.

6 THE COURT: I commend all the attorneys in this
7 case for the fine job that they have done, I commend
8 the Sheriff's Office for the security in the courthouse
9 during this trial, the families of both the victims and
10 the defendant's family, I appreciate the fine job that
11 has been done to make this an orderly process.

12 MR. KULP: Thank you, Your Honor.

13 MR. FLEMING: Thank you, judge.

14 MR. MURDAUGH: With that, can I go home?

15 THE COURT: You are excused.

16 (TRANSCRIPT CONCLUDED)

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1 CERTIFICATE OF REPORTER

2
3 I, the undersigned, Deborah Garrison, Official
4 Court Reporter for the 9th Judicial Circuit of the
5 State of South Carolina, do hereby certify that the
6 foregoing is a true, accurate and complete transcript
7 of all the proceedings had and evidence introduced in
8 the jury trial of the above-captioned case before the
9 Honorable Gregory V. Jackson, in Beaufort, South
10 Carolina on October 8-15, 2001.

11 I do further certify that I am neither kin to nor
12 counsel for any of the parties hereto and have no
13 interest in the outcome of this action.

14
15 

16 Deborah Garrison
17
18
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22
23

24 Charleston, South Carolina

25 January 15, 2002

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Case # 9965-07-030
et al
Beaufort
Gregory

EXHIBITS

Plaintiff(s) State

vs.

Defendant(s) Tavarus Rogers

PLAINTIFF'S EXHIBITS		DEFENDANT'S EXHIBITS		COURT'S EXHIBITS
1	Photo Side of trailer	1	911 Tape	1 Jury list (5 pg)
2	Photo front of trailer	2	Wire statement	2 Gazette 10-9-2001
3	Photo front of trailer	3	Wire statement	3 Island Packet 10-9-2001
4	Photo back of trailer	4	Wire statement	4 Carolina Morning 10-10-01
5	Diagram (Back)	5	Wire statement	5 Gazette 10-10-01
6	Diagram (Bedroom)	6	Toby Reische ^{statement}	6 Doctor's Excuse Norman August
7	Diagram (Living)	7	Box of beer CANS	7 Jury list (2 pgs)
8	Autopsy (Riley)	8	Telephone Receiver	8 Photocopies News articles
9	Autopsy (Reische)	9	Playing cards (red)	9 Order sequestering jury
10	Photo lineup	10	Playing cards (blue)	10 List of books being read by Joe
11	DI. 1. 1.)	11	List of Crime	11 20 Jan 99 Status Robert

JUROR MASTER LIST
BEAUFORT COUNTY

PAGE 1

REPORT DATE : 09/04/01

10-8-01

NAME	ADDRESS	CITY/STATE/ZIP	SOC. SEC. #	BIRTHDAY	SEX
0001 01 SAMANTHA D AIKEN		ST HELENA ISLAN SC 29928			B F
0002 01 THELMA J ALBANY		DALE SC 29914			B F
0003 01 ANTONIUS ALLEN		BEAUFORT SC 29902			B H
0004 01 DORIS H ALLEN		BEAUFORT SC 29906			B F
0005 01 JOSHUA A ANACHER		HILTON HEAD ISL SC 29926			V H
0006 01 BOO Y AN		BEAUFORT SC 29902			A H
0007 01 SUSAN M ANDERSON		HILTON HEAD SC 29928			V F
0008 01 RONALD A ANTONINCCI		HILTON HEAD ISL SC 29926			V H
0009 01 NORMAN ARGAST		HILTON HEAD ISL SC 29928			V H
0010 01 REID A AUSTIN		GREENPOND SC 29446			B H
0011 01 SHANNON H BARNETT		BURTON SC 29906			V F
0012 01 BARBARA H BARNETT		HILTON HEAD ISL SC 29926			V F
0013 01 DENISE L BARRY		HILTON HEAD ISL SC 29928			V F
0014 01 JOSEPHINE S BATCHELOR		HILTON HEAD ISL SC 29928			V F
0015 01 WILLIAM A BEACH		HILTON HEAD ISL SC 29926			V H
0016 01 JAMES E BEARD		ST HELENA ISL SC 29928			V H
0017 01 TYRONE J BELFORD		BEAUFORT SC 29902			B H
0018 01 ISLE J BELLE S		BLUFFTON SC 29918			V F
0019 01 MARY E BENDLIN		BLUFFTON SC 29918			V F
0020 01 ANN L BERNETT		BEAUFORT SC 29902			V F
0021 01 MATTHEW J BENOIT		BLUFFTON SC 29918			V H
0022 01 AASE A BERLING		HILTON HEAD ISL SC 29926			V F
0023 01 LYTTON F BLASS		ST HELENA ISL SC 29928			V H
0024 01 DAVID E BOGAN		PORT ROYAL SC 29935			V H
0025 01 HENRY P BOMER		HILTON HEAD ISL SC 29928			V H
0026 01 HUGH T BOLSTER		PORT ROYAL SC 29935			V H
0027 01 TRACY A BORDEAUX		BEAUFORT SC 29902			B F
0028 01 MARY H BOULLY		HILTON HEAD ISL SC 29928			V F
0029 01 PHYLLIS H BRAY		BEAUFORT SC 29902			V F
0030 01 DAVID L BRINKLEY		HILTON HEAD SC 29928			V H
0031 01 HELEN T BROCKRECK		FRIPP ISLAND SC 29928			V F
0032 01 RICKY BROWN		BEAUFORT SC 29906			B H
0033 01 MELISSA A BRYAN		BEAUFORT SC 29902			V F
0034 01 WILLIAM G BURGER		HILTON HEAD ISL SC 29928			V H
0035 01 JEAN D BURKE		BEAUFORT SC 29902			B F
0036 01 WALTER I BURNS		HILTON HEAD ISL SC 29926			V H
0037 01 JOHN A BURT		BLUFFTON SC 29918			V H
0038 01 WILLIAM R BURT		HILTON HEAD ISL SC 29926			V H
0039 01 CHRISTINE M BURTON		BEAUFORT SC 29902			V F
0040 01 MICHAEL A BYRD		BEAUFORT SC 29902			V H
0041 01 MAUREEN G BYRNES		BEAUFORT SC 29902			V F
0042 01 GILBERT T CALHOUN		HILTON HEAD ISL SC 29926			V H
0043 01 WILLIAM V CAMP		BEAUFORT SC 29902			V H
0044 01 ENNA L CAMPBELL		HILTON HEAD ISL SC 29928			B F
0045 01 KATHERINE R CAMPBELL		BEAUFORT SC 29901			B F
0046 01 ELIZABETH A CARRS		HILTON HEAD ISL SC 29926			V F
0047 01 JUDITH H CARRINGTON		HILTON HEAD ISL SC 29928			V F
0048 01 KELVIN J CARTER		BEAUFORT SC 29902			V H

JUROR ROSTER LIST
BEAUFORT COUNTY

2303
PAGE 2

REPORT DATE :09/04/01

#	NAME	ADDRESS	CITY/STATE/ZIP	SOC. SEC. #	BIRTHDAY	SEX
0049	01 DAVID E CHAPMAN JR		BURTON SC 29906			BH
0050	01 JAMES R CHILDERS		YEMASSEE SC 29945			WH
0051	01 JERMAINE M CHISOLM		ST HELENA ISLAND SC 29920			BH
0052	01 DOROTHY E CHRIST		BLUFFTON SC 29910			WF
0053	01 GLORIA CIRESTI		BLUFFTON SC 29910			WF
0054	01 JOHN W CLARK		HILTON HEAD ISL SC 29928			WH
0055	01 DELLA COAKIN		ST HELENA ISL SC 29920			BF
0056	01 NICHELLE L COCHRAN		HILTON HEAD SC 29926			WF
0057	01 SHANNON M COCHRAN		HILTON HEAD ISL SC 29926			WF
0058	01 MARGARETTE M COLBY		SEA BROOK SC 29940			WF
0059	01 GRAHAM R COLEMAN		HILTON HEAD SC 29928			WH
0060	01 JAMES M COLESTIND		HILTON HEAD ISL SC 29926			WH
0061	01 KENNETH E CONKLIN		BEAUFORT SC 29902			WH
0062	01 DANIEL R CONNELLY		BEAUFORT SC 29902			WH
0063	01 WILLIAM F CONNOR		HILTON HEAD SC 29928			WH
0064	01 WALTER J CONTI		ST HELENA ISL SC 29920			WH
0065	01 KATHARINE G COOK		BLUFFTON SC 29910			WF
0066	01 ANTHONY D CORDRAY		HILTON HEAD SC 29926			BH
0067	01 HAROLD C COSBY		BEAUFORT SC 29902			BH
0068	01 ROBERT L CRAWFORD		PARRIS ISLAND SC 29905			BH
0069	01 JERRY L CRISS		BLUFFTON SC 29910			WF
0070	01 JOSEPH CUCCO		HILTON HEAD SC 29928	1		WH
0071	01 GERALD L DANIELS		SEA BROOK SC 29940			BH
0072	01 PAMELA C DARDEN		BEAUFORT SC 29906			BF
0073	01 JEFFREY S DAVIES		HILTON HEAD ISL SC 29928			WH
0074	01 VIRGINIA R DAVIS		BEAUFORT SC 29902			WF
0075	01 SEMJOYAH J DELANEY		SEABROOK SC 29940			BH
0076	01 SHARON L DENARS		HILTON HEAD ISL SC 29928			WF
0077	01 ALVENA P DENNIS		BURTON SC 29906			BF
0078	01 TERI L DEROUEN		ST HELENA SC 29920			WF
0079	01 TRACEY D DINGLE		BEAUFORT SC 29902			BF
0080	01 KELSIE S DION T		HILTON HEAD ISL SC 29926			WF
0081	01 BRUNDA R DOWERTY		LAUREL BAY SC 29906			WF
0082	01 LYNN M DOSIO		HILTON HEAD SC 29926			WF
0083	01 AARON P DOWELL		HILTON HEAD ISL SC 29925			WH
0084	01 CAROL L DRUM		BURTON SC 29906			AF
0085	01 JAMES G DUHN		ST HELENA ISL SC 29920			WH
0086	01 FRANK DURAND		HILTON HEAD ISL SC 29928			WH
0087	01 LAURIE L DURHAM		HILTON HEAD SC 29928			WF
0088	01 CHRISTINE E ENLERS		HILTON HEAD ISL SC 29928			WF
0089	01 LINDA R ENNERT		HILTON HEAD ISL SC 29928			WF
0090	01 ALJIN H ELDREDGE		HILTON HEAD ISL SC 29928			WF
0091	01 ELIZABETH C ELLIS		HILTON HEAD SC 29928			WF
0092	01 WILLIAM T ELLIS SR		ST HELENA ISL SC 29920			BH
0093	01 STEPHEN C ENMONS		HILTON HEAD ISL SC 29928			WH
0094	01 EDWARD J EVERETT		HILTON HEAD SC 29928			WH
0095	01 MICHAEL S EVERETT		BURTON SC 29903			WH
0096	01 BOSE A EWING		BEAUFORT SC 29902			WF
0097	01 SYDNEY V FALK		OKATIE SC 29910			WH

JUROR MASTER LIST
BEAUFORT COUNTY

REPORT DATE :09/04/01

JUR #	NAME	ADDRESS	CITY/STATE/ZIP	SEC. SEC. #	BIRTHDAY	SEX
0196 01	ALEJANDRINA C LEE		BEAUFORT SC 29906			H F
0197 01	JAMES S LEE		HILTON HEAD ISL SC 29926			V H
0198 01	MARIE H LEROY		HILTON HEAD ISL SC 29928			V F
0199 01	DONALD S LEVINE		BEAUFORT SC 29902			V H
0200 01	DAVID E LEWIS		HILTON HEAD ISL SC 29928			V H
0201 01	NANCY A LINCOLN		HILTON HEAD ISL SC 29928			V F
0202 01	JAMES C LINDSAY		BEAUFORT SC 29902			V H
0203 01	JOSEPH B LINDEN		BEAUFORT SC 29901			V H
0204 01	ELIZABETH H LITVIN		HILTON HEAD ISL SC 29926			V F
0205 01	JAMES C LOCKE		BEAUFORT SC 29902			V H
0206 01	RAFAEL LONDONO		BEAUFORT SC 29902			H H
0207 01	BEHNIE L LONG		BURTON SC 29906			H H
0208 01	BARBARA M LOOSBROCK		HILTON HEAD ISL SC 29926			V F
0209 01	NITZI L LUDIN		HILTON HEAD ISL SC 29926			V F
0210 01	EUGENE W LOW		HILTON HEAD ISL SC 29926			V H
0211 01	GERARDO J LUNA		HILTON HEAD SC 29926			H H
0212 01	RONALD W MANGUM SR		HILTON HEAD SC 29926			V H
0213 01	CHEVEL W MARTIN		BEAUFORT SC 29902			V F
0214 01	JOSEPH A MARTIN		HILTON HEAD ISL SC 29926			V H
0215 01	HOLLY M MARTIN		DAUFUSKIE IS SC 29915			V F
0216 01	JAMES R MASCARELLA		HILTON HEAD ISL SC 29926			V H
0217 01	JEANE B MASSEY		BEAUFORT SC 29902			V F
0218 01	DEWISE M MAY		ST HELENA ISL SC 29920			V F
0219 01	JOAN E MCCARTHY		BLUFFTON SC 29910			V F
0220 01	DANIEL J MCCLELLAN		FRIPP ISLAND SC 29920			V H
0221 01	MARK W MCCORMACK		HILTON HEAD ISL SC 29928			V H
0222 01	FLORENCE E MCCURRY		HILTON HEAD ISL SC 29928			V F
0223 01	ANANDA M MCGUIRE		BEAUFORT SC 29906			H F
0224 01	JANE L MCKEY		HILTON HEAD ISL SC 29926			V F
0225 01	DANIEL J MCCLAUGHLIN		HILTON HEAD SC 29920			V H
0226 01	S B MCCLAUGHLIN		FRIPP ISLAND SC 29920			V H
0227 01	DAVID A MCNATH		PORT ROYAL SC 29935			V H
0228 01	CARMALITA J MCNULLEN		HILTON HEAD ISL SC 29926			V F
0229 01	PHYLISS J MERCHEN		HILTON HEAD SC 29920			V F
0230 01	JUDY E NESSER		HILTON HEAD ISL SC 29928			V F
0231 01	MARY J NESSIER		HILTON HEAD SC 29920			V F
0232 01	BETTY M MIDDLETON		BLUFFTON SC 29910			V F
0233 01	BETTY E MILBURN		BURTON SC 29902			V F
0234 01	DORIS A MILLER		HILTON HEAD ISL SC 29928			V F
0235 01	JOHN M MILLER		ST HELENA ISL SC 29920			V H
0236 01	WILLIAM A MILLER		HILTON HEAD SC 29920			V H
0237 01	DAISY B MITCHELL		BURTON SC 29906			H F
0238 01	DOLORES R MITCHELL		HILTON HEAD ISL SC 29928			V F
0239 01	RICHARD MITCHELL		HILTON HEAD ISL SC 29926			H H
0240 01	SHAWN L NIXON		BEAUFORT SC 29906			H H
0241 01	KRISTEN L NOORE		HILTON HEAD SC 29920			V F
0242 01	HILDA B NOREAN		BEAUFORT SC 29902			V F
0243 01	MARK E MORRIS		BURTON SC 29906			V H
0244 01	TAMMIE L MORRIS		BEAUFORT SC 29902			V F

JUROR MASTER LIST
BEAUFORT COUNTY

2307
PAGE 6

REPORT DATE :09/04/01

1 #	NAME	ADDRESS	CITY/STATE/ZIP	SOC. SEC. #	BIRTHDAY	SEX
0245 01	LUCILLE O MORRISON		YENASSEE SC 29945			W F
0246 01	CHERYL H MOUTRIE		ST HELENA ISL SC 29920			B F
0247 01	ERIC S MILICA		PORT ROYAL SC 29935			W H
0248 01	ROBERTA MULLEN		SEA BROOK SC 29940			B F
0249 01	ROSEANNE R MULLEN		BLUFFTON SC 29910			W F
0250 01	JEANNE H MULLET		HILTON HEAD ISL SC 29926			W F
0251 01	SUZANNE A MURFORD		HILTON HEAD ISL SC 29926			W F
0252 01	FRANK H MURPHY		BEAUFORT SC 29902			W H
0253 01	SUSAN E MURPHY		HILTON HEAD ISL SC 29920			W F
0254 01	ERICKA F MURRAY		HILTON HEAD ISL SC 29920			B F
0255 01	GORDON H MURTAUGH		BLUFFTON SC 29910			W H
0256 01	HARVLYNN V MYER		HILTON HEAD ISL SC 29926			W F
0257 01	BETTY NEECE		BLUFFTON SC 29910			W F
0258 01	BEHINA S NICKSON		BEAUFORT SC 29906			B F
0259 01	RICHARD J NIXON JR		BEAUFORT SC 29902			B H
0260 01	HART H MORRIS		LAUREL BAY SC 29902			W F
0261 01	JANICE L NUSSBAUM		HILTON HEAD ISL SC 29920			W F
0262 01	JOSEPH L OBIE		SHELDON SC 29941			B H
0263 01	SUSAN E OLSEN		HILTON HEAD ISL SC 29926			W F
0264 01	DELORES D ORAGE		BEAUFORT SC 29902			B F
0265 01	JACK OREN		BEAUFORT SC 29902			W H
0266 01	JULI A OSUNA		BEAUFORT SC 29902			W F
0267 01	JOHN H PALMER JR		HILTON HEAD ISL SC 29920			W H
0268 01	CLINT T PARSONS		BEAUFORT SC 29906			W H
0269 01	FATE G PATERSON		HILTON HEAD ISL SC 29920			W F
0270 01	ALICIA R PATTERSON		BEAUFORT SC 29904			B F
0271 01	ROBERT R PATTERSON		BEAUFORT SC 29902			W H
0272 01	JOHN K PATTON		PORT ROYAL SC 29935			W H
0273 01	BENITEZ A PAZ DEL		HILTON HEAD SC 29920			B F
0274 01	LAURETTA E PAZANT		BEAUFORT SC 29901			B F
0275 01	HORNA J PECK		SHELDON SC 29941			W F
0276 01	JOSEPH C PEEDEN		BURTON SC 29906			W H
0277 01	JOHN I PERCIVAL		ST HELENA SC 29920			W H
0278 01	WILBER E PERRELL JR		BURTON SC 29902			W H
0279 01	CHRISTY H PETERS		BURTON SC 29906			W F
0280 01	JENNIFER L PETERSON		BEAUFORT SC 29902			W F
0281 01	HARRIET B PFANN		HILTON HEAD ISL SC 29926			W F
0282 01	SAM J PICCIONE III		HILTON HEAD ISL SC 29926			W H
0283 01	SHARRA M PIERCE		BURTON SC 29906			B F
0284 01	JUAN D PINO		PARRIS ISL SC 29905			B H
0285 01	JANET H PLAYER		BURTON SC 29903			W F
0286 01	JOHN C PLAYER		LOREDO SC 29931			W H
0287 01	COREY R POLIQUIN		BLUFFTON SC 29910			W H
0288 01	JANIE V POLITE		YENASSEE SC 29945			B F
0289 01	JOSEPH H POLOSCHAN		ST HELENA SC 29920			W H
0290 01	KAREN A POPE		ST HELENA ISL SC 29920			B F
0291 01	KYRA H POPLIN		HILTON HEAD ISL SC 29920			W F
0292 01	ANTHONY R PORTER		BEAUFORT SC 29902			W H
0293 01	EARLINE H PORTER		HILTON HEAD ISL SC 29926			B F

JUROR MASTER LIST
BEAUFORT COUNTY

REPORT DATE : 09/04/01

#	NAME	ADDRESS	CITY/STATE/ZIP	SOC. SEC. #	BIRTHDAY	SEX
0294 01	PENNY J POTTER		BLUFFTON SC 29910			W F
0295 01	EMILY E POWELL		HILTON HEAD ISL SC 29928			W F
0296 01	EDITH L POWERS		BEAUFORT SC 29902			W F
0297 01	TIMOTHY H PRICE		BURTON SC 29906			W H
0298 01	FRANKIE H PRINUS W		BLUFFTON SC 29910			B F
0299 01	H A PUGH		BEAUFORT SC 29902			W F
0300 01	LATASHA R PUSHA		BURTON SC 29902			B F
0301 01	VIVIAN T QUATTLEBAUM		HILTON HEAD ISL SC 29928			W F
0302 01	JOHN R RAABE		BEAUFORT SC 29902			W H
0303 01	SANDRA H RAECKELBOOM		BEAUFORT SC 29902			W F
0304 01	JANET M RAHERKAMP		OKATIE SC 29910			W F
0305 01	ELIZABETH H RANOS		ST HELENA ISL SC 29920			A F
0306 01	ELAINE B RATHBUN		BEAUFORT SC 29902			W F
0307 01	JAMES A REED		BLUFFTON SC 29910			W H
0308 01	CATHERINE V REESE		BEAUFORT SC 29902			W F
0309 01	DANIEL J REEVES		BEAUFORT SC 29902			W H
0310 01	JARINE H REEVES		BEAUFORT SC 29906			W F
0311 01	MITZI T REID		BLUFFTON SC 29910			W F
0312 01	ANTON L RHEM		BEAUFORT SC 29906			B H
0313 01	JEFF BRIDAN		ST HELENA ISL SC 29920			B H
0314 01	JOHN C RICHARDS		HILTON HEAD ISL SC 29928			W H
0315 01	JACOB R RICHARDSON		BEAUFORT SC 29902			B H
0316 01	LESLIE B RICHARDSON		HILTON HEAD ISL SC 29928			W F
0317 01	DIANE H RICKER		BLUFFTON SC 29910			W F
0318 01	FRANK R RILEY		SEABROOK SC 29940			B H
0319 01	DAVID A RINEHART		HILTON HEAD ISL SC 29926			W H
0320 01	JUAN RIVADENEIRA		BEAUFORT SC 29906			B H
0321 01	JANE C RIVERS		HILTON HEAD ISL SC 29926			W F
0322 01	NIRKIA S RIVERS		BLUFFTON SC 29910			B F
0323 01	LAWRENCE R ROBERTS		BEAUFORT SC 29902			W H
0324 01	HENRY ROBINSON		ST HELENA ISL SC 29920			B H
0325 01	ROSS W ROBINSON		HILTON HEAD ISL SC 29928			W H
0326 01	TANY M ROBINSON		BURTON SC 29906			B F
0327 01	WILLIE J ROBINSON JR		ST HELENA ISL SC 29920			B H
0328 01	JANICE H ROEDER		OKATIE SC 29910			W F
0329 01	LESLIE J ROLDAN		BURTON SC 29903			B F
0330 01	CLARENCE D RONDQUEST		HILTON HEAD SC 29928			W H
0331 01	SCOTT R ROSIAN		HILTON HEAD SC 29928			W H
0332 01	ALBERT H ROSS		HILTON HEAD ISL SC 29926			W H
0333 01	LESLIE P ROWELL		BEAUFORT SC 29902			W F
0334 01	HARVEY H RUTLAND JR		ST HELENA SC 29920			W H
0335 01	ARLENE S RYAN		BURTON SC 29902			W F
0336 01	VICTOR SANCHEZ		HILTON HEAD SC 29926			B H
0337 01	CAROLINE H SANDERS		ST HELENA ISL SC 29920			W F
0338 01	HENRY A SCHAEFFER		BLUFFTON SC 29910			W H
0339 01	HANK E SCHALLER		HILTON HEAD ISL SC 29926			W H
0340 01	THOMAS C SCHAU		HILTON HEAD ISL SC 29928			W H
0341 01	ANDREW J SCHENBERG		HILTON HEAD ISL SC 29928			W H
0342 01	DEVEREE T SCOTT SR		BLUFFTON SC 29910			B H

JUROR MASTER LIST
BEAUFORT COUNTY

2309

REPORT DATE :09/04/01

#	NAME	ADDRESS	CITY/STATE/ZIP	SOC. SEC. #	BIRTHDAY	SEX
0343 01	ROBERT L SEABROOK		SEA BROOK SC 29940			BH
0344 01	TEDRICK T SEARS		BLUFFTON SC 29910			VH
0345 01	RUTH L SELLERS		FRIPP ISLAND SC 29920			VF
0346 01	DANA H SHANNON		HILTON HEAD ISL SC 29928			VF
0347 01	CARRIE A SHELTON		HILTON HEAD SC 29928			VF
0348 01	CAROL E SHIFFERT		BEAUFORT SC 29902			VF
0349 01	RICKY D SHURAKE		HILTON HEAD ISL SC 29926			VH
0350 01	KARLA H SIMON		BURTON SC 29906			VF
0351 01	VINCENT E SIMPKINS		BURTON SC 29906			VH
0352 01	SUSAN H SINGLETON		BEAUFORT SC 29902			VF
0353 01	DAVID C SLAUGHTER		LAUREL BAY SC 29902			BH
0354 01	NANCY R SMALL		ST HELENA SC 29920			VF
0355 01	CATHERINE SMALLS		BEAUFORT SC 29902			BF
0356 01	JAMES G SMALLS		ST HELENA ISL SC 29920			BH
0357 01	CURTIS L SMART		RIDGELAND SC 29936			VH
0358 01	BRIAN H SMITH		BEAUFORT SC 29902			VH
0359 01	DENNIS H SMITH		HILTON HEAD ISL SC 29928			VH
0360 01	JAMES D SMITH		ST HELENA ISL SC 29920			BH
0361 01	JOHN J SMITH		SHELTON SC 29941			VH
0362 01	NANCY E SMITH		HILTON HEAD ISL SC 29926			VF
0363 01	RODNEY D SMITH		HILTON HEAD SC 29928			BH
0364 01	STEPHANIE H SMITH	3c	LAUREL BAY SC 29906			VF
0365 01	DAVID L SMITH III	ST	BLUFFTON SC 29910			VH
0366 01	JOSEPH E SMITH III		BLUFFTON SC 29910			VH
0367 01	GEORGE D SMITH JR		BURTON SC 29902			VH
0368 01	GARY W SNYDER		BLUFFTON SC 29910			VH
0369 01	MATTHEW A SOLOO		HILTON HEAD SC 29928			VH
0370 01	KRISTA A SOLLEY		HILTON HEAD SC 29928			VF
0371 01	RASKELL D SOPSHTER		BURTON SC 29902			VH
0372 01	WILLIAM E SPEARS JR		BEAUFORT SC 29902			VH
0373 01	MICHAEL A SPEIR		PARRIS ISLAND SC 29905			VH
0374 01	NICHILLE D SPICER		LAUREL BAY SC 29902			AF
0375 01	JOANNE E STANLEY		BURTON SC 29902			VF
0376 01	JOHN P STANTON		HILTON HEAD ISL SC 29926			VH
0377 01	WILLIAM E STARK		BURTON SC 29902			VH
0378 01	NANCY H STEWART		SHELTON SC 29941			BF
0379 01	PADELLA F STEWART		ST HELENA SC 29920			BF
0380 01	JOSEPH W STONEBRAKER		BEAUFORT SC 29902			VH
0381 01	DIANA L STRICKLAND		BEAUFORT SC 29902			VE
0382 01	SANDRA L STRICKLAND		HILTON HEAD SC 29926			VF
0383 01	HOLLY A STRIMPEL	1	BLUFFTON SC 29910			VF
0384 01	DAVID H STROHS		HILTON HEAD ISL SC 29928			VH
0385 01	HECTOR O SUAREZ		HILTON HEAD SC 29926			VH
0386 01	AARON V SULLIVAN		BEAUFORT SC 29906			VH
0387 01	WILLIAM Y SWIFT		PARRIS ISLAND SC 29905			BH
0388 01	KIM J SWITZER		BURTON SC 29906			AF
0389 01	GENE TAGGART		HILTON HEAD ISL SC 29926			VH
0390 01	LEE D TALLEY		BEAUFORT SC 29902			VH
0391 01	TYRONE TAYLOR		BEAUFORT SC 29902			BH

JUROR MASTER LIST
BEAUFORT COUNTY

REPORT DATE :09/04/01

NO	NAME	ADDRESS	CITY/STATE/ZIP	SOC. SEC. #	BIRTHDAY	SEX
0392 01	GENTRY D THAMES		BEAUFORT SC 29902			M
0393 01	SHIRLEY A THOMAS		HILTON HEAD ISL SC 29928			F
0394 01	THEODORE H THOMAS		HILTON HEAD SC 29926			M
0395 01	SHELLA R THOMPSON		BURTON SC 29906			F
0396 01	TIERRA F THOMPSON		SEABROOK SC 29940			F
0397 01	LANDON K THORNE		SHELDON SC 29941			M
0398 01	CAROL A TREEST		BURTON SC 29906			F
0399 01	BRUCE E TUFTS		BLUFFTON SC 29910			M
0400 01	MARY J TRACY		BLUFFTON SC 29910			F
0401 01	RONALD E TUCKER		BEAUFORT SC 29906			M
0402 01	ANNIE S UNDERWOOD		ST HELENA ISLAND SC 29920			F
0403 01	VALERIE R VAUGHAN		HILTON HEAD ISL SC 29928			F
0404 01	MARGARET H VENNING		BEAUFORT SC 29902			F
0405 01	MICHAEL L WALKER		HILTON HEAD ISL SC 29926			M
0406 01	DUANE W WARD		PORT ROYAL SC 29935			M
0407 01	DUKE W WASHINGTON		SEA BROOK SC 29940			M
0408 01	EATHER M WASHINGTON		BEAUFORT SC 29902			F
0409 01	GLADYS WASHINGTON		BEAUFORT SC 29902			F
0410 01	ROBERT B WATSON		BEAUFORT SC 29902			M
0411 01	STEPHANIE M WATTS		BURTON SC 29906			F
0412 01	LEE J WEBB		BEAUFORT SC 29902			M
0413 01	WILLIAM H WENNER		BURTON SC 29906			M
0414 01	NORMA J WEINER		HILTON HEAD ISL SC 29926			F
0415 01	CRYSTAL H WELLS		BURTON SC 29902			F
0416 01	JAMES W WESCOTT		SEA BROOK SC 29940			M
0417 01	JOHN A WEYMOUTH		HILTON HEAD SC 29928			M
0418 01	CHARLES C WHITE		FRIPP ISLAND SC 29920			M
0419 01	CHARLES W WICKES MR		HILTON HEAD ISL SC 29926			M
0420 01	JOHN S WIEDENANN		HILTON HEAD ISL SC 29928			M
0421 01	RICHARD I WILES		HILTON HEAD ISL SC 29926			M
0422 01	CARLOS L WILLIAMS		BLUFFTON SC 29910			M
0423 01	CLYDETHA WILLIAMS		HILTON HEAD ISL SC 29926			F
0424 01	MARY WILLIAMS		BURTON SC 29906			F
0425 01	PATRICIA A WILLIAMS		BURTON SC 29906			F
0426 01	ROBERT T WILLIAMS JR		BEAUFORT SC 29902			M
0427 01	DONALD H WILLIAMSON		HILTON HEAD ISL SC 29928			M
0428 01	REGINALD S WILSON		ST HELENA ISL SC 29920			M
0429 01	NICHELLE L WINBUSH		PARRIS ISLAND SC 29902			F
0430 01	TIMOTHY L WINSET		HILTON HEAD ISL SC 29926			M
0431 01	JENNIFER M VOGGIN		HILTON HEAD ISL SC 29926			F
0432 01	CAROL A WOLACK		BEAUFORT SC 29902			F
0433 01	MATTHEW D WOOD		HILTON HEAD SC 29928			M
0434 01	LORI E WOODRUM		PORT ROYAL SC 29935			F
0435 01	ROBERT A WOODS		HILTON HEAD ISL SC 29926			M
0436 01	REBECCA S WOOLWINE		HILTON HEAD ISL SC 29928			F
0437 01	GENEVA M WRIGHT		SEA BROOK SC 29940			F
0438 01	LARRY WRIGHT		SEABROOK SC 29940			M
0439 01	THOMAS WRIGHT		SEABROOK SC 29940			M
0440 01	RICHARD A YANNER		HILTON HEAD ISL SC 29928			M

JUROR MASTER LIST
BEAUFORT COUNTY

2314

REPORT DATE :09/04/01

#	NAME	ADDRESS	CITY/STATE/ZIP	SOC. SEC. #	BIRTHDAY	SEX
0441 01	CHRISTOPHER S YOUNG		BEAUFORT SC 29902			M
0442 01	BERNARD R YOUNG		HARDEEVILLE SC 29927			M
0443 01	DOROTHY C YOUNG		ST HELENA ISL SC 29928			F
0444 01	JACQUELINE H YOUNG		HILTON HEAD ISL SC 29926			F
0445 01	BICILE A YOUNG		BURTON SC 29902			F
0446 01	STACEY J YOUNG		ST HELENA SC 29928			M
0447 01	BETTY B YUSATYIS		BURTON SC 29902			F
0448 01	STEVEN B ZIPLOW		HILTON HEAD ISL SC 29928			M
0449 01	DORIS L ZOLLAR		HILTON HEAD ISL SC 29928			F
0450 01	PATRICIA A ZWARG		FRIPP ISLAND SC 29928			F
JUROR GROUP #..... 01			450			
JUROR TERM DATE..... 10/08/01			450			
GRAND TOTAL			450			

STATE OF SOUTH CAROLINA

County of BEAUFORT

06-CP-07-1094

In the Court of Common Pleas

TAVARUS LEE ROGERS, SR. #244362
Full name and prison number (if any) of Applicant.vs.
The State of South Carolina
Name of Respondent.APPLICATION FOR
POST-CONVICTION RELIEFCLERK OF COURT
BEAUFORT, S.C.

JUN 28 AM 11:37

INSTRUCTIONS — READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention LIEBER CORRECTIONAL INSTITUTE
2. Name and location of Court which imposed sentence Beaufort County Court of General Session
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 99-GS-07-220 99-GS-07-281 99-GS-07-288
 - (b) 99-GS-07-221 99-GS-07-282
 - (c) 99-GS-07-222 99-GS-07-283
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Armed Robbery (25 yrs) Kidnapping (30 yrs) Swingman 1st (Life)
 - (b) Murder (Life) Kidnapping (30 yrs) (All October 16, 2001)
 - (c) Murder (Life) Kidnapping (30 yrs)

5. Check whether a finding of guilty was made

(a) after a plea of guilty.

(b) after a plea of not guilty YES

(c) after a plea of nolo contendere.

6. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. S.C. Court of Appeals

ii.

iii.

(b) the result by each such Court to which you appealed:

i. Affirmed conviction

ii.

iii.

(c) the date of each such result:

i. Filed July 7, 2004

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished opinion No. 2004-117-427

ii.

iii.

8. If you answered "no" to (6), state your reasons for not so appealing:

(a)

(b) N/A

(c)

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Effective Assistance of Counsel

(b) Due Process Violation

(c)

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) See memorandum of law

(b)

(c)

11. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? yes
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? ---
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? ---
- (d) any other petitions, motions or applications in this or any other Court? ---

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Petition for Certiorari

ii. ---

iii. ---

iv. ---

(b) the name and location of the Court in which each was filed:

i. South Carolina Supreme Court

ii. ---

iii. ---

iv. ---

(c) the disposition thereof:

i. Denied

ii. ---

iii. ---

iv. ---

(d) the date of each such disposition:

i. N/A

ii. ---

iii. ---

iv. ---

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

i. N/A

ii. ---

iii. ---

iv. ---

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) See memorandum of Law
- (b) _____
- (c) _____

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

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

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you:

- i. Cory H. Fleming PO Box 567 Beaufort, SC 29901
- ii. Propathy Clark Kulp 3660 West Montague Avenue North Charleston, SC 29418
- iii. Robert M. Dudek 1122 Lady Street Suite 240 Columbia, SC 29201

(b) the proceedings at which each such attorney represented you:

- i. Summary Trial - C.H. Fleming / P.C. Kulp
- ii. Direct Appeal - R.M. Dudek
- iii. _____

18. State clearly the relief you seek in filing this application.

vacate conviction; alternatively, New Trial

19. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA

County of Dorchester

VERIFICATION

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

Tavarus Rogers

SWORN to and subscribed before me this 13day of April 2006

Billy Cornelly (L.S.)
Notary Public

CLERK OF COURT
BEAUFORT, S.C.

05 APR 28 AM 11:37

My Commission Expires: August 12, 2014

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

I, Tavarus Rogers, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty 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.

Tavarus Rogers
Applicant

SWORN or affirmed to and subscribed before me this

13 day of April 2006

Billy Cornelly
Notary Public

My Commission Expires: August 12, 2014

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

COUNTY OF BEAUFORT
Honorable Carmen T. Mullen, Presiding Judge in Beaufort County

No. 06-CP-07-1094

TAVARUS ROGERS #244362.....PETITIONER,

v.

STATE OF SOUTH CAROLINA; and
ATTORNEY GENERAL, ALAN WILSON.....RESPONDENT,

AMENDED APPLICATION FOR POST-CONVICTION RELIEF

TO: RESPONDENT, STATE OF SOUTH CAROLINA AND THE HONORABLE COURT:

Petitioner/Applicant Tavarus Lee Rogers through its undersigned counsel, allege unto the Honorable Court Petitioner's Amended Application for Post-Conviction Relief and Memorandum of Law as follows:

Tavarus Lee Rogers (hereinafter "Applicant" or "Rogers") was indicted in 1999 by the Beaufort County Grand Jury for armed robbery, two counts of murder, three counts of kidnapping and burglary 1st degree. He was tried by jury on October 16, 2001 in Beaufort County and found guilty as charged and sentenced by the Honorable Jackson V. Gregory to confinement for twenty five years for armed robbery, thirty years for kidnapping, and life imprisonment for burglary first degree and two counts of murder (99-GS-07, 0221 and 0222). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. Rogers is presently confined in

the South Carolina Department of Corrections at Lieber Correctional Facility.

Applicant now files this Amended Application which alleges ineffective assistance of counsel and violation of due process. This Amended Application supplements the initial Application in this case. Applicant's primary arguments are:

1. Ineffective assistance of counsel at trial: Failure by counsel to permit Plaintiff to testify in his own defense.
2. Ineffective assistance of counsel at trial: Failure by counsel to examine key alibi witness, Shamira Holmes, and failure to call Ms. Holmes as a defense witness.
3. Ineffective assistance of counsel at trial: Failure to require a live line up prior to trial.

In addition, Taverus Lee Rogers has prepared a memorandum of law on the following additional points and arguments, which memorandum is incorporated and attached hereto:

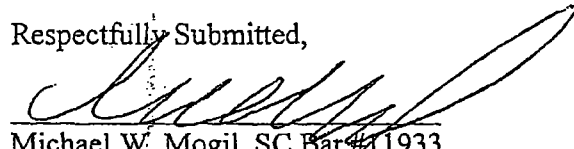
4. Ineffective assistance of counsel: Failure by counsel to object to the prosecution's closing argument at trial which Petitioner deems prejudicial.
5. Ineffective assistance of counsel: Failure by counsel to object to the trial court's jury charge(s) which allegedly shifted the burden of proof to the Defendant on the element of malice.
6. Ineffective assistance of counsel: Failure by counsel to object to the trial court's jury charge(s) that employed facts from the instant case and facts used in the prosecution's summation's in its charge.

The undersigned counsel requests unto the Honorable Court for the opportunity to submit a supplemental memorandum of law which conforms to the facts and evidence introduced at hearing, scheduled for August 31, 2011.

Hilton Head Island, South Carolina

August 29, 2011

Respectfully Submitted,



Michael W. Mogil, SC Bar #11933
2 Corpus Christie Place, Ste. 303
(843) 785-8110
Hilton Head Island, SC 29928
Attorney for Petitioner

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT

CA/No. 06-CP-07-1094

TAVARUS L. ROGERS #244362.....PETITIONER,

-VS-

STATE OF SOUTH CAROLINA; and
ATTORNEY GENERAL, HENRY McMASTER.....RESPONDENT,

AMENDED PCR APPLICATION AND
MEMORANDUM OF LAW IN SUPPORT
BROUGHT PURSUANT TO RULE 15 SCRCP

Respectfully Submitted,

/s/

Tavarus L. Rogers

INDEX

INDEX.....	(ii)
MEMORANDUM OF LAW.....	(1)
ISSUE (A).....	(2)
ISSUE (B).....	(8)
ISSUE (C).....	(12)
CONCLUSION.....	(19)
CERTIFICATE OF SERVICE.....	(20)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)

TAVARUS L. ROGERS #244362) CA/No. 06-CP-07-1094
PETITIONER,)
-V-) AMENDED POST CONVICTION RELIEF
STATE OF SOUTH CAROLINA; and) APPLICATION AND MEMORANDUM OF
ATT. GEN. HENRY McMASTER) BROUGHT PURSUANT TO RULE 15 of
RESPONDENT,) S.C.R.Civ.P.

COMES NOW, Tavarus Rogers, by and through attorney of record who respectfully moves this Honorable Court to amend the Original Post Conviction Relief Application in the above captioned case number pursuant to Rule 15 S.C.R.Civ.P.

Respectfully Submitted,

/s/ _____

Tavarus L. Rogers

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S CLOSING ARGUMENT THAT VIOLATED THE GOLDEN RULE AND DENIED PETITIONER A FAIR TRIAL?

FACTS

During closing arguments to the jury the Prosecution argued the following without objection from Counsel, as recorded:

His Honor will charge you that in South Carolina when you inflict injury upon a person that causes a death, in order to be found guilty of murder you have to have it in your mind at the time of the infliction of the injury. In other words, if you do not have it in your mind that you want to kill somebody, it's not murder. But if you have it in your mind -- and it doesn't say that it has to be there an hour a head of time, or thirty minutes ahead of time, or even a minute a head of time, but it says you have to have formed it in your head that you want to kill somebody when you, by way of example, pull the trigger. Now, Kidnapping is the seizing or confining of a..[Tr.p.1473, L.12-25]...person. He will charge you what all this big 'ole, all kinds of things, but only those two words in the definition have any import, "seize" or "confine". If, Madam Juror, Mr. Juror, any one of you ladies and gentlemen, if I were to take a gun and if I were to make you lie down on the floor and take away from you your freedom to move, I have kidnapped you. It doesn't have to be taking somebody away and trying to get a ransom from them. It only means you have to seize them or confine them for kidnapping. [Tr.p.1474, L.1-10].

Well, that satisfies Burglary, when you enter without consent of another person, and when you use a gun to come in, God knows if that ain't without consent, I

don't know what is, and beat the fellow up at the front door. And when you come in there with the intent to take his money and his dope -- and please understand, I prosecute people for dope everyday. I don't appreciate it and I don't like it and they ought to be admonished for doing that, but the mere fact that you have dope does not give a person the right to and steal from you your money just because you sell dope; and that's what Paul Reischl's brother said Toby. He said he was a dealer. But it doesn't give another person the right to come in and steal and rob you. It doesn't give you a right to kill them. [Tr.p.1476, L.5-21].

Well, if you don't like dope so bad that you're going to give people the right to kill, that's fine I hope you don't have that attitude. [Tr.p.1477, L.15-17].

If anything ever happened, and if you don't like...[Tr.p.1477, L.25]...him -- if it doesn't really upset your conscience, if it doesn't upset your conscience that he killed a person that his brother identified as a drug dealer, does it upset your conscience that he executed a person who nobody said was a drug dealer? [Tr.p.1478, L.1-5].

Everybody -- and they knew not who it was. They didn't know that you were John Doe, or Richard Roe, or what your full names were. [Tr.p.1478, L.18-20].

DISCUSSION

Petitioner contends that he was denied his constitutionally guaranteed right to the effective assistance of trial counsel when Counsel failed to object to the Prosecution's improper closing argument that violated the Golden Rule and denied Petitioner his right to a fair trial that is protected under the U.S. Constitution's Fourteenth Amendment.

Golden Rule arguments are generally improper and may constitute reversible error. State v. Henry 78 P.3d 403, 410 (Kan. 2003). A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors passions or prejudices. Humphries v. State 351 S.C. 362, 570 S.E.2d 160, 166 (2002); accord Simmons v. State 331 S.C. 333, 338; 503 S.E.2d 164, 166 (1998).

The traditional notion of the Golden Rule, though not yet contained in any rule of evidence or procedure, but can be seen at 75 Am.Jur.2d §282 p.357, which holds a lawyer shall not urge the jury members to imagine themselves or their families or friends in the place of the victim or the defendant and to render their verdict from that perspective. Although the forbiddance of Golden Rule arguments began in civil trials to hinder the plaintiff from urging the jury to put itself in the place of the victim in order to obtain higher damages, the prohibition has now also been made applicable to criminal actions as well. See 75 A.Am.Jur.2d Trial §650 (1991), also see Lucas v. State 335 So.2d 566, 568 (Fla.Dist.Ct.App.1976)(holding that "[t]he techniques of asking jurors to place themselves in the position of the victim has been held to be "improper in both civil and criminal".).

The Golden Rule argument, suggesting to jurors as it does, that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from the neutrality and to decide the case on the basis of personal interest and biases rather than on the evidence. Regardless, of the nomenclature used, any argument that

importunes the jurors to place themselves in the shoes of one of the parties is "disallowed". See Johnson v. State 587 S.E.2d at 781 (2003); also see Black's Law Dictionary 7th Ed. at p.700.

The Court, quoting State v. Gilstrap 205 S.C. 412, 416, 32 S.E.2d 163, 164-65 (1944) reasoned: "The rule in this State, and we think in most jurisdictions, is that upon the whole case, it appears to the court that the defendant was prejudiced by the language used, as a result of which he did not have a fair and impartial trial, it would be the duty of the court to reverse the case and remand it for a new trial". The Court further opined "an argument of this nature addressed to the jury tends to completely destroy and nullify all sense of impartiality in a case of this kind. It's logical affect is to arouse the passions and prejudices of the jury. Jurors are sworn to be governed by the evidence and it is their duty to regard the facts of the case impersonally". Id at 417.

Statements such as those made in State v. McDaniel 462 S.E.2d 883, 884, In her closing argument, the solicitor used you or a form of you some forty-five times, asking the jury to put themselves in the place of the victim. Moreover, the request concerned family members, as in White (infra), but directly to the jurors themselves. This was clearly reversible error under White 144 S.E.2d 481. Surely Counsel should have objected to this line of argument, for the argument in the instant case mirrors that of McDaniels (supra), and also held impermissible in White (supra).

In Berger v. United States 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), the United States Supreme Court indicated: The United States Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty to govern all, whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As, such he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that the guilty shall not escape or innocence suffer. He may prosecute with earnest and vigor--indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id* at 55 S.Ct. 633 (emphasis added).

The South Carolina Supreme Court echoed this same standard in State v. King 71 S.E.2d 793 (1952), "A solicitor is an officer of the court representing all the people, including the accused, and occupies a quasi-judicial position and must see that justice is done, that no conviction takes place except in strict conformity with the law and that the accused is not deprived of any constitutional rights or privileges, and however strong his belief may be of an accused's guilt, he must conduct the trial in a manner fair and impartial to the accused....". The Court has specifically indicated that the duty of a solicitor is to see that justice is done and not to convict the defendant, and further that the solicitor is a quasi-judicial officer, and must not do things which prevent a fair trial. State v. Durden 212

S.E.2d 587 (1975). Petitioner believes he is right as a matter of law and fact in the instant matter, and that Counsel was ineffective for failing to object to the Prosecution's improper closing and as a result of Counsel failure, Petitioner was denied his constitutionally guaranteed right to the effective assistance of trial counsel as well as his right to a fair trial that is protected under the due process clause of the Fourteenth Amendment.

For the aforementioned violations of Petitioner's rights, this Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S INSTRUCTIONS TO THE JURY THAT IMPERMISSIBLY COMMENTED ON THE FACTS OF THE CASE, WHEN THE TRIAL COURT USED FACTUAL EXAMPLES OF THE CASE IN THE CHARGE?

FACTS

During opening summation to the Jury the Prosecution explained to the Jury "that at some point that night four people came to the house and were invited in by Paul Reischl and stayed there for a length of time, which you will hear testimony about. Certain things happened -- not bad, just a friendly visit. That then those four people left. Later, around 3:00 in the morning, two people came back. There was a knock on the door -- and this is the testimony that you will hear from the witnesses, that there was a knock on the door and when the door was opened it was pushed in and two people came in carrying shotguns. They made everybody lie down, under threats of bodily injury, on the floor. [Tr.p.1198, L.2-13].

During the Trial Court's charge to the Jury the following statements by the Court was recorded:

Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be express malice. [Tr.p.1501, L.12-18].

If one intentionally kills another during the commission of a felony, the inference of malice may arise. [Tr.p.1502, L.5-7].

Petitioner contends that Counsel should objected to the Trial Court's charge that used "examples" of circumstances that could easily constitute an impermissible comment on the facts of the case in such the Jury was to determine whether or not malice existed. This was easily seen for the Court's examples of malice consisted on "lying in wait". The very points stressed by the Prosecution that allegedly Petitioner left and "waited" until the early morning hours only to return and murder the victims.

DISCUSSION

Petitioner contends that the Trial Court's examples created in effect an impermissible comment on the facts of the case.

Judicial comments on the facts of a case is prohibited in South Carolina, See South Carolina Constitution Art. 5, §17, "A trial judge may not instruct the jury regarding what weight should be given certain evidence or even that certain evidence is or is not entitled to consideration from them. As the South Carolina Supreme Court said in State v. Hartley 414 S.E.2d 182 at 183:

"A judge shall not charge in respect to matters of fact, but shall declare the law. State v. Bagwell 23 S.E.2d 244 (1942)(A judge cannot express in his charge, or intimate any opinion as to the

weight or sufficiency of testimony without violating the prohibition of the Constitution as to charging upon the facts). 75 A Am.Jur.2d Trial §1203 at 693 (1991)(The trial court may not instruct the jury what weight should be given [to the evidence], or even that any particular evidence is or is not entitled to receive weight or consideration from them). State v. Edwards 120 S.E. 490 (1923)(wherein our Supreme Court held the absence of motive is a mere circumstance to be considered by the jury and rejected an instruction that the absence of motive may raise a reasonable doubt as to the defendant's guilt because it was a charge on the facts.).

In the instant case the Court's examples of malice reflected the facts of the case and reiterated "points" stressed in the State's opening summation to the Jury. The definition included examples which concurred with the State's articulated theory of malice.

This charge only reiterated the facts as put forth by the Prosecution, to where the malice charge could reasonably be interpreted as a judicial endorsement of the prosecution's argument. Proving malice was central to the State's case against Petitioner. Since the Court's charge impermissibly skewed the jury's consideration of the facts regarding these issues, Petitioner was prejudiced by the error and counsel was ineffective for failing to object to the improper instructions given by the Court.

Petitioner further argues that his due process rights to a fair trial were violated by the comments of the Court. For

through the doctrine of substantive due process, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. Whitney v. California 47 S.Ct. 641 (1927).

The threshold question, is whether the comments by the trial Court were sufficiently conscience-shocking as to implicate substantive due process protections. Petitioner contends that they were, because the trial Court acted intentionally, for purposes that only served the prosecution. Here the issue asserted is one protected by the due process clause, when it's violation by the Court served a compelling interest, which amounted to abuse of power sufficient to shock the judicial conscience. County of Sacramento 118 S.Ct. at 1717-18.

Petitioner contends that these direct comments by the Trial Court were a direct violation of his rights to a fair trial, and that the only purpose served by this was to direct a verdict for the State. Furthermore Counsel was ineffective for failing to object and preserve this meritorious issue for appellate review. As there is a reasonable probability that but for this deficiency the results of the trial as well as the appeal may have been different.

For the aforementioned violations, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (C) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S CHARGE THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF DUE PROCESS?

FACTS

The Trial Court gave the following instructions to the Jury without objection from Counsel, as recorded:

The State must prove beyond a reasonable doubt that the Defendant killed another person with malice aforethought. "Malice" is hatred, ill, will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that...[Tr.p.1500, L.19-25]..the law will infer evil intent. Malice aforethought does not require malice exists for any particular time before the act is committed, but malice must exist in the mind of the Defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act. Malice aforethought may be expressed or inferred. The terms express or inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist; that is; either by direct or by inference from the facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be express malice. Malice may be inferred from conduct showing total

disregard for human life. Inferred malice may arise when the deed is done with a deadly weapon. [Tr.p.1501, L.1-21].

DISCUSSION

In a long line of cases, culminating in Yates v. Evatt 111 S.ct. 1884 (1991), the United States Supreme Court has recognized that the prosecution "must prove each and every element" of the crime charged beyond a reasonable doubt. in re Winship 397 U.S. 158 (1970). The burden of proof on any element cannot be shifted to the defense, because doing so decreases the State's burden of proving the crime beyond a reasonable doubt.

As early as 1975 the United States Supreme Court considered a Maine Rule which required the defendant charged with murder to prove he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a State could not shift the burden of proof on any element of the crime to the defendant. Mullaney v. Wilbur 421 U.S. 684 at 701 (1975). The Court found the risk described to be intolerable and reversed Wilbur's conviction. Id.

The United States Supreme Court overturned another conviction in Sandstrom v. Montana 442 U.S. 510 (1979). In that case Montana law provided that a person could be charged with deliberate homicide when that person "purposely or knowingly" caused the death of another and, at Sandstrom's trial, the trial judge instructed the jury, "the law presumes that a person intends the

ordinary consequences of his voluntary acts. Sandstrom (supra) at 512.

After considering Sandstrom's argument, the Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense, ("that he purposely or knowingly killed another person"). The Court again noted that a State "must prove each and every element" of the crime charged beyond a reasonable doubt and that the defendant cannot be required to prove any element of his defense or disprove any element of his crime. A "reasonable juror might have interpreted the instructions either as a conclusive presumption or as a burden shifting presumption, but either interpretation the Court rendered the instruction unconstitutional".

The United States Supreme Court was confronted with another burden shifting instruction in Francis v. Franklin 471 U.S. 307 (1985). The Court found that the use of "rebuttable" presumption was also unconstitutional for the same reasons set forth in Sandstrom (supra). The defendant there was charged with malice murder, and his sole defense was that he lacked the requisite intent to kill. The Court focused on, and held: unconstitutional (2) two sentences of the trial court's jury charge; as follows: "the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his own acts, but the presumption may be rebutted". Francis v. Franklin (supra) at 311. The Franklin Court evaluated both conclusive and rebuttable

mandatory presumptions and concluded that both place the burden of persuasion on the defendant. Franklin (supra) at 314. Both types of presumptions were deemed unconstitutional because they relieved the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. Franklin (supra) at 355 [S]uch shifting of the burden or persuasion with respect to a fact the State deems so important that it must be either proved or presumed, is impermissible under the Due Process Clause. See Patterson v. New York 432 U.S. 197, 215 (1977). As part of it's decision the Court refused to find that a presumptive jury instruction is cured if the jury is told that the presumption may be rebutted by the defendant. The Court noted that such an instruction does not cure the violation of the Due Process Clause because telling the jury that the defendant may rebut the presumption only serves to shift the burden of proof more firmly to the defense.

In deciding Francis v. Franklin, the Court relied upon it's decision in Mullaney v. Wilbur , just as the Court did in Sandstrom. But more importantly all three cases relied upon the bedrock constitutional principles set forth in In re Winship (supra)("that a state must prove every fact of every element of the crime charged beyond a reasonable doubt, and that mandatory burden shifting jury instructions relieves the State of that burden of proof in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Shortly, after Franklin was decided, a South Carolina case

began winding it's way through the appeals process on it's way to consideration by the United States Supreme Court. Dale Robert Yates was convicted of murder and sentenced to death. His direct appeals were denied at all levels. See State v. Yates 310 S.E.2d 805 (1982) cert. denied, Yates v. South Carolina 462 U.S. 1124 (1983). Yates then filed a Petition for Writ of Habeas Corpus to the South Carolina Supreme Court. Yates claimed that the trial court erred in charging the jury....that malice is implied or presumed from the use of a deadly weapon, because that presumption relieved the State of it's burden of proof on an essential element of the crime. His application was denied summarily by the Court. Yates then filed an appeal to the United States Supreme Court in 1985, that Court remanded his case to the South Carolina Supreme Court for reconsideration in light of Francis v. Franklin (supra). See Yates v. Aiken 474 U.S. 896 (1985). On remand of the Yates case, the Supreme Court of South Carolina noted that the jury instruction at Yates trial suffered from the same infirmities present in State v. Elmore 308 S.E.2d 781 (1983) and also addressed in Francis v. Franklin (supra). Yates 349 S.E.2d 84 (1986). The Court neglected to consider Yates in light of Francis v. Franklin, however and only questioned whether it's previous decision in Elmore (supra) should be applied retroactively. After deciding that Elmore would not be applied retroactively, the Court affirmed Yate's conviction.

Yates again appealed to the United States Supreme Court. In a second decision issued in early 1988, the Court briefly recounted

the procedural history of Yates, against the background of decisions in Sandstrom, Elmore, Franklin, and In re Winship (supra). The Court noted that the South Carolina opinion apparently concluded that Franklin (supra) was not to be applied retroactively because it had announced a new rule of law. The Supreme Court disagreed, however saying, "Franklin was merely an extension and reaffirmation of it's prior decisions. The Yates opinion concluded, since it [The Supreme Court of South Carolina] has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires. Yates v. Aiken 484 U.S. 211 (1988). Again the South Carolina Supreme Court refused to vacate Yates conviction, finding that the charge used was harmless error. Yates v. Aiken 391 S.E.2d 530 (1989). Once again Yates appealed this denial to the United States Supreme Court. In it's (3rd) third review of his conviction, the United States Supreme Court set aside Yates conviction without a (3rd) third remand to the South Carolina Supreme Court. Yates v. Evatt 500 U.S. 391.

Based on case law, there can be no doubt that the malice instructions given in the instant case were unconstitutionally, conclusionary, mandatory and burden shifting in violation of the Due Process Clause. The instructions in the instant case were additionally erroneous and confusing because the Court instructed the jury on (2) two types of malice, (1) the jury could conclude malice if they determined that Petitioner committed a "wrongful act", i.e..."robbery"; and (2) that the jury could simply infer

malice existed if there was a weapon used. In essence there has been no finding of guilt beyond a reasonable doubt because the Trial Court's instructions to the jury relieved the State from proving each and every element of the offense charged.

There can be no doubt that Petitioner was prejudiced by the failure of Counsel to object. Especially since the Court charge two different types of malice and these inferences rose to the level of presumptions that unconstitutionally shifted the burden off the State of proving every element that the State deemed so important. Petitioner contends that he was denied the effective assistance of trial counsel failed to object to the improper instructions given by the Court.

For the aforementioned violations, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

CONCLUSION

WHEREFORE, Petitioner believes that through issues presented and citations of authorities relied on that he has shown unto this Court that his rights were violated at trial, including but not limited to his Sixth Amendment guaranteed right to the effective assistance of trial counsel, as well as his Fourteenth Amendment right to a fair trial.

THEREFORE, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

Respectfully Submitted,

/s/ _____

Tavarus L. Rogers

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT

CERTIFICATE OF SERVICE

CA/No. 06-CP-07-1094

I, Tavarus Rogers, do hereby swear under the penalty of perjury that I have mailed the Original and (1) one copy of the enclosed Amended Post Conviction Relief Application and Memorandum of Law in Support to the Beaufort County Clerk of Court Ms. Elizabeth M. Smith P.O. Box Drawer 1128, Beaufort, SC. 29901. I further state that a copy of the aforesaid was also mailed to the Attorney General's Office Mr. Henry McMaster the same stated herein. This was done by way of the U.S. Mail.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS _____ DAY OF _____, 200⁶

NOTARY PUBLIC

MY COMM. EXPIRES _____

Respectfully Submitted,

/s/ _____

Tavarus L. Rogers

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF BEAUFORT)

06-CP-07-1094

Tavarius Lee Rogers, Sr., 244362,)
)
 Applicant,)
)
 v.) RETURN
)
 State of South Carolina,)
)
 Respondent.)
 _____)

The Respondent, making its Return to the application for Post-Conviction Relief (PCR) filed April 28, 2006, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the February 1999 term of the Beaufort County Grand Jury for armed robbery (99-GS-07-0220), two counts of murder (99-GS-07-0221, 0222), three counts of kidnapping (99-GS-07-0281, 0282, 0283) and burglary 1st degree (99-GS-07-0288). He was represented by Timothy Clay Kulp, Esquire and Cory H. Fleming, Esquire. On October 16, 2001, the Applicant proceeded to trial after which he was found guilty as charged. He was sentenced by the Honorable Jackson V. Gregory to confinement for a period of twenty five (25) years for armed robbery, thirty (30) years for each count of kidnapping, and life imprisonment for burglary 1st and both counts of murder.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Tavarus Rogers, Op. No. 2004-UP-427 (S.C. Ct. App. filed July 7, 2004).

Attached herewith and incorporated herein by reference are the records of the Beaufort County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Due process violation.

III.

The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant further alleges that he was denied due process of law. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon

which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a prima facie showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

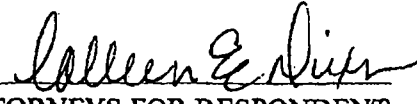
WHEREFORE, having made its Return, the State requests that a hearing be held.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOT
Assistant Deputy Attorney General

COLLEEN E. DIXON
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

August 10, 2006

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

)
) IN THE COURT OF COMMON PLEAS

2006-CP-07-1094

Tavarus Rogers,

Applicant,

vs

State of South Carolina,

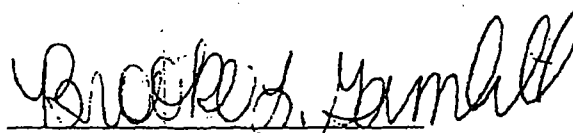
Respondent.

)
)
)
) AFFIDAVIT OF SERVICE BY MAIL
)
)
)
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return and attachments in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Otto E. Lipfert, III, Esquire
Griffith Sadler & Sharp, PA
P.O. Drawer 570
Beaufort, SC 29901

DATED this 9th day of August, 2006.



Brooke L. Gambill, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA
14TH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF GENERAL SESSIONS
CASE NO. 2006-CP-07-01094

STATE OF SOUTH CAROLINA

PLAINTIFF

VERSUS

SEPTEMBER 5, 2012

TRANSCRIPT OF POST CONVICTION

RELIEF HEARING

BEAUFORT, SOUTH CAROLINA

TAVARIUS LEE ROGERS

DEFENDANT

ORIGINAL

B E F O R E:

HON. CARMEN T. MULLEN, JUDGE.

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

ON BEHALF OF THE STATE:

HON. ASHLEIGH R. WILSON

HON BEHALF OF DEFENDANTS:

HON. MICHAEL W. MOGIL

HON. RICHARD H. BATEMAN

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

INDEX

Caption & Appearances.....	1
Index.....	2
The Court.....	4

TAVARIUS LEE ROGERS

Direct Examination	
Mr. Mogil.....	10
Cross-Examination	
Ms. Wilson.....	53

HON. CORY H. FLEMING

Direct Examination	
Mr. Mogil.....	63
Cross-examination	
Ms. Wilson.....	73

HON. TIMOTHY KULP

Direct examination	
Ms. Wilson.....	81

TAVARIUS LEE ROGERS ON REBUTTAL

Re-direct Examination	
Mr. Mogil.....	86

ARGUMENT

Mr. Mogil.....	91

ATTACHMENTS

Certificate of Reporter.....101

Keyword Index

EXHIBITS

No exhibits were presented, either for marking for identification, or entering as evidence.

1 BEGINNING 2:17 P.M.

2 BY THE COURT:

3 THE COURT: Next, Tavarious Lee Rogers. Thank you.
4 Whenever you're ready.

5 MS. WILSON: May it please the Court, your Honor.
6 Tavarious Lee Rogers versus the State of South Carolina,
7 Docket Number 2006-CP-07-1094. Mr. Rogers was
8 originally indicted for armed robbery, two counts of
9 murder, five counts of kidnaping, one count of burglary
10 first degree. He proceeded to trial, and was convicted
11 on October 16, 2011. And he was convicted of the armed
12 robbery. He received 25 years on both of the murder
13 charges. He received a life sentence on three of the
14 five kidnaping charges. He received 30 years to be
15 consecutive to each other. And on the burglary first
16 degree, he also received a consecutive life sentence.
17 And two of the kidnaping charges were regarding the
18 murder victim, so the judge did not sentence the
19 applicant on those charges.

20 He was represented by Cory Fleming and Timothy Kulp.
21 And today, he's represented by Mike Mogil. And Mr.
22 Mogil's indicated that he has a motion he'd like to put
23 before the court.

24 THE COURT: Okay. Mr. Mogil.

25 Mr. Mogil: May it please the Court, your Honor.

1 Michael Mogil for the applicant, Tavarious Rogers. Your
2 Honor, this case has been -- just to correct one thing,
3 Mr. Rogers was convicted in October 2001, not 2011.

4 MS. WILSON: Sorry.

5 THE COURT: Okay.

6 MR. MOGIL: This case has been proceeding for some
7 time. I've been involved with the case for almost two
8 years now. And your Honor, amongst the many claims that
9 Mr. Rogers filed in his initial application and we've
10 supplemented, there is a key element of his claim that
11 requires the testimony of an alibi witness. That
12 witness was subpoenaed by me last year. She's a school
13 teacher. I've met with her. She was, due to a
14 continuance in April that Mr. Fleming requested for
15 medical, we weren't able to get her then. And she, as
16 of this week, when we got the trial roster two weeks
17 ago, we were unable to find her. We have now located
18 her. I actually hired the sheriff's department ten days
19 ago to find her and serve her a subpoena for today. We
20 found her today through the assistance of Mr. Rogers'
21 mother, who is in the courtroom.

22 She is a school teacher. I'm not going to proffer
23 what her testimony is, but she is the alibi witness that
24 we would be talking about that was not called. Because
25 I feel, under *State v. Walker*, it's an essential

1 component of his PCR claim, again, I directly ask for a
2 continuance for sufficient time with notice to subpoena
3 her to appear so that the Court can evaluate her
4 testimony on the alibi issue. I think it's essential to
5 his case. Mr. Rogers, who's incarcerated, does not
6 object to the continuance, and I don't know about the
7 State.

8 Now, you have, your Honor, just to be -- when you
9 gave the continuance based on Mr. Fleming absence, you
10 said, *I don't want to hear this case continued again.*
11 So, I do want you to be aware of that, with candor to
12 the Court, but I think it's essential.

13 THE COURT: Okay. Ms. Wilson.

14 MS. WILSON: May it please the Court, your Honor.
15 It's the State's position that we object to this
16 continuance. This is a 2006 case, and the State is here
17 ready to proceed. It's my understanding that this alibi
18 witness issue was put in his original PCR application.
19 So, the fact that she hasn't been found, your Honor,
20 we're ready to go and we're ready to proceed today on
21 the issue.

22 THE COURT: Is there any reason why you didn't
23 depose her, Mr. Mogil?

24 MR. MOGIL: There is no reason, other than I wasn't
25 even aware that her deposition testimony would be

1 adequate substitution in this proceeding, and I expected
2 her to be here. It was only as recently as a week ago
3 that she's no longer at the preschool where she used to
4 work. Her phone number wasn't working, so I really
5 didn't think it was going to be an issue talking to her
6 last year when I met with her. And not realizing that
7 it would be an adequate substitute in any case, but.

8 THE COURT: How many times has this case been
9 continued?

10 MS. WILSON: Several times, your Honor. It's my
11 understanding that it's gone through three attorneys at
12 the Attorney General's Office, and I'm the third one to
13 get it. I have notes from Matt Freidman, who handled it
14 prior to me, and it said that it was continued several
15 times, and that Mr. Mogil be prepared to go on September
16 2011.

17 It was continued to August 2011, at Mr. Mogil's
18 request. And Judge Brown indicated that no other
19 continuances would be granted. And then, it was
20 continued in April 2012, the term, first term this year,
21 because of some scheduling conflicts. So, it's my
22 understanding that it shouldn't be continued, and we're
23 ready to proceed today, but we'll leave it in your
24 hands.

25 THE COURT: Mr. Mogil, at some point, we really do

1 need to go forward. Craig Brown, obviously, ordered
2 that it go forward at one time. Is that correct?

3 MS. WILSON: Yes, your Honor.

4 THE COURT: There will be no further continuances.
5 So, Mr. Kulp, how many times have you come this way?

6 MR. KULP: I think just once, your Honor.

7 THE COURT: Okay.

8 MR. KULP: Twice.

9 THE COURT: Okay. All right. I think we need to go
10 forward. Other than that, are you ready to proceed, Mr.
11 Mogil?

12 MR. MOGIL: Yes, your Honor, we're ready to proceed.
13 I think that the claim is the same. It's that the
14 testimony of the witness might be beneficial.

15 THE COURT: All right. Let's go ahead, then.

16 MS. WILSON: Thank you, your Honor.

17 MR. MOGIL: Your Honor.

18 THE COURT: Yes, sir.

19 MR. MOGIL: If you have no preference, I'd prefer to
20 call the attorneys first.

21 THE COURT: Absolutely.

22 MR. MOGIL: Call Cory Fleming.

23 MS. WILSON: Your Honor, --

24 HON. CORY FLEMING: Your Honor, may I -- go ahead.

25 MS. WILSON: I was just going to say, your Honor,

1 because Mr. Fleming has to leave, I prefer to call the
2 applicant first, just so we wouldn't have to recall Mr.
3 Fleming after the applicant testifies as a rebuttal
4 witness. Whatever you think.

5 MR. MOGIL: And your Honor, would I be able to call
6 the applicant in rebuttal of Mr. Fleming?

7 MS. WILSON: No, I'm saying the State would
8 prefer --

9 MR. FLEMING: Don't worry about me. We can --

10 THE COURT: You okay?

11 MR. FLEMING: We're fine.

12 THE COURT: Okay.

13 MR. FLEMING: Let's get it done.

14 THE COURT: Okay. All right. Well, let's go ahead
15 and call Mr. Rogers. Okay? I apologize. You're
16 calling the applicant.

17 MR. MOGIL: I wanted to call Mr. Fleming.

18 THE COURT: Okay. We're going to go ahead and call
19 the applicant first. So, that's fine. Let's go ahead
20 and call him.

21 MR. MOGIL: Okay.

22 MS. WILSON: And your Honor, if you don't have
23 anything in your packets up there, just let me know.

24 THE COURT: All right. I've got the amended
25 application.

1 MS. WILSON: You should have a disc of the
2 transcript and, I think, a printed copy from Judge
3 Buckner.

4 THE COURT: Okay. And can anyone give me just a
5 background on how it is that both Tim Kulp and Mr.
6 Fleming were trial attorneys in this case.

7 MR. FLEMING: This was a death penalty case.

8 THE COURT: Thank you. I assumed as much. Okay.
9 Sir, do you swear or affirm the testimony you give to be
10 the truth, so help you God?

11 DEFENDANT: Yes, ma'am.

12 THE COURT: Thank you, sir. Come on and take a
13 seat. There you go. Okay. Having a hard time finding
14 it.

15 Sir, just give us your name for the record.

16 DEFENDANT: Tavarious Lee Rogers.

17 THE COURT: Thank you, sir.

18 MR. MOGIL: Is he sworn, your Honor?

19 THE COURT: He is.

20 MR. MOGIL: Thank you, your Honor.

21 TAVARIUS LEE ROGERS

22 DIRECT EXAMINATION, MIKE MOGIL:

23 Q Mr. Rogers, where are you presently incarcerated?

24 A At Leiber Correctional Institute.

25 Q Okay. And are you married?

1 A No, sir.

2 Q Do you have any children?

3 A I have one.

4 Q And what's his name?

5 A He's a junior. Lee Rogers, Jr.

6 Q Is he here today?

7 A Yes, sir.

8 Q And are your parents here today?

9 A Yes, sir.

10 Q Can you identify them.

11 A Yes, they're right there. My son. Stand up.

12 THE COURT: Thank you.

13 A And my mother and father.

14 THE COURT: Thank you.

15 Q How old are you, Mr. Rogers?

16 A Thirty-four.

17 Q How long have you been in Leiber?

18 A Since 2001. October 2001.

19 Q Did you appeal your conviction?

20 A Yes, sir.

21 Q And who was your lawyer on appeal?

22 A Mr. Bob Dudeck, Robert, Mr. Robert Dudeck.

23 Q Okay. Do you recall, in summary, what were the
24 basis for your appeal before the appellate court?

25 A It was an issue with the -- with the identification

1 process that Mr. Kulp had put together for me, arguing
2 *Neil v. Biggers*, and the five factors in determining the
3 identification process.

4 Q Okay. Were you involved with the appeal personally?

5 A Not really.

6 Q And how is it that Cory Fleming came to be your
7 attorney?

8 A I'm not sure. I think he was appointed. Right? He
9 was appointed.

10 Q You did not privately retain him?

11 A No, sir.

12 Q How about Tim, Timothy Kulp?

13 A I think he was hired by Mr. Fleming.

14 Q Okay. Did you have any attorneys in your criminal
15 case back in 2000 prior to Mr. Fleming?

16 A Ms. Eve Fleming, who was a public defender at the
17 time.

18 Q And then you were -- Mr. Fleming was appointed
19 thereafter?

20 A Yes, sir.

21 THE COURT: Do we know who was first chair and who
22 was second chair? Do you know who was the lead counsel
23 at your trial?

24 A I think it was Cory Fleming.

25 THE COURT: Mr. Fleming was lead counsel. Okay.

1 Q Okay. During the time of your trial, where were you
2 housed?

3 A At Beaufort County Detention Center.

4 Q Did you have contact with Mr. Fleming during this
5 time?

6 A Yes, sir.

7 Q Okay. And where would you meet him?

8 A They have a special room in the county jail that
9 when you meet with your attorney.

10 Q Now, there were a number of hearings prior to your
11 trial. Can you explain what those hearings were about.

12 A It was several hearings. An in-court identification
13 hearing; a probable cause hearing, and not in that
14 order, but -- and some other motions that we filed
15 along, Mr. Fleming filed for me.

16 Q Okay. Were all those hearings within the same time
17 frame, within the same month or weeks?

18 A No, they were spread out over the course of
19 appropriately three years.

20 Q And during that time, were you in Beaufort the whole
21 time?

22 A Yes, sir. Some of the courts -- some of the court
23 dates or some of the hearings were in other counties,
24 like Hampton County, Colleton County. We was following
25 the judge.

1 Q And who was the judge in that?

2 A Mr. Gregory, the Honorable Jackson V. Gregory.

3 Q Mr. Rogers, you filed this post conviction hearing.
4 Okay. When did you file your post conviction case
5 originally?

6 A I originally filed it in 2006. I have an exact date
7 in here if you need it, but it was in the year of 2006.
8 Do you need the exact date?

9 Q No.

10 A Okay.

11 Q And in your initial application, which we've
12 amended, you raised several matters.

13 A Yes, sir.

14 Q The first matter you raised is what's generally
15 known as -- and counsel, I'm reading here, let me know
16 -- what's generally known as the Golden Rule. Can you
17 explain in your words why you feel the prosecutors
18 charged the jury violated the Golden Rule.

19 A Well, it was actually the prosecutor's closing
20 argument.

21 Q Was it?

22 A And I feel it violated my Golden Rule rights,
23 because he used the form or some form of you or your in
24 his closing argument some 34, 35 plus times. And the
25 Golden Rule argument states that, generally, this type

1 of argument and this type of language is not used,
2 because it takes the jurors away from deciding the case
3 neutrally. It's generally believed that it inflames the
4 passions and the prejudices of the juries, and it takes
5 them away from being fair to me.

6 MR. MOGIL: Your Honor, and I'm not as familiar, but
7 in terms of having the -- what the -- you have it,
8 probably, in your transcript. But in terms of reading
9 it into the record, would you prefer that this witness
10 to read it into the record or?

11 THE COURT: I was actually just looking for it. If
12 you can direct me to a page in the transcript.

13 A Okay. I have several pages. Page 1,473.

14 THE COURT: Give me one second.

15 A Okay.

16 THE COURT: And just so I'm clear, did Mr. Fleming
17 handle the guilt phase and Mr. Kulp handle the
18 litigation, or how did you all break it up?

19 MR. FLEMING: Fundamentally. Fundamentally.

20 THE COURT: Okay.

21 MR. FLEMING: Yes, your Honor. I mean, there were
22 several motions that Mr. Kulp spearheaded. Most of the
23 guilt phase was my bailiwick, and then the mitigation
24 came.

25 THE COURT: Okay. And I'm sorry, sir, what page

1 again?

2 A Page 1,473.

3 MR. MOGIL: And your Honor, I could also guide the
4 Court, as well. I have a copy, too.

5 THE COURT: Okay. Thank you. All right.

6 A Page -- well, starting from Page 1,473, then.

7 THE COURT: Okay.

8 A Several pages after that. And I have the lines if
9 you need the lines.

10 THE COURT: Sure. Go ahead and give it to me.

11 A Okay. 1,473, Lines 12 through 25. Page 1,474,
12 Lines 1 through 10.

13 THE COURT: Give me one second, sir.

14 A Oh. Sorry.

15 THE COURT: I'm reading them as you're telling them
16 to me, so, okay.

17 A Oh, I'm sorry.

18 THE COURT: Okay. I'm sorry. Going on Page 1,474.

19 A Lines 1 through 10. Page 1,476, Lines 5 through 21.

20 THE COURT: Okay.

21 A Page 1,477, Lines 15 through 17.

22 THE COURT: Okay.

23 A Again, Page 1,477, Line 25.

24 THE COURT: Okay.

25 A Page 1,478, Line 1 through 5. I think that's a

1 continuation.

2 THE COURT: Got that already. I've read it.

3 A Page 1,478, Lines 18 through 20.

4 THE COURT: Okay.

5 A And along those same lines, Page 1,481, Lines 16
6 through 22. But I would like to include in that --

7 THE COURT: Yes, sir.

8 A -- another issue with prosecutorial misconduct. I
9 don't know if I can combine those with ineffective
10 assistance of counsel, but I --

11 THE COURT: That would have been in your direct
12 appeal at the beginning.

13 A Prosecutorial misconduct.

14 THE COURT: Would have been taken up, yes.

15 MR. MOGIL: And Your Honor, I'm going to allow Mr.
16 Rogers to testify, and if I could have the ability to
17 summarize after he testifies, an argument, what I think
18 this says.

19 THE COURT: Okay.

20 MR. MOGIL: Rather than make the argument during his
21 testimony.

22 THE COURT: Yes. That's fine.

23 BY MR. MOGIL:

24 Q Is it your position, Mr. Rogers, that the failure of
25 counsel to object to this closing statement and charge

1 by counsel was ineffective assist of counsel?

2 A Yes, it is my position. It's my understanding, in
3 reading of this case in law, while I'm not verse -- very
4 versed in law, but pertaining to my case, how I read the
5 Golden Rule argument, it says, you know, suggesting to
6 the jury that it does put themselves in the shoes of the
7 parties in impermissible. And in his closing argument,
8 the prosecutor said that -- he made a direct reference
9 to the jury by saying:

10 *If Madam Juror or Mr. Juror, any one of*
11 *you ladies and gentlemen, if I were to take*
12 *a gun, and if I were to make you lie down in*
13 *the floor and take away from your freedom to*
14 *move, I have kidnaped you.*

15 And by putting the jury in the shoes of -- of
16 victims, it would take them away from neutrality and
17 incite their passions and their prejudice.

18 Your Honor, do I have to read all of this, or is
19 this stated in --

20 BY MR. MOGIL:

21 Q Mr. Rogers, you can if you feel there's other -- I'm
22 going to summarize it.

23 A Oh, okay.

24 Q If you feel there's other parts that you feel were
25 prejudicial that weren't objected to, go ahead.

1 A Okay. Thanks. Well, I just want to point out all
2 those -- all the lines that I gave you right along
3 coincide with this case. I want to point out another
4 section of this where I feel that the prosecutor was
5 appealing to the morale of the jury and taking them
6 farther away from neutrality when he said that:

7 *Well, if you don't like dope so bad*
8 *that you're going to give people the right*
9 *to kill, that's fine. I hope you don't have*
10 *that attitude. And if anything ever happened,*
11 *and if you don't like him, --*

12 MS. WILSON: Your Honor, the State would object. Is
13 this allegation toward Mr. Fleming's ineffective
14 assistance of counsel or the prosecutorial misconduct
15 allegation that we discussed we wouldn't be discussing
16 because Mr. Rogers already brought that issue.

17 THE COURT: Well, I think it could go to both.
18 Quite frankly, it's for defense counsel not objecting to
19 the statements. And then, it could go to what was his
20 direct appeal, or should have been a direct appeal issue
21 of prosecutorial misconduct.

22 MS. WILSON: Okay. Thank you.

23 THE COURT: I think it still applies for ineffective
24 assistance of counsel, so he may continue.

25 MR. MOGIL: Thank you.

1 A *If anything ever happened and you don't*
2 *like him, and if it doesn't really upset your*
3 *conscience, if it doesn't upset your conscience*
4 *that he killed a person that his brother*
5 *identified as a drug dealer, does it upset*
6 *your conscience that he executed a person*
7 *who nobody said was drug dealer?*

8 A And like I said, I believe that appeals to the
9 morality of the juror, further taking them away from the
10 neutrality of the case and deciding the case based on
11 the evidence alone.

12 And also, directly coinciding with that was Page
13 1,481, Line 16 through 22, when he said that:

14 *I know if I was in jail or if I was*
15 *in prison, for whatever reason I was in*
16 *jail for, I wouldn't be talking to the*
17 *fellow that was accusing with me, nor*
18 *would you, nor would anyone or anybody that*
19 *wasn't guilty of the crime for which they*
20 *were accused.*

21 And my position that the prosecutor vouched for the
22 credibility of the evidence, instead of letting the jury
23 decide what weight and what should be given -- or what
24 should be given to the evidence of the case. And I
25 would believe that my counsel was ineffective because he

1 did not object to that line of language when the
2 prosecutor was making those statements to the jury.

3 Further, I have cases, *State versus Herren*,
4 *Humphries versus State*, *Simmons versus State*, and
5 basically, saying that a solicitor's closing argument
6 must not appeal to the personal biases of the jurors,
7 nor be calculated to arouse the jurors' passion or
8 prejudices.

9 And I have several cases pertaining to the same 11
10 along those same lines.

11 THE COURT: I don't need you to cite case law to me.
12 I know it, so that's fine.

13 A Okay. Thank you. Yes, sir. Yes, ma'am.

14 THE COURT: I need to know what the factual
15 allegations are that you are stating. And I appreciate
16 being pointed directly to in the transcript, because,
17 obviously, it's a very long transcript, so.

18 A Yes, it is.

19 THE COURT: I appreciate that.

20 A Okay. That's -- that's my position when it comes to
21 the Golden Rule argument.

22 THE COURT: Okay.

23 A Like I said, you know, --

24 THE COURT:

25 A -- I know you know case law.

1 THE COURT: I understand that.

2 A And I thank you.

3 BY MR. MOGIL:

4 Q Okay. Mr. Rogers, another issue that you've raised
5 in your motion that we've also raised is the issue about
6 counsel's lack of objection to the testimony in the in-
7 court identification process.

8 A Okay. Can you give me one second, Mr. Mogil? I
9 want to make sure I covered everything that I wanted to
10 cover regarding that first issue. Can I have just one
11 second? Thank you, ma'am.

12 THE COURT: Sure.

13 REPORTER'S NOTE: Defendant Rogers is
14 looking through his file.

15 A Okay. Thank you.

16 THE COURT: Okay.

17 BY MR. MOGIL:

18 Q Mr. Rogers, another issue that you've raised that
19 you believe would be ineffective assistance of counsel
20 is related to the lack of objection of the in-court
21 identification hearing. Can you explain that whole
22 process and what you felt went wrong.

23 THE COURT: Was this during a *Neil v. Biggers*
24 hearing?

25 A Yes, ma'am.

1 THE COURT: Okay.

2 A And during that hearing, I also would like to refer
3 you to -- well, my -- my position on that hearing, and I
4 understand that Mr. Fleming and Mr. Kulp argued
5 extensively with the *Neil v. Biggers*, but my position on
6 that is that the wrong argument was presented with that.
7 And also, going along the lines with the prosecutor, --

8 THE COURT: Well, what did you want argued that they
9 didn't argue?

10 A Prior inconsistent statements. I feel like if the
11 judge had heard the prior inconsistent statements that
12 they made in previous testimony, that it would have made
13 a difference on the outcome of what the judge decided as
14 far as having them, you know, be inadmissible to testify
15 as far as identification.

16 THE COURT: All right. Can you point to me where,
17 in the transcript, the *Neil v. Biggers* hearing is? I
18 know you said you had a number of pretrial motions, and
19 I don't know how many days.

20 A Yeah, this is a different transcript.

21 THE COURT: I've got them all. I've got --

22 A Okay. It's August 28th and 29th of 2001 transcript.

23 THE COURT: All right. I may not have that. I may
24 have --

25 MS. WILSON: Your Honor, I think you have the trial

1 volume.

2 THE COURT: I just have trial. I don't have any
3 pretrial. Okay.

4 MR. MOGIL: I have copies.

5 MS. WILSON: I have a copy, too.

6 THE COURT: If you've got one for me, that'd be
7 great. Thank you. Okay.

8 MR. MOGIL: Your Honor, what I'm handing up to you
9 is just -- it's not a complete set. It came from Mr.
10 Rogers. A copy of the transcript of record from June 8,
11 2000, which was a probable cause hearing; and a copy,
12 Pages 145 through 152 of the what you call the in-court
13 identification -- what I call the in-court
14 identification hearing.

15 THE COURT: The *Neil v. Biggers* hearing. Okay.

16 MR. MOGIL: *Neil v. Biggers* hearing. That's what
17 he's going to be referring to.

18 THE COURT: Okay. All right. Thank you.

19 BY MR. MOGIL:

20 Q Mr. Rogers, if you could proceed and explain --

21 A Okay.

22 Q -- to the Court what you feel the inconsistent
23 statements were and what the objection should have been,
24 in your mind.

25 A Okay. Before I get to that, there's dealing with

1 the same inquiry, identification procedure, I feel that
2 my attorney should have objected to a suggestive out-of-
3 court identification procedure, and that dealt with the
4 prosecutor showing a lineup, a photo lineup, of me to
5 the witnesses in a back room or in a lobby prior to the
6 hearing. And being that it was a identification
7 hearing, I think that, if he had showed a picture of me,
8 and then they come in the courtroom, there's no way they
9 could not say that that's the guy, you know. And
10 although my attorneys objected to a lot of things, like
11 I said, that was key in that -- in that part of the
12 procedure, that issue having been objected to.

13 THE COURT: Okay. Ms. Wilson, do you have an entire
14 copy of the *Biggers* hearing?

15 MS. WILSON: I want to say I do. What page numbers?

16 THE COURT: I'm looking at -- this one says 145, but
17 it starts, clearly, earlier than that.

18 A No, that's -- that's -- what I'm talking about is
19 Page 44, Line 7 through 25.

20 MS. WILSON: Your Honor, I don't think I do.

21 THE COURT: Okay.

22 A Do you have a copy of that?

23 MR. MOGIL: No, I don't.

24 A I do.

25 THE COURT: Okay. So, Mr. Mogil, is the testimony

1 you gave me on Page 145, is this the actual trial
2 testimony of the identification? Is that what this is?

3 MR. MOGIL: Your Honor, I believe that's from the
4 set that Mr. Rogers has. That's the transcript from the
5 in-court identification hearing itself, not from the
6 trial.

7 THE COURT: Okay. Okay. Thank you.

8 A I've lost a couple of pages, due to a lot of shaking
9 down and stuff like --

10 THE COURT: Okay. All right.

11 A What I'm referring to, your Honor, is Page 44, Line
12 7 through 25.

13 THE COURT: Give me a sec.

14 A Okay.

15 THE COURT: Okay. I see what you're talking about
16 now. Okay.

17 A Okay. Okay. That's my position on that, it should
18 have been objected to, you know.

19 MR. MOGIL:

20 Q Mr. Rogers, --

21 A Dealing with that very issue.

22 Q Mr. Rogers, before you interluded into that issue, I
23 was asking you about the prior inconsistent statement
24 issue. If you could elaborate on that and give the
25 Court the benefit of where, exactly, are the two

1 transcripts you're referring to.

2 A It was several pretrial hearings, as I mentioned.
3 Your Honor, do you have the June 8, 2000 probable cause
4 hearing?

5 THE COURT: That is one you did give me, correct?

6 MR. MOGIL: Your Honor, I presented you just three
7 pages from that, the title page, the index, and Page
8 108.

9 THE COURT: Okay. I have 108 of it.

10 A I'll need you to have 116, also, for purposes of the
11 argument.

12 Q Mr. Rogers, you also handed your copy of 116.

13 THE COURT: Okay.

14 A Your Honor, although I'm referring to Page 108 and
15 116, do you want from 108 to 116, because I have that,
16 too?

17 THE COURT: That'd be great, yes, please.

18 A Thank you.

19 THE COURT: Thank you. Okay. All right. Okay.

20 A Okay.

21 THE COURT: This is the probable cause hearing?

22 A Yes, ma'am.

23 THE COURT: Okay.

24 A And that was June 8th of 2000, Page 108, Lines 4
25 through 13.

1 THE COURT: Okay.

2 A And referring to Page 116, Lines 3 through 8. And
3 basically, there was testimony given that says that one
4 of the witnesses in the case, she identified a guy by
5 the name of Wes. She knew his name. His name was Wes.
6 She remembered that name. And they put together a
7 lineup with Wes McKinnon's face in it, and she picked
8 him out of the lineup. And the officer was specific in
9 what she had said to him was, you know, boom, that's the
10 guy who mask fell off his face, and that's how she, you
11 know, identified him from a photo lineup.

12 And in a subsequent hearing, pretrial hearing, which
13 was the in-court identification hearing, that switched
14 up, everything switched up. And if you have the hearing
15 from August 29th of 2001, Page 145, Lines 9 through 12?

16 THE COURT: Okay. I don't have that. That's what I
17 think I gave back to you.

18 A Oh, okay. I'm sorry.

19 MR. MOGIL: Your Honor, for reference sake, I had a
20 copy of that excerpt from 145 to 152 that I handed up.

21 A You got it now? Because I'm going from 144 to 146.

22 MR. MOGIL: That was not the complete transcript.

23 A I don't know how that happened.

24 THE COURT: I've got 145.

25 A Okay.

1 THE COURT: Okay. This is the part where it says
2 that the other person's mask came off. Okay.

3 A Yes.

4 THE COURT: Yes.

5 A Yes. And then, just like I said, that the same
6 witness said in that subsequent hearing, that now the
7 mask that fell off was Tavarius, and she pointed at me,
8 and said that this is now how she can identify me. But
9 when there's previous testimony that she identified
10 someone else, and even picked him out of a photo lineup
11 through that same testimony. I was not picked out of a
12 photo lineup. And this was 32 months later, so that was
13 -- it was key to be objected to as a prior inconsistent
14 statement from my trial attorneys to show the judge
15 that, now, I feel that the witnesses are trying to make
16 certain testimony in effect in the case to fit the facts
17 in this proceeding. They trying to, you know, bolster
18 the identification process, because this is what the
19 hearing was about.

20 BY MR. MOGIL:

21 Q So, Mr. Rogers.

22 A Yes, sir.

23 Q If you could summarize the error that you believe
24 was the failure to object to what?

25 A The prior inconsistent statements. Yes.

1 THE COURT: Prior identification of someone else as
2 the person in the photo lineup that was not you.

3 A That was not me.

4 THE COURT: Okay.

5 A And she used that to identify that person, but then,
6 in a subsequent hearing, she used those same statements
7 and said that it wasn't that guy whose mask fell off,
8 because she -- she quotes that. And I think it's 152.
9 No, I'm sorry.

10 Q Mr. Rogers, I think you're referring to Page 145,
11 Line 12, approximately.

12 A Are you sure? Yes. Okay. It's 145. I can read --
13 said the question -- one of the questions was:

14 Okay. At that point, the mask had
15 fall open -- fallen open.

16 The answer:

17 Yes, as far as Tavarious.

18 Question:

19 How about the other person's mask?

20 Answer:

21 Wes's didn't come on -- I mean, off at all.

22 And question:

23 Okay. So you were unable to identify
24 that person.

25 Answer:

1 I was able to identify him by his
2 clothes that he was wearing.

3 And this wasn't -- the testimony wasn't given
4 nowhere previous that she was able to identify Wes
5 McKinnon by his clothes. And being they was a photo
6 lineup of his face, I don't know how she could have got
7 to where his clothes would helped her identify him when
8 there was no picture of him in his clothes. It was just
9 face pictures.

10 THE COURT: Okay. Mr. Mogil, you need to give me a
11 background of this case. Do you have co-defendants?

12 MR. MOGIL: I believe the co-defendant was tried
13 separately.

14 THE COURT: Obviously, they were tried -- but there
15 were co-defendant in this case?

16 MR. MOGIL: Yes.

17 THE COURT: And there were four co-defendant in the
18 case. All right. And obviously, they weren't tried
19 with him, because this is a death penalty case. And so,
20 did any of the co-defendant testify against this
21 witness?

22 MR. FLEMING: No, your Honor.

23 THE COURT: No.

24 MR. MOGIL: No.

25 THE COURT: Okay. And no one testified against each

1 other. Okay. Tell me what -- just give me briefly the
2 allegations. I mean, you all know I just stepped in on
3 this case, so tell me.

4 MR. MOGIL: Allegations of the PCR?

5 THE COURT: Pardon?

6 MR. MOGIL: The allegations of the PCR?

7 THE COURT: No, no, no. I'm understanding the
8 allegations of the PCR by going through them. I just
9 need to know -- and Mr. Fleming, if you wanted to give
10 me the background, he probably is the best person to do
11 it.

12 MR. FLEMING: I'll do it.

13 THE COURT: Yes.

14 MR. FLEMING: There was a -- there was a -- on
15 Coffin Point, on Saint Helena, there were -- two people
16 killed in a house. The testimony, essentially, was --
17 was, and came out, that Mr. Rogers, along with Wes
18 McKinnon and -- and some other people, they were having
19 a party earlier. And so, all of these people were, at
20 one point, together, partying as if we were all in this
21 room. And the allegation was, the jury believed, was
22 that Wes and Tavarious Rogers came back at some time
23 later and committed essentially what was going to be a
24 robbery involving some drugs and money, et cetera.

25 THE COURT: Right. Okay.

1 MR. FLEMING: And then, two people got killed in --
2 in that exchange. Some other people got hurt.

3 THE COURT: Okay.

4 MR. FLEMING: And there was a -- Mr. Rogers was
5 actually arrested illegally under what was what -- what
6 they termed a coroner's warrant. A coroner's warrant
7 was issued by Mr. Copeland, with the misunderstanding
8 that he had the right or the power to arrest without
9 convening a, you know, without convening a coroner's
10 inquest.

11 Mr. Rogers was kept for about four days, and
12 Tavarious could -- will, obviously, remember it. Was for
13 about four days, at which time they took him to
14 Charleston, attempted to coerce him with a polygraph.
15 And then, he allegedly confessed. There is a
16 confession, a fairly detailed description of events and
17 that kind of thing.

18 As a result of the illegal arrest, that was
19 suppressed. And that's the bulk -- there was a ton of
20 work with regard to that.

21 THE COURT: That didn't come out. Okay.

22 MR. FLEMING: But because of all of those hearings,
23 that's where it is. That's essentially the background.
24 The death penalty was noticed, you know, and it
25 proceeded as any other death penalty trial.

1 THE COURT: Okay. And the witnesses that I'm seeing
2 as talking about he's got an issue with the I.D. of him
3 and the face mask that I'm reading on Page 145, were
4 there eyewitnesses at the scene?

5 MR. FLEMING: Yes.

6 THE COURT: Okay.

7 MR. FLEMING: Yes.

8 THE COURT: And I understand that whoever did come
9 in and do this actually had masks on, and part of their
10 witnesses' testimony, or the witness's testimony is
11 that the masks fell to the side or they were able to see
12 them, right?

13 MR. FLEMING: That's -- and I don't remember
14 specifically what it is, but yeah, that's --

15 THE COURT: And the allegation was, all these people
16 had been together earlier. So that's why some of these
17 people can identify like what this specific Wes was
18 wearing and --

19 MR. FLEMING: That's correct.

20 THE COURT: -- knows the voice, even if they can't
21 see the face.

22 MR. FLEMING: And there was specific testimony.

23 THE COURT: Okay. All right. Thank you. I
24 appreciate the background. Okay. All right.

25 BY MR. MOGIL:

1 Q And Mr. Rogers, for the benefit of the Court, who
2 were these witnesses that were involved with the in-
3 court identification? What was their relationship to
4 the trial?

5 A They were the only witnesses as far as testifying
6 against me.

7 THE COURT: I mean, were they victims or were
8 they --

9 A Yes. They were victims. I was charged with
10 kidnaping. Two -- three of those people that testified
11 against me at trial, and each one of them had
12 inconsistent statements in previous hearings. Each one
13 of them. Testimony, written statements. That all
14 changed when we got to subsequent hearings such as the
15 identification hearing and the trial.

16 And it was pointed out in some cases in some
17 instances, but prior inconsistent statements was not
18 raised as an issue, which I think was key for the jury
19 to hear that these statements and also to see that these
20 statements does not match or coincide with the
21 statements that the witnesses are making right now in
22 trial.

23 THE COURT: When you say *prior inconsistent*
24 *statements*, you mean statements they made about the
25 previous I.D.s?

1 A About -- about everything. About previous I.D.s.,
2 about the events that took place pertaining to me.

3 THE COURT: Okay. Okay.

4 MR. MOGIL: And your Honor, and to clarify, I think
5 just -- and again, I apologize, for we only have
6 excerpts of the transcripts, but the first transcript,
7 the person testifying is one of the investigators. And
8 he is testifying as to what he recorded at the time.
9 Mr. Rogers is saying that that recollection and that
10 testimony is -- of what the witnesses' said at the first
11 hearing, is inconsistent with the testimony they gave at
12 the in-court identification process.

13 THE COURT: The witnesses.

14 MR. MOGIL: The people who identified him.

15 THE COURT: Right. Not the investigator, but the
16 witnesses.

17 MR. MOGIL: Right.

18 THE COURT: Okay. I understand.

19 MR. MOGIL: The victims didn't identify him, because
20 they were not around, so.

21 THE COURT: Okay. I understand. Okay. Okay.

22 BY MR. MOGIL:

23 Q Mr. Rogers.

24 A Yes, sir.

25 Q Another issue that you raised in your initial

1 application, and have raised, is the lack of objection
2 to the jury charge given by the Court relating to the
3 issue of malice. Can you explain that to the Court.

4 A Okay, before I move on, I made mention of other
5 witnesses having inconsistent statements. I'm not sure
6 if I should give examples.

7 THE COURT: Give me which witnesses' names..

8 A Okay. The witnesses that we was initially talking
9 about was Jocelyn Wendel Shaw.

10 THE COURT: Yes.

11 A Okay. And the other witness, Kristal Wire, she had
12 two handwritten statements. Cory, you got those
13 statements, cause I don't?

14 MR. FLEMING: I didn't bring them, Tavarious. I
15 didn't know that was going to be raised. I've got --

16 A I lost them. Somewhere down the line, they got
17 lost.

18 MR. FLEMING: I've got reams. And I'll check and
19 see what I do have, Judge.

20 THE COURT: Okay. Okay.

21 A Yeah, somewhere down the line, it got lost out of my
22 paperwork.

23 THE COURT: Okay.

24 A But -- but there's also testimony given to that,
25 too.

1 THE COURT: Okay.

2 A And in fact, Page 15 in that.

3 THE COURT: I'm going to give you -- I'm going to
4 give him back this, because I don't want him to lose it.
5 Okay. And actually, give him this, too.

6 A Okay. This is Page 15 of the in-court
7 identification. I'm sorry. You might need more than
8 that. And we're talking about Kristal Wire's statement
9 as Lines 12 through 13, when she talking about she came
10 down the hallway, and she looked up. And he had asked,
11 *Where is Mitch.* And you heard -- and that's as far as
12 the line goes.

13 But in two of her handwritten statements, I believe
14 would testify -- I believe they was commented on at
15 trial, right? That she said she never looked up. She
16 wrote two statements and said she never looked up, and
17 so, that's why she couldn't identify anybody in the
18 photo lineups. But then, in this -- in this hearing,
19 she said she did look up, and now she can identify me,
20 because she can look up.

21 THE COURT: I saw that.

22 A Okay. And that's -- and two of her handwritten
23 statements, two, she came back, I'm thinking like a day
24 or two after she made her first initial handwritten
25 statement, she came back, and I guess she wanted to

1 revise some things or something of that -- something of
2 that nature, something to that effect. And in both
3 instances, she said she never looked up. And so, that's
4 why she couldn't identify me.

5 THE COURT: Okay. Okay.

6 A But when it comes to this pretrial hearing in court,
7 she said I did look up, and that's the guy over there at
8 that table right there. And so, that was an
9 inconsistent statement I think that should have been
10 raised at trial, you know. And I think that should have
11 been said, you know, this is an inconsistent statement.
12 And I think that should have been raised by my -- by my
13 attorneys.

14 THE COURT: Okay.

15 A Thank you.

16 BY MR. MOGIL:

17 Q Mr. Rogers, what about the live lineup? Did you
18 want a live lineup?

19 A Initially, we didn't know about anybody testifying
20 and saying that I was the guy doing any finger pointing.

21 THE COURT: Right.

22 A We didn't know about any of that.

23 THE COURT: Okay.

24 A And then, some 32 months later, we didn't know, all
25 the way up until then, we didn't know that. And so, the

1 prosecutor made notice to Mr. Fleming and Mr. Kulp that
2 he was planning on having the witnesses do that. And
3 so, that was the purpose of the hearing. And so, with
4 the first witnesses that testified, that came up after
5 her testimony, after was it Kris -- it was after Kris
6 Wire's testimony that it came up that this is just a
7 show-up, really, because now, we realize that the
8 prosecutor just show her -- show her the pictures in a
9 lobby prior to the hearing. And plus, you know, they
10 had attended court, you know, several pretrial hearings
11 before this and had seen me in that type of setting.

12 THE COURT: The person walking, in, probably, in
13 handcuff and shackles?

14 A Exactly.

15 THE COURT: Okay.

16 A And so, after my attorneys made mention of that, the
17 prosecutor and the Hon. Jackson V. Gregory said that
18 somewhere along the lines that we can relieve ourselves
19 of having the other witness walking in and just saying
20 that's him by having a lineup. And initially, this was
21 -- this was the ideal that we were going on along with.
22 And there's testimony that we was going to do that, and
23 have guys come in, you know, that was in the County with
24 me, have guys come in. And I don't know if they was
25 going to dress us out in different clothes or whatever.

1 But Mr. Fleming made sure that I knew that those girls
2 had came in before and it probably would be just a show-
3 up, and convinced me that it's probably not a good idea.
4 I was all for the idea, but -- because I knowed I didn't
5 -- I don't know those girls, and I know they didn't know
6 me.

7 THE COURT: Okay.

8 A So, I was all for the idea. And I even gave him
9 some names. And one of the names I remember was Ricardo
10 Fishburne, because he was like in a cell next to me, and
11 people thought we were brothers. And so, that's why I
12 know I remember him.

13 THE COURT: Okay.

14 A And I was convinced. He convinced me that it
15 probably would be a bad idea to do that, because then we
16 lose that right to say, well, it wasn't just a show-up
17 because you relieved that with a lineup. And so, I
18 ain't sure if I waived something. And Cory even said
19 that. He said we're not sure if we're waiving some kind
20 of right of not doing this.

21 THE COURT: Oh, he asked Judge Gregory that.

22 A Oh, okay. And --

23 THE COURT: He didn't want to give an advisory
24 opinion, is what I read, but.

25 A Okay. And that is my position. I believe that --

1 THE COURT: Okay.

2 BY MR. MOGIL:

3 Q Mr. Rogers, before we get to the alibi witness
4 issue, just, in the closing argument, closing, the jury
5 charges the court gave the jury, you believe that there
6 was something prejudicial with the malice charge. Can
7 you -- and counsel failed to object to that. Can you
8 elaborate on that for the Court.

9 A Okay. Let me find it.

10 MS. WILSON: Your Honor, a copy of that is in here.

11 THE COURT: Okay. Can you give me a page, Ms.
12 Wilson.

13 MS. WILSON: Sure. It starts on Page 1,500, and
14 it's in the Volume 6. So, there should be another one.

15 THE COURT: 1,400?

16 MS. WILSON: Yes. 1,500, your Honor.

17 THE COURT: 1,500. Okay.

18 MS. WILSON: And it goes on to, I think, 1,502.
19 It's just the whole murder charge.

20 THE COURT: Got it.

21 A Mr. Mogil, was the question about the malice charge?

22 MR. MOGIL: Yes, your Honor. Yes.

23 THE COURT: Let me just go ahead and read the malice
24 charge.

25 MR. MOGIL: Okay.

1 THE COURT: Just give me a second, okay?

2 MR. MOGIL: Thank you.

3 THE COURT: Okay. I've read the malice charge. And
4 we all know that the law has changed since then. But at
5 the time, that was the current law.

6 A Okay.

7 MR. MOGIL: Your Honor, you're saying that the way
8 the judge presented the elements of malice has -- the --

9 THE COURT: It was proper at the time, and it was
10 proper up until --

11 MR. FLEMING: Two years ago?

12 THE COURT: Yes, two years ago.

13 MR. KULP: And reviewed again in August.

14 MR. FLEMING: But it wouldn't have been improper in
15 this case, anyway, because there was no evidence of
16 mitigation.

17 THE COURT: There was no self-defense or -- okay.

18 MR. FLEMING: Right.

19 A And --

20 BY MR. MOGIL:

21 Q Mr. Rogers, --

22 A Yes. No, I --

23 Q Let's switch gears.

24 A No, I don't -- can I explain --

25 Q Sure. Go ahead.

1 THE COURT: Sure.

2 A -- the malice charge? Without trying to beat you
3 over the head with case law, I know you know case law,
4 there was a case, *Yates versus Aiken*, and it culminated
5 in *Yates versus Yvette*, *Yvatt* [sic], something like
6 that. It talks about the same line of language that the
7 judge gave to the jury in a charge in my case as it was
8 in *Yates*. And *Yates* was ultimately overturned. And
9 this was a case, a 1988 case, but it was ultimately
10 decided in 1990 something. And it runs along the same
11 lines, if you want me to read some of that.

12 THE COURT: Okay.

13 A Dealing with *Yates*.

14 Q Mr. Rogers, why don't you point out, in the jury
15 charge itself, what did you find objectionable in the
16 jury charge.

17 A The language of the jury when -- it is intentional
18 doing of a wrongful act without just cause or excuse.
19 Basically, -- basically, the jury charge itself, and
20 certain facts that was commented on that ran along
21 similar lines to the prosecutor's opening summation.
22 And he commented on those same -- it ran along those
23 same lines, when the prosecutor said that two people
24 came back, somewhere along those lines, two people came
25 back and did this. And the judge, ultimately, in his

1 closing argument -- I mean, his charge to the jury, said
2 that, for example, lying in wait for a person or any of
3 the acts of preparation.

4 THE COURT: You thought it was too similar to your
5 case. Is that correct?

6 A Yes, made.

7 THE COURT: Is that what you're arguing? Okay. I
8 understand.

9 MR. MOGIL: Essentially, your Honor, he's arguing
10 that the inference, when the judge gave the instruction
11 on inferences, he used the examples, which I --

12 MS. WILSON: Your Honor, I want to object to his
13 testimony.

14 THE COURT: Mr. Mogil? That's all right. He
15 doesn't need to explain the law. I know it.

16 MS. WILSON: Okay. I just would like for the
17 applicant to testify, and not him.

18 THE COURT: We're fine.

19 MS. WILSON: Thank you.

20 THE COURT: We're fine. I understand what his
21 objection is to it. All right.

22 BY MR. MOGIL:

23 Q Mr. Rogers, who is Shamira Holmes.

24 A I'm sorry. Are we done with the malice charge?

25 THE COURT: We are.

1 Q Mr. Rogers, who is this Shamira Holmes?

2 A She's the mother of my child.

3 Q Okay. And what was the nature of your relationship
4 with Shamira Holmes back at the time when you were
5 arrested?

6 A She was -- she was my girlfriend at the time.

7 Q Was your child born at the time?

8 A No, she was about five months pregnant at the time.
9 Probably a little more. Five or six months.

10 THE COURT: And we're going back, now, to what?
11 1999? 2000?

12 A 1999, yeah, January -- end of '98, beginning of '99.

13 Q And were you living together at the time you were
14 arrested?

15 A Yes.

16 Q Where were you living?

17 A We were living -- I'm not sure the exact address,
18 but I was living with her and her mother on Drayton
19 Drive. Somewhere in Port Royal. I'm not sure of the
20 exact address, but it was on Drayton Drive.

21 Q And we're not re-trying your case, Mr. Rogers, right
22 now.

23 A Right.

24 Q But for the purposes of today, were you with Ms.
25 Holmes the night that you were accused of this crime?

1 A Yes.

2 Q Okay. Why was Ms. Holmes not called as a witness in
3 your case?

4 A I'm not sure, but I -- I made mention to Mr.
5 Fleming, but along the lines of the -- a confession and
6 statements that were made, it was said to me that, if I
7 had anybody to testify as an alibi or a witness in my
8 case, then those statements would be able to be brought
9 up. I wasn't sure on the case law on that. I'm still
10 not sure. But that was made mention to me. And so, we
11 didn't even pursue -- I didn't even pursue it. I didn't
12 even pursue a alibi witness, because he said the burden
13 of proof was on the State. And so, all we had to do is
14 just put up a defense. We didn't have to go on, you
15 know, offense.

16 Q Okay. Specifically, who were you speaking with in
17 the offices? Was it Mr. Fleming or Mr. Kulp that you
18 met with to discuss this issue?

19 A It was probably -- probably Mr. -- Mr. Fleming.
20 Probably so. I've talked to Mr. Kulp, too, but mainly
21 Mr. Fleming, because he's -- he's from down here. He's
22 has easy access to me. So I -- I recall seeing him more
23 times than I seen Mr. Kulp.

24 Q Were you asked to list potential witnesses who could
25 help you at any point in your preparation for the trial?

1 A I don't -- -- I don't -- I'm not sure. I don't
2 recall asking to be -- to list any witnesses. I don't
3 recall that.

4 Q Do you have specific recollection of discussing that
5 you were with Ms. Holmes with Mr. Fleming?

6 A I made mentioned to him, yes. And he -- he even
7 wanted to talk to her. And I -- my -- my thought was
8 that he was talking to her about being an alibi witness,
9 but when he -- when he talked to her, he talked to her
10 about what was it, a handwritten note. And her
11 recollection of that is that he showed a computer --
12 well, sorry, that's probably hearsay, but her
13 recollection of that is he showed her a note on a
14 computer or a laptop, and asked if that was my
15 handwriting. And that was the extent of the
16 conversation.

17 Q And what was -- how do you know about that
18 conversation?

19 A She told me that.

20 Q Okay. She told you that at the time?

21 A She told me that at the time, and she recently told
22 me that. She told me that like a year ago.

23 Q If you were to be tried again, would you call Ms.
24 Holmes as a witness?

25 A I would attempt to call Ms. Holmes as a witness, but

1 it's my understanding, along with my mother and my
2 father, who talked to her today, that she doesn't really
3 want to get involved with this case. I'm not sure why.
4 I told her all she had to do was just tell the truth; if
5 nothing else, if you don't remember, you just don't
6 remember, but whatever; if you call, just tell what you
7 remember as pertaining to whatever, you know. And she
8 was in agreeance [sic] with that last year when this
9 case was continued. And then -- cause of scheduling
10 issues or something.

11 And then, this year, she had a talk with her
12 husband. They was separated last year, and supposedly,
13 she was agreeing with it. And then, this year, they're
14 back together. And she had a talk with her husband, and
15 now, things changed. She said she doesn't want to get
16 involved; she doesn't -- she just doesn't want to get
17 involved with the case.

18 Q Mr. Rogers, if you were tried again for these
19 charges, would you testify that you were with Ms.
20 Holmes?

21 A I'm not sure if I would testify. I would have to
22 look at what evidence would be presented against me,
23 especially the confession or anything like that. But
24 I'm not sure if I would testify, but I probably would
25 want to, yes.

1 Q I guess my question was, if you testified, would you
2 testify you were with Ms. Holmes?

3 A Oh, yes. Yes, sir. Sorry.

4 Q And you believe if she told -- if she was telling
5 the truth, she would testify the same?

6 A Yes.

7 MR. MOGIL: And your Honor, will the Court examine
8 Mr. Rogers on the consequences of PCR, or do you want me
9 to go through that questioning?

10 THE COURT: Well, Mr. Rogers, I assume you
11 understand. This was a death penalty case, and the only
12 thing I could do is undo your previous trial. That
13 means you would be tried again. It means you'll be
14 facing the death penalty again. And this time, you
15 could go forward, and the jury could find you not only
16 guilty, but also sentence you to death. And I want to
17 make sure you understand and appreciate that that's the
18 only two things that can happen here.

19 Again, either I deny your application, or I grant
20 you a new trial. And again, you'll be facing the
21 charges all over again. You'll be facing the death
22 penalty all over again. Do you understand that, sir?

23 A Yes, ma'am.

24 THE COURT: All right.

25 BY MR. MOGIL:

1 Q Okay. Mr. Rogers, other than the issues that we've
2 raised that I've questioned you on and that you've
3 elaborated on, do you have any other elements relating
4 to your post conviction relief application and your
5 attorneys' representation of you or conduct during the
6 trial that you would like to raise to the Court that I
7 may have missed or that the Court should be aware of?

8 A I think we covered everything. I did make mention
9 of the jury instruction to -- I mean, yeah, the jury
10 instruction or the jury charge commenting on the facts
11 of the case. I think that pretty much sums.

12 THE COURT: Yes, I understand, and I didn't mean to
13 cut you off on those two. I understand your objection
14 to the malice jury charge. It was, Number 1, the law
15 has changed as far as inferred malice. No question as
16 to that. But I think, as Mr. Fleming piped in, there
17 was no mitigation in this case. In other words, there
18 was no self-defense or other issues, so that really
19 doesn't matter. It was thought that the comments, which
20 is, I will tell you, a standard comment that the judges
21 state, and it's in the desk book when they say, for
22 example, lying in wait shows, obviously, inferred
23 malice. So, anyway. Or I'm sorry. Actually, it's
24 express malice, someone lies in wait, so it's obvious.
25 So, I understand that's your issues.

1 Okay. So, other than these four issues, do you have
2 anything else --

3 A No, ma'am.

4 THE COURT: -- you want raised? Was this case only
5 tried once?

6 MR. FLEMING: It was only tried once.

7 THE COURT: Just making sure.

8 MR. FLEMING: Forever, but it was once.

9 THE COURT: Okay. Forever, but once. Okay. All
10 right. And just so I'm clear, is Shamira Holmes the
11 mother of your son?

12 A Yes, ma'am.

13 THE COURT: That is your son. Okay. All right.

14 A Also, your Honor, I don't know if I'm waiving a
15 right by saying that's all I want to say, cause I might
16 want to say something to -- in response to what Mr.
17 Fleming might have to say.

18 MR. MOGIL: I think he's referring to would he have
19 the opportunity to rebut anything Mr. Fleming says.

20 THE COURT: Okay. Well, let's see what happens.
21 Let's see. All right? You can step down, sir.

22 A All right. Thank you.

23 THE COURT: Is that all you want to cover right now?

24 A Yes, ma'am.

25 MS. WILSON: Your Honor, will I be able to cross-

1 examine the witness?

2 THE COURT: Oh, you know, that would be nice.

3 Sorry. Sorry. I'm getting a little ahead of myself. I
4 apologize.

5 MS. WILSON: Okay. May it please the Court.

6 THE COURT: Yes, ma'am.

7 TAVARIUS LEE ROGERS

8 CROSS-EXAMINATION, MS. WILSON:

9 Q How are you doing this afternoon, Mr. Rogers?

10 A I'm doing well.

11 Q Good. How many times do you think you met with Mr.
12 Kulp and Mr. Fleming over the years, you know, that you
13 were preparing for your trial?

14 A Uh-huh.

15 Q I mean, a lot? Frequently?

16 A A lot.

17 Q Okay.

18 A Mr. Kulp more -- I mean, Mr. Fleming more times than
19 Mr. Kulp.

20 Q Okay. And do you recall him going over the
21 discovery that he received from the State in your case?

22 A Discovery as far as evidence?

23 Q Um-hmm.

24 A Discovery, we had a hearing for that in December 'of
25 '99, and the judge made them come up with everything

1 that they had. And there was no evidence in this case.
2 No physical evidence in this case.

3 Q Okay. Okay. There was no -- you said there was no
4 physical evidence. Well, did you review with Mr. Kulp
5 or Mr. Fleming statements of the witnesses that the
6 State was going to call?

7 THE COURT: An incident report?

8 MS. WILSON: Incident reports from the police? Did
9 you review any of that?

10 A I'm -- I'm quite sure I did, yes, ma'am.

11 Q And do you recall discussing with him like any of
12 your possible defenses that you could present at trial?

13 A I recall him saying things about our defense, --

14 Q Okay.

15 A -- you know, later on down the line. The whole --
16 the whole time, up until like several months before we
17 went to trial, it was, we trying to get this throwed out
18 altogether because of the probable cause, and there was
19 no probable cause to arrest me.

20 Q Okay. and --

21 A As far as I recall.

22 Q Okay. Thank you. And did you give Mr. Fleming or
23 Mr. Kulp any leads or potential witnesses that you --
24 you listed a couple. I think you said you did earlier.

25 A Yes, ma'am.

1 Q Did you give them specific names and addresses and
2 stuff?

3 A I'm not -- I can't recall many names or anybody else
4 except for Shamira Holmes.

5 Q Okay. So you only gave them Ms. Holmes as far as
6 you can recall.

7 A Yeah. I mean, I -- not that I recall. I --

8 Q Okay. And it was your decision to go to trial that
9 day. That's correct?

10 A Yes, ma'am.

11 Q No pleas were given. No plea offers of anything
12 were extended to you?

13 A Yes, ma'am.

14 Q Okay.

15 A A plea offer was offered to me.

16 Q A plea offer was extended to you?

17 A Yes.

18 Q And it was your decision to reject that and proceed
19 to trial?

20 A Yes.

21 THE COURT: What was the plea offer? Just to life?

22 A Thirty.

23 THE COURT: Thirty?

24 A Thirty years. Two counts of manslaughter, 30 years,
25 run consecutive. Something like that.

1 THE COURT: Thirty years to run consecutive?

2 A No. Concurrent.

3 THE COURT: Concurrent.

4 A That's together, right?

5 THE COURT: Concurrent's together, right. Okay.

6 So, you think it was -- you think it was an offer of 30,
7 two counts of voluntary manslaughter?

8 A (Defendant nodded head.)

9 THE COURT: Okay. Mr. Fleming, I'm sure will tell
10 me.

11 BY MS. WILSON:

12 Q Okay, Mr. Rogers, you said that your trial counsel
13 was ineffective because he didn't object to the
14 prosecution's closing statement, and you said that it
15 violated your -- the Golden -- the right -- your Golden
16 Rule, right?

17 A Yes, ma'am.

18 Q That's correct, right?

19 A Yes, ma'am.

20 Q Okay. And when it was happening at trial, did you
21 mention this, or that you felt something fishing going
22 on with this --

23 A I left --

24 Q -- to your attorneys?

25 A I left everything up to Mr. Fleming. I had no

1 knowledge of the law at all.

2 Q Okay. So, you didn't mention it to him at all.

3 Okay. Okay. And you did testify here today that you
4 recall having a hearing pursuant to *Neil v. Biggers*.

5 That's correct?

6 A Yes, ma'am.

7 Q Okay. And your attorneys moved to suppress the
8 identification by the two victims. Is that correct?

9 A Yes.

10 Q Okay.

11 A According to the *Neil v. Biggers* hearing.

12 Q Okay. And do you recall your attorneys cross-
13 examining one of the victims during the *Neil v. Biggers*
14 hearing regarding the statement she gave to the police
15 and her inability to identify anybody previously to come
16 into court that day?

17 A Which witness are we talking about?

18 Q Let me tell you. All right. This one is the
19 Kristal Wire. Do you recall that was -- they cross-
20 examined Kristal Wire, and asked -- they questioned her
21 about her inability to identify anyone or on her
22 statement that she gave?

23 A Yes, ma'am.

24 Q You recall that?

25 A Yes, ma'am.

1 Q Okay. Do you recall them cross-examining Jocelyn
2 Shaw, I think, oh, Jocelyn Wendel. Sorry. I can't
3 understand my own handwriting. Do you recall them
4 cross-examining her about her inability to identify your
5 clothing and the fact that she saw your picture in the
6 newspaper? You recall them questioning her about that?

7 A Yes, ma'am. Yes.

8 Q And you're saying that these inconsistent
9 statements that they were making were made in that *Neil*
10 *v. Biggers* hearing. Is that correct?

11 A In that hearing, and in trial, and in a previous
12 hearing.

13 Q Okay.

14 A A probable cause hearing.

15 Q And so, these hearings weren't before the jury. Is
16 that correct?

17 A Those hearings?

18 Q Yes. Were they just in front of the judge?

19 A The trial was.

20 Q Well, other than the trial. I'm speaking of the
21 *Neil v. Biggers* hearing and their testimony.

22 A That was not in front of a jury, no.

23 Q That was in front -- okay. And do you recall filing
24 an appeal in this case?

25 A Yes, ma'am.

1 Q Okay. And do you recall what your issues were on
2 appeal?

3 A It was -- it was ran along the lines of the *Neil v.*
4 *Biggers*.

5 Q Okay. So, your issue on appeal was the
6 identification of you by the victims and their in-court
7 identification being able to be heard by the jury.

8 A Yes, ma'am.

9 Q Was that the issue? Okay. And do you know what
10 the result of your appeal was?

11 A It was denied.

12 Q So, your appeal was affirmed? They affirmed your
13 convictions and your sentences?

14 A If that's the language that -- yes, ma'am.

15 Q Okay. Thank you for that. And you testified that
16 one of your allegations against your attorneys is their
17 failure to request a live lineup?

18 A Yes.

19 Q Was that your allegation? Okay. And you say you
20 testified that they couldn't have requested a live
21 lineup before the hearing, because they didn't know that
22 you would be identified. Is that correct?

23 A Right.

24 Q Okay.

25 A I'm sorry. Let me explain that, because you said

1 that I -- that they didn't request one. No, is that we
2 didn't follow through with one. The prosecutor and the
3 judge offered that to us as some kind of relief, because
4 of what we was saying in the -- in the hearing that it's
5 just basically a show-up. And prior to this hearing, no
6 one made an identification as to me or gave any
7 description of me to identify me, and this is some 32
8 months later. And so, --

9 Q Okay. Thank you. So, you're saying that trial
10 counsel didn't follow up with the live lineup?

11 A Exactly.

12 Q Okay. And did your attorneys tell you why they
13 didn't want to proceed with a live lineup?

14 A He said that -- he convinced me that it, basically,
15 would be a show-up, because they had attended court
16 several times beforehand. And so, there would be no
17 way. And even made an example with the judge. I
18 believe he said something about not knowing one of the
19 Beatles, Paul or something? Or one of the Beatles. But
20 even though he didn't know him or met him personally,
21 after having seen his picture, he'd be able to pick him
22 out of a hundred people.

23 Q Okay. So, basically, from what I'm getting, tell me
24 if I'm wrong, your trial counsel told you that having a
25 live show-up would have just been the same thing as

1 having just a show-up, because they had already seen
2 your picture; they'd already seen you in court; they had
3 already, according to the testimony, seen you in the
4 newspaper; so, it kind of would have been pointless. Is
5 that --

6 A Right along those lines, yes, ma'am. I was of the
7 -- I was saying that there's no way they could pick me
8 out, because I don't know them, so they can't know me.

9 Q Okay. And with regards to your testimony that trial
10 counsel failed to put up your alibi witness, and you
11 testified that Shamira Holmes would have been your alibi
12 witness, did you tell trial counsel about her possibly
13 being your alibi witness?

14 A Yes.

15 Q Okay. And today, you're saying you talked to Ms.
16 Holmes since your trial proceeding, and it's your
17 understanding that she does not want to testify.

18 A That -- that changed just within the last year.

19 Q Okay.

20 A Yes.

21 Q And you also testified that you're not really sure
22 that you would have taken the stand at your trial to
23 confirm this alibi's story.

24 A No. The question was asked would I take the stand
25 if I was granted a new trial.

1 Q Okay. If you were granted a new trial, would you
2 take the stand -- I would have --

3 Q -- to testify to your alibi witness?

4 A I'm sorry. I would have to give it some thought. I
5 would want -- I would want to put up my own defense and
6 try and save my life, yes, but I, you know, I don't know
7 the law that well. And so, things that Mr. Fleming told
8 me in that first trial convinced me that it was a bad
9 idea to do that.

10 MS. WILSON: Nothing further, your Honor.

11 THE COURT: Mr. Mogil, anything?

12 MR. MOGIL: Not regarding testimony from the
13 witness, your Honor.

14 THE COURT: Okay. You may step down, sir. And Mr.
15 Fleming, I am going to step down for one minute.

16 MR. FLEMING: Sure.

17 THE COURT: And I promise you, it will be one
18 minute, and I'll be right back out. Wanda, if you need
19 to take one minute, you're welcome to. Go ahead and
20 take a seat. I'll swear you in when I get back.

21 OFF THE RECORD 3:38 P.M.

22 BACK ON THE RECORD 3:40 P.M.

23 THE COURT: Do you swear or affirm the testimony you
24 give will be the truth, so help you God, Mr. Fleming?

25 MR. FLEMING: I do.

1 THE COURT: All right.

2 HON. CORY H. FLEMING

3 DIRECT EXAMINATION, MR. MOGIL:

4 Q Mr. Fleming, you've been in court and you've heard
5 Mr. Rogers testify. Is that accurate that you were
6 appointed counsel in this case?

7 A Yeah. My wife was initially appointed with the
8 public defender's office after the notice of death
9 penalty was issued. I agreed to be appointed as
10 counsel. Lead counsel was sort of nebulous with all
11 three of us, because all three of the lawyers involved
12 in the case had plenty of trial experience. So we just
13 sort of broke up the case. We made the decision in a
14 death penalty case because we were going to so
15 stringently argue in the guilt phase. Oftentimes, in
16 death penalty cases, you nail it in on that phase,
17 because all you're trying to do is save the person's
18 life.

19 In this case, we were going to argue very much with
20 regards to the failure of the State to prove the case,
21 and we felt that it was necessary to eliminate one of
22 the lawyers from that argument. Because, if you lose
23 the first part, you don't want the jury to then hear
24 from the same guy or person, female, to -- because they
25 didn't believe you the first time, why are they going to

1 believe you the second time. And so, that's why we
2 bifurcated this. However, that was for purposes of
3 being in front of the jury.

4 Behind the scenes, my wife, Eve, participated during
5 the whole time, until she -- the reason that she wasn't
6 -- ended up being in the case is that we -- she got
7 pregnant. We had our first child, and she couldn't --
8 she couldn't keep working through. We didn't want to
9 delay it.

10 It felt like every death-penalty-qualified lawyer in
11 Beaufort was on this case in one fashion. Mr. Newman
12 was on it. Mr. Lee. I think somebody else was on one.
13 And other lawyers had been appointed and fallen off.
14 And so, we -- I knew Mr. Kulp. I knew how good he was.
15 And I ask him if he wanted to participate, and he said
16 yeah. And that's how he got involved in the case.

17 Because I'd been involved in it so long, I stayed
18 with the first phase of the case. Hopefully, we would
19 never have to get to the second part. Mr. Kulp then
20 prepared the mitigation phase, penalty phase of the
21 case. And then also did a great deal of the underlying
22 legal research concerning all of the different, various
23 issues, some of which were raised today.

24 Q Mr. Fleming, one of the claims made by Mr. Rogers in
25 his, I guess, the most complicated claim was the failure

1 to -- your failure to object to the in-court
2 identification procedure in the aspects of it that were
3 inconsistent with prior statements that identify
4 witnesses. Can you explain, going back to the time, how
5 you dealt with those inconsistent statements, or were
6 they just missed, or did you address them different,
7 separately, in a different motion. How did that happen?

8 A Well, let me first begin by saying I'm a little bit
9 unclear about what that -- what the allegation is. I
10 don't think that there's any question that we objected
11 to the in-court identification. I think there is a -- a
12 fairly lengthy motion filed. There is a voluminous, 36-
13 page brief that Mr. Kulp filed immediately prior to
14 trial to reconsider the judge's ruling in limine
15 concerning the introduction of it.

16 If I can break it apart and say with regards to the
17 -- the physical lineup, that part, I think, is fairly
18 clear. I don't -- I did not actually specifically
19 remember my conversations with Tavarious concerning that
20 until he testified and it reminded me of that, because,
21 as you know, it's been eleven years, and that's a lot of
22 cases under the bridge there.

23 But we felt like the damage was already done; that
24 these people, all of these witnesses, who clearly did
25 not identify him in the photo lineup, we felt like each

1 and every one of the witnesses involved in the case was
2 either coached -- by that, I don't mean any insidious
3 thing -- coached into knowing who they -- the State
4 thought the assailant was. So, for instance, they'd
5 seen Tavarious in various hearings, bond hearings,
6 motions hearings, oftentimes were there. His picture
7 was in the newspaper. Certainly, they could have had
8 access to other documents. He went to Beaufort High
9 School. There was a -- I think we said something about
10 there was a lot of -- a photo of him in the annuals. I
11 mean, there were other ways that they could get access
12 to it.

13 But if we had allowed him to participate in a live
14 lineup, it would have given credence where none was due
15 to the identification process. And we felt like it was
16 much better to focus on the fact that they walked into
17 the courtroom, looked over at the defense table, with
18 the two older white guys and one black male, point to
19 him and say that's the guy. We argued that
20 vociferously. I think it's very clear that we argued
21 that. So, I don't think it's correct to say that we did
22 not object to the identification process.

23 With regards to whether or not there was an
24 inconsistency -- inconsistent statements, I don't have
25 an independent recollection of what -- how we cross-

1 examined the witnesses. I did not read those parts of
2 the transcript, because that was not brought. When I
3 read the application, I did not see that raised, and
4 therefore, I haven't seen it. I can tell you, it's my
5 belief that we addressed inconsistencies.

6 One of the things that Mr. Rogers brought up was,
7 apparently, a witness -- you've reference a probable
8 cause hearing. I'm not -- I've been doing this a while,
9 but I -- I think you mean a preliminary hearing?

10 THE COURT: That's all I could assume, yes.

11 A Okay. And if it's a preliminary hearing
12 unfortunately, what you find is that the people who
13 testify in a preliminary hearing testify about 95
14 percent of what they testify to is hearsay. It is very
15 common that they will testify and mix up the facts of
16 what one person says versus another. That's not a prior
17 inconsistent statement that's attributable to the person
18 on the stand.

19 I don't recall raising that issue, because it -- it
20 seems to be I wouldn't raise the issue because it was
21 fairly clear. I am certain in trial that I spent a
22 great deal of time on cross-examination, cross-examining
23 these witnesses' only identification and their prior
24 inconsistent statements. I'm not -- I'm not aware of a
25 process in which you can eliminate someone's testimony

1 simple because they gave different -- different
2 statements in the past. As I have been told many times
3 before, that goes to weight, not admissibility. And I
4 don't see how I could have ever eliminated a person's
5 ability to testify by way of objecting to the fact that
6 they may have said something different in the past.
7 Whether or not I raised it or cross-examined them, I
8 think, would be very clear in the transcript. I just
9 haven't read it.

10 I spent an inordinate amount of time preparing for
11 these cross-examinations, and if -- all I can say is, if
12 I didn't cross-examine them on inconsistencies, there
13 was a strategy behind it. There was a reason for it,
14 because I, you know, and I mean, Tavarius knows, between
15 Mr. Kulp and I, we spent a full month in full
16 preparation for this. And so, I -- you know, if I
17 didn't do it, I didn't do it.

18 Q Just for my benefit, --

19 A Yeah.

20 Q -- in terms of when Mr. Rogers is stating his an
21 objection should have been made at the in-court
22 identification hearing, who was that hearing before?
23 Was it Judge Gregory?

24 A Well, certainly, yeah. All motions -- all
25 evidentiary hearings are made before the trial judge.

1 Q So, if the objection had been made, it would have
2 been considered in his ruling on the identification.
3 What would the objection have accomplished, had you made
4 it?

5 A I have no idea. I mean, that would be -- that's
6 sort of like I object, I don't like the witnesses'
7 testimony, can you strike it. I mean, I -- I don't
8 understand what the objection -- objection, the witness
9 is testify differently to what they testified before?
10 Is that what you're talking about?

11 Q Right. Well, when Mr. Rogers was arguing -- is
12 arguing is that the witnesses gave statements that
13 completely contradicted the testimony that they gave at
14 that second hearing. They gave statements to the
15 investigator. I guess I'm asking what point --

16 A I don't know what the transcript says, and I'm
17 sorry. Again, I wasn't -- I was under the impression
18 that we were arguing a different point. I didn't
19 realize this was being brought up. Because I did
20 prepare for the hearing and read things and culled
21 through a lot of stuff. I assume the transcript speaks
22 for itself. I don't -- I don't have anything else to
23 add to it except that, you know, I would assume that I
24 brought out whatever inconsistencies that I thought at
25 the time were appropriate. And it may be -- you know,

1 the problem with preliminary and in limine hearings is
2 that you don't show your hand completely. I mean, you
3 don't -- you don't hand the other side your play book in
4 a motion in limine, and then -- and then expect them not
5 to prepare for it in trial. And so, I -- but again,
6 without knowing specifically -- specifically what it was
7 I was -- I should have done, I can't decide what it was
8 -- what reasons I made, but you don't always put
9 everything on the table in those pretrial motions. They
10 can be a bit dangerous. But I don't know that that's
11 the case in this situation.

12 Q Who, on the team, would have been responsible to
13 interview the various potential witnesses in the case?

14 A Well, everybody. We had multiple -- we didn't just
15 have myself. My wife at the time, when she was involved
16 in the case, would have been involved in interviewing
17 witnesses. Certainly, Mr. Kulp, the very -- very less
18 -- much less so, because he got into it on a later time.
19 I had two separate investigators hired. One was my
20 full-time investigator, B.J. Adams, and I know he -- he
21 went with me to every interview I had, for specific
22 technical reasons. If someone changed their testimony,
23 I needed somebody who wasn't a lawyer to be able to say
24 it.

25 But most importantly was a woman by the name of Dale

1 Davis. Dale Davis was our mitigation coordinator. And
2 the way that works is that there is unbelievable amounts
3 of information that you have to gather. Tavarious had
4 lived in several places. He had family members living
5 overseas. He had school records, et cetera. She was
6 responsible for many of, I bet, probably 50 interviews,
7 as well. So, most -- and of course, I attempted to
8 interview every State's witness in the case, and have
9 affidavits in the file showing that they refused to talk
10 with me, and that kind of thing, which is not uncommon.

11 Q Was Shamira Holmes interviewed?

12 A She absolutely was.

13 Q From your recollection.

14 A Absolutely, she was.

15 Q And from your file, what came out of her interview?

16 A I -- I do not -- I do not -- I did not interview her
17 every time. I do not recall specifically. Again, we
18 wrote down notes, and the notes will reflect. The
19 purpose of interviewing Shamira, quite frankly, was for
20 mitigation purposes. Obviously, she was the mother of
21 -- of Tavarious' child. We did speak to her about --
22 about the case itself. Never once, ever, in four or
23 five interviews, did she ever say that -- that she was
24 an alibi witness; that she -- Tavarious could not have
25 done this because she was -- she was with her -- or she

1 was with him. She, with regards to factual, I believe
2 she said something to the effect of he's not that kind
3 of person, and I don't think he could have done it.
4 Which was, of course, information we were looking for.
5 But she did not specifically address that evening at any
6 way and provide any alibi whatsoever.

7 She did indicate that she had, the night before, or
8 very close proximity, had unbraided Tavarius' hair. And
9 so, I know that we were specifically talking to her
10 about the things that took place at the time. But she
11 never once said anything about being an alibi. And
12 quite frankly, Tavarius remembers that he told me that,
13 but I can assure you with absolutely no doubt that if he
14 had told me she was an alibi witness, I would have made
15 sure that that was specifically addressed. She was
16 never referred to as an alibi witness.

17 He did refer to somebody as an alibi witness. I had
18 grave concerns about the veracity of that particular
19 witness, based on the information I knew about the case.
20 If you're going to cross-examine me further on that, you
21 can, but --

22 Q Mr. Fleming, did you -- when you --

23 A But I interviewed that witness, which --

24 Q I'm talking about Shamira Holmes, really, just --

25 A Well, but I think it's important for you to

1 understand that the one alibi witness that was told to
2 me, myself, and Mr. Adams, identified that witness, and
3 that witness told me that he was not, and told me other
4 things. So, my point is that I would have interviewed
5 Shamira had I been told that she was an alibi witness
6 since I did interview another one. Although, I did not
7 believe he was going to be an alibi witness from the
8 beginning.

9 Q When you said Ms. Holmes was talked to four or five
10 times, is that by other people on the team?

11 A Yeah, most -- most of the conversations were, yes.

12 Q Do you remember --

13 A I do not actually ever -- I don't -- I don't have
14 any personal recollection of talking with her. I don't
15 have any personal recollection of talking with several
16 of the witnesses. I just -- I'm sorry, but it has been
17 eleven years, and I just -- I can remember some things
18 crystal clear, but I can't remember that.

19 MR. MOGIL: Your Honor, I don't have any further
20 questions of the witness.

21 THE COURT: Ms. Wilson.

22 MS. WILSON: Thank you, your Honor.

23 HON. CORY H. FLEMING

24 CROSS-EXAMINATION, MS. WILSON:

25 Q Mr. Fleming, you just testified today that you did

1 discuss a potential alibi for the applicant with someone
2 whose information he provided you. Is that correct?

3 A He provided -- he provided me a name. I -- I
4 actually did not write the name down. The individual
5 lived in Saint Helena. I went to Saint Helena with my
6 investigator. We went. I specifically remember the
7 interview. We pulled up in the front yard. There were
8 about a dozen African-American males in the front. They
9 almost ran from us. They then recognized my
10 investigator as -- as being one of Mr. Moss' guys. And
11 so, what that essentially means is that he was safe to
12 talk to.

13 They all -- we indicated we were looking for this
14 individual. They, at first, said he wasn't there, and
15 in fact, he was standing in the crowd. He did come up
16 eventually and talk to us -- talk to us, and did not
17 provide an alibi. He actually said what do you want us
18 -- what do you want me to testify to. And I took that
19 to mean that he was willing to perjure himself, and I
20 said I wanted the truth. And he was not able to give us
21 any truth that would support any notion of the truth.

22 Q Okay. Mr. Fleming, --

23 A Um-hmm.

24 Q -- the applicant alleges that you failed to object
25 to a Golden Rule violation in the Court's charge to the

1 jury.

2 A Um-hmm.

3 Q Did you ever notice or have a reason to -- a reason
4 to object to that?

5 A No, I -- clearly, I didn't object. And I would hope
6 that between Mr. Kulp and I sitting there, that if we
7 had thought that it would have been a violation or
8 something that we would have objected. I think, as I
9 re-read the transcript, because I did prepare for that
10 portion, because it was specifically listed, I think
11 that, unfortunately, sometimes transcripts don't quite
12 read the way it happens, if you will. They're a little
13 bit canned, a little bit dry. I think most of what the
14 solicitor was using the word you for was the general as
15 if -- this particular solicitor is sort of a -- a
16 homespun fellow, and he doesn't use words always quite
17 specifically. Another way of saying what he was saying
18 was, one might do something and one might do something
19 else. When he says you, he wasn't referring to the jury
20 specifically.

21 I think that some of the points that Tavarus
22 brought out when he specifically did, I think were, in
23 retrospect, probably a little bit -- a little bit close,
24 but of course, I did not believe that they were
25 objectionable at the time, or I would have objected.

1 And we certainly raised enough objections in this case.

2 Q Okay. Were you made aware of a malice, a problem
3 with the malice charge that was charged during the
4 applicant's case?

5 A I spoke -- I spoke to Mr. Kulp, and I -- we both
6 were thinking about the charge conference. And I'll be
7 honest with you, I have -- I have no specific memory of
8 the charge conference. Obviously, I didn't object to
9 the charge. I believed it was appropriate under the
10 circumstances. When I read the PCR application and
11 looked at it, it looked like every malice charge I've
12 ever seen in my life up until the first time we used the
13 new one, which was in front of Judge Buckner. I was
14 actually trying the first case with that charge, and --
15 and Judge Buckner gave the new charge. And that's how I
16 know about it. Which wouldn't have even been applicable
17 in this case.

18 Q Okay.

19 A I thought that charge, as it read now, would be
20 appropriate. I mean, I would have liked to have done
21 something else, but I mean, it's -- I mean, I'm not -- I
22 don't want you to think that if there was something else
23 I could have done for Tavarus, I wouldn't have done it.
24 I think he probably knows that, as well, but you know,
25 we are bound by the law and we are officers of the

1 court, and if that's what the court -- the law says,
2 that's what it says.

3 Q And I just want to be clear on your testimony
4 regarding the prosecutor's statements, because I think
5 that applicant's making an allegation based on this
6 Golden Rule violation, and he's also making allegations
7 regarding the prosecutor's statement. Is that when you
8 were talking about the prosecutor's use of the term you;
9 meaning, you know, instead of you did this, he was
10 implicating one might, instead of speaking to the jury
11 specifically?

12 A What I think, and Mr. Kulp actually sat down and
13 went through it and wrote down the specific uses of the
14 words in the last ten minutes or so. We sort of sat
15 there and looked at it, because we were, you know, I
16 mean, it's -- I think, if I can explain it, when you are
17 in the fire, you know, when you are literally listening
18 to everything happening, you're processing a lot of
19 information. And so, we relied on one another, as well.
20 And I am certain that neither of us felt like that it
21 was -- that it crossed the line that we needed to
22 object. I'm certain of that, because I'm certain we
23 would have objected if that was the thing, the issue.

24 The use, in retrospect, reading the transcript, when
25 you look at the use of the word you, it's clear to me

1 having tried many cases against this solicitor. And
2 see, it's clear to me when a person may misinterpret
3 what he's saying in a transcript, but much of what he
4 says when he uses the word *you*, as if you the jury, he's
5 actually saying you as a sort of you a person. When a
6 person does this, then this happens, as opposed to we
7 just use the word when you do this, this happens, is how
8 I read that transcript. But I, you know, I don't know
9 any other way to explain it except to say -- now, there
10 -- Tavarious did raise a couple issues about some
11 specific references to the jury, and I -- I mean, I
12 think those -- that's not what I'm saying on those
13 instances.

14 Q Okay.

15 A I think that's maybe once or twice that he does say
16 that. And I certainly would say that that's pretty
17 close to the line, I guess, but we certainly, obviously,
18 made the calculated decision not to object to those
19 particular references, because we obviously didn't think
20 it was harmful. It doesn't have to be -- it doesn't
21 have to be improper for us to object to it if it's too
22 harmful, if you know what I mean, you know. Even if we
23 don't think it's going to be sustained.

24 But -- but we didn't object in this circumstance.

25 And I can only -- again, it's impossible to remember

1 what specific thoughts are going through your head
2 eleven years after a jury charge. But I can only say
3 that I believe that we would have objected if we thought
4 that it was harmful or inappropriate to the level that
5 would cause a problem.

6 MS. WILSON: Okay. No further questions, your
7 Honor.

8 A I hope that's helpful. That's the best I can do.

9 MS. WILSON: Thank you.

10 MR. MOGIL: Your Honor, may I have a minute.

11 THE COURT: Sure. I'll tell you what I'm going to
12 do. I'm going through right now your cross-examination
13 of Ms. Wire during the trial of this case. It starts on
14 Page 1,257. I am now on Page 1,286, and you are still
15 cross-examining her.

16 MR. MOGIL: Okay.

17 THE COURT: So, it's clearly a lengthy cross-
18 examination, clearly, as to the previous statements.

19 MR. FLEMING: And I actually still have my entire --
20 I just didn't bring it, but I -- if anybody needs it, I
21 have --

22 THE COURT: I've got it right here.

23 MR. FLEMING: -- each cross-examination, with every
24 question that I asked in there, with relationship, back
25 to prior inconsistent statements.

1 THE COURT: Okay. Mr. Fleming, I know you probably
2 are getting ready to leave as soon as you can. Do you
3 have any interest in this portion?

4 MR. FLEMING: Actually, I would, yes. Thank you,
5 Judge.

6 THE COURT: Go ahead and take a look at it. That's
7 from your start of your cross.

8 MR. FLEMING: Thank you. Okay.

9 MR. MOGIL: Your Honor, I have nothing further.

10 THE COURT: Okay. From the answer.

11 MR. FLEMING: It specifically says that, so.

12 THE COURT: Okay. All right.

13 MR. FLEMING: May I be excused if -- I mean, I'm a
14 witness, but.

15 THE COURT: You may, and if for some reason I need
16 to call you back, I know where to find you. So if we
17 need to hold it over, we could. All right.

18 MR. FLEMING: Okay.

19 THE COURT: Thank you.

20 MR. FLEMING: Thank you, Judge.

21 MS. WILSON: Thank you so much.

22 THE COURT: Call your next witness.

23 MR. MOGIL: I don't have any further witnesses. The
24 State -- Mr. Kulp was noticed as a witness, but not by
25 us.

1 THE COURT: Okay. Do you want to call Mr. Kulp?

2 MS. WILSON: Yes, your Honor, the State would like
3 to call Mr. Timothy Kulp.

4 THE COURT: Come on up. Sir, do you swear the
5 testimony you give will be the truth, so help you God?

6 MR. KULP: I do, your Honor.

7 THE COURT: Thank you. Kulp, K/u/l/p?

8 MR. KULP: That's correct, your Honor.

9 THE COURT: All right. Ms. Wilson, whenever you're
10 ready.

11 MS. WILSON: Thank you, your Honor. May it please
12 the Court.

13 HON. TIMOTHY KULP

14 DIRECT EXAMINATION, MS. WILSON:

15 Q Mr. Kulp, how did you get involved in this
16 applicant's death penalty trial?

17 A As Mr. Fleming said, when his wife, Eve, was
18 conflicted, I -- someone called me, and I can't remember
19 who, and asked if I'd be interested in participating.
20 I'd done four death penalty cases prior to that. And I
21 agreed to do so. I'd be happy -- I said I'd be happy to
22 be appointed.

23 Q You say you had prior experience with death penalty
24 cases.

25 A I did.

1 Q And did you file any documents in support of the
2 applicant's argument regards the *Neil v. Biggers*
3 hearing, an identification argument that you were making
4 on behalf of the defendant?

5 A I did, because identification was such a huge issue.
6 Mr. Fleming touched on it, but the dilemma that we found
7 ourselves in, which was addressed in a very lengthy
8 motion, and I can't recall -- my computer just died, but
9 if we filed a motion prior to the initial *Biggers*
10 hearing, but we did -- I did file a 40- or 50-page
11 motion after the hearing titled as a motion to
12 reconsider the court's decision on the issue of
13 identification that dealt with both the science of
14 eyewitness identification, the facts in the case, the
15 inconsistencies in testimony of the witnesses, not
16 particularly their coaching, but their previous exposure
17 in other court proceedings to effectively the gentleman
18 in the orange jump suit sitting at the table as being
19 suggestive. And the Court denied that motion.

20 But as Mr. Fleming said, I think to clarify from my
21 perspective, there was a point when, in the proceedings,
22 someone or the court suggested let's just have a lineup
23 up here right now. And we huddled. And the concern was
24 that, since the witnesses who would be exposed to this
25 in-court lineup had been tainted, we believed, by

1 previous exposure, it was more than suggestive, it would
2 have been easy for them to say, yeah, that's the same
3 guy I've seen in court before. And that would just
4 simply nail down the issue of identification even more,
5 as opposed to being a cure.

6 We fought long and hard on that issue, because when
7 we had -- after having the confession suppressed, which
8 was before I got in the case, that was a primary area of
9 work to attempt to convince the judge to keep that out,
10 because, as I recall, and again, as Cory says, it's been
11 a long time, that would have really put us in the
12 ballpark, considering that the client insisted on going
13 forward with a very strenuous and asserted defense
14 during the guilty phase, in addition to the fact that
15 there weren't any plea offers from the State at the
16 outset of the case.

17 MS. WILSON: No further question. Thank you.

18 THE COURT: I want to ask you, were there eventually
19 some plea offers made, and was Mr. Fleming right, do you
20 remember was it 30 years concurrent to voluntary
21 manslaughter charges?

22 A There was, and it was made, I think, the second week
23 into the three-week trial. And I recall going back and
24 speaking to Mr. Rogers about it, because we had then
25 effectively computed that -- considered that, based on

1 the nature of the offer, that he would end up being
2 eligible for parole or either maxed out after about 23
3 years. I was very actually considering what we knew
4 about the case at that point and that far into it, I was
5 very upset that he wasn't even considering the offer.
6 So much so that we had a very -- very emotional
7 discussion about it in the lockup in the courtroom. But
8 he -- he wholeheartedly rejected that -- that offer.

9 THE COURT: Were you involved in any of the
10 suppression of his alleged confession in Charleston
11 County?

12 A No, ma'am.

13 THE COURT: Weren't a part of any of that?

14 A No, your Honor.

15 THE COURT: Okay. Okay.

16 A I was not.

17 THE COURT: Okay.

18 MS. WILSON: No further questions from the State,
19 your Honor.

20 THE COURT: Sorry. Go ahead, Mr. Mogil..

21 MR. MOGIL: No questions for Mr. Kulp. Your Honor,
22 may I call Mr. Rogers in brief as a rebuttal witness?

23 THE COURT: Any objection to Mr. Kulp being excused
24 from anyone?

25 MS. WILSON: No objection, your Honor.

1 THE COURT: You've got a drive.

2 MR. KULP: Yes. Thank you, your Honor.

3 THE COURT: You're excused.

4 MR. KULP: Good to see you, your Honor.

5 THE COURT: Thank you. You, too. Come on back up,
6 Mr. Rogers. Mr. Mogil, do you have a copy of his
7 appeal?

8 MR. MOGIL: We have the decision on the appeal, but
9 not the appeal itself.

10 MS. WILSON: You want the actual briefs?

11 THE COURT: I would, and I'd like to see the
12 decision, if you have it. That's not a part of what I
13 have, is it? Pardon? Go ahead and just briefly put him
14 under oath again just to make sure. We'll be fine. Mr.
15 Rogers, we're just going to put you under oath, again,
16 sir.

17 A Okay.

18 THE COURT: Just out of an abundance of caution.
19 Okay?

20 A All right.

21 THE COURT: You got it right there. You're fine.
22 Do you swear or affirm the testimony you give to be the
23 truth, so help you God?

24 A Yes, ma'am.

25 THE COURT: Thank you. You can go ahead and take a

1 seat.

2 MS. WILSON: Okay, your Honor, two final briefs.
3 Two final briefs. We have the order, final order.

4 THE COURT: I've got it right here. Okay.

5 MS. WILSON: Okay. I was going to say, I have a
6 petition for re-hearing, order denying the hearing.
7 Okay.

8 MR. MOGIL: May I proceed, your Honor.

9 THE COURT: You may.

10 TAVARIUS LEE ROGERS ON REBUTTAL

11 RE-DIRECT EXAMINATION, MR. MOGIL:

12 Q Mr. Rogers, you just heard Mr. Kulp talk about a
13 conversation regarding a plea offer where they
14 calculated some potential parole eligibility. Do you
15 recall that conversation?

16 A Yes, sir.

17 Q Okay. And for the Court's benefit, at the time, why
18 did you not accept the plea that was offered by the
19 State?

20 A Well, it was my understanding, from a long time
21 talking with Mr. Fleming and Mr. Kulp, that this case
22 could be easily won, because they had no physical
23 evidence on me; the eyewitnesses were shaky at best, is
24 what they determined at the court they used. And so, at
25 this time, you know, it was why take 30, when you told

1 me for 30 months -- 34 months that I would be going home
2 after this trial is over. So, it is just --

3 THE COURT: That's your testimony that Mr. Kulp told
4 you, you could go on home after this trial's over?

5 A No, Mr. Fleming.

6 THE COURT: Mr. Fleming.

7 A Yes. We could easily win. That wasn't his exact
8 statement, but my recollection of what he was saying was
9 that I would be going home after this case is over,
10 because we going to win this case. And so, 34 months
11 later, you know, he's saying, at the trial, you know,
12 they offered me 30 years, and I'm -- I was kind of
13 blinded by the fact that I should be going home. And
14 so, taking 30 years for something I didn't do, would be
15 kind of redundant. It'd be kind of crazy.

16 THE COURT: You understood you were facing the death
17 penalty, correct?

18 A Yes, ma'am.

19 THE COURT: All right.

20 A And I have a paper where the plea offer -- where the
21 plea was offered to me, and he said something to the
22 effect, -- I have to find it, but if I have to, I will,
23 it's over there somewhere.

24 THE COURT: And it said what?

25 A I did not sign for the plea and I did not sign the

1 paper saying I reject the plea, but I still rejected the
2 plea. And it was a plea for 30 years to manslaughter.

3 THE COURT: Well, if you hadn't rejected it, you
4 would have given the plea, and that's what would have
5 happened, so. Okay.

6 A And also, -- huh?

7 BY MR. MOGIL:

8 Q Okay. Did you want to add something to that, Mr.
9 Rogers?

10 A Oh, also by the -- by the hearing being a
11 preliminary hearing, it was -- it was a probable cause
12 hearing in June 8th of 2000. The preliminary hearing
13 happened in -- happened within months of the case. It
14 was January of 1999 when this case first took place.
15 And the preliminary happened March, February, March,
16 April, somewhere up in there of '99. That probable
17 cause hearing, and the judge ruled that there was no
18 probable cause to arrest me. And so, I was falsely
19 arrested. And that where -- where the suppression of
20 statements came in at.

21 THE COURT: Oh, I understand now. I understand what
22 you're saying. Okay.

23 A Yes, ma'am.

24 THE COURT: Preliminary hearing would have come
25 first, and then --

1 A Yes.

2 THE COURT: -- you would have had your later -- it
3 was, basically, it was a -- okay.

4 A Okay. Yes. I wasn't -- I didn't pull anything from
5 a preliminary hearing. All those hearings that I pulled
6 it were pretrial.

7 THE COURT: I understand now. Okay.

8 A Thank you. And I don't know if it matters, but Ms.
9 Fleming, I believe she did become pregnant, but she was
10 -- she asked to be removed from the case because of a
11 conflict of interest from another client that she had
12 for some reason or other.

13 MS. WILSON: Objection, your Honor. This is not
14 rebuttal to the testimony given by either one of his
15 attorneys.

16 THE COURT: Okay.

17 MR. MOGIL: No, actually, your Honor, just Mr.
18 Fleming said that his wife had to leave the case because
19 she was pregnant with their child. She couldn't
20 participate in the case. He testified to that.

21 THE COURT: Okay.

22 MR. MOGIL: Not that it's important.

23 A I'm not even sure if it was even important or not,
24 but I was just wanting to make sure that the record
25 states she didn't just say I'm leaving the case. She

1 asked to be removed from the case in a hearing in front
2 of Mr. Gregory.

3 THE COURT: Judge Gregory, yes.

4 A Yes. Because of a conflict of interest. And that
5 was -- that was a pretrial hearing in itself.

6 BY MR. MOGIL:

7 Q Mr. Rogers, Mr. Fleming testified that he does not
8 recall you presenting Shamira Holmes as an alibi
9 witness. Do you recall?

10 A Yes, I do. And the reason that he gave me for not
11 wanting to follow those lines was that, by me calling a
12 alibi witness, it was somehow unsuppressed statements
13 that were made, because they can show the difference, or
14 something to that nature. Something to the difference
15 in statements or something like that. I ain't even sure
16 what the law is, but I remember him telling me that, and
17 that's how I know that we talked about that.

18 Q Mr. Rogers, the question I was going to ask was not
19 related to Mr. Kulp's testimony, so I'll just do it in
20 closing.

21 THE COURT: Okay.

22 MR. MOGIL: No further questions for the witness.

23 Do you want to add anything, Mr. Rogers?

24 THE COURT: Anything further?

25 A No, sir. No, ma'am.

1 THE COURT: Okay.

2 MS. WILSON: Nothing from the State, your Honor.

3 THE COURT: Let me ask you, when's the last time you
4 saw your son?

5 A Prior to today?

6 THE COURT: Yes.

7 A About -- about a year ago. About a year ago.

8 THE COURT: All right. All right, sir, you may step
9 down.

10 MR. MOGIL: Do you have any other witnesses?

11 MS. WILSON: Nothing from the State, your Honor.

12 THE COURT: All right. Briefly.

13 ARGUMENT, MR. MOGIL:

14 MR. MOGIL: Briefly, yes, your Honor. Mr. Rogers
15 raises a number of issues in his application for post
16 conviction relief. Obviously, the issue as to whether
17 objections should have been made to at the
18 identification hearing is a very complicated issue
19 that's also been reviewed by the Court of Appeals. Mr.
20 Rogers feels very strongly about that, because he has
21 testified he didn't know these people; there's no way
22 they could have identified him. And he really, he's
23 challenging the veracity of the witnesses and saying his
24 lawyers should have objected.

25 I'm focusing, additionally, on a couple of issues.

1 And obviously, hindsight is golden. And at the time, it
2 appeared to both Mr. Rogers and his counsel; that the
3 State did not have a strong case, and therefore, they
4 did not put on an alibi witness.

5 But Mr. Rogers has testified that he presented that
6 to his counsel, that if he was tried again, he would put
7 on this witness. The witness has reasons, I'm sure
8 related to family, for not wanting to get involved in a
9 complicated legal proceeding of this nature. And I
10 respect that, but to the extent that the law provides an
11 incarcerated inmate with an opportunity to revisit his
12 trial, the fact that a person he says he was with was
13 not called as a witness on his behalf, to me, is
14 essential.

15 And I think there's a case, *Walker* -- it's *Walker v.*
16 *State*, because it's an application for post conviction
17 relief. But I can give you a citation of that if you
18 don't have it, your Honor. But it's a 2012 Court of
19 Appeals case in which, I believe, the court found that
20 failure to call an alibi witness would be grounds for
21 post conviction relief. In *Walker*, as the court, in
22 their decision writes, actually, the witness was called
23 at the post conviction hearing. And that's why I felt
24 it was so important that whether Ms. Holmes wants to
25 testify or not is really not the issue. If we could

1 somehow get her here, now that we know where she is, and
2 let the court interpret her own, you know, let the court
3 evaluate her testimony for what it is, that would be
4 critical. But to me, your Honor, that is a fundamental
5 and central element of post conviction relief, the
6 failure to call that witness.

7 The Golden Rule element, as Mr. Fleming
8 acknowledged, some of the statements made by the
9 solicitor are borderline. Mr. Fleming accurately
10 stated, and when you look at a transcript in the
11 abstract, uses of words can, you know, lose their
12 context or meaning. But your Honor, I take the liberty,
13 some of the things that were said here really cannot be
14 interpreted as the worst of the word review really meant
15 one. Referring to the trial transcript, Page 1,474, the
16 solicitor says:

17 *If Madam Juror, Mr. Juror, any one of*
18 *you ladies and gentlemen, if I were to take*
19 *a gun, and if I were to make you lie down on*
20 *the floor and take away from you your freedom*
21 *to move, I have kidnaped you.*

22 That is not substituting you for one and speaking in
23 an objective subject. It's not -- that's putting the
24 jury in the position of a victim. And --

25 THE COURT: Mr. Murdaugh does that all the time as a

1 hypothetical, is what I think he calls it.

2 MR. MOGIL: As a hypothetical?

3 THE COURT: As a hypothetical, to explain the law.
4 I will agree with Mr. Fleming is that Randolph Murdaugh
5 did do that. There's that question. I understand your
6 argument, and if you want to go ahead and finish. I
7 will tell you two things that I am going to look at,
8 based on what you all have raised for me. Number one,
9 the I.D. issue. I understand that the, you know, Court
10 of Appeals already looked at it, and they found that
11 Judge Gregory didn't abuse his discretion.

12 I can tell you that, obviously, I look at from the
13 aspect of whether or not, you know, Mr. Kulp and Mr.
14 Fleming, you know, were ineffective in objecting or
15 cross-examining. I mean, I've gone through and looked
16 at this. I mean, Mr. Fleming's cross-examination of Ms.
17 Wire in this case goes from Page 1,257 to 1,300. So
18 we're talking about 40-plus pages, of course, with a
19 little bit of re-direct in there. But 40-plus pages of
20 going after this woman on your behalf, Mr. Rogers. I'm
21 having a hard time seeing it, but I want to read every
22 word of it. Just see exactly how he goes after it. So
23 I'm going to do that.

24 Additionally, as Mr. Fleming said, I have looked
25 through most of the closing argument made by Solicitor

1 Murdaugh, and I would agree with him that there are a
2 few things that come close. The question then becomes
3 is, is it their failure to object to it; does that
4 result in ineffective assistance of counsel; and then
5 did that result or prejudice you; and did it affect the
6 outcome of the trial. And that's the hurdle you have to
7 get past on a PCR, which is the harder hurdle. Again, I
8 would agree with him that some of them came rather
9 close.

10 But I don't know if it makes it past the second
11 portion of that is whether or not the failure to object
12 actually affected the outcome of the trial and found
13 that prejudiced with it. So, I'm just -- I just want
14 you to know that those are the two issues that I'm
15 looking at specifically.

16 You know, the malice jury charge, it was proper; it
17 was under the time; and there's nothing wrong with it.

18 The Shamira Holmes portion of it, even to this day,
19 you're not sure that she will testify or would testify.
20 And typically, when we have alibi witnesses, and after
21 the fact, they come in with, you know, affidavits and
22 things that say this is what she's saying; had she been
23 called, this is what it was, and so kind of have a in-
24 between. So, I will look at those. I will let you
25 know. I'll request a proposed order from someone, and

1 we'll go from there. Okay?

2 MR. MOGIL: Your Honor, may I bring one more issue
3 before the Court?

4 THE COURT: Sure.

5 MR. MOGIL: And it may not be within this Court's
6 jurisdiction, but as a result of the convictions in the
7 proceedings below, the Court made a finding on kidnaping
8 of the one -- of the one person who wasn't dead. And as
9 a result of that finding, because she was a woman,
10 without making any specific finding that --

11 THE COURT: Right.

12 MR. MOGIL: -- any sexual activity, Mr. Rogers was
13 facing an offender's list. And it's very important to
14 him --

15 THE COURT: It affects his status at SCDC, South
16 Carolina Department of Corrections, correct?

17 MR. MOGIL: It affects his status. It also is a
18 record that is -- it's just, you know, it's not related
19 to his conduct in the case, and I don't know if it's
20 proper for --

21 THE COURT: Let me ask you, how does -- Mr. Rogers,
22 how does it affect your status at SCDC? Does it
23 preclude you from doing certain things or being
24 housed --

25 A Yes, ma'am.

1 THE COURT: Tell me how it affects it exactly.

2 You're fine. Keep your seat. You're fine, sir.

3 A Well, there are certain female officers that work on
4 the yard, and certain female supervisors.

5 THE COURT: Okay.

6 A And I actually also -- they supervisor of certain
7 jobs. And I'm excluded from some of those jobs because
8 of -- because of that.

9 THE COURT: Okay.

10 A And --

11 THE COURT: Okay.

12 A Being a sexual offender.

13 MS. WILSON: Your Honor, is the applicant bringing
14 this up as a PCR application allegation or after --

15 A Well, I don't think -- it was raised.

16 THE COURT: I'm going to tell you, as of right
17 now, I don't even know if I have jurisdiction for it,
18 because --

19 MS. WILSON: Not a PCR, your Honor.

20 THE COURT: -- quite frankly, it would be more
21 properly in front of the original judge, but he's
22 retired, of course, and I actually am his replacement.
23 So, Mr. Mogil, are --

24 MR. MOGIL: I guess I'm looking for some guidance.
25 I mean, I'm looking for --

1 THE COURT: I can tell you -- Alison, do some
2 research to see at what point -- I can tell you, Mr.
3 Mogil, I have done this frequently in cases after the
4 fact, you know. Even people who have been incarcerated
5 two, three, four years, the solicitor's office has
6 brought it back up to me.

7 And we've gone ahead and adjusted and, on the
8 record, have made a finding that there was no
9 allegations of any, you know, sexual nature that would
10 rise to the level of needing to be under the sexual
11 registry or to affect your status. So, I guess my
12 suggestion would be Solicitor Murdaugh does, part-time,
13 try these, you know, try some cases. You might want to
14 go -- that might be the best avenue to go through and
15 speak to him about seeing if he would agree. I mean,
16 it's easiest when you both come to court and you both
17 agree, and that makes it easy for my finding.

18 I haven't heard all the facts of this case. I'm
19 going to assume, based on what I've heard here today,
20 and again, I'm only assuming, because I haven't heard
21 everything, that there was no mistreatment of any of
22 the, you know, alleged kidnap victims. But that's
23 something that I think we need to revisit through the
24 solicitor's office is what I'm guessing. Because that's
25 just how I've done it before. I've never had it brought

1 up in a PCR application. But Alison's going to look
2 into it. She's going to get a hold of -- it's Randolph
3 Murdaugh that tried this case is what I see on here,
4 correct?

5 A Yes, ma'am.

6 THE COURT: So, we'll go talk to Solicitor Murdaugh.
7 He's still around, and still trying some cases, and
8 we'll see where we're going to go. Okay? We'll see.
9 We'll see. If it's possible. I don't know at this
10 point if it's something that can be raised. It's been a
11 long time, but we'll see. Okay?

12 MR. MOGIL: All right. Thank you.

13 THE COURT: All right. Absolutely.

14 MS. WILSON: Your Honor, since you're taking this
15 matter under advisement, --

16 THE COURT: Yes.

17 MS. WILSON: -- would you like for me to get you a
18 full copy of the transcript?

19 THE COURT: I'm okay as far as I'm going to go
20 through, like I said, I just want to read the trial
21 transcript, because there is nothing I can do about
22 Judge Gregory's prior ruling in the *Biggers* hearing.

23 MS. WILSON: Okay.

24 THE COURT: It is what it is, and the Court of
25 Appeals has already opined that.

1 MS. WILSON: Okay.

2 THE COURT: So, they found that he did everything
3 correctly.

4 MS. WILSON: If you just want it extra, just let me
5 know. And I think I put an electronic copy up there,
6 too, for --

7 THE COURT: I do.

8 MS. WILSON: Okay.

9 THE COURT: Well, actually, I might be able to go
10 back and look at it, then.

11 MS. WILSON: Okay.

12 THE COURT: So, let me do that, and I'm going to --
13 certainly, I can look at the closing argument. Okay.

14 MS. WILSON: Thank you, your Honor.

15 THE COURT: All right. Absolutely. Also, do you
16 all mind -- do you want to do this here?

17 A Yes, ma'am.

18 THE COURT: Okay. Absolutely.

19 MS. WILSON: That's fine.

20 THE COURT: If you all don't mind, please. Please.
21 We're going to need to do it right here with all the
22 jack hammers. That's all right.

END 4:25 P.M.

CERTIFICATE OF REPORTER

SEPTEMBER 5, 2012 TRANSCRIPT OF

POST CONVICTION RELIEF HEARING .

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, Wanda H. Rowe, CVR-M, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing September 5, 2012, Transcript of Post Conviction Relief Hearing is a true, accurate, and complete record of the proceedings had and evidence introduced and/or admitted at said proceeding in the case of State versus Tavarious Lee Rogers, Beaufort County, Court of General Sessions, Case Number 2006-CP-07-01094.

I further certify that I am of neither kin, counsel, or interest to any party hereto.

The original of this transcript, nor any copy of same, is not certified, nor authorized for use by me, to be true, accurate, and complete without my original signature and stamp affixed hereto.

Witness my signature April 23, 2012.


Wanda H. Rowe, CVR-M
Official Court Reporter

ORIGINAL

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Tavarus Lee Rogers, Sr. #244362)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2006-CP-07-1094

ORDER OF DISMISSAL

13 JAN - 4 AM 11:33
 BEAUFORT COUNTY S.C.
 CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 28, 2006. The Respondent made its return on August 10, 2006. An evidentiary hearing on the matter was held on September 5, 2012 at the Beaufort County Courthouse before the Honorable Carmen T. Mullen. The Applicant was present at the hearing and represented by Michael W. Mogil, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the evidentiary hearing, along with Cory Fleming, Esquire, and Timothy Kulp, Esquire. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, and the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the Applicant's appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Applicant was indicted at the February 1999 term of the Beaufort County Grand Jury for armed robbery (99-GS-07-0220), two counts of murder (99-GS-07-0221, -0222), five counts of kidnapping (99-GS-

07-0281, -0282, -0283, -0285, -0286), and burglary 1st degree (99-GS-07-0288). He was represented by Cory Fleming, Esquire and Timothy Kulp, Esquire.

At trial, the Applicant was found guilty. On October 16, 2001, the Applicant was sentenced by the Honorable Jackson V. Gregory to confinement for a period of twenty-five (25) years for armed robbery, thirty (30) years for three (3) counts of kidnapping¹, and life imprisonment for burglary 1st degree and both counts of murder. The kidnapping sentences are to be served consecutively to each other and concurrent to all other charges. The burglary 1st degree sentence is also to be served consecutively. All other charges are concurrent.

A timely notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Rogers, Op. No. 2004-UP-427 (filed July 7, 2004).

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
2. Due Process Violation

The Applicant amended his application on August 31, 2011 and supplemented the initial application with the following allegations:

1. Ineffective assistance of counsel at trial
 - a. Failure by counsel to permit Plaintiff to testify in his own defense.
 - b. Failure by counsel to examine key alibi witness, Shamira Holmes, and failure to call Ms. Holmes as a defense witness.
 - c. Failure to require a live line-up prior to trial.

¹ Judge Gregory did not impose a sentence for two of the kidnapping charges that were related to the deceased victims.

At the hearing, Applicant proceeded solely on the allegations of ineffective assistance of counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

At the beginning of the Applicant's evidentiary hearing, the Applicant's counsel requested a continuance in order to subpoena an alibi witness who had recently been located. The State opposed the continuance and argued that the State was ready to proceed. The Court denied the Applicant's motion for continuance as the case had been continued twice before and proceeded with the evidentiary hearing.

At the evidentiary hearing, the Applicant testified that he met with trial counsel, Cory Fleming and Timothy Kulp, frequently prior to trial. He testified that he reviewed discovery and discussed possible defenses with trial counsel prior to trial. The Applicant testified that he knowingly and intelligently rejected a plea offer of thirty (30) years to be served concurrently and that it was his decision to proceed to trial. The Applicant testified that the Solicitor, Randolph Murdaugh's closing statement violated his rights. He testified that Solicitor Murdaugh used the words "you" and "your" approximately thirty-five (35) times during the State's closing argument. The Applicant testified that all of the references to "you" or "your" were prejudicial and that trial counsel should have objected. The Applicant testified further that the "Golden Rule" was violated and the prosecutor incited the passions of the jury and appealed to the morality of the jury. He also testified that an example given by Solicitor Murdaugh was too similar to the facts of his case.

The Applicant testified that trial counsel argued extensively during his Neil v. Biggers² hearing. He testified that trial counsel argued the wrong statement and should have argued prior inconsistent statement because the victim switched her testimony during the in-court identification. He testified that trial counsel should have objected to the photo line-up as a suggestive out of court procedure. The Applicant also testified that he recalls trial counsel cross-examining the victim about her inability to identify the perpetrator's clothing and about her

² 409 S.C. 188, 93 S.Ct. 355 (1972).

viewing the Applicant's picture in the newspaper prior to her identification. He testified that he also recalled trial counsel's cross-examination of the victim about the statement she gave to the police and her inability to identify anyone as the perpetrator. The Applicant also recalled that trial counsel further pointed out the inconsistencies in the victim's testimony at trial.

The Applicant testified further that he mentioned his alibi to trial counsel prior to trial. He testified that his child's mother Shamira Holmes was his alibi witness and that he was at home with her during the time the crime took place. He testified that he does not recall trial counsel requesting the names of potential witnesses. The Applicant testified that trial counsel went to speak with Holmes about a handwritten note, but did not discuss the Applicant's alibi with Holmes. The Applicant testified that he would have called Holmes to testify at the PCR hearing, but Holmes no longer wishes to testify on his behalf or get involved. The Applicant testified further that he is not sure if his case were retried if he would take the stand to testify about his alibi.

The Applicant testified that trial counsel should have objected to the malice jury charge. He also testified that trial counsel should have requested an in-court line up. He testified that trial counsel told him that an in-court line up would have been a bad idea. The Applicant testified that he was given a plea offer of thirty (30) years, but that he did not take the plea because it was his understanding that the case could easily be won. He testified that trial counsel told him that his case could be won and that he would be going home soon. Lastly, the Applicant testified that he did not want to receive thirty (30) years for something he did not do and that he understood he was facing death if he proceeded to trial.

Trial counsel, Cory Fleming, Esquire, testified at the evidentiary hearing that his wife, Eve Fleming, was originally appointed to represent the Applicant and that he was appointed to

represent the Applicant when the Applicant was noticed for the death penalty. Counsel testified that he then asked Timothy Kulp, Esquire to assist with the Applicant's defense. Counsel testified that Fleming handled the guilt phase and Kulp handled the penalty phase of the Applicant's trial.

Trial counsel testified that he objected to the in-court identification by the victims and filed a lengthy motion and brief prior to trial requesting that the Court reconsider its ruling. Counsel testified that he felt an in-court line-up was not necessary because the damage had already been done. Counsel testified that a live line-up would have further validated the in-court identifications by the victims. Counsel testified further that he believed he addressed the inconsistencies of the victim's testimony at trial on cross-examination. He testified that an objection based on the in-court identification would not have had any effect as it has already been ruled upon by the trial judge.

Counsel, Corey Fleming testified further that all of the lawyers working on the Applicant's case interviewed potential witnesses. Oftentimes, the investigator and mitigation coordinator working on the case were present when witnesses were interviewed. Fleming testified that he interviewed Shamira Holmes for mitigation purposes and she never indicated that she was the Applicant's alibi witness. Fleming testified that Holmes provided no alibi and only said that she had braided the Applicant's hair that day. Fleming testified that had Holmes told him that she was the Applicant's alibi witness he would have investigated the matter. Fleming also testified that the Applicant never referred to Holmes as an alibi witness. However, Fleming testified that the Applicant gave him the name of another potential alibi witness that lived on St. Helena. He testified that when he went to visit the witness, the witness provided no alibi for the Applicant and made some indication that he was willing to provide perjured

testimony on the Applicant's behalf at trial. Fleming testified that he could not put up perjured testimony and that he felt the testimony of the alibi witness was not credible based on his interview of the witness.

Fleming testified that he did not see the prosecutor's comments in the State's closing to be objectionable. He testified that had they been objectionable he would have objected. Counsel testified that when the prosecutor used the term "you" throughout his closing, he was not referring to the jury specifically, but was using the term as if to say "one might". Counsel testified that he felt that some of Solicitor Murdaugh's statements may have been close to the line, but none of the solicitor's statements were harmful and agreed it is possible that the statements could be misinterpreted in the transcript. Lastly, counsel testified that the malice charge given by the judge to the jury was not objectionable and was the standard malice charge at that time. Fleming discussed 2009 change in the law pursuant to the S.C. Ruling in State v. Belcher³.

Trial counsel, Timothy Kulp, Esquire, also testified at the evidentiary hearing. Kulp testified that he was brought in by Fleming because the case was one in which the Applicant was facing the death penalty. Kulp testified that he filed a brief in support of the Applicant's argument in the Neil v. Biggers hearing. He testified that after the Court ruled in the State's favor he filed a forty or fifty page motion for reconsideration. Counsel testified that the motion addressed the science of witness identification, the inconsistency in testimony, and the victim's previous exposure to the Applicant. Counsel testified that his motion for reconsideration was ultimately denied. Counsel testified that the Judge Gregory suggested a live line-up, but that they were concerned that the witnesses had already been tainted by previous exposure and it would

³ 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009).

have been easier to identify the Applicant and nail down the previous identification and determined after a lengthy discussion and consideration not to so.

Lastly, counsel testified that a plea offer was extended to the Applicant two to three weeks prior to trial. Counsel testified that he thought that the Applicant would max out after twenty-three (23) years. He testified that ultimately the Applicant did not even consider the plea and rejected the plea offer.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel extensively conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in their representation.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have objected to the comments made by the prosecutor during the State's closing statement. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506, 515-516, 680 S.E.2d 909, 914 (2009) (citing Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." Id. (citing State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)(overruled on other grounds)).

This Court finds that the Solicitor Murdaugh's comments during the State's closing were not objectionable and was not a "golden rule" argument. This Court finds that the trial transcript does not reflect evidence of the Solicitor telling the jury to put themselves in the shoes of the victims. This Court finds further that the testimony was not objectionable and its purpose was not to appeal to the personal biases of the jury. This Court finds that trial counsel was not ineffective

for failing to object to the solicitor's closing statement when the comments were not objectionable and were not an impermissible "golden rule" argument and any significant objection would only highlight some perceived significance.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have objected to the prior inconsistent statements of the victims identifying the Applicant and that counsel should have requested a live show-up. This Court finds that trial counsel argued vigorously against the in-court identification by the victims during the Applicant's Neil v. Biggers hearing. This Court finds that trial counsel also filed a lengthy motion to reconsider on the Applicant's behalf after the in-court identification was allowed. Trial counsel gave credible testimony that it was not in the Applicant's best interest to have a live show-up identification because it would further validate an already questionable identification by the victims. This Court finds that despite the admission of the in-court identification, the record reflects that trial counsel was able to successfully address the inconsistencies in the victim's identification of the Applicant on cross-examination. This Court finds that trial counsel was not ineffective for not objecting to the prior inconsistent statements of the victim identifying the Applicant. This Court finds further that trial counsel was not ineffective for not requesting a live show-up and in fact was in the Applicant's best interest.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have investigated Shamira Holmes more thoroughly as an alibi witness. "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation on what the witnesses' testimony would have been cannot, by itself,

satisfy the applicant's burden of showing prejudice." Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

This Court finds that trial counsel was not ineffective for failing to call Shamira Holmes as an alibi witness at trial. This Court finds further that the Applicant did not support his claim of ineffectiveness for failing to call an alibi witness at the evidentiary hearing because Holmes did not testify at the evidentiary hearing. This Court finds that the Applicant's mere speculation as to what Holmes' testimony would have been is insufficient to support his claim, especially in light of the Applicant's testimony that Holmes was not present at the evidentiary hearing because she no longer wanted to testify on the Applicant's behalf. This Court finds that trial counsel gave credible testimony that the Applicant never indicated that Holmes an alibi witness. This Court also finds that trial counsel gave credible testimony that the alibi witness provided by the Applicant (other than Holmes) was found not credible and unable to account for the Applicant's whereabouts during the time the crimes were committed.

This Court finds that the Applicant has failed to carry his burden of proving that trial counsel should have objected to the malice charge given by the judge to the jury. This Court finds that the malice charge given by the trial judge was the standard malice charge at that time and was appropriate for the Applicant's case. This Court further finds that the Courts ruling in State v. Belcher in no way affected the appropriateness of the malice charge given in the Applicant's case because no evidence was provided that would "reduce, mitigate, excuse or justify the homicide." State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009). This Court finds trial counsel was not ineffective for failing to object to the malice charge given to the jury.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice;
and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 31 day of December, 20 12



The Honorable Carmen T. Mullen
Presiding Judge
14th Judicial Circuit

Beaufort, South Carolina.

WITNESSES

Toper

werill

ARREST WARRANT #:

E133413

Arrested on January 10, 1999

ACTION OF GRAND JURY

True Bill

Foreman:

Sarah Daniels
Grand Jury

VERDICT

Guilty

Foreman:

Luz Bright
Petit Jury

Date: 10-13-01

DOCKET #: 99GS07-0220

THE STATE OF SOUTH CAROLINA
County of Beaufort

COURT OF GENERAL SESSIONS

Term: February, 1999

THE STATE

vs.

Tavarus Rogers

INDICTMENT FOR

0139

ARMED ROBBERY

(16-11-330)

STATE OF SOUTH CAROLINA)
County of Beaufort)

INDICTMENT #99GS07-0220

At a Court of General Sessions, convened on February 03, 1999,
the Grand Jurors of Beaufort County present upon their oath:

COUNT: ARMED ROBBERY
(16-11-330)

That Tavarus Rogers did in Beaufort County on or about January 02, 1999,
while armed with a deadly weapon, to wit: a shotgun, feloniously take from the
person or presence of the victim, Paul Reischl by means of force or
intimidation goods or monies of said victim, such goods or monies being
described as follows: monies and narcotics.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR

Paul G. Mendenhall

WITNESSES

Roper

Averill

ARREST WARRANT #:

E133414

Arrested on January 10, 1999

ACTION OF GRAND JURY

True Bill

Foreman:

Sarah Daniels
Grand Jury

VERDICT

Guilty

Foreman:

Susan Singleton
Petit Jury

Date:

10-13-01

DOCKET #: 99GS07-0221

THE STATE OF SOUTH CAROLINA
County of Beaufort

COURT OF GENERAL SESSIONS

Term: February, 1999

THE STATE

vs.

Tavarus Rogers

INDICTMENT FOR

0116

MURDER

16-3-20

STATE OF SOUTH CAROLINA)
)
County of Beaufort)

INDICTMENT #99GS07-0221

At a Court of General Sessions, convened on February 08, 1999,
the Grand Jurors of Beaufort County present upon their oath:

COUNT:

MURDER
16-3-20

That Tavarus Rogers did in Beaufort County on or about January 02, 1999,
feloniously, wilfully and with malice aforethought, kill one Paul Reischl by
means of shooting him and that the said Paul Reischl did die in Beaufort County
as a proximate result thereof on or about the second day of January , 1999.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR

Paul G. Mendenhall

WITNESSES

Roper
Averill

ARREST WARRANT #:

E133412

Arrested on January 10, 1999

ACTION OF GRAND JURY

True Bill

Foreman:

Sarah Daniels
Grand Jury

VERDICT

Guilty

Foreman:

Susan Singleton
Petit Jury

Date:

10-13-01

DOCKET #: 99GS07-0222

THE STATE OF SOUTH CAROLINA
County of Beaufort

COURT OF GENERAL SESSIONS

Term: February, 1999

THE STATE

vs.

Tavarus Rogers

INDICTMENT FOR

0116

MURDER

16-3-20

STATE OF SOUTH CAROLINA)
)
County of Beaufort) **INDICTMENT #99GS07-0222**

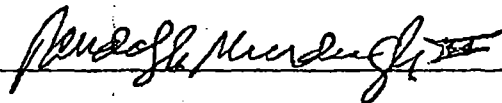
At a Court of General Sessions, convened on February 03, 1999,
the Grand Jurors of Beaufort County present upon their oath:

COUNT: MURDER
16-3-20

That Tavarus Rogers did in Beaufort County on or about January 02, 1999,
feloniously, wilfully and with malice aforethought, kill one James Mitchell
Riley by means of shooting him and that the said James Mitchell Riley did die
in Beaufort County as a proximate result thereof on or about the second day of
January , 1999.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR



WITNESSES

Roper

Averill

Jocelyn Wendel

ARREST WARRANT #:

F901546

Arrested on January 21, 1999

ACTION OF GRAND JURY

True Bill

Foreman:

Grand Jury

VERDICT

Guilty

Foreman:

Petit Jury

Date: 10-13-01

DOCKET #: 99GS07-0281

THE STATE OF SOUTH CAROLINA
County of Beaufort

COURT OF GENERAL SESSIONS

Term: February, 1999

THE STATE

vs.

Tavarus Rogers

INDICTMENT FOR

0095

KIDNAPPING

(16-3-910)

STATE OF SOUTH CAROLINA)
County of Beaufort)

INDICTMENT #99GS07-0281

At a Court of General Sessions, convened on February 08, 1999,
the Grand Jurors of Beaufort County present upon their oath:

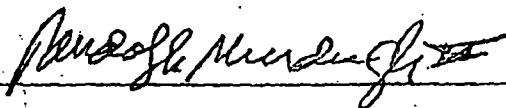
COUNT:

KIDNAPPING
(16-3-910)

That Tavarus Rogers did in Beaufort County on or about January 02, 1999,
did wilfully and unlawfully seize, confine, inveigle, decoy, kidnap, abduct and
carry away one Jocelyn Wendel , without authority of law.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR



WITNESSES

Roper

Averill

Kristal Wire

ARREST WARRANT #:

F901545

Arrested on January 21, 1999

ACTION OF GRAND JURY

True Bill

Foreman:

Grand Jury

VERDICT

Guilty

Foreman:

Petit Jury

Date: 10-13-01

DOCKET #: 99GS07-0282

THE STATE OF SOUTH CAROLINA
County of Beaufort

COURT OF GENERAL SESSIONS

Term: February, 1999

THE STATE

vs.

Tavarus Rogers

INDICTMENT FOR

0095

KIDNAPPING

(16-3-910)

STATE OF SOUTH CAROLINA)
)
County of Beaufort)

INDICTMENT #99GS07-0282

At a Court of General Sessions, convened on February 03, 1999,
the Grand Jurors of Beaufort County present upon their oath:

COUNT: KIDNAPPING
(16-3-910)

That Tavarus Rogers did in Beaufort County on or about January 02, 1999,
did wilfully and unlawfully seize, confine, inveigle, decoy, kidnap, abduct and
carry away one Kristal Wire , without authority of law.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR



WITNESSES

Roper

Averill

Toby Reischl

ARREST WARRANT #:

F901544

Arrested on January 21, 1999

ACTION OF GRAND JURY

TRUE BILL

Foreman:

Grand Jury

VERDICT

Guilty

Foreman:

Petit Jury

Date:

10-13-01

DOCKET #: 99GS07-0283

THE STATE OF SOUTH CAROLINA
County of Beaufort

COURT OF GENERAL SESSIONS

Term: February, 1999

THE STATE

vs.

Tavarus Rogers

INDICTMENT FOR

0095

KIDNAPPING

(16-3-910)

STATE OF SOUTH CAROLINA)

)

INDICTMENT #99GS07-0283

County of Beaufort)

At a Court of General Sessions, convened on February 03, 1999,
the Grand Jurors of Beaufort County present upon their oath:

COUNT:

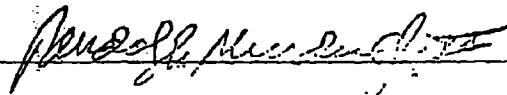
KIDNAPPING

(16-3-910)

That Tavarus Rogers did in Beaufort County on or about January 02, 1999,
did wilfully and unlawfully seize, confine, inveigle, decoy, kidnap, abduct and
carry away one Toby Reischl, without authority of law.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR



WITNESSES

Roper

Averill

ARREST WARRANT #:

E133702

Arrested on January 21, 1999

ACTION OF GRAND JURY

True Bill

Foreman:

Grand Jury

VERDICT

Guilty

Foreman:

Petit Jury

Date:

10-13-01

DOCKET #: 99GS07-0288

THE STATE OF SOUTH CAROLINA
County of Beaufort

COURT OF GENERAL SESSIONS

Term: February, 1999

THE STATE

vs.

Tavarus Rogers

INDICTMENT FOR

0079

BURGLARY IN THE FIRST DEGREE

(DWELLING) 16-11-311(A)(1)(A)

STATE OF SOUTH CAROLINA)
)
County of Beaufort)

INDICTMENT #99GS07-0288

At a Court of General Sessions, convened on February 08, 1999,
the Grand Jurors of Beaufort County present upon their oath:

COUNT: BURGLARY IN THE FIRST DEGREE
(DWELLING) 16-11-311(A)(1)(A)

That Tavarus Rogers did in Beaufort County on or about January 02, 1999,
willfully and unlawfully enter the dwelling of Paul Reischl without consent and
with the intent to commit a crime therein and the defendant or another
participant in the crime was armed with a deadly weapon.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR

Penelope Mendenhall

STATE OF SOUTH CAROLINA

COUNTY OF

STATE

VS.

AKA:

Race: B/K Sex: M Age: _____

DOB: _____ SS#: _____

Address: _____

DL# _____

SID#: _____

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:99 -GS- 07 - 220A/W#: E133413Date of Offense: 1-2-99S.C. Code §: 16-11-330CDR Code #: 0 1 1 3 1 9☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADSTO: Armed Robberyin violation of § 16-11-330 of the S.C. Code of Laws, bearing CDR Code # 01 11 31 9☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for _____ days/months jail time, since 1-6-99.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§14-1-206 (Assessments 100%) \$ _____

§14-1-211(A)(1) (Surcharge) \$ 100.00

§14-1-211(A)(2) (Surcharge) \$ _____

§56-5-2995 (DUI Assessment) \$ _____

3% to County (if paid in installments) \$ _____

TOTAL \$ 100.00

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

PRESIDING JUDGE John H. Gregory

Judge Code: _____

Sentence Date: 10-16-01Court Reporter: Debra Harrison

White - Clerk

Green - Commission

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

VS.

AKA:

Race: B/KSex: M

Age: _____

DOB: 1-10-1979

SS#: _____

Address: _____

DL# _____

SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

99 -GS- 07 - 221A/W#: E133414Date of Offense: 1-2-99S.C. Code §: 16-3-20CDR Code #: 011116☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Murderin violation of § 16-3-20 of the S.C. Code of Laws, bearing CDR Code # 011116☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of life imprisonment days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for _____ days/months jail time. from Jan 6, 1999☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____all indictments

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____ \$

§14-1-206 (Assessments 100%)..... \$

§14-1-211(A)(1) (Surcharge)..... \$ 100.00

§14-1-211(A)(2) (Surcharge)..... \$

§56-5-2995 (DUI Assessment)..... \$

3% to County (if paid in installments)... \$

TOTAL..... \$ 100.00

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

PRESIDING JUDGE Robert GregoryJudge Code: 1111Sentence Date: 10-16-01

Court Reporter: _____

White - Clerk

Green - Commission

STATE OF SOUTH CAROLINA

COUNTY OF Benfort
STATE VS.Tavarus Rogers

AKA:

Race: Blk Sex: M Age: _____

DOB: _____ SS#: _____

Address:

S.T. HELENA, SC 29920

DL# _____

SID#: _____

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:99 -GS- 7 - 222A/W#: E-133412Date of Offense: 1/10/99S.C. Code §: 16-3-20CDR Code #: 11116☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADSTO: Murderin violation of § 16-3-20 of the S.C. Code of Laws, bearing CDR Code # 11116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of Life Imprisonment days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for _____ days/months jail time per 1-6-99☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§14-1-206 (Assessments 100%)... \$ _____

§14-1-211(A)(1) (Surcharge)..... \$ 100.00

§14-1-211(A)(2) (Surcharge)..... \$ _____

§56-5-2995 (DUI Assessment)..... \$ _____

3% to County (if paid in installments)..... \$ _____

TOTAL..... \$ 100.00

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

PRESIDING JUDGE Robert H. GregoryJudge Code: 1111Sentence Date: 10-16-01Court Reporter: Debra Harrison

White - Clerk

Green - Corrections

Candy - Probation

2478

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.Tavarus Rogers

AKA:

Race: B/K Sex: M Age: _____

DOB: _____ SS#: _____

Address:

571 Helena, SC 29920

DL# _____

SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

99-GS-7-281A/W#: F901546Date of Offense: 11/21/99S.C. Code §: 16-3-910CDR Code #: 101915☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS TO: Kidnappingin violation of § 16-30-910 of the S.C. Code of Laws, bearing CDR Code # 101915☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for _____ days/months jail time. from Jan 6, 1999.☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 99-GS-07-283 and 282

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS

Recipient: _____

*Fine: \$ _____

\$14-1-206 (Assessments 100%) \$ _____

\$14-1-211(A)(1) (Surcharge) \$ 100.00

\$14-1-211(A)(2) (Surcharge) \$ _____

\$56-5-2995 (DUI Assessment) \$ _____

3% to County (if paid in installments) \$ _____

TOTAL \$ 100.00

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

PRESIDING JUDGE Jacob H. GregoryJudge Code: 1111Sentence Date: 10-16-01Court Reporter: Debra Harrison

White - Clerk

Green - Corrections

Crimin - Probation

D.L. - District

10/10/01

1107-91-90

10/16/01

STATE OF SOUTH CAROLINA

COUNTY OF
STATEBeaufort

VS.

AKA:

Race: B/K Sex: M Age: DOB: IS#:

Address:

5 T. Helena, SC 29903

DL#

SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

99 -GS- 07-282A/W#: F901545Date of Offense: 1-2-99S.C. Code §: 16-3-910CDR Code #: 010915☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADSTO: Kidnappingin violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 010915☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for days/months jail time. since Jan 6, 1999☒ CONCURRENT or ☒ CONSECUTIVE to sentence on: 99-GS-07-281 and 283all other murder indictments

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ set by SCDPPPS Recipient: *Fine: \$ §14-1-206 (Assessments 100%) \$ §14-1-211(A)(1) (Surcharge) \$ 100.00§14-1-211(A)(2) (Surcharge) \$ §56-5-2995 (DUI Assessment) \$ 3% to County (if paid in installments) \$ TOTAL \$ 100.00PTUP days/hours Public Service EmploymentObtain GED Attend Voc Rehab. or Job Corps May serve W/E beginning Substance Abuse Counseling Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning \$ paid to Public Defender Fund.Other: PRESIDING JUDGE Richard GregoryJudge Code: 1111Sentence Date: 10-16-01Court Reporter: Debra

White - Clerk

Green - Corrections

Candy - Clerk

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

VS.

AKA:

Race: Blk Sex: M Age: _____

DOB: _____ SS#: _____

Address

DL#

SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

99 -GS- 07 - 283A/W#: F901544Date of Offense: 1-2-99S.C. Code §: 16-3-910CDR Code #: 0/0/9.5☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS TO: Kidnappingin violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 0/0/9.5☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for _____ days/months jail time. from Jan 6, 1999.☒ CONCURRENT or ☒ CONSECUTIVE to sentence on: 99-GS-07-0281 and 99-GS-07-0282to 2 murder indictments
+ Armed Robbery

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:\$ _____

\$14-1-206 (Assessments 100%)\$ _____

\$14-1-211(A)(1) (Surcharge)\$ 100.00

\$14-1-211(A)(2) (Surcharge)\$ _____

\$56-5-2995 (DUI Assessment)\$ _____

3% to County (if paid in installments)\$ _____

TOTAL\$ 100.00

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

PRESIDING JUDGE Jacob H. HargisJudge Code: 1/1/1Sentence Date: 10-16-01

Clerk of Court/Deputy Clerk

Court Reporter: Debra

White - Clerk

Green - Corrections

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
STATE VS.
Tavarus Rogers
AKA:
Race: B/K Sex: M Age:
DOB: SS#: 29920
Address: ST. HELENA SC
DL# SID#

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
99 -GS- 07-288
A/W#: E133702
Date of Offense: 1-2-99
S.C. Code §: 16-11-311
CDR Code #: 0101719
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Burglary - 1st
in violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0101719
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of life days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ imprisonment; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☒ The Defendant is to be given credit for _____ days/months jail time. from Jan 6, 1999.
☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
☐ set by SCDPPPS _____

Recipient: _____
*Fine:\$
§14-1-206 (Assessments 100%).....\$
§14-1-211(A)(1) (Surcharge)\$ 100.00
§14-1-211(A)(2) (Surcharge)\$
§56-5-2995 (DUI Assessment).....\$
3% to County (if paid in installments) ...\$
TOTAL\$ 100.00

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund.
Other: _____

[Signature]
Clerk of Court/Deputy Clerk
Court Reporter: [Signature]

PRESIDING JUDGE [Signature]
Judge Code: _____
Sentence Date: 10-16-01

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Jackson V. Gregory, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAVARUS ROGERS,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE	4
ARGUMENTS	
1.	
The judge erred by allowing the in-court identifications from witnesses Wire and Wendel since neither eyewitness was able to identify appellant from a photo array after the shooting. It was undisputed both witnesses later saw appellant in court, as a defendant, in an orange jumpsuit, prior to identifying him. The in-court identifications in this case were both conducive to irreparable mistaken identification, and should not have been allowed. (Issue one).....	5
2.	
The trial judge erred by refusing to suppress a note allegedly written by appellant while he was illegally incarcerated. The judge correctly suppressed appellant's statement given to the police on the grounds that he was illegally incarcerated under a "coroner's warrant" when he gave that statement. The prison note was also the fruit of the poisonous tree, and should also have been suppressed. Further, the probative value of the jail note was substantially outweighed by its unduly prejudicial effect. (Issues two and three).....	15
CONCLUSION.....	22

TABLE OF AUTHORITIES

CASES

<u>Brown v. Illinois</u> , 422 U.S. 590, 95 S.Ct. 2254 (1975)	18
<u>Dunaway v. New York</u> , 442 U.S. 200, 99 S.Ct. 2248 (1979)	18
<u>Manson v. Braithwaite</u> , 432 U.S. 98, 97 S.Ct. 2243 (1977)	12
<u>Neil v. Biggers</u> , 409 U.S. 188, 93 S.Ct. 375 (1972)	5, 13
<u>State v. Alexander</u> , 303 S.C. 377, 401 S.E.2d 146 (1991)	21
<u>State v. Langley</u> , 334 S.C. 643, 515 S.E.2d 98 (1999)	21
<u>State v. LaRue</u> , 271 S.C. 256, 246 S.E.2d 890 (1978)	13
<u>State v. Mansfield</u> , 343 S.C. 66, 538 S.E.2d 257 (2000)	12
<u>State v. Patterson</u> , 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)	13
<u>State v. Saltz</u> , 346 S.C. 114, 551 S.E.2d 240 (2001)	21
<u>Taylor v. Alabama</u> , 457 U.S. 687, 102 S.Ct. 2664 (1982)	15, 18, 19
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407 (1963)	19

RULES

Rule 403, SCRE	20

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourth Amendment	15, 16

STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge erred by allowing witnesses Wire and Wendel to make in-court identifications of appellant, where neither witness could identify appellant from a photo array, or otherwise, shortly after the shooting; where both witnesses subsequently saw appellant in court as a defendant in an orange jumpsuit, since their identifications were impermissibly tainted, and unreliable?

2.

Whether the trial judge erred by allowing the admission of an inculpatory jail note appellant allegedly wrote while illegally incarcerated on a "coroner's warrant," since the judge ruled in his earlier order that "all alleged statements" made by appellant while illegally incarcerated were suppressed as the "fruit of the poisonous tree," and the jail note was also the fruit of the poisonous tree?

3.

Whether the trial judge erred by allowing the admission of the jail note since its probative value was substantially outweighed by its unduly prejudicial effect given the circumstances under which the note was seized, and the ambiguities of its context?

STATEMENT OF THE CASE

Appellant was indicted at the February, 1999 term of the Beaufort County grand jury for two counts of murder, armed robbery, assault with intent to kill, burglary in the first degree, possession of a firearm during the commission of a violent crime and four counts of kidnapping. R. 274. The state sought the death penalty.

Appellant's case was called to trial on October 16, 2001, before the Honorable Jackson V. Gregory and a jury. Cory H. Fleming and Timothy C. Kulp represented appellant. The solicitor was Randolph Murdaugh, III.

The jury found appellant guilty on each count. On October 16, 2001, the jury found the existence of aggravating circumstances, but could not reach a verdict on the sentence.¹ R. 271, ll. 17-20.

Judge Gregory sentenced appellant to life imprisonment for each count of murder, life imprisonment for burglary in the first degree, thirty years consecutive on each count of kidnapping and twenty-five years for armed robbery. R. 272, l. 17 – 273, l. 15.

This appeal follows.

¹ The kidnapping sentences appear impermissible given the murder convictions under South Carolina Code Section 16-3-20.

ARGUMENTS

1.

The judge erred by allowing the in-court identifications from witnesses Wire and Wendel since neither eyewitness was able to identify appellant from a photo array after the shooting. It was undisputed both witnesses later saw appellant in court, as a defendant, in an orange jumpsuit, prior to identifying him. The in-court identifications in this case were both conducive to irreparable mistaken identification, and should not have been allowed. (Issue one).

Relevant Facts

On August 17, 2001, a motion to suppress any in-court identifications hearing was held before Judge Gregory. R. 373. The statement of eyewitness Kristal Wire dated January 3, 1999, was marked prior to the hearing. R. 377, ll. 1-7. The statements of both Wire and the other eyewitness, Wendel, are in the record. R. 346; 352.

Defense counsel Fleming requested a hearing on the admissibility of these in-court identifications under the principles of Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972). R. 381, l. 4 – 383, l. 17. The solicitor then called Kristal Wire as a witness.

As will be seen infra, the shooting in this case took place on January 1, 1999 following a party. R. 1-3. Appellant and West McKinnon were at this party in the victim's home. The state's theory of the case was that appellant and McKinnon left the party, returned some time later with masks over their faces, and committed a robbery. Two men were shot and killed during the robbery. R. 5-31.

Wire testified that she believed she arrived at the Coffin Point Road mobile home party after ten o'clock that evening. R. 384, ll. 11-12. Wire met Paul Reisch at the party. Jocelyn Wendel and James "Mitch" Riley were also present. R. 385, ll. 4-24.

Wire testified that she was introduced to a man named "V." R. 386, ll. 2-8. Wire remembered that some of the men were playing cards. She said, "I don't remember their names being introduced that night." R. 386, ll. 9-15.

Wire recalled at some point — "they left. And Jocelyn, Paul and James and I were still there." R. 386, l. 17-24. "And then about half an hour, forty-five minutes later is when we heard the knock on the door ... they came around, holding long guns. Shotguns, I believe. With, just like a white, some type of cloth around their face not covering the whole face." R. 386, l. 17 – 387, l. 9.

Wire said the two men with guns ordered them to get down on the floor. Wire said one man held them at gunpoint while the other man "went in the back with Paul to his room to get the rest of the stuff. And as the one was holding us by gunpoint, he yelled, "Don't do it, "V;" come on, "Dog." R. 387, ll. 13-20.

During the robbery, two of the men were shot and killed. R. 388, l. 3 – 390, l. 7. Wire then identified "V" during the in camera hearing as "the one in the orange jumpsuit." R. 390, ll. 1-11. Wire admitted on direct examination by the solicitor that she was not able to pick appellant or the other alleged robber out of any of three photographic lineups she was shown after the robbery.² R. 394 ll. 1-22.

² As will be seen infra, appellant's picture was only contained in State's Exhibit #3. Neither Wire nor Wendel were able to implicate appellant from the photo array. R. 299.

On cross-examination, Wire acknowledged she had to put on her glasses earlier in the hearing when she was asked to identify appellant in court. Wire admitted that she had a vision problem, but she claimed her sight problem did not exist at the time of the shooting. R. 396, l. 7 – 397, l. 6.

Wire also acknowledged that there were twenty-four people in the courtroom at the time of her identification of appellant, and that only three of them were African-Americans. One of those black men was a sheriff's deputy. R. 397, ll. 7-22. Appellant was the only black man wearing an orange jumpsuit and sitting next to defense counsel. R. 397, l. 16 – 398, l. 22.

Wire gave statements to the police within eight hours of the shooting. R. 398, ll. 5-11. Wire acknowledged she identified the intruders that night as "two black males" and that she was not able to describe their facial features to the police. R. 401, ll. 14-19. Wire also admitted she could not describe their height, their weight, any scarring, hair styles, facial hair, skin tones or clothing. R. 402, l. 8 – 403, l. 10. The following occurred on cross-examination of Wire:

Q. You did not give a description of the intruders to the police eight hours after it occurred, did you?

A. No.

Q. You wrote in your statement that two black males with white cloth of some kind around their face, did you not?

A. Yes, I did.

Q. You also told Sam Roser that you knew that the intruders were black because the eyes and nose area was open but the rest of their head was covered with white clothing or masks, correct?

A. Yes, it is.

Q. You also said in your statement that once you got on the floor you never looked up?

A. If that's what it says in there, then yes --

Q. I'm asking you if that's what you told the police. Eight hours after the shooting.

A. I -- I think so. Like I say, I don't remember. I mean I blocked a lot out. At that time.

Q. So when the shooting was fresh in your mind you could not describe the intruders, could you?

A. Now when I was asked then, no.

R. 404, l. 7 -- 405, l. 2.

Wire also again admitted she could not identify the robbers from the photo array she was shown after the shooting. R. 405, l. 3 -- 407, l. 8.

Wire said had "a couple" drinks that night, and admitted that people at the party were smoking marijuana. Wire alleged she did not see anybody using cocaine even though cocaine was abundant in the mobile home. Wire denied she snorted cocaine that night, but acknowledged she had told defense counsel that one man at the party, Toby, admitted using cocaine that evening. R. 407, l. 12 -- 408, l. 21.

As to her belated identification, Wire admitted she received a telephone call from Detective Averill after appellant was arrested. She also had seen newspaper accounts of the arrest, and she discussed the shooting with Jocelyn Wendel and Toby. R. 410, ll. 9-20. The following also occurred on cross-examination of Wire:

Q. And you've seen Tavarus Rogers in open court, haven't you?

A. Yes.

Q. And, in fact, he was represented by a lawyer? And that he approached the bench in front of the judge much like Judge Gregory, correct?

A. Yes.

Q. And Judge Gregory or whomever it was, had a conversation with Tavarus Rogers' lawyer?

A. Yes.

Q. Correct? And you paid attention to what was going on in court, obviously?

A. Uh, huh.

R. 410, l. 24 – 411, l. 11.

Wire admitted her identification of appellant in court that day was her first of him in any setting. R. 412, ll. 8-10. On re-direct examination, the solicitor had Wire acknowledge that he had shown her the three line-ups prior to court that day. Wire told the solicitor of the third photo lineup, "if any of them that I thought would be [appellant], number six [would be]." R. 417, l. 15 – 418, l. 11.

Wire acknowledged on cross-examination that she made even this tentative identification "after you saw him [appellant] in open court at a previous hearing." R. 418, ll. 16-18.

Defense counsel Fleming argued the state had the burden of proving the identification was not unduly suggestive. R. 425, ll. 11-20. The defense attorneys, Fleming and Kulp, then urged the judge to not allow any in-court identifications based upon their

motion, memorandum and testimony. R. 426, l. 6 – 429, l. 14. That motion and memorandum are in the record. R. 359.

Detective Scott Wendel, the father of Jocelyn Wendel, would then testify that he had talked to his daughter outside the courtroom during Wire's identification hearing. Wendel said he had not described appellant to Jocelyn. As will be seen infra, Wendel's testimony would later be taken on August 29, 2001. R. 440, l. 1 – 442, l. 12. The judge then said that the witnesses had been sequestered for purposes of the identification hearing, and that "if it should happen again, somebody's going to jail. I can tell you that." R. 442, l. 18 – 443, l. 2.

Detective Sam Roser testified Kristal Wire could not identify anyone from three photo arrays he showed her. R. 452, ll. 2-4. Roser also said that Wire told him after the shooting that she could not describe the intruders. R. 459, ll. 5-12. Roser acknowledged Wire's statement said "that . . . she never looked up." R. 460, ll. 5-7.

Detective Matthew Averill also testified that Wire could not pick anyone out of the photographic line-ups. Averill said that appellant was number six in line-up three, but that he was not included in the first two photographic arrays. R. 462, l. 17 – 463, l. 7; R. 464, l. 11 – 466, l. 14.

Defense counsel again argued that Wire's in-court identification should be suppressed because she could not identify appellant or give any physical description of the robbers. R. 468, l. 4 – 469, l. 15. Counsel also argued when shown line-up three earlier in court, that Wire still equivocated, even though there had been "an intervening suggestive event." R. 469, l. 2 – 472, l. 5.

Counsel said that Wire had seen appellant in open court at a bond hearing or some other proceeding and now “miraculously says that she can identify him. And looks over in the courtroom today, looks at Mr. Rogers, the only black male not in a courtroom uniform, and says that’s him.” R. 472, ll. 6-11.

The judge ruled that he would allow Wire to identify appellant in court. R. 476, l. 22 – 478, l. 3.

Wendel

Jocelyn Wendel testified at the August 29, 2001 hearing. She admitted that she could not identify appellant when shown photo arrays after the shooting. R. 530, l. 20 – 531, l. 10. Wendell then identified appellant as the man “in an orange jumpsuit” seated at counsel table. R. 531, ll. 12-21.

Wendel now claimed that appellant’s mask fell down when the robbers entered. R. 536, l. 19 – 538, l. 3. Wendel acknowledged she had attended all of the hearings in this case, and that she knew appellant would be wearing an orange jumpsuit as usual. R. 542, l. 10 – 545, l. 20.

Detective Averill testified Wendel could not identify appellant from State’s Exhibit #3, the photo array. R. 553, ll. 16-19. Averill said, however, that Wendel did identify West McKennon out of one of the lineups. R. 553, ll. 5-19.

Defense counsel argued that Wendel’s in-court identification of appellant should also be suppressed based on the suggestibility of her identification and the unreliability of that identification. R. 563, l. 23 – 566, l. 15. Counsel argued the state had the burden of proof and that Wendel’s identification was unreliable given the very suggestive

circumstances under which she later saw appellant in an orange jumpsuit. R. 566, l. 21 – 571, l. 16.

The judge also denied the defense motion to exclude Wendel's in-court identification of appellant. R. 576, l. 25 – 577, l. 21.

Wendel then identified appellant in court during the trial. R. 22, l. 25 – 23, l. 16. Wendel admitted on cross-examination she could not identify appellant from a photo array shown to her forty-eight hours after the shooting. R. 24, ll. 17-23.

Kristal Wire also testified that she remembered seeing appellant at the party earlier that evening. R. 46, l. 19 – 47, l. 19. Wire said at some point that night "the four black males" left. R. 47, ll. 20-22. Wire recalled that later two men came running in with shotguns. Wire now claimed "his, Tavarus' [mask] fell off of the bottom of his face, that I can remember." R. 48, l. 12 – 49, l. 19.

On cross-examination, Wire said she did not know how much cocaine or marijuana was consumed that evening at the party. R. 51, ll. 14-19.

Detective Matthew Averill later testified that there were no fingerprints or evidence linking appellant to the crime. R. 193, ll. 4-8; R. 194, ll. 18-22. Averill also said that in addition to Wire and Wendel, Toby Reisch also could not identify the robbers from a photo array. R. 195, l. 11 – 196, l. 24.

Discussion

"Reliability is linchpin in determining the admissibility of identification testimony." State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257, 263 (2000) *citing* Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977).

In Neil v. Biggers, *supra*, the Court listed several factors for the court to consider when determining whether an identification is reliable and admissible: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of confrontation; and (5) the amount of time between the crime and confrontation.

The net effect of a suggestive identification is to be weighed against these factors. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

Applying these factors to this case, it is apparent that neither Wire nor Wendel could identify appellant from a photo array shortly after the shooting.

Both Wire and Wendel admittedly later viewed appellant in an orange jumpsuit in court, and while sitting at counsel table, where it was obvious he was the defendant. Further, both witnesses were ordered to the floor at the time of the robbery, and a fair reading of this record shows there was not an opportunity for them to obtain a look at the face of the man they later identified as appellant.

While Wendel would claim at the August 29th hearing that appellant's mask fell down, this assertion contradicts her inability to pick appellant out of a photo array. The identification in this case came after appellant was arrested, his case was discussed in the newspaper, and he was viewed at a bond hearing or other proceeding in an orange jumpsuit. The state did not carry its burden of proof to justify an in-court identification of appellant at trial.

In State v. LaRue, 271 S.C. 256, 246 S.E.2d 890 (1978), this Court held the burden is upon the state to show by clear and convincing evidence that an in-court identification

was not tainted as suggestive police action. Here, the solicitor's showed Wire the photographic line-up immediately before the August 17, 1999, hearing — where she had already viewed appellant in the orange jumpsuit — this was highly suggestive in an already tainted atmosphere.

This is an unusual case, and it is apparent that the identification of appellant was based upon Wire and Wendel viewing him in court in an orange jumpsuit as a defendant after his arrest. The judge abused his discretion by allowing Wire and Wendel to make in-court identifications under these circumstances.

2.

The trial judge erred by refusing to suppress a note allegedly written by appellant while he was illegally incarcerated. The judge correctly suppressed appellant's statement given to the police on the grounds that he was illegally incarcerated under a "coroner's warrant" when he gave that statement. The prison note was also the fruit of the poisonous tree, and should also have been suppressed. (Issues two and three).

Appellant filed a motion to suppress his inculpatory statement given while illegally in prison pursuant to Taylor v. Alabama, 457 U.S. 687, 688, 102 S.Ct. 2664, 2666 (1982). R. 305. This motion alleged that appellant was illegally detained pursuant to a coroner's warrant. That warrant was dated January 4, 1999, and was Exhibit A to the defendant's motion. R. 313.

The defense argued that a coroner "may jail a person who refuses to obey a summons or refuses to give evidence in an inquest. The coroner does not have the independent authority to issue a warrant for the arrest of a witness unless that person is first summoned to an inquest and either disregards a summons or refuses to testify. The triggering event is the issue of a summons to appear at the coroner's inquest." Appellant's motion at p. 2, R. 300.

A hearing on this motion was convened on June 8, 2000. Defense counsel Fleming argued that appellant was never arrested on a warrant for probable cause but "only arrested on the coroner's warrant, and as a result of that, it is a Fourth Amendment violation." R. 596, ll. 15-19. The defense argued under Taylor v. Alabama, appellant's inculpatory statement had to be suppressed. R. 596, l. 8 – 597, l. 8.

The solicitor *conceded* "that the warrant which was served upon Tavarus Rogers was without legal authority. The statute that it was issued under had been repealed approximately three years before." R. 597, ll. 10-13.

Beaufort County Detective Jeffrey Purdy testified that appellant was arrested at a house on St. Helena and later taken from the Beaufort County Detention Center to Charleston. R. 602, l. 15 – 604, l. 21. Captain Kevin McHale testified he interrogated in Charleston. McHale testified at some point appellant told him: "I didn't mean to do it, I didn't mean to shoot him." R. 648, l. 6 – 650, l. 9.

On June 22, 2000, Judge Gregory issued an order stating the state had conceded the coroner's warrant issued June 4, 1999, for appellant's arrest was invalid and without legal authority. R. 298. The order stated that the state had failed to prove by a preponderance of the evidence that "any of the alleged statements made by appellant Tavarus Rogers to the police are admissible. The state has failed to prove that the taint of the Fourth Amendment violation was purged and therefore all statements are suppressed as the 'fruit of the poisonous tree.'" R. 298.

The issue was left open until the time of trial of whether a jail note seized in prison would be admissible against appellant. At trial, the solicitor argued, in camera, to the judge that while appellant was incarcerated, he was seen allegedly slipping something under the door. The solicitor said a note was seized, and that the fingerprints on it matched appellant. R. 142, l. 10 – 143, l. 2.

Defense counsel Fleming argued the first matter concerning the note was whether it was relevant and then whether its probative value was exceeded by its unduly prejudicial

effect. The defense argued there was no indication who the letter was written to or who it was written by. R. 144, l. 20 – 145, l. 19.

The defense also argued that, although appellant may have handled the note, it was unclear who the note was directed to and “there’s no name on that note.” Defense counsel Kulp described the note as simply “jail e-mail.” The defense argued the note was so prejudicial that the fact appellant possessed the note was not sufficient to justify its admissibility. R. 149, l. 5 – 150, l. 6.

The defense also argued appellant was illegally detained on the illegal coroner’s warrant “and that is the ruling of this court.” The defense said the state had subsequently obtained arrest warrants “based on information [the inculpatory statement] they illegally obtained by illegally detaining Tavarus Rogers.” Appellant was never released from jail from the time of his illegal arrest on the coroner’s warrant to the time of the subsequent serving of the “legitimate” arrest warrants upon him following his inculpatory statement to the police. R. 150, l. 4 - 151, l. 7.

The defense argued appellant’s jail note was “the fruit of the poisonous tree.” R. 151, ll. 8-22. Counsel added, “but for his illegal detention, the note would not have been able to have been wrote.” R. 152, ll. 2-24.

Beaufort County Detention Center Official Richard Rivers testified that on January 22, 1999, he observed appellant slipping something under a door in the detention center. The defense renewed its objection to this note coming before the jury at trial. R. 222, l. 21 – 225, l. 6. The seized note was then published to the jury by the solicitor:

MR. MURDAUGH: And if Your Honor please, may I publish State’s Exhibit 13 to the jury?

THE COURT: Yes, sir.

MR. MURDAUGH: Ladies and gentlemen, you'all will have this with you in the jury room. It is a piece of evidence, but I'm going to read it to you.

"What did you tell Mrs. Wilson (the public Defender's investigation)? She said our stories are fucked up. I told her that after we left P shit you stop them" – up in brackets again – "(Cee and Bro) off at C shit and drop off in Saxonville at luck shit about 1 a.m. or later. Then I called you that morning and you took me to Lady's Island with CAP about 7 or 8 a.m. You gotta fucking holla at me less you done told these crackas you was there at the time of the shit, what? We gotta have our stories "top of the line", unquote. (Flush this shit – rip it up fist*) (*Write me back*)."

R. 248, ll. 6-21.

The judge ruled earlier the note was admissible for "whatever it's worth." R. 250, l.

21 – 251, l. 6.

Discussion

The state conceded that the coroner's warrant caused appellant to be illegally detained or incarcerated. The trial court correctly found appellant's inculpatory statement while incarcerated therefore had to be suppressed. Appellant respectfully submits the trial judge erred by ruling the jail note did not have to be suppressed as the "fruit of the poisonous tree."

In Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664 (1982), the Supreme Court held that a confession obtained through the custodial interrogation of the defendant after he had been illegally arrested should have been suppressed. The Court noted that in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979) and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975), the police illegally arrested suspects without probable cause. The