

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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Edward W. Miller, Circuit Court Judge NOV - 6 2013

Case No. 09-CP-23-0741 **S.C. Supreme Court**

FREDDIE EUGENE OWENS Petitioner,

v.

STATE OF SOUTH CAROLINA Respondent.

APPENDIX
VOLUME V OF VIII

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1 have to rule on it at this time. We'll just see
2 how it plays out. I don't know what your
3 examination of the attorneys will reveal. Let's
4 just see how that goes.

5 **MR. WEYBLE:** Okay. All right.

6 **THE COURT:** All right.

7 **MR. WEYBLE:** Thank you. Also, before we get
8 underway with the testimony, uh, one of the, I
9 guess two of the allegations in the application
10 relate to, uh, the proposition that Mr. Owens was
11 shackled during the 2006 resentencing. At this
12 time, we would like to -- we intend to withdraw
13 both of those and just sort of leave them behind.
14 They will no longer be part of the application.

15 **THE COURT:** Okay. The same is true with
16 your motion for summary judgment.

17 **MR. WEYBLE:** Yes, that would be true.

18 **THE COURT:** All right. Any objection to
19 that, Mr. Mabry?

20 **MR. MABRY:** No, sir. No, sir.

21 **THE COURT:** Okay. All right.

22 **MR. WEYBLE:** All right. And then the final
23 thing, and this is just sort of a housekeeping
24 matter, I think, but I'd like to bring it up just
25 in case. That's the issue of post-hearing

1 briefing. I think it's a matter of routine in
2 capital postconviction relief cases here in South
3 Carolina, but I wanted to go ahead and make sure
4 there wouldn't be any objection to setting a
5 post-hearing briefing schedule at some point when
6 we are in a better position to do so and that the
7 court would not be opposed to that.

8 **THE COURT:** Mr. Mabry?

9 **MR. MABRY:** Judge, I think we can do that by
10 proposed order if you want to do it that way. I
11 don't think we need to make a schedule.

12 **THE COURT:** We'll cross that bridge when we
13 come to it. I'm going to want to hear everything
14 you want to say. Don't worry about that.

15 **MR. WEYBLE:** To sort of clarify, I guess, my
16 own position, the reason I want to do that is
17 because what we intend to put on here in the form
18 of live testimony is not going to be the
19 comprehensive story. There is a big record in
20 this case. We're not going to be rehashing all
21 that here in the courtroom. We want to fill
22 those details in for you in brief form after the
23 hearing.

24 **THE COURT:** Okay. All right. You ready?

25 **MR. WEYBLE:** I think we have one more thing

1 at this time.

2 MS. PAAVOLA: Yes, Your Honor, we would like
3 to request -- we think it would be helpful if Mr.
4 Owens was able to write during the PCR hearing.
5 He is having some difficulty with the current
6 restraints. With the advice of SCDC or whoever
7 else is in charge of security, we would like to
8 request that he have a little more freedom of
9 movement.

10 THE COURT: Yes, sir.

11 CORRECTIONAL OFFICER: Your Honor, we have an
12 electronic stun belt. With your permission, if
13 you want the restraints off of him, this is your
14 courtroom, sir. If we do, I would ask permission
15 with you to put the stun belt on him. It's your
16 courtroom.

17 THE COURT: I will tell you yes, sir, I don't
18 want to interfere with security procedures. If you
19 feel that that is going to maintain security, I'll
20 be happy to --

21 CORRECTIONAL OFFICER: I would much prefer to
22 leave the restraints on him, but it is your
23 courtroom, sir, and we bought alternative means
24 just in case.

25 MS. PAAVOLA: I'm not a security personnel,

1 but I would just like to say that I think if you
2 want to leave the restraints but not this, that
3 would be sufficient. He needs slightly more
4 freedom of a movement for his hands to be able to
5 write.

6 THE COURT: Are you right-handed, Freddie?

7 MR. OWENS: (Nods head.)

8 THE COURT: See if we can get his right hand
9 free.

10 (WHEREUPON, there is a pause.)

11 MR. MABRY: I did have a motion in limine, as
12 the court already knew, in response to their
13 discussion of Ms. Glass' affidavit, I did have a
14 motion in limine to prohibit any testimony going
15 outside the allegations of the complaint. You
16 already heard that. Basically our position on
17 that is just that we had no time to prepare for
18 this. I was served with Ms. Glass' affidavit, at
19 least what appears to be what they say is her
20 files, Friday week ago I think. Then in the last
21 week coming to trial is when there was a series of
22 e-mails back and forth.

23 That allegation five is not -- the way it is
24 worded is not what they meant, it meant something
25 else. We haven't had the proper time to respond

1 to the allegation. If you look at the whole
2 complaint, there is another allegation where they
3 say, you know, for example, discussing factual
4 things, it is clear what they alleged. They should
5 have put in all Ms. Hammock's testimony from the
6 first two trials and Mr. Evans' testimony from the
7 second trial. Our motion is to prohibit any
8 testimony outside the allegation.

9 **THE COURT:** Okay. I appreciate that. This
10 is, uh, -- I think that may be too narrow a
11 reading of the allegation contained in number five
12 to, uh, limit, uh, -- I haven't ruled on the
13 admissibility of the affidavit yet. I do think
14 that the first sentence is sort of an encompassing
15 allegation. I don't think your objection would
16 apply to that. We'll certainly keep an eye on it
17 and make sure that we don't come into something
18 that is totally unrelated to what's alleged in the
19 application.

20 **MR. MABRY:** I understand your ruling, Your
21 Honor. I just want to make clear.

22 **THE COURT:** What's your objection?

23 **MR. MABRY:** Sir?

24 **THE COURT:** Go ahead. I'm sorry.

25 **MR. MABRY:** My objection is if you read the

1 sentence that way, there is no way for me to
2 understand what you're talking about. How can I
3 investigate a claim or respond to a claim where I
4 don't know what they are talking about? They
5 refer to what they're talking about but if you
6 read it, that sentence all-encompassing, there is
7 no way to tell what I'm talking about to prepare.
8 That's my objection. I understand what the
9 Court's ruling is.

10 **THE COURT:** All right. Do you want this page
11 back?

12 **MR. MABRY:** Yes, sir.

13 **THE COURT:** Shirley, you can hand that back
14 to him? Thank you.

15 Okay.

16 **MR. WEYBLE:** Your Honor, we're ready to call
17 our first witness.

18 **THE COURT:** All right.

19 **THE CLERK:** Place your left hand on the Bible
20 please. Raise your right.

21 **JOEY SAVITZ III**

22 is first duly sworn and then testifies as follow:

23 **THE CLERK:** You may be seated.

24 **MR. WEYBLE:** Your Honor, would it be okay if
25 I move this?

1 **THE COURT:** Sure.

2 **MR. WEYBLE:** I don't know. Is it connected
3 to anything here?

4 **THE CLERK:** No.

5 State your full name for the record please
6 and spell your last name.

7 **THE WITNESS:** Okay. My name is Joseph L.
8 Savitz, S-A-V-I-T-Z, the third.

9 **DIRECT EXAMINATION**

10 **BY MR. WEYBLE:**

11 **Q** Good morning, Mr. Savitz.

12 **A** Good morning.

13 **Q** You have already provided your name. Can you
14 tell us what you do?

15 **A** I am the Senior Appellate Defender at the
16 Office of Appellate Defense.

17 **Q** All right. Can you describe for us a little
18 bit what you do.

19 **A** Oh, okay. What we do is we handle most of
20 the criminal appeals in South Carolina, almost all of
21 the indigent appeals. I personally do half of the
22 capital and non-capital murder cases and a bunch of
23 other odds and ends.

24 **Q** Okay. So now you said you do half of the
25 capital cases.

1 **A** Right.

2 **Q** When you receive a capital direct appeal ---

3 **A** Right.

4 **Q** --- case to work on, describe for us sort of
5 what you normally do. You have a protocol that you go
6 through?

7 **A** Yeah. What we do is, of course, we get the
8 transcript of the entire trial. Read it. Look at the
9 exhibits, look at the motions, look at everything we
10 can, decide on the issues we're going to present to
11 the Supreme Court, do the research and see if they are
12 valid and write a brief. Every death penalty case
13 gets argued in the Supreme Court. We go and argue it
14 and they come out with an opinion, either winning or
15 losing. If we lose, we usually go to U.S. Supreme
16 Court, or try to go anyway. That's pretty much the
17 end of our involvement.

18 **Q** All right. Did you personally handle the
19 direct appeal of Freddie Owens 2006 resentencing?

20 **A** I represented Mr. Owens three different
21 times. Two successfully, the latter, last one
22 unsuccessfully.

23 **Q** That would be '99 successfully, '03
24 successfully, '06 unsuccessfully?

25 **A** Yeah. I guess that's right.

1 Q Those dates would be the dates of the trial,
2 not the date of the appeal, uh, State Supreme Court
3 opinion.

4 A That's right.

5 Q All right. Now prior to your testimony this
6 morning, have you had the chance to review the brief
7 that you filed in connection with the appeal of the
8 2006 judgement?

9 A I will be honest with you, I have not looked
10 at the brief but I have looked at the record where the
11 allegations arose.

12 Q Okay.

13 A But I have not looked at my brief. I kind of
14 remember what the issues were.

15 Q Okay. And have you also had a chance to look
16 at Mr. Owens' PCR application. The one -- I should
17 say the one allegation pertaining to --

18 A I know what the allegation against me is.

19 Q Okay. So you are aware that the claim, I
20 believe it's 10(d) and 11(d) in the application is
21 that the direct appeal should have included a
22 challenge to the trial court's refusal to allow the
23 defense counsel to question prospective jurors about
24 whether their work in the field of law enforcement ---

25 A Right.

1 Q --- would bias them in favor of law
2 enforcement officers who might testify. Is that
3 right?

4 A That's right.

5 Q Now, you said you had a chance to review
6 trial record?

7 A That's right.

8 Q The area that we are referring to here is
9 pages 289 to 295 of the trial record. Having reviewed
10 those documents, are you aware of any sort of
11 strategic decision why you would have chosen not to
12 raise the issue that is described in the PCR
13 application?

14 A No. If it's -- there -- Let me back up and
15 kind of put the cart before the horse. If it is a
16 winning issue, to me, there could never be any
17 strategic reason for abandoning a winning issue in
18 favor of some ones that you going to lose on. That
19 type of strategy is not a reasonable strategy. I did
20 not have a strategic reason for -- short answer is I
21 didn't have a strategic reason for not raising that
22 issue. Even if I had, uh, in raising a bunch of
23 losing issues instead of the winning issue would not
24 be a valid strategy. It would, in and of itself, be
25 ineffective, I believe. I had no strategic reason.

1 Q All right, Mr. Savitz. Thanks. That's all
2 that I have.

3 **CROSS-EXAMINATION**

4 **BY MR. MABRY:**

5 Q Mr. Savitz, ---

6 A Mr. Mabry.

7 Q --- good morning. I didn't think I'd ever
8 call you Mister. Were you aware of this issue when
9 the case came up on appeal?

10 A Yeah, I was -- well, I was aware of the law.
11 Yeah. The law about it.

12 Q Let me ask you this, did you review the
13 record, the four volumes ---

14 A Yeah.

15 Q --- from the third sentencing proceeding?

16 A Yes, I did.

17 Q You were aware that this issue had been
18 raised below wanting to question these jurors about
19 bias and whether they would believe a police officer
20 over someone else?

21 A That's right.

22 Q You made a decision not to raise that issue
23 in your final brief?

24 A That's correct.

25 Q Could you tell the Court why you made that

1 decision?

2 **A** I felt like the law was against us on that
3 issue. I'm still -- I mean, I'm still of that
4 opinion.

5 **Q** Would that be State v. Adams, 279 S.C. 238,
6 1983?

7 **A** Yeah, it could be. I have not looked at it.
8 I know there is law out there that says you don't get
9 to question jurors about whether they believe X over
10 X.

11 **Q** Do you remember, subsequent to Adams, there
12 were other decisions? I believe State versus Davis?

13 **A** I don't believe I've ever raised that issue
14 before in a case. It was because I was aware there
15 were cases out there. I never have done a whole lot
16 of research on them to be honest with you. My
17 understanding was the law was not favorable to us.

18 **Q** State versus Southerland, 316 S.C. 377?

19 **A** That might have been mine.

20 **Q** Sir?

21 **A** Was that my case?

22 **Q** I have the sites here.

23 **A** S-O-U-T-H-E-R-L-A-N-D? That was mine.

24 **Q** It is your understanding there were several
25 holdings in the South Carolina Supreme Court that

1 stated you could not question jurors about who, what
2 kind witness they would believe or not believe?

3 **A** Yeah, that's correct.

4 **Q** Including a police officer?

5 **A** Police officer, anybody else, baker, tailor.

6 **Q** Do you know if any of these jurors that might
7 have been questioned along these lines that ended up ..
8 on this jury in this case?

9 **A** I have no idea.

10 **MR. MABRY:** No further questions.

11 **THE COURT:** Any redirect?

12 **MR. WEYBLE:** Just a couple of questions, Your
13 Honor.

14 **REDIRECT EXAMINATION**

15 **BY MR. WEYBLE:**

16 **Q** Mr. Savitz, I think you mentioned you had not
17 done a whole lot of research on this?

18 **A** That's right.

19 **Q** If research were to be done and if that
20 research were to provide a basis for perhaps
21 challenging the state court rule imposing fairly
22 relatively narrow constraints on voir dire in a
23 capital case, would there have been any reason not to
24 raise the federal challenge to the existing state law?

25 **A** No. There's no law, so there's no real reason

1 not to raise it. As to the law, I've been wrong
2 before. There could be a case out there that says I'm
3 completely absolutely wrong. And, uh, if there is,
4 there is.

5 Q Okay.

6 A But my understanding of the law is it was not
7 a very good issue for us to raise. I thought the
8 other issues we had were possibly winners. But we
9 were three trials down the road.

10 MR. WEYBLE: Thank you. No further
11 questions, Your Honor.

12 **RECROSS-EXAMINATION**

13 **BY MR. MABRY:**

14 Q Mr. Savitz, are you aware of the decision, I
15 believe, in 2008 from the Court of Appeals regarding
16 whether it was sufficient if a trial judge asked a
17 jury if they could be fair and impartial?

18 A I mean that's pretty much the law in South
19 Carolina. You ask a juror if they could be fair. If
20 they say yeah, then there are pretty much a lot of
21 hurdles to get to the jury.

22 Q A standard review on appeal is an abuse of
23 discretion?

24 A Yeah. The judge gets to see the juror and
25 judge their demeanor and stuff.

1 **Q** Thank you.

2 **MR. WEYBLE:** Nothing further.

3 **THE COURT:** You can step down. Do you want
4 me to release him from subpoena or you want him to
5 hang around?

6 **MR. WEYBLE:** We can release him, Your Honor.

7 **THE COURT:** Okay. Okay.

8 **MR. WEYBLE:** Your Honor, we had planned to
9 call Bill Godfrey as our next witness although I
10 have not seen him at this point. We have him
11 under subpoena but I have not see him here.

12 **MR. MABRY:** He was at his office. .

13 **MR. WEYBLE:** May I step out and see if he is
14 outside?

15 **THE COURT:** Yeah. Will you call up and see
16 if he was in one of the other courtrooms?

17 **MR. MABRY:** Mr. Gibson is here if we want to
18 go out of order.

19 **THE COURT:** Well, we can do it, but I want to
20 find out where Godfrey is.

21 **MR. MABRY:** Yes, sir.

22 (WHEREUPON, there is a pause.)

23 **THE CLERK:** She said he left with a lot of
24 files in his car 15 minutes ago. That was the
25 time frame for him to be here.

1. **THE COURT:** You want to wait or you want to
2 go with Mr. Gibson.

3 **MR. WEYBLE:** We had planned to call Mr.
4 Godfrey first. If he's on his way here, could we
5 give it a few minutes to see if he comes? If not,
6 we'll call Mr. Gibson.

7 **THE COURT:** All right. We'll wait about five
8 minutes. We will take about a five-minute break.

9 **MR. MABRY:** Your Honor, I believe he is
10 bringing his case file for this case. It's
11 several boxes.

12 **THE COURT:** Okay. Yeah, he's got a bad back
13 too.

14 (WHEREUPON, a recess is taken at approximately
15 10:19 a.m. until 10:26 a.m.)

16 **THE COURT:** We just contacted Bill Godfrey.
17 He said that he had been on telephone standby and
18 nobody had called him. He will be here less than
19 15 minutes. Do you want to go forward?

20 **MR. WEYBLE:** Your Honor, I think, uh, we'll go
21 forward with Mr. Gibson rather than make everyone
22 wait longer.

23 **THE COURT:** Okay. All right.

24 **THE CLERK:** Mr. Gibson, if you would step up
25 here please, place your left hand on the Bible and

1 raise your right hand.

2 THE WITNESS: Yes, ma'am.

3 KENNETH GIBSON

4 is first duly sworn and then testifies as follow:

5 THE CLERK: Thank you. You may be seated.

6 THE WITNESS: Hey, Judge.

7 THE COURT: How are you?

8 THE WITNESS: I'm good. How about you?

9 THE CLERK: State your full name for the
10 record please.

11 THE WITNESS: Kenneth Clifton Gibson.

12 THE CLERK: Thank you.

13 DIRECT EXAMINATION

14 BY MR. WEYBLE:

15 Q Good morning, Mr. Gibson.

16 A Morning.

17 Q We've already got your name. How are you
18 employed?

19 A Uh, lawyer. On my own.

20 Q On your own?

21 A Yes. Sole practice.

22 Q How long have you been practicing law?

23 A Since '95.

24 Q According to the court record in this case,

1 you and Bill Godfrey were appointed by Judge Patterson
2 in an order dated February 2nd, 2006 to represent
3 Freddie Owens?

4 **A** I don't know about the date but we were
5 appointed by Judge Patterson.

6 **Q** Okay. How did you end up getting this
7 subordinate?

8 **A** I have no idea.

9 **Q** Okay.

10 **A** Judge Patterson called me and said, hey, I
11 have a capital case that I think you will be good for.
12 You will work with Bill Godfrey. How does that sound?
13 And I said sounds good.

14 **Q** You didn't go looking for a case?

15 **A** No.

16 **Q** Had you, at that time, ever done a capital
17 trial before?

18 **A** No.

19 **Q** Did you, in fact, also remain on the case
20 from the time of the appointment until the conclusion
21 of the trial?

22 **A** Yes.

23 **Q** I would like to show you what has already
24 been marked as Applicant's Exhibit 5, which I believe
25 is your timesheet. Does that look familiar to you?

1 **A** Yes.

2 **Q** Is, in fact, your timesheet?

3 **A** Yes.

4 **Q** Does it appear to be an accurate copy of the
5 timesheet you prepared in connection with the 2006
6 presentencing trial of Mr. Owens?

7 **A** Yes.

8 **MR. WEYBLE:** Your Honor, we would move to
9 admit that as Applicant's Exhibit, uh, 5. We will
10 be going out of order. We will go back to the
11 rest of them.

12 **MR. MABRY:** No objection.

13 **THE COURT:** Okay. Without objection.

14 **MR. WEYBLE:** Your Honor, if it's okay, I
15 would like to leave this with Mr. Gibson.

16 **THE COURT:** Okay. Sure. Yeah.

17 **THE WITNESS:** Thank you.

18 (WHEREUPON, Applicant's Exhibit Number 5 is
19 admitted into the record.)

20 **BY MR. WEYBLE:**

21 **Q** Okay. Now, you and Mr. Godfrey went into the
22 case. Did you two develop any sort of agreement or an
23 understanding about what the division of labor on the
24 case would be as you preceded into the trial?

25 **A** Yes. I would be handling primarily -- well,

1 back up. Even though it was a resentencing, the state
2 had indicated and I think they were entitled to
3 introduce evidence related to the crime. Mr. Godfrey
4 was going to handle primarily the litigation evidence.
5 I was going to primarily handle the evidence related
6 to crime and guilt issues.

7 Q Okay. And so did it remain that way for some
8 period of time, that division of labor?

9 A It did. We would cross over, sort of, both
10 ways. But yeah, that pretty much remained our
11 agreement or our division of labor throughout the
12 trial of the case.

13 Q Okay. Let's talk a little bit about the
14 trial. I know you've seen the application for
15 postconviction relief. I know you are aware that it
16 contains a number of allegations, that certain matters
17 should have been objected to in order to preserve them
18 for appellate review. I would talk a little bit about
19 that. First of all, at the time of Mr. Owens trial,
20 uh, were you familiar generally with South Carolina's
21 rules for preserving error for appellate review?

22 A Yes.

23 Q Just sort of describe for us your
24 understanding of what those rules are, if you would.

25 A If you don't object to it, it's not

1 preserved.

2 Q Okay. Simple enough. As for the trial as a
3 whole, your approach, was it your intention to try to
4 preserve as many errors as possible for review on
5 direct appeal?

6 A Yes. It was my intention to preserve as many
7 objections as possible whether actual error or not
8 throughout the trial.

9 Q I want to talk a bit about the jury
10 selection. Prior to this case, had you ever
11 participated in the selection of a capital jury?

12 A No.

13 Q Did you have any experience conducting
14 individual voir dire?

15 A Yes. I had second chaired some trials down
16 in Georgia where I started my career. Their process
17 for picking juries are a lot more extensive than here
18 in the state of South Carolina.

19 Q I see. Were any of those -- none of those
20 were capital cases?

21 A No.

22 Q So now, what, if anything, did you do to
23 specifically to prepare yourself for participating in
24 the selection of this capital jury?

25 A Oh, wow. To recollect, I would guess -- I'm

1 sort of speculating. I don't recall everything I did.
2 But primarily, it would have been what I would have
3 done for probably any trial which is basically try to
4 figure out what areas, uh, -- we looked at the jury
5 pool. We tried to figure out which jurors we did not
6 want at all based on their backgrounds. Tried to
7 identify areas that we thought would be hot button
8 issues that would make a juror more prejudiced or not.
9 Uh, I can't think of anything else. That primarily
10 would have been it in a general global sense.

11 Q Do you recall whether you acquired and looked
12 at any of the case law specifically governing voir
13 dire in a capital case?

14 A Yes, I did look at case law governing --

15 Q I know it's been a long time. I know your
16 answer is I don't remember. But do you recall what
17 cases you may have looked at?

18 A I don't recall what I looked at. But
19 basically what I looked at was also a, uh, capital
20 manual, like a handbook or something like that. I'm
21 not sure because I have not looked at things since
22 this trial. But there was a book out there that
23 basically goes through like all the cases in South
24 Carolina that have dealt with capital issues and stuff
25 like that. I went through that book to identify, you

1 know, whatever case law issues that were out there.

2 Q Okay. I want to talk, uh, ask you
3 specifically about one prospective juror in
4 particular. You know what, I'd like to give you -- I
5 would like to sort of station it up there.
6 Unfortunately, it's pretty big.

7 A Okay.

8 Q But this is a copy of the trial record. I'm
9 going to -- I apologize for it being so large.

10 A Not at all. I think that's my fault, not
11 yours.

12 Q I think we are going to be there.

13 A Okay.

14 Q So the section of the record that I'm going
15 to ask you about now is on page 483 lines 10 to 14.
16 At that point in the record, Judge Patterson
17 disqualified prospective juror number 1. Her name was
18 Sonya Abels. On the ground, that quote, there is a
19 case right on point that if a woman talks to her
20 priest after she is called as a juror about capital
21 punishment, she is disqualified under the law. Do you
22 want to take a second look at that?

23 A I think I recall what you are talking about.
24 Not specifically, but I recall from looking at this
25 section of the record what you were talking about.

1 Q Okay. Now, was it your impression at that
2 time that that was a correct statement of the law by
3 Judge Patterson?

4 A I don't recall what my impression was, but
5 yeah. I would imagine that that would have been, that
6 I would have trusted the judge on that.

7 Q Okay. If it turned out that the judge maybe
8 was not correct on that ---

9 A Uh-huh.

10 Q --- proposition of law, would there have been
11 any reason for you not to have raised an objection at
12 that point to preserve the issue?

13 A No, it would have been no reason. As far as
14 I know there was no strategic reason not to pursue
15 that issue.

16 Q All right. I'm going to -- first, I'm just
17 going to jump a little bit from issue to issue here
18 instead of dragging you ---

19 A Okay.

20 Q --- through a lot of things that aren't
21 really going to be directly relevant. I want to move
22 to the surveillance video.

23 A Okay.

24 Q During the State's case-in-chief, the jury
25 was shown a surveillance video basically of the

1 shooting at the convenience store.

2 **A** Yes.

3 **Q** This occurred, I think it began around page
4 1076.

5 **A** All right.

6 **Q** So do you recall generally what that video
7 showed?

8 **A** Yes.

9 **Q** Now, was it possible from looking at the
10 video to make out the identity of either of the
11 robbers who appeared on the video?

12 **A** No.

13 **Q** Okay. At the time that the video was going to
14 be played for the jury, did you -- and this is the
15 jury, of course, that had not, uh, been instructed on
16 the compass liability.

17 **A** Uh-huh.

18 **Q** Did you give any consideration to requesting
19 some form of an instruction, either at that time or
20 maybe at the time the rest of the instruction would be
21 given at the conclusion of the case, to indicate to
22 the jury that no prior jury had ever made a specific
23 finding as to who was who in that video?

24 **MR. MABRY:** Objection. That's not what they
25 allege in their complaint. They ask for

1 instruction, but they don't ask for instruction of
2 the jury for our case. This is a new matter.

3 MR. WEYBLE: Your Honor, I don't think it's
4 new at all. I think it's perfectly in line with
5 the --

6 THE COURT: Go ahead. Go ahead and ask the
7 question. He can cover it on cross.

8 THE WITNESS: I don't think I -- no, I did
9 not consider that.

10 BY MR. WEYBLE:

11 Q Okay. Now, based on what you know at that
12 time, would there have been, in your judgement, any
13 risk to Mr. Owens to have requested an instruction
14 like that?

15 A No. None whatsoever.

16 Q I want to sort of jump again to the testimony
17 of Officer Joe Wood who was with the Greenville County
18 Sheriff's office?

19 A Yes.

20 Q He testified about having interviewed Mr.
21 Owens on November 11th, 1997 about or in connection
22 with the robbery homicide. His testimony begins
23 around page 1080 of the record. The specific point
24 that I would like to ask you about is on page 1093.

25 A Okay.

1 **Q** Near the end of Officer Wood's direct
2 examination, the prosecutor asked him, quote, how did
3 he, being Mr. Owens, make you feel. Now, did you give
4 any consideration to raising an objection to that
5 question at that point?

6 **A** I do not recall.

7 **Q** All right. Officer Wood then goes on to
8 answer the question by saying, quote, he is one of two
9 people in probably 25 years of homicide that I have
10 interviewed that actually gave me cold chills. Now,
11 you recall that occurring at trial?

12 **A** Yes.

13 **Q** There was no objection. Was there a reason?

14 **A** No, there was no strategic reason or
15 otherwise for us not to object to that.

16 **Q** All right. Uh, I'm going to jump again to
17 the victim impact testimony?

18 **A** Okay.

19 **Q** Julietta Christy who was the victim advocate
20 with the Sheriff's office testified about having a
21 gone to notify the victim's children that their mother
22 had been killed. Do you recall generally?

23 **A** Yes. Generally, yes.

24 **Q** Now, this is page 1266 to 1274 of the record.
25 Now, near the end of her direct examination, Ms.

1 Christy testified that she had been a victim's
2 advocate for about 15 and a half years and that she
3 had been involved in thousands of cases. So the
4 prosecutor, on page 1274, line 8, then asked her,
5 quote, and how would you describe this event in your
6 career. Now, at that point, did you consider that
7 question to be going toward testimony that would be
8 admissible under Payne versus Tennessee?

9 **A** I don't recall. Uh, sort of the way you
10 worded the question, I think that if I had thought it
11 that I would have objected. But I don't recall.

12 **Q** Okay. If that question wasn't improper,
13 would there have been a reason not to object?

14 **A** No.

15 **Q** Ms. Christy then answered the question this
16 way -- this is 1274, lines 9 through 12. She said,
17 quote, this is the hardest, hardest case I ever had to
18 work on. I have never had to do death notification
19 before or since. This was the definitely the hardest
20 case I have. It affected me the most deeply and still
21 does. Basically the same question, in your judgment,
22 was that appropriate victim impact testimony under
23 Payne?

24 **A** I don't know.

25 **Q** Okay. The same for a follow-up question. If

1 it was not appropriate, would there have been a reason
2 not to object?

3 **A** No.

4 **Q** Okay. All right. I want to move now to the
5 list of disciplinary infractions.

6 **A** Okay.

7 **Q** This occurred or was dealt with on pages 1354
8 through 1386 of the trial record. It was fairly long,
9 uh, ---

10 **A** Okay.

11 **Q** --- sort of back and forth. So the
12 prosecution called a Major Nettles from the South
13 Carolina Department of Corrections to offer records
14 pertaining to a series of infractions that Mr. Owens
15 allegedly committed during his incarceration. Are you
16 familiar with it?

17 **A** Yes.

18 **Q** Okay. So the prosecution argued that they
19 were business records and should have been admissible
20 under Rule 8036. Do you oppose that? And after a
21 fairly lengthy discussion, Judge Patterson ended up
22 compromising by allowing a list of, I think it was 28
23 infractions?

24 **MR. MABRY:** I'm going to object to the form
25 of the question that Judge Patterson compromised.

1 I think he ruled properly. I object to the form.

2 MR. WEYBLE: Your Honor, the compromise was
3 not made in a pejorative way. I will offer
4 another term.

5 THE COURT: Okay.

6 BY MR. WEYBLE:

7 Q Judge Patterson ultimately determined that
8 list of 28, uh, essentially one-line descriptions of a
9 date and a very brief description of the occurrence
10 would be admitted.

11 A Yes.

12 Q You recall that?

13 A Yes.

14 Q Okay. On direct appeal, Mr. Owens argued
15 that admission of that evidence and that list
16 violated, among other things, the confrontation
17 clause. South Carolina Supreme Court said that that
18 was -- that ground was not preserved at trial. My
19 question to you is was there a reason not to include
20 the confrontation clause basis for the objection along
21 with the other bases that you did argue to the judge?

22 A No.

23 Q I want to talk now about the prosecution's
24 closing argument. The PCR application identifies
25 several items that were part of Mr. Ariail's closing

1 argument that we've alleged were improper and ought to
2 have been objected to in order to preserve their
3 availability for appellate review. So now I'm going
4 to take them basically two pieces. The first one, it
5 occurs at trial transcript page 1552, line 3 through 9
6 and 1555, lines 16 through 1556, line 1.

7 **A** You can just tell me.

8 **Q** Okay. I can summarize them.

9 **A** Okay.

10 **Q** I won't read them to you. I'll summarize
11 them. If you would like to read them, ---

12 **A** All right.

13 **Q** --- you are more than welcome to. The
14 argument was essentially the prosecution seeks death
15 penalty rarely. This case was one of the rare cases
16 in which the judgement was made that it was warranted
17 and that the prosecutor wanted the death penalty and
18 would not be satisfied with a life sentence?

19 **A** Uh-huh.

20 **Q** Now, did you believe that those arguments, at
21 the time that they were made, were within the
22 boundaries set by the due process clause?

23 **MR. MABRY:** Will you tell me again where you
24 are?

25 **MR. WEYBLE:** I am 1552, line 9 and 1555,

1 line 16 through 1556 line 1.

2 MR. MABRY: Let's take them one at a time.

3 MR. WEYBLE: They both go together.

4 MR. MABRY: Well, that's my first objection.
5 I think that they don't go together.

6 MR. WEYBLE: Well, we're the ones
7 formulating the plan.

8 MR. MABRY: Wait a minute. Wait just a
9 second. I'm going to object to the form of the
10 question because he's lumping both -- different
11 parts of an argument together saying that they are
12 the same thing. They're not. That is my first
13 objection to the form of the question.

14 THE COURT: Well, I'm going to allow him to
15 ask it. You can clear it up on cross.

16 MR. MABRY: Yes, sir.

17 BY MR. WEYBLE:

18 Q Mr. Gibson, are you with me?

19 A Yes.

20 Q I think where we left off was whether you
21 made any judgments about those forms of argument, uh,
22 with respect to the due process clause?

23 A Okay. I don't recall. I would imagine that,
24 if at the time I thought it was improper, that I would
25 have objected. There was no reason for me not to

1 object. There was no strategic reason that I didn't
2 object. If there's case law out there or any
3 precedent or anything that says it is improper now, it
4 should have been preserved.

5 Q Okay. That is fine. The second piece of the
6 prosecution's argument that I want to talk about --
7 and this only one excerpt. It occurs on page 1561,
8 lines 3 through 15. Again, I'm just going to
9 describe. I'm not going to read it to you. It's
10 there if you would like to take a look at it.

11 A Okay.

12 Q The argument was that life in prison would be
13 easy for Mr. Owens and would not constitute real
14 punishment. It would be the same -- I have the same
15 question for you. Did you view that to be a proper
16 argument under South Carolina law, also under relevant
17 federal law?

18 A I'd give you the same answer that I gave to
19 the other.

20 Q Okay.

21 A At the time, I guess I would have had -- if I
22 thought it was improper, I would have objected.
23 That's not to say I could not have been wrong about
24 that if it is improper and I should have objected and
25 should have preserved that.

1 Q I want to turn now to the participation in
2 the mitigation portion of the case?

3 A Okay.

4 Q You mentioned earlier that you had, sort of,
5 this division of labor with Mr. Godfrey under which
6 you were primarily responsible for the, -- dealing
7 with the prosecution's evidence.

8 A Uh-huh.

9 Q And he would have been primarily responsible
10 for the mitigation portion of the case; is that
11 right?

12 A Yes.

13 Q Okay. Uh, now, despite that agreement, at
14 some point, did you end up taking on some
15 responsibility for presenting part of a mitigation
16 case?

17 A Yeah, like I said, there was crossover both
18 ways, but yeah.

19 Q Okay. Now, if there was a reason, why did
20 that happen, if you know?

21 A Primarily, it happened because when we got
22 into it, we sort of realized there was a whole lot
23 more mitigation stuff than there was, -- search for a
24 better term, guilt stuff.

25 Q So it was coming out that, you know, Bill was

1 going to end up being responsible for basically 75 to
2 80 percent of the trial. So, uh, as we went on, it
3 just seemed, in order for me to pull my fair share,
4 that I should take on more witnesses.

5 Q Did you know anything about Mr. Owens or
6 anything about his background prior to the time you
7 were appointed February the --

8 A No, and I hadn't lived here, so I didn't even
9 know who Freddie was.

10 Q Okay. When did you meet him for the first
11 time? Do you recall?

12 A Wow, I can't tell you the date. We went down
13 -- Bill and I went down to Lieber and met him -- when
14 was that?

15 Q I think you might want to look at page 3, the
16 fifth entry, entry from the bottom, and see if that
17 refreshes your recollection?

18 A The fifth entry from the bottom, page 3.
19 Yep, that sounds right. 6/19/2006.

20 Q So that would have been your first meeting
21 with Mr. Owens?

22 A Yes.

23 Q All right. How long does it take to get
24 from, uh, -- were you in the Greenville area at that
25 time?

1 **A** Uh-huh.

2 **Q** How long does it take to get from here to
3 Lieber roughly?

4 **A** It took us roughly a little over three hours
5 to get there.

6 **Q** So more or less a full day trip ---

7 **A** Yeah.

8 **Q** --- to go and come back?

9 **A** Yes.

10 **Q** Now, given that, would you have left any of
11 those trips off of your timesheet when it came to get
12 paid for your work in the case?

13 **A** No.

14 **Q** Was anyone else present at that meeting on
15 June 19th?

16 **A** Bill was.

17 **Q** Okay. Anyone else?

18 **A** No. Not that I recall.

19 **Q** All right. Now, uh, according to your
20 timesheet again, it looks like the second meeting,
21 your second meeting with Mr. Owens occurred at Perry
22 on September 7th, 2006. Does that sound right?

23 **A** Sounds right.

24 **Q** Was anyone else present at that meeting?

25 **A** Bill.

1 Q Just Bill?

2 A Yeah, I'm not sure if anyone else was at that
3 meeting or not. I know Bill was there. I don't know
4 if we had one of the investigators with us or not. I
5 don't recall.

6 Q Okay. Now, my review of your timesheet does
7 not indicate any other meetings between you and Mr.
8 Owens, is that right, or might there have been
9 additional meetings?

10 A We met like at the courthouse and stuff like
11 that. We went down to the holding cell. Uh, but no.
12 I mean other than that, those were the two times that
13 basically I went, you know, for the purpose of seeing
14 him, if that answers -- if that makes sense.

15 Q Yes.

16 A Okay.

17 Q Now, at some point, was a team assembled to
18 help, a team beyond you and Mr. Godfrey prepared to
19 mitigate the case?

20 A Yes.

21 Q Do you recall when that team was assembled?

22 A No.

23 Q I want to show you what has been marked,
24 what we have marked as Exhibit 1 which is Mr.
25 Godfrey's timesheet.

1 **A** I can look at it, but I can tell you right
2 now I can't tell you when the team was assembled based
3 on his timesheet.

4 **Q** I think this might help refresh your
5 recollection.

6 **A** Okay.

7 **Q** I'll give you the line number in just a
8 second.

9 **A** Okay.

10 **Q** Look at page 3, lines 3 and 4 and lines 23
11 and 24.

12 **A** Okay. I can tell you what it says when he
13 said that he talked to people, but that doesn't
14 refresh my recollection.

15 **Q** Okay. That's fine. I'll go ahead and take
16 that exhibit back. Well, at some point, the team was
17 assembled?

18 **A** Yes.

19 **Q** And what involvement, if any, did you have in
20 choosing the members of the team?

21 **A** Bill told me who he knew because Bill had a
22 lot more experience than I had. He said they were
23 good people. I trusted Bill and that's who we picked.

24 **Q** Okay. Okay. Now, prior to the addition of
25 the other team members had you personally been doing

1 any active work to prepare for the mitigation
2 presentation in the case?

3 **A** Ask that again please.

4 **Q** Prior to the time this team was assembled --
5 and I expect we'll establish from Mr. Godfrey a little
6 detail about when it was assembled. Prior to that
7 time, were you personally out doing any mitigation
8 investigation or preparation for this case?

9 **A** No.

10 **Q** Okay. And so once the team was put together,
11 were they given responsibility for conducting the
12 investigation?

13 **A** Yes, that's my understanding. Yes.

14 **Q** You testified that you did end up with the
15 responsibility for presenting part of the mitigation
16 case at trial?

17 **A** Yes.

18 **Q** What part was that?

19 **A** Marjorie Hammock.

20 **Q** Was there any -- were there any other
21 witnesses that you called?

22 **A** Not that I recall off the top of my head.

23 **Q** What about Tora Brawley?

24 **A** Say it again.

25 **Q** Tora Brawley.

1 **A** Yeah, I think I did her as well.

2 **Q** How far in advance of the trial did you take
3 responsibility for actually handling the examination
4 of those witnesses?

5 **A** Let's see. We went to Columbia to meet with
6 the entire team and Donna Schwartz-Watts. And it was
7 probably a week or so before that that we had agreed
8 that I was going to do those two. Let's see. That
9 would have been -- we met on November 3rd, 2006. So I
10 think Bill and I talked about it probably a week and a
11 half or two weeks before that.

12 **Q** Okay.

13 **A** So some time late October, mid-to-late
14 October.

15 **Q** Between the time you talked about it ---

16 **A** Yes.

17 **Q** --- in the mid-to-late October ---

18 **A** Yes.

19 **Q** --- and this time of this November 3rd
20 meeting, what did you do to prepare for what would
21 ultimately be your role as the direct examiner of
22 either of those witnesses?

23 **A** Uh, I don't want to -- I don't want to leave
24 anybody with the wrong impression. Even though we
25 sort of divided the labor, uh, Bill had kept me

1 abreast of pretty much everything that had gone on. I
2 know we had gone down -- I understood that -- he kept
3 me abreast of the issues. We had talked to the
4 doctors and went out to see the doctor together down
5 in Charleston. So, I mean, if you're asking the
6 question of when I started preparing, I guess that's
7 really from Day 1. But if you are asking the question
8 when did I start actually, you know, focusing in on
9 providing testimony or handling testimony that
10 probably occurred a week and a half to two weeks
11 before that November 3rd date.

12 Q Okay. What was Ms. Hammock's testimony -- in
13 the grand scheme of the strategy that you all
14 developed ---

15 A Yes.

16 Q --- what was Ms. Hammock's testimony supposed
17 to provide for the defense?

18 A It was supposed to, uh, give the jury an
19 understanding of his family background of things, of
20 things that had gone on his life, basically a social
21 record of what had happened up to this trial or led up
22 to the events that caused this trial.

23 Q Okay. Now, and you may have already answered
24 this, but I want to ask again just to make sure that
25 you get a chance to say everything you could say about

1 it, prior to the time you agreed to handle these two
2 witnesses which occurred around mid-to-late October, I
3 guess?

4 **A** Yeah.

5 **Q** Had you been focusing on the subjects that
6 they were going to testify about or were you sort of
7 generally aware of them because of your overall
8 involvement in the case?

9 **A** I was more focused on the guilt issues.

10 **Q** Okay. Now, had you personally reviewed any
11 of the -- Mr. Owens' social history or institutional
12 records that were in the case file?

13 **A** I had reviewed the transcripts from the
14 previous trial. So whatever is included in those
15 previous trials, that is what I have gone over.

16 **Q** Had you personally interviewed any members of
17 Mr. Owens' family?

18 **A** No.

19 **Q** Or acquaintances?

20 **A** No.

21 **Q** All right.

22 **A** Never did. And did not throughout the
23 trial other than the ones that we were planning on
24 calling.

25 **Q** How did you decide what questions to ask

1 during direct examination of Ms. Hammock?

2 **A** Uh, I sort of used her -- when we met on that
3 Saturday, we sat and we talked. We sort of went
4 through what information she had, what information,
5 you know, that she thought was important, what
6 information -- we talked about her earlier testimony,
7 you know, what she thought had gone well, you know,
8 whatever, what she thought hadn't. And then based on
9 that conversation, I basically formulated, you know,
10 the questions to try to get it out of her. What I do
11 is basically is also I say I'm going to ask you
12 questions that are going to allow you to talk okay.
13 That's how I formulated it.

14 **Q** Okay. Now, as the testimony came out in
15 trial, did it serve -- by that testimony, I mean Ms.
16 Hammock's testimony.

17 **A** Yeah.

18 **Q** Did it serve the purpose that you intended it
19 to serve in the larger scheme of the defense's
20 mitigation case?

21 **A** When the trial was going on, I thought that
22 it had. Uh, you know, going back and looking at --

23 **MR. MABRY:** I'm going to object to that
24 portion because the case law says looking back,
25 hindsight, is not how you judge an ineffective

1 assistance of counsel claim.

2 **THE COURT:** Okay. I'm aware of that. I'm
3 going to let him go ahead.

4 **THE WITNESS:** Thank you, Your Honor. You
5 know, I've gone back and looked through the
6 transcripts. I think her testimony at our trial
7 was shorter. There is no reason that I had to
8 make it shorter. But, you know, that's the way it
9 came out.

10 **BY MR. WEYBLE:**

11 **Q** Okay. If additional information had been
12 available that could have been used to present a
13 fuller picture of Mr. Owens' background, would you
14 have used it?

15 **A** Yes.

16 **Q** If it had been possible for you to present a
17 fuller picture of Mr. Owens' experiences in the
18 Department of Juvenile Justice and the effects that
19 they had on him, would you have used that information?

20 **A** Yes.

21 **Q** To the extent that something less than a full
22 account of Mr. Owens' background from his earliest
23 days to his time at DJJ did not come out at trial, was
24 that because you or the defense team as a whole had
25 made a strategic decision not to present what was

1 available?

2 **A** We did not make any kind of strategic
3 decision to not present the full and complete picture
4 of his background.

5 **MR. WEYBLE:** Your Honor, if I could have just
6 have a moment.

7 **THE COURT:** Sure.

8 **MR. WEYBLE:** That's all we have, Your Honor.

9 **THE COURT:** Okay. Cross.

10 **MR. MABRY:** Do you need a break, Judge?

11 **THE COURT:** No, I'm good. Let's go.

12 **CROSS-EXAMINATION**

13 **BY MR. MABRY:**

14 **Q** Good morning, Mr. Gibson.

15 **A** Good morning, Mr. Mabry.

16 **Q** Let's kind of start with where you got --
17 where you came into this case. When you and Mr.
18 Godfrey were appointed, Mr. Owens had already been
19 tried, found guilty and sentenced to death by one jury
20 in, I believe, 1998; is that correct?

21 **A** I'm not sure about the dates.

22 **Q** There was one jury that found him guilty and
23 they sentenced him to death?

24 **A** Yes.

25 **Q** Ms. Hammock, Marjorie Hammock testified in

1 the first trial, you said a little longer in that
2 trial, but Mr. Owens had still been sentenced to
3 death?

4 **A** Yes.

5 **Q** Then, Mr. Owens had had a sentencing hearing
6 in front of Judge Kittredge and Ms. Hammock had
7 testified again and Dr. Evans testified he was again
8 sentenced to death; is that correct?

9 **A** Yes.

10 **Q** When you were appointed on this case, one of
11 the first things that you did was getting the
12 transcript from the first two trials?

13 **A** Yes.

14 **Q** And you reviewed those transcripts; is that
15 correct?

16 **A** Yes.

17 **Q** Those included Ms. Hammock's testimony and
18 Mr. Evans' testimony from the second sentencing
19 proceeding?

20 **A** Yes.

21 **Q** Okay. Just a moment. Eventually, you --
22 y'all retained Paige Tarr as your mitigation
23 investigator?

24 **A** Yes.

25 **Q** What is her job? What was she supposed to

1 do?

2 **A** It's my understanding that her job was to go
3 out and basically find witnesses, interview witnesses,
4 identify issues and investigate issues that we thought
5 might mitigate the circumstances for what he was on
6 trial for.

7 **Q** And was part of her responsibility to go out
8 and interview family members, Mr. Owens' family
9 members?

10 **A** She, along with Caroline Graham.

11 **Q** Caroline Graham was the private investigator?

12 **A** Yes.

13 **Q** As a result of their speaking with Mr. Owens'
14 family and talking with them, did y'all make a
15 decision not to call any of Mr. Owens' family members
16 in the case?

17 **A** My understanding -- I didn't talk with his
18 family members.

19 **Q** Right.

20 **A** But my understanding was that we were having
21 trouble, uh, we were having trouble getting some of
22 the family members to testify.

23 **Q** Okay.

24 **A** And we also had questions about whether or
25 not they were going to provide evidence that was going

1 to be helpful.

2 Q All right.

3 A That was my understanding. Like I said, I
4 did not talk to -- I didn't talk with them privately.

5 Q This is what was related to you by Ms. Tarr
6 and Ms. Graham at the meeting?

7 A Yes.

8 Q At that meeting -- let's talk about that
9 meeting. All the members of the defense team met at
10 Donna Schwartz-Watts' house in Columbia sometime
11 before the trial?

12 A Yes.

13 Q And that was to kind of formulate a strategy?

14 A Yeah. And also for them primarily -- it was
15 really, from my perspective, it was for them to update
16 us as to everything they had done.

17 Q Okay.

18 A And then also, you know, once we had been
19 updated to figure out and plan how we were going to
20 put the testimony up.

21 Q Okay. So you kind of wanted a -- don't let
22 me put words in your mouth, but y'all wanted a
23 cohesive theme throughout the penalty phase of the
24 trial?

25 A Yes.

1 Q All right. And that cohesive theme was that
2 Freddie came from a difficult environment, grew up in
3 a very difficult environment and he was taught to be a
4 violent person by the men in his life and that he
5 recently had tried to get help for himself while he
6 was on death row?

7 A Yes.

8 Q That may be a little more concise. I know
9 I'm summarizing.

10 A There were also some medical issues that the
11 doctors had covered that we represented as well.

12 Q Okay. He had some history of depression?

13 A I think -- it's been a long time since I read
14 this transcript. It's been like four years. My
15 recollection was that it was a little more detailed
16 than that. There was something -- my recollection is
17 that he suffers -- suffered and potentially continues
18 to suffer from, uh, a medical condition, a
19 physiological condition with his brain.

20 Q Okay.

21 A And that was something that Donna Schwartz-
22 Watts and Dr. Brawley had uncovered in their
23 investigation.

24 Q You had three psychological experts to
25 testify at the third sentencing proceeding?

1 **A** I'm not sure about the terms of
2 "psychological" and "psychiatric", but there were
3 three doctors that dealt with brain issues that
4 testified.

5 **Q** Okay. Do you know why you did not call
6 Dr. Jim Evans who testified in the second sentencing
7 proceeding?

8 **A** Bill and I talked about it. We came to the
9 conclusion that we decided that we wanted to get a new
10 team to look at it.

11 **Q** Okay. Mr. Evans' testified before in front of
12 Judge Kittredge but Mr. Owens was still sentenced to
13 death; is that correct?

14 **A** That's my understanding from the transcript,
15 yes.

16 **Q** Do you know of any statement by the solicitor
17 or the judge during the trial, and I'm referring to
18 the first allegation in the complaint, uh, --

19 **A** And I don't know what you mean by the first
20 allegation in the complaint.

21 **Q** Okay. The first allegation says that you
22 should have objected to statements by the Solicitor
23 and similar instructions by the trial court that the
24 state may only seek death where aggravating
25 circumstances are present, which improperly suggested

1 to potential jurors that aggravating circumstances had
2 already been found. You remember that occurred during
3 the trial where you felt like the jury was under the
4 impression that aggravating circumstances had already
5 been found?

6 **A** Uh, I mean, he argued it during his closing.
7 I have not looked in his transcript.

8 **Q** Okay.

9 **A** Uh, so I don't know if it occurred earlier.
10 The record will speak for itself.

11 **Q** Okay. That's fair enough. With regard to
12 Juror Abels, Sonya Abels, do you remember exactly what
13 she said besides the fact that she had gone to her
14 pastor talked him about the death penalty?

15 **A** I don't recall.

16 **Q** Are you familiar with the case of the State
17 versus Gilbert?

18 **A** I am not.

19 **Q** Do you remember Ms. Abels testifying that,
20 when questioned by the judge, Judge Patterson, that
21 she could not sentence someone to death and live with
22 herself?

23 **A** I don't recall.

24 **Q** Would that have been a reason you didn't try
25 to rehabilitate her or didn't object to Judge

1 Patterson excusing her?

2 **A** That probably would not have been the reason.

3 **Q** Do you think it was because she had gone to
4 her pastor and talked to him about the death penalty?
5 Judge Patterson said there was a case on point?

6 **A** It would have been that Judge Patterson said
7 there was a case on point.

8 **Q** Okay. Fair enough. Uh, do you remember any
9 testimony -- I guess I need to -- you have the
10 transcript there in front of you. Do you remember
11 testimony in the penalty phase of your trial from
12 Detective Wood that the person in front of the counter
13 was wearing a homemade stocking mask and the person
14 behind the counter was wearing a ski mask like the
15 kind you buy out of a store?

16 **A** I don't recall that testimony, but I have no
17 reason to dispute that it's in there.

18 **Q** Do you remember testimony in the record when
19 Mr. Vance was testifying or Mr. Vance's testimony was
20 read into the record where he stated that Andre Golden
21 had a homemade stocking mask and Freddie Owens had a
22 ski mask?

23 **A** I don't recall the testimony.

24 **Q** I'm sorry. I'm wrong. Investigator Belue, if
25 you will turn to the record page 1126, and I'm going

1 by the record cites, I believe, the big black letters?

2 **A** You said what letters?

3 **Q** 1126.

4 **A** All I have are transcript numbers.

5 **Q** I'll get it for you. I'm looking at lines 10
6 through 13. Investigator Belue was testifying in
7 front of the jury in your case about the crime scene
8 video. Does he not indicate that the person in front
9 of the counter was wearing a homemade stocking mask?

10 **A** Yes. According to the testimony 10 through
11 13, the person that was in front of the counter had on
12 a hooded jacket and a homemade mask.

13 **Q** And then did Investigator Belue testify also
14 to, I believe, lines 14 -- or 10 through 14 that the
15 perpetrator behind the counter had a ski mask on?

16 **A** Yes.

17 **Q** Okay. Now, if you'll turn to page 1209.

18 **A** Okay.

19 **Q** Through 1211. If you will, just read through
20 that. Does Mr. Vance talk about the fact that Mr.
21 Owens was wearing a ski mask when he arrived at the
22 Speedway?

23 **A** Hold on just a second.

24 **Q** You're actually going to have to --

25 **A** You say it's 1209.

1 Q I might actually have to give you three
2 different record cites for that.

3 A Okay. (Reading.)

4 Q Earlier that night. There were some other
5 robberies before they went to the Speedway; is that
6 right?

7 A Okay. That's -- I think so.

8 Q Okay. Tell me when you're done.

9 A All right. I am.

10 Q Go to record 1222 and 1223?

11 A (Reading.) Okay.

12 Q Go to 1236, lines 11 through 18.

13 A 1236, lines 11 through 18, you say?

14 Q Yes. Thank you.

15 A (Reading.) Okay.

16 Q In that testimony of Mr. Vance, does he
17 describe Mr. Owens wearing a ski mask and Mr. Owens
18 wearing a homemade stocking type mask?

19 A Yes.

20 Q Okay. The video that was shown to the jury,
21 the person in front of the counter had on a homemade
22 type stocking mask?

23 A I don't recall.

24 Q Okay. Okay. I'm going to show you two
25 exhibits from the actual trial. First, I'll show you

1 State's Exhibit 37. Is that a still photograph from
2 the crime scene video when the two perpetrators
3 entered the Speedway?

4 **A** Appears to be, yes.

5 **Q** One of them has got on a ski mask like you
6 buy in a store. And one of them has some other type
7 of mask on; is that right?

8 **A** I can't tell what the other one has on. I
9 can't tell if he has any type of mask.

10 **Q** What about State's Exhibit 39. Is that the
11 individual in front of the counter?

12 **A** Yeah.

13 **Q** He is not wearing a ski mask, is he?

14 **A** It does not appear to be a ski mask, no.

15 **Q** Okay.

16 **MR. MABRY:** Can I hand these up, Judge.

17 **THE COURT:** Sure. Thank you.

18 **MR. MABRY:** All right.

19 **BY MR. MABRY:**

20 **Q** Now, did you feel like during the trial that
21 the solicitor had created some false impression with
22 the jury regarding who was in front of the counter and
23 who was behind the counter?

24 **A** I don't recall.

25 **Q** Okay. If you and Mr. Godfrey were going to

1 establish who was who in the video, who would you have
2 called to do that?

3 **A** Freddie.

4 **Q** Okay.

5 **A** But see, see the problem is though Freddie
6 told us all along that he wasn't in the store.
7 Freddie never lied to me about anything. But what he
8 told us what happened was that there were four of
9 them. Two of them went in, but he was not part of
10 that two. He was one of the two who had actually
11 stayed outside in the vehicle. He was not involved.
12 He was not in the store now.

13 **Q** So you couldn't use Freddie to establish who
14 was who in the store?

15 **A** Well, except -- if we were going to use
16 Freddie, we should have called Freddie to say he was
17 not in the store together. But like I said, that
18 really wasn't, it really was not an issue for us.

19 **Q** Okay. Could you call Mr. Golden to establish
20 who was who in front of the store?

21 **A** We thought about calling Mr. Golden. But
22 Mr. Golden had flipped so much in his testimony.
23 Basically what happened with Mr. Golden was this, he
24 got one deal and then he went and filed a PCR. In
25 order to get him to testify in the second trial, they

1 basically said, listen, if you testify, we will help
2 you out again. He testifies and the next thing, you
3 know, he comes up with an even better deal. They
4 reduced his sentence even further. The problem with
5 us calling Mr. Golden was that we just did not, I did
6 not trust Mr. Golden as far as what he would say. He
7 had flipped so many times in his testimony as to what
8 was going on.

9 **Q** In fact, Mr. Golden testified in the first
10 trial that Freddie was the man behind the counter and
11 the person that killed Irene Graves; isn't that
12 correct?

13 **A** Yeah. And for that, he got a deal. Then he
14 testified again in the second trial and he got an even
15 better deal.

16 **Q** He testified to the same thing in the second
17 trial.

18 **A** Right. But there was no deal for him to have
19 in the third trial.

20 **Q** Right.

21 **A** That's why they didn't call him. And I
22 didn't call him because I just didn't think he was
23 trustworthy.

24 **Q** Okay. He also testified in the second trial
25 that Mr. Owens stabbed him coming out of the shower in

1 prison?

2 **A** I think he did maybe testify to that. That.
3 was another reason why --

4 **Q** You couldn't call him?

5 **A** Yeah. I didn't think that Mr. Golden was the
6 most trustworthy.

7 **Q** Okay. Do you know any way that you could
8 have gotten Judge Patterson to instruct the jury who
9 was who in the video?

10 **A** No. Judge Patterson doesn't know who was who
11 in the video.

12 **Q** Do you know whether or not judges are allowed
13 to comment on the facts of the case?

14 **A** They are not supposed to.

15 **Q** You know, the next ground dealt with Joe
16 Wood's testimony. Do you know whose witness that was,
17 Mr. Wood?

18 **A** I thought -- given that Mr. Godfrey was the
19 one who stood and said no questions, I'm assuming that
20 it was his. But honestly, I can't recall.

21 **Q** Okay.

22 **A** And the reason why I say that is because
23 based on our division of labor, he was somebody that
24 should have come in under my officers, because Mr.
25 Godfrey was the one who stood up and said that, I just

1 don't recall.

2 O Okay. Did you know Detective Wood?

3 A I did not know Detective Wood.

4 Q Did Mr. Godfrey know Detective Wood?

5 A Yes.

6 Q And he knew his history?

7 A Yes, and I think that might be why he ended
8 up taking him.

9 Q Detective Wood's testimony was in the penalty
10 phrase of the third trial. Were you aware that
11 character evidence could come in regarding Mr. Owens
12 in the penalty phase?

13 A Yes.

14 Q Let's go to the third ground. Counsel failed
15 to object to victim impact testimony. Do you know of
16 any rule -- let me go back a second. I missed
17 something.

18 A Okay.

19 Q On the videotape, when the videotape of the
20 crime scene was played, do you know of anything that
21 was wrong with the videotape, chain of custody, had it
22 been tampered with, had it been altered that you know
23 of?

24 A Not that I'm aware of.

25 Q Was there any reason that you know of you

1 could have objected to the playing of the videotape
2 when it was playing?

3 **A** Not that I am aware of, no.

4 **Q** As far as you know, it fairly and adequately
5 represented what the cameras captured inside the
6 Speedway when Ms. Graves was killed?

7 **A** As far as I know.

8 **Q** Do you know of any reason or any basis to
9 object to Ms. Christy's testimony about what the
10 children said when she notified them that their mother
11 had been hurt and then notified them that their mother
12 had been killed?

13 **A** Not that I'm aware of, no.

14 **Q** Did she make clear to the jury that this was
15 the only time she ever had to notify anyone of a
16 death?

17 **A** I think she did, yes.

18 **Q** Would that be a reason that she would have
19 remembered this event?

20 **A** I would suspect so.

21 **Q** Now, as far as the disciplinary violations,
22 there was -- no question there was an objection
23 regarding the admissibility of those, correct?

24 **A** Uh-huh.

25 **Q** That takes up numerous pages in the

1 transcript. Did you think you had preserved the
2 confrontation clause challenge?

3 **A** I thought that I had. I mean, during the
4 argument, I clearly told the judge that one of our
5 main concerns about it was that the witnesses were not
6 there and we couldn't cross-examine them about it. I
7 was a little surprised that appellate court put it the
8 way they did, but I thought that it had been
9 preserved.

10 **Q** You did object to the records coming in under
11 the business records exception?

12 **A** Yes.

13 **Q** But they came in any way?

14 **A** Yes.

15 **Q** Are you aware of decisions from the United
16 States Supreme Court and our state Supreme Court that
17 there is no confrontation clause violation when
18 records are admitted under the business records
19 exception?

20 **A** Uh, yeah, I'm aware of some cases.

21 **Q** All right. Do, uh, -- if there was any
22 testimony of Ms. Hammock's that came out in the first
23 two trials that didn't come out on the third, was that
24 intentional or was it just the way it played out in
25 front of a jury?

1 **A** It was not intentional, just the way it
2 played out in front of the jury.

3 **Q** As I understand, it was your intention and
4 Mr. Godfrey's intention to basically develop her
5 testimony along the same lines, perhaps in a more
6 concise fashion, but along the same lines as her
7 testimony in the first two trials?

8 **A** Yes.

9 **Q** Now, did y'all subpoena Mr. Owens' records
10 from the Department of Juvenile Justice?

11 **A** I did not. I don't know -- I know we had got
12 them. I'm not sure how we got them. But we did get
13 his particular records from DJJ. That's my
14 understanding or recollection.

15 **Q** Isn't it a fact that Mr. Owens went to DJJ
16 for Assault with Intent to Kill? That's what he was
17 adjudicated delinquent for?

18 **A** I don't recall.

19 **MR. MABRY:** One moment please.

20 (WHEREUPON, State Exhibit Number 1 was marked for
21 identification.)

22 **BY MR. MABRY:**

23 **Q** I'm going to show you what was marked as
24 State's Exhibit 1. It is a commitment order for DJJ.
25 Does that indicate what offenses Mr. Owens was

1 committed to the Department of Juvenile Justice for?

2 **A** Yes.

3 **Q** What were those?

4 **A** A Burglary second, actually two counts of
5 Burglary second, Unlawful Possession a Pistol and
6 Assault with Intent to Kill.

7 **Q** Do you remember any of the facts surrounding
8 that incident?

9 **A** I do not.

10 **Q** Let me see if I can refresh your memory. Do
11 you remember Mr. Owens when he was admitted to DJJ at
12 the R&E center, telling the R&E personnel that there
13 were some boys that were going to gang him or he
14 thought so. He was at a school bus. He went and got
15 a pistol at a friend's house and came back to the bus
16 stop. You don't remember any of this?

17 **A** I don't recall.

18 **Q** Okay. And these individuals called his
19 mother a name, which I won't repeat. It begins with a
20 "B". Then they said challenged Freddie to a fight.
21 Then Mr. Owens shot in their direction. You recall
22 any of that?

23 **A** I don't.

24 **Q** Now, how was Ms. Graves killed?

25 **A** She was shot.

1. Q Do you remember the testimony in -- do you
2 remember the testimony in any of the proceedings that
3 she made some kind of smart remark to Mr. Owens before
4 he shot her in the head?

5. A I believe so.

6. Q Okay.

7. A I can't remember what it was.

8. Q Right.

9. A But it was allegedly some -- some comment
10 that was made.

11. Q He was trying to get her to open the safe and
12 she made some smart comment to him and then he shot
13 her.

14. A I don't want to say that.

15. Q I understand.

16. A What Freddie --

17. Q What Freddie told you is different than what
18 the record says?

19. A Yes, so I don't know what happened, you know,
20 that night.

21. Q Do you remember the fact that in this
22 sentencing proceeding, the third sentencing
23 proceeding, the solicitor did not introduce any of Mr.
24 Owens' disciplinary infractions in the case-in-chief,
25 from DJJ?

1 **A** Okay.

2 **Q** You and Mr. Godfrey elicited testimony from:
3 Donna Schwartz-Watts about Mr. Owens' disciplinary
4 problems at DJJ.

5 **A** I know we elicited testimony regarding his
6 problems at DJJ. I don't know if we went into what
7 his disciplinary situation was. But if it is in the
8 record, we did.

9 **Q** It was basically generalized by Ms.
10 Schwartz-Watts as he got into fights and he was
11 disrespectful to teachers?

12 **A** Whatever the record says. I trust the
13 record.

14 **Q** Okay. You just don't remember?

15 **A** I don't recall.

16 **Q** Do you remember testimony in the record from
17 Ms. Maddock, the teacher, Mr. Owens' teacher that
18 y'all put up, that the first day Freddie came to class
19 in the third grade, he picked up his desk and threw it
20 across the room and told her, now what you going to do
21 about it?

22 **A** I recall that testimony.

23 **Q** You recall the testimony from Mr. Owens'
24 second sentencing proceeding from his gym coach that
25 Freddie was disrespectful to teachers?

1 **A** I don't recall it. But if it is in there,
2 I've got no reason to dispute it.

3 **Q** Do you remember Mr. Owens disciplinary
4 history at DJJ that there were a lot of writeups for
5 him making outbursts in class and being disrespectful
6 to teachers and those type things?

7 **A** I recall that, yes.

8 **Q** During that times that you met Mr. Owens,
9 Freddie Owens, you talked with him, did he ever tell
10 you he had been assaulted in any way at DJJ?

11 **A** No, I don't think we talked about that. I
12 think I primarily became aware of all the problems he
13 had had down at DJJ through Dr. Schwartz-Watts. Our
14 conversations with him, when we got into some factual
15 background and stuff like that, it was -- we did a lot
16 of strategic stuff and stuff like that, talking to him
17 about what was going on with him and stuff like that.
18 That is my recollection. Bill may recollect
19 differently. But, uh, the sessions he had with Dr.
20 Schwartz-Watts were a lot more, like, open.

21 **Q** Let me ask you this, did Dr. Schwartz-Watts
22 or Ms. Tarr or Caroline Graham, any of these
23 investigators that spoke with Mr. Owens or his family
24 relate to you that Mr. Owens had been sexually
25 assaulted at DJJ or forced to engage in any sexual

1 conduct that he didn't want to or anything like that?

2 **A** I recall that, no.

3 **Q** All right. If that had been told to you or
4 you had that information, you would have presented it
5 to the jury, would you not?

6 **A** Yes.

7 **MR. MABRY:** I believe that's all that I have,
8 Your Honor.

9 **MR. WEYBLE:** No redirect, Your Honor.

10 **THE COURT:** All right. Thank you.

11 Can we release him from subpoena?

12 **MR. WEYBLE:** Fine with us, Your Honor.

13 **THE COURT:** Okay.

14 **MR. GIBSON:** Thanks, judge. Have a good one.

15 **THE COURT:** All right. Why don't we just take
16 a short break. Who are you going to call next?
17 Mr. Godfrey is here and has been waiting.

18 **MR. WEYBLE:** Yes, Your Honor. We'll be
19 calling Mr. Godfrey next.

20 **THE COURT:** Okay. And Judge Kinlaw is in the
21 courtroom too.

22 **MR. WEYBLE:** We do not have Judge Kinlaw
23 under subpoena. We do not intend to call him.

24 **MR. MABRY:** I did, Judge. I notified his
25 office just to be on stand by. I didn't mean to

1 inconvenience him.

2 THE COURT: All right. Let's take a break.

3 MR. MABRY: But I'll talk with him while we
4 are on break.

5 THE COURT: All right.

6 MR. MABRY: How long we on, Your Honor?

7 (WHEREUPON, a recess is taken from approximately
8 11:30 a.m. until 11:46 a.m.)

9 MR. WEYBLE: We'll call Bill Godfrey.

10 THE CLERK: Please raise your right hand.

11 BILL GODFREY

12 is first duly sworn and then testifies as follow:

13 THE CLERK: You may be seated. State your
14 full name for the record please.

15 THE WITNESS: It is Everett P. Godfrey, but
16 everybody calls me Bill.

17 DIRECT EXAMINATION

18 BY MR. WEYBLE:

19 Q All right. Mr. Godfrey, good morning. What
20 do you do, sir?

21 A I do primarily criminal defense in state and
22 federal court.

23 Q Okay. According to the court record in this
24 case, you and Mr. Ken Gibson were appointed by Judge
25 Patterson in an order dated February 2nd, 2006 to

1 represent Freddie Owens. Is that correct?

2 **A** That's correct.

3 **Q** All right. Now, at that -- well, first of
4 all, how did you end up getting the appointment, if
5 you know?

6 **A** How did I end up getting appointed?

7 **Q** Why you, in other words?

8 **A** I got called back to chambers one day. Judge
9 Patterson looked at me and said your number has come
10 up. I have run out of people. You are qualified. I
11 need to have somebody. You can either do the Freddie
12 Owens case or the -- I don't remember the other case.
13 I said I would do the Freddie Owens case. If I've got
14 to do one, I will do that one.

15 **Q** Okay. Now, at that point, had you ever done
16 a capital trial before?

17 **A** Yes.

18 **Q** Which one?

19 **A** I don't know the name of it. I was second
20 chair with Mauldin in '93 or '94. Then I had another
21 capital case over in Pickens County. I got replaced
22 about a month before the case was to go to trial.
23 Suzanne Coe took it for a little bit of money.

24 **Q** You did not remain on it through the actual
25 trial?

1 **A** No.

2 **Q** Had the jury been picked by the time you got
3 off?

4 **A** No.

5 **Q** Okay. In this case, you did get appointed and
6 you did stay on all the way through the trial; is
7 that correct?

8 **A** Yes.

9 **Q** Now, I would like to show you what we already
10 had marked as Exhibit 1, which I believe is your
11 seven-page timesheet. I would like you to take a look
12 at that?

13 **A** It looks like it.

14 **Q** Looks like it?

15 **A** Uh-huh.

16 **Q** Does it appear to be an accurate copy of the
17 timesheet that you prepared?

18 **A** I'm sure that it is.

19 **MR. WEYBLE:** Your Honor, we would move to
20 admit what has been marked as Applicant's 1.

21 **MR. MABRY:** No objection.

22 **THE COURT:** Okay.

23 (WHEREUPON, Applicant's Exhibit Number 1 is
24 admitted into the record.)

25 **BY MR. MABRY:**

1 Q All right. Now, I'm not sure whether you
2 were here for this or not. Mr. Gibson talked a little
3 in his testimony about the two of you having
4 established kind of a rough division labor between the
5 two of you. Is that consistent with your
6 recollection? If so, how would you characterize the
7 division?

8 A That's correct. Initially, when we got
9 started, we thought we would let him do the majority
10 of the, uh, of what would be the guilt phase. I would
11 do the majority of what would be the mitigation phase.

12 Q Okay. Is that more or less what you
13 established going forward?

14 A Yes.

15 Q All right. Now, have you seen the PCR
16 application in this case, the fin-- the second, I
17 guess it would be the second amended application?

18 A I think it ended up in my office but I
19 honestly can't tell you that I read it that closely.
20 I know I glanced at it.

21 Q Okay. That's fine. I want to talk with you a
22 little bit about certain occurrences at the trial. I
23 may jump around a little bit rather than make you sort
24 of narrate for us everything that happened at the
25 trial. I'll direct you -- there's a copy of the

1 record right there. I'll direct you to the relevant
2 portion of the record. First of all, a number of
3 these have to do with allegations that certain things
4 should have been objected to in order to preserve them
5 for appellate review. Were you familiar at the time
6 of this trial generally with the South Carolina rules
7 governing preservation of error?

8 **A** Yes.

9 **Q** Can you describe for us your understanding of
10 what those rules are?

11 **A** If there is potentially an evidentiary error,
12 if you do not object to it, it is not preserved and
13 the appellate decision can not rule on it.

14 **Q** Okay. Now, uh, in terms of your approach to
15 the trial as a whole, were you consciously trying to
16 preserve the potential errors for appellate review?

17 **A** In this trial and every trial.

18 **Q** Okay. I want to talk about -- a little bit
19 about jury selection. Prior to this case, I think
20 maybe you already answered this, have you ever
21 participated in selecting a capital jury?

22 **A** No.

23 **Q** Okay. Did you have any experience with
24 conducting individual voir dire of prospective jurors?

25 **A** I have watched it done.

1 Q Watched it done in other capital cases?

2 A Yes.

3 Q But never personal participation?

4 A Correct.

5 Q Okay. Now, what, if anything in particular,
6 did you do in preparing for selecting the jury in Mr.
7 Owens' case?

8 A I believe Ken and I sat down and we talked
9 about the type of people that we would like to have on
10 the jury as far as background, ages, religion, things
11 like that.

12 Q So sort of a personal profile ---

13 A Yes.

14 Q --- of a certain type of juror; is that
15 right? Uh, did you do any legal research into the
16 case laws specifically governing capital jury
17 qualification and jury selection?

18 A Yes.

19 Q I know it has been a long time, do you recall
20 what ca--

21 A No.

22 Q Now, at some point, did you request the
23 assistance of some sort of an expert for the capital
24 or for the jury selection process?

25 A Yes, I did.

1 Q Can you sort of describe that for us?

2 A Well, I was trying to get, uh, Jeff Bloom.
3 Jeff was tied up. He gave me the name of another
4 person. I do not remember his name. He wanted a
5 phenomenal amount of money. Judge Patterson would not
6 agree to the phenomenal amount of money.

7 Q So in the end, was the phenomenal amount of
8 money granted?

9 A No.

10 Q Okay. And as a result, did you all use an
11 expert?

12 A We did not have a jury consultant expert.

13 Q Okay. Okay. I want to talk with you
14 specifically about one prospective juror. This is --
15 if you want to look, this is on page 483 line -- you
16 got a more compact copy of the record. This is 483,
17 lines 10 to 14?

18 A That is 483 of the stamped --

19 Q You know, that's a good question. Can I come
20 and look at yours and see?

21 A Sure.

22 Q It may be that we're going to be dealing with
23 different numbers here?

24 A It's the little number?

25 Q It's the little number.

1 **MR. MABRY:** It is 525, for the record, if you
2 start with the beginning of your testimony. I
3 didn't know where you were starting.

4 **THE WITNESS:** Okay.

5 **BY MR. WEYBLE:**

6 **Q** So you with me?

7 **A** I'm with you.

8 **Q** This is Sonya Abels?

9 **A** Uh-huh.

10 **Q** So Judge Patterson disqualified, uh,
11 Prospective Juror Abels on the ground that there is a
12 case -- he says, quote, there is a case rather on
13 point that if a woman talks to her priest after she's
14 been called as a juror by capital punishment, she is
15 disqualified under the law. My question to you is did
16 you consider that to be a correct statement of the law
17 from Judge Patterson at that time it was made?

18 **A** Frankly, I don't remember. I do remember
19 this juror.

20 **Q** Okay.

21 **A** Upstate religion is a problem. You have got
22 the fundamentalists who want to put everybody to
23 death. Then you have the more liberal religions that
24 are, some people hold very closely. The way this
25 woman struck me, she said she talked to her pastor,

1 she could never vote for death, I didn't think there
2 was any way possible to rehabilitate her.

3 Q Okay. In terms of the question now or the
4 statement of the law made by Judge Patterson, which
5 was there was a case was right on point saying that if
6 a woman talks her priest after she's been called, then
7 she is disqualified?

8 A I don't recall. I don't remember that case
9 now.

10 Q Okay.

11 A I do not recall.

12 Q Okay. Let's just -- and maybe again your
13 answer will be "I don't recall". But if that was not
14 a correct statement of law --

15 A Then it was error on my part.

16 Q Okay. I want to move now to the surveillance
17 video that was admitted during the state's case-in-
18 chief. They offered this surveillance video to show
19 the shooting at the convenience store. This begins
20 on, again we're talking about the little numbers here,
21 page 1076. You have a general recollection of the
22 introduction of that video in front of the jury?

23 A That was Larry Belue's testimony. I remember
24 that.

25 Q Okay. Do you have recollection of the video

1 itself?

2 **A** I looked at that video numerous times.

3 **Q** Okay. Go ahead.

4 **A** Primarily because Freddie told me he was not
5 in that store. I looked at that video for the better
6 part of an afternoon over and over again trying to
7 pick up physical characteristics and movements. So,
8 yeah, I remember that video.

9 **Q** Okay. And given the time that you spent
10 studying that video, was it your assessment that was
11 impossible to tell who was who on that video?

12 **A** You had Mr. Golden's testimony that if you
13 looked at the video, you can not tell who the two
14 people are. Okay. What you do have is the testimony
15 of Mr. Golden telling you who the people are. Uh, was
16 Mr. Golden telling the truth? I don't know.

17 **Q** Okay. Uh, I think you've answered my
18 question which was you can't tell from looking at the
19 video.

20 **A** You can not.

21 **Q** Now, at the time this video was played for
22 the jury, uh, this jury, of course, was there just for
23 sentencing, resentencing, right? And my review of the
24 record was they were never told whether or not any
25 prior jurors had made any specific findings about who

1 was the actual shooter, right? So my question is when
2 this video was played for the jury, did you give any
3 consideration to requesting some sort of an
4 instruction at that time or maybe as part of the
5 larger package of instructions that would be given at
6 the end of the evidence to the jury to indicate that
7 there had been no prior finding that Mr. Owens was,
8 which of the two people on that tape was Mr. Owens?

9 **A** I did not consider an instruction at that
10 time. If it's wrong, it's wrong. But I did not.

11 **Q** Okay. Let's move to Officer Wood's
12 testimony. He was with the Greenville County
13 Sheriff's office. He testified about an interview
14 that he conducted with Mr. Owens on November 11th,
15 1997 in connection with the robbery and homicide at
16 the Speedway. This begins -- his testimony begins
17 around page 1080. The part that I want to ask you
18 about begins or appears on page 1093. So now, near
19 the end of his direct examination, the Solicitor asked
20 him how did he make you feel, he, being Mr. Owens.
21 Are you with me? Did you consider raising an
22 objection to that question?

23 **A** I did not consider raising an objection to
24 the question. I was surprised with Joe's answer.

25 **Q** Surprised with his answer?

1 **A** Yes.

2 **Q** What about that answer surprised you?

3 **A** Well, when he said he had a shiver went down
4 his spine.

5 **Q** Cold chills, I think, was the quote.

6 **A** Of course, once it was out, it was out. I
7 thought about objecting. I didn't object. I would've
8 called more attention to it if I had.

9 **Q** Uh-huh.

10 **A** The objection should have occurred, if I had
11 made it, at Bob's question as opposed to at Joe's
12 answer.

13 **Q** All right. So, uh, I want to make sure I
14 understand what you are saying. Is it your testimony
15 that the question in your assessment was objectionable
16 and you would've rather done the objection at that
17 time; is that right?

18 **A** Now that I know Joe's answer, I would have
19 objected when I heard the question. I didn't know
20 where he was going with it.

21 **Q** Okay. Okay. All right. Let's move again to
22 the victim impact testimony given by Julietta Christie
23 who was a victim's advocate at the Sheriff's office.
24 She testified about having gone to notify the victim's
25 children, that she had been killed. Uh, do you have a

1 general recollection of her testimony?

2 **A** I remember the testimony.

3 **Q** Now, near the end of her direct examination,
4 she indicated that she had been a victim's advocate
5 for about 15 and a half years and been involved in
6 thousands of cases. The Solicitor then asked her how
7 would you describe this event in your career. This
8 occurs on page 1274, line 8. My question to you is
9 whether you considered that at that time to be a
10 proper request for victim impact testimony within the
11 scope made permissible by the rules in Payne versus
12 Tennessee?

13 **A** Actually, at the time, I did and I'll tell
14 you why. The victim impact people never deal with
15 what this lady dealt with. This lady did something
16 that she'll probably never do again, and that is, go
17 to someone's children and say your mother is not
18 coming home. And I personally can see how that would
19 have a direct and traumatic impact on her. So, you
20 know, if what I did was error, it's error.

21 **Q** Now, when you were making that judgment, were
22 you making that judgment based on your own views about
23 what ought to be admissible or did this -- were you
24 running that though the rule laid out in Payne, to the
25 extent you can even recall at this time?

1 **A** I can't tell you what was going through my
2 mind at the time. I believed at the time that Judge
3 Patterson would let it in. Uh, but if you are asking
4 for the analysis that I went through my mind at the
5 time, I can't give you that. It's been too far.

6 **Q** Okay. Well, just to sort of follow up with
7 this a little bit, Ms. Christie's answer, of course,
8 was, quote, this was the hardest, hardest case I ever
9 had to work on. I never had to do death penalty
10 notification before or since and this is definitely
11 the hardest case I had. It affected me the most
12 deeply and still does. I think have the same question
13 for you whether you believe that was admissible under
14 Payne versus Tennessee.

15 **A** I think it's admissible really. If I'm
16 wrong, I'm wrong.

17 **Q** Okay. All right. Now, I want to move to the
18 list of disciplinary infractions that the prosecution
19 was allowed to bring in concerning Mr. Owens' time in
20 SCDC. Now, this was something from the record that
21 Mr. Gibson handled. Maybe we can short-circuit this.
22 I don't know how much involvement you had in the
23 formulation or articulation of the objection. If it
24 was all Mr. Gibson, then you can say so and we can
25 move on.

1 **A** Ken handled it. We talked about it at
2 length, especially the night before this was going to
3 come up. We were trying to figure out some way to
4 keep out the disciplinary record if we could. We had
5 a huge enough problem as it was, the second murder
6 that they clearly were going to talk about.

7 **Q** Okay. Well, to your knowledge and based on
8 your recollection of these discussions that you had
9 with Mr. Gibson and what went on during the exchange
10 in court over this objection, was there a reason to
11 omit the confrontation clause as one of the bases for
12 the objection?

13 **A** I'm surprised as Ken was when we read the
14 appellant the decision. It seems to me that when you
15 object to hearsay, you're objecting to confrontation.
16 If it's hearsay, you're obviously not able to confront
17 the person that has made the report. I thought we
18 preserved it. I thought Ken did a fine job to
19 preserve it. I was surprised when I read the
20 appellate decision on that.

21 **Q** So your position is not that you guys -- not
22 that you omitted it, but you thought you'd include it
23 and there was no reason not to?

24 **A** We did not use the word "confrontation". We
25 did not say we object under the confrontation clause.

1 When you object as to hearsay, I don't see how it
2 doesn't implicate the confrontation clause. But
3 obviously the appellant people know better.

4 Q All right. Let's move to the prosecution's
5 closing argument. Our application identifies a few
6 items in Mr. Ariail's closing argument that we alleged
7 were improper and should have been objected to and
8 preserved for review on appeal. Here again, Mr.
9 Gibson was the one who actually did the defense
10 closing argument. In light of that, would you have
11 been listening to Mr. Ariail's argument for objections
12 or would that have been strictly something Mr. Gibson
13 ---

14 A We were both listening.

15 Q Okay. So you would have been involved in
16 formulating objections?

17 A Of course.

18 Q So the first, there have been sort of two ---
19 they break down into two sections, the items in Mr.
20 Ariail's closing argument. The first one is on page
21 1552, lines 3 through 9.

22 A Okay.

23 Q Also 1555 lines 16 to line 1 on the following
24 page on 1556.

25 A All right.

1 **Q** I won't read all of that to you. But in
2 those passages, the solicitor is -- I'm paraphrasing
3 here, -- obviously, is asserting to the jury that the
4 prosecution seeks death only rarely, that this was one
5 of the rare cases in which a determination had been
6 made that was warranted, uh, and that the prosecutor
7 wanted death penalty, he wouldn't be satisfied with
8 something less. Is that sort of a fair
9 characterization?

10 **A** Pardon me. Where is that in there?

11 **Q** Excuse me?

12 **MR. MABRY:** I'm going to object. I don't see
13 that in there.

14 **BY MR. WEYBLE:**

15 **Q** That's not in 1555, 1556? I'm sorry. 1555,
16 line 9 through 11 would be one of the statements about
17 satisfaction or dissatisfaction with anything less
18 than the death sentence.

19 **A** Okay.

20 **Q** Okay. So my question to you is pretty
21 simple, when you heard that argument, did you consider
22 that argument to be consistent or within the
23 boundaries set by the process clause or the Eighth
24 Amendment for prosecutorial argument in a capital
25 penalty phase?

1 **A** He came very close to saying that he expected
2 the jury to return a death penalty. He had already
3 made that decision. I thought it was close but I did
4 not object to it.

5 **Q** Okay. Now, if, in fact, it was over the
6 line, would there had been a reason for you not to
7 object? Did you have a strategic reason not to
8 object?

9 **A** No.

10 **Q** The second section of the testimony or the
11 argument that I wanted to discuss with you occurs on
12 1561 lines 3 through 15?

13 **A** I remember that one.

14 **Q** Okay. Well, my question to you is
15 essentially the same. I'm paraphrasing but the
16 subject matter at that point in the solicitor's
17 closing argument was that Mr. Owens, if he was given
18 life, would have an easy life in prison. My question
19 to you is whether in your judgment that was
20 permissible under South Carolina law as well as under
21 federal Constitution?

22 **A** I do not believe it was permissible but I let
23 it go in. And I let it go in for this reason, uh, it
24 appeared to me that Solicitor Ariail at that point in
25 time was reaching so much that I thought the jury

1 would think what he was saying was foolish. They
2 already heard testimony from Dr. Tom Cobb who said
3 that when he met with Freddie, he was in a cage and he
4 talked to him through a window and a door. Yes, it
5 was objectionable. Yes, I let it go in. I thought --
6 at the time, I thought Ariail looked foolish making an
7 argument like that to the jury after what they heard.

8 **Q** At the time this was occurring, were you
9 aware of the South Carolina Supreme Court's then
10 fairly recent decision in State versus Bowman? Was
11 that part of your calculation?

12 **A** I don't remember now, sir. I don't know.

13 **Q** Okay. All right. Let's turn now to the
14 mitigation part of the case. This case, of course,
15 had been tried twice by the time it came to you in the
16 penalty phase. Of course, it also had been tried
17 twice. Did that -- what affect, if any, did that fact
18 have on your approach to the case?

19 **A** Tremendous.

20 **Q** How so?

21 **A** Obviously, the elephant in the room that you
22 could never get rid of was the homicide at the jail.
23 It was going to come in. There was no possible way I
24 could keep it out. That is a bad fact case. I knew
25 what didn't work the first two times. I set about

1 trying to find some way to distinguish Freddie from
2 the first two cases to this third presentencing. I
3 wanted to try to find new facts. I wanted to find
4 something that the jury might be able to seize upon.

5 What we came upon, Dr. Tom Cobb whose office
6 is -- he teaches at Charleston Medical School. He
7 provides forensic services. Found out from talking to
8 Dr. Cobb that he, in fact, knew Freddie Owens.
9 Freddie told him that he would like to have treatment.
10 Everyone knows a lot of these folks want treatment
11 because they want drugs. Freddie said something and
12 Tom Cobb brought it out. Freddie said he would like
13 to have treatment because he did not want to get in
14 trouble. Dr. Cobb found that to be unusual because
15 that's not what people tells him when he goes in
16 there.

17 I was trying to use that as a wedge or an
18 angle somehow to say, look, this is the way Freddie
19 Owens was. This is what happened to him and his
20 family. His stepdaddy locking him out of the house,
21 making him fight, had all these bad things happen to
22 him.

23 We had this wonderful teacher that came in,
24 which I thought gave really good testimony on behalf
25 of Freddie, painting him as a young student. I wanted

1 a Greenville jury -- you know, Greenville is a very
2 conservative place. I always look at my jury panel to
3 try to figure out what I'm going to try to do to try
4 to sell them on a particular idea. Greenville being a
5 conservative place, my view was it is very strong with
6 family values. People around here get really upset
7 when family values are not followed and families
8 absolutely fall apart.

9 I wanted to use his background of what
10 happened with his family to show how it could create
11 violence in him. I wanted to use the teacher to show
12 that people out there did find some promise with
13 Freddie. We all know what Freddie did or at last what
14 the court system says he did. Then I wanted to use
15 Dr. Cobb to say this fellow is now coming and saying
16 he wants treatment so he won't get in trouble. So I
17 was trying to set up in the mitigation a Freddie Owens
18 was then as opposed to a Freddie Owens is now or in
19 the process of now. That's what my theory was.

20 The elephant in the room hurts you. There's
21 nothing I can do with the -- what happened at the
22 jail. That's what I was trying to do.

23 Q Okay. Okay. Well, let's -- Okay. You
24 covered a lot of territory there. I would like to
25 kind of back you up and then take some of this a

1 little bit incrementally. Prior to the time you were
2 appointed to represent him in February of 2006, did
3 you know Freddie Owens?

4 **A** I knew his name. I knew what happened. When
5 I say that, I did not remember that case that he went
6 for trial on. I remember what happened at the jail.
7 In my conversations with people in the community, they
8 remembered what happened at the jail. It was all over
9 the press. You know, that -- a lot of folks
10 remembered that, not just me. But that's the other
11 thing that I do. I talk with people that I know had
12 nothing do with the case and bring up a conversation
13 and ask some stuff to see what they know. I even try
14 out theories on people sometimes.

15 **Q** Okay. But you did not personally know him?

16 **A** Did not personally know him.

17 **Q** Okay. Do you recall when you met him for the
18 first time?

19 **A** No, I do not.

20 **Q** Would it did refresh your recollection to
21 take a look at your timesheet? I think it's there.
22 Let's see. This will be -- page 1, line 116, I think,
23 is the place to go for this.

24 **A** Yep. I see that I saw him on June the 19th.

25 **Q** Okay. Would that have been your first

1 meeting with him?

2 **A** I would think so.

3 **Q** Okay. That meeting occurred where?

4 **A** It could have occurred at Lieber.

5 **Q** Okay. Now, was anyone else present for that
6 meeting?

7 **A** I don't remember. I heard Ken testify that
8 he was, but I don't remember.

9 **Q** Okay. Okay. Uh, now, without revealing any
10 privileged information, can you tell us what topics
11 you might have discussed with Mr. Owens at that first
12 meeting?

13 **A** At that first meeting with Freddie or any
14 client, I try to get background information about them
15 and their family and schools, employment and records.

16 **Q** Do you recall whether or not that occurred at
17 this particular meeting with Mr. Owens?

18 **A** I do not have any present memory of my
19 conversation with Freddie on June the 19th, okay, of
20 that year, of '06. But that's what I always do at the
21 first meeting.

22 **Q** That would be in a capital or a non-capital?
23 I guess, suppose up until that time, it would have
24 been all non-capital cases, right, because that was
25 your standard practice?

1 **A** That's my standard practice.

2 **Q** Okay. Now, according to the timesheet, the
3 second meeting, your second meeting with Mr. Owens,
4 uh, occurred at Perry Correctional Institution on
5 September 7th of '06. I'm drawing that from
6 page 3, line 6.

7 **A** If it's there, I'm sure that's correct.

8 **Q** Does that sound correct to you?

9 **A** I see I visited Freddie at Perry on September
10 7, 2006.

11 **Q** All right. And the same question, if you
12 recall, without revealing privileged information what
13 the substance of that conversation might have been,
14 the topics covered.

15 **A** I do not recall.

16 **Q** Okay. Now, based on that timesheet, it
17 appears there was one other meeting before trial
18 involving you and Mr. Owens, that one would have been
19 on October 2nd, 2006, which was the original trial
20 date, in fact, before it was continued. Does that
21 sound right to you?

22 **A** That's correct. I'm sure that's correct.

23 **Q** Now, were there -- to your recollection, were
24 there any other meetings, face-to-face meetings with
25 him before trial that you would have been involved in?

1 **A** Not at the institutions.

2 **Q** You say not at the institutions, would there
3 have been some elsewhere?

4 **A** We always talked with him here at the
5 courthouse.

6 **Q** Okay. So whenever you would have to come to
7 court, you met with him there. I see. Now at some
8 point in the pretrial period, did you assemble a team
9 to help prepare the mitigation case?

10 **A** Yes.

11 **Q** Do you recall when that team -- when you set
12 about assembling that team?

13 **A** I started calling people about the middle of
14 August. It came together about the end of August, I
15 think it was.

16 **Q** The end of August. Okay. When you say it
17 came together, I wonder if it will refresh your
18 recollection a little bit if you look at page 3 line 3
19 and 4 of your timesheet.

20 **A** Yeah.

21 **Q** That's when you were interviewing members of
22 your team?

23 **A** I had already talked to some people before
24 that. That's when about the final decision was made
25 was about on that particular day or those dates. The

1 end of August.

2 Q And the final decision was made about whom at
3 that point?

4 A At that point in time, it was going to be
5 Donna Schwartz-Watts, Tora Brawley and Paige Tarr and
6 then, what's her name, Margaret -- the social
7 historian.

8 Q Marjorie Hammock?

9 A Yes.

10 Q Those were the four people who you had
11 originally selected be part of the team?

12 A Uh-huh.

13 Q Now, did you interview all of them? Your
14 timesheet has an entry for interviewing team members.
15 I don't know any more than that. Were they all
16 interviewed or was some subset of them interviewed?

17 A I know I spent a good -- I spent a while
18 talking to Dr. Schwartz-Watts in particular about the
19 neuropsychologist.

20 Q What made you go -- what made you go to Dr.
21 Schwartz-Watts in the first place?

22 A I had worked with her on numerous cases in
23 the past.

24 Q Okay. So you had some familiarity with her?

25 A A lot.

1 **Q** Okay. Okay. Now, you said you would talk
2 with her a lot about the neuropsychological aspects,
3 is that what I heard you say?

4 **A** Yeah.

5 **Q** Okay.

6 **MR. MABRY:** I think he said the
7 neuropsychologist.

8 **BY MR. WEYBLE:**

9 **Q** Okay. Okay. And that person, I assume,
10 would have been Dr. Brawley?

11 **A** That's correct.

12 **Q** All right. And so was it that Dr. Brawley
13 was chosen at the recommendation of Dr. Schwartz-
14 Watts?

15 **A** Yes, and for this reason, I wasn't really
16 happy with what I read in the transcript from the
17 previous sentencing hearing with the other doctor.

18 **Q** Okay.

19 **A** The problem I seen in these cases is that you
20 put up the sentencing mitigation, and it's more like a
21 shotgun rather than it is a cogent, logical process.
22 I discovered that Dr. Brawley and Dr. Schwartz-Watts
23 knew each other very well and worked together on other
24 cases. I thought that would be helpful in trying to
25 get a logical, cogent presentation put up.

1 I watch their faces. When a lot of these
2 experts testify, what one expert says does not fold
3 into what the other expert says. I wanted to have
4 something that would dovetail together that they could
5 hopefully understand. That was one of the big reasons
6 for using Dr. Schwartz-Watts' recommendation of Dr.
7 Brawley. Then, of course, I had some questions in my
8 mind about Dr. Evans. But, uh, -- I think was Evans.

9 Q Okay. Okay. Now, you also mentioned that
10 Paige Tarr was one of the four people that you had
11 initially selected. How did you go about identifying
12 and selecting her?

13 A I had not done a -- been involved with a
14 death penalty case in several years. I asked Donna if
15 she knew a good mitigation specialist. She told me
16 about Paige Tarr. I talked to Paige Tarr. She told
17 me that she had been trained by David. I even found
18 out, I think, that David was the godfather of her
19 children. Based upon my interview with her and what
20 Donna thought about her, I thought that would be a
21 good person to get.

22 Q Okay. And Marjorie Hammock, why was she
23 selected?

24 A I talked to Steve Sumner about Marjorie
25 Hammock. Because when I read previous transcripts, it

1 appeared to me that she did a very good job. And I
2 talked to Steve. Steve told me that he was very happy
3 with her. And that is the reason that I decided to
4 use her.

5 Q At some point, you mentioned the -- I don't
6 remember your exact language now, but you seem to
7 imply in one of your earlier responses that the team
8 was originally four.

9 A That's correct.

10 Q But it didn't end up four. There was an
11 extra one. Tell us about that. Who was that extra
12 person.

13 A The extra person became Caroline Graham. She
14 is a licensed private investigator who also was doing
15 mitigation work at the time. I discovered that Paige
16 Tarr was having some personal problems. I thought it
17 best to get somebody else just in case.

18 Q At what point did you make this discovery
19 about Ms. Tarr's personal problems?

20 A I believe about early in September. I don't
21 know how early. Early to middle September, I realized
22 there was a personal problem.

23 Q What was Paige Tarr's role on the team? What
24 were you relying upon her to do?

25 A She was to go out and get any information

1 that we didn't have. We had a good bit obviously from.
2 the two previous cases. Records don't change. I
3 wanted some additional school records. I wanted her
4 to go out and talk with family members and see if we
5 could find family members that potentially could help
6 us.

7 As far as work orders, I didn't have any work
8 orders. She was supposed to go out and fill in the
9 gaps and see if she could find some witnesses. At
10 this point in time, I don't remember whether it was
11 Paige or whether it was Caroline that discovered Dr.
12 Cobb. But that was a really good discovery.

13 Q Okay. Okay. What was Marjorie Hammock's
14 role on the team? What did you envision her bringing
15 to the presentation?

16 A She was going to be testifying as she did in
17 the first two trials. She wanted to -- she needed to
18 testify specifically about Freddie's background. I
19 was really and truly more interested in the Freddie's
20 family life and what happened to Freddie as a young
21 fellow. She had done a fine job on that and on other
22 occasions. I thought she would do a fine job with
23 that. On the whole, I am still satisfied with what
24 she did.

25 Q With what Ms. Hammock did?

1 **A** Uh-huh.

2 **Q** Before putting this team together in late
3 August or early September 2006, had you personally
4 been going out and conducting any sort of mitigation
5 investigation yourself or is that the reason you put
6 the team together to have them do it?

7 **A** What I did prior to that, I had gone through
8 and read the transcripts. We had the case files from
9 the previous two cases. I have gone through and read
10 all of that and found out what we had as far as
11 records. So up until the time that the, as you say,
12 the team was put together, at that point in time, I
13 knew what was in the case files from the previous two
14 cases and also what was in the transcripts.

15 **Q** Okay. So you weren't requesting any --

16 **A** I was not personally going out and talking to
17 anyone.

18 **Q** Okay. Or requesting any additional records
19 from sources beyond what --

20 **A** No.

21 **Q** All right. Now you mentioned that you
22 received materials from prior defense attorneys,
23 right?

24 **A** Yes.

25 **Q** That would include their mitigation

1 materials?

2 **A** I'm sorry. What?

3 **Q** That would include their mitigation
4 materials, right?

5 **A** Yes.

6 **Q** Now, I want to show you what has been marked
7 as Exhibit 2.

8 **MR. MABRY:** This is the summary?

9 **MR. WEYBLE:** Yeah.

10 **MR. MABRY:** No objection.

11 **BY MR. WEYBLE:**

12 **Q** I'm going to show you what has previously
13 been marked as Exhibit 2, chronology, see if that --
14 does that look familiar to you?

15 **A** (Reviewing). You know, I'm sure this came
16 out of the files that I allowed you to look at. It's
17 been so many years. If you are asking if I recognize
18 this now, I don't.

19 **Q** Okay. You said you are sure that that came
20 out of your file?

21 **A** I allowed you to have my entire set of files,
22 which you copied. You're telling me that this came
23 out of there and I have no reason to doubt it. I'm
24 sure that it was there.

25 **MR. WEYBLE:** I am not sure if that's a

1 sufficient foundation, but we would move to admit
2 that document.

3 MR. MABRY: No objection.

4 THE COURT: Okay.

5 (WHEREUPON, Applicant's Exhibit Number 2 is
6 admitted into the record.)

7 BY MR. WEYBLE:

8 Q All right. Just hold on to that for a minute
9 in case we need to refer to it. Now, in addition to
10 that, I think I already know what your answer is going
11 to be, but you received other materials from prior
12 counsel?

13 A My understanding was that we got a -- the
14 complete case file from all four previous attorneys.
15 So I believe that we had -- everything that they had
16 was turned over to us.

17 Q Now, did that, in turn, at least the portions
18 of it that you deemed to be useful, in turn, become
19 part of the file that you created or maintained as
20 well?

21 A The file that you personally looked at, that
22 I took to your office and gave to you, is everything
23 that I received except for one box of transcripts,
24 which you said you all didn't need.

25 Q Okay. The file that you provided to us, did

1 that also include Mr. Gibson's file?

2 **A** I don't know. Honestly, I don't know the
3 answer to that.

4 **Q** It certainly included your entire file.
5 Correct? Would it be fair to say that if they were
6 records -- if records pertaining to Mr. Owens'
7 background were not in the file that you provided to
8 us, that meant they were not in -- they have never
9 been in your file and you didn't have them?

10 **A** Most likely.

11 **Q** Okay. Now, you touched on this earlier. I'd
12 like to return to this a little bit. Once the
13 mitigation team -- I know I keep referring to it as a
14 team -- was in place around mid-September of 2006, did
15 you direct them to focus their work in any particular
16 area or on any particular issue?

17 **A** I had talked with Donna Schwartz-Watts about
18 the fact that I wanted to use information from Dr.
19 Cobb, something that the jury hasn't heard before
20 about Freddie Owens, that he has recognized that he
21 needed help to stay out of trouble. I think everybody
22 on that team knew that I really wanted to beat to
23 death the idea that Freddie had a very miserable
24 family life which had a major impact upon him and his
25 violence. I wanted to use that as much as I could.

1 Where it broke down a little bit for me was
2 that Dr. Cobb did not always go to give the treatment
3 or sessions himself. The problem with that is that
4 Dr. Cobb -- the psychiatrists in training, the
5 interns, they would go sometimes and talk with Freddie
6 Owens. It would have been stronger, obviously, for me
7 if it had been Dr. Cobb each and every time, but it
8 wasn't.

9 I was trying to focus this thing -- after I
10 discovered Dr. Cobb, I was trying to focus this thing
11 so that people could say yeah, that's terrible, yeah,
12 he did that but he's trying to do better. He's
13 seeking help. So, yeah, I was focusing people trying
14 to get them to do that. Whether I succeeded or not,
15 who knows.

16 Q Okay. Uh, in addition to that area, that
17 area of focus that you just described, did you direct
18 that anyone conduct any additional investigation of
19 Mr. Owens' experiences as a juvenile in the Department
20 of Juvenile Justice as part of this picture that you
21 said you wanted to paint of his difficult background
22 leading up to this?

23 A We were clearly looking at that. Dr.
24 Schwartz-Watts had his DJJ records. Freddie was at
25 DJJ at a time when DJJ in Columbia was a mess. There

1 was a federal lawsuit filed by Gaston Ferry on behalf
2 of Protection and Advocacy Services against them.
3 There was oversight by the federal court for a good
4 while. And I discovered -- and I don't remember from
5 whence this information came. I remember that we
6 found out that Dr. Lillian Tidler, who was a
7 board-certified forensic juvenile psychiatrist, was
8 employed there at the time. I wanted Dr. Tidler to be
9 contacted to see if she remembered anything about
10 Freddie Owens. Dr. Tidler had left Columbia and from
11 what we found out was living somewhere in Virginia, I
12 think. We had not located her.

13 Donna Schwartz-Watts went to a medical
14 convention that, I think, was in Chicago, Illinois.
15 And at that convention, she ran across Lillian Tidler.
16 She talked to Lillian Tidler about Freddie Owens. I
17 don't remember what was said in total. I know we did
18 not ever call Dr. Lillian Tidler. Right now, I do not
19 remember why. I am assuming it's because she did not
20 remember Freddie. But, yeah, we looked at that.

21 Sort of had a two-edge sword on it from my
22 standpoint. I really wanted to beat to death the idea
23 that his family life and environment led him to where
24 he was. I wasn't particularly happy with the reason
25 why he was in DJJ. And, uh, I was concerned about how

1. it would play out with an upstate jury. A lot of
2. folks around here think if you -- he is there because
3. he did something. Of course, I didn't like the charge
4. that he went down there on. The short answer is no, I
5. did not use any of the DJJ material directly. Donna
6. Schwartz-Watts was -- knew about the disciplinary
7. records stuff from DJJ. And, of course, he got
8. switched over to the adult prison before it was over,
9. I think.

10. **Q** Right. So now, aside from, you mentioned Dr.
11. Watts knew about the DJJ records, have you looked at
12. the DJJ records as well? Did you review those?

13. **A** I looked at them. Yes, I did.

14. **Q** Okay. Aside from what was in the records
15. produced by DJJ, did you commission any additional
16. investigation about Mr. Owens' actual experiences
17. during his time in DJJ or were you sort of satisfied
18. with what you had seen in the records?

19. **A** I don't remember now whether we tried to find
20. a social worker or someone at DJJ that knew Freddie at
21. the time or not. I don't remember. I know that I was
22. concerned about the DJJ information because it helped
23. in a way in my view and didn't help in a way. The
24. theory that I was trying to go on was the family got
25. him to where he was. Now he's trying to do better.

1 And he was at DJJ for a gun charge. I'm not sure -- I
2 didn't see enough good to use that. Okay.

3 Q Okay.

4 A So if I'm wrong, I'm wrong.

5 Q Okay. Well, had you personally talked with
6 him about his experiences during that period when he
7 was in DJJ?

8 A No.

9 Q Okay. And did you receive any reports from
10 anyone else who had talked to him about that period in
11 terms of what his individual experience --

12 A Written reports, I'm sure I didn't. If there
13 were any verbal reports, I don't remember.

14 Q Okay.

15 A It's been so long ago.

16 Q Now, there was an order entered by Judge
17 Patterson on June 1st, 2006 setting the trial date for
18 October 2nd of 2006, did there come a point when you
19 requested a continuance of that trial date?

20 A There was, yes.

21 Q And whose idea was it to get the continuance?

22 A Donna Schwartz-Watts.

23 Q Donna Schwartz-Watts. And the reason for
24 that?

25 A She wanted to see Freddie Owens one more

1 time.

2 Q Okay. And in fact, --

3 MR. MABRY: No objection.

4 BY MR. WEYBLE:

5 Q I want to show you what's been marked as
6 Exhibit 3 in which I believe is a September 20th
7 e-mail from Dr. Watts to you. Do you remember that?

8 A Sure do.

9 Q Is it as I have described it?

10 A You described as an e-mail from Donna, Dr.
11 Schwartz-Watts to me?

12 Q Yes.

13 A That is correct.

14 Q Does it appear to be an accurate copy of the
15 e-mail that Dr. Schwartz-Watts sent you?

16 A Sure.

17 MR. WEYBLE: Your Honor, I would move to
18 admit that document.

19 MR. MABRY: No objection.

20 THE COURT: Okay.

21 (WHEREUPON, Applicant's Exhibit 3 is admitted into
22 the record.)

23 BY MR. WEYBLE:

24 Q Okay. Now, I think, uh, one of us already
25 indicated that that came on September 20th, 2006,

1 right?

2 **A** September 20, 2006 is the date.

3 **Q** Okay. And you touched on this a little bit,
4 but I'd like to make sure we cover it sufficiently.

5 Why was the continuance necessary?

6 **A** Donna Schwartz-Watts told me that she wanted
7 meet with Freddie Owens one more time at her office.

8 **Q** Okay. Now the record indicates that the
9 continuance was granted and you all end up getting, I
10 believe it worked out to five additional weeks. A new
11 trial date set for November 6th, 2006. Now, as that
12 date got closer, did your final strategy for the
13 trial, uh, began to coalesce, I suppose you can say?

14 **A** What we did, our three primary experts lived
15 in Columbia. I got with everybody and suggested that
16 we all meet on Saturday morning and Donna Schwartz-
17 Watts allowed us to use her home. We went to Donna
18 Schwartz-Watts' home and we met with the experts. Dr.
19 Cobb did not come.

20 **Q** Now, you said Saturday morning?

21 **A** I believe it was a Saturday.

22 **Q** You remember which Saturday morning this was?

23 **A** No.

24 **Q** I think you still got your timesheet there?

25 **A** I just remember it was a Saturday morning.

1 Q You might want to, uh, you might refresh your
2 recollection from your timesheet. I'd direct you to a
3 spot, but I don't see it in my notes right now.

4 A Maybe November 2 of 2006, page 6.

5 Q November 2 or November 3? At any rate, we
6 can easily check the calendar to determine which one
7 it was.

8 A Actually, well unless I was dyslexic when I
9 did the timesheet, I put down November 2.

10 Q Okay.

11 A The 3rd was a Saturday. It would have been a
12 Saturday. Whatever the Saturday was. It was not
13 during a work week. It was during a Saturday morning.

14 Q Now, I think you mentioned that Dr. Cobb was
15 not there.

16 A Correct.

17 Q Who else was there?

18 A Everybody. Everybody other than Dr. Cobb.
19 Paige Tarr, Caroline Graham, Dr. Donna Schwartz-Watts;
20 Dr. Tora Brawley and, uh, her social historian.

21 Q Marjorie Hammock?

22 A Yes.

23 Q Okay. Now you mentioned this earlier, I
24 think, but was it part of your, the package that you
25 intended to present to the jury to conclude a

1 description of Mr. Owens' background from his small
2 childhood through essentially to the --

3 **A** That's done in every case. It's expected to
4 be done in every case. What I wanted to bring out
5 boldly was what happened to him as a young fella when
6 the sort of, like, stepdaddy came around and locked
7 them out.

8 **Q** Which -- who is the witness or was there more
9 than one witness through whom you planned to present
10 that information?

11 **A** It's primarily going to come in through the
12 social historian.

13 **Q** Marjorie Hammock?

14 **A** Yes.

15 **Q** Now, in the final weeks and days leading up
16 to November 6th start of trial, were you comfortable
17 with Ms. Hammock's level of effort in the case or
18 preparation for the trial?

19 **A** Comfortable? No. I found her difficult to
20 reach by phone. I found that she expected other team
21 members to do things for her that I would expect that
22 she would do for herself, like having preparation of
23 the genogram. My comfort level with her was quite
24 low.

25 The only thing that made me feel better was

1 that I knew what Steve Sumner had told me about how
2 she testified. I knew how she testified in the other
3 trials. She was really with it on that Saturday
4 morning. So I've got -- I'm schizophrenic about her.
5 My comfort level was not the greatest in the world.
6 That's very true.

7 Q Okay. Now, in fact, let me show you what has
8 been marked as Exhibit 4 and ask if you recognize
9 that?

10 A (Reviewing.) Yep, look like e-mails.

11 Q Just to put a finer point on that, it is a
12 four-page document containing a series of e-mails
13 between you and Paige Tarr over the course of October
14 11th and 12th?

15 A Sure do.

16 Q And does it appear to be an accurate copy --

17 A Yes.

18 Q --- of those e-mails?

19 MR. WEYBLE: All right. Your Honor, we would
20 move to admit that document.

21 MR. MABRY: No objection.

22 THE COURT: Without objection.

23 (WHEREUPON, Applicant's Exhibit 4 is admitted into
24 the record.)

25 BY MR. WEYBLE:

1 Q Okay. Now, in those e-mails, in particular,
2 I would like to direct your attention to the bottom
3 of, I believe, it's the first page, page 1, onto the
4 next page. Did you express some concerns to Ms. Tarr
5 about Ms. Hammock's ---

6 A Yes, I did.

7 Q --- performance? And at some point, were you
8 considering replacing Ms. Hammock with someone else as
9 a result of those concerns?

10 A It had been mentioned to me by other people.
11 I did consider it, but not for very long. So, the
12 answer is yes. I did consider it, but it was not for
13 very long.

14 Q Okay. And in the end, she was not replaced.
15 Of course, she testified.

16 A That is correct.

17 Q Around this time as well, were you also --
18 you mentioned some of this earlier -- having some
19 concerns about the performance and reliability of Ms.
20 Tarr herself?

21 A Yeah, she was -- her personal problems were
22 having an impact on her ability to do her job.

23 Q And so, I think you mentioned earlier that
24 part of her job was to be going out and filling in the
25 holes, I think is what you said. Was she fulfilling

1 that function?

2 **A** I believe that she was in large part. She
3 made some silly mistakes. Like, during the trial, I
4 had school records that Solicitor Ariail wanted a copy
5 of. I asked Paige to bring them up to me. She drove
6 up from Columbia and handed me an envelope over the
7 bar and left. And when I looked in envelope, it
8 wasn't the school records. It was just a silly
9 accident that she didn't -- she wasn't always focused,
10 but the girl was going through a lot.

11 **Q** Uh-huh. Now did she -- you know who else in
12 terms of family members or others who may have been
13 familiar with Mr. Owens background or history that she
14 interviewed, if any?

15 **A** I do not remember now who it is that she
16 interviewed. I know that she came up and met with Ken
17 and I on a Saturday morning. I believe it was a
18 Saturday morning. Had to have been a Saturday
19 morning. She left after talking with Ken and me to go
20 talk to some family members.

21 **Q** Do you know whether she succeeded in talking
22 to those family members?

23 **A** Right now, I don't remember the outcome of
24 that. I believe Caroline Graham also may have talked
25 to some family members. But it's so long ago now that

1 I can't tell you how I know what I think I know.

2 Q Okay. Now at trial, the actual trial, Ms.
3 Hammock's testimony, her direct examination was
4 conducted by Mr. Gibson?

5 A Right.

6 Q The best of your recollection, was there
7 a particular reason why Mr. Gibson got that assignment
8 instead of you?

9 A No.

10 Q Now, since he was the person who did the
11 direct examination, was he also the person who chose
12 the topics? Did he outline the direct examination or
13 was that something you would have done instead?

14 A Let's go back to what I previously testified
15 to. We met at Donna Schwartz-Watts' house. We sat
16 down there and tried to come up with a common plan and
17 a common theme and a broad outline of the questions
18 that need to be asked, particularly that went along
19 with a theory, along with the usual stuff that you
20 always put in there. So, you know, there was a plan.
21 That was the whole purpose of that extended meeting at
22 Dr. Schwartz-Watts' house.

23 So, you know, are you saying did Ken come up
24 with the questions on his own? No, he didn't. There
25 was a combination. It was effort, not just with Paige

1 Tarr, Caroline Graham, Ken and me, but also with, uh,
2 Dr. Schwartz-Watts, Tora Brawley and --

3 **Q** Okay. That's in terms of the big plan. I
4 think what my question is directed at is the actual,
5 uh, the details, I suppose, of trying to figure out
6 how decisions were made or how particular details
7 about Mr. Owens' background were determined to be
8 something that should be included in the direct
9 examination or left out of the direct examination,
10 whether you had any role in that or whether that was
11 done by others?

12 **MR. MABRY:** I object. I think he answered
13 that question. It's been asked and answered.

14 **THE COURT:** Well, go ahead and answer it.

15 **THE WITNESS:** You know, what we wanted to do
16 and what I told everybody I wanted them to do was
17 to go over in great detail the family history of
18 Freddie Owens and what happened to him. As far
19 as putting things in and leaving them out, uh, I
20 don't recall now if I had a conscious decision to
21 leave out the DJJ information. I may have
22 because I did not like the reason he was there.
23 And, uh, I had the elephant in the room already.

24 **BY MR. WEYBLE:**

25 **Q** By the DJJ information, you mean the

1 information that was available from the DJJ records?

2 **A** That is correct.

3 **Q** Okay. Now I think you also just testified,
4 and please correct me if I'm wrong, that you wanted a
5 detailed presentation of Mr. Owens' background, right?
6 That's what you were aiming for at trial; is that
7 correct?

8 **A** I wanted his background brought out and I
9 wanted in particular the problems he had, especially
10 like being locked out of the house and being forced to
11 fight. I wanted that clearly before the jury. I
12 wanted the jury to be incensed about the fact that a
13 young fellow could be treated that way. If a young
14 fellow is treated that way, maybe they can understand
15 why a little older fellow would get into some major
16 problems. And then maybe they could understand that
17 when he got a little older, he said, "Help me. I don't
18 want to get in trouble."

19 **Q** So I think you've already testified to this.
20 Forgive me if I'm taking you over ground you already
21 recovered. The primary witness through whom that
22 information was going to be bought out was Marjorie
23 Hammock?

24 **A** That's correct.

25 **Q** Now, as her testimony actually unfolded at

1 trial, uh, were you satisfied with the level of detail
2 that she provided? Was it consistent with what you
3 were aiming for?

4 **A** It was consistent with what I was aiming for.
5 I thought she did a relatively good job. Everything
6 was covered. Uh, it wasn't covered in as many words
7 as it was in the previous two trials, but it was
8 covered. The primary thing that I really wanted to
9 cover and I thought she did it very well.

10 **Q** All right. Now, if additional information
11 had been available through her perhaps to present a
12 fuller picture, a more detailed picture of Mr. Owens'
13 background, would there have been a reason for you not
14 to use it?

15 **A** No, but I didn't know of any fuller
16 information that I wanted to use.

17 **Q** Uh, --

18 **A** As far as I know -- go ahead.

19 **Q** I'm sorry. If it had been possible for you to
20 perhaps present a fuller picture of Mr. Owens' time at
21 the Department of Juvenile Justice based not strictly
22 on his records but on his personal experiences there,
23 would you have considered using that information?

24 **A** I would have considered it. I don't know
25 that I would have. The DJJ stuff is a tricky

1 situation. And whether it would or would not have
2 helped, I think, is an open question. If leaving it
3 out was an error, then I made an error.

4 Q Again, we're talking about information that
5 really -- I think what you have testified to is you
6 did not have it anyway. It would be asking you to
7 speculate if I were asking you to say would you have
8 used this.

9 A I did have a live person who could testify as
10 to the Freddie Owens' stay at the Department of
11 Juvenile Justice. I could have had a live person to
12 talk about the general state of DJJ while he was there
13 but I don't think that would be particularly relevant.
14 It may have hurt us more than help us. When Dr.
15 Tidler did not work out, I don't know of anybody else
16 that we could have called. And I do believe that we
17 looked, if memory serves. Honestly, I don't remember.

18 If there is a live person down there, whether
19 they are with them now or not, if they talked about
20 Freddie Owens when he was there and, in particular,
21 about his alleged treatment while he was there, then
22 it may well have helped. If you talked about general
23 stuff at DJJ, I'm not sure it would've helped us.

24 MR. WEYBLE: Okay. Your Honor, if I could
25 just have minute. (Pause.)

1 That's all I have.

2 **THE COURT:** All right. I guess we ought to
3 break for lunch. How long do y'all need? An
4 hour?

5 **MR. WEYBLE:** That should be fine for us.
6 Thank you.

7 **THE COURT:** Okay. Two o'clock.

8 Mr. Godfrey, you can go eat too. Don't talk
9 about the case though.

10 (WHEREUPON, a recess is taken from approximately
11 1:00 p.m. until 2:18 p.m.)

12 **THE COURT:** Ready?

13 **MR. MABRY:** The State's ready, Your Honor.

14 **THE COURT:** Okay.

15 **CROSS-EXAMINATION**

16 **BY MR. MABRY:**

17 **Q** Mr. Godfrey, I'd like to start with -- am I
18 talking loud enough?

19 **A** Yes, sir.

20 **Q** Okay. Start with a little background. You
21 were appointed first chair counsel in this case; is
22 that correct?

23 **A** That's correct.

24 **Q** How long have you been practicing at this
25 time?

1 **A** Over 20 years.

2 **Q** All right. That's primarily criminal
3 defense?

4 **A** 98 percent of what I've done my entire career
5 has been criminal defense.

6 **Q** Okay. In this case, you were appointed to
7 represent Mr. Owens in what would be his third
8 sentencing proceeding. And he had already
9 been convicted of murder, the murder of Irene Graves,
10 previously which was not overturned; is that correct?

11 **A** That is correct.

12 **Q** So going into the case, you knew that the
13 jury was going to be told that Mr. Owens had already
14 been convicted of murder and that was not a decision
15 for the jury to make?

16 **A** Correct.

17 **Q** So your preparation in this case, as I
18 understand it, is to present some kind of mitigation
19 theory or evidence in Mr. Owens' behalf?

20 **A** Yes.

21 **Q** Was there ever any question in your mind
22 whether the state was going to be able to prove the
23 aggravating circumstances that they alleged?

24 **A** No.

25 **Q** Why is that?

1 **A** They proved the aggravating circumstances
2 twice before. Looking at the facts of the case, I
3 would be surprised if a jury would not find an
4 aggravating circumstance.

5 **Q** The video that was shown for the jury, does
6 it -- in your mind, does it clearly portray an armed
7 robbery of the store during which Ms. Graves was
8 murdered?

9 **A** Yes.

10 **Q** There was testimony in the record that money
11 was actually taken from the cash register or missing
12 from the cash register?

13 **A** Yes.

14 **Q** Okay. And what, uh, -- let me ask you first.
15 I'm just going to kind of go through the grounds.
16 Okay. The first ground they allege is that you should
17 have objected to the solicitor or similar instructions
18 by the Court, being Judge Patterson, that the State
19 only seek the death penalty where aggravating
20 circumstances are present. Did you see anything
21 improper about the statements, those statements that
22 were made to the jury?

23 **A** No.

24 **Q** Is it typical or is it your understanding
25 typical in the capital case that the jury is at some

1 point in time explained the difference between a non-
2 capital and a capital murder?

3 **A** Yes.

4 **Q** Did you believe there was any suggestion to
5 the jury in this case that the aggravating
6 circumstances had already been found?

7 **A** No.

8 **Q** Were they instructed numerous times that the
9 State had to prove the aggravating circumstance beyond
10 a reasonable doubt?

11 **A** Yes. In fact, I thought Judge Patterson did
12 a -- from the time we were questioning the jury all
13 the way through, I thought he did an excellent job
14 keeping that out in front of the jury and explaining
15 it correctly.

16 **Q** Juror Abels was the juror that they were
17 questioning you about. Do you remember that juror?

18 **A** That's the lady that said she had talked to
19 her pastor.

20 **Q** Right.

21 **A** Yes.

22 **Q** Are you familiar with the case of State
23 versus Gilbert?

24 **A** Not anymore.

25 **Q** Were you familiar at the time of this trial?

1 **A** Yes.

2 **Q** What is your understanding of the holding in
3 State versus Gilbert?

4 **A** If you seek outside advice, like from a
5 pastor, then you're disqualified.

6 **Q** Okay. And do you remember Ms. Abels giving
7 other testimony in this case? In addition to the fact
8 that she went and talked to her pastor about the death
9 penalty, do you remember her stating that she was a
10 Type 2 juror?

11 **A** You know for some -- no. But if it is in the
12 record.

13 **Q** Let's go to page 526 of the record. I'm
14 talking about the big black numbers.

15 **A** What line?

16 **Q** 526 starting with line 6. Well, starting
17 with line 3. Judge Patterson said, and you have had a
18 chance to review the three types of jurors, that
19 document that you had in the other courtroom. Her
20 answer was, yes, sir. He said if you had to classify
21 yourself as a juror in regard to these three types,
22 which type would you classify yourself on. And was
23 her response, I would classify myself as a juror
24 number two?

25 **A** That's what it says.

1 Q Then she was asked again, number two. Her
2 answer was?

3 A Yes.

4 Q Then was she also asked, uh, Ms. Abels,
5 although the guilt of the defendant had been
6 determined, and that's true, Mr. Owens had been
7 convicted of murder, this is just a sentencing
8 proceeding. You couldn't, under no circumstances,
9 ever give the death penalty. And what was her answer?

10 A I don't believe so.

11 Q Did you see any way after hearing her
12 testimony about what type of juror she was, whether
13 she could sentence someone to death, and the fact that
14 she had gone to her pastor and talked about the death
15 penalty, did you see any way that you could
16 rehabilitate her and get her qualified?

17 A No. Especially since she went to her pastor,
18 if she had by some remarkable circumstance ended up on
19 the jury, and then if the jury had voted unanimously
20 for death, I think it would have put her in a very
21 strange moral situation in her church and with her
22 pastor. I didn't see any way that that juror could be
23 rehabilitated.

24 Q All right. Do you remember Ms. Abels also
25 testifying that she couldn't -- and I'm looking at

1 page 528. I don't believe that I could do it, you
2 know, and just be able to go forward with my life and
3 then, and then I just don't think that I could do it
4 and live. Okay. It's just too deep within me.

5 **A** I know the words are in the transcript. I
6 don't remember her saying that. What I remember is
7 the way she presented herself, she appeared to be
8 totally 100 percent sincere.

9 **Q** Okay. And you didn't see any reason to
10 question her any further?

11 **A** No.

12 **Q** The next ground is failure to request a
13 proper instruction from the court or object to the
14 crime scene video. Do you know of any objection you
15 could have made at the time the video was offered into
16 evidence?

17 **A** No, I do not.

18 **Q** Did -- to your knowledge, was there any
19 problem with the chain of custody or had anybody
20 changed or altered what was in the video so that you
21 could?

22 **A** No.

23 **Q** As far as you know, did it fairly and
24 accurately represent what the cameras captured inside
25 the Speedway when Ms. Graves was killed?

1 **A** Yes.

2 **Q** And do you know of any way you could have
3 gotten Judge Patterson to instruct the jury who was
4 who in the videotape?

5 **A** That's commenting on the facts. He could not
6 do that.

7 **Q** All right. The next -- are you also aware
8 that there is testimony in the record regarding or
9 during the preceding that you handled, there was
10 testimony from Officer Belue about the person in front
11 of the counter wearing a homemade stocking mask and
12 the person behind the counter wearing a ski mask?

13 **A** Yes, I know Larry Belue testified to that.

14 **Q** All right. Are you also aware that Mr. Vance
15 testified that Mr. Owens had the ski mask and Mr.
16 Golden had the homemade pantyhose or stocking mask?

17 **A** Yes.

18 **Q** Do you know of any false impression the state
19 left with the jury regarding who was who in the
20 videotape?

21 **A** No.

22 **Q** Now, uh, Officer Wood testified in the
23 penalty phase. Are you aware that in the penalty phase
24 the state can introduce evidence of the defendant's
25 character?

1 **A** Yes.

2 **Q** And did Officer Wood testify to numerous
3 statements of Mr. Owens that reflected on Mr. Owens'
4 character?

5 **A** Yes.

6 **Q** Officer Wood also testified that Mr. Owens'
7 statements to him at that time that they were made to
8 him gave him cold chills, do you remember that?

9 **A** I remember that very well.

10 **Q** All right. And I believe you were the
11 attorney who was going to cross-examine Mr. Wood?

12 **A** Correct.

13 **Q** Can you tell us why you did not object to
14 that statement?

15 **A** I didn't see it coming. When Bob asked the
16 -- when Solicitor Ariail asked the question that he
17 asked, it piqued my interest, but I did not see coming
18 what was going to come. When Joe Woods said what he
19 said, I could have objected and I could move to
20 shrike. I guess potentially it could've been
21 sustained, but I would have brought attention to it.
22 Where I missed it, if I missed it at all, was not
23 objecting to the question of Solicitor Ariail, not the
24 answer of Joe Wood.

25 **Q** Okay. And, uh, would it have been proper for

1 Investigator Wood to have testified whether Mr. Owens
2 made these statements in a bragging fashion or in a
3 serious fashion?

4 **A** I think he can testify as to how the
5 statements were made based upon the demeanor of the
6 person in front of them.

7 **Q** Whether he took him serious?

8 **A** Yes.

9 **Q** Would you agree that the statement Mr. Owens
10 gave him cold chills when he made those statements,
11 would be a way of testifying whether Mr. Owens made
12 the statement seriously or not?

13 **A** That's speculation on -- possibly.

14 **Q** Okay. Do you think that testimony by Mr.
15 Wood had any effect on the resulting sentence in the
16 case?

17 **A** Again, that's pure speculation.

18 **Q** Okay.

19 **A** I think what put the jury over the edge was
20 the incident at the jail.

21 **Q** All right. Let me ask you about that. When
22 you were assigned to this case, this case had already
23 been tried twice, correct?

24 **A** Correct.

25 **Q** In the first case, the information about Mr.

1 Owens' murder of Christopher Lee came in before that
2 jury?

3 A And shouldn't have.

4 Q And they sent it back because the defense
5 attorneys didn't have time to investigate his
6 confession?

7 A Correct.

8 Q The second time around in front of Judge
9 Kittredge, the testimony was offered in the penalty
10 phase and it came in once again; is that correct?

11 A Correct.

12 Q Based on the decisions from the Supreme Court
13 involving those two cases, did you see any way that
14 y'all could keep out the incident at the Greenville
15 County Jail where Mr. Lee was murdered?

16 A No. I looked at a bunch of cases and our
17 Supreme Court had already ruled. I looked at -- no,
18 there's nothing else out there.

19 Q Are you familiar with another case, State
20 versus Evans out of Spartanburg County where there was
21 a murder in the park in which the defendant had not
22 been convicted but it was admitted in the penalty
23 phase?

24 A Right now, no.

25 Q Okay. All right. What problems did that

1 cause for you and Mr. Gibson in this case, that second
2 homicide coming in?

3 **A** The second homicide is truly the elephant in
4 the room. The facts of that case are bad, I mean,
5 from top to bottom, when it occurred and how it
6 occurred and what Freddie Owens did the next morning
7 at breakfast following through with the confession.
8 That is a huge problem in this case. If that incident
9 at the jail could have been kept out, we may have had
10 a different result. In fact, there may have been a
11 different result the first two times. That incident
12 at the jail is hugely prejudicial. I don't know a way
13 to get around it.

14 **Q** Okay. This was also probative of Mr. Owens'
15 character as well, right?

16 **A** It would be, yes.

17 **Q** Okay.

18 **A** And, of course, that's the reason I was
19 trying to find something that I could point to
20 recently which showed a change in Mr. Owens. And
21 thanks to Dr. Cobb, at least we had something. Maybe
22 it wasn't a whole lot, but it was something.

23 **Q** Since we're on that subject, what caused Mr.
24 Owens to attack Mr. Lee at the Greenville County
25 Detention Center from your recollection of the record?

1 **A** Mr. Lee was taunting Freddie Owens.

2 **Q** Verbally taunting him?

3 **A** Verbally taunting him.

4 **Q** And that was about being convicted of the --

5 **A** Yeah, that he knew that he was going to be
6 convicted, that he had a relative on the jury.

7 **Q** Okay.

8 **A** And Freddie Owens, based on everything that
9 I've seen in all the files and all the talks that I've
10 had with the psychologists and psychiatrists, if you
11 treat Freddie with respect and you tell him the truth,
12 there is no problem. If Freddie feels like he's been
13 disrespected, then it seems that sometimes there is a
14 problem. For the jail to put him back in a pod with
15 general population after being found guilty of murder
16 under these circumstances was incredibly stupid. And
17 then to have somebody in there taunting him, it's a
18 terrible situation, terrible facts.

19 **Q** There was no evidence that Mr. Lee had tried
20 to attack Mr. Owens physically?

21 **A** None.

22 **Q** Was a taunting of his being convicted and
23 having to go to Perry Correctional?

24 **A** Yes.

25 **Q** Not only did Mr. Owens punch and knockout Mr.

1 Lee, but he continued to assault Mr. Lee in other
2 ways; is that correct? Numerous ways.

3 **A** The facts are ugly.

4 **Q** Okay. The next ground is a ground regarding
5 victim impact testimony. Do you know of any objection
6 that you could've made to keep out the statements that
7 the children made and their reaction when Ms. Christie
8 told them that their mother had been killed?

9 **A** I do not.

10 **Q** Did you see the testimony that the question
11 about, that was asked of her by the solicitor about
12 this case, her relating to the jury this is the only
13 death notification that she ever made, did you see
14 that as objectionable?

15 **A** I did not. Perhaps I am wrong about that,
16 but I did not.

17 **Q** The next ground deals with the disciplinary
18 infractions. I think you covered that fairly well.
19 Are you familiar with the court decisions, though
20 subsequent or around the same time as this case was on
21 appeal, that records that are admitted under the
22 business records exception do not implicate the
23 confrontation clause?

24 **A** I understand what it says. Okay.

25 **Q** Yes, sir.

1 **A** The problem that I have with it, when you
2 start talking about prison records, where is the
3 business record and where is the hearsay? If somebody
4 has the duty to report, that's a business record. I
5 don't see any way around it. If somebody doesn't have
6 the duty to report, then I say it is not a business
7 record.

8 **Q** Didn't Judge Patterson limit the
9 admissibility to those reports that the officer had a
10 duty to report, those instances?

11 **A** That is what happened.

12 **Q** Okay. And even he limited it just to short
13 summary of what occurred?

14 **A** Correct. And we got rid of their doggone
15 PowerPoint display.

16 **Q** The state was going to introduce a PowerPoint
17 display, I believe, breaking it down by violent
18 crimes, property crimes and something else?

19 **A** Yeah. It was -- it would have been a
20 devastating PowerPoint the way they had it set up. We
21 got rid of that and I was very happy about that.

22 **Q** I go back to the question I had, were you
23 aware of decisions that have come down that said --
24 that have said or ruled that once evidence is admitted
25 under a business records exception that it doesn't

1 violate the confrontation clause?

2 **A** Yes.

3 **Q** Okay. On ground five, it is alleged that,
4 uh, I will go over what is stated in the ground, that
5 y'all didn't have Ms. Hammock testify in as much
6 detail as the first time. If you would, tell us about
7 that. Was that by design?

8 **A** What I told everybody and what we discussed
9 on that day we met down at Donna Schwartz-Watts'
10 house, I wanted to have a coach, logical presentation
11 from everybody. I was particularly interested in the
12 family history and abuse that Freddie Owens had
13 suffered, particularly interested in the teacher and
14 particularly interested in Dr. Cobb and what he had to
15 say. Obviously, the rest of it is also important and
16 needs to be brought out.

17 I was never comfortable with Marjorie
18 Hammock. But I thought that when she testified that
19 she did a good job. I thought she did what we needed
20 to have done. Did I sweat bullets during the
21 testimony? Yes, I did.

22 **Q** Did you what?

23 **A** Sweat bullets. And I did.

24 **Q** Oh, okay.

25 **A** She gave me some concern. Now, that Saturday

1 morning, she talked very well.

2 Q Okay.

3 A She was with it, and she knew what she was
4 doing. But I was uneasy with her.

5 Q Okay. Even though she testified in two
6 previous trials on Mr. Owens' behalf?

7 A She knew the case. She knew the facts. She
8 knew the history. She had done it before and she had
9 done it well, I thought. This time, I think she did
10 it well.

11 Q What about Dr. Jim Evans? Why did you not
12 call him or choose to call him in the third
13 sentencing? He had been used in the second
14 sentencing.

15 A Yeah, I know. Part of it was the fact that I
16 wanted to have somebody that I thought would more
17 easily dovetail in with Donna Schwartz-Watts and what
18 Donna Schwartz-Watts had to say. I wanted the experts
19 to come in -- I wanted everything to link up. That's
20 the number one reason.

21 The number two reason, I knew from talking to
22 Donna that she and Dr. Brawley were friends and had
23 worked together on other cases. I didn't have any
24 reason to believe there would be any problem. As far
25 as Dr. Evans is concerned, I guess the biggest thing

1 that concerned me about the testimony in the second
2 sentencing, he had done a test and it was machine
3 read. He sent it to, uh, --

4 Q He did a test while Mr. Owens was on death
5 row?

6 A I believe that is correct.

7 Q Okay.

8 A He sent the test out west, like to
9 California, and had a diagnosis of it. I didn't think
10 that that would play in front of a local jury. I
11 think that most people in this area -- when I'm trying
12 to figure out what a jury is going to believe, I think
13 most juries think that there are a lot of doctors
14 around here and there are a lot of specialists around
15 here and you would not need to go out of state to get
16 a diagnosis if it was legitimate. That concerned me.
17 And then the fact that Solicitor Ariail had heard the
18 testimony before.

19 Q Dr. Evans' testimony?

20 A Right.

21 Q Okay.

22 A Which means that Ariail, more than likely
23 Betty Strom, had done some research on it. I think
24 there is a perhaps legitimate question about whether
25 or not the specialty that Dr. Evans had would normally

1 use that type of information in rendering their
2 opinion.

3 Q Talking about the QEEG that he ran?

4 A Yes.

5 Q Are you aware of any papers or studies or
6 even cases that have held that that QEEG analysis is
7 not generally recognized in the neuropsychological
8 community?

9 A I did not go that far. I just decided I
10 wasn't going to use Dr. Evans. Knowing Steve Sumner
11 and Alex Kinlaw, I believe that if they could have had
12 a local doctor look at that and come up with a
13 diagnosis, then they would have. It just struck me as
14 odd that you are going way out of state to get a
15 diagnosis. Our problems were bad enough as they were
16 trying to get around the facts that we had been given.
17 I did not want to give the jury a phantom issue of the
18 defense trying to throw smoke and mirrors at them by
19 having some West Coast doctor say something.

20 Q Okay. I got you. Dr. Jim Evans was a, is a
21 neuropsychologist and Dr. Brawley is a
22 neuropsychologist as well; is that correct?

23 A That's correct.

24 Q You decided to use a different
25 neuropsychologist than Dr. Evans?

1 **A** Yes. The primary reason, as I said, was
2 because she and Dr. Schwartz-Watts knew each other,
3 worked together. I thought it would be easier to get
4 their testimonies to line up. They could talk to each
5 other and, uh, explain things in a way that a jury
6 could understand that it was a commonality coming at
7 them rather than scattered.

8 **Q** Okay. Uh, the next ground is that you failed
9 to investigate and present mitigating evidence of
10 applicant's experiences while incarcerated in DJJ and
11 the impact of those experiences upon his character,
12 conduct and psychological condition. Let me first ask
13 you, at the time you were working on this case, were
14 you aware of the lawsuit that had occurred beginning
15 in 1990 and continuing up until 2003 involving the
16 Department of Juvenile Justice?

17 **A** I knew about the lawsuit, I knew it was filed
18 in 1990. I knew the federal court had put DJJ under
19 oversight. Probably '93, I guess, or '94, I became a
20 board member of P&A, Protection and Advocacy. And
21 every month --

22 **Q** So you were on the board?

23 **A** I was on the board.

24 **Q** Okay.

25 **A** We were getting updates regularly. The

1 person charged with the responsibility for looking at
2 DJJ and checking up on them was Phyllis Ross who was a
3 wonderful lady, social worker. I guess she still
4 works at P&A. I don't know. I been gone for a long
5 time.

6 **Q** You knew everything that was going on
7 involving that lawsuit?

8 **A** I was, at one point, general counsel for P&A.
9 And I went to Gaston's office and sat down and talked
10 with him about the lawsuit. I was completely aware of
11 it. I also made a visit to DJJ. I got Jim, who was a
12 DJJ agent in Pickens County, I got Jim to set up a
13 visit so I could visit down there and look for myself.
14 It wasn't one of the public dog and pony shows. I got
15 to go in each college and see everything and it was
16 particularly horrible.

17 **Q** Okay. Now, if you would, explain to us,
18 knowing all of that, why did you not offer evidence in
19 the penalty phase of the conditions of confinement at
20 DJJ when Mr. Owens was there?

21 **A** I think the general conditions of confinement
22 would be a difficult thing to try to bring out or sell
23 a jury on. If I could have used Dr. Lillian Tidler,
24 if she could have testified, I think that would have
25 been extremely good testimony.

1 Q She treated him there for depression?

2 A At the present time, I can not tell you
3 exactly why we did not use Lillian Tidler. I'm
4 thinking that what Donna found out is that Dr. Tidler
5 did not remember or did not treat Freddie Owens. I'm
6 not sure about that.

7 Q Okay.

8 A That's the best I can do right now. The
9 other thing was I didn't like the reason why he was
10 there.

11 Q Tell us about that. Why was he there?

12 A He was there on a gun charge.

13 Q Assault with intent to kill?

14 A Right.

15 Q Exactly what did he do?

16 A Well, there was, uh, -- he felt threatened.
17 And allegedly, he fired the gun at some people.

18 Q Okay.

19 A I had enough of guns and shooting to deal
20 with already. I didn't really want to -- if Ariail
21 wasn't going to bring it up, I really didn't want to
22 go there.

23 Q Okay. Let me ask you about that. Do you
24 remember, in this case, the solicitor did not present
25 Mr. Owens' disciplinary violations from DJJ?

1 **A** Right.

2 **Q** You and Mr. Godfrey introduced limited
3 testimony about his behavior at DJJ and that was
4 through Dr. Schwartz-Watts?

5 **A** That's correct.

6 **Q** That was basically to show Mr. Owens'
7 continued impulsive behavior into his teenage years?

8 **A** Correct.

9 **Q** If you had introduced general conditions of
10 confinement at DJJ in this case, would that have
11 opened the door to the solicitor getting in all of Mr.
12 Owens' disciplinary violations at DJJ?

13 **A** I believe that it would.

14 **Q** He had numerous violations there; is that
15 correct?

16 **A** He had a lot of violations.

17 **Q** In fact, he had only been there about two
18 weeks, and he jumped up and kicked a boy in the head
19 and then kicked him several more times on the ground
20 giving him about 14 stitches; is that correct?

21 **A** I don't remember. It may be. I don't know.
22 I don't remember.

23 **Q** All right. And he had some other assaults on
24 other juveniles down there at DJJ?

25 **A** Yes.

1 Q He also had some verbal confrontations with
2 some teachers in the classroom?

3 A Yes.

4 Q Is that what you were talking about earlier
5 when you said it was a double-edged sword whether to
6 go into DJJ?

7 A Yes.

8 Q Did you know of anything specifically that
9 happened at DJJ where Mr. Owens was a victim rather
10 than the actual perpetrator of violence?

11 A No.

12 Q Did Mr. Owens ever tell you or Mr. Gibson
13 that he had been sexually assaulted or forced to
14 perform any kind of sexual behavior on another
15 individual?

16 A No.

17 Q Did Ms. Graham or Ms. Tarr ever relate to you
18 or anybody in the defense team relate to you that they
19 had discovered anything like what I just described?

20 A No.

21 Q If they had, what would you have done with
22 that information?

23 A We would have very strongly considered using
24 it. The reason I say it that way and maybe I'm wrong,
25 but I really wanted to go after the family that was

1 dysfunctional that got this ball rolling. I wanted
2 the teacher to show that there was promise. I wanted
3 Dr. Cobb to show that there was change and perhaps
4 hope.

5 Q Did, uh, -- at any time during the
6 solicitor's closing argument -- I'm moving on to the
7 eighth allegation. Any time during that argument, did
8 you feel like Solicitor Ariail was arguing his
9 decision to seek the death penalty as a basis for the
10 jury to impose a death sentence?

11 A No, I did not.

12 Q Do you remember during the trial of this case
13 was there testimony about Mr. Owens' condition of
14 confinement?

15 A Yes.

16 Q In fact, the jury was told that Mr. Owens was
17 in a cage inside of a cell?

18 A Yes.

19 Q There was also testimony he was taken to the
20 recreation yard?

21 A Yes.

22 Q There was testimony that at least he was fed
23 while he was there?

24 A I don't remember that. I'm sure that it's
25 true. If you say it's in there, the record speaks for

1 itself.

2 Q Do you remember one of the disciplinary
3 violations was he threw his food tray on the guard?

4 A Yes.

5 Q So there was at least some testimony that he
6 was fed while he was in the Department of Corrections?

7 A Yes.

8 Q Do you remember any testimony that he was
9 reading books while he was on death row or at Lieber?

10 A Yes.

11 Q Do you remember testimony that he was
12 teaching other people how to read?

13 A Yes.

14 Q Do you remember testimony that he received
15 visitors?

16 A Yes.

17 Q Was there testimony that he was being treated
18 by doctors?

19 A Yes.

20 Q Do you know of anything in Solicitor Ariail's
21 argument regarding life versus death where he
22 misstated the record about Mr. Owens' conditions of
23 confinement?

24 A He misstated the record when he talked about
25 the prison being a 30-acre, basically, little city.

1 Q Do you remember -- was there testimony about,
2 I mean, argument about 30 acres?

3 A Not in this one.

4 Q I didn't mean to confuse you. I think you --
5 he did make a statement big city, big prison is a
6 little city, excuse me. It should be in volume four?

7 A Right. You have any idea what page?

8 Q I'll find it. Hold on just a second. I'm
9 working on it. I'm trying to find the argument now.
10 I think I can find it. Just give me a second. All
11 right. 1615.

12 A 1615.

13 Q That's the regular cite. Not the little
14 writing but the big letters.

15 A Oh, yes.

16 Q Big numbers.

17 A (Reading.) Okay.

18 Q Big prison is like a little city.

19 A Yeah, it just goes to show you what time does
20 to your memory. I remember Ariail saying it was like
21 30 acres, that he had 30 acres to roam around in. You
22 know, clearly, I think that this particular argument
23 of Solicitor Ariail was objectionable. I will state
24 again I did not object. If I'm wrong, I'm wrong. But
25 based on what the jury had heard from Dr. Cobb and I

1 believe it was somebody else about how he is being
2 housed. It appeared to me that Solicitor Ariail was
3 basically almost lying to the jury.

4 Q So you think he lost credibility by making
5 this argument?

6 A I did, yes.

7 Q That's why you didn't object?

8 A Maybe I'm wrong, but that's what I did at the
9 time.

10 Q Okay. Do you remember the argument, the
11 portion of the argument where the solicitor stated
12 they told you that I'm not satisfied with a life
13 sentence or -- I'm trying to remember the argument.
14 Let me go back to it again.

15 A Page 1609.

16 Q Yeah. They have said earlier that the
17 solicitor is not satisfied with a life sentence.
18 That's why we've asked for the death penalty. They
19 told you that they were going to want the death
20 penalty and I do. Do you think that was
21 objectionable?

22 A I think, as I testified earlier, I think that
23 is close to improper but I don't think it's improper.

24 Q Okay.

25 A Obviously, the solicitor asked for the death

1 penalty otherwise we wouldn't have been in a death
2 trial.

3 Q The jury knew that?

4 A It's not like the solicitor said I expect you
5 to give me a death penalty because I've already said
6 he should be put to death.

7 Q Then after that --

8 A Maybe I'm wrong, but that's the way I looked
9 at it.

10 Q After he made those two sentences, he starts
11 talking about why it is appropriate in this case?

12 A Right.

13 Q Then he talks about how the facts and the
14 evidence and what Freddie Owens did; is that right?

15 A I'm sorry. One more time.

16 Q He goes into arguing why this case is
17 appropriate for the death penalty and he's arguing the
18 evidence in the case?

19 A That's correct.

20 Q Okay. Now did -- you had Ms. Graham talking
21 to family members. Did y'all consider calling any of
22 the family members as witnesses? And if you did, what
23 happened? Why did you not call them?

24 A Basically what my understanding was is that
25 the family was not cooperative.

1 **Q** Okay.

2 **A** Right now, I can't tell you whether I heard
3 that from Paige Tarr, Carolyn Graham or both of them.
4 I can't tell you. But, you know, it would have been
5 wonderful to have a family member who could come up
6 and ask that -- for his life to be spared. We didn't
7 have that.

8 **MR. MABRY:** Just one moment, Your Honor.

9 **THE COURT:** Okay.

10 (WHEREUPON, there is a pause.)

11 **MR. MABRY:** That's all that I have, Your
12 Honor.

13 **THE COURT:** All right. Any redirect?

14 **MR. WEYBLE:** No redirect, Your Honor.

15 **THE COURT:** Thanks. You can step down.
16 Cut him loose?

17 **MR. WEYBLE:** Yes, sir. Fine with us.

18 **THE COURT:** See you.

19 **MS. PAAVOLA:** Your Honor, we call Ms. Jill
20 Rider.

21 **THE COURT:** All right.

22 **THE CLERK:** Ms. Rider, if you will, step up
23 here please. Place your left hand on the Bible
24 and raise your right hand.

25

JILL RIDER

1 is first duly sworn and then testifies as follow:

2 **THE CLERK:** Thank you. You may be seated.

3 State your full name for the record please.

4 **THE WITNESS:** Jill Rider.

5 **THE CLERK:** Thank you.

6 **DIRECT EXAMINATION**

7 **BY MS. PAAVOLA:**

8 **Q** Ms. Rider, could you tell the court please
9 how you are employed?

10 **A** I am a paralegal with the law firm of Bloom
11 Weyble and Norris and also the Death Penalty Resource
12 Center.

13 **Q** Could you explain just briefly what your
14 basic duties include?

15 **A** Uh, I do lots of different things. I do
16 collection of documents, maintaining the file, filing
17 pleas.

18 **Q** Okay. So basic paralegal work?

19 **A** Yes.

20 **Q** Including maintaining files?

21 **A** Yes.

22 **Q** Were you responsible for maintaining all the
23 files in the Freddie Owens case?

24 **A** Yes.

25 **Q** Do you recall maintaining a copy of trial

1 counsel's file in this case?

2 **A** Yes.

3 **Q** Could you please explain how you obtained
4 that file?

5 **A** Uh, I requested the file. Sent a written
6 request with a release signed by Mr. Owens. After
7 some difficulty, trial counsel delivered the file to
8 me.

9 **Q** He physically delivered the file to you?

10 **A** Yes.

11 **Q** What did you do with the file once you
12 received it?

13 **A** Uh, well, the first thing I did was send it
14 to be copied and gave to the original to Mr. Weyble to
15 return to trial counsel and indexed the file copy.

16 **Q** So during the course of maintaining Mr.
17 Godfrey's file, you had an opportunity to inventory
18 it?

19 **A** Yes.

20 **Q** And so you are familiar with the contents of
21 that file?

22 **A** Yes.

23 **Q** And, in fact, did you recently pack the copy
24 of that file and bring it here with you to courtroom
25 today?

1 **A** Yes.

2 **Q** Did you also receive a file from Ms. Drucy
3 Glass in connection with this case?

4 **A** Yes.

5 **Q** Could you explain how you obtained that file?

6 **A** Uh, it was brought to the office by Ms.
7 Glass.

8 **Q** Are you familiar with the contents of that
9 file?

10 **A** Yes.

11 **MR. MABRY:** Same -- just renewing my
12 objection to that, Your Honor.

13 **THE COURT:** Okay. It's under advisement.

14 **MR. MABRY:** Yes, sir.

15 **THE COURT:** Okay.

16 **BY MS. PAAVOLA:**

17 **Q** You had an opportunity to inventory the file?

18 **A** Yes.

19 **Q** Also, you packed and brought a copy of that
20 file with you to the courtroom today as well?

21 **A** Yes.

22 **Q** I'm going to show you some documents that we
23 premarked. First, I'm going to show them to Mr.
24 Mabry. (Pause).

25 I'm going to hand you what's been marked

1 Applicant's Exhibits 10 through 18?

2 **A** Okay.

3 **Q** If you could, just look through them and let
4 me know if you know what these documents are.

5 **A** Yes, I do.

6 **Q** What are they, in general?

7 **A** There are documents that were taken from Ms.
8 Glass' file that were not contained in trial counsel's
9 file.

10 **Q** Okay. And then specifically, could you --

11 **MR. MABRY:** Same objection, Your Honor.

12 **THE COURT:** Okay. Same ruling.

13 **BY MS. PAAVOLA:**

14 **Q** Could you tell us generally what each one is?

15 **A** You want me to like say the exhibit?

16 **Q** Yeah, Applicant's Exhibit number 10, for
17 example, what is that?

18 **A** This is a copy of Ms. Mason who was Mr.
19 Owens' mother's medical records.

20 **Q** All right. What about Exhibit number 11?

21 **A** 11 is a copy of the DSS records?

22 **Q** Okay. And Applicant's Exhibit number 12?

23 **A** This is the family criminal records.

24 **Q** And Applicant's Exhibits number 13 through
25 15, I believe, are?

1 **A** SCDC records for family members.

2 **Q** For various family members?

3 **A** Yes.

4 **Q** Finally, Applicant's Exhibit numbers 17 -- 16
5 17 and 18, can you explain what those are?

6 **A** Yes, they are DJJ records.

7 **Q** Okay. And I think you already testified to
8 this a little bit. Just to be clear, did you compare
9 the contents of Ms. Glass' file to contents in Mr.
10 Godfrey's file?

11 **A** Yes.

12 **Q** These documents that you just identified from
13 Ms. Glass' file, were those present in Mr. Godfrey's
14 file?

15 **A** No, they were not.

16 **MS. PAAVOLA:** Your Honor, at this time, we
17 would move to admit the records. I assume
18 there's the same objection.

19 **MR. MABRY:** Same objection. All the grounds
20 we stated earlier.

21 **THE COURT:** Yeah. All right. Well, they are
22 marked for ID. I'll make the final decision.

23 **MS. PAAVOLA:** Thank you, Your Honor. No
24 further questions.

25 **THE COURT:** Cross?

1 **MR. MABRY:** Yes, sir.

2 **CROSS-EXAMINATION**

3 **BY MR. MABRY:**

4 **Q** Ms. Rider, did you go to Mr. Gibson's office
5 and get any files from him?

6 **A** I believe that, uh, Mr. Godfrey indicated
7 that --

8 **Q** My question is did you go to Mr. Gibson's
9 office?

10 **A** No, I did not. I did not go to anybody's
11 office.

12 **Q** Okay. You didn't go to anybody's office.
13 Then how did you get Mr. Godfrey's file?

14 **A** As I testified, he bought it to my office.

15 **Q** He bought it to you?

16 **A** Yes.

17 **Q** But you didn't go to Mr. Gibson's office and
18 get his file?

19 **A** No.

20 **Q** Okay. Did you go to -- do you know who
21 Marjorie Hammock is?

22 **A** Yes.

23 **Q** Did you go her office and get her files?

24 **A** I didn't go to anyone's office and get their
25 files.

1 Q All right. Did she bring you a copy of her
2 files?

3 A I don't remember her bringing me a copy of
4 her file.

5 Q So you can't tell me that what you say is Ms.
6 Glass' file is not contained in Ms. Hammock's file?

7 A I can tell you that it's not contained in
8 trial counsel's file.

9 Q That wasn't my question. My question is you
10 can not tell the judge or me that what you claim is
11 Ms. Glass' file is not contained in Ms. Hammock's
12 file?

13 A No, I can't tell you that.

14 Q Cause you haven't looked in Ms. Hammock's
15 file?

16 A No.

17 Q And you haven't looked in Dr. Schwartz-Watts'
18 file either, have you?

19 A No.

20 Q You have not looked in Dr. Brawley's file
21 either, have you?

22 A No.

23 Q Or Dr. Cobb's?

24 A No.

25 Q You have known Ms. Glass -- you've known her

1 for a long time, haven't you?

2 **A** Yes, I have.

3 **Q** She is an excellent mitigation investigator,
4 is she not?

5 **A** She is.

6 **Q** The first thing she would do when she located
7 potential mitigation evidence would be to provide a
8 copy to the trial attorneys that she was working for,
9 wouldn't she?

10 **A** You would have to ask Ms. Glass what she did.
11 I don't know.

12 **Q** How long have you been working for the Center
13 for Capital Litigation or Mr. Bloom?

14 **A** I've worked for Mr. Bloom for 12 years.

15 **Q** 12 years. Okay. And are you telling this
16 court that Ms. Glass does not promptly turn over
17 materials that she discovers as a mitigation
18 investigator?

19 **A** I can't tell what Ms. Glass does.

20 **Q** What has been your experience with her? Her
21 common practice.

22 **A** I would imagine that if she was asked for
23 documents that she would turn them over.

24 **Q** Do you think she would have to be asked, if
25 she was retained by Mr. Rollins and Mr. Allen or Mr.

1 Sumner and, uh, Judge Kinlaw to represent Mr. Owens,
2 that she would have to be asked to turn over those
3 materials or would she --

4 **MS. PAAVOLA:** Your Honor, --

5 **THE COURT:** Wait a minute, what's the
6 objection.

7 **MS. PAAVOLA:** I think she has already
8 testified she doesn't have any personal knowledge
9 about what Ms. Glass would do?

10 **THE COURT:** He is asking her about her
11 experience and what her -- her state of mind with
12 respect to how Ms. Glass would conduct her
13 affairs. I'm going to allow the question.

14 **BY MR. WEYBLE:**

15 **Q** Based on your history with Ms. Glass, would
16 she have to be asked to give the materials by
17 attorneys she was working directly for or would she
18 provide them copies of what she found?

19 **A** I'm not sure I understand what you're saying.
20 If you had records, would she give them to an
21 attorney? I'm not understanding what you're asking.

22 **Q** I'll ask it this way. Let's say her husband,
23 Mr. Bloom, was appointed to represent a defendant in a
24 capital case and she was the mitigation investigator
25 and she went out and found all these documents in

1 front of you.

2 **A** Right.

3 **Q** Would she hold on to them or would she turn
4 them over to Mr. Bloom?

5 **A** She would turn them over.

6 **Q** That's what I thought. Now, what did you say
7 each one of these documents are? What is the first
8 one?

9 **A** The first one is medical records of the
10 defendant's mother.

11 **Q** Okay. What's the next one?

12 **A** The next one is DSS records.

13 **Q** Okay. Was there testimony in this trial
14 about Mr. Owens being taken into custody by DSS
15 because of the fire at the house? Or do you know?

16 **A** I don't know.

17 **Q** Okay. Go ahead.

18 **A** The next one is criminal records from the
19 defendant's family.

20 **Q** All right. Was there testimony in this case
21 about Mr. Owens -- most of his entire family being in
22 prison?

23 **A** Yes. And then the next one, two, three are
24 SCDC records of family members.

25 **Q** Okay. Same thing. There was testimony in

1 this case about his father, his stepfather, his
2 grandmother, his brothers all incarcerated, right?

3 **A** Yes.

4 **Q** All right. What else?

5 **A** The next three are DJJ records.

6 **Q** Of who?

7 **A** The first one is --

8 **Q** Brother?

9 **A** Sister.

10 **Q** Sister?

11 **A** Yes.

12 **Q** He was in DJJ?

13 **A** She. The sister.

14 **Q** Yeah.

15 **A** And then the next two are brothers.

16 **Q** Okay. They were in DJJ?

17 **A** Yes.

18 **Q** Was there testimony in this case about Mr.
19 Owens' mother being 18 when he was born?

20 **A** Yes.

21 **Q** Ma'am?

22 **A** Yes.

23 **Q** Thank you.

24 **MR. MABRY:** Nothing further, Your Honor.

1' **MS. PAAVOLA:** No further questions.

2' **THE COURT:** Okay. Ma'am, how you know that
3 that was Mr. Godfrey's complete file?

4 **THE WITNESS:** Because that's what he told
5 me.

6 **THE COURT:** He told you that?

7 **THE WITNESS:** Uh-huh.

8 **THE COURT:** Okay. Thank you. All right.

9 **MR. WEYBLE:** Your Honor, that's it for our
10 witnesses who are present today. We had an e-mail
11 exchange, I think, last week about Dr. Garbarino
12 who was due to arrive later this afternoon and we
13 would be prepared to put him up first thing in the
14 morning. But he's not here yet for us to put him
15 up this afternoon.

16 **THE COURT:** Okay. Tell me what else you
17 have. What else are we going to --

18 **MS. PAAVOLA:** Dr. Garbarino is our only other
19 witness.

20 **MR. WEYBLE:** He will be our last witness at
21 this point.

22 **THE COURT:** Okay. How long will he take?

23 **MS. PAAVOLA:** I expect it will be fairly
24 lengthy on direct. I assume he will probably
25 be ---

1 **MR. MABRY:** He may be lengthy on cross. I
2 don't know. Let's see what he says, Judge.

3 **MS. PAAVOLA:** --- lengthy on cross.

4 **THE COURT:** All right.

5 **MS. PAAVOLA:** So I expect we would need at
6 least until the lunch hour possibly.

7 **THE COURT:** Okay.

8 **MS. PAAVOLA:** If you have any witnesses for
9 the afternoon.

10 **MR. MABRY:** Yeah. Y'all cut me. Two of the
11 issues were dropped. I have a couple of witnesses
12 and we got Dr. Schwartz-Watts to take by phone.

13 **THE COURT:** When do you want to do that? So
14 we can kind of get her.

15 **MR. MABRY:** I will whenever the court wants
16 to. I'll call her tonight. I got Dr. Brawley
17 too. We can do her by phone if y'all are willing
18 to do that. She's very short.

19 **THE COURT:** You want to think about it
20 tonight and see.

21 **MR. WEYBLE:** Your Honor, I don't think we
22 even need to even think about it. We're
23 comfortable with that.

24 **THE COURT:** You talked to her.

25 **MR. MABRY:** Yes, sir. She would like that.

1 **THE COURT:** Okay.

2 **MR. MABRY:** And I may call Ms. Glass.

3 She would like to be by phone. She has got two
4 small children at home.

5 **THE COURT:** Who? Drucy Glass?

6 **MR. MABRY:** Yes, sir. She's not doing this
7 anymore.

8 **THE COURT:** Okay.

9 **MS. PAAVOLA:** Uh, no.

10 **MR. MABRY:** I mean, not Drucy Glass. I'm
11 sorry. Paige Tarr. Not Ms. Glass.

12 **THE COURT:** Who?

13 **MR. MABRY:** Ms. Tarr.

14 **THE COURT:** Okay.

15 **MR. MABRY:** I get them mixed up. They're
16 all mitigation specialists.

17 **THE COURT:** All right.

18 **MR. MABRY:** I did not mean it that way.

19 **THE COURT:** What about doing Drucy Glass by
20 phone?

21 **MR. MABRY:** I will be glad to do it if you
22 want to, Your Honor.

23 **THE COURT:** What do y'all think about that?
24 That would resolve your issue if everybody -- you
25 can think about it tonight and let me know in

1 morning. That might save some time and money.

2 **MR. WEYBLE:** Your Honor, Ms. Paavola raises a
3 good point. Given the nature of -- maybe Mr.
4 Mabry's better to speak to this. But given the
5 nature of the concerns that he's articulated, I
6 don't know that she could do it by phone without
7 being in the physical presence of the file that
8 she delivered to us.

9 **MS. PAAVOLA:** I'm just concerned whether she
10 would need to identify the records.

11 **MR. MABRY:** I don't have the burden of proof
12 in this case.

13 **MR. WEYBLE:** We've already offered her direct
14 testimony as to what the file is. It's Mr. Mabry
15 who is raising questions about the veracity of
16 what we offered.

17 **THE COURT:** This is what you are concerned
18 about, these documents that have been proffered?

19 **MR. WEYBLE:** Those are the documents that
20 were in her file that were not also in trial
21 counsel's file.

22 **THE COURT:** Okay. And that's what you are
23 interested in knowing, getting from her, that she
24 had those and nobody asked for them; is that
25 right?

1 **MR. WEYBLE:** That's correct.

2 **MR. MABRY:** The first question is did she
3 turn those over to the first four attorneys or to
4 Ms. Hammock. I can't believe Ms. Glass would hold
5 back materials from the attorney that she was
6 working for.

7 **THE COURT:** Right.

8 **MR. WEYBLE:** It's not so much the question of
9 holding back materials or sharing materials. You
10 can share materials or you can also share the
11 information that is contained within the
12 materials. She was a member of the first two
13 defense teams. She was not a member of the third
14 one. It's quite possible that the information
15 that she gathered contained in those documents
16 were shared with the lawyers at the first and the
17 second trial in a way other than providing them
18 with a photocopy duplicate of the documents, you
19 know, provided during meetings where no one was
20 present or various other ways. I don't know that
21 that necessarily answers the question. She can
22 certainly have shared that information with them
23 without giving them physical copies of documents.

24 **MR. MABRY:** It's very important in this case.
25 This is a new issue that the Court knows they

1 brought up. I have not had time to investigate
2 it. If she turned this information over to the
3 first four lawyers or to Ms. Hammock who was been
4 on the first three cases, then Ms. Hammock had
5 this information before she testified in the
6 third trial. So the issue would be irrelevant.
7 That's critical testimony that's got to come
8 either with her being here or by phone. I'm
9 willing to do it by phone.

10 **THE COURT:** Why don't y'all think about that
11 overnight. If we can organize that, why don't
12 y'all see about doing that.

13 **MR. WEYBLE:** Okay. We can do that.

14 **THE COURT:** Y'all think about it. If there
15 are any other arguments you need to present, we
16 will do that. Mr. Owens does not intend to
17 testify?

18 **MS. PAAVOLA:** No, sir.

19 **THE COURT:** Okay. Do y'all want me to talk to
20 him about that or not?

21 **MR. MABRY:** I guess we probably better,
22 Judge.

23 **MR. WEYBLE:** Your Honor, he does not have any
24 constitutional right to testify in this
25 proceeding.

1 **THE COURT:** I know that, but I want to make
2 sure he understands.

3 **MR. WEYBLE:** Well, sure. We're certainly
4 comfortable with you doing it, if you would like
5 to.

6 **MS. PAAVOLA:** Yeah.

7 **THE COURT:** All right. Mr. Owens, how you
8 doing?

9 **MR. OWENS:** I'm all right.

10 **THE COURT:** All right. Well, you
11 understand. You been in court before. And, uh,
12 you understand what's going on today?

13 **MR. OWENS:** Yes, sir.

14 **THE COURT:** Okay. And you've had ample time
15 to speak with your attorneys and meet with them
16 and go over the issues and everything?

17 **MR. OWENS:** Yes, sir.

18 **THE COURT:** Okay. As a matter of fact, I
19 remember when I first met you, you requested that
20 these two counsel be appointed to represent you;
21 is that right?

22 **MR. OWENS:** Yes, sir.

23 **THE COURT:** And, uh, you happy with them?
24 So far so good?

25 **THE COURT:** They've answered your questions

1 and your concerns as that has come up throughout
2 their representation?

3 MR. OWENS: No complaint. .

4 THE COURT: Okay. You understand that you
5 have an opportunity here to testify and tell your
6 side of the story if you want to. Do you
7 understand that?

8 MR. OWENS: Yes, sir. .

9 THE COURT: Okay. And I understand that you
10 are not going to do that; is that right?

11 MR. OWENS: No, sir.

12 THE COURT: Okay. And you are fully
13 satisfied with that decision?

14 MR. MABRY: Yes, sir. .

15 THE COURT: You talked with your attorneys
16 about what would happen if you did testify?

17 MR. OWENS: Yes, sir.

18 THE COURT: And what subjects that you would
19 go into?

20 MR. OWENS: Yes, sir.

21 THE COURT: You understand you would be
22 subject to cross-examination?

23 MR. OWENS: Yes, sir.

24 THE COURT: And, uh, you feel confident that
25 you have an idea about how the process would work

1 if you did testify?

2 MR. OWENS: Yes, sir.

3 THE COURT: Do you have a -- and you spoken
4 them -- with them about the process if you don't
5 testify?

6 MR. OWENS: Yes, sir.

7 THE COURT: Is it your decision based on
8 everything that you know that you don't want to
9 testify in this case?

10 MR. OWENS: Freely and voluntarily.

11 THE COURT: Okay. If you have any other
12 questions you need to ask me about that, you let
13 me know.

14 MR. OWENS: All right.

15 THE COURT: And if you change your mind, we
16 will accommodate you. Okay?

17 MR. OWENS: I appreciate it.

18 THE COURT: Okay. Where are y'all -- y'all
19 going back? Where are y'all staying?

20 CORRECTION OFFICER: Actually, sir, we're
21 going to house him at Perry tonight.

22 THE COURT: Okay.

23 CORRECTION OFFICER: I'll be coming back in
24 the morning.

25 THE COURT: All right. What time do you want

1 to start? 9:30?

2 MR. MABRY: 9:30.

3 MR. WEYBLE: 9:30 is fine with me.

4 THE COURT: 9:30? We're staying local.

5 CORRECTION OFFICER: Okay.

6 (WHEREUPON, the Court recesses for the day at
7 approximately 3:18 p.m.)

P R O C E E D I N G S

1
2 (WHEREUPON, the Court resumes on Tuesday, the 20th
3 day of July, 2010 at approximately 9:53 a.m.)

4 **THE COURT:** All right. Y'all ready?

5 **MR. MABRY:** The last thing you asked about
6 was Ms. Glass, doing her by telephone.

7 **THE COURT:** I was just going to let y'all
8 tell me what you thought.

9 **MR. MABRY:** Our position is the affidavit
10 should not come in ---

11 **THE COURT:** I understand.

12 **MR. MABRY:** --- for the reasons we have
13 stated.

14 **THE COURT:** Her testimony would replace that.

15 **MR. WEYBLE:** Right, Your Honor. We would
16 offer the affidavit as her direct testimony. If
17 Mr. Mabry wants to conduct cross-examination of
18 her by phone, we don't have any objection to
19 that. I did speak with her last night. My
20 understanding is that will be available by
21 telephone today if the Court wants to go with
22 that route.

23 **MR. MABRY:** We will be glad to do that,
24 Judge.

25 **THE COURT:** Okay. We'll handle it that way.

1 **MR. WEYBLE:** Your Honor, if I could, she
2 asked me to send her sort of a text message or
3 something to give her some idea of when she might
4 be called.

5 **THE COURT:** Well, you all know better than
6 me.

7 **MR. MABRY:** I guess we will do it after the
8 doctor. They offering the affidavit in their
9 case. I will be cross examining her. It will be
10 better to be done that way.

11 **THE COURT:** All right. I guess we'll know a
12 little better later in the morning. See how this
13 examination goes.

14 **MR. WEYBLE:** Sure.

15 **MR. MABRY:** In regard to Ms. Glass, since
16 they are offering her affidavit as her direct
17 testimony, I've asked them just this morning if
18 they could provide me a copy of her affidavit in
19 the second trial from Judge Kittredge. The one
20 for her funding, if they can find that. The
21 clerk is trying to find it. I don't have it. I
22 have her first affidavit, but I don't have her
23 second affidavit on what she did in the case.

24 **THE COURT:** We will see if we have a copy of
25 it.

1 **MR. WEYBLE:** Mr. Mabry indicated that he had
2 asked us for that this morning. I don't think we
3 have it. I have not seen it in the file. If we
4 did have it, certainly we would make it
5 available.

6 **THE COURT:** We're going to see if it was
7 scanned. We'll look forward.

8 **MR. MABRY:** Thank you, Judge.

9 **THE COURT:** All right.

10 **MR. MABRY:** I do have -- before the doctor
11 testifies -- I do have some objections and
12 motions in limine. I'd ask that he step out of
13 the courtroom while I make those motions.

14 **THE COURT:** Okay. Doctor, if you would.
15 Thank you. Okay.

16 **(WHEREUPON, the witness exits the courtroom at**
17 **approximately 9:55 a.m.)**

18 **THE COURT:** Okay.

19 **MR. MABRY:** Yes, sir. Judge, my
20 understanding from the discovery that they sent
21 me is that Dr. Garbarino, I believe I'm
22 pronouncing it correctly, Garbarino, excuse me,
23 is going to testify regarding Freddie Owens' life
24 history growing up and then also the conditions
25 of confinement at DJJ and how those affected him

1 or could have affected him. That's kind of what
2 I'm anticipating based on discovery.

3 Our objection is to prohibit any testimony
4 about general conditions of confinement at DJJ
5 because it is irrelevant. As Supreme Court has
6 held in Burkhart, Bowman and Bryan, the general
7 conditions of confinement, those cases dealt with
8 future, but this is past. But it is still
9 irrelevant because those cases say what happened
10 to some other inmate, whether he might have tried
11 to escape, whether he was assaulted by another
12 guard, another inmate, is totally irrelevant.

13 My understanding is he is basing his
14 testimony on the DJJ lawsuit pleadings and other
15 things that were filed in that case. From our
16 review of that material, there is absolutely
17 nothing in there about Mr. Owens', any assault on
18 Mr. Owens or anything that happened to Mr. Owens.
19 Our objection is that is totally irrelevant and
20 should not be allowed. We object to that
21 testimony.

22 Further, our understanding
23 is -- and that's a global objection. We would
24 like to continue to run through his testimony in
25 our cross. But we are also objecting --

1 **THE COURT:** You don't sound very confident.

2 **MR. MABRY:** Well, I don't have --

3 **THE COURT:** Go ahead.

4 **MR. MABRY:** I don't know how the Court's
5 going to rule. The court may allow it by
6 proffer. May not allow it at all. We don't
7 think it should be allowed at all because it has
8 nothing to do with Mr. Owens. I also understand
9 they -- to give you a little history on this,
10 Judge, they had some law students go to several
11 prisons and interview people who claim to have
12 been with Mr. Owens in DJJ. Those law students
13 then provided their notes to someone who typed
14 those up. Then those notes are not affidavits
15 from these inmates. They are just interviews.
16 Those -- my understanding also Dr. Garbarino is
17 going to base his opinion on those.

18 Our objection there is this is an IAC,
19 ineffective assistance of counsel claim. The
20 evidence has to be admissible for there to be
21 ineffective assistance of counsel. They have not
22 called any of these inmates who they interviewed
23 to claim certain things happened to them or may
24 have happened to Mr. Owens. They could have
25 called them to testify and they haven't. They're

1 trying to get in through the back door what
2 they've been unwilling to call the witnesses to
3 testify to.

4 We object to him testifying to any opinion of
5 his based on basically double hearsay, what these
6 law students say these inmates told them and then
7 what was reported to a stenographer who wrote up
8 these notes. With that, that's basically our
9 objection.

10 **THE COURT:** Okay.

11 **MS. PAAVOLA:** Well, Your Honor, first of
12 all, the issue is relevancy. This is really not
13 conditions of confinement testimony. It's
14 absolutely relevant because it is about the
15 environment in which Mr. Owens grew up. If he
16 had grown up from those particular ages in his
17 own home, absolutely, the doctor can talk about
18 the environment in his home. And he will talk
19 about that. But Mr. Owens spent a significant
20 portion of his childhood in the Department of
21 Juvenile Justice which served as a parental
22 figure for him. That's the state's roll in the
23 juvenile system. And the environment in which he
24 was housed there is absolutely relevant to his
25 development.

1 Dr. Garbarino has reviewed a number of
2 documents that relate to the specific time that
3 Mr. Owens was housed in DJJ. But he also has
4 information directly from Mr. Owens himself. I
5 think the documents -- there is just no issue
6 that the environment in which he spent a
7 significant portion of his childhood is relevant.

8 I think -- the issue that he's talking about
9 with conditions of confinement in Bowman and
10 Burkhart is really a totally different kind of
11 issue. That's about whether you can tell the
12 jury what kind of conditions Mr. Owens might live
13 in if he were sentenced to a life sentence versus
14 a death sentence. That's not what we're doing
15 with this testimony at all.

16 With respect to the DJJ interviews, first of
17 all, Mr. Mabry is incorrect somewhat. The
18 interviews were conducted by law students. Some
19 of them were conducted by law students. Some
20 were conducted, I think at least one was
21 conducted by Mr. Weyble. And whoever conducted
22 the interview typed that report themselves and then
23 provided -- we provided those to Dr. Garbarino.
24 He has reviewed those. I won't say he's going to
25 heavily rely on them and offer them as if they

1 are, uh, -- we're not trying to sneak in hearsay.
2 He's just reviewed it to see if the information
3 that we've collected from other people who have
4 the same experiences or were housed with Mr.
5 Owens corroborate the stories that he's told
6 about what it was like for him to live at DJJ.

7 **THE COURT:** Okay. You are saying they are
8 unreliable?

9 **MR. MABRY:** They are unreliable. What
10 happened to those inmates or some other inmate at
11 DJJ is irrelevant. He was there for two years
12 basically, almost 2 years, and if they wanted to
13 introduce this testimony and make it relevant, it
14 has got to do with Mr. Owens and what happened
15 with Mr. Owens there and what they can show
16 happened to Mr. Owens. Plus, this expert can't
17 parrot back to the court or couldn't parrot back
18 to the jury what Mr. Owens has told him or what
19 anyone else told him. He can say I looked at
20 these materials and I relied on them, but he
21 can't go any further than that.

22 **MS. PAAVOLA:** The reports still have to be
23 admissible for Mr. Garbarino to rely on them.
24 He's an expert and he's telling a mitigation
25 history in a capital case. He's absolutely

1 entitled to rely on information that's not on its
2 own right admissible. We're not trying to admit
3 those reports and I think that that's clear. The
4 most recent case on this issue --

5 **THE COURT:** Which case? I didn't hear you.

6 **MS. PAAVOLA:** (inaudible).

7 **THE COURT:** Okay.

8 **MS. PAAVOLA:** I don't see why that's an
9 issue. He should be allowed to rely on whatever
10 information he wants to rely on. And if they
11 want to cross-examine him about --

12 **THE COURT:** You say it goes to the weight?

13 **MS. PAAVOLA:** Yeah, of course.

14 **THE COURT:** Okay. All right. Well, we'll,
15 uh, -- I'm going to allow him to testify. Your
16 objection will be ongoing.

17 **MR. MABRY:** Yes, sir.

18 **THE COURT:** No need to renew it.

19 **MR. MABRY:** Yes, sir. Thank you.

20 **THE COURT:** Unless something new comes up and
21 you feel necessary.

22 **MR. MABRY:** Yes, sir.

23 **THE COURT:** All right. Y'all ready?

24 **MS. PAAVOLA:** We are. We'll call Dr. James
25 Garbarino.

1 **THE COURT:** Okay.

2 **(WHEREUPON,** the witness enters the courtroom at
3 approximately 10:03 a.m.)

4 **THE CLERK:** Doctor, if you will, step up here
5 please and place your left hand on the Bible.
6 Raise your right hand.

7 **JAMES GARBARINO**
8 is first duly sworn and then testifies as follow:

9 **THE CLERK:** Thank you. You may be seated.
10 State your full name for the record and spell
11 your last name.

12 **THE WITNESS:** James Garbarino,
13 G-A-R-B-A-R-I-N-O.

14 **THE CLERK:** Thank you.

15 **DIRECT EXAMINATION**

16 **BY MS. PAAVOLA:**

17 **Q** Good morning, Dr. Garbarino.

18 **A** Good morning.

19 **Q** Could you please tell the Court how you are
20 currently employed?

21 **A** I'm currently a Professor of Psychology at
22 Loyola University in Chicago.

23 **Q** All right. Do you have any other titles
24 there?

25 **A** Well, I'm a Senior Faculty Fellow at the

1 Center for the Healing Rights of Children.

2 Q Okay. Could you tell us briefly what your
3 duties are involved with that?

4 A Well, as a professor of psychology, my duties
5 involved teaching graduate and undergraduate students,
6 mentoring dissertations, doing scholarly work, uh,
7 participating in the university academic life and that
8 sort of thing.

9 Q All right. Could you give us a brief
10 overview of your educational history?

11 A I received my Bachelor's degree from Saint
12 Lawrence University in 1968. My PhD from Cordell
13 University in 1973.

14 Q Prior to working at Loyola University, what
15 employment history do you have?

16 A Prior to that, I was a professor at Cornell
17 University where I was director of the Family Life
18 Development Center. Prior to that, President of the
19 Erikson Institute for Advance Study in Child
20 Development in Chicago from '85 to '94. Prior to
21 that, Professor of Human Development at Pennsylvania
22 State University from '80 to '85.

23 Q Are you a member of any professional
24 associations?

25 A I'm a member of the American Psychological

1 Association and the International Society of
2 Prevention of Child Abuse and Neglect.

3 Q Are you a fellow of the American
4 Psychological Association?

5 A Yes, I am.

6 Q Can you explain what that means?

7 A It's kind of an elite status within the
8 American Psychological Association to which you are
9 elected by other members on the basis of received
10 accomplishments and achievements.

11 Q Are you the author of any publications?

12 A I am the author of more than 20 books and
13 about 150 scholarly articles. All dealing in one way
14 or another with child development, adolescent
15 development, trauma, child abuse, violence.

16 Q Have you received any awards for your work?

17 A I received the first what was called the
18 Henry Kempe Award from the National Conference of
19 Child Abuse and Neglect. Henry Kempe was a physician
20 who was sort of the pioneer in American efforts to
21 deal with child abuse. The Brandt Steele Award from
22 the Center for Child Abuse in Colorado who was a
23 psychiatrist and was one of the pioneers in this
24 field. The Vincent de Francis Award from the American
25 Humane Association, which is a leading child

1 protection group. Award from the University of
2 Missouri Center for trauma studies. From the American
3 Psychological Association, their award for career
4 achievement and professional contributions to public
5 service.

6 Q All right. And have you yourself performed
7 any studies or research on the effects of trauma on
8 youth?

9 A Yes, I've done a number of studies over the
10 years. Much of that research is contained in a 1999
11 book called the Lost Boys. I've won a couple of
12 rewards for my research from over the years, mostly
13 dealing with child abuse and community violence.

14 Q Can tell us a little bit more about Lost
15 Boys, what is that about?

16 A Lost Boys is a book that's based on
17 interviews that were done by myself and my research
18 partner with incarcerated and detained youths who, uh,
19 had committed acts of violence and violent
20 delinquency. Used those interviews as informed and
21 illuminated by review of other people's research on
22 development of aggression and violence and the impact
23 of trauma in the lives of delinquent and violent
24 youths.

25 Q You also authored a book called No Place to

1 be a Child: Growing Up in a War Zone. Can you explain
2 what that is?

3 **A** That book dealt with interviews we did in
4 five war zones around the world. Mozambique in
5 Southeast Africa, Cambodia in Southeast Asia,
6 Nicaragua in Central America, Palestine in Israel in
7 the Middle East and the inner city Chicago.

8 **A** Have you previously been qualified as an
9 expert to testify to the affects of trauma and
10 violence on youths?

11 **A** Yes, I have.

12 **Q** About how many times would you say you've
13 been qualified?

14 **A** I think it's about 30 times.

15 **Q** Do you know roughly how many states
16 that might cover?

17 **A** I think it's about seven states.

18 **Q** Does that includes South Carolina?

19 **A** Yes.

20 **MS. PAAVOLA:** Your Honor, at this time, I move
21 to qualify Dr. Garbarino as an expert in the
22 psychological affects of trauma and violence on
23 youths.

24 **THE COURT:** All right. Any voir dire?

25 **MR. MABRY:** No, sir.

1 **THE COURT:** Any objection?

2 **MR. MABRY:** No, sir.

3 **THE COURT:** Okay. So qualified.

4 **BY MS. PAAVOLA:**

5 **Q** I would like to show you what's marked as
6 Applicant's Exhibit 19 and ask you if that's copy of
7 your CV.

8 **A** Yes, I believe so.

9 **MS. PAAVOLA:** Your Honor, we would move to
10 admit Applicant's Exhibit 19.

11 **MR. MABRY:** No objection.

12 **THE COURT:** Okay.

13 **(WHEREUPON, Applicant's Exhibit 19 is admitted**
14 **into the record.)**

15 **BY MS. PAAVOLA:**

16 **Q** Okay. Dr. Garbarino, I'd like to begin by,
17 uh, just talking to you a little bit about what you
18 did to prepare for your testimony this case. Did you
19 review any materials?

20 **A** I reviewed a box of documents about that
21 high. It must have been 5-600 pages worth of
22 documents. I interviewed the, uh, -- interviewed
23 Freddie Owens in the prison for about four hours.
24 And, uh, that's what I did.

25 **Q** Can you give us sort of an overview of what

1 kinds of document you looked at?

2 **A** Well, there were, uh, social history
3 developed by professionals involved in the case
4 previously. I reviewed some transcripts of previous
5 trials, sections of transcripts. I reviewed reports
6 of interviews done with, uh, other fellows who were
7 incarcerated with Freddie at some point. I reviewed
8 an enormous file of documents related to lawsuit about
9 conditions in the DJJ system. Reports from other
10 expert witnesses in earlier trials. I saw a
11 chronology of family and events in Freddie's life. I
12 think that's all that I can think of.

13 **Q** Okay. You said you interviewed Mr. Owens for
14 approximately four hours. Did you also speak with him
15 a separate time?

16 **A** We had one brief phone conversation as well.

17 **Q** All right. I'd like to turn now to some
18 basic information on your work in the area of child
19 development. Perhaps you can give us a brief
20 introduction on some of the basics that are needed for
21 good psychological development in children?

22 **A** Well, people would -- I'm sure other experts
23 would use somewhat different words. I think you'd get
24 pretty good agreement on stable, positive attachment
25 relationships with, uh, key adults in your life.

1 Feelings of safety and security, particularly, in the
2 early childhood and extending onward. Opportunities
3 for educational development, uh, basic physical and
4 emotional care from parents or other caregivers.
5 Acceptance by parents. I think that would be a very
6 common sort of starting place. I think that captures
7 -- the positive sense of identity would probably be
8 very important as well.

9 Q Okay. And by contrast, can you tell us what
10 the definition of trauma is?

11 A Trauma has a number of definitions. One of
12 my best professional definitions is the simultaneous
13 experience of overwhelming negative arousal and
14 overwhelming negative cognition. Overwhelming
15 negative arousal is when a sensory experience is
16 overwhelming. Negative, feeling flooded, feeling
17 terrified, feeling like your emotional circuits are
18 blown. At the same time, the idea of what's
19 happening, that you -- the feeling of utter
20 vulnerability, the feeling of total threat, the
21 feeling of having no control over your fate, those two
22 elements together seem to produce what we typically
23 call trauma.

24 Q That would be one professional definition.
25 Could you also tell us what it means to talk about the

1 three dark secrets of trauma?

2 **A** Attempting to communicate the meaning of
3 trauma with children, particularly, -- I use this idea
4 of three dark secrets, the idea being that when
5 children are traumatized, at some point, they learn
6 this secrets. One, I call the Snowden secret. The
7 reference is to a book by Joseph Heller called
8 Catch-22 in which it takes place in World War II on an
9 American aircraft. A member of the crew was injured
10 with anti-aircraft fire. When the main character goes
11 to help him, he opens up his flap jacket and this
12 character Snowden's insides fall out.

13 The book calls this Snowden's secret, the
14 idea that the human body, which appears to be so
15 strong and durable and intact can shown to be a very
16 fragile bag filled with gooey stuff and lumps. And
17 acts of violence teach this or expose the secret to
18 children.

19 The second one I called Dantrell secret.
20 This is named after a little boy in Chicago who was
21 walked to school by his mother. When she let go of
22 his hand, he walked the next 75 feet to the front door
23 of the school where the teacher stood. Because it was
24 a dangerous neighborhood, there was a police car
25 sitting at the corner by the school. Nonetheless, he

1 was shot in the back of the head and killed. The
2 message for children is that adults can't protect you,
3 that you are really on your own out there, that you
4 can get killed and adults can't protect you from it.

5 The third, I called Migram's secret. That's
6 in reference to a psychologist who did a very famous
7 study years ago where he took normal people and asked
8 them to being in an experiment where they were going
9 to be the teacher. The learner in the original
10 experiment was an elderly man with a heart condition.
11 They were told the man was hooked up to electrodes in
12 a room. They could not see him, but they could hear
13 him.

14 They were told to teach him a task. Every
15 time, he made a mistake, they would give him electric
16 shock and they would increase dosage of shock. The
17 board in front of them goes up from 0 to 480. It has
18 a skull and cross bones and says "Danger", "High
19 Voltage". They give the people a sample of a 10.
20 Here, it is the board that goes up to 180.

21 Before the experiment, Migram asked people do
22 you think people will continue to give shocks even
23 after they realize the person is in great pain and
24 agony. Most people said no. In fact, when they did
25 the study, something like two-thirds of normal people

1 continued to give these electric shocks even after the
2 man in the other room is screaming. He's in agony.
3 He's in pain. Eventually, he apparently passes out
4 and is even dead. Milgram's secret was that people
5 would do anything. Anything is possible.

6 Children learn this when they're exposed
7 particularly to very grotesque acts of violence. Who
8 would think, as I learned from talking to children in
9 Africa, that somebody would put your parents in a pot
10 and ball them to death. It happens. Those three
11 secrets are ways that I've used to communicate some of
12 the ideas of trauma.

13 Q All right. Are there different forms of
14 trauma or ways that you can be exposed to traumatic
15 events?

16 A Well, I think one of the biggest differences
17 is whether it is a single incident, which we usually
18 call an acute incident of trauma. In an otherwised
19 normal, positive life, you have one very bad day. For
20 example, there is a very famous incident called the
21 Chowchilla kidnaping years ago. A group of children
22 were kidnaped on a school bus on their way to summer
23 school and buried underground for a day in this
24 abandoned truck or something. They were rescued. The
25 perpetrators were found.. The kids were saved. This

1 was a classic, acute, single incident of trauma. The
2 other category is repeated or what's called chronic
3 trauma where a trauma becomes a frequent occurrence,
4 almost becomes part of the fabric of daily life.

5 Q All right. Is there a difference in the way
6 that chronic trauma might affect a child versus a
7 single incident of acute trauma?

8 A Well, most -- I think most of the research
9 would say that acute incidents of trauma, single
10 incidents, the prognosis for recovery are pretty good.
11 Essentially, you reassure children that things are
12 back to normal. One bad thing doesn't happen and they
13 believe you. It's called the therapy of reassurance.

14 For example, research after 9/11 in New York
15 found that although the majority of children showed
16 signs of having been traumatized by that date, within
17 six or eight months, most of them are back to normal.
18 Those children in the Chowchilla kidnaping, a year
19 later, they were basically back to normal. Even they,
20 however, showed the effect that they had lost a little
21 bit of confidence in the future.

22 Psychiatrists who did the research found that
23 compared to other children like them, when she asked
24 how old do you expect to be -- grow old to be, they
25 expected to live seven years less than other children

1 just based on that one day. Generally, the prognosis
2 is very good.

3 For chronic trauma, repeated trauma, uh, a
4 lot of other issues need to come into play, that there
5 is no ability to reassure them things are back to
6 normal. You have what I and others have called
7 developmental adjustment where you begin to change
8 your whole pattern of thinking and feeling and
9 behaving to accommodate to this reality that you have
10 been in jeopardy, are in jeopardy, will probably
11 continue to be in jeopardy. So it tends to have more
12 effects on what you think about the world, how you see
13 yourself, how you shape your personality, much more
14 far-reaching effects.

15 Q All right. And you've talked already about
16 physical violence being a form of trauma, can other
17 things, like sexual abuse, be a form of trauma?

18 A There's a lot of evidence of sexual abuse can
19 be and as traumatizing to children as it is to adults.
20 Once again, particularly if it is repeated or chronic
21 because it violates the child's sense of safety. I
22 think it is one of the standard elements of any
23 definition of child abuse.

24 Q What about, uh, exposure to violence in
25 general? Can one experience trauma by witnessing acts

1 of violence or other traumatic events that are not
2 necessarily perpetrated against the individual
3 himself?

4 **A** There are a number of studies that point to
5 traumatic effects of exposure to violence. One
6 example is in Kuwait after the first Gulf War. The
7 United Nations in Kuwait immediately after the war,
8 arriving two days after the war. A study that was
9 done a year later found Kuwaiti children showing
10 symptoms of trauma who hadn't even been in Kuwait
11 during the Iraqi occupation. What had happened to
12 them was they were shown videotapes of the Iraqi
13 atrocities which the Kuwaiti government did as
14 political education. Just seeing these atrocities on
15 television was enough to elicit a traumatic response.

16 There is a studies that found that children
17 who saw the movie Jaws back in the '70s showed
18 lingering traumatic effects from these very powerful
19 images. Even media images of violence can have some
20 effect. There are many studies that point to the
21 effect of observing first-hand violence committed
22 against others in prisons, in refugee camps, in war
23 zones, in violent neighborhoods and in families.

24 **Q** All right. Much of your work, a majority of
25 your work has been specifically about how trauma

1 affects children. Can you tell us a little bit more
2 about how children in particular are affected by
3 trauma?

4 **A** Most people know the expression "fight or
5 flight". This has been promoted. It's been a very
6 popular idea that went faced with a terrifying
7 situation. People either flee or fight back. The
8 evidence for children is they are more likely to do
9 something else. That is, to emotionally disconnect
10 from the situation. Psychologists will call it
11 dissociation. They pretend they aren't there or they
12 emotionally shut down. They disconnect because they
13 can't really fight back if they are children and they
14 can't really flee when they are young children.

15 So this dissociation is the way to protect
16 themselves from the experience but it isn't risk-free
17 strategy. When it is repeated, when it's intense,
18 when it's severe, it can lead to a more generalized
19 dissociation of connection with your feelings. And I
20 think the modern thinking is that in its most extreme
21 form, this is the origin of multiple personalities
22 that people -- kids start off saying it was as if I
23 was not there and eventually say I was not there and
24 eventually some kids say I wasn't there but somebody
25 else was. It's a very normal self-protective

1 response, but it also carries with it the risk of
2 causing other problems down the line.

3 **Q** You touched on this briefly with one of the
4 studies, but can you explain in a little more detail
5 what the term "terminal thinking" means and how that
6 relates to children?

7 **A** Well, as I said, the study of the Chowchilla
8 kidnaping, they found that even one bad day produced
9 this reduction in the sense of future orientation.
10 Future orientation is the expectation that you will
11 live in the future and so you are motivated to do
12 things in the future that contribute to that. In a
13 sense, much of what we expect as teenagers is based on
14 that. Study so you'll do well on a test. Stay in
15 school so you go to college. Don't get pregnant so
16 you can have a better life. Go to school so you can
17 get a job. Don't smoke so you won't get cancer.

18 But one of the effects of trauma,
19 particularly repeated chronic trauma is to reduce the
20 sense of future orientation. At the extreme, replace
21 it with something that is often called "terminal
22 thinking". For example, if you say to a 15-year-old
23 what do you expect to be when you're 30 and he says
24 dead, this is an example of terminal thinking."

25 I had a call a few years ago from the

1 American Cancer Society --

2 **MR. MABRY:** I'm going to object at this
3 point. Hearsay and, obviously, can't recall what
4 the Cancer Society has to do with this case.

5 **THE COURT:** All right. Let's just see where
6 he goes with it. Go ahead.

7 **THE WITNESS:** Well, they said they were
8 testing some cancer prevention messages with
9 adolescents. They found one group of adolescents,
10 particularly those who came from very tough
11 violent backgrounds discounted these messages
12 saying why should I worry about getting cancer
13 when I'm 40 or 50. I'll probably be dead by the
14 time I'm 30. To me, it was an example of how
15 terminal thinking was evident in very important
16 aspects of their behavior.

17 **BY MS. PAAVOLA:**

18 **Q** All right. What about trauma associated with
19 child abuse in particular? Are there specific ways in
20 which that affects a child's development?

21 **A** I think the common understanding among
22 professionals will be that because child abuse is a
23 trauma like any other trauma, it has a traumatic
24 effect. But the effect is magnified because the
25 people that you were counting on to be your basic

1 security and acceptance and support are the people who
2 are delivering the traumatic experiences. It is
3 particularly debilitating.

4 Most, I think, researchers, experts would say
5 if you could point to one thing that was a common
6 element in a huge number of problems, whether it's
7 antisocial behavior or self-destructive behavior, that
8 child abuse would certainly be a good candidate.

9 Q All right. Uh, you've talked a lot about a
10 variety of your works, studies relating to specific
11 risk factors. Can you explain, first of all, what is
12 meant by that term a "risk factor"?

13 A A risk factor is usually taken to mean some
14 variables, some experience, some characteristic which,
15 on average, pushes a child in adolescence in a
16 negative direction as opposed to what might be called
17 a developmental asset which pushes them in a positive
18 direction.

19 Q Are there any studies in particular that
20 relate to how risk factors or exposures to different
21 respect factors might affect a child's development?

22 A They are really quite a few. As an example,
23 one of the classic study done by a researcher named
24 Arnold Sameroff, he looked at eight risk factors,
25 poverty, absence of a parent, substance abuse from the

1 parent, mental illness in the parent, low educational
2 attainment in a parent, rigid and punitive child-
3 rearing style, uh, large number of children in the
4 family and dealing with racism. Eight risk factors
5 that are commonly used in social histories.

6 As to the question how does the number of
7 these risk factors affect the likelihood of both
8 problem behaviors or social problem behavior and
9 intellectual development. The important finding was
10 that with one or two risk factors, the average child
11 is doing just fine. On the measure, for example,
12 those with zero risk factors, the average was 119.
13 With one risk factor, it's 116. With two, it's 113.
14 With 100 being the goal for normal development, this
15 means that even with any two of these risk factors,
16 the average child is doing just fine. The average
17 with four risk factors was 93. With six and more,
18 it's 85.

19 The point is, if you ask what's the impact of
20 any one of those risk factors, the answer is it
21 depends on number one, number five, number six or
22 number four. The accumulation of the risk factor is
23 evident in that study as it's evident in other another
24 studies.

25 There is a study by a guy named Zagerth where

1 he asked the question how does the accumulation risk
2 factors affect the likelihood that a delinquent youth
3 will be involved in murdering somebody. He found that
4 if there are four risk factors, that doubled the odds.
5 Being an abused child, being in a family with family
6 violence, being in a gang, having substance abuse
7 problems, those four doubled the risk. And there were
8 four more that tripled the risk. If you add having
9 neurological problems that affect thinking and
10 feeling, serious school -- academic difficulties and
11 school attendance difficulties, uh, using a weapon,
12 and, uh, having previous arrest, those added on
13 tripled the risk. Again, any one of them is not the
14 story. It's always the accumulation of these risk
15 factors.

16 On the positive side, these developmental
17 assets, you have a list of 40 developmental assets.
18 developed by researchers in Minnesota called the
19 Research Institute. And they found, once again, there
20 were 40 of them. Each of them are positive but the
21 issue isn't one of -- which one you have, but how many
22 you have. So, for example, the risk of violence being
23 involved in violent behavior, if you have 31 to 40
24 assets, at least six percent of kids were involved in
25 violence. If you had 0 to 10 of the assets, it's 61

1 percent. Once again, any one is not the story. But
2 if you have 31 to 40, it's very rare. If you have 0
3 to 10, it's the majority who are involved in violent
4 behavior.

5 Q All right. And you've talked in your work
6 about a war zone neighborhood. Could you explain what
7 you mean by that?

8 A I began -- we began to do this kind of work
9 after being in the Middle East and talking with
10 Palestinian youth and finding that some of their
11 experiences sounded a lot like kids in Chicago. As I
12 mentioned before, in this book, Growing up in a War
13 Zone, No Place to be a Child, and we looked at the
14 experience of kids in Mozambique which had a civil war
15 and Nicaragua which had a civil war and Palestine,
16 Israel that had high levels of political violence and
17 Cambodia where they had a genocidal, political regime
18 and a civil war and then kids growing up intercity
19 Chicago in neighborhoods where the likelihood, for
20 example, of having witnessed a death was the same as
21 it was in these war zones.

22 The likelihood of having a mother who was
23 seriously depressed was the same in intercity
24 neighborhoods as it was in refugee camps of --
25 Cambodian refugee camps in Thailand who had escaped

1 from war. We found a lot of parallels in what they
2 experienced. The frequency, the prevalence of
3 traumatic exposure and issues of fear and ability of
4 an adult to protect you and all those sorts of issues
5 were very similar.

6 Q All right. So we talked a little bit about
7 the background. I want to turn now to a little more
8 specific discussion of some of the particular risk
9 factors that you studied in your work over the years.
10 First, what about the role of parental abandonment.
11 Is that something that you found to be a risk factor
12 or is known to be in your field?

13 A As I said before, when Sameroff developed his
14 list of eight major risk factors, absence of the
15 parent was one. There is a lot of research lead by a
16 guy named Ronald Rohner in countries all over the
17 world looking at parental rejection. The basic
18 finding being that parental rejection, by itself,
19 seems to account for about 25 percent of all bad
20 development and kids. It's one of the most powerful
21 single risk factors.

22 There are hundreds of studies on father
23 abandonment and its impact on children or teenagers.
24 Less studied is maternal abandonment although I will
25 say the interviews I have done with, uh, incarcerated

1 youths and adults that, if anything, maternal
2 abandonment seems to be even worse than paternal
3 abandonment. The reason being that in our society you
4 can make sense of the fact that your father abandoned
5 you because it is so common. But to have your mother
6 abandon you seems to particularly devastating.

7 Q All right. You mentioned that the absence of
8 a father has been known to be particularly traumatic.
9 What about for boys in particular? Can you tell us
10 how not having a father figure affects a boy's
11 development?

12 A A lot of lists of risk factors put father
13 absence for boys as near the top of, uh, something
14 that is very risky or dangerous. One researcher who
15 has illuminated some of that process is a Canadian
16 researcher who has looked particularly at aggression
17 and particularly at the way boys learn how to control
18 aggression and the way they learn to sort of be normal
19 about their aggressive behavior. He found that father
20 absence was a big risk factor for boys who could not
21 do this.

22 One of mechanisms that he identified was when
23 little boys wrestle with their fathers in a healthy
24 sort of way, they learn how to express aggression, how
25 to control their bodies, how to sort of learn the

1 ropes of aggression in a normal way because their
2 fathers are more powerful and they care about their
3 boys and their conscience to teaching them how to be
4 normally aggressive for their society. Trombley
5 (phonetically) says, and I think he's right, that boys
6 who don't have fathers, don't have this educational
7 experience in the same way. They have to rely upon
8 the media, their peers, others to teach them the ropes
9 about aggression.

10 **Q** What about the presence of an abusive father?
11 Is that a risk factor?

12 **A** Certainly, the presence of any abusive is and
13 for the aggressive -- boys' development of aggressive
14 beliefs and behaviors is probably particularly
15 important.

16 **Q** You have written about this issue, sometimes
17 you call it the little man of the house or the role of
18 having, uh, serving as a mother's protector. How does
19 that affect a child -- a child's development?

20 **A** It's very common in interviewing the men and
21 teenagers who were the boys that we're talking about
22 to find that because their fathers were either absent
23 or were abusive, that they were drawn into this role
24 of being their mother's protector as a young child.
25 They often report that they were told to be the man of

1 the house. They have to be responsible for trying to
2 protect their mothers. They do this to the best of
3 their ability often in childhood.

4 It becomes particularly problematic later on.
5 Because as adolescents, they often, in effect, lose
6 respect for their mothers. And their mother's ability
7 to discipline them decreases because they quite
8 rightly say I've been protecting you all these years,
9 you know, who are you to tell me what to do.

10 There is a study of latchkey children,
11 children who come home without parents there after
12 school.

13 **MR. MABRY:** Your Honor, I'm going to object
14 at this point. He keeps citing studies. We have
15 no idea what the validity of these studies are.
16 It's basically recited hearsay.

17 **MS. PAAVOLA:** Your Honor, he's an expert in
18 his field. He's talking about the research in his
19 field. I think he should be allowed to discuss
20 that.

21 **THE COURT:** If he relied on it in arriving at
22 his opinion.

23 Did you rely on these studies in arriving at
24 some opinion that you may give in this case?

25 **THE WITNESS:** Perhaps some of them in a

1 general way but not -- I mention Sameroff, these
2 are particular studies. They are mostly used as
3 an example of general findings in the field.

4 **THE COURT:** Okay. I mean, does it -- the
5 foundation, provide the foundation for what you
6 have done in this case?

7 **THE WITNESS:** No one study does but the sum
8 total of them certainly is in my professional
9 expertise.

10 **THE COURT:** Okay. So the objection is
11 overruled. But maybe we can narrow where going so
12 we don't -- I mean, this is very educational, but
13 perhaps we can get more specific.

14 **BY MS. PAAVOLA:**

15 **Q** Okay. Actually I think I just have one more
16 risk factor to discuss with you, which I think you
17 have talked about in your own work. All right. Can
18 racism be a risk factor in exposure to that?

19 **A** Yes, it does appear in Sameroff's list. It
20 appears in another study, a very important one that
21 asked the question what percent of kids show some harm
22 when exposed to accumulation of risk factors. They
23 looked at five risk factors. Being abused and
24 neglected, living in the most violent neighborhoods,
25 being a boy between the ages of 13 and 15 and dealing

1 with issues of racism, and found that 100 percent of
2 the kids in that category showed either serious
3 academic or mental health problems. Racism, because
4 of its communication of the message of rejection and
5 because of its historical impact on identity clearly
6 is a risk factor for development.

7 Q Now I would like to turn to specifically how
8 exposure to these risk factors, I think you talked
9 about accumulation of these risk factors, how it
10 affects the child's development. So can you explain
11 to us what you mean by, you talked a little bit about
12 this already but the comparison of accumulation of
13 risk versus opportunity factors, can you explain that
14 a little bit more?

15 A Well, the -- in a sense, the best way to draw
16 a map of your child's life is to look at the
17 accumulation of risk factors and the accumulation of
18 positive influences whether you call them opportunity
19 factors or developmental aspects. The sum total is a
20 bit like saying if you got minus five and plus three
21 -- what is that -- plus two and minus two. If you had
22 minus ten and plus two, that's minus eight. It's a way
23 of getting the idea of are there compensatory,
24 positive influences to balance out negative ones.

25 Q You've written in, particularly in Lost Boys,

1 you have written about a code of behavior or how these
2 boys that you interviewed present themselves. Can you
3 explain what is meant by "code of behavior"?

4 **A** Well, a number of researchers in the field of
5 boys development have written about what is called the
6 boys' code or masculine code. And generally, what
7 they are referring to is the message that boys receive
8 -- boys in general. Some boys more than others --
9 that you need to be in control, you need to be in
10 control of your feelings, you need to present yourself
11 as a strong powerful person, that negative feelings
12 like sadness and fear need to be hidden and not
13 displayed because they are viewed as signs of
14 weakness. That is generally there in the research
15 literature on the cultural boys in America.

16 **Q** Can you also explain what is meant by
17 "masking"?

18 **A** One of the ways this issue of the code is
19 manifest is that boys, and particularly boys in high
20 threat situations, are likely to mask their -- what
21 they would see as their negative feelings. For
22 example, a guy named Terrence Real wrote a book called
23 I Just Don't Want to Talk About It, what he calls
24 covert male depression. Research always shows females
25 as having higher levels of depression than males.

1 Real and others attribute this, in part, to
2 the fact that males don't display symptoms of
3 depression as easily because it's taken as a sign of
4 weakness. They mask their feelings of sadness. They
5 mask their feelings of fear. They mask their feelings
6 of hopelessness or despair. They may -- these
7 feelings may come out sometimes when they trust
8 somebody or they feel very close or feel very
9 disclosing. They come out. More often though, the
10 masking is this aggressive, tough persona that they
11 present to the world. Often beneath that is someone
12 who is very scared, very sad, very depressed.

13 Q All right. Let's turn now to your specific
14 findings about Freddie's life history. From your
15 review of the materials, uh, and your other
16 preparation, did you reach any conclusions about
17 whether Mr. Owens had exposure to any of these risk
18 factors that we've already talked about this morning?

19 A I think based on the social history, the
20 records and the interview material, it seems that
21 Freddie Owens had almost all of the risk factors that
22 I've ever read about. I would be hard-pressed to
23 think of any that he didn't have. So the answer would
24 be an overwhelming yes.

25 Q All right. And let's talk about something in

1 particular. Neglect is a risk factor, yes?

2 **A** Yes.

3 **Q** Is that something you found present in
4 Freddie's life history?

5 **A** Well, certainly, a general description of his
6 early life will support that. In addition, I believe
7 there are some documented social service findings of
8 children being removed because of classic neglect in
9 the home.

10 **Q** What about parental abandonment from either
11 the father or the mother?

12 **A** Once again, the records, as I understand it,
13 demonstrate abandonment by a biological father at the
14 very least and then intermittent absence of a
15 stepfather.

16 **Q** Based on what you understand about the
17 neighborhood that Mr. Owens grew up in, does it fit
18 your category of a war zone neighborhood?

19 **MR. MABRY:** I'm going to object. I don't
20 think he's qualified to answer that.

21 **THE COURT:** Well, he's just talking about
22 his description of what a war zone neighborhood
23 means to him, I think. Okay. All right. Go
24 ahead.

25 **THE WITNESS:** Yes. My understanding is

1 this was the kind of neighborhood where community
2 violence was very common. The police were often
3 called or lots of incidents go unreported to
4 police. Lot of exposure to traumatic violence.
5 The kind of experience that many people would
6 never encounter in their entire lives, children in
7 these neighbors encounter it with some regularity
8 and frequency.

9 I know Chicago much better than I know South
10 Carolina. But in Chicago, if you do a map of
11 neighborhoods and draw in red the neighborhoods
12 that have the highest rates of homicide or violent
13 crime, those are the areas that we typically talk
14 about as war zone. In Chicago, many of them are
15 public housing projects where you have
16 concentrations of poor families who are unable to
17 break out of that. You get a cycle of criminal
18 violence, drug dealing, more criminal violence,
19 family disruption, all the elements that typically
20 appeared as a war zone neighborhood.

21 **BY MS. PAAVOLA:**

22 Q Did Freddie experience any traumatic events
23 in his life?

24 A Well, based on what he said during the
25 interview, as well as things that others elicited from

1 him and things that are in diverse records, I think
2 the answer is very clearly yes. Multiple experiences
3 including --

4 **MR. MABRY:** I'm going to object on grounds
5 of hearsay. He can't just parrot back what
6 someone just told him. He couldn't do that in
7 front of the jury. He couldn't parrot back what
8 Mr. Evans has said or any witness.

9 **MS. PAAVOLA:** I mean, yes, he can. He's an
10 expert. He's giving a life history.

11 **THE COURT:** Okay. Well, just, uh, get him
12 to describe what he's relying on when he's -- I
13 mean this what he relied on to come to his opinion
14 and where he got it so we can have an idea of what
15 he's talking about.

16 **BY MS. PAAVOLA:**

17 **Q** All right. I mean, you already explained
18 that trauma is a risk factor. I'm asking you if you
19 find evidence of risk factors in order to formulate
20 your opinion in this case. In particular, with regard
21 to trauma, is that a risk factor that you have found
22 in formulating your opinion about Freddie's life
23 history?

24 **A** Yes. The sources include interview material,
25 documents, affidavits from, uh, individuals who were

1 present in his life in various capacities, peers,
2 adults, staff people and institutions, some variety of
3 sources. There is a whole list of traumatic events.
4 Some police reports, medical records on his mother, a
5 whole variety of sources, all of which contain
6 evidence of traumatic exposure. Witnessing dead
7 bodies, witnessing acts of severe violence, people
8 being hit in the head, people being shot, bodies that
9 were shot, whippings with electric cords, witnessing
10 the torture and rape of a young girl, the aftermath of
11 that, bloody clothes from the girl, witnessing a girl
12 stabbed to death his pet rabbit, children being beaten
13 because the perception was they might be gay. That
14 list is extensive and come from so many different
15 sources that I think it is extremely unlikely that all
16 of these sources could be misrepresenting the nature
17 of his experiences.

18 **Q** What about the issue of family history of
19 criminal violence? Is that a risk factor that you
20 found present in Freddie's life history?

21 **A** It certainly is. To my understanding and
22 from the records, there are multiple arrests of his
23 immediate and extended family incarcerations, of
24 immediate and extended family going back at least one
25 or two generations.

1 Q All right. What about the issue of child
2 abuse? Is that something that you found present in
3 the documents or other information that you collected?

4 A Clearly, there is the social service
5 intervention about neglect which involved placement of
6 the children. There are multiple reports of extreme
7 corporal punishment in the form of whippings, which in
8 most jurisdictions where they investigated would be
9 capable of being substantiated as child abuse. There
10 are a number of examples of things which would be
11 considered psychological emotional treatment,
12 emotional neglect.

13 There is an example given of the family for,
14 uh, I believe a brother's 12th birthday, arranging for
15 a prostitute to come as a birthday present for the 12-
16 year-old brother. There is sexual abuse of him by
17 adult women. Two women in their 30's having sex with
18 him when he was about 12. This would meet the
19 requirements for statutory rape. There is an enormous
20 number of incidents which are present in reports of
21 several individuals, in Freddie Owens' report,
22 documents. I would feel very confident in saying he
23 has experienced child abuse as a risk factor.

24 Q All right. And then you talked earlier about
25 how being a mother's protector can be problematic for

1 a young boy's development. Is that something you have
2 found present with Mr. Owens?

3 **A** Well, by his report, he often slept on the
4 floor in front of the door to his mother's bedroom to
5 try to protect her. There is reports of when he was
6 in elementary school he had trouble staying awake.
7 Said he could not sleep at night. All of which is
8 suggestive of a child who is terrorized and
9 traumatized at night. He reports that he was able to
10 protect his mother better when he got a gun as a young
11 adolescent and was able to be a more powerful
12 protective factor. So I think that pattern has been
13 very clear in the reports that were available to me.

14 **Q** You talked about one study that cited or this
15 one study that cited difficulties in school attendance
16 as a risk factor in a boy's development. Is that
17 something Mr. Owens experienced as well?

18 **A** The school records show him failing several
19 grades in elementary school and having very large
20 numbers of absences, even dating to ninth grade,
21 which, I think, may have been his last year of school.
22 20, 18, 30 days a year absence as well as grades that
23 he received F's, D's.

24 **Q** What about early childhood exposure to drugs?

25 **MR. MABRY:** I couldn't hear the question.

1 **BY MS. PAAVOLA:**

2 **Q** What about exposure to drugs in his
3 community? Is that something that Mr. Owens
4 experienced?

5 **A** Based on his report and some of the other
6 affidavits, there was family drug use. At least,
7 there is a report that I believe, I think it's his
8 stepfather, for his birthday asked for cocaine. That
9 was provided to him. Freddie was drawn into the drug
10 dealing culture at a very young age and was involved
11 with those drugs and, to some degree, perhaps using
12 drugs and alcohol. Just very common amongst
13 traumatized children as self-medication. I think
14 there are multiple reports of that as well.

15 **Q** And then finally, in Mr. Owen's life history,
16 was racism a significant risk factor?

17 **MR. MABRY:** I couldn't hear. I couldn't
18 hear the question.

19 **MS. PAAVOLA:** I'm sorry.

20 **MR. MABRY:** Was what?

21 **BY MS. PAAVOLA:**

22 **Q** Was racism a significant factor for Mr.
23 Owens?

24 **A** Well, it would appear so. There is a very
25 specific incident in his report when the children were

1 sent into foster care with a white family where he and
2 his siblings were forced to live in the basement in
3 very substandard conditions and the white children
4 were kept upstairs. It seems to me it ought to be an
5 undeniable fact that racism exists in America and
6 that, as an African-American child, he would have
7 encountered this growing up.

8 There's a study just a few years ago that
9 asked whites and African Americans across the whole
10 country how often does your race come in to your mind
11 as something that affects what happens to you. Among
12 whites, it was three or four or five or six percent
13 who said very often. Among African-Americans, it was
14 85 percent or more. So clearly -- and clearly from
15 his own self-reports, he's very aware of racism being
16 a factor in his life experience.

17 **MS. PAAVOLA:** Your Honor, may I have one
18 moment please?

19 **THE COURT:** Sure.

20 **BY MS. PAAVOLA:**

21 **Q** All right. Dr. Garbarino, you mentioned kind
22 of generally that trauma, violent trauma and sexual
23 abuse were both risk factors in Mr. Owens' life. But
24 I would like to ask you about the details of some of
25 those events. Can you explain to the court in detail

1 what some of these incidents were?

2 **MR. MABRY:** Same objection, Your Honor.

3 **THE COURT:** Okay.

4 **MR. MABRY:** Total hearsay. I don't think it
5 can come in in front of a jury, so it's
6 irrelevant.

7 **THE COURT:** Okay. Go ahead.

8 **THE WITNESS:** Well, he reports -- I'm sorry.
9 Is it okay?

10 **THE COURT:** Yeah. Yeah. Go ahead.

11 **THE WITNESS:** He reports that his first two
12 sexual encounters at age 12 were with 34-year-old
13 -- 30-year-old women. Women in their 30's. One
14 of whom was a crack addict who offered to have sex
15 with him in exchange for drugs. The other woman
16 also drew him into sex when he was 12. As I say,
17 that's a classic sexual abuse. It's statutory
18 rape, technically, I believe. As far as, uh, --
19 and then there were other sexual encounters before
20 the age of 16 with older girls and women, many of
21 whom were drug addicted people.

22 As far as traumatic violence, there's an
23 incident when he was riding in the car, somebody
24 was shot by point-blank in the face and their
25 blood and bones ended up in his face. He was 10

1 or 11 at that age. There is this witnessing
2 coming across this girl being sodomized and raped
3 by three men in the clearing of a path that he
4 used to walk home by. He didn't go out of the
5 house for weeks afterward.

6 There is witnessing the grandfather being hit
7 in the head with a cinder block and his
8 grandmother then shooting the man who did that in
9 the leg. There is coming upon a relative throwing
10 a 40-ounce beer bottle at another relative. He
11 has so many experiences that any one of them would
12 have lead -- would have, I think, lead, in a
13 middle class well functioning family, to a kid
14 going into therapy or counseling. Any one of
15 these incidents would have been deemed significant
16 enough to initiate that kind of mental health
17 intervention. As best I could understand, there
18 is no mental health intervention for any of these
19 incidents.

20 **BY MS. PAAVOLA:**

21 **Q** All right. That incident that you talked
22 about where he witnessed the girl being raped and
23 sodomized, how old -- do you recall how old he was
24 when that happened?

25 **A** I believe he said he was about 10 or 11 at

1 the time. The other incident where he saw the person
2 shot in the face and the blood and the bone got in his
3 own face, do you recall how old he was then?

4 **A** I believe he was about 10 or 11 at that time
5 as well, 11 or 12.

6 **Q** And then I think you also mentioned something
7 about him finding a dead body?

8 **A** I believe he found the dead bodies of, uh, I
9 think at least one of the people was a member of his
10 extended family. It was a, I believe, a murder-
11 suicide case. I think he was again maybe 12 or 13,
12 10, in that range.

13 **Q** All right. I would like to turn now to the
14 information that you have related to Mr. Owens'
15 experiences in the Department of Juvenile Justice.
16 First of all, can you recall about roughly when Mr.
17 Owens went into DJJ and when he came out?

18 **A** I believe he was about 15 and he came out at
19 about 19.

20 **Q** Do you recall around what the date might have
21 been?

22 **A** I believe he was released in the spring or
23 summer preceding the murder that he was convicted of.

24 **Q** Okay. Now you've kind of giving us a life
25 history of Mr. Owens in his community. Can you now

1 tell us what his life was like in the Department of
2 Juvenile Justice?

3 **A** Again, based on the records available, the
4 affidavits of others who were in the facilities and
5 the federal lawsuit --

6 **MR. MABRY:** I'm going to object at this
7 point. It's my same objection. It's all hearsay.

8 **THE COURT:** Okay. All right. Go ahead.
9 Yes, sir.

10 **THE WITNESS:** He entered the system, uh, and
11 a system in which the issues of violence, sexual
12 and physical violence continued, if not were
13 magnified and that, in that environment, he
14 entered the environment in a very vulnerable state
15 and, in adapting to that environment, became more
16 and more violent and dangerous. For example, the
17 records show that he was about 147 pounds, 5 foot
18 10 when he entered. He was described as being
19 sort of a skinny kid. He's reported by another
20 who knew him then that he cried often when he
21 first was admitted.

22 And by the time he left that system, he began
23 to exercise and lift weights and do pushups and
24 built himself up physically to become more strong
25 and intimidating, and did become more strong and

1 intimidating. There were numerous incidences
2 that, uh, observed threatened and actual sexual
3 assault that occurred in his presence, as well as
4 that were inflicted upon him and may even have
5 participated in. The exper-- all the evidence
6 that I saw suggested that those four years
7 compounded whatever risk problems -- risk factors
8 and problems he brought into the institution.

9 **BY MS. PAAVOLA:**

10 **Q** Okay. I want to ask you about some of those
11 in a little more detail. I think you just said he
12 observed sexual assaults on others. Can you tell us
13 what those were or some of what those were?

14 **A** Well, he observed a younger boy being forced
15 to endure anal rape by an older who threatened him
16 with a pencil to his throat, I believe it was. He
17 observed multiple anal rape of other boys on at least
18 one occasion. He observed boys being forced to perform
19 oral sex on older boys on at least one location.

20 When asked about, you know, out of every 10
21 boys, how many experienced some kind of sexual
22 assault, his answer was probably 6 or 7 out of each
23 10. And I have no reason to doubt that given the
24 reports that were available as well as the reports
25 that have been made in the past about juvenile

1 institutions of this nature. I think it is fair to
2 say that he was certainly witnessed multiple occasions
3 of sexual assault of other boys.

4 Q Did Mr. Owens experience any sexual abuse
5 that was perpetrated against himself?

6 A Well, he says that yes, he did. He had oral
7 sex imposed upon him, that on multiple occasions, he
8 was threatened with sexual assault. He claims that
9 even before being institutionalized, he was
10 approached, experienced homosexual approach from a
11 grown man when he was a teenager. But these sorts of
12 experiences continued in the institution.

13 Q What about physical violence? Are there --
14 were there any incidents where Mr. Owens sustained any
15 serious physical injuries?

16 A I believe he had scars that were attributed
17 to various fights and assaults that took place. All
18 the respondents who were interviewed who had been in
19 the facilities speak of the frequency of assaults and
20 fights and necessity of fighting. Some of them spoke
21 about initiation rituals where the new boys were told
22 they had to fight their way out of rooms. This is, I
23 think, so widespread in prisons and juvenile
24 facilities to be at this point in American history
25 almost evident.

1 **Q** Okay. I think you already said that you
2 reviewed some of the materials from the DJJ
3 class-action lawsuit. Do those documents corroborate
4 what you collected from other witnesses like Mr. Owens
5 and the other inmates?

6 **A** I believe they do. Widespread pattern of
7 these issues related to issues of crowding, lack of
8 supervision and, to some degree, standards of conduct
9 by some staff and many detainees in the facilities.

10 **Q** Based on what you know and about child
11 development and information you have collected
12 specifically about Mr. Owens' history, was the period
13 of time that he spent in the Department of Juvenile
14 Justice a significant period in his development?

15 **A** Yes. These years of middle -- adolescent
16 years are generally recognized to be very important
17 for correcting bad developmental patterns that he was
18 developing or interventions to bring kids back to some
19 social or positive development. All the evidence
20 seems to be that all that many problems, mental health
21 problems, behavioral problems that Freddie Owens
22 brought to the institution were compounded and
23 exacerbated by his experience there at a time when he
24 needed very powerful positive interventions to
25 recover.

1 Q Okay. So we talked about the general
2 knowledge your field and we've talked now about some
3 specific risk factors that you find present in Mr.
4 Owens' life. Lastly, I would like to ask you if you
5 have reached any conclusions about how, uh, if they
6 do, these particular risk factors that you explained
7 that were present in Mr. Owens' life affected him in
8 particular?

9 A I think my -- the overall story of his life
10 is one of incredible accumulation of risk factors that
11 undermined his mental health, his motivation for
12 pro-social behavior, his capacity for pro-social
13 behavior, his vocational success. Almost every domain
14 of his development seems to have been impaired by
15 this, by this cumulative effect of trauma and lack of
16 positive intervention.

17 The fact that these risk factors exist in
18 almost every domain of his life and the fact that he
19 may well be -- have been particularly vulnerable to
20 some of these influences, there's reports from him and
21 from others in the family that as a little child, he
22 was fearful. He was taught that he had to fight to
23 protect himself. There is a repeated story of being
24 locked out of the house with his brothers and told to
25 fight against neighborhood kids who were harassing

1 him.

2 I really believe that had he been in a
3 positive environment as a child, he certainly could
4 have had a positive life as a teenager. If he had
5 been in a much more positive environment as a
6 teenager, he could well have recovered to a more
7 pro-social positive way of life as an adult. I think
8 the cumulative effect of all of this has been to
9 inflict a high level of damage evidenced in his
10 diagnosed depression, evidenced in his severe react to
11 violence, to sexualized issues. On almost every
12 domain of development.

13 There's all this evidence in school records
14 about almost mental retardation early on which seemed
15 clearly to be not the result of some organic
16 predisposition for retardation but rather the
17 cumulative effect of living in such a stressful,
18 unsupportive environment because he appears now as a
19 normal intelligent, if not above average, intelligent
20 person.

21 Q You talked earlier about one of the effects
22 being a code of behavior or you explained masking. Is
23 that a coping mechanism that you found that you've
24 concluded Mr. Owens' uses?

25 A I think very clearly that, uh, as I said

1 before, that he was reported to cry a lot when he
2 first came into DJJ. When I asked him what would be
3 the most surprising thing about you, he said I cry a
4 lot now even. He has clearly masked -- most people
5 see his very, very aggressive, angry, rageful behavior
6 and yet there is multiple evidence of a sort of softer
7 side that is kept private and it's very, uh, almost
8 jealously guarded as a private thing because it's such
9 a sign of weakness and should not be revealed to those
10 who might hurt him.

11 Q. Did you review -- in Mr. Owens' DJJ files,
12 did you review any psych reports where he was
13 evaluated? Do you recall that?

14 A Yeah, there were several, I believe.

15 Q In particular, I would like to ask you about
16 one. I don't know if you remember it. I guess we'll
17 will find out. Mr. Owens was evaluated in 1995 when
18 he first entered the Department of Juvenile Justice.
19 Do you recall that report?

20 A I believe so.

21 Q Was there anything in that report that you
22 can recall that is an example of this kind of masking
23 or coded behavior as a method for coping?

24 A I believe it's in every report, but you could
25 correct me, where they speak about a very high level

1 of suspicion about disclosing feelings to anyone, uh,
2 a very strong message that, uh, only by being strong
3 and aggressive will he be safe. In one of the
4 reports, there's talk about suicidal ideation,
5 thinking about suicide, thinking about things are so
6 desperate it would be better if his family were dead,
7 if he were dead. There is a diagnosis of depression
8 in one of the reports. There was medication offered.
9 I don't know if that's the report you're referring to.

10 Q You reviewed some information from the former
11 trial testimony in this case. In particular, I want
12 to ask you if you recall the testimony of Joe Wood ---

13 A Yes, I do.

14 Q --- who talked about, uh, -- well, he talked
15 about how Mr. Owens' made him feel. But prior to
16 that, he talked about some statements that Mr. Owens
17 made to him. Do you recall? Do you know what type of
18 statements I'm talking about?

19 A Yes, I believe you said I don't -- can I say
20 it?

21 THE COURT: Yeah, you can say it.

22 THE WITNESS: I don't give a shit about what
23 happens to me. I don't care about my life. I'm
24 destined to be in prison. Those sorts of things,
25 if I recall correctly.

1 BY MS. PAAVOLA:

2 Q Does that relate in any way to your
3 conclusions? Does that support your conclusions in
4 this case?

5 A I believe it does. I think it's part of this
6 general masking, his general persona of aggressive
7 violent behavior as a defensive, protective mechanism
8 also related to his terminal thinking that you get so
9 desperate. I think it's hard for most of us to
10 appreciate how desperate you feel with that kind of
11 life about any prospects for the future. The
12 combination of needing to be strong and rage about --
13 he didn't volunteer for this life that he started as
14 an infant. I think it's not surprising that somebody
15 would have great rage about this.

16 I must say that in conjunction to this, I
17 think there is -- with all the terrible stuff that he
18 has talked about happening to him, that he had been
19 involved in, I think there are other things that he
20 considers even more terrible that he has not
21 disclosed. I think his angry, rageful aggressive
22 persona is all tied up in this mix of things.

23 Q You reviewed a variety of records from the
24 Department of Juvenile Justice. Do you recall that
25 Mr. Owens had several writeups, I guess what they will

1 be called, incidents?

2 **A** Yes.

3 **Q** Is that surprising to you?

4 **A** No, it's not surprising to me both in general
5 because in facilities like this, a lot of juveniles
6 are involved in very aggressive behavior. My
7 understanding from the federal class action suit is
8 that the official writeups of many incidents
9 misrepresented the nature of them. That assaults
10 might be represented as fights, for example. It
11 doesn't surprise me that someone as hurt and troubled
12 and angry as Freddie Owens, particularly with the
13 homophobic rage that he has of being sexually
14 victimized and starting the process as a relatively
15 small light boy in a place that values big, tough
16 aggression that he would be involved in a sequence of
17 aggressive behavior that would escalate, not
18 dissipate.

19 **Q** All right. So after Mr. Owens was released
20 by the Department of Juvenile Justice, where did he
21 go?

22 **A** From Juvenile Justice, he went -- my
23 understanding is he went to adult prison for ---

24 **Q** Oh, yes. You're right.

25 **A** --- for an interim of a year before he was

1 released at 19. My understanding is he went back to
2 his home environment.

3 Q All right. Was the environment any different.
4 than it was when he went in?

5 A No. To the best of my knowledge, no. The
6 criminality and the violence, the lack of care was
7 still present.

8 Q Was there anything that Mr. Owens did to try
9 to better his situation or remove himself from that
10 environment?

11 A By his report, he attempted -- looked into,
12 investigated enrolling in Greenville Tech to try to
13 get on some positive educational track and that did
14 not happen.

15 Q All right. Do you recall, Dr. Garbarino, at
16 the time of the Speedway shooting, how old Mr. Owens
17 was?

18 A I believe he was 19.

19 Q Based on your review of his life history and
20 your experience in the area of child development, is
21 there any significance that you would attach to his
22 age at the time of the crime?

23 A Well, only that he, even in a normal
24 situation, would not be a fully mature adult. The
25 various ages that used maturity was if they are 16 for

1 consent to some things and 18 for some things and 21
2 are very gross, kind of, average markers. But many
3 19-year-olds, perhaps most 19-year-olds are not
4 mature. There's a lot of evidence of society
5 understanding that, maybe more in the past than today,
6 but I don't think there's a special significance
7 except that he was not a fully formed adult.

8 Q You talked about a number of specific
9 experiences that Mr. Owens had throughout his life and
10 childhood. Did he have any control over whether he
11 experienced many of these events?

12 A Many of them would have been out of his
13 control. Who his parents were, the quality of care he
14 got, the neighborhood he lived in. I should point
15 out, the neighborhood you live in turns out to be a
16 very powerful influence, particularly for kids at
17 risk.

18 Kids who develop a chronic pattern of
19 aggression and bad behavior by age 10, on average, 30
20 percent of them will end up as serious violent
21 delinquents. But in some neighborhoods, it's not 30
22 percent, but 60 percent. In other neighborhoods, it's
23 15 percent. So living in these sort of war zone
24 neighborhoods makes any individual problems that you
25 bringing to adolescents worse or better.

1 Obviously, the older he gets, the more he's
2 making choices. But many of these experiences were
3 certainly not under his control. Certainly, once he
4 was sentenced into the juvenile justice system, it was
5 very little control over whether or not he would face
6 the threat of assault and experience assault.

7 Q I think you touched on this earlier briefly.
8 A lot of your work -- some of your work has talked
9 about ways to intervene in kids' lives like Freddie's.
10 Are there things that could've been done to help him
11 somewhere along the way?

12 A I believe there certainly were things. And
13 the further back you go, the more things could've been
14 done. I think that if Freddie had been placed in a
15 different family early on in life, he might well have
16 turned out differently. If he had been placed in a
17 different juvenile facility at 15, 16, he might well
18 had turned out differently. There is evidence that
19 violence reduction programs and teenagers can be
20 effective if they simultaneously change their thinking
21 and give them practice and alternatives to violent
22 behavior. I don't see any evidence that these kinds
23 of programs were available to him. I believe there's
24 even a record of him requesting counseling at some
25 point and not being offered.

1 Q Mr. Owens' mother -- I think you collected
2 information. He has a loving relationship with his
3 mother; is that right?

4 A I would say yes, but he also has a very
5 ambivalent and ambiguous relationship towards his
6 mother, as would not be surprising given the fact that
7 she did not protect him from a lot of experiences and
8 he wasn't in a position of trying to protect her from
9 a lot of experiences.

10 Q Is having a parent who does have love and
11 care for a child, enough to overcome some of these
12 other risk factors that you talked about?

13 A Well, certainly enough to overcome some of
14 them in small measure. In extreme cases, it might
15 even be possible to overcome large numbers of risk
16 factors. But it's unlikely that even if he had one
17 parent who was really well-functioning and provided
18 excellent parenting, that would be enough given the
19 accumulation of other factors.

20 Q Mr. Owens disclosed to you a number of
21 traumatic experiences in his life, violence, sexual
22 abuse. In your experience, interviewing lots of
23 children like Mr. Owens was, is that something that
24 typically you can get out initially in an initial
25 interview, for example?

1 **A** Usually not. But it depends on a great deal
2 on who the interviewer is and what their relationship
3 with the interviewee is. I certainly had the
4 experience when we were doing the research for Lost
5 Boys of being told by members of the staff it's
6 pointless to interview this boy or that boy because
7 they don't say anything. And then particularly, when
8 interviewed by my colleague who was a very sympathetic
9 woman, they would talk for three or four hours with
10 her. So it depends a great deal on who is asking. It
11 may take a period of time to build up enough trust for
12 disclosure or it may involve somebody who already is
13 trusted to sort of be a sponsor for disclosure. It's
14 not at all surprising or unusual to have, particularly
15 with matters of sexual assault involving males, to
16 have extreme reticence to disclosure.

17 **Q** So why do you think Mr. Owens was able to
18 disclose those things to you on the first interview?

19 **A** Well, I think the most important reason was
20 your presence. In his life, there had been several,
21 maybe two or three women who he feels he can trust
22 enough to be disclosing to. And it seemed clear to me
23 that you had that kind of relationship built up with
24 him and you sort of sponsored my interview with him.
25 And he was able, willing to be more disclosing than he

1 might have been if I interviewed him alone or someone
2 else had interviewed him.

3 Q Would it be typical in your experience that
4 someone like Mr. Owens would be able to disclose such
5 things without some kind of relationship of trust in
6 place?

7 A I think it would be very surprising.

8 Q Okay. Finally, I would like to ask you, Dr.
9 Garbarino, if you could sort of sum up a little bit.
10 You talked about kind of this exterior that Mr. Owens
11 presents and you've also talked a little bit about the
12 underlying ways in which his development might have
13 been affected. So, I guess, in some ways, that's sort
14 of a contrast. Based on your work and your
15 significant experience in this area, what is it about
16 this explanation that you offered that people can
17 relate to and understand?

18 A Well, I think there are a couple of things.
19 One is for somebody trying to understand this, they
20 have to be able to see, not only the 200-pound grown
21 man that we're looking at in court but understand
22 there is an untreated traumatized child inside of that
23 dangerous man. That alone is a very important part, I
24 think, of any way of understanding because all of a
25 sudden things start to fall in place and make sense.

1 That's one thing.

2 The second thing is this fundamental idea
3 about accumulation of risk factors, that if enough
4 risk factors accumulate, no one is immune. There is a
5 study, for example, of American soldiers in World War
6 II that asked after 60 days of continuous contact --

7 **MR. MABRY:** I'm going to object to this,
8 Your Honor. A study of World War II veterans.

9 **THE COURT:** Okay. Overruled. Go ahead.

10 **THE WITNESS:** This study found that after 60
11 days in combat, 98 percent of the soldiers were
12 psychiatric casualties. It wasn't because of
13 some individual vulnerability on their part
14 because the accumulative affect was too much for
15 human beings to endure. So I think making that
16 point about it's not because of the absence of
17 any one respect but accumulation is a way to get
18 people to understand this.

19 Even neurological and genetic things could
20 not be understood without the whole context of a
21 life. If I might give another study that was
22 done by researchers, Caspi and Moffitt, they
23 looked at the particular gene called MAOA gene.
24 This gene affects chemicals in your brain that
25 are involved in processing stress. If you ask

1 the question does it matter if this gene is
2 turned on or turned off, the answer is, it
3 depends. For abused kids, if it is turned off,
4 85 percent develop conduct disorder.

5 **MR. MABRY:** I'm going to object to this, Your
6 Honor. He's going into what would be a
7 neurologist testimony.

8 **THE COURT:** Yeah, he's getting a little far
9 field there.

10 **MS. PAAVOLA:** Well, Your Honor, I think he's
11 talking about just examples of how he reached a
12 conclusion.

13 **THE COURT:** Has anyone done a neurological
14 study on Mr. Owens?

15 **MS. PAAVOLA:** Yes, actually there is
16 testimony at the prior trial about his
17 neurological impairments.

18 **THE COURT:** Okay. Relating MAOA gene?

19 **MS. PAAVOLA:** No, not related to that
20 specific gene.

21 **THE COURT:** Okay. Well, let's narrow it down
22 a little bit. Go ahead.

23 **BY MS. PAAVOLA:**

24 **Q** All right. Well, what about the examples of
25 sexual abuse that you have given? Uh, is that

1 something in particular that you found impacts people,
2 helps them understand how someone like Freddie might
3 develop?

4 **A** In my experience, when juries hear that the
5 Defendant experienced significant sexual abuse --

6 **MR. MABRY:** Objection.

7 **THE COURT:** Yeah, I don't know how -- I'm
8 not sure he's qualified to testify about what
9 juries think.

10 **MS. PAAVOLA:** I think the question for Your
11 Honor will be whether testimony like Dr.
12 Garbarino's would have made a difference. I think
13 we should be allowed to offer evidence about
14 whether it would have made a difference.

15 **THE COURT:** That's more argument than it is
16 evidence.

17 **MS. PAAVOLA:** Could we have an opportunity to
18 proffer the testimony?

19 **THE COURT:** Okay. Go ahead.

20 **BY MS. PAAVOLA:**

21 **Q** Do you need me to ask the question again?

22 **A** Please.

23 **Q** We're talking about sexual abuse and how, in
24 your experience, that, in particular, has been
25 something that affects others and helps them

1 understand this kind of life story.

2 **A** In the field of child abuse and neglect,
3 generally, any time there are issues of sexual abuse,
4 people are particularly upset. We can see this in the
5 allocation of funding. It's a very high intensity
6 issue for people. When it is offered in as part of
7 the life history of the defendant, I believe that
8 based on my experience in other trials that it has an
9 impact on people's understanding of how a person was,
10 uh, how a person was developed and how a person was
11 damaged.

12 **Q** Finally, what about trauma in general or
13 violent acts. Are people who have expressed those
14 particular events able to understand those in general
15 terms?

16 **A** You know, the very strict definition for
17 posttraumatic stress disorder in the manual that
18 psychologists and psychiatrists used for diagnosis --
19 and I'm not offering a diagnosis. I'm simply saying
20 if you look at the manual definition, talks about
21 experiences outside the realm of normal human
22 experience. Almost by definition, it's hard for
23 people to know what trauma is who haven't been
24 traumatized unless you give them a lot of specific
25 details about it.

1 Some of these things, like having -- until
2 recently, if you just watched movies, you think when
3 people are shot, you think they just very peacefully
4 fall over and die. But people who have actually seen
5 it know that you blood and bone and brains splattered
6 all over the place. That gap between what people
7 typically know and what trauma typically involves can
8 be very helpful. People understand you are not
9 talking about something very vague and small scale,
10 but something very profound.

11 **Q** No further questions, Your Honor.

12 **THE COURT:** Okay.

13 **MR. MABRY:** Can we take a break? Short
14 break.

15 **THE COURT:** Yeah, I think we can do that.

16 Doctor, you are welcome to step down. Please
17 don't discuss your testimony with anybody. We'll
18 take about 5 or 10 minutes and then we'll come on
19 back.

20 **MR. MABRY:** Thank you, Your Honor.

21 (WHEREUPON, a recess is taken from approximately
22 11:27 a.m. until 11:51 a.m.)

23 **THE COURT:** You ready?

24 **MR. MABRY:** Yes, sir. I have a quick matter
25 of law. If we could ask the witness to step out,

1 I'll just put it on the record.

2 THE COURT: Okay.

3 MR. MABRY: It won't take but 30 seconds
4 maybe.

5 THE COURT: Just let him step into the
6 hallway.

7 MR. MABRY: That'll be great.

8 THE COURT: Okay.

9 (WHEREUPON, the witness exits the courtroom at
10 approximately 11:51 a.m.)

11 THE COURT: Okay.

12 MR. MABRY: Yes, sir. Judge, at this time,
13 the Respondent moves to strike testimony of Dr.
14 Garbarino. We rely on, I believe it's Moriarty
15 versus Garden Statuary Church of God. It's 334
16 South Carolina, it looks like 150, 511 S.E.2d 699
17 where there's testimony regarding recovered
18 memories of abuse. It may not receive at trial
19 absence accompanying testimony of memory
20 repression. That in a cause of action involving
21 alleged sexual abuse.

22 We also move to strike under Jones versus
23 Doe. That's a South Carolina Appellate decision,
24 2006, which basically says the rules permit an
25 expert to give an opinion and rely on facts and

1 data that are not admitted into evidence or even
2 admissible in evidence. It does not allow for the
3 unqualified admission of hearsay evidence merely
4 because an expert has used it in forming his
5 opinion.

6 **THE COURT:** Okay.

7 **MR. MABRY:** I understand the Court's ruling
8 but our position is the jury would have never
9 heard this testimony on either of these cases. We
10 move to strike it at this time.

11 **THE COURT:** I'm not sure he testified that it
12 was a recovered memory.

13 **MR. MABRY:** Maybe he can clarify that.
14 Maybe he is just saying that he didn't tell
15 anybody until he told him.

16 **THE COURT:** I think that's what he said.
17 Anyway, I don't want to argue your petition.

18 **MR. WEYBLE:** Right. Your Honor, I don't know
19 anything -- I'm not sure where the reference to
20 suppressed or repressed recovered memory was
21 either. But there is a larger point here that has
22 come up several times that I just want to briefly
23 address. Mr. Mabry's mentioned it again. That is
24 that the jury never would have heard this. We can
25 not disagree with that more.

1 Everything that Dr. Garbarino's said is
2 clearly within the mainstream what the Supreme
3 Court of the United States has established as
4 relevant admissible mitigating testimony. There
5 has been several references to the hearsay rules.
6 Just three weeks ago, the Supreme Court of the
7 United States entered a decision called Sears
8 versus Upton that reversed the denial of
9 postconviction relief by a Georgia state court in
10 a capital case. In so, part of one of the
11 observations the Supreme Court made was the fact
12 that some such evidence may have been hearsay does
13 not necessarily undermined its value or
14 admissibility for penalty phase purposes.

15 We're talking about a specific and somewhat
16 unique set of rules that govern a capital
17 sentencing trial. They're not all the same as the
18 rules that you find in an ordinary civil case or
19 in a criminal case. I have heard certainly
20 nothing from Dr. Garbarino that would not have
21 been admitted in a capital trial just about
22 anywhere in this country. Or sort of, to take it
23 the other way, I have seen" certainly a number of
24 Supreme Court decisions and decisions by the lower
25 court reversing a trial judge or reversing a death

1 sentence under circumstances where information
2 similar to this was kept out wrongly by the trial
3 judge.

4 **THE COURT:** Okay.

5 **MR. WEYBLE:** I think we need to understand
6 what the rules are here to begin with.

7 **MR. MABRY:** I understand the rules.

8 **THE COURT:** Okay. All right. Well, we
9 don't need to fight. I allowed it in, so it's not
10 a --

11 **MR. WEYBLE:** Okay. Thank you.

12 **THE COURT:** All right. Anything else?

13 **MR. MABRY:** No, sir. We're ready to go
14 forward.

15 **THE COURT:** All right. Thank you, Mr. Bond.

16 (WHEREUPON, the witness enters the courtroom at
17 approximately 11:55 a.m.)

18 **CROSS-EXAMINATION**

19 **BY MR. MABRY:**

20 **Q** Mr. Garbarino -- is it Garbarino?

21 **A** Garbarino.

22 **Q** Mr. Garbarino, tell me exactly where this war
23 zone is that Freddie lived in?

24 **A** My understanding is he lived in a public
25 housing project. I forgotten the name of the project,

1 but it is recognized as being a high crime area.

2 Q Do you know how long they lived there in that
3 war zone, what you described as being a war zone?

4 A I believe they were there for a period of
5 years.

6 Q Okay. Are you sure about that?

7 A I'm not sure of the dates, no.

8 Q Are you aware that Mr. Owens and his family
9 moved about five or six times during his childhood?

10 A That sounds about right, yes.

11 Q Where the other places that he lived besides
12 this housing project?

13 A I can't recall the different neighborhoods he
14 was in.

15 Q You haven't been to them, have you?

16 A No, I haven't.

17 Q Are you telling this judge that these places
18 that you haven't even been, these four or five other
19 places that he lived at besides the housing project
20 were war zones?

21 A I'm saying to the judge that based on a
22 description of what I read in reports and what he
23 reported to me on his experiences, it appears to me
24 that he lived in areas that were very high crime and
25 at least some of the time met these requirements, yes.

1 Q How many different schools did Mr. Owens go
2 to in his lifetime, if you even know?

3 A I believe several at least.

4 Q Okay. Did you know that he went to Mauldin
5 Elementary School?

6 A I don't remember the names of the schools.

7 Q You even know where Mauldin is?

8 A No.

9 Q Okay. It's about 10 miles south of here.
10 Would you describe Mauldin, South Carolina as a war
11 zone?

12 A I don't know Mauldin, South Carolina. You
13 have to describe for me the crime rates and that sort
14 of thing.

15 Q Did you know he went to Eastside High School?

16 A That sounds familiar. Very briefly.

17 Q Do you even know where Eastside High School
18 is?

19 A No.

20 Q Are you telling the Court that that area is a
21 war zone surrounding Eastside High School

22 A Again, if you describe to the crime rates and
23 all of that, I could probably tell you.

24 Q You don't know, do you?

25 A Of course, I don't.

1 Q Now, did you know Freddie Owens has a sister?

2 A Yes.

3 Q Did you know he has a sister that has never
4 been in trouble with the law at all?

5 A Uh, I think I remember that. I'm not sure
6 about that.

7 Q How come Freddie's sister has never been in
8 trouble with the law but Freddie has been in trouble
9 with the law? She grew up in the exact same household
10 you described.

11 A I think there are at least two reasons we can
12 point to. One, the boys are more vulnerable to these
13 environments, particularly when it comes to criminal
14 violence than girls. That's pretty well established.
15 And that the kinds of effects, these kinds of
16 traumatic environments have on children differs as a
17 function of their temperament as well as their actual
18 life experience. I have to look at what her life
19 experience was. We may want to look for evidence of
20 other kinds of that negative effects.

21 Q Did you ever talk to his sister?

22 A No.

23 Q Did you talk to any individuals that served
24 time in prison or the Department of Juvenile Justice
25 with Mr. Owens?

1 **A** I've read affidavits from some, but I have
2 not spoke with them directly up.

3 **Q** Let me ask you. You read affidavits? You
4 have sworn affidavits from these people that were in
5 prison with Freddie?

6 **A** I have reports that the defense made
7 available of summaries of interviews they took with
8 them.

9 **Q** That wasn't my question. Do you have
10 affidavits, sworn affidavits from these enemies that
11 served time in Freddie in prison or DJJ?

12 **A** I'd have to look at the reports to see if
13 they were sworn affidavits.

14 **Q** Well, please look. Tell me.

15 **A** They are in my files in the back.

16 **Q** Maybe they can answer that.

17 **A** Maybe they can answer.

18 **MS. PAAVOLA:** Your Honor, they're not sworn
19 affidavits.

20 **MR. MABRY:** Thank you.

21 **THE COURT:** Okay. Thank you.

22 **BY MR. MABRY:**

23 **Q** So your testimony earlier on direct about the
24 affidavits that you reviewed, you don't have any
25 affidavits, sworn affidavits from these people that

1 served time with Freddie, do you?

2 **A** I have the summaries of these interviews that.
3 I took to be reports on what they said.

4 **Q** Okay. Did you review the personal files of
5 those inmates to see what those inmates were in prison
6 with Freddie for, what they were serving time for?

7 **A** I believe for each of them, there was some
8 documentation on their incarceration history and since
9 that time and at that time as well.

10 **Q** Okay. When did you receive that material?

11 **A** Probably a couple of weeks ago.

12 **Q** Could it have been last week when I sent them
13 the RAP sheets on these inmates?

14 **A** I'm not sure when most recently that I
15 received these statements plus these records. I don't
16 know if these are the RAP sheets you are referring to.
17 I'd have to ask defense counsel.

18 **Q** Okay. Do you know why these inmates were in
19 the Department of Juvenile Justice?

20 **A** They went in for a mixture of violent
21 offenses, robberies, assault, sexual crimes. As I
22 recall, quite a range of juvenile offenses.

23 **Q** Did you get their juvenile files to see if
24 they were even in the same dorm with Mr. Owens?

25 **A** I didn't systematically review that issue. I

1 did ask if at least two other reports that I felt were
2 particularly important served time in the same
3 facility with Freddie.

4 Q Who did you ask that information of?

5 A Can I look at my note here?

6 THE COURT: Sure. Yeah.

7 THE WITNESS: Reginald Lewis and Ronald --

8 BY MR. MABRY:

9 Q No, that's not my question. Who did you ask
10 -- you said you didn't review it. You said I asked
11 somebody and they told you. Who told you that?

12 A I asked counselor if they were aware of were
13 these individuals in a position to comment directly
14 because they had been incarcerated with Freddie in the
15 same institution.

16 Q All right. And that was -- you didn't verify
17 it yourself. His attorney sitting behind me told you
18 that; is that correct?

19 A Yes, I didn't go to the Justice files for
20 myself, no.

21 Q All right. Did you review the DJJ files to
22 see if people were even credible people, like did they
23 have in history of lying or not telling the truth at
24 DJJ?

25 A No, I relied upon the summaries of the

1 interviews I was given.

2 Q Now, almost all of these interviews that were
3 with Freddie are still in prison?

4 A According to the information I saw, that is
5 true, yes.

6 Q Now, would they have any motive or reason to
7 blame their problems on what happened at DJJ when they
8 were there?

9 A Of course, they would.

10 Q Okay. In fact, two of these inmates are on
11 death row, is that not correct?

12 A I can't attest to number, but I do recall
13 that at least one or two are on death row, yeah.

14 Q So they are under death sentences and could
15 have actual postconviction relief applications pending
16 right now regarding their cases and what was or was
17 not entered in the mitigation phase of their case, is
18 that not correct?

19 A I have no way of knowing if they're in that
20 procedure. I certainly can assume it's possible,
21 sure.

22 Q Okay. I want to talk specifically about Mr.
23 Owens records at DJJ. You reviewed those; is that
24 correct?

25 A Yes. I can't cite them chapter and verse..

1 Q Sure. I will help you try to do that. Mr.
2 Garbarino, was Mr. Owens committed to the R&E sentence
3 in Columbia for assault with intent to kill, burglary
4 second, two counts and possession of a pistol?

5 A That sounds right to me.

6 Q Earlier you said he was 15 but I believe the
7 records actually show he was 16 when he was committed
8 to DJJ.

9 A That may be. Maybe the original charge was
10 when he was 15? It was in that period, 15 or 16.

11 Q He actually went to DJJ on December the 24th,
12 to R&E, not to the prison, but to the R&E Center on
13 December 23rd, excuse me, 1994?

14 A That sounds right to me.

15 Q The lawsuit involving DJJ, the class-action
16 lawsuit, some of the materials you looked at, that
17 actually began in 1990, did it not?

18 A Again, that sounds right. I couldn't swear
19 to the date.

20 Q DJJ had been under federal oversight since
21 that lawsuit was filed, is that not correct?

22 A Again, I believe so, yes.

23 Q In fact, the District Court issued an order
24 approximately 2 weeks after Freddie Owens came into
25 R&E. Did you read that opinion from District Court?

1 **A** I believe it was in the file. I don't think
2 I read it.

3 **Q** Okay. And that opinion -- you don't think
4 you read it?

5 **A** I don't think so.

6 **Q** You remember reading an opinion that said
7 that DJJ complied or was beginning to comply with
8 almost everything but the overcrowded conditions?

9 **A** That sounds like something from that summary
10 that was there. Yes, sir.

11 **Q** All right. You said Mr. Owens was committed
12 for assault with intent to kill, burglary, two counts
13 and possession of a pistol. Can you tell me about
14 that incident? What do you know about that crime that
15 he committed or those charges that he was adjudicated
16 delinquent of?

17 **A** There are so many incidents to remember. If
18 you could refresh my memory, I would appreciate it.

19 **Q** Do you remember when he came into R&E that he
20 told the people there that he had been in an
21 altercation with some boys that lived next door that
22 had been going on for a while and he thought he was
23 going to get jumped on at the bus stop. So he went to
24 a friend's house and got a gun and came back.

25 By the time he came back, the neighbor -- a

1 neighbor was arguing with his mother, Mr. Owens'
2 mother. Then the same teenagers came out on the front
3 porch and called Mr. Owens' mother a name and then
4 they challenged Mr. Owens to a fight and he took out
5 the gun and shot in their direction. Do you remember
6 that?

7 **A** Yes, that sounds familiar.

8 **Q** Mr. Owens, when he came into DJJ, told them
9 that these boys called his mother a name, made some
10 kind of verbal remark to him, challenged to fight him
11 and he pulled out a gun and shot in their direction?

12 **A** That sounds like at least one account of the
13 event.

14 **Q** Well, that's his account of the event. Is
15 that right?

16 **A** I think so.

17 **Q** Okay. Now, do you know how Ms. Graves was
18 killed in this case? The victim in this case?

19 **A** Yes, in a general sense. In the course of a
20 robbery.

21 **Q** Well, how was she killed? Was she strangled?

22 **A** She was shot.

23 **Q** Okay. She was shot. Now, you reviewed the
24 transcripts in this case, did you not?

25 **A** I -- yes. But I reviewed -- I focused on the

1 mitigation phase and the testimony there.

2 Q Do you remember the testimony that during the
3 robbery, Ms. Graves made some kind of smart remark to
4 Mr. Owens and then he shot her?

5 A Actually no, I don't remember that part of
6 the incident, but it's not surprising to me.

7 Q It's not what?

8 A It's not surprising, given his reactive
9 nature.

10 Q And that's similar to the crime he committed
11 before he went to DJJ, wasn't it?

12 A In that sense of being disrespectful, yes.

13 Q And firing a pistol?

14 A Yes.

15 Q Have you read his confession to the murder of
16 Christopher Lee at the jail?

17 A I believe I read a summary. I don't think I
18 read the whole confession.

19 Q And why did he attack Mr. Lee at the jail?

20 A As I recall, because he made a racist remark
21 about him or he made some remark that he found
22 offensive.

23 Q Okay. Freddie had been convicted of murder,
24 was brought back to the detention center and Mr. Lee
25 said basically y'all better hold the bus because

1 Freddie's going to be going to Perry Correctional with
2 the rest of y'all. He said something about he had a
3 relative on the jury. And Mr. Owens attacked him;
4 isn't that right?

5 **A** Again, I don't remember the details of that.
6 My focus was not on the details.

7 **Q** Okay. Well, Mr. Lee did not attack Mr. Owens
8 physically, did he?

9 **A** If your rendering the account is accurate in
10 the record, sure.

11 **Q** In fact, Mr. Lee made some kind of smart
12 remark to Mr. Owens and Mr. Owens attacked him?

13 **A** It appears so.

14 **Q** Beat him, burned him with a lighter,
15 strangled him, stuck a pen up his nose; is that
16 right?

17 **A** Again, I didn't focus on the assault details.
18 I assume you are telling that -- you are providing an
19 accurate record.

20 **Q** Well, that action is similar to the action
21 that he went down to DJJ for. Somebody smarted off to
22 him and he retaliated, didn't he?

23 **A** Well, he does have the chronic pattern of
24 responding to disrespect and ---

25 **Q** Insults.

1 **A** --- insults.

2 **Q** Okay.

3 **A** Which is very consistent with, in many
4 things, including the South Carolina culture of honor
5 that's been written about extensively.

6 **Q** Okay. Did you review his entire DJJ file?

7 **A** I looked at it all. I can't cite chapter and
8 verse.

9 **Q** Okay. In fact, there is no report in the DJJ
10 file that Mr. Owens ever a complained of any sexual
11 abuse at DJJ, is there?

12 **A** My understanding is there are a lot of things
13 that are not in the official reports that people said
14 happened. I'm not aware that he officially -- I
15 believe the account was that he did complain about it
16 and it was written up in a different way than he
17 complained.

18 **Q** My question is did you review the records
19 from Department of Juvenile Justice that they provided
20 to you?

21 **A** Yes.

22 **Q** And that's part of what you based your
23 opinion on, correct?

24 **A** In part, yes.

25 **Q** Was there anywhere in the Department of

1 Juvenile Justice records that Mr. Owens told anyone
2 that he was sexually assaulted or sexually abused or
3 forced to engage in any sexual contact?

4 **A** I don't recall but I'm open to correction if
5 I am not recalling correctly.

6 **Q** Well, do you have them with you up there?

7 **A** No, I don't.

8 **Q** Okay. I'd like you to point out to us where
9 in the Department of Juvenile Justice records on Mr.
10 Owens that he reported that he was sexually abused or
11 forced to engage in any sexual contact or anything of
12 that nature?

13 **A** I'm willing to stipulate. If you say it's
14 not in there, it's not in there. Again, it's not
15 surprising given the difficulty in getting them to
16 elicit the reports of sexual abuse by males and given
17 the fact that it may well be that reports were made
18 and written up in different ways. I can't go to this
19 and show you where that report was made.

20 **Q** Were you provided with his Department of
21 Corrections records?

22 **A** I think a summary. I'm not sure what level
23 of detail it was.

24 **Q** Okay. Well, Mr. Owens has been confined in
25 the Department of Corrections. He left DJJ and went

1 to an adult prison; is that correct?

2 **A** Yes.

3 **Q** Was there any record in the Department of
4 Corrections adult prison that Mr. Owens ever reported
5 being sexually assaulted, sexually abused or forced to
6 engage in any sexual contact?

7 **A** Not that I know of.

8 **Q** All right. After he left that prison and got
9 out and committed these crimes, he was reincarcerated
10 at the Greenville Detention Center. Is there any
11 report from the records of the Greenville County
12 Detention Center that he was sexually assaulted,
13 forced to engage in any sexual contact?

14 **A** Not that I'm aware of.

15 **Q** Okay. After he was convicted of this murder
16 and sentenced to death the first time, he went to the
17 Department of Corrections and stayed on death row or
18 at Lieber Corrections. Are you aware of that?

19 **A** Yes.

20 **Q** And can you tell us is there any report in
21 any record at the Department of Corrections for
22 basically 12 years that he reported any sexual assault
23 or any of being forced to engage in any sexual
24 conduct?

25 **A** Not that I'm aware of. I'm open to

1 correction if there are.

2 Q In fact, several times, more than once, when
3 he went into the adult Department of Corrections, he
4 was asked whether he had been sexually abused
5 before ---

6 A Uh-huh.

7 Q --- when they do an intake in the Department
8 of Corrections and he denied that he had ever been
9 sexually abused; is that correct?

10 A I believe I read that in the records at least
11 once, yes.

12 Q Now, when Mr. Owens was first brought into
13 the R&E center in January of 1995, a psychological
14 evaluation was done on him; is that correct?

15 A Yes.

16 Q And is there any notation in that
17 psychological evaluation or social history that was
18 done in R&E that he had ever been sexually abused or
19 forced to engaged in any sexual conduct?

20 A I can't recall if it's in report but
21 somewhere along, I think in one of those earlier
22 reports, there's mentioned sexual activity at the age
23 of 12. That may only be another report, but I'm not
24 sure.

25 Q It just said he first had sexual contact with

1 another person. It doesn't say who. His first sexual
2 contact was at 12?

3 A Maybe it says that.

4 Q Okay.

5 A Again, it's not surprising.

6 Q In fact, in his original intake medical
7 sheet, he said he had five partners in the last five
8 years, I mean, the last year; is that correct?

9 A It sounds right, but I'm not sure of the
10 number.

11 Q In fact, he disclosed that he had gonorrhea
12 in the past?

13 A I believe that's in the record.

14 Q But there was no mention of any sexual abuse
15 or being forced to engaged in any sexual contact?

16 A Not I recall, no, sir.

17 Q Now, did you review Mr. Owens' school
18 records?

19 A Yes. Once again, there was a lot of records
20 but I didn't have access to it.

21 Q Did Mr. Owens have trouble obeying orders in
22 school, talking back to teachers?

23 A As I recall, there were numerous incidents of
24 suspensions and disciplinary problems, yes.

25 Q In fact, he had to go to an alternative

1 school. This is before he ever went to DJJ. He had
2 to go to an alternative school where they send
3 students with behavioral problems?

4 **A** Yes, I believe so.

5 **Q** And do you remember the testimony of Ms.
6 Maddock, in this trial, that the first day she met
7 Freddie Owens, he came in the room, picked up a desk
8 and threw it across the room and said now what you
9 going to do about that?

10 **A** Yes, that sounds familiar.

11 **Q** Did you also see the testimony of his middle
12 school gym coach that Freddie was disrespectful to
13 teachers?

14 **A** I believe so, yes.

15 **Q** Now, at DJJ, did Freddie Owens engage in the
16 same type of conduct?

17 **A** I believe so, yes.

18 **Q** In fact, there's numerous incidences where
19 the teachers told him to sit down, be quiet, go to his
20 room or do whatever and he wouldn't do it, he refused?

21 **A** Yes, I believe so.

22 **Q** He would disrupt the classes; is that
23 correct?

24 **A** I can't recall that word specifically but
25 certainly it sounds like the kind of problems he had.

1 Q Do you remember an incident that occurred
2 approximately 2 weeks after Mr. Owens arrived at DJJ
3 where he assaulted another inmate by kicking him in
4 the head and then kicking him two or three times on
5 the floor?

6 A I don't remember that specific incident.

7 Q Well, it's noted in the R&E.

8 A I'm not disputing that it's there.

9 Q Okay. And that inmate had to go to the
10 hospital and receive about 14 stitches.

11 A Uh-huh.

12 Q Do you remember Mr. Owens telling the R&E
13 lady when he first got there that he learned how to
14 fight when he was young and he liked to fight and he
15 wasn't afraid of being hit.

16 A Yes, I remember that.

17 Q That was just a few days after he got to R&E?

18 A Yes.

19 Q Is that right?

20 A Yes.

21 Q And he also told her that in addition to
22 shooting at those boys, he confronted another boy that
23 he thought had assaulted his brother. The boy denied
24 it and Mr. Owens ended up breaking the boy's nose?

25 A I remember the assault on behalf of his

1 brother, yes.

2 Q Okay. And as Mr. Owens stayed at the
3 Department of Juvenile Justice, there were other
4 assaults that he committed while he was there?

5 A Yes, I believe so.

6 Q On other inmates?

7 A Yes.

8 Q In fact, there was one instance, it wasn't an
9 assault but he came out of his room with no clothes on
10 and made a vulgar comment to one of the guards. You
11 remember that?

12 A I don't remember that one in specific, but
13 it's not surprising.

14 Q In fact, do you remember Dr. Schwartz-Watts'
15 testimony in this case that Mr. Owens' behavior at the
16 Department of Juvenile Justice was horrible?

17 A I don't remember the exact words, but yes,
18 there was testimony that his behavior was horrible.

19 Q You reviewed the file. Do you agree with
20 that?

21 A Yes.

22 Q Now, Mr. Owens was -- you said when he came
23 in -- I believe we cleared up he was 16 when he came
24 in. He was 5 foot 10 inches tall and weighed
25 approximately 150 pounds, 147.

1 **A** 147, yeah.

2 **Q** Okay. He also told them that he was on the
3 wrestling team at the high school where he was
4 attending, did he not?

5 **A** I do not recall that, but he may have. I'm
6 not sure.

7 **Q** The R&E report also indicates that Mr. Owens
8 has been taught by his family that violence and
9 intimidation are appropriate manners of resolving
10 conflict?

11 **A** Yes.

12 **Q** Okay. So when he came to DJJ, he had already
13 been taught that violence was a way of resolving
14 conflict and he was doing that; is that correct?

15 **A** Yes.

16 **Q** It also indicates in the R&E report that when
17 he arrived at DJJ, he reacted impulsively and without
18 thought or regard for the consequences of his
19 behavior; is that correct?

20 **A** Yes, he was very troubled. They offered a
21 diagnosis of conduct disorder, I think.

22 **Q** That's correct. Conduct disorder. He had
23 that before he even got to DJJ?

24 **A** Yes.

25 **Q** It also indicates that Mr. Owens tends to

1 hold his feelings in, prefers not to talk to other
2 people. Unfortunately, those negative and
3 uncomfortable feelings tend to accumulate until they
4 are expressed in socially unacceptable manners, e.g.
5 fighting?

6 **A** Yes, I remember that.

7 **Q** That's when he came to DJJ?

8 **A** Uh-huh.

9 **Q** When did Mr. Owens tell you he first got a
10 gun?

11 **A** I think it is was around the age of 10, 9,
12 somewhere like that.

13 **Q** Where did he get it?

14 **A** If I recall, he got it from a family member,
15 but I'm not sure about that. Someone in the
16 neighborhood.

17 **Q** Now, after he went through R&E, he eventually
18 was committed to DJJ; is that right?

19 **A** I believe so.

20 **Q** They recommended commitment cause he showed
21 the lack of remorse for any of the offenses that he
22 committed prior to coming to R&E.

23 **A** Yes.

24 **Q** Now, do you know what the facts are around
25 the burglary charges that he went down to DJJ on?

1 **A** I have to be reminded.

2 **Q** Sir?

3 **A** I have to be reminded.

4 **Q** Okay. He and some friends went to an
5 athletic store and broke out the window and stole some
6 clothing. A couple of days later, they go back and
7 break in the store and go in and steal clothes again.
8 You remember that now?

9 **A** Yes.

10 **Q** DJJ did not teach Mr. Owens how to steal, did
11 it?

12 **A** No.

13 **Q** Did you see anywhere in the DJJ records or
14 the DOC records, both, where Mr. Owens told them that
15 he used cocaine?

16 **A** It seems to me that there were mixed messages
17 about that. That was denial at one point and there
18 may have been admission at some point. But I'm not
19 sure about cocaine. Marijuana but --

20 **Q** Right, I know he told them he used marijuana
21 and drank alcohol occasionally. But did you ever see
22 anything that indicated he used crack cocaine or
23 cocaine?

24 **A** I don't recall in the records, no.

25 **THE CLERK:** Sorry.

1 **THE COURT:** That's all right. Go ahead.

2 **BY MR. MABRY:**

3 **Q** Do you remember Mr. Owens admitting at the
4 Department of Juvenile Justice that he had been
5 expelled from school approximately four times?

6 **A** I don't recall if he specifically mentioned
7 that, but the record seemed to indicate that he had
8 been.

9 **Q** And he failed some grades as well?

10 **A** Yes, I mentioned that earlier.

11 **Q** Actually, he came to DJJ. According to the
12 school, he was in the ninth grade, but he was older
13 than a ninth grade student should be?

14 **A** Yes.

15 **Q** Did Mr. Owens also report in the DJJ records
16 that his friends were getting him into trouble?

17 **A** I remember a reference. I can't remember if
18 it's from that or one of the family interviews, but
19 that sounds familiar, yes.

20 **Q** And was Mr. Owens put in a maximum security
21 lockup at DJJ because of the assault where the student
22 got all of the stitches?

23 **A** I don't recall.

24 **Q** Did you read his psychological evaluation
25 from DJJ?

1 **A** Well, there were several psychological
2 evaluations. Which one?

3 **Q** Well, you remember in one, I think it was the
4 earliest one where he was smiling when discussing his
5 history of fighting?

6 **A** Yes, I remember reading that.

7 **Q** So he had learned how to fight before he went
8 to DJJ?

9 **A** Yes, he did.

10 **Q** Does that psychological evaluation or did it
11 indicate when you read it that Mr. Owens is an
12 irritable, self-satisfied adolescent who has very
13 limited regard for societal standards and acts out in
14 response to his immediate feelings?

15 **A** That language sounds familiar, yes.

16 **Q** And does that record also indicate that Mr.
17 Owens, in conjunction with the interview data, test
18 results suggests that Mr. Owens has an exaggerated
19 sense of personal power and self-importance?

20 **A** That also sounds like language I remember
21 from the report.

22 **Q** Then does the record of April 7th, 1995
23 indicate his aggression seems to bolster his
24 self-esteem and may be resistant to change?

25 **A** I don't specifically recall that language but

1 I will grant that it could be in the report.

2 Q Mr. Owens had problems with aggression when
3 he came in to DJJ, didn't he?

4 A Yes.

5 Q Do you remember whether he ever threatened
6 staff when he was at DJJ?

7 A I believe there were incidents, yes.

8 Q Were there incidents where he was sent to the
9 SMU [sic] or maximum-security unit at DJJ on more than
10 one occasion because of his behavior?

11 A I think you referred to that earlier. I
12 believe -- yes, I believe so.

13 Q I'm talking about other than that?

14 A Other than that.

15 Q Other than that, there were several times
16 where he had to go?

17 A I believe so.

18 Q He was in the ROTC program at DJJ?

19 A Yes.

20 Q And he got kicked out of the ROTC program,
21 didn't he?

22 A I believe so.

23 Q And there were times when Mr. Owens or at
24 least one occasion when Mr. Owens and other inmates
25 were supposed to be doing work and Mr. Owens incited.

1 the other inmates not to do their work?

2 **A** I believe so, yes.

3 **Q** Were there instances where Mr. Owens refused
4 to comply with the discipline that was imposed by DJJ
5 for his violations?

6 **A** I'm sure there were.

7 **Q** So he would do something wrong and they would
8 say this is what you have to do as punishment and he
9 would say no, I'm not going to do punishment?

10 **A** A very troubled, angry teenager. There's no
11 doubt about that. I've already stipulated to that.

12 **Q** In fact, there were numerous violations that
13 Mr. Owens was written up for; isn't that correct?

14 **A** Yes.

15 **Q** Now, have you reviewed -- I'm going to show
16 you now what's volume 1 through 7 of the first trial
17 of Mr. Owens. Have you reviewed that record?

18 **A** No, I believe I reviewed just some sections
19 of the mitigation.

20 **Q** All right. Was there testimony in the first
21 trial and sentencing proceeding that you could find
22 that Mr. Owens was sexually abused or forced to engage
23 in any sexual misconduct or conduct at the Department
24 of Juvenile Justice?

25 **A** I don't recall that.

1 **Q** This is two volumes from the second trial in
2 front of Judge Kittredge. It's a sentencing
3 proceeding. Was there any testimony in that
4 sentencing proceeding that Mr. Owens was abused in a
5 sexual manner or forced to engage in any sexual
6 conduct while at DJJ.

7 **A** I don't -- I'm not sure but I don't believe
8 so. I thought that was the whole of this.

9 **Q** Okay. Then the third trial -- it was
10 actually four volumes. This is just two. Was there
11 any testimony in that case about Mr. Owens being
12 sexually abused at DJJ or forced to engage in any
13 sexual misconduct?

14 **A** I don't recall that there was. There was
15 very little explanatory information about his
16 background.

17 **Q** When did you interview Mr. Owens?

18 **A** About four weeks ago. About four weeks ago.

19 **Q** Okay. Is that when he told you about the
20 sexual abuse at DJJ?

21 **A** We talked about it at that point and again on
22 a recent telephone conversation.

23 **Q** Four weeks ago would have been around June
24 the 20th of 2010?

25 **A** I could check my agenda. I'm trying to

1 remember. It was ---

2 Q Approximately?

3 A --- approximately in that period.

4 Q Okay. Did Mr. Owens explain to you why he
5 never told the first two lawyers that represented him
6 or the second two lawyers that represented him or the
7 third set of lawyers that represented him about being
8 sexually abused and forced to engage in sexual conduct
9 at DJJ?

10 A Well, he said he was very, very distressful
11 of most people, held very tightly to information and
12 that with his current attorney, he felt a level of
13 trust that he was able and willing to disclose things
14 that were very painful and embarrassing and
15 humiliating. That was his explanation.

16 Q Okay. Did he explain to you why he did not
17 tell Ms. Glass, Drucy Glass who was the first
18 mitigation investigator in the first two trials or Ms.
19 Tarr that he -- both of whom are ladies, obviously,
20 females. Why he did not tell them about this new
21 information?

22 A We didn't specifically address that. I don't
23 know.

24 Q Okay. Do you remember Mr. Owens being
25 treated at DJJ for depression?

1 **A** I remember that in -- well, yes, in the
2 record, I remember that.

3 **Q** There's pretty good extensive records on him
4 being treated for depression at DJJ. There's no
5 mention in there about any sexual abuse or forced
6 sexual contact in those records at all, is there?

7 **A** I don't recall.

8 **Q** In fact, what he told the doctor he was
9 depressed about was his family back home and the
10 situation that they were in.

11 **A** Yes.

12 **Q** And he's talked to numerous psychiatrists and
13 psychologists, not talking about you, over the last 15
14 years and he hasn't reported to any of them that he
15 was sexually abused at DJJ, has he?

16 **A** To the best of my knowledge, that's true. I
17 have to rely on the reports.

18 **MR. MABRY:** Nothing further, Your Honor.

19 **REDIRECT EXAMINATION**

20 **BY MS. PAAVOLA:**

21 **Q** Dr. Garbarino, uh, Mr. Mabry asked you if you
22 were aware that Mr. Owens has one sister who has never
23 been in any legal trouble. Do you know how his other
24 siblings have faired?

25 **A** I believe his other siblings have been

1 incarcerated, or are incarcerated or have serious
2 mental health problems. I think so.

3 Q With regard to the one sister who's never
4 been in legal trouble, do you know otherwise how she
5 functions in her normal life?

6 A If I recall, I think it's the sister who left
7 school at 16 and has had a series of difficult
8 relationships and, uh, situations. I don't remember
9 specifically.

10 Q Do you know if she is employed?

11 A I don't know for sure. My understanding was
12 that she wasn't, but I'm not sure.

13 Q Do you know if she has a history of
14 depression?

15 A As I recall, there's mental health issues,
16 uh, depression being one of them.

17 Q Mr. Mabry asked you about some particular,
18 some orders in the DJJ lawsuit file. I believe he
19 said that there is a 1995 order that says DJJ was in
20 the process of complying with some of the requirements
21 in that lawsuit. Do you recall reviewing additional
22 documents from a later period that indicate they
23 clearly had not complied with those requirements?

24 A There were so many documents. It was hard to
25 keep track. I think it is an ongoing -- was an

1 ongoing problem through the 1990s even after the
2 initial report and after the decree. Certainly, the
3 overcrowding, I think, was clearly documented. Most
4 of the suit --

5 **Q** Do you -- do you know if the department was
6 subject to federal monitoring?

7 **A** I don't recall.

8 **Q** Uh, Mr. Mabry asked you about a number of
9 different incidents that Mr. Owens was involved in in
10 the Department of Juvenile Justice. I think you said
11 that's not surprising. Can you explain why that is
12 not surprising to you based on your information about
13 a person with --

14 **MR. MABRY:** I'm going to object to the
15 leading. It's about the third leading question.

16 **THE COURT:** Okay. Try not to lead so much.

17 **MS. PAAVOLA:** All right.

18 **THE WITNESS:** What I meant by not surprising
19 was, given his history of, uh, aggression and his
20 family teaching about aggression and his
21 traumatic experiences and his mental health
22 issues and his apparent rage about, uh, so much
23 about his life, it's not surprising that he would
24 have great difficulty conforming to even a
25 well-run juvenile justice facility, let alone an

1 overcrowded one that had many of the issues that
2 were identified at some point in the system.

3 **BY MS. PAAVOLA:**

4 **Q** Uh, Mr. Mabry asked you about whether or not
5 Mr. Owens had reported this incident of sexual abuse
6 in the Department of Juvenile Justice. What did he
7 tell you about that incident?

8 **A** Well, he reported, uh, --

9 **MR. MABRY:** My same objection to the hearsay.
10 I understand.

11 **THE WITNESS:** Okay, Your Honor?

12 **THE COURT:** Yeah. Yeah, please.

13 **THE WITNESS:** He reported that he was
14 sleeping in a cot near the guard station, the
15 adult monitoring station, and another boy
16 approached him and began to have oral sex with him
17 within sight of at least one staff member. Their
18 response was to laugh and think it was not
19 something that he -- he did -- he said he did
20 complain about it and it was dismissed by the
21 staff.

22 There was another incident where he felt
23 someone was repeatedly trying to come at him
24 sexually in the shower on several instances. At
25 least one time, it was with the knowledge of a

1 staff person.

2 **BY MS. PAAVOLA:**

3 **Q** Mr. Mabry asked you about a number of bad
4 behaviors in school. Is there anything inconsistent
5 with that behavior with what you've found in Freddie's
6 life history?

7 **A** I don't think so. Since the cumulative
8 effect of his family and social experiences would
9 have, based on the evidence that's there, sort of
10 suppressed his intellectual ability and made it very
11 difficult to study and to do his work and fail his
12 grades, a large number of absences and the fact that
13 he was very aggressive and angry and probably was
14 worthy of a conduct disorder evaluation, even as an
15 elementary school child.

16 **Q** You were asked about, in particular, this
17 assault on behalf of his brother. Do you recall that?

18 **A** Yes.

19 **Q** What did Mr. Owens tell you about that
20 incident?

21 **A** As I recall, he said that as the oldest boy
22 in the family, it was his job to protect the other
23 kids and that there were repeated instances of he and
24 his siblings being bullied or attacked or threatened
25 and that he ultimately felt a responsibility to

1 protect them. It was very clear, given the message by
2 his stepfather that anybody who disrespects who or
3 infringes on you, you have to respond to that with
4 violence and aggression. That was the message he was
5 given very early on and learned, unfortunately, well.

6 Q Uh, you were asked about Mr. Owens' behavior
7 before he went into the Department of Juvenile
8 Justice. I think you said he learned to fight before
9 he got to DJJ. Why did he learn to fight before that
10 period of time?

11 A Well, from what I read in the records and
12 reports and from his testimony, he was explicitly told
13 to learn to fight. Even there's incidents reported
14 several times of being locked out of the house and
15 told you have to fight these kids from the
16 neighborhood. So I think there's no question that he
17 learned to fight and was engaged in aggressive
18 behavior throughout certainly later childhood and
19 early adolescence. The fact that he felt he needed a
20 weapon to protect himself and his mother by the time
21 he was nine, getting in drug-related sorts of
22 activities in his late childhood and early
23 adolescence. I think that's pretty clear.

24 Q Did he witness any fighting in his home?

25 MR. MABRY: Objection. This is redirect. I

1 don't see how that has anything to do with my
2 cross-examination.

3 **THE COURT:** Yeah, I mean, I think he's
4 already testified to that anyway.

5 **MR. MABRY:** Yeah.

6 **THE COURT:** So go ahead, I mean, move on.

7 **BY MS. PAAVOLA:**

8 **Q** You were asked a bunch of questions of how
9 DJJ might have affected Mr. Owens. Is DJJ the only
10 thing that might have impacted Mr. Owens' development?

11 **A** No, I think that experience clearly made
12 worse a lot of things that he brought to the
13 institution, the problems with aggression and mental
14 health problems, academic problems. None of these
15 seemed to improve in that situation.

16 **Q** You were asked about incidences that Mr.
17 Owens was fighting in DJJ. What did he tell you about
18 those kinds of events?

19 **A** Well, he told me that this was a necessary
20 survival strategy. This was also a way to send a
21 message that you were not to be attacked and you were
22 a strong person and that even if you -- he said even
23 if you were defeated, you got more respect for
24 fighting back. The worst possible thing was to be a
25 passive victim. It was much better to fight, hurt

1 other people, even hurt yourself in the course of
2 these fights in order to establish your position and
3 protect yourself.

4 Q Mr. Mabry asked you about a specific DJJ
5 report that said, uh, -- I'm paraphrasing somewhat --
6 something along the lines of Mr. Owens' uses
7 aggression as a form of self-esteem. Uh, did he have
8 any other outlets for self-esteem?

9 A I'm unaware of others. He certainly didn't
10 have academic success. I don't remember any
11 indication of artistic or musical abilities that would
12 have provided self-esteem recurrency. There was some
13 mention before of wrestling. I don't know how
14 successful that was. I think there was a mention of
15 playing football. But certainly in that environment,
16 it would be really tough but would have been one of
17 the few ways to increase positive self-esteem.

18 Q Mr. Mabry asked you a number of questions
19 about why Mr. Owens might not have previously
20 disclosed these incidents of sexual abuse. Do you
21 have any information about how much time Mr. Owens'
22 spent with any member of his prior defense teams?

23 A I don't really have specific information.
24 All I was led to understand was he was very suspicious
25 and very closed mouth about a lot of these issues and

1 very reluctant to disclose anything other than his
2 aggressive persona to them.

3 **Q** Was he able to identify any member of those
4 teams that made an effort to build a trusting
5 relationship with him?

6 **A** As I recall, the only person he mentioned was
7 an elementary school teacher which I think was
8 mentioned in the cross-examination.

9 **Q** Did you recall what grade she taught?

10 **A** I think it was third or fourth.

11 **Q** And the sexual assaults occurred in DJJ?

12 **A** Yes. The ones that he disclosed to me.

13 **Q** Did he indicate if any member of any of his
14 prior defense teams even asked him if he had been
15 sexually abused?

16 **A** I don't -- simply don't recall him saying
17 that, no.

18 **MS. PAAVOLA:** No further questions.

19 **MR. MABRY:** Just two questions and ---

20 **THE COURT:** Okay.

21 **MR. MABRY:** --- I'll be done.

22 **RECROSS-EXAMINATION**

23 **BY MR. MABRY:**

24 **Q** You reviewed the transcript of the last
25 trial. Did Ms. Maddock testify about the stepfather

1 locking him out of the house and forcing him to fight?

2 **A** I believe she testified at least one of the
3 trials. It's hard to keep straight which one, but
4 that sounds familiar to me.

5 **Q** Only other question, do you remember an
6 incident report at DJJ where Mr. Owens was not
7 defending himself, but got up in the face of another
8 inmate wanting to fight him? That would have been on
9 November 6th, 1996?

10 **A** I don't remember that specific incident, but
11 it certainly seems plausible that he would do that.

12 **MR. MABRY:** Thank you.

13 **THE COURT:** Okay.

14 **MR. MABRY:** Nothing further.

15 **MR. WEYBLE:** No further questions.

16 **THE COURT:** I'm trying to think of something
17 to ask you. Nah, I guess not.

18 Can we release him from subpoena?

19 **MS. PAAVOLA:** Yes, Your Honor. He's not
20 under subpoena.

21 **THE COURT:** Any -- oh, he's not? Oh, okay.
22 Well, you're free to go, stay, whatever you would
23 like to do.

24 **THE WITNESS:** Thank you.

25 **THE COURT:** All right. With the exception

1 of Ms. Glass, you all are -- does that conclude
2 your case?

3 **MS. PAAVOLA:** Yes, Your Honor.

4 **THE COURT:** All right. When do you want to
5 try to organize that? Do you know? After lunch?

6 **MR. WEYBLE:** Your Honor, I think that's fine.
7 Again, as I understand it, this will be
8 cross-examination by Mr. Mabry.

9 **MR. MABRY:** Relatively short. I don't think
10 it would take very -- too long.

11 **THE COURT:** Do you think she's there right
12 now?

13 **MR. WEYBLE:** I don't know.

14 **THE COURT:** Why don't you step out for a
15 second and call and see.

16 **MR. WEYBLE:** All right. I assume there's a
17 speaker -- I don't --

18 **THE COURT:** Yeah, we have that.

19 **MR. WEYBLE:** Okay. Let me see if I can --
20 I'll see whether I can get a hold of her.

21 **MR. MABRY:** I'll tell you what, Judge. I have
22 not got her timesheet yet from the second case.
23 If we could wait until after lunch. I didn't
24 think about that.

25 **THE COURT:** I understand that they did not

1 find -- they hadn't been able to find it as of
2 yet.

3 MR. MABRY: Okay. Well, I can go forward. I
4 can go forward without it.

5 THE COURT: Okay. All right.

6 MR. MABRY: She's going to be under oath.

7 THE COURT: Okay. Go ahead and give her a
8 call.

9 MR. WEYBLE: Available now?

10 THE COURT: Yeah, let's do it right now.

11 MR. WEYBLE: Okay. Okay.

12 THE COURT: Everybody just be at ease.

13 MR. MABRY: Yes, sir.

14 (WHEREUPON, a recess is taken from approximately
15 12:48 p.m. until 12:50 p.m.)

16 MR. WEYBLE: Your Honor, I did not get a hold
17 of her. I did leave a detailed message. I did
18 speak with her last night. She indicated that she
19 would be more or less around today.

20 THE COURT: Okay. You want to wait for a
21 couple of minutes and see if she calls you right
22 back?

23 MR. WEYBLE: Sure.

24 THE COURT: Let's do that. Otherwise, we'll
25 just try and set it.

1 **MR. WEYBLE:** Your Honor, while we have a
2 minute, I think, we talked yesterday morning. I
3 offered yesterday morning several documents from
4 the DJJ class-action lawsuit. I think at the
5 time, the question was why they would be relevant.
6 I think now that you heard the rest of the story
7 including some questions by Mr. Mabry himself
8 about some of the information generated by that
9 lawsuit, I think at this point the question of
10 relevance ought to clearly be resolved in favor of
11 finding them relevant. We would go ahead and --

12 **THE COURT:** Renew admission of the documents?

13 **MR. WEYBLE:** Yes.

14 **THE COURT:** Mr. Mabry?

15 **MR. MABRY:** We object.

16 **THE COURT:** And the grounds for your
17 objection?

18 **MR. MABRY:** Same objection. General
19 conditions of confinement at DJJ were irrelevant.
20 I haven't looked through those documents. I
21 assume they cover a much broader time period than
22 he was even there. They wouldn't be admissible on
23 those grounds. He was only there for a little
24 less than two years. I just don't think
25 they are relevant.

1 **THE COURT:** All right.

2 **MR. MABRY:** They're not tied to him
3 directly.

4 **MR. WEYBLE:** A couple of things, Your Honor,
5 number one, the documents that we've offered, in
6 fact, do cover the time that Mr. Owens was there.
7 The lawsuit was a lot longer than that. We didn't
8 -- we're not offering you the multiple thousands
9 of pages that there are. On the question of
10 relevance again, this comes back to the Eighth
11 Amendment definition of what is potentially
12 mitigating evidence. I think we are well within
13 the main stream. This is exactly the kind of
14 thing that gets presented to capital juries all
15 the time in cases across the country. It's simply
16 not relevant -- not irrelevant. Judge, the "I",
17 "R" goes on. Make sure that's clear.

18 **MR. MABRY:** I like the first one better.

19 **THE COURT:** All right. I'm over -- yes, sir.
20 Anything?

21 **MR. MABRY:** It's just -- you know, in the
22 trial of this case, in the penalty phase, they
23 could not call inmates in to testify to what
24 happened to them at DJJ. That's exactly what that
25 is, the class-action. I don't think it would be

1 relevant. It couldn't be prejudicial not to
2 introduce it.

3 **MR. WEYBLE:** Again, Your Honor, none of the
4 three DJJ documents that we provided to you
5 purport to be the testimony of other inmates. One
6 of them is a report generated by a public agency.
7 The other two were signed entered orders from a
8 United States District Judge containing findings
9 of fact based on evidence considered by that
10 judge.

11 **THE COURT:** Okay. Well, over the State's
12 objection, I'm going to admit it. Okay.

13 **MR. MABRY:** Yes, sir.

14 **THE COURT:** We'll just be at ease. Let's
15 give her about five minutes and see if she calls
16 back.

17 (WHEREUPON, Applicant's Exhibits 6, 7, and 8 are
18 admitted into the record.)

19 (WHEREUPON, a recess is taken from approximately
20 11:54 a.m. until 11:57 a.m.)

21 **MR. WEYBLE:** Your Honor, I just heard from
22 Ms. Glass. She's ready to receive a phone call
23 from us.

24 **THE COURT:** Oh, good. Okay.
25 Shirley, you know how to work that thing?

1 **MR. WEYBLE:** We're going to do it in here.

2 **THE COURT:** Yeah, we'll just do it right
3 here.

4 **MR. WEYBLE:** Oh, okay.

5 **THE CLERK:** You have the number?

6 **MR. WEYBLE:** It's area code 803-240-7178.

7 **THE CLERK:** 717?

8 **MR. WEYBLE:** 8.

9 **THE COURT:** That's her cell phone, I take
10 it?

11 **MR. WEYBLE:** That is.

12 **COURT REPORTER:** I don't have her full name.

13 **MR. WEYBLE:** Drucy Glass. D-R-U-C-Y, G-L-
14 A-S-S.

15 **THE COURT:** I am going to ask that you all
16 introduce her and ask her if she affirms that what
17 she has said in her affidavit is her testimony.

18 **MR. WEYBLE:** Okay.

19 **THE CLERK:** Okay. You may speak.

20 **THE WITNESS:** Okay.

21 **THE CLERK:** All right. Thank you.

22 **THE COURT:** All right. Shirley, you got to
23 put her under oath.

24 **THE CLERK:** Okay. Ms. Glass? Ms. Glass?

25 **THE WITNESS:** Yes.

1 **THE COURT:** This is Judge Miller. How are
2 you?

3 **THE WITNESS:** Just fine. How are you?

4 **THE COURT:** Good. Thank you for agreeing to
5 appear telephonically. We are -- the applicant is
6 calling you as a witness. We ask you to, uh, --
7 I'm going to ask the clerk to place you under
8 oath.

9 **DRUCY GLASS**
10 is first duly sworn and then testifies as follow:

11 **THE CLERK:** Thank you.

12 **THE COURT:** All right. And if you would,
13 uh, state your name for the record.

14 **THE WITNESS:** Drucy Glass, G-L-A-S-S.

15 **THE COURT:** Okay. I'll turn it over to Mr.
16 Weyble.

17 **DIRECT EXAMINATION**

18 **BY MR. WEYBLE:**

19 **Q** Good morning, Ms. Glass.

20 **A** Good morning.

21 **Q** Good afternoon. Uh, I'll be very quick with
22 you. Did you -- what do you do? What did you used to
23 do professionally?

24 **A** I'm a licensed social worker. I worked as
25 mitigation specialist on death penalty cases.

1 Q All right. Did you, in that capacity, do any
2 work in any cases involving Freddie Owens?

3 A I did.

4 Q Could you tell us was there more than one
5 case?

6 A Correct. I worked on the first trial. I
7 think I was contacted by John Rollins, was his name,
8 the first lawyer. And then I was then again contacted
9 by Steve Sumner for the second trial.

10 Q Okay. Did you on July 9th of this year
11 execute an affidavit about the record that you amassed
12 and maintained in that case?

13 A Yes.

14 Q Is the contents of that affidavit -- are the
15 contents of that affidavit correct as you know?

16 A Yes.

17 Q Do you still affirm the contents of the
18 affidavit that you signed on July 9th?

19 A I do. I do not have it in front of me right
20 this second though, but I recall it.

21 Q Okay. Thank you.

22 THE COURT: Okay. Cross-examination.

23 MR. MABRY: Would it be better if I'm up
24 here, Judge?

25 THE COURT: Sure.

1 **MR. MABRY:** Okay.

2 **THE COURT:** Introduce yourself.

3 **CROSS-EXAMINATION**

4 **BY MR. MABRY:**

5 **Q** Okay. Drucy, this is Anthony Mabry. I'm
6 just going ask you a few questions, okay?

7 **A** Okay.

8 **Q** All right. You have provided the collateral
9 attorneys in this case your file materials. What I
10 want to ask you about is you collected those file
11 materials during the, uh, I guess as a mitigation
12 specialists in the first -- before the first trial;
13 is that right?

14 **A** Uh, yes.

15 **Q** Okay. What did you do with those file
16 materials when you collected them?

17 **A** Well, I keep a copy. But I provide another
18 copy to the trial attorneys or to a licensed social
19 worker, the one who was going to testify.

20 **Q** Okay. That was going to be my question. If
21 they were not in trial counsel's file, the trial
22 attorneys that represents Mr. Owens in the first or
23 second proceeding, you would have turned those over to
24 Ms. Hammock; is that right?

25 **A** Ms. Hammock got a copy, but the lawyer also

1 got a copy.

2 Q Okay. And Ms. Hammock -- as you know, Ms.
3 Hammock testified in all three trials; is that
4 correct?

5 A Correct.

6 Q Okay.

7 A Correct.

8 Q And Ms. Tarr called you after she was
9 retained as the mitigation specialist in this case.
10 When she called you, would you have relayed that same
11 information to her that you had given the previous
12 lawyers a copy of your file and Ms. Hammock?

13 A Uh, you know, I have no recollection of that
14 phone call with Paige Tarr.

15 Q Right.

16 A But I was told that she called me about five
17 days before trial. I was in New York at the time.
18 You know, I would have told her that my copy of my
19 records were in South Carolina.

20 Q Right.

21 A But she's also a mitigation investigator. So
22 she knows that the records are not kept by us. I
23 mean, we collect them to give them to the lawyers.

24 Q Right, you gave them to the lawyers and you
25 gave Ms. Hammock a copy?

1 **A** Yes.

2 **Q** Okay. No further questions. Thank you.

3 **THE COURT:** Okay. Hang on.

4 Anything else y'all want to add?

5 **MR. MABRY:** Not me.

6 **MR. WEYBLE:** Just one more question.

7 **REDIRECT EXAMINATION**

8 **BY MR. WEYBLE:**

9 **Q** Ms. Glass, do you have any idea of what
10 either of the trial lawyers that you worked for in
11 this case or Ms. Hammock did with the records once you
12 provided them to them?

13 **A** I have no idea.

14 **THE COURT:** All right. They're coming back
15 at you again.

16 **MR. MABRY:** I got one more question.

17 **RECROSS-EXAMINATION**

18 **BY MR. MABRY:**

19 **Q** They marked as a Defendant's Exhibit 2 a
20 summary dated, uh, --well, it doesn't have a date on
21 it. But it's basically a summary, a chronology -- you
22 know what I'm talking about -- of Mr. Owens' life?

23 **A** It's a -- are you talking about a chronology
24 that I did?

25 **Q** I think so. That's what I'm asking you

1 about. It doesn't have a date on it. But your
2 timesheet from the first trial indicates that you were
3 working on this chronology or a chronology the whole
4 time you were preparing for trial. You gave that to
5 Ms. Hammock and you gave it to the attorneys; is that
6 correct?

7 **A** I'm sure I did. Yes.

8 **Q** Okay. And it doesn't say you wrote it, but
9 it basically lists Mr. Owens' family, who the members
10 are and then it lists chronology of things that
11 happened in his life and happened to -- in his
12 family's life?

13 **A** Yes. We routinely do one of these
14 chronologies as a mitigation specialist.

15 **Q** That's based on the records that you
16 discovered during your investigation?

17 **A** Records, I think, and interviews, yes.

18 **MR. MABRY:** Okay. That's all I have. Thank
19 you very much.

20 **MR. WEYBLE:** Your Honor, our only --

21 **THE COURT:** Not done yet.

22 **MR. WEYBLE:** Our only concern would be that
23 since Ms. Glass could not be shown that document
24 -- I just want to make sure the record is clear --
25 she hasn't completely authenticated it. I'm not

1 -- you know, it may be that she did write it, but
2 she hasn't established that for us and she can't
3 unless she sees it.

4 **MR. MABRY:** Maybe I can follow up.

5 **THE COURT:** Yeah.

6 **BY MR. MABRY:**

7 **Q** Drucy, at the top it says "Confidential" and
8 there are two dashes and it says attorney work
9 product, Freddie Eugene Owens, Jr. Does that sound
10 familiar?

11 **A** You know, without seeing it, I don't know.
12 But I usually -- that is the format I do a chronology
13 in.

14 **Q** Okay. And then it has his date of birth and
15 his Social Security number?

16 **A** Yes, in the left corner, uh-huh.

17 **Q** Yeah. Okay. Do you know of anybody else in
18 this case that prepared chronology besides you?

19 **A** In the first two trials, it would have been
20 me. I don't know what happened in the third trial.

21 **Q** Okay. Thank you very much.

22 **THE COURT:** Anything else?

23 **MR. WEYBLE:** Nothing else, nothing further.

24 **THE COURT:** Ms. Glass, you, uh, -- did you --
25 do you remember speaking with Mr. Owens as part of

1 your work?

2 **THE WITNESS:** Yes.

3 **THE COURT:** Okay.

4 **THE WITNESS:** I met with him several times
5 in the Greenville County Jail.

6 **THE COURT:** Okay. And you would have
7 included in your material everything that you
8 think would have been important for his defense
9 counsel to present at trial with respect to
10 mitigation, is that a fair statement?

11 **THE WITNESS:** I mean, as part of my job, I
12 collect all the records and then provide them to
13 the lawyers. And then, I think, I mean, they
14 decide what they might use or how they will
15 question the social worker who is testifying. I
16 routinely give the lawyers the records. That's
17 who I am collecting them for.

18 **THE COURT:** Sure. I guess I will just ask.
19 In speaking with Mr. Owens, did he ever reveal to
20 you any sexual abuse that he was subjected to
21 during his time in DJJ or any other time?

22 **THE WITNESS:** You know, I -- I -- I've
23 worked on so many cases over the years, I can not
24 recall actually.

25 **THE COURT:** Okay. That's why I asked. If he

1 had done that, would you consider that to be
2 significant for his lawyers to know about?

3 **THE WITNESS:** Yes.

4 **THE COURT:** Would you have included it in the
5 materials that you provided to the attorneys?

6 **THE WITNESS:** It would have been -- I assume
7 I would've put it in interview notes, you know,
8 after I interviewed the client and write up the
9 interview notes or if we had records documenting
10 the abuse, it would have been in the chronology.
11 But yes, I would have shared it with the lawyers.

12 **THE COURT:** Okay. Y'all have any other
13 questions you want to ask?

14 **MR. WEYBLE:** No, sir.

15 **MR. MABRY:** No, Your Honor.

16 **THE COURT:** Okay. How's the weather in
17 upstate New York?

18 **THE WITNESS:** Actually, it's great. It's
19 like in the mid-70s today.

20 **THE COURT:** Thank you very much for that.
21 We're baking down here in South Carolina. Thank
22 you very much, Ms. Glass.

23 **THE WITNESS:** All right. All right. Bye-
24 bye.

25 **THE COURT:** All right. Shut that down.

1 **MR. WEYBLE:** Your Honor, should we go ahead
2 and admit the affidavit now?

3 **THE COURT:** Yeah. Anything else before we
4 break for lunch?

5 **MR. MABRY:** I'll make my motions but I can
6 wait until after lunch.

7 **THE COURT:** Okay. I want to give them over
8 lunch to make sure that you all have presented
9 your full case. And if there's anything you want
10 to present, let us know after lunch in case Mr.
11 Owens decides he wants to testify. Okay. All
12 right. How about 2:30? Is that good?

13 **MR. MABRY:** Yes.

14 **THE COURT:** Hey, Anthony. Anthony.
15 Anthony.

16 **MR. MABRY:** Yes, sir.

17 **THE COURT:** I understand that they've just
18 gotten the actual, physical file back. So if you
19 wanted to go look and see if you can find the
20 document that you looking for.

21 **MR. MABRY:** She answered it, so I don't need
22 it.

23 **THE CLERK:** You don't need it then?

24 **MR. MABRY:** Right.

25 **THE COURT:** Okay. Thanks.

1 **MR. MABRY:** Yes, sir. Thank you.

2 (WHEREUPON, a recess is taken from approximately
3 1:08 p.m. until 2:52 p.m.)

4 **THE COURT:** Okay. Anything else from the
5 applicant?

6 **MR. WEYBLE:** No.

7 **THE COURT:** All right.

8 **MR. MABRY:** Your Honor, at this time, we
9 renew our pervious objection. We understand the
10 Court has previously ruled.

11 **THE COURT:** Okay.

12 **MS. PAAVOLA:** At this time, we will move for
13 a directed verdict on each ground. We do not
14 believe the applicant has met his burden of proof
15 as to any of the grounds in the application.

16 **THE COURT:** All right. Do you want to reply?

17 **MR. WEYBLE:** Your Honor, I think there is, at
18 the very least, a genuine issue of material of
19 fact and law on each of our grounds.

20 **THE COURT:** Okay. I'm going to respectfully
21 deny the motions.

22 **MR. MABRY:** Yes, sir.

23 **THE COURT:** All right.

24 **MR. MABRY:** The Respondent calls John Rollins
25 to the stand.

1 **THE COURT:** Okay.

2 **THE CLERK:** Place your left hand on the Bible
3 please and raise your right hand.

4 **JOHN ROLLINS**

5 is first duly sworn and then testifies as follow:

6 **THE CLERK:** Thank you. You may be seated.

7 State your full name for the record please.

8 **THE WITNESS:** John Marshall Rollins, Jr.

9 **THE CLERK:** Thank you.

10 **DIRECT EXAMINATION**

11 **BY MR. MABRY:**

12 **Q** Mr. Rollins, tell the court reporter how you
13 spell your last name?

14 **A** R-O-L-L-I-N-S.

15 **Q** Thank you. Mr. Rollins, how long have you
16 been practicing law?

17 **A** Since 1988.

18 **Q** All right. And were you appointed to
19 represent Mr. Owens in his first capital case?

20 **A** I was.

21 **Q** Were you the first chair attorney?

22 **A** I was.

23 **Q** Who was the mitigation investigator that you
24 retained?

25 **A** Drucy Glass. It's been so long.

1 Q All right. What was Ms. Glass' duties or
2 what was she supposed to do?

3 A What her duties were to gather all the
4 information and mitigation evidence and collect that
5 for us and to come up with a general overview of what
6 was there for the penalty phase.

7 Q Did she do that in this case?

8 A She did.

9 Q And did she provide you with the documents
10 and materials that she obtained through her
11 investigation?

12 A She did.

13 Q After you completed this case and Mr. Owens
14 was convicted and sentenced to death, did you
15 eventually turn over your files to the attorneys who
16 were appointed to represent Mr. Owens in his second
17 proceeding?

18 A We retained those files until another
19 attorney was appointed. And then I personally took
20 those over there and turned those into them.

21 Q Do you remember who that was?

22 A That would have been in Mr. Sumner's office,
23 I believe it was.

24 Q Okay. I want to show you one quick document.
25 Applicant's Exhibit number 2. Does that document look

1 familiar to you at all?

2 **A** (Reviewing.) It does.

3 **Q** What do you remember that document being?

4 **A** The information that Ms. Glass collected is
5 what it appears to be.

6 **Q** Did she summarize that for you and the other
7 attorney in this chronology?

8 **A** Right. Uh-huh.

9 **Q** Did you have any trouble communicating with
10 Mr. Owens during your representation of him?

11 **A** No, I got Mr. Owens from the beginning, being
12 on the Public Defender's contract. And, uh, he and I
13 talked on numerous occasions. Mr. Owens was always
14 pleasant with me. We always got along and, I thought,
15 did what we needed to do.

16 **Q** Did he appear to you to be cooperative with
17 you in your efforts?

18 **A** Certainly.

19 **Q** Did you ever, during your representation of
20 him, develop any evidence that he was sexually abused
21 at the Department of Juvenile Justice or forced to
22 engage in any sexual conduct at the Department of
23 Juvenile Justice?

24 **A** No, sir. None of that evidence was ever
25 presented to me.

1 Q If you had received such evidence, would you
2 have used it to his benefit in his trial?

3 A We would have certainly explored it, yes.

4 MR. MABRY: That's all I have of this
5 witness.

6 **CROSS-EXAMINATION**

7 **BY MS. PAAVOLA:**

8 Q Good afternoon, Mr. Rollins.

9 A Good afternoon.

10 Q I just have a couple of questions.

11 A Uh-huh.

12 Q You said you provided a copy of your file to
13 Steve Sumner?

14 A Yes.

15 Q Are you absolutely certain that every
16 document that you had was in the copy of the file that
17 you maintained?

18 A What I had was I had, uh, -- of course, at
19 trial, we had three or four boxes of stuff. I had
20 everything in three ring binders where it would stay
21 in order as we were doing the case, where it was
22 tabbed and everything. That's what I took over to
23 them. They actually had what I had. I didn't retain
24 a copy for me. I just gave them everything I had.
25 That way, we would be sure there wasn't anything

1 missing.

2 Q Do you know what Mr. Sumner did with the file
3 after you gave it to him?

4 A I have no idea. I was no longer involved in
5 it after that.

6 Q I know it's been a long time. But can you
7 remember roughly about how much time you spent with
8 Mr. Owens?

9 A It was several months. It was several
10 months. Once they -- I remember on the top of my head
11 -- I don't remember what the date was. On the Public
12 Defender's contract, you get assigned a particular
13 person. You go down there and talk with them then.
14 At that time, they weren't seeking the death penalty
15 against him. It was just a regular murder case at
16 that point. I maybe saw him a couple, three times or
17 whatever prior to that.

18 Once they sought the death serve notice on us
19 with the death penalty, that created the situation
20 where we had the funds and the money to get the
21 experts and all that stuff. We were going down there
22 on a real regular basis then. We were wrapping this
23 thing up to go to trial.

24 Q Did you ever personally ask him if he had
25 been sexually abused?

1 **A** Off the top of my head, I don't remember that
2 specific question. We talked about everything, you
3 know, related to this case from his mother being an
4 alibi witness, his family, you know, just everything
5 involved in it. Once they started seeking the death
6 penalty, you really got involved in it. We had a lot
7 going on with the case. He was fully cooperating with
8 me and telling me what we needed to know. Those other
9 ladies were down there talking with him to get
10 information from him so they would know which
11 direction to go as far as mitigation.

12 **Q** All right. Thank you. Thank you.

13 **THE COURT:** Anything else.

14 **MR. MABRY:** No, sir.

15 **THE COURT:** All right.

16 **MR. MABRY:** Steve Sumner.

17 **THE COURT:** Good to see you.

18 **THE CLERK:** Mr. Sumner, if you would, place
19 your left hand on the Bible please. Raise your
20 right hand.

21 **STEVE SUMNER**

22 is first duly sworn and then testifies as follow:

23 **THE CLERK:** Thank you. You may be seated.

24 State your full name for the record please.

25 **THE WITNESS:** Steven Sumner.

1 **THE CLERK:** Thank you.

2 **DIRECT EXAMINATION**

3 **BY MR. MABRY:**

4 **Q** Mr. Sumner, would you spell your last name
5 for the court reporter please?

6 **A** Certainly. S-U-M-N-E-R.

7 **Q** How do you spell Steven? Is it "PH" or "V"?

8 **A** With a V.

9 **Q** With a V. Okay. Thank you.

10 **A** Sure.

11 **Q** Mr. Sumner, were you appointed to represent
12 Mr. Owens in his second sentencing proceeding before
13 Judge Kittredge?

14 **A** I was.

15 **Q** Did, uh, you have any trouble communicating
16 with Mr. Owens during your representation of him?

17 **A** Not that I can recall.

18 **Q** Did he appear to be cooperating with you and
19 your efforts?

20 **A** He did.

21 **Q** Who was your mitigation investigator during
22 that representation?

23 **A** To my recollection, it was Drucy Glass.

24 **Q** To your knowledge, did Ms. Glass provide you
25 with -- a copy of all the records she obtained from

1 the various sources she investigated in mitigation?

2 **A** To my knowledge, yes. My memory is very
3 fuzzy at that point. I know she was working with, I
4 think, with Marjorie Hammock out of Columbia. I think
5 they had more contact than she had with me.

6 **Q** To your knowledge, was she providing Ms.
7 Hammock with materials that she obtained?

8 **A** To my knowledge, yes.

9 **Q** Do you know of any file materials that she
10 would have withheld from you? Ms. Glass?

11 **A** No, I don't believe she would have withheld
12 anything I requested.

13 **Q** What was her job to do this case for you?

14 **A** I think her job was to be a scout and go back
15 and, I guess speaking in analogy here, Judge, go out
16 and find background information regarding Mr. Owens'
17 childhood, his education, his family, his social
18 upbringing, anything that would come to bear in terms
19 of mitigation as to why he might have committed the
20 crimes that he had been convicted of. It's a
21 wide-ranging -- as you know, it is a wide-ranging
22 spectrum of things. She would get that.

23 I do recall, I believe, that she would give
24 me primarily telephone updates. She was in Columbia,
25 I believe, at the time. Primarily the telephone

1 updates. Occasionally, I do believe we met in person
2 on occasion. She communicated with Ms. Hammock. At
3 some point, we all -- to my total recollection, this
4 has been quite some time ago. I don't have the file.
5 I believe we all sat down and went through the various
6 theories of what we felt like we would put from a
7 trial strategy perspective. It was ultimately
8 determined what we would go with. Ms. Hammock
9 primarily did that, but I thought Ms. Glass did an
10 excellent job.

11 Q All right. And was it her job to find
12 anything in Mr. Owens' life that might help y'all
13 present mitigation?

14 A I felt that it would be her primary job to
15 investigate those things and bring it to our
16 attention.

17 Q During your representation of Mr. Owens, did
18 you ever receive any information or mitigation
19 investigative material that Mr. Owens had been
20 sexually assaulted in the Department of Juvenile
21 Justice or forced to engage in any sexual conduct at
22 DJJ?

23 A No, not to my knowledge. I don't recall DJJ
24 ever being mentioned.

25 Q Okay. Did you talk to Mr. Owens during your

1 representation?

2 **A** I did.

3 **Q** If you had become aware of such information,
4 would you have used it in the sentencing phase?

5 **A** If I felt that it was credible, I certainly
6 would have given it strong consideration. And if I
7 felt that it was something that would make a
8 difference for him, I would say yes.

9 **Q** You don't remember that ever --

10 **A** I don't -- as I just said earlier, I don't
11 recall DJJ ever being mentioned in the case, although
12 it's been quite some time ago.

13 **Q** Okay. And you received the file from Mr.
14 Rollins as he testified; is that correct?

15 **A** I did. It was very well organized and it
16 appeared to be complete.

17 **Q** What did you do with the file after you
18 completed your representation of Mr. Owens?

19 **A** An attorney in Greenville named Ken Gibson
20 who then was taking over Mr. Owens' case after John
21 Kittredge's decision was overturned. The case was
22 remanded. My recollection is Ken Gibson was the lead
23 attorney and Bill Godfrey worked with Ken, I think.
24 And Ken came over to my office and went through the
25 file. I said, Ken, just take it with you. He took it

1 totally. He took it completely.

2 Q Okay.

3 A I did not retain copies. He took it.

4 Q All right. No further questions.

5 THE COURT: Okay.

6 CROSS-EXAMINATION

7 BY MS. PAAVOLA:

8 Q Mr. Sumner, you said Drucy Glass was working
9 close with Marjorie Hammock?

10 A To my recollection, yes.

11 Q Do you have any personal knowledge of what
12 documents, if any, she gave to Ms. Hammock?

13 A Today, no, I do not.

14 Q Did you ever personally ask Mr. Owens if he
15 had been sexually abused?

16 A I do not recall asking him that question.

17 Q Provided a copy of your file to Mr. Godfrey
18 -- I'm sorry, to Mr. Gibson?

19 A Yes, Bill Godfrey, I believe ultimately did
20 get the file of course and work through it. But
21 initially, it was given to Ken Gibson

22 Q Can you be absolutely sure that everything
23 that was in your file you gave to Mr. Gibson?

24 A To the very best of my knowledge, it was. I
25 was there when he picked it up. He and I were on a

1 conference table. He took everything and loaded it
2 into his car. I think I helped him load it in his car
3 because it was several boxes.

4 Q All right. Thank you.

5 MR. MABRY: Just one on redirect.

6 REDIRECT EXAMINATION

7 BY MR. MABRY:

8 Q You know if this Applicant's Exhibit number 2
9 was in the file? Do you remember that?

10 A (Reviewing.) You know, Judge, all I can say
11 is this looks very familiar to me. It appears to me
12 to be a product that I have seen in the past when I
13 was representing Mr. Owens.

14 Q Okay.

15 A I don't know what the title of the document
16 would be. It looks like a diagram with a lot of
17 extensive notes about background about Mr. Owens.

18 MR. MABRY: Thank you. Nothing further, Your
19 Honor.

20 THE COURT: Anything else?

21 MS. PAAVOLA: Oh, no further questions.

22 THE COURT: Okay. Thanks. Can we excuse
23 him?

24 MR. MABRY: We can excuse him.

25 THE COURT: All right. Any objection?

1 **MR. WEYBLE:** No, Your Honor.

2 **MR. MABRY:** I'm going to grab the next
3 witness, Judge.

4 **THE CLERK:** Mr. Ariail, if you would, step up
5 here please. Place your left hand on the Bible
6 and raise your right hand.

7 **SOLICITOR ROBERT ARIAIL**
8 is first duly sworn and then testifies as follow:

9 **THE CLERK:** Thank you. You may be seated.
10 State your full name for the record please.

11 **THE WITNESS:** Uh, Robert Mills Ariail.

12 **DIRECT EXAMINATION**

13 **BY MR. MABRY:**

14 **Q** Spell your last name for the court reporter,
15 Mr. Ariail.

16 **A** A-R-I-A-I-L.

17 **Q** And Mr. Ariail, you are the solicitor for the
18 13th Judicial Circuit?

19 **A** I am.

20 **Q** And how long have you served in that
21 capacity?

22 **A** 13 and a half years.

23 **Q** Did you remember the trial of this case
24 against Mr. Owens, the third sentencing proceeding?

25 **A** Yes, sir. I do.

1 **Q** Have you also reviewed voir dire of Ms. Abels
2 who was one of the jurors in this case or one of the
3 general jurors?

4 **A** Yes.

5 **Q** Do you remember her testimony, the testimony
6 of her individual voir dire?

7 **A** I do.

8 **Q** And do you recall her being disqualified by
9 Judge Patterson because she had approached her pastor
10 and talked to him about the death penalty?

11 **A** I remember she made the statement that she
12 consulted with her pastor and he did eventually
13 disqualify her. I can't remember if he did it on that
14 ground alone or other grounds where she stated she
15 couldn't give the death penalty. My recollection was
16 in reading the transcript that she could not give the
17 death penalty.

18 **Q** The record will reflect why?

19 **A** Sure.

20 **Q** You touched on something I want to ask you.
21 Did she, in her testimony, make statements such as she
22 would classify herself as a number two juror and she
23 couldn't give the death penalty and live with it?

24 **A** That's right. That is a key element, at
25 least in my period of trying death penalty cases, that

1 is a number one indicator you are looking for is the
2 answer to that one, two or three juror question. When
3 they say they're a two, barring some major unforeseen
4 circumstance, that's going to be struck by the State.

5 Q And number two juror is one who could only
6 give a life sentence?

7 A That's correct.

8 Q And if Ms. Abels had been qualified in this
9 case, for some reason had been rehabilitated or some
10 other reason, would you had struck her if she had been
11 presented?

12 A Yes, sir. Yes, sir.

13 Q How were the jurors -- you remember how the
14 jurors were struck in this case?

15 A This case, uh, -- let's see. This is the
16 third, Owens 3. My recollection, we qualified a
17 panel. We did not do a strike as you go. We did a
18 qualify the panel and then we went back and struck
19 them in the order in which they were called, which I
20 think is what the law requires. I've only had it
21 happen, other than that, one other time that the
22 judge, actually Justice Pleicones I would like to add,
23 shook them up again and drew them out at random after
24 we qualified the panel. That's the only time I ever
25 seen that done. The rest of them are drawn in the

1 same order in which they was listed on the jury sheet.

2 **Q** So as they are qualified?

3 **A** As they are qualified.

4 **Q** That's how they come up and then you strike
5 that?

6 **A** Uh-huh.

7 **Q** Do you remember how many strikes you had
8 remaining at the time Ms. Abels would have come up if
9 she had been qualified?

10 **A** I do now having reread the transcript.

11 **Q** How many did you have remaining?

12 **A** We had three at that time.

13 **Q** Do you know if you exercised any of those
14 three strikes?

15 **A** We did not. We had three strikes left over
16 at the end of this case which I thought was fairly
17 unusual.

18 **Q** All right. Thank you, sir.

19 **A** Sure.

20 **Q** Nothing further.

21 **MR. WEYBLE:** Your Honor, we don't have any
22 questions for Mr. Ariail.

23 **THE COURT:** Okay.

24 **THE WITNESS:** That it?

25 **THE COURT:** I don't know. Do we want to

1 release him or not? No objection, I'm sure. All
2 right.

3 MR. MABRY: Judge, the next two witnesses we
4 have will be by phone.

5 THE COURT: Okay.

6 MR. MABRY: We can take one now. I do have,
7 Dr. Brawley who can not testify until 4:00. Her
8 husband is leaving to go to Afghanistan. She says
9 she will be available at 4:00.

10 MR. MABRY: Okay. That's fine.

11 MR. MABRY: So we can take Dr. Schwartz-
12 Watts now.

13 THE COURT: All right.

14 (WHEREUPON, there is a pause.)

15 THE CLERK: Okay. Can you --

16 THE COURT: Dr. Schwartz-Watts? I'm sorry.

17 THE CLERK: Can you hear me?

18 THE WITNESS: I can.

19 THE CLERK: Okay. Thank you.

20 THE COURT: All right. Dr. Schwartz-Watts,
21 this is Judge Miller. How are you today?

22 THE WITNESS: I'm fine, Your Honor. Thank
23 you.

24 THE COURT: Yes, ma'am. We're going to, uh,
25 -- the hearing is convened. We're in the

1 courtroom. I'm going to ask the clerk to swear
2 you at this time.

3 **THE CLERK:** Raise your right hand please.

4 **DONNA SCHWARTZ-WATTS**

5 is first duly sworn and then testifies as follow:

6 **THE CLERK:** Thank you.

7 **THE COURT:** All right.

8 **DIRECT EXAMINATION**

9 **BY MR. MABRY:**

10 **Q** Donna, can you hear me? This is Anthony
11 Mabry.

12 **A** I can, Anthony.

13 **Q** Okay. I just have a few questions for you.
14 Were you, uh, I guess the psychiatric expert that was
15 retained in this case by Mr. Godfrey and Mr. Gibson??

16 **A** Yes, I was.

17 **Q** Did you retain or after you were retained
18 begin looking for someone to serve as a psychologist
19 or neuropsychologist in this case?

20 **A** Yes, when I evaluated Mr. Owens, I was
21 concerned because he had had a history of being quite
22 impulsive and I believe he had had some head injuries.
23 I recommended to Mr. Godfrey that we get a
24 neuropsychological consult.

25 **Q** All right. Were you aware that in the

1 previous trial, second trial of Mr. Owens before Judge
2 Kittredge, Dr. Jim Evans who is a psychologist had
3 already testified?

4 **A** Yes, I had read his transcript in the course
5 of my evaluation of Mr. Owens.

6 **Q** All right. And can you tell the court did
7 you make a decision whether or not to use Mr. Evans
8 again and why did you make that decision?

9 **A** Sure. And of course, keep in mind, Mr.
10 Mabry, it wasn't my decision but I certainly will
11 recommend a neuropsychologist. I recommended Dr. Tora
12 Brawley because I had a long history of working with
13 her. She's quite conservative in terms of doing
14 neuropsychological test or interpretations of them. I
15 just had a longer history of working with her. I
16 certainly had worked with Dr. Evans before. But in my
17 opinion, I prefer working with Dr. Brawley.

18 **Q** Okay. Did you have any information at that
19 time regarding the susceptibility of a quantitative
20 EEG which Mr. Evans had testified to in the first or
21 in the second trial?

22 **A** Yes. I did have some knowledge of that.

23 **Q** And what was that knowledge?

24 **A** Your Honor, and what I told Mr. Mabry is
25 that's certainly a neuropsychological issue. But I

1 certainly know from working with Dr. Brawley and other
2 neuropsychologist that they don't rely upon that as
3 part of their neuropsychologic battery as far as tests
4 that they run.

5 **Q** Do you know whether or not a quantitative EEG
6 is generally accepted in the neuropsychological
7 community?

8 **A** Just from, again, not being a
9 neuropsychologist, but certainly working with many, it
10 is not generally accepted by them.

11 **Q** Okay. Did that cause you some concern about
12 using Mr. Evans in this case as a live witness before
13 the jury?

14 **A** No, not necessarily. And again, that
15 certainly wasn't my call. I was just the psychiatric
16 expert. But I trust Dr. Brawley and I knew that if
17 Mr. Owens has some underlying cognitive deficit, I
18 would rely upon her test result as part of my opinion.

19 **Q** Would it be fair to say you preferred having
20 her instead of Dr. Evans?

21 **A** Yes.

22 **Q** And why is that?

23 **A** Again, I had just worked with Dr. Brawley.
24 She gives different tests. Your Honor,
25 neuropsychologists, there's different kinds of

1 batteries of tests they give. Again, you would
2 probably be better asking Dr. Brawley. But they give
3 what is called a rigid battery and a flexible battery.
4 Dr. Brawley administers what is called a flexible
5 battery. She may use some different tests that other
6 neuropsychologists may or may not use. I just had
7 more work experience with Dr. Brawley over the years.
8 I consider her very reliable and conservative in her
9 opinions.

10 **Q** Did you consider her more reliable than Dr.
11 Evans?

12 **A** Yes.

13 **Q** Okay. Were there any concerns about Dr.
14 Evans' findings being attacked if he did testify?

15 **A** Certainly not with me. Let me just say for
16 the record I work with Dr. Evans many times. And I
17 certainly have relied upon his results. That was
18 probably an issue for Mr. Godfrey. But I just
19 recommended -- I normally work with Dr. Brawley and I
20 usually would recommend her when I do a case.

21 **Q** Are you aware whether or not Dr. Evans'
22 findings have been attacked previously?

23 **A** Oh, yes. Even in the transcript of the
24 testimony where he, I think, in front of Judge
25 Kittredge, there was some questions. And he, I

1 believe, produced some documentation about that, yes.

2 **Q** Okay. During the time that you were involved
3 in this case, did you, I guess, speak with Mr. Owens,
4 the defendant, Freddie Owens?

5 **A** Oh, absolutely. I spent probably about ten
6 hours with Mr. Owens. I saw him on three separate
7 occasions. He was transported to my office when I was
8 at USC.

9 **Q** During that time, did you ever discuss with
10 him whether or not he had been the victim of any kind
11 of sexual abuse?

12 **A** Yes.

13 **Q** Okay. And what was his response?

14 **A** First of all, Mr. Owens had witnessed a lot
15 of abuse. In fact, I found some notes. I, believe it
16 or not, had typewritten the notes from some of my
17 evaluations with him. He witnessed a lot of abuse. I
18 was very concerned about him being abused as well. He
19 denied sexual abuse to me but did admit, -- he
20 volunteered that he had had an occurrence in the
21 community where a preacher had approached him
22 sexually. I believe he was on a telephone and the
23 preacher came up and asked him to have sex. He was
24 very upset about that. In terms of sexual abuse, he
25 denied that to me.

1 Q Okay. One moment please. (Pause).

2 If he had ever communicated to you any kind
3 of sexual abuse that occurred at DJJ, would you have
4 made note of that your report?

5 A Yes. I also reviewed those for you too, Mr.
6 Mabry. The only notes I had of DJJ -- and I
7 specifically asked him about DJJ -- is Mr. Owens told
8 me that he really enjoyed ROTC and that he worked in
9 the office with Flora Brooks Boyd who was actually the
10 administrator or the director of DJJ at that time.
11 The information I have from him was that he and
12 another cadet were the only two to make the cadet
13 challenge. He was very attached to Sergeant Major
14 Berry who wanted him to go into the military. In
15 terms of -- I don't recall if I ever specifically said
16 were you've sexually abused at DJJ. I have no -- I
17 certainly asked him about sexual abuse and didn't have
18 that history.

19 Q And if he had told you something like that,
20 would you have committed that to Mr. Godfrey and Mr.
21 Gibson?

22 A Absolutely.

23 Q Thank you, ma'am. I don't have anything
24 further.

25

CROSS-EXAMINATION

1 BY MR. WEYBLE:

2 Q Dr. Schwartz-Watts, this is Keir Weyble. How
3 are you?

4 A Hi. I'm fine. Thank you.

5 Q Just a few questions for you. You were not
6 involved in the 1999 or 2003 trials of Mr. Owens; is
7 that right?

8 A That's correct.

9 Q You did not have any prior knowledge of Mr.
10 Owens from any other source before you got involved in
11 this case; is that right?

12 A Not at all. That's correct.

13 Q You were brought into the trial team for this
14 case in early September of 2006, does that sound
15 right?

16 A Yes, that's correct.

17 Q As of that time, trial was set for October
18 2nd, 2006; is that right?

19 A Yes, sir. That's exactly correct. I was
20 very concerned about that and had -- in fact, had
21 talked, I believe, with Judge Patterson who assured me
22 he would make sure Mr. Owens was available and
23 transported to my office so that I could meet him.

24 Q Okay.

25 A Meet with him and do an appropriate

1 evaluation.

2 Q All right. But so nevertheless, after seeing
3 Mr. Owens one time, you contacted Bill Godfrey and
4 urged him to get a continuance; is that correct?

5 A That's correct.

6 Q The reason for that was because you could not
7 do what you needed to do in the short time that you
8 had available to you; is that correct?

9 A That's right. Mr. Owens, uh, it was clear
10 that he had some mental illness when I evaluated him.
11 I was concerned that I felt that he needed
12 neuropsychological evaluation. There were some
13 consultations that I needed. I felt that given his
14 history that there was more -- he probably had more
15 symptoms than what had previously been outlined to the
16 court, you know, from reading the transcripts from his
17 prior trials.

18 Q Okay. In terms of your role on this defense
19 team in 2006, it was a limited role; is that right?

20 A That's correct.

21 Q And you, in fact, were not the person who was
22 responsible for relating to the jury the details of
23 Mr. Owens' social history; is that right?

24 A That's correct.

25 Q In fact, that job belonged to Marjorie

1 Hammock, am I right?

2 **A** That's right.

3 **Q** Okay. Now, Mr. Mabry asked you a little bit
4 about the issue of sexual abuse and whether you asked
5 Mr. Owens about that. In your experience, is it true
6 that it's not common for a young man, particularly, to
7 be reluctant to reveal that he has been a victim of
8 sexual abuse?

9 **A** That is not uncommon at all, Mr. Weyble.
10 That is actually quite common.

11 **Q** And in fact, of all the possible features of
12 a person's background, sexual abuse can be among the
13 most difficult to uncover, is that true?

14 **A** Certainly. Yes, that's true.

15 **Q** And the reason for that is because victims of
16 sexual abuse tend to be particularly embarrassed by it
17 or ashamed by it?

18 **A** That's certainly one reason.

19 **Q** And is it also true, uh, particularly for
20 young men like Mr. Owens that admitting something like
21 that equates to admitting weakness or vulnerability?

22 **A** It could, especially when you are in an
23 institutional setting. If that information were to be
24 released to other inmates, it could possibly place you
25 in danger.

1 Q All right. Nevertheless, there are certain
2 techniques that have -- or one technique in particular
3 that has been developed to try to get in information
4 like that. What I am referring to, of course, is
5 spending significant time with a person and developing
6 a relationship of trust; is that right?

7 A That's certainly one way. What I do is
8 called a trauma history. The other thing I find after
9 just doing this job for 20 years is that you have to
10 ask very detailed questions. You just can't just ask
11 a client, "Have you been abused?" You have to ask
12 very specific questions.

13 Q Okay. Now, is it possible that, uh, I know
14 you spent ten hours with him and what I think you --
15 paraphrasing here -- what you described as somewhat of
16 a compressed, uh, period that you had to work in. Is
17 it possible that ten hours might not have been enough
18 to establish the kind of trust that might be necessary
19 to get at, uh, the most deeply guarded information
20 that a person might have?

21 A I think that would be fair. Mr. Owens,
22 though -- you know, keep in mind I thought we had a
23 very good relationship. He was very forthcoming, uh,
24 giving the information. He certainly did, when I
25 asked him about, uh, abuse, he actually volunteered

1 about the preacher where, uh, he stated -- I'm sorry.
2 I could pull my notes for you. But he actually did
3 disclose that he had certainly been propositioned by
4 homosexual advance. But you're right. Certainly, he
5 began disclosing some information. But it could be
6 for a number of reasons, time being one of them.

7 Q Okay. You certainly couldn't say that if you
8 had even a little bit more time to speak with him that
9 additional information might not have developed; is
10 that right?

11 MR. MABRY: I'm going to object. That is
12 speculation.

13 MR. WEYBLE: Your Honor, I don't think it is
14 speculation.

15 THE COURT: That's all right. Go ahead.

16 BY MR. WEYBLE:

17 Q You can go ahead and answer the question,
18 Doctor.

19 A I don't -- you know, I can't answer it. He
20 may or may not have told me had I had more time to
21 evaluate him. Normally what one would do is that if
22 you found such information, I would confront Mr. Owens
23 with it, which is what I did on the third interview.
24 When I had information that he had not disclosed, I
25 confronted him with that. That's certainly one

1 technique. He may or may not have would have
2 disclosed that to me.

3 Q Sure, and the answer is you don't know,
4 there's no way to know, right?

5 A That's correct. I certainly felt like he was
6 very disclosing. We have a very good rapport. In my
7 opinion, he had disclosed some details to me that I
8 don't think had been disclosed to others. Again, I
9 couldn't tell you how many times I would need to meet
10 with him if he would have felt comfortable disclosing
11 that to me.

12 Q Okay. Just a couple more things. In terms
13 of the information that you had about Mr. Owens' time
14 at DJJ, that information was limited to what was in
15 the paper record generated by DJJ and what Mr. Owens
16 had told to Dr. Tidler; is that right?

17 A That's correct. I had his med -- I believe
18 it was his medical records and I had the psychological
19 report from when he had gone into R&E.

20 Q Okay.

21 A I may have had some of his writeups. But
22 yes, the information I had came from the record. I
23 personally interviewed Dr. Tidler and then, of course,
24 I interviewed Mr. Owens about some of those records.

25 Q In fact, you operated -- once you found out

1 that he had been under the care of Dr. Tidler, you
2 assumed that he had been in good hands, is that
3 correct, because you have such respect for Dr. Tidler?

4 **A** Absolutely. Your Honor, Dr. Tidler is a
5 child forensic psychologist. She did her child
6 training at John Hopkins and she now works in
7 Virginia. She is one of the most respected child
8 forensic psychologists I know. I actually ran a
9 clinic with her at the same time, probably during the
10 period where she was evaluating and treating Mr.
11 Owens. I did know how thorough she was and how much
12 time she spent with the children. In my opinion, she
13 is one of the best treating doctors I know.

14 **Q** And finally, Doctor, you did not have any
15 personal involvement in the class-action lawsuit
16 against DJJ that was pending throughout the period
17 that Mr. Owens was in that facility; is that right?

18 **A** No, not at all. In fact, USC had been
19 providing the treatment during period of time. I
20 believe in the 15 years that I worked there, I was
21 probably subpoenaed on one case of one child and it
22 was a child whom I was specifically giving care to
23 that had been abused. I believe Mr. Ferry or either
24 the DJJ attorney subpoenaed me to one of those
25 hearings. But no, I had no other involvement at all.

1 Q All right. Thank you very much, Doctor.
2 That's all I have.

3 THE COURT: Any --

4 MR. MABRY: Yes, Your Honor. Briefly on
5 redirect.

6 REDIRECT EXAMINATION

7 BY MR. MABRY:

8 Q Dr. Schwartz-Watts, you had Ms. Tidler's
9 records from her treatment with -- of Mr. Owens from
10 DJJ?

11 A Let me look. I think I did, Mr. Mabry, but
12 let me be sure.

13 Q Okay.

14 A All I have on my report -- and I'm sorry
15 because I don't have those records -- it says just
16 Department of Juvenile Justice -- oh, no. Excuse me.
17 I do have them. Yes.

18 Q Okay.

19 A I have it listed that I had her mental health
20 records from January 7th, 1997, January 15th, 1997 and
21 January 27th, 1997.

22 Q Okay. And as you testified, she was very
23 thorough in her work?

24 A Oh, absolutely. She -- for example she would
25 bring her own box into the clinic and she would do all

1 of her own records and bring them with her each time.
2 So she would make sure the continuity of care was
3 followed through. It wasn't uncommon for her at all,
4 she would see probably just one child per hour. She
5 would usually spend about an hour per child that she
6 was treating.

7 Q Okay. And in her records, you did not
8 uncover any time that he told Ms. Tidler that he had
9 been sexually abused?

10 MR. WEYBLE: Your Honor, I object to this. I
11 don't know if I've have seen these records or not.
12 They're not here and not available for us to look
13 at.

14 MR. MABRY: They're in the DJJ records that I
15 believe that you provided to me, aren't they?

16 MR. WEYBLE: I don't know.

17 MR. MABRY: I assumed that they are.

18 MR. WEYBLE: My initial answer to that
19 question was no, they're not.

20 THE COURT: Wait a minute. One at a time.

21 MR. WEYBLE: Sorry, Your Honor.

22 MS. PAAVOLA: We did provide Mr. Mabry with a
23 copy of the DJJ file that we received. But I'm
24 really not certain if those contained documents
25 specifically from Ms. Tidler or not. I don't

1 recall seeing them. If you have them, that will
2 be helpful.

3 **MR. MABRY:** Absolutely. Just a second.

4 **THE COURT:** All right. Be patient please,
5 Dr. Schwartz-Watts.

6 **THE WITNESS:** I'm sorry, sir?

7 **THE COURT:** Be patient please. We are
8 checking for some records.

9 **MR. MABRY:** My position on that, Judge, is he
10 asked her this on cross. He bought up Dr. Tidler
11 and Dr. Tidler's records. I'm just going into it
12 on redirect. They are Mr. Owens' records that
13 they could have obtained through a release to him.
14 They're objecting to me asking about when they
15 could have obtained them. That's my position.

16 **MR. WEYBLE:** Your Honor, first of all, I
17 didn't bring up Mr. Tidler's records. The problem
18 here is, Judge, we don't know what Dr.
19 Schwartz-Watts has in front of her. It may be
20 that we have something that purports to be some
21 piece of the record created by Dr. Tidler. I don't
22 know that that's the same thing. We can't tell
23 because we can't see them.

24 **THE COURT:** Dr. Schwartz-Watts, you gave
25 dates of the documents that you had in front of

1 you?

2 **THE WITNESS:** Yes, sir. I have the dates. I
3 don't have the documents but the report that I
4 prepared for the court ---

5 **THE COURT:** Right.

6 **THE WITNESS:** --- I specifically listed DJJ
7 mental health records, Dr. Tidler dated January
8 7th, 1997, January 15th, 1997 and January 27th,
9 1997.

10 **THE COURT:** That was pertaining to your
11 report that was presented to Mr. Godfrey?

12 **MR. MABRY:** Yes, sir.

13 **THE COURT:** Okay.

14 **MR. MABRY:** I'm looking at some records,
15 Judge, that I have. DJJ records from Jill Rider,
16 from Ms. Rider to me. They contain physician
17 orders signed by Lillian Tidler for Welbutrin,
18 Vistaril, uh, March 11th for Darvocet, March 16th
19 for Darvocet, January 27th, psychiatric,
20 psychiatry, Zoloft, Ambien. These are all Lillian
21 Tidler's. These are the records that I received
22 from them.

23 **THE COURT:** From -- who is "them" for the
24 record?

25 **MR. MABRY:** From collateral counsel. Now, I

1 don't have the actual doctor's reports. I have
2 the physician orders.

3 **THE COURT:** I'm going to allow him to ask the
4 question. It certainly appears that these are
5 documents that everyone has access to.

6 **MR. WEYBLE:** That's fine, Your Honor. We'll
7 see where it goes. If the objection arises again,
8 we'll alert you.

9 **THE COURT:** Okay.

10 **BY MR. MABRY:**

11 **Q** Well, my question, Dr. Tidler [sic], is very
12 simple. Was there anything in those records that
13 indicated to you that Mr. Owens had reported any
14 sexual abuse at DJJ or anybody forced him into any
15 kind of sexual conduct?

16 **A** No. But if you look on my report on page 3,
17 I did actually outline and put into quotation some of
18 the actual notations from Dr. Tidler.

19 **Q** Yes.

20 **A** If it will help the court, I noted that he
21 was preoccupied with anxiety about the health of his
22 various family members and was hopeless about his
23 future.

24 **Q** Okay.

25 **A** Other notations that I noted that she put

1 where he had improvement in his sleep and mood after
2 being placed on medication.

3 Q Okay.

4 A There is another, uh, I think another entry
5 from her where she changed his medication before he
6 was transferred to the Department of Corrections to
7 make sure that those medicines were the same ones that
8 Mr. Owens would receive once he was transferred to
9 Turbeville. Then I followed that paragraph up that
10 once he was at Turbeville, he was not, uh, -- there
11 was no continuity of care. He was evaluated on one
12 occasion. I believe I put notations from that
13 followup there as well.

14 Q Okay. I'm looking at a medical record that I
15 received from collateral counsel dated January 7th,
16 1997 where Mr. Owens was talking about, uh, -- is that
17 one of the records you have, January 7th?

18 A Yes, it was.

19 Q Okay. And it talks about Mr. Owens being
20 depressed and aggressive, being angry, and it was over
21 family problems, him worried about his family and
22 their future?

23 A That's correct.

24 Q Okay. That's all the questions I have.

25 MR. WEYBLE: Just one moment, Your Honor.

1 **THE COURT:** Sure.

2 **MR. WEYBLE:** No further questions, Your
3 Honor.

4 **THE COURT:** Thank you very much, Dr.
5 Schwartz-Watts.

6 **THE WITNESS:** Thank you all.

7 **THE COURT:** Okay. All right.

8 **THE WITNESS:** Bye-bye.

9 **THE COURT:** Bye.

10 Shirley, you can hang that up.

11 **MR. MABRY:** I have one more witness at four
12 o'clock, Dr. Brawley.

13 **THE COURT:** And that's it?

14 **MR. MABRY:** That's it.

15 **THE COURT:** Well, let's just take a break.

16 **MR. MABRY:** I will call her. Maybe she's
17 home yet shortly before.

18 **THE COURT:** We'll take a 15-minute break.

19 **MR. MABRY:** She had to see her husband off.
20 I told her you would understand.

21 **THE COURT:** That's totally understandable.
22 Okay.

23 (WHEREUPON, a recess is taken at approximately
24 3:36 p.m.)

25 (WHEREUPON, the Court resumes at approximately

1 4:00 p.m.)

2 **THE CLERK:** Okay. There we go. This is Judge
3 Miller.

4 **THE COURT:** Dr. Brawley?

5 **THE WITNESS:** Hi, Judge Miller.

6 **THE COURT:** How are you?

7 **THE WITNESS:** I'm fine. Thank you.

8 **THE COURT:** Great. We are in the courtroom.
9 We are convened in the case of Freddie Eugene
10 Owens versus the State of South Carolina.

11 **THE WITNESS:** Yes, sir.

12 **THE COURT:** You are being called as a
13 witness by the state. Everyone is present.
14 We're ready to go. I'm going to ask the clerk to
15 place you under oath.

16 **THE WITNESS:** Okay.

17 **THE CLERK:** Dr. Brawley, raise your right hand
18 please.

19 **TORA BRAWLEY**
20 is first duly sworn and then testifies as follow:

21 **THE CLERK:** Thank you.

22 **DIRECT EXAMINATION**

23 **BY MR. MABRY:**

24 **Q** Dr. Brawley, this is Mr. Mabry. How are you
25 doing this afternoon?

1 **A** Fine. Thank you.

2 **Q** Good. You are a neuropsychologist; is that
3 correct?

4 **A** That's correct.

5 **Q** Were you retained as a neuropsychologist by
6 the defense team in Mr. Owens' third sentencing
7 proceeding?

8 **A** In 2006, yes, sir.

9 **Q** Can you tell the court why you were retained
10 in this case?

11 **A** I was provided a referral from Dr.
12 Schwartz-Watts. I believe had she had evaluated Mr.
13 Owens and wanted for me to perform an evaluation.

14 **Q** All right. Are you aware that Dr. Jim Evans
15 had previously testified in the second sentencing
16 proceeding regarding Mr. Owens?

17 **A** Yes, I am.

18 **Q** Can you tell me why you were retained instead
19 of Dr. Evans being used again in this case?

20 **MS. PAAVOLA:** Your Honor, we object to that
21 on the basis on speculation.

22 **THE COURT:** Well, she can state her state of
23 mind, I guess. Over your objection, go ahead.

24 **THE WITNESS:** Uh, well, uh, certainly, Dr.
25 Schwartz-Watts can address that too since she

1 provided the referral. What I can tell you is
2 that she routinely consults me for the
3 neuropsychological evaluations.

4 **BY MR. MABRY:**

5 **Q** Okay. Are you aware or were you aware that
6 Mr. Evans had conducted quantitative EEG of Mr. Owens?

7 **A** Uh, --

8 **Q** Or testified to that effect in the second
9 proceeding?

10 **A** Yes, I was provided his testimony for review.

11 **Q** And can you tell the court whether or not a
12 quantitative EEG is generally recognized in the
13 neuropsychological community as a valid way to conduct
14 an evaluation?

15 **A** I don't know about the word "recognized", but
16 I can tell you that I don't know any other
17 neuropsychologist that uses a QEEG. I've been on
18 faculty of Duke University medical school. I have
19 worked in head injury and spinal cord injury
20 facilities. And until I came to South Carolina and I
21 came across some work from Dr. Evans, I did not even
22 know what a QEEG was.

23 **Q** Okay. And did you consider conducting a
24 quantitative EEG as part of your evaluation in this
25 case?

1 **A** Absolutely not. In that literature, even
2 today, it is still considered controversial,
3 experimental. You know, there are significant issues
4 with that particular test.

5 **Q** All right. And during your evaluation of Mr.
6 Owens, I assume you had some conversations with him
7 and talked with him?

8 **A** As part of my evaluation, I perform an
9 extended clinical interview at the onset of the
10 evaluation.

11 **Q** All right. And during your interview with
12 Mr. Owens, did he ever relate to you that he had been
13 the victim of sexual abuse at DJJ or forced to engage
14 in any kind of inappropriate sexual behavior at DJJ?

15 **A** That was not reported to me.

16 **Q** If that had been reported to you, would you
17 have reported that to Dr. Schwartz-Watts and the
18 attorneys in this case?

19 **A** Yes.

20 **Q** Did you specifically ask him about sexual
21 abuse?

22 **A** That is a routine part of my clinical
23 interview. That's something that I always cover when
24 I'm looking at emotional and psychological history.

25 **Q** All right. He denied any sexual abuse?

1 **A** Correct.

2 **MR. MABRY:** Okay. That's all I have, Your
3 Honor.

4 **THE COURT:** Okay. Cross-examination.

5 **CROSS-EXAMINATION**

6 **BY MS. PAAVOLA:**

7 **Q** Dr. Brawley, can you tell us about how long
8 this interview was that you conducted with Mr. Owens
9 before you gave him the --

10 **A** My interviews generally run about one hour.

11 **Q** Your role in this case was fairly limited, is
12 that fair to say?

13 **A** That's correct.

14 **Q** In fact, basically your role was to look at
15 his brain function and present that to the jury.

16 **A** That's correct.

17 **Q** Your role was not to present his life history
18 or his family background or anything like that?

19 **A** I take that as part of my evaluation.
20 Background history, like head injuries and drug use
21 and also psychological functioning, can impact
22 cognitive status. In that sense, I do take a history
23 in those areas.

24 **Q** Okay. And that's the history that you took
25 during the one-hour interview?

1 **A** That's correct.

2 **Q** And so, I think you already explained, to the

3 extent that it relates to your own testimony, you had

4 some information. But your primary role is simply to

5 present the findings from the neuropsych battery?

6 **A** That is correct.

7 **Q** Thank you.

8 **THE COURT:** Any redirect?

9 **MR. MABRY:** No, sir.

10 **THE COURT:** All right. Thank you very much,

11 Dr. Brawley.

12 **THE WITNESS:** All right. Y'all, take care.

13 **THE COURT:** All right. You too.

14 **THE WITNESS:** Thank you. Bye-bye.

15 **THE COURT:** Okay.

16 **MR. MABRY:** The State rests.

17 **THE COURT:** Okay.

18 **MR. MABRY:** At this time, Your Honor, we'd

19 renew -- I guess I ought to wait and see if they

20 want to call any reply, but we renew our

21 objections and our motions for directed verdict.

22 **THE COURT:** Okay. Y'all have any reply?

23 **MR. WEYBLE:** Your Honor, we don't have any

24 reply.

25 **THE COURT:** Okay. Well, I'm, uh, -- uh, same

1 rulings.

2 MR. MABRY: Okay. All right. I just renew
3 those at this time ---

4 THE COURT: Yeah.

5 MR. MABRY: --- since they had rested. Same
6 objection. Renew our previous objections and our
7 motions for directed verdict on each ground.

8 THE COURT: Okay. All right. Now, you all
9 have talked about you wanted to do a briefing. Is
10 that right? Do y'all want to make any closing
11 remarks to me? I mean, how do -- what do y'all
12 want to do?

13 MS. PAAVOLA: Your Honor, we have one issue
14 we need to wrap up with regard to the documents
15 that we introduced through the testimony of Ms.
16 Rider. I believe the -- I don't believe there was
17 a final ruling on those, the admissibility of
18 those documents.

19 THE COURT: Which documents we talking about?

20 MS. PAAVOLA: Applicant's Exhibits numbers
21 10 through 18, the documents that came from the
22 file of Ms. Glass.

23 THE COURT: Oh. Yeah. Anything you want to
24 tell me?

25 MR. MABRY: No, sir. I just want to clarify

1 . one thing. When those were shown to me, Ms.
2 Paavola explained to me that they were school
3 records from -- and she can correct me if I'm
4 wrong. We can just stipulate on this. There were
5 school records in Ms. Glass file that they contend
6 were in Ms. Glass' file that weren't in trial
7 counsel's file. But these records that they have
8 marked -- I can't remember the exhibit numbers.

9 **THE COURT:** 10 to 18.

10 **MR. MABRY:** Yeah, I think 10 to 18 were not,
11 according to Ms. Rider's testimony, not in trial
12 counsel's file. I want to make that clear that
13 there were school records that were in Ms. Glass'
14 file that were in trial counsel's file. These are
15 records that they determined were not in trial
16 counsel's file when they received it from Mr.
17 Godfrey.

18 **MS. PAAVOLA:** That's correct. There are --
19 there were a very small number of school records
20 in trial counsel's file. There are more school
21 records in Ms. Glass' file, but there were some
22 school records in trial counsel's file.

23 **THE COURT:** Okay.

24 **MR. MABRY:** The same school records. That's
25 my point I want to clear to the court. The same

1 school records that were in Ms. Glass' file were
2 in trial counsel's file. They pulled those out
3 and only submitted those documents.

4 **MS. PAAVOLA:** Well, they are not the same.
5 There's a stack of school records in Ms. Glass'
6 file about this big. That's handful of pages of
7 the records in trial counsel's file. They are the
8 same to the extent that the files that are in
9 trial counsel's file are also in Ms. Glass' file.

10 **THE COURT:** You're introducing -- you want to
11 introduce these to show that trial counsel did not
12 have them in their file; is that right? Is that
13 the purpose for the introduction of those records?

14 **MS. PAAVOLA:** The primary purpose is really
15 that, uh, -- you know, I think we've had a lot of
16 back and forth about why the information wasn't
17 presented. But the primary purposes is that the
18 documents contained a number of details about Mr.
19 Owens' life history that wasn't presented to this
20 capital jury at the last proceeding and whether
21 it's because they didn't have them and they should
22 have or they had them and just didn't present it.
23 The real issue is they didn't present it and these
24 documents contained details that should have been
25 presented.

1 **THE COURT:** Okay.

2 **MR. MABRY:** Our position is that doesn't
3 prove what they claim to prove in this case. Ms.
4 Glass testified she turned all these over to the
5 attorneys. She also testified she turned them
6 over to Ms. Hammock who was the same mitigation
7 investigator who testified, I mean, same social
8 worker that testified in the third trial.

9 **THE COURT:** Okay. You guys are arguing
10 about an ultimate issue.

11 **MR. MABRY:** Right.

12 **THE COURT:** Just with respect to the
13 introduction of these documents, I'm going to
14 allow them.

15 **MR. MABRY:** Yes, sir.

16 **THE COURT:** You object?

17 **MR. MABRY:** Not at this point in time.

18 **THE COURT:** Okay.

19 **MR. MABRY:** I just wanted to make a
20 clarification.

21 (WHEREUPON, Applicant's Exhibits 10 through 18 are
22 admitted into the record.)

23 **THE COURT:** All right. Anything --

24 **MR. WEYBLE:** Well, then that brings us to
25 the issue of post-hearing briefs which I brought

1 up initially yesterday.

2 **THE COURT:** Yeah.

3 **MR. WEYBLE:** I think ordinarily we, uh, -- I
4 think in a case like this, given the back and
5 forth about some issues and some subjects, we
6 would just propose that some sort of briefing
7 schedule be set and the time begin to run to
8 receive the record.

9 **MR. MABRY:** I think we can handle it by
10 proposed orders, Judge. As I told you, you got to
11 review the record.

12 **THE COURT:** How do y'all feel about that?

13 **MR. WEYBLE:** Well, Your Honor, I would
14 object to doing any form of proposed orders. The
15 reason for that is according to the statute 17-27-
16 160(d), according to civil rule 52(a), uh, we, or
17 both parties are entitled to your conclusions,
18 your findings, your conclusions, your mental
19 impressions. I wouldn't presume to be able to
20 accurately imagine every determination you're
21 going to make about this case. I don't think Mr.
22 Mabry could either. What we can do as advocates
23 is present to you our best case. But at the end
24 of the day, we are entitled to your findings and
25 your conclusions.

1 **THE COURT:** Okay. Well, we will, uh, --
2 what do you propose for your briefing schedule?
3 How long, once you get the record?

4 **MR. WEYBLE:** I would say given -- there's
5 some factual complexity here. I would request
6 that we be given 60 days after we receive the
7 record to file our initial briefs. I don't know
8 whether you want to do them simultaneously.

9 **THE COURT:** No, you're the moving party.
10 He's got to get yours and respond. How about 45
11 days. Will give you how long?

12 **MR. MABRY:** Whatever you determine, Judge.

13 **THE COURT:** Well, --

14 **MR. MABRY:** 30?

15 **THE COURT:** 30. And then if y'all have --
16 I'll give you 10 days to do a brief reply brief.
17 And that's once he submits his.

18 **MR. WEYBLE:** That's fine, Your Honor. Thank
19 you.

20 **THE COURT:** All right. Anything else?

21 **MR. MABRY:** Shortly, Judge, back on the
22 issues of these documents that they submitted.

23 **THE COURT:** Right.

24 **MR. MABRY:** I understand the Court's ruling
25 to let them in. But the record will show what

1 they actually are. I think the testimony would
2 have been -- Ms. Rider identified them as not
3 being in trial counsel's file. There was also
4 testimony that they never went to Mr. Gibson's
5 office and got anything from Mr. Gibson's file.
6 Uh, that's the testimony. I don't remember what
7 Mr. Godfrey and Mr. Gibson's testimony was about
8 how the -- what pile each one of them had and
9 whether Mr. Gibson delivered it to him. Anyway,
10 whatever the record reflects, that's what the
11 record reflects.

12 **THE COURT:** Sumner said he went to Gibson's
13 office.

14 **MR. MABRY:** Right.

15 **MR. WEYBLE:** I think Mr. Gibson testified
16 yesterday that Mr. Godfrey had gotten a
17 combination of what Gibson had got in the file.

18 **MR. MABRY:** I just don't remember that
19 testimony. That may be in the record. Whatever
20 is in the record is in the record.

21 **THE COURT:** Okay.

22 **MR. WEYBLE:** Fair enough.

23 **MR. MABRY:** Yes, sir.

24 **THE COURT:** Okay. Y'all, uh, thank you very
25 much for the insightful, efficient presentation.

1 Thank you.

2 Mr. Owens, anything you want to --

3 MR. OWENS: No, sir.

4 THE COURT: All right. Well, good.

5 (WHEREUPON, the hearing concludes at approximately

6 4:16 p.m.)

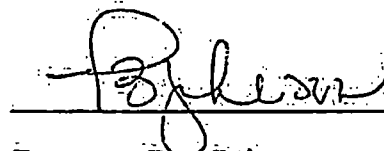
CERTIFICATE

365

1 I, the undersigned, Teresa B. Johnson, Official
2 Court Reporter for the Thirteenth Judicial Circuit of
3 the State of South Carolina, do hereby certify that
4 the foregoing is a true, accurate and complete
5 Transcript of Record of all the proceedings had and
6 evidence introduced in the trial of the captioned
7 case, relative to appeal, in the Court of Common Pleas
8 for Greenville, South Carolina, on the 31st day of
9 May, 2011.

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

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Teresa B. Johnson

Official Court Reporter

The State,

vs.

Freddie Eugene Owens

CASE NUMBER(S): 1998-65-23-5220

OFFICE OF INDIGENT DEFENSE ATTORNEY'S TIME SHEET

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PAGE 1 of 7

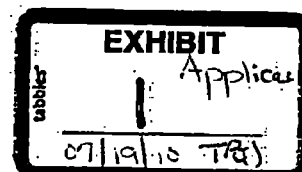
DATE	ACTIVITY (Please make explanation detailed enough to determine what service was performed)	Long Distance Telephone Calls (Month/Year)	Out-Of-Court TIME	In-Court TIME
1 2-3-06	Review Order Appointing Counsel		.1	
2 3-2-06	Study Capital Case Law		2.0	
3 3-6-06	Study Capital Case Law		2.0	
4 3-11-06	Study Capital Case Law		6.0	
5 3-14-06	Study Capital Case Law		2.0	
6 3-22-06	Study Capital Case Law		2.0	
7 3-24-06	Study Capital Case Law		4.0	
8 3-31-06	Study Capital Case Law		4.0	
9 4-7-06	Study Capital Case Law		4.0	
10 4-14-06	Study Capital Case Law		4.0	
11 5-06	Calls to Appellate Defense to get		} 0	
12	prior trial transcripts. Calls to			
13	former counsel to get old files			
14 6-10-06	Reading 1st trial transcript		5.0	
15 6-16-06	Reading 1st trial transcript		4.0	
16 6-19-06	Travel to Lieber CT to visit Freddie		9.0	
17 6-23-06	Reading 1st trial transcript		4.0	
18 6-24-06	Reading 1st trial transcript		4.0	
19 6-25-06	Reading 1st trial transcript		3.3	
20 6-26-06	Study of both Reversals by Sup Ct		1.0	
21 7-6-06	Review of juror questionnaire from judge		.5	
22 7-13-06	Review of State's response to juror		} 4.5	
23	questionnaire and the attached copy of			
24	State v. Smart. Researched juror			
25	profiling			
TOTAL FOR THIS PAGE:			65.4	
TOTAL FOR ALL PAGES:			15.4	

I hereby certify to the Court that the information set forth on this time sheet accurately reflects the time and activities performed by me for the above named client.

Signature: [Signature]

Date: 12-1-06

CID FORM 200 (2/94) Local Duplication is authorized.



The State,

vs. Freddie Eugene Owens

CASE NUMBER(S): 1998-LS-23-5220

OFFICE OF INDIGENT DEFENSE
ATTORNEY'S TIME SHEET

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PAGE 2 of 7

DATE	ACTIVITY (Please make explanation detailed enough to determine what service was performed.)	Long Distance Telephone Calls (Time only)	Out-Of-Court TIME	In-Court TIME	
7-14-06	Reviewed Short order transporting Freddie to Perry until trial is complete		1.6		
7-20-06	Prepared Response to State's objection to juror questionnaire		2.25		
7-21-06	Reviewed judge's decision Regarding juror questionnaire	}	1.5		
7-24-06	Reviewed letter from state Regarding discovery and the state's Recap sheets on discovery		}	1.3	
8-9-06	Reviewed State's submission of Freddie's behavior and discipline Record from Lieber	}		2.0	
8-11-06	Reviewed 4 cases of old files from Freddie's previous counsel		}	5.5	
8-15-06	Reviewed Gag Order			0	
8-18-06	Reviewed State's motions				
	① motion to produce underlying data, documents and Facts Supporting any Expert Testimony by Defense	}			
	Witnesses under Rule 705				
	② motion to submit witness list prior to jury qualification		1.5		
	③ motion for defense to produce school Records				
	④ State's Notice of Aggravation				
TOTAL FOR THIS PAGE:			12.65		
TOTAL FOR ALL PAGES:			78.05		

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7-20-06

I hereby certify to the Court that the information set forth on this time sheet accurately reflects the time and activities performed by me for the above named client.

Signature: [Signature]

Date: 12-10-06

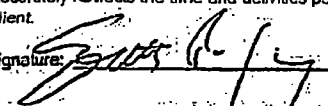
The State,

OFFICE OF INDIGENT DEFENSE ATTORNEY'S TIME SHEET

Freddie Eugene Owens
CASE NUMBER(S): 1998-65-23-5220

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DATE	ACTIVITY (Please make explanation detailed enough to determine what service was performed.)	Flare Distance Telephone Calls (per hour)	Out-Of-Court TIME	In-Court TIME
8-18-06	Researched law on State's motion and	}	4.5	
2	Notion of aggravation			
3 8-30-06	Interviewed possible death team members		1.5	
4 8-31-06	Interviewed possible death team members		1.5	
5 9-5-06	Reviewed Order of Sequestration		1.2	
6 9-7-06	Visit Freddie at Perry C.F.		3.0	
7 9-6-06	Prepared Order of Transport of Freddie to	}		
8	MD; judge signed; clerked; gave to DOC		1.0	
9 9-7-06	Reviewed State's motion of notion of	}		
10	defendant to advise competency and		1.0	
11	defendant's intention to present expert			
12	testimony; Research of motion			
13 9-7-06	Reviewed State's motion to prohibit	}		
14	defendant from stating out juror		3.5	
15	during voir dire Research of motion			
16 9-7-06	Scanned into computer defendant's jail	}		
17	arrest records and prior testimony of		2.25	
18	neuropsychic and social workers Emailed			
19	to Dr. Watts and Dr. Browley			
20 9-11-06	Prepared Order of Transport of Freddie to			
21	MD; judge signed; clerked; gave to DOC		1.0	
22 9-13-06	Tried to find a jury consultant		1.5	
23 9-15-06	Prepared two letters of introduction for			
24	Paige Tarr and Carolyn Cochran - team members		.75	
25 9-18-06	Reviewed juror Riquan's transport - prepared papers		6.5	
I hereby certify to the Court that the information set forth on this time sheet accurately reflects the time and activities performed by me for the above named client.			TOTAL FOR THIS PAGE:	27.2
Signature:  Date: 12-1-06			TOTAL FOR ALL PAGES:	105.25

The State,

vs.

Freddie Eugene Owens

CASE NUMBER(S): 1998-65-23-5220

OFFICE OF INDIGENT DEFENSE

ATTORNEY'S TIME SHEET

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DATE	ACTIVITY (Please make explanation detailed enough to determine what service was performed.)	Long Distance Telephone Calls (Number of calls)	Out-Of-Court TIME	In-Court TIME	
1 9-20-06	DI Watts needs more time - wants continuance	}	.75		
2	Discussion of why and how much time				
3 9-22-06	Further discussion with team members	}	2.5		
4	about need for continuance and what				
5	continuance can do for us				
6 9-27-06	Prepared, filed and served motion of	}	1.5		
7	continuance				
8 9-27-06	Considered filing defense motions, Rescinded	}	10.0		
9	laws, reviewed old transcripts				
10 9-27-06	Prepared order of transport for Freddie to	}	1.0		
11	see MD, checked, filed, faxed to DDC				
12 9-28-06	Hearing on joint exceptions and motions			2.0	
13 9-29-06	Ex Parte meeting with judge about problems				
14	with continued state interest to hearing		1.5		
15 9-29-06	Trial prep, meeting with judge about				
16	continuance and discussions with team		5.0		
17 9-27-06	Prepared Funding Order		4.5		
18 10-2-06	Reviewed all prison, school, and psychiatric	}	11.5		
19	Reviews of Freddie				
20 10-2-06	Visit with Freddie at Perry		3.0		
21 10-2-06	Judge continued jury panel until 11-6-06		1.5		
22 10-2-06	Reviewed State's proposed pre-trial changes		1.5		
23 10-4-06	Discussions with team		1.5		
24 10-10-06	Prepared order of transport, checked, faxed to DDC		1.0		
25 10-11-06	Discussion with team members		1.0		
I hereby certify to the Court that the information set forth on this time sheet accurately reflects the time and activities performed by me for the above named client.			TOTAL FOR THIS PAGE:	44.75	2.0
Signature: <u>[Signature]</u> Date: <u>12-1-06</u>			TOTAL FOR ALL PAGES:	150.00	2.0

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CASE NUMBER(S): 1948-GS-23-5220

ATTORNEY'S TIME SHEET

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D

The State,

VS

Freddie Eugene OwensCASE NUMBER(S): 1998-65-23-5220OFFICE OF INDIGENT DEFENSE
ATTORNEY'S TIME SHEET

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DATE	ACTIVITY (Please make explanation detailed enough to determine what service was performed)	Long Distance Telephone Calls (each one)	Out-Of-Court TIME	In-Court TIME	
1 11-1-06	Re-read all of Freddie's medical, psychiatric,	}	13.6		
2	school, prison disciplinary- and incident reports				
3	Tried to find any other prison records				
4	could not in penalty phase. Tried to find				
5	ways of blunting State's case. Is				
6	blame thing, in penalty phase unhelpful	}	7.5		
7 11-2-06	Worked on direct questions for Dr. Bradley,				
8	Dr. Watts, Dr. Cobb, and Ms. May, trying				
9	to get all witnesses working to common goal				
10	of impulse control - controlled now with				
11	medication	}	6.2		
12 11-3-06	worked on opening statement, talked with				
13	Ken about unified theory in penalty phase;				
14 11-4-06	Made sure everything (all files) ready for trial	}	1.0		
15 11-6-06	met with Ken to discuss jury qualifications questions				
16 11-6-06	Hearing about defendant's clothes & security				
17	final jury qualification; individual voir dire	}	1.5	7.05	
18 11-6-06	Recess time (not lunch)				
19 11-6-06	Review of day and preparation for tomorrow				
20 11-7-06	Individual voir dire	}	1.35	6.95	
21 11-7-06	Recess (not lunch)				
22 11-7-06	Review of day, trial prep, get ready for tomorrow				
23 11-8-06	Individual voir dire	}	1.5	7.5	
24 11-8-06	Recess (not lunch)				
25 11-8-06	Review of day & trial prep				
TOTAL FOR THIS PAGE:			36.65	21.5	
TOTAL FOR ALL PAGES:			258.35	23.5	

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I hereby certify to the Court that the information set forth on this time sheet accurately reflects the time and activities performed by me for the above named client.

Signature: [Signature]Date: 12-1-06

The State:

Franklin Eugene Owens

CASE NUMBER(S): *1999-63-23-5226*

OFFICE OF INDIGENT DEFENSE ATTORNEY'S TIME SHEET

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DATE	ACTIVITY (Please make explanation detailed enough to determine what service was performed.)	Long Distance Telephone Calls (Each 5 min)	Out-Of-Court TIME	In-Court TIME
1 11-9-06	Meeting w/ Ken about jury strike and	}	3.7	
2	general trial prep			
3 11-9-06	Trial			5.6
4 11-9-06	Recess (not lunch)		.5	
5 11-9-06	Made sure all witnesses for defense were	}		
6	notified to be in court. Review of		3.2	
7	penalty hearing and trial prep			
8 11-10-06	Trial prep		1.0	
9 11-10-06	Trial			7.4
10 11-10-06	~~Deposition~~ Trial			2.35
11 11-11-06	Jury Deliberation & Recess (not lunch)		2.85	
12 11-17-06	Prepare letters, filing, mailing of			
13	Notice of Appeal		3.0	
14				
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22				
23				
24				
25				

I hereby certify to the Court that the information set forth on this time sheet accurately reflects the time and activities performed by me for the above named client.

Signature: *Scott E. [unclear]*

Date: *12-1-06*

TOTAL FOR THIS PAGE:

14.25 15.35

TOTAL FOR ALL PAGES:

259.35 38.85

CONFIDENTIAL -- ATTORNEY WORK PRODUCT
FREDDIE EUGENE "Luke" MASSEY OWENS, JR.

DOB:

SS#:

PART I. - FAMILY MEMBERS

PARENTS:

Mother: Dora Diane Mason
DOB:
Address: Greenville, SC
Phone:
Work: - She is supervisor at a
Janitorial Service at the Heyward Mall
Father: Freddie Eugene Massey - (referred to as F.E.
Massey is this document)
DOB:
SS#: }
Address: Greenville, SC
no phone
Step-Father: Alex Bernard Mason - (referred to in this document
as Bernard)
DOB:
SS#:
SCDC#:
Address: Kirkland Correctional Inst.
Maxout date is 7/23/99

SIBLINGS:

- 1) Marie Antonette Owens
DOB:
Address:
- 2) Freddie Owens
- 3) Donald Andrew Owens "Andy"
DOB:
SS#:
Address: presently living with girlfriend
- 4) Lorenzo Abdul Owens
DOB:
Address:
- 5) Satail Latorva Owens
DOB:
Address:

GRANDPARENTS:

Grandmother:
Mary Lee Mingo
DOB:
DOD: - heart attack
Grandfather:
DOB:
DOD: 1993 or 1994

PART II. SUMMARIES OF FAMILY MEMBERS - from records & interviews

DORA DIANE MASON - FREDDIE'S MOTHER - age 38; Presently living at :. She is a supervisor at the Janitorial Service at Heyward Mall. She was the oldest of six children in her own family. She went on to have five children of her own in six years - having her first child at age 16. F.E. Massey is the father of all five of her children - he was 19 when their first child was born. Dora continued to live at home with her mother, Mary Mingo, after the births of each of her children. F.E. Massey was extremely violent - and came from a violent family - he refused to pay her child support; she received AFDC. Harsh beatings from Freddie Eugene were frequent and common place.

Dora began a relationship with Alex Bernard Mason when Freddie was approximately five years old. Bernard had been dating Dora's sister. At some point - Freddie was around 4 yrs old - DSS took all five children into custody after they were left in the care of Dora's mentally handicapped brother. There was no electricity in the house at the time. Bernard rallied to Dora's rescue and they began a relationship from that point forward. They rented a small two bedroom house together and worked with DSS - it took approximately one year for DSS to return all five children. Bernard was also extremely violent and abusive. (Dora reports that F.E. Massey was more abusive than Bernard) Dora was treated at the Emergency Room on more than one occasion after being beat (I did not ask her which man sent her to the ER). Police being called to the house was common in Dora's relationships with both F.E. Massey and Bernard Mason. She reports that getting up in the morning and going to a job has always provided a welcomed break from the chaos and confusion of her homelife.

FREDDIE EUGENE MASSEY - (F.E. MASSEY) - FREDDIE'S BIOLOGICAL FATHER - age 39; Presently living in G'ville with wife and young children. Unsure if he is working. He was 19 yr. when he and Dora had their first of five children together. They never married - he never supported Dora's five children. He comes from an extremely violent family - according to Dora, five relatives from this family are in prison for murder at this time. F.E. Massey has been incarcerated at SCDC four different times - the last sentence was the longest - a 5 yr. sentence for distribution of crack. He served approximately 3+ years for this sentence. His arrest record begins at age 17. A Beta IQ test in his SCDC file indicates an IQ score of 90. SCDC records indicate he obtained a 10th grade education.

ALEX BERNARD MASON - (BERNARD) - FREDDIE'S STEP-FATHER - age 36; Currently incarcerated at Kirkland Correctional Inst. for Domestic Violence 3rd and Parole Violation - after numerous arrests for assaulting Dora Mason - some more of these arrests had the charges dropped - apparently only three stuck. He is serving a 3 year sentence - although SCDC records indicate he is serving 3 yrs for ABWIK. His adult arrest record begins at age 17 in Greenwood, SC. with an arrest for Disorderly Conduct and then an arrest for A&B within the next month. His arrest record

is extensive - many arrests for Assault and Battery - one rape but it was nolle prossed. He is serving his third sentence in the Dept. of Corrections (two different 8 yr. sentences and this most recent is for 3 years) with countless incarcerations in the Greenville Detention Center.

1984 - 8 yrs for A&B -- released in 1989

1990 - 8 yrs for Possession of Crack -- released 1994

1997 - 3 yrs. for Domestic Violence 3rd & Parole Violation - will be released in July.

Freddie clearly can not stand Bernard - although Bernard does not act like he knows this; Bernard was extremely abusive towards Freddie's mother - also abusive towards the children but not to the extent he beat Dora. Bernard was a fairly good worker (when he was not in the detention center or prison) - he was able to find a job and keep it. Although he admits that he and Dora often fought over \$\$\$ - he would give her his pay check to pay bills and then he would want portions of it back to go buy drugs and then more drugs - she would say "no" or she would have already spent it and then he would get angry and beat her up - he says this story repeated itself over and over.

By his own admission, Bernard became hooked on Crack Cocaine years ago - the time frame on this is in dispute. He claims he did not become hooked until 1993 - although he was first arrested for Crack and was sent to prison for this arrest in 1990. He reports to have 4 brothers and one sister - all hooked on Crack Cocaine today.

Also by his own admission he is extremely violent - Bernard calmly told me "I am a very violent individual myself". He does not like it when someone "crosses" him. He claims that he was the only father that Freddie and his siblings ever really knew -- Freddie Massey, Sr., was worthless and never around. Bernard knows Freddie Massey - he describes him as very violent - from a very violent family and now also hooked on Crack Cocaine.

Bernard will "max out" his prison sentence on 7/23/99. Dora spoke with him by phone recently, he refused to tell her when he will get out - according to my conversation with Dora last week. She appears fearful about his release.

I met with Bernard on 1/12/99; he continually blames Dora for everything that has ever gone wrong in his life and in her children's life. He is extremely angry that she has a new boyfriend - who apparently lives across the street from her on Hall Street. The Owens kids will not have anything to do with Bernard - he blames this totally on Dora & her boyfriend - he feels they have influenced the children. He also blames Freddie's arrest for this murder on Dora - had she allowed Freddie to hang with him after Freddie was released from Turbeville Correctional Inst. in July 1997 - "this entire crime would never have occurred". He claims to love Dora and he would like to return to her house to live - but the boyfriend is blocking this from happening. He told me that he is thinking about moving to Newberry with a guy he met in prison - if he does not get back with Dora. He takes full credit for Dora having a

good job today - he explains that he made the decision that it was time she got a job when she first went to work years ago. He takes credit for her ever getting the kids back from DSS years ago.

Bernard claims to be the one who "had to teach Freddie to fight and stand up for himself". Freddie was continually picked on in the neighborhood when he attended Greenville Middle School - a gang of five would chase Freddie and his brother, Andrew, home after they got off the bus - Bernard instructed Dora to lock the boys out of the house in order "to make them have to learn to fight". She did so and hence Freddie learned to fight. (Freddie relays a similar story). However, he soon began hanging around some pretty tough kids from the project after that and things began to go down hill from there according to Bernard. Bernard seems to think that all fathers would have done the same for their kids - it had to be done for Freddie's own good.

Bernard used to date Dora's sister, Kathy. He thinks she is an alcoholic who becomes violent when she drinks. Bernard thinks Dora's family is extremely violent also.

MARY LEE MINGO - MATERNAL GRANDMOTHER - died age 56; Raised six of her own children and then at one time had at least 8 of her grandchildren living with her in her home (Dora's five children plus Kathy's three children) in addition to her own son, Robert, who is mentally disabled. From all descriptions she was a true matriarch in this family - when she spoke - they all listened. She apparently was also the neighborhood bootlegger. She was first arrested in 1985 for shooting Jerome Smith in the leg. These charges were later dismissed after the victim signed an affidavit stating he did not want to prosecute. Mary was arrested three years later for shooting her son-in-law after he stabbed his wife/her daughter the night before. She was tried and convicted of ABH and sentenced to 6 years in prison (at age 49) - she served 14 months at the Women's Correctional Institution in Columbia. She was arrested a couple years after her release for purchasing a handgun - charged with Felon in possession of a handgun.

According to Bernard, Mary hooked up with abusive men during her younger years - then she became hardened. She loved her children and grand children - she protected each and all of them. During my interview with Bernard, this was the only person whom he spoke kindly of - he thought Mary was a wonderful person who care deeply for her family and he felt she cared for him even if he had differences with Dora.

Both Andy's and Lorenzo's DJJ records mention that they each named the death of this grandmother as a "major loss" which greatly affected each of them. Lorenzo stated that since her death, he felt the whole family has "split apart". Her death greatly impacted this family.

KATHY OWENS WALKER - MATERNAL AUNT - age ??; She works for Dora today at the janitorial company. She has three children similar in ages to Dora.

She stabbed Dora's son Lorenzo in the abdomen during a fight

with Marie on New Year's eve day in 1995, she was arrested and then incarcerated (where??) for a period of time -- Dora kept Kathy's three children while Kathy was incarcerated. Lorenzo has a huge scar on his rib cage from this incident.

DONALD ANDREW OWENS "ANDY" - BROTHER age 19; Described as a "Mama's Boy" by Bernard Mason. His first arrest at 14 for shoplifting which was handled in family court. Second arrest at age 16 on New Years Eve/1995. Entire family had been drinking/intoxicated. Although each DJJ file contains a different version of what really happened New Years Eve - it appears that Dora and Bernard began fighting and then Dora called the police to have him arrested. Upon their arrival, they arrested Dora for some outstanding warrants for fraudulent checks. Andy & Lorenzo arrived home, (intoxicated) and began arguing with the police. A scuffle broke out; Andy and Lorenzo were arrested and charged with Resisting Arrest & Interfering with a Police Officer. Andy was eventually sent to R&E at DJJ for this offense -- where he adjusted well. Full Scale IQ is 72; Performance 72 - Verbal 74. He failed the 4th and 6th grades; high absenteeism. Andy dropped out of school at age 17 - reading on 3rd grade level. He reported to DJJ that he always carried weapons in neighborhood at age 17 (Colt .32 and box cutter). Andy began drinking at age 16. He was recently incarcerated on a rape charge and violation of probation charge. Records also indicate that he spent time at Perry Correctional Institution - but I do not have these records. Presently living in Berea with 30+ year old girlfriend.

LORENZO ABDUL OWENS - BROTHER - age 18; has been in LD classes since the 3rd or 4th grade; Had seizures as a child. Has numerous broken bones as a child. Was knocked unconscious at age 12 or 13. Receives SSI check. Everyone in the family thinks that Lorenzo acts "crazy".

Was arrested on New Years Eve/1995 with various family members in what started as an argument between Bernard and Dora. By the end of the evening, Dora, Andy, and Lorenzo were all arrested (not Bernard!!).

Lorenzo has repeated the sixth and ninth grades. Other records indicate that he failed Kindergarten and first grades. He was expelled from J.L. Mann High School in October 1997 after being charged with Simple Assault - he beat a kid up at the bus stop on 9/30/97. WISC-III was administered in 1993. His Full Scale IQ is 62. Verbal- 59 and Performance 70. According to a Forensic Evaluation in DJJ records, his IQ scores dropped almost 20 points in a three year period.

SATAIL - SISTER - age 17; Was first committed to R&E of DJJ on 5/28/98 for the same incident at the bus stop that her brother, Lorenzo, was arrested for on 9/30/97. WISC-III was administered in 1991 = Full Scale IQ of 72 - Verbal - 73 and Performance 74. She is currently enrolled in the 10th grade at JL Mann High School although she keeps threatening to quit school - (she turned 17 on Jan. 2). According to DJJ records, she has a history of school problems, truancy and inappropriate behavior in

school. School records indicate she is classified as an Educable Mentally Disabled Student.

MARIE ANTONETTE OWENS - SISTER age 22; presently living at home and working at Taco Bell. She has no arrest record. According to family members, she was expelled from school (for fighting??) but never tried to return. She uses her income to help her mother support the family. Freddie claims she is a "do-gooder".

PART III. FAMILY CHRONOLOGY

1938

. Mary Lee Mingo (maternal grandmother) was born this date. She quit school in the 8th grade. She went on to have 6 children. - Dora was her oldest child. [SCDC records]

1959

. Freddie Eugene Massey - (F.E. Massey) (biological father) was born this date in Greenville County. [SCDC records]

1960

. Dora Diane Owens (mother) was born this date to Mary Lee Mingo and _____ in Greenville County. (need father's name)

1963

. Alex Bernard Mason (step-father) was born this date in Greenville County. [Interview w/ Bernard Mason]

1976

Marie Antonette Owens (sister) was the first of five children born to Dora Diane Owens (age 16) and Freddie Massey (age 19). Marie was born at Greenville General Hospital. Dora continued to live at home with her mother, Mary Mingo, after the births of each of her five children. [Interview with Dora Mason]

1977

. F.E. Massey (father) was arrested for larceny from auto tampering - Court Disposition = convicted - 30 days; suspended \$200 fine. [Sled rap sheet]

1978

Freddie was born this date in Greenville General Hospital. he was the second child born to Dora Owens and Freddie Massey. Nicknamed "Luke". Still waiting on birth records.

1979

Donald Andrew "Andy" Owens was the third child born to Dora Owens and Freddie Massey. Donald was born at Greenville General Hospital - still waiting on records.

3-18. 1st birthday

1980

3-18. 2nd birthday

4-22. Bernard Mason (age 17) was arrested for Shoplifting by Greenwood County Sheriff Dept. Convicted; 30 days or \$200 fine. This was his first arrest (age 17). [SCDC records]

8-12. Bernard Mason was arrested for Disorderly Conduct in Greenwood; was convicted & sentenced to 30 days in jail. [FBI Rap sheet]

1981

Lorenzo Abdul Owens was the fourth child born to Dora Owens and Freddie Massey. Lorenzo was born at Greenville General Hospital - still waiting on birth records.

3-18. 3rd birthday

1982

Satail Latorya Owens was the fifth child born to Dora Owens and F.E. Massey in six years. Satail was also born at Greenville General Hospital - still waiting on birth records.

1-6. Bernard Mason was arrested in Greenville for GL-auto and ABWIK.

2-15. The ABWIK charges against Bernard Mason were dismissed. [SCDC records]

3-18. 4th birthday

1983

1-1. Mary Lee Mingo (maternal grandmother) worked as a janitor at Greenville High School - she was employed there for three years. [SCDC records]

2-16. Bernard Mason was arrested & charged with ABWIK for cutting Michael Lee Clark in the face with a knife at a local club. Clark received 32 stitches in his face. [FBI Rap Sheet/G'ville County Court records]

3-18. 5th birthday

***Bernard Mason relates the following story which occurred around this time. Dora and her children were living with her mother, Mary Mingo. Also living in the house was her sister Kathy, and her own three children. Also living there was Dora's mentally handicapped brother, Robert, who collects an SSI check. Dora left her children with Kathy to watch ---- evidently Kathy went out and left Robert in charge of the five children (not sure if Kathy's three were also there at the time). Someone called DSS and they took all the children into protective custody. Dora

asked Bernard for help ---- Bernard had been dating Kathy - but he and Dora began dating during this crisis. They got a house together and then worked with DSS to get the children back home - it took approximately one year for DSS to return her custody of all five children.

***Dora told the same story basically about the children having to go into foster care - she adds that there was also no electricity in the house at the time the children were removed.

***Freddie has no recollection of being in foster care - but he has been told this story by his family over the years.

6-8. Bernard Mason pled guilty to Aggravated Assault; he was sentenced to 3 yrs. in SCDC suspended; and placed on 3 yrs. probation and he was to make restitution. [G'ville County Court records]

7-25. Bernard Mason was arrested for A&B. Convicted and sentenced to 30 days suspended. Inmate's statement is that two guys broke a window out of his house - he got mad and went and beat them up. [FBI Rap sheet/SCDC records]

7-27. Bernard Mason arrived at Perry Correctional Institution - R&E Center for Assault & Battery for 60 days - record is unclear since it indicates he received a 30 day suspended sentence earlier. [FBI Rap Sheet]

Kindergarten - San Soci Elem. [interview w/Freddie]

1984

2-3. F.E. Massey was committed to SCDC - Perry Correctional Institute. He had been charged with Disorderly Conduct and several counts of trespassing and then failed to appear in court. [Sled rap sheet]

3-18. 6th birthday

4-20. Bernard Mason was arrested for ABHAN. [FBI rap sheet]

6-13. Bernard Mason (address 201A Mayfield Street, G'ville) was arrested and charged with Criminal Sexual Conduct 1st for the rape of Valeria Pacheta Mackey - he was charged along with two other individuals. [G'ville County Court records]

First Grade - San Soci Elem. [Interview w/Freddie]

9-28. F.E. Massey was arrested & charged with damage to private property - Convicted; forfeited \$200 bail. [Sled rap sheet]

10-11. Bernard Mason was indicted for Criminal Sexual Conduct for the rape of 26 yr. old Valeria Pancheta Mackey. [G'ville County Court records]

11-14. Bernard Mason was tried and found guilty of ABHAN &

Aggravated Assault; he was sentenced to 8 years in the Dept. of Corrections. [G'ville County Court records]

**Dora Mason was listed as Bernard's common law wife on SCDC forms.

11-20. Bernard Mason was tested at SCDC - his scores were as follows: Revised Beta IQ 99; Gates Reading = 2.9; WRAT Spelling 2.4; WRAT Math = 3.3. [SCDC records]

1985

1-23. The Criminal Sexual Conduct charges against Bernard Mason were dismissed for "lack of evidence". [G'ville County Court records]

3-18. 7th birthday

4-29. Mary Lee Mingo was arrested and charged with ABWIK. Jerome Smith was shot in the left leg by Mary Lee Mingo as he was sitting on the porch at 313-A Green Ave. He was then transported to the ER for treatment. [Arrest records]

5-8. Bernard Mason was re-sentenced on the ABHAN charge after the Supreme Court remanded his case for reconsideration of sentence - he was sentenced to 6 yrs. in the SC Dept. of Corrections. [G'ville County Court records]

Second Grade - San Soci Elem. [Interview w/Freddie]

12-3. The arrest warrant against Mary Mingo for ABWIK was dismissed after the victim signed an affidavit that he would not prosecute. [G'ville County Court records]

1986

3-18. 8th birthday

Third Grade - San Soci Elem. [Interview w/Freddie]

4-22. Bernard Mason was denied Work Release this date due an Unfavorable Psychological and a History of Assaultive Behavior. [SCDC records]

9-24. Bernard Mason was denied Parole from SCDC this date - to be reviewed again in one year. [SCDC records]

1987

3-18. 9th birthday

Fourth Grade - San Soci Elem. [Interview w/Freddie]

1988

1-2. F.E. Massey was arrested and charged with Failure to Comply; Driving Under the Influence; Driving w/out and Driver's

License; A&B; and other charges. [Rap Sheet]

1-5. F.E. Massey was sent to R&E at Perry Correctional. [SCDC records]

1-10. Mary Lee Mingo (maternal grandmother - age 49yr) was arrested and charged with ABWIK by Greenville City police. She was under the influence at the time of her arrest. She was charged with shooting her son-in-law. She states he came after her with a knife, she shot in the ground with a .22 pistol, he was hit in the stomach. Her son-in-law had stabbed her daughter the night before. All this happened in the street in front of their house. [Statement in SCDC file]

2-23. Bernard Mason was denied Work Release at SCDC due to "Unfavorable results of Psychological". [SCDC records]

3-18. 10th birthday

March ? Mary Mingo was released from Greenville County Jail on \$20,000 bond.

8-8. Mary Lee Mingo (maternal GM) was tried and convicted of ABHAN in Greenville County before Judge William Traxler and sentenced to 6 yrs in prison. SCDC records indicate that she had one prior conviction for DUI. She denied any prior mental health treatment. [SCDC records/Greenville Court records]

***Freddie was living with his grandmother at the time of her arrest and conviction -
Dora's address at this time was Greenville, SC

Fifth Grade - Pelham Rd. Elem. [Interview w/Freddie]

10-2. F.E. Massey was arrested and charged with: Driving w/out a license; Driving under the influence; A&B.

10-5. F.E. Massey was committed to SCDC - Perry Correctional Institute for 30 days??? - can not tell from records how long of a sentence.

10-26. F.E. Massey was arrested for A&B - 5 counts. [SCDC records]

10-27. Mary Lee Mingo applied for Work-Release at SCDC. [SCDC records]

11-1. F.E. Massey was committed to SCDC - Perry R&E Center. [SCDC records]

12-12. Mary Lee Mingo's application for Work Release was denied due to "negative responses from the community". [SCDC records]

1989

3-18. 11th birthday

6-3. F.E. Massey was arrested & charged w/ A&B.

7-3. Mary Lee Mingo was approved for Community Work Release.
[SCDC records]

6-10. Bernard Mason maxed out his sentence at SCDC this date and was released - he returned to Greenville. [SCDC records]

7-28. Bernard Mason was arrested & charged with Possession with Intent to Distribute Crack Cocaine; Failure to Comply; Disorderly Conduct. His address was 36-A Woodland Homes in G'ville. Bail was set at \$5,000. [Arrest records]

8-13. Deputy Warden Doris Howell called Dora Mason on this date to assess the "family situation" before SCDC released Mary Lee Mingo on Community Work Release. Ms. Mason reported that the victim (Mary's son-in-law) was sentenced to one year in Perry Correctional Institute for Parole Violation. Furthermore, the victim had not taken a warrant out on Ms. Mingo and she still converses with him and her daughter was still in a common law marriage with the victim. Ms. Howell did try and confirm the victim's incarceration at Perry CI, however, no one in the family knew the victim's real name - they only knew him by his nickname.

Sixth Grade - Greenville Middle School [Interview w/Freddie]
Freddie reports he failed the 6th grade

9-9. Dora Mason officially married Bernard Mason this date - the had been living as common law husband & wife prior to this time.
[Interview with Dora Mason]

10-4. Mary Lee Mingo (maternal grandmother) was paroled from the Dept. of Corrections. She returned to her home in Greenville.
[SCDC records]

1990

1-10. F.E. Massey was arrested & charged w/ failure to appear - for A&B??? - records are unclear. [Sled rap sheet]

1-12. F.E. Massey was committed to SCDC - Perry R&E Center for 30 days. [Sled rap sheet]

2-15. F.E. Massey was arrested this date and charged with Possession with Intent to Distribute Crack/Cocaine and Resisting

arrest. [Arrest records]

3-1. F.E. Massey was arrested and charged with Unlawful Possession of a Pistol. A police officer approached Massey to follow up on a narcotics investigation - he then saw the handle of the guns sticking out of Massey's jacket. [Arrest records]

3-3. Bernard Mason was charged with Criminal Domestic Violence - for beating up Dora. [Rap Sheet]

3-18. 12th birthday

4-12. Bernard Mason pled guilty in G'ville County Court to Possession w/Intent to Distribute Crack Cocaine & Distribution of a Controlled Substance within Proximity of a School. He was sentenced to 8 yrs in prison. He arrived this date at R&E Center at Perry Correctional Institution. Dora Mason was listed as his wife on the SCDC forms. [Arrest records]

5-8. Bernard Mason was tested at SCDC - BETA IQ was 78 (Moderately Low intelligence level) - WRAT Reading = 2.6 grade level; WRAT Math = 3.6 grade level. [SCDC records]

Seventh Grade - G'ville Middle School [Interview w/Freddie]
Freddie reports he failed the seventh grade

9-1. Mary Lee Mingo purchased a handgun this date at Luthi's - located at 23 Butler Street in Greenville. [G'ville County Court records]

10-18. F.E. Massey pled guilty to Possession with Intent to Distribute Crack. He was sentenced to 5 yrs. in prison provided upon service of 5 yrs plus 5 yrs. probation. [G'ville County Court records]

10-31. Mary Lee Mingo was arrested and charged with Unlawful Possession of a Handgun/Felon in Possession of a Pistol. Her bail was set at \$1,000. [G'ville County Court records]

1991

3-18. 13th birthday

4-23. Mary Lee Mingo was indicted for Making a False Statement when Purchasing a Handgun and Felon in Possession of a Pistol - from arrest on 10/31/90. [G'ville County Court records]

11-5. Mary Lee Mingo pled guilty this date in G'ville County Court and was sentenced to one year in SCDC for Unlawful Possession of a Handgun. Sentencing Judge was Frank Epps. [G'ville County Court records]

SCDC HAS NO RECORDS INDICATING SHE WAS EVER SENT TO THE WOMEN'S PRISON - DID SHE SERVE THIS TIME AT COUNTY JAIL?????

1992

3-18. 14th birthday

7-16. Bernard Mason received a reduction in custody level due to "poor adjustment to the institution". He had seven disciplinary reports in two months. [SCDC records]

1993

3-18. 15th birthday

Dora and the children were living at 36-A Woodland Homes at this time - according to various records.

2-23. F.E. Massey "maxed out" his five year prison sentence??
[SCDC records]

1994

1-7. Andy (brother - age 14) was arrested for Shoplifting.
[DJJ records]

1-11. Bernard Mason maxed out his sentence at SCDC - he was released and returned home to live in Greenville. [SCDC records]

1-26. Freddie (age 15) was arrested; charged with Unlawful Possession of a pistol & ABWIK. [G'ville Fam. Ct. records]

3-3. Andy (brother) appeared in Family Court on Shoplifting charge. [DJJ records]

3-18. 16th birthday

5-9. Petition filed in family court on Freddie for January arrest charges.

8-13. Freddie (age 16) was arrested & charged with Burglary 2nd.
[Family court]

8-26. School year began.

8-29. Freddie enrolled in Eastside High School.

10-4. Freddie withdrew from Eastside High School.

11-26. Mary Lee Mingo (maternal grandmother) died of heart attack.

11-26. Bernard Mason was involved in an altercation with Richard Carson. Mason cut Carson with a knife on his face and neck; Carson underwent surgery and was hospitalized. [G'ville County Court records]

11-28. An Arrest Warrant was issued for Bernard Mason's arrest;

he was charged with ABWIK. [G'ville County Court records]

12-10. Freddie (age 16) was involved in a Burglary this date [Family court records]

12-13. Freddie (age 16) and his brother Andy were arrested & charged with Burglary 2nd (2 counts); they was held in the Juvenile Detention Center in Greenville County. [Family court records]

12-20. A Detention Hearing was held - it was recommended that Freddie continue to be held for pending charges. [Family court records]

12-22. Freddie (age 16) was committed to R&E Center. His parents address was G'ville, SC [Family court records]

1995

1-6. Freddie (age 16) had an HIV test; negative. [DJJ records]

1-19. While at R&E, Freddie Owens had a physical examination. He reported that his mother was 34 yrs. old & his father was 36 yr. old. He reported his first sexual contact was at age 12 yrs and he had previously had Gonorrhea. He reported last smoking marijuana seven months ago. [DJJ med. records]

1-25. Freddie Owens was released from R&E Center - with a recommendation for commitment to DJJ. [DJJ records]

2-25. F.E. Massey was arrested and charged with ABHAN - he hit Brenda Viola Hill in the head with a beer bottle - she was transported to the hospital and received stitches in her head. [Arrest records]

3-18. 17th birthday

3-23. Freddie (age 17) was committed to DJJ "for an indeterminate period not to exceed his 21st birthday" for the charges of Contempt of Court & Burglary 2nd (2 cts), Unlawful possession of a pistol & ABWIK. Parents address was G'ville, SC [Family court records]

3-29. Freddie arrived at Birchwood at DJJ. [DJJ records]

5-8. Bernard Mason was convicted of Criminal Domestic Violence and sentenced to 30 days in jail. [G'ville County Court records]

August ??

Andy appeared in G'ville Family Court. He was adjudicated and sentenced to probation and community service for the Burglary which took place on 12/13/94. [DJJ records]

8-16. A Bench Warrant was issued for F.E. Massey after he failed to appear in court on the ABHAN charges. His address at the time was 107 Lincoln St. [G'ville County Court records]

10-31. Bernard Mason was indicted on the charge of ABWIK (for the assault of Richard Carson). [G'ville County Court records]

12-31. Earlier in the day - Lorenzo intervened in fight between his aunt, Kathy Walker, and his sister. He was stabbed in the side by the aunt - who was arrested. Lorenzo was transported to the hospital and received 25 stitches in his side. Dora was not home when this fight broke out because she was in Columbia visiting Freddie at DJJ.

Evening Hours - Dora, Bernard, and all the children were at a party drinking/intoxicated. Dora and Bernard returned home first and began arguing and fighting. Dora called the police to have Bernard arrested. The police arrived and realized that Dora had several outstanding warrants for fraudulent checks. They arrested her. Andy - (age 16) and Lorenzo - (age 14) - returned home to find their mother being arrested. They each drunk and tried to intervene, a scuffle broke out and they were each arrested and charged with Resisting Arrest, Interfering with a Police Officer and Assault. During this scuffle, Lorenzo tore some stitches that he had received earlier in the day from the incident with his aunt. (These charges against Lorenzo were eventually dropped in October 1977).

***By the end of this day, Dora, her sister (Kathy Walker), and her two sons were all sitting in jail from two separate incidents!!!

1996

2-5. While at DJJ (John G. Richards), Freddie had x-rays made of his right hand - all were negative. [DJJ med. records]

2-22. F.E. Massey pled guilty in G'ville County Court to ABHAN and was sentenced to 6 months in jail. [G'ville County Court records]

3-18. 18th birthday

4-8. Bernard Mason was given 10 yrs. probation for the charge of ABWIK - under the condition that he pay \$4,550. in restitution through the clerk of courts office. [G'ville County Court records]

4-15. Andy was committed to R&E at DJJ for the arrest on New Years Eve. [DJJ records]

5-5. Bernard Mason was arrested and charged with Criminal Domestic Violence 3rd; - the officer was called to the residence - Dora Mason reported that Bernard hit her in the mouth with a closed fist during an argument. [G'ville County Court records]

5-6. Bernard was released from jail on \$2,500 bond. His address was . . . , G'ville, SC. [G'ville County Court records]

6-28. Bernard Mason was arrested and charged with Criminal Domestic Violence 3rd; - the officer was called to Street; Bernard Mason and Dora Mason were arguing - the officer calmed them both down & then drove away - he was flagged down by Dora Mason who told him that Bernard had again threatened her and she was afraid for her safety. Bond was set at \$2,500. [G'ville County Court records]

7-1. Bernard Mason posted bail and was released from jail. [G'ville County Court records]

7-23. Bernard Mason was convicted of Public Disorderly Conduct and sentenced to 30 days; suspended to \$200. [G'ville County Court records]

8-28. Bernard Mason was convicted of Failure to Appear in Court and Failure to Comply with Court Order. [G'ville County Court records]

8-29. While at DJJ, Freddie had x-rays made of his left hip & pelvis - both were normal. [DJJ med. records]

9-19. As of this date, Bernard Mason was \$150 in arrears in paying restitution payments. An Affidavit was signed by Mason's Probation and Parole Officer listing the violations to the conditions of his Parole.

10-17. While at DJJ, Freddie had x-rays made of his left ankle - which he twisted while running. Negative x-ray for fracture although it noted the following "Accessory ossicle formation is demonstrated involving the mid anterior aspect of the left navicular, which finding is presumed to be chronic in nature". [DJJ med. records]

10-25. Freddie returned for additional x-rays of his left ankle due to an "unusual soft tissue area of swelling". These x-rays also noted no fracture. [DJJ med. records]

11-20. Freddie had x-rays of his right hand - after complaining that it hurt only in cold weather. X-rays were normal. [DJJ med. records]

11-27. While at DJJ (John G. Richards), Freddie had x-rays of his left ankle after twisting it - ankle was swollen. [DJJ med. records]

1997

1-6. Referral made for Freddie to be transferred to SCDC by 19th.

birthday. [DJJ records]

1-15. While at DJJ (John G. Richards), Freddie had x-rays of spine - titled Scoliotic Survey. Conclusion: Mild Scoliosis is noted involving the lumbar spine. This is noted in the erect position. [DJJ med. records]

1-28. Lorenzo received a Forensic Evaluation for Competency by the Dept. of Disabilities and Special Needs which was ordered by Greenville County Family Court to determine whether he was competent to stand trial on the charges of Resisting Arrest and Interfering with a Police Officer (arrest in December 1995). He was found competent. [DJJ file]

2-7. Freddie had x-rays of his left foot & ankle after twisting his foot the night before - x-rays were normal. [DJJ records]

3-17. Order of Transfer was signed this date - allowing Freddie to be transferred to SCDC. [DJJ/SCDC records]

3-18. 19th birthday

3-21. **FREDDIE WAS TRANSFERRED FROM DJJ TO R&E CENTER AT SCDC THIS DATE.** Charges on new RAP Sheet were: 1) Burglary 2nd degree - 2cts; Convicted - 15 yr sentence. 2) Possession of Weapon; Convicted - 1 yr to run concurrent. 3) ABWIK: Convicted - 15 yr to run concurrent.

3-27. Andy (brother) was arrested and charged with Criminal Sexual Conduct 1st. The victim identified him from a 6 photo lineup as the man who raped her at St. [G'ville County Court records]

4-17. Freddie (age 19) had a parole hearing this date - was denied parole for following reasons: Nature/Seriousness of current offense

Use of weapon/violence in current offense
Failure to maintain favorable adjustment
Indication that release could pose threat
to the community. [DJJ records]

6-10. Bernard Mason was indicted for Criminal Domestic Violence - (arrest date was 6/28/96) it was noted that he had two prior convictions for the same offense. [G'ville County Court records]

6-18. The charges against Bernard Mason for his arrest on 5/5/96 for Criminal Domestic Violence were Nolle Prossed/Dismissed this date.

7-7. Freddie (age 19) was granted an Unconditional Release from SCDC this date - he was released from Turbeville Correctional

Institute.

9-29. Bernard Mason was arrested and charged with Receiving Stolen Goods. [SCDC file]

9-30. Lorenzo was arrested this date at school - he was charged with Assault & Battery from an incident which had occurred earlier in the day at the school bus stop. He and another boy began fighting - Lorenzo went on to school - the other boy went home with cuts and bruises. Lorenzo was suspended from school as a result of these charges. [DJJ records]

10-22. Freddie (age 19) was arrested and charged with A&B.

11-5. Andy pled guilty to ABHAN - (pled down from Criminal Sexual Assault). He was sentenced to 5 yrs; provided he serve 1 yr - and received credit for time served and he is to have not contact with the victim and be employed within 14 days after his release. [G'ville County Court records]

11-11. Freddie (age 19) was arrested and charged with murder of Irene Graves.

12-31. A warrant was issued for the arrest of Bernard Mason for violating numerous conditions of his Parole.

1998

2-5. Bernard Mason pled guilty to Criminal Domestic Violence - he was sentenced to 3 yrs. to run concurrent with probation violation sentence. Alex Mason was found guilty of Violating his Probation - he was sentenced to 3 yrs. He was sentenced by Judge Paul Short. [G'ville County Court records]

2-6. Bernard Mason arrived at R&E Center of SCDC this date.

3-18. 20th birthday

5-7. Lorenzo (brother) was committed to R&E Center at DJJ for Assault and Battery - from the incident at the school bus stop in Sept/1997. [DJJ records]

5-28. Satail ; (sister) was committed to R&E at DJJ for Assault and Battery. [DJJ records]

PSYCHOLOGICAL ABUSE AND NEGLECT

Freddie mother is a 18 year old single parent with an 18 month old daughter when Freddie is born.

Freddie lives with mother who lives with her mother. Father, Freddie Eugene Massey Sr. who was reported to be abusive lives with the family from time to time. He provides little financial support or nurturing for Freddie. *Atoc*

Mother unable to provide shelter, food, clothing or a safe environment, children are taken into protective custody and placed in foster care.

Freddie is separated from his mother and grandmother and siblings. *age 6*

Freddie witnesses constant fights, abuse of his mother He is not shielded from violence. *father MGN step-father neighbors*

From time to time there is inadequate food, shelter, and clothing.

Frequently there is not enough adult attention, comfort, and guidance.

Child must run home daily to avoid fighting. *child*

Child is not protected from other children who attempt to fight at the school bus stop and elsewhere in the neighborhood.

Freddie must fight to protect his sisters and brothers and was locked out of the home so that he would face his attackers and defend himself.

Parent does not provide child with clean clothes to attend school.

Child is frequently unkempt at school.

Freddie does not receive consistent resources in school for the development of educational skills.

Freddie experiences many dislocations and frequent absences throughout his school tenure.

Freddie has been separated from family members, his grandmother, father, step-father, sister, brother, aunts, uncles, cousins and his own conviction and incarceration for crimes.

Child was living with maternal Grandmother, a significant care giver, at the time that the grand mother shot her son-in-law she claimed in self-defense.

The son-in-law had shot her daughter the night before. Grandmother was arrested, convicted and sentenced to SC Department of Corrections.

Mother was beaten frequently by Freddie's father and step father. The male children including Freddie often tried to intervene.

There were no successes for Freddie, not at home, not at school, not in the neighborhood.

Bill Godfrey

From: "donna watts" <donnasw1963@yahoo.com>
To: "Bill Godfrey" <bill@godfreylawfirm.com>
Sent: Wednesday, September 20, 2006 1:37 PM
Subject: Freddie Owens

Dear Bill,

Pursuant to our conversation today, I am writing to request that you ask for a continuance in the Freddie Owens case if at all possible. As you know, even with such short notice, we have gotten a lot of work done. I have seen Mr. Owens once and he has received his neuropsychological evaluation. As you know, we discovered upon my evaluation of Mr. Owens, that he is receiving treatment for a presumed bipolar disorder in the Department of Corrections. He is on the medications Risperidone and Depakote, both of which are powerful psychiatric medications. This came as a surprise to all of us. Even more surprising are the preliminary reports that show Mr. Owens disciplinaries have decreased substantially which may or may not coincide with these medications. At this point, although the SCDC records have been requested, we have yet to receive them. Because of this new evidence, some of the mitigation that had been completed in prior trials will need to be revamped. For example, family histories of mental illness will need to be assessed. We know that Mr. Owen's sister has received psychiatric treatment. We are in need of those records etc.

To do the best job possible, I would request the trial be continued...a few months would be best, but at this point, if you can get it continued into November, we should have the SCDC records, and time to interview and re-interview various sources of information. I do not want to interview Dr. Cobb until I have the SCDC records.

I understand Paige Tarr will bring me the DJJ records, but I don't have them yet. Depending upon what is in the records, I may have to interview the psychologists there.

I also need to meet with your social worker, as I have no social history at all at this point.

I testified in Dorchester County yesterday as you know, and I am subpoenaed for testimony tomorrow and possibly Friday in Greenwood. Time is of the essence. If Judge Patterson needs a copy of my schedule, I will be glad to provide it to him. I will have time beginning next week to focus on Mr. Owen's case, but a lot of how I manage that time will depend upon what sources of information I have.

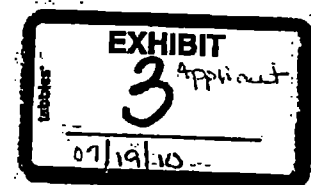
I still need to see Mr. Owens at least two more times to clarify any diagnoses and confront him with any information I receive which requires further interview.

If you need to contact me, please call me at 803-261-6522.

Sincerely,

Donna Watts

Get your own web address for just \$1.99/1st yr. We'll help. Yahoo! Small Business.



9/22/2006

Bill Godfrey

From: <paigetarr@sc.rr.com>
To: "Bill Godfrey" <bill@godfreylawfirm.com>
Sent: Thursday, October 12, 2006 7:09 AM
Subject: Re: Owens

Donna and I have talked with Tora and I am feeling pretty good about what she could bring to the table, especially since I am not all that enthusiastic about Marjorie's level of preparation and interest. Tora will bring in info about his early years and school difficulties which will dovetail nicely, I believe, with what Donna will say about his childhood and what Tom Cobb seems to believe about him. If we can get hold of Lillian Tidler, I think she might be an awesome addition because she actually saw some of this in Freddie as an early adolescent. Donna and I had discussed asking you about bringing in Shirley Furtick to replace Marjorie, but with a few weeks to prepare, we thought it safer to just push Marjorie through. Part of my job is to bird dog the experts until they come through and that is what I will do in this case.

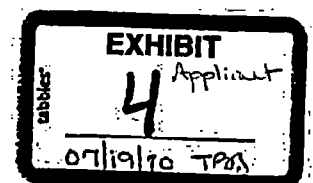
Donna wants to speak with some family and Carolyn is using some of her computer resources to track them down. We will take a run at some of these people today and continue until we get them.

I will check in with you in a little while - I am walking out the door now to drive to your office. Call me if you need me before that.
Thanks, Paige

----- Original Message -----

From: Bill Godfrey <bill@godfreylawfirm.com>
Date: Wednesday, October 11, 2006 9:37 pm
Subject: Re: Owens
To: paigetarr@sc.rr.com
Cc: "Graham, Carolyn" <cgrahamsc@aol.com>

- > Paige,
- >
- > Donna said Tora would be great, but I do not think in my last
- > contact
- > with Tora that she was planning to testify. Has Donna talked with
- > her? Is
- > Tora really on board?
- >
- > What specifically does Donna need? What is the list of items,
- > and where
- > are we in obtaining those items?
- >
- > Yes, there will be affidavits for the jury consultant cap, if
- > necessary.
- > Time to push Marjorie. I really do not like her attitude



11/3/2006

> regarding
> preparation, especially since she has done this case twice before.
> Either
> she comes up to speed or I will have to kill her off. You know
> her; get with
> her and see where she really is. Let me know.
>

> Bill

> ----- Original Message -----

> From: <paigetarr@sc.rr.com>

> To: "Bill Godfrey" <bill@godfreylawfirm.com>

> Sent: Wednesday, October 11, 2006 8:20 PM

> Subject: Re: Owens
>
>

>> Bill,
>> Tora would be a great addition and I was planning on issuing her a
>> subpoena. She is on board and knows her stuff. Marjorie is moving
>> slowly, but I keep leaving her messages and hope to track her down
>> before we go see Freddie next Thursday. Donna still needs a few
>> things, but Carolyn and I are working with her on those items. We
>> will check with Ken tomorrow while we are there. I will get a date
>> from Donna to try and schedule a team meeting so that we can all be
>> working off the same page as we prepare for testimony. Are you
>> going to have people testify or prepare affidavits about the fee
> cap on the
>> jury consultant? More later, Paige
>>

>> ----- Original Message -----

>> From: Bill Godfrey <bill@godfreylawfirm.com>

>> Date: Wednesday, October 11, 2006 5:15 pm

>> Subject: Re: Owens

>> To: paigetarr@sc.rr.com

>> Cc: "Graham, Carolyn" <cgrahamsc@aol.com>
>>

>>> Paige,
>>>

>>> Hope your child is doing much better.
>>>

>>> I will not be able to meet with anyone tomorrow. I have court
>>> in Pickens

>>> and then have to see a federal client in Spartanburg.
>>>

>>> I thought that Carolyn was coming up to get subpoenas printed
>>> and

>>> signed. I also thought that you and Carolyn were going to talk
>>> with

>>> Freddie's family (what there is of it). I did not realize that we
>>> were to

>>> have a meeting.
>>>

11/3/2006

>>> Regarding Friday, I do not want to come down and have a team
>>> meeting
>>> until after Donna finishes all of her work. I was anticipating
>>> sometime next
>>> week. I would like to try and get all the experts (not Cobb) in
>>> one place at
>>> one time to brain storm and work on penalty strategy. In
>>> particular, I want
>>> Marjorie involved. She continues to worry me a little, in as much
>>> as she
>>> loses items given to her and then finds them again. I want to make
>>> sure that
>>> she is truly on board and ready to go. Based upon her first two
>>> testimonies,
>>> I think she will be fine, but she does worry me.
>>>
>>> Have you and Carolyn gotten all of the information that Donna
>>> wanted?
>>> Has the DOC still been dodging? What information is left to be
>>> received and
>>> from whom? Is Donna satisfied with what she presently has?
>>>
>>> Please note that Donna advised me that Tora Brawley would be a
>>> really
>>> good witness for us. Does Brawley know what Donna thinks, and is
>>> she on
>>> board?
>>>
>>> I would like to have all of this iced away before Donna and
>>> the rest of
>>> the psychiatrists go on convention the end of this month.
>>>
>>> Judge Patterson has now agreed to a jury consultant. He will
>>> approve the
>>> \$250 per hour, but will cap the fee at \$2000. I get the impression
>>> (perhaps
>>> wrongly) that he would be willing to approve more, if we push him.
>>> I have
>>> not gotten in touch with Emerson Smith as yet -- probably
tomorrow.
>>>
>>> Is there anything else going on that I should know about? If
>>> so, email
>>> me and fill me in.
>>>
>>> You and Carolyn might want to try and contact Ken Gibson when
>>> you get
>>> here or perhaps tonight. I have sent him one email, which was not
>>> returned,
>>> but he said he did not get it. His numbers are cell 417-1980;
>>> office

11/3/2006

>>> 241-6699; and fax 250-4449.

>>>

>>> Bill

>>> ----- Original Message -----

>>> From: <paigetarr@sc.rr.com>

>>> To: <bill@godfreylawfirm.com>

>>> Sent: Wednesday, October 11, 2006 3:43 PM

>>> Subject: Owens

>>>

>>>

>>>> Bill,

>>>> Your office should be receiving a call from Tom Cobb's assistant

>>>> about who will be paying for his time while he speaks with us and

>>>> testifies on Freddie's behalf. We spoke about his schedule for

>>>> the next couple

>>>> of weeks and he will be calling me back to suggest a day for us

>>>> to sit

>>>> down with him in Charleston. I had a sick child and was unable

>>>> to get

>>>> up to Greenville today, but will be there by 9:30am in the

> morning.>>> Then I will be here with Donna on Friday to interview

> Freddie.>> If we

>>>> are able to meet tomorrow in Greenville, do you still want to

> meet>>> here on Friday? Just let me know. Thanks, Paige

>>>>

>>>>

>>>>

>>>>

>>>>

>>>>

>>>>

>>>>

>>>>

11/3/2006

Kenneth C. Gibson
Attorney at Law

INVOICE

Date: December 4, 2006
 INVOICE # 41

TO

South Carolina Office of
 Indigent Defense
 Post Office Box 11433
 1122 Lady Street, Suite 1110
 Columbia, South Carolina
 29211

Due Date			
11/25/2006			
Owens, Freddie (Death Penalty)			
Description	Hours	Hourly Rate	Amount
11/6/2006 - Hearings on procedural issues, general juror qualification and juror voir dire	7.05	\$75.00	\$528.75
11/6/2006 - Wait for Court during recesses and general work on selecting jury including review of legal research, review of questionnaires and preparation of voir dire examination	5	\$50.00	\$250.00
4/28/2006 - Conference with former counsel for Defendant, obtain copies of files	2	\$50.00	\$100.00
3/13/2006 - Research statutes, cases, and manuals relating to general death penalty procedure	6	\$50.00	\$300.00
3/14/2006 - Research statutes, cases, and manuals relating to general death penalty procedure	5	\$50.00	\$250.00
3/16/2006 - Research statutes, cases, and manuals relating to general death penalty procedure	7	\$50.00	\$350.00
2/15/2006 - Review Appointment Order and Previous Appellate Orders regarding case	3	\$50.00	\$150.00
11/7/2006 - Voir Dire and Jury Qualification	6.95	\$75.00	\$521.25
11/7/2006 - Wait for Court during recesses and general work on selecting jury including review of legal research, review of questionnaires and preparation of voir dire examination	3	\$50.00	\$150.00
11/8/2006 - Wait for Court during recesses and general work on selecting jury including review of legal research, review of questionnaires and preparation of voir dire examination	5	\$50.00	\$250.00
11/8/2006 - Voir Dire and Jury Qualification	7.5	\$75.00	\$562.50
11/9/2006 - Trial	5.6	\$75.00	\$420.00
11/10/2006 - Trial	7.4	\$75.00	\$555.00



11/11/2006 - Trial	2.35	\$75.00	\$176.25
11/9/2006 - Wait during recesses and Trial Preparation including review of documents, research of legal issues, preparations of witness testimony and cross-examination	5	\$50.00	\$250.00
11/10/2006 - Wait during recesses and Trial Preparation including review of documents, research of legal issues, preparations of witness testimony and cross-examination	7	\$50.00	\$350.00
11/11/2006 - wait during recesses; prepare closing argument	10	\$50.00	\$500.00
10/29/2006 - Trial Preparation including review of records and files, research of various issues, preparation of testimony and evidence, investigation of witnesses, preparation of closing argument, preparation for Juror Qualification, and conferences	6	\$50.00	\$300.00
10/30/2006 - Trial Preparation including review of records and files, research of various issues, preparation of testimony and evidence, investigation of witnesses, preparation of closing argument, preparation for Juror Qualification, and conferences	7	\$50.00	\$350.00
10/31/2006 - Trial Preparation including review of records and files, research of various issues, preparation of testimony and evidence, investigation of witnesses, preparation of closing argument, preparation for Juror Qualification, and conferences	7	\$50.00	\$350.00
11/1/2006 - Trial Preparation including review of records and files, research of various issues, preparation of testimony and evidence, investigation of witnesses, preparation of closing argument, preparation for Juror Qualification, and conferences	9	\$50.00	\$450.00
11/2/2006 - Trial Preparation including review of records and files, research of various issues, preparation of testimony and evidence, investigation of witnesses, preparation of closing argument, preparation for Juror Qualification, and conferences	8	\$50.00	\$400.00
11/3/2006 - Travel to Columbia for meeting with Mitigation team; prepare witness testimony and other general trial preparation	9	\$50.00	\$450.00
10/24/2006 - Trial Preparation including research of various legal issues including potential motions regarding exclusion of evidence, strategization of case; research relating to deals obtained by Steven Golden	8	\$50.00	\$400.00
10/25/2006 - Trial Preparation including research of various legal issues, review of files including juror questionnaires	6	\$50.00	\$300.00
10/26/2006 - Trial Preparation including conferences with witnesses, review of files and research, strategization of case, and general preparation for closing argument	11	\$50.00	\$550.00
10/27/2006 - Trial Preparation including review of files, strategization of case, preparation of witness testimony and cross-examination, and preparation for juror qualification	6	\$50.00	\$300.00
10/23/2006 - Travel to and from Charleston; conference with Dr. Cobb	9	\$50.00	\$450.00
10/2/2006 - Conferences relating to continuance	1	\$50.00	\$50.00
10/2/2006 - Hearing on Motion for Continuance and excusal of jury	0.5	\$75.00	\$37.50
9/24/2006 - Trial Preparation including: research of legal issues; strategization of case; review of files; preparation of witness testimony and cross-examination; preparation for juror qualification	8	\$50.00	\$400.00

9/25/2006 - Trial Preparation including: research of legal issues; strategization of case; review of files; preparation of witness testimony and cross-examination; preparation for juror qualification	7	\$50.00	\$350.00
9/26/2006 - Trial Preparation including: research of legal issues; strategization of case; review of files; preparation of witness testimony and cross-examination; preparation for juror qualification	9	\$50.00	\$450.00
9/27/2006 - Trial Preparation including: research of legal issues; strategization of case; review of files; preparation of witness testimony and cross-examination; preparation for juror qualification	10	\$50.00	\$500.00
9/28/2006 - Hearing on Juror Exemptions and Pre-Trial Motions	2	\$75.00	\$150.00
9/28/2006 - Trial Preparation including: research of legal issues; strategization of case; review of files; preparation of witness testimony and cross-examination; preparation for juror qualification	4	\$50.00	\$200.00
9/29/2006 - Trial Preparation, confereces, and work to obtain continuance	3.5	\$50.00	\$175.00
9/10/2006 - General Trial Preparation including: review of files; research of legal issues; preparation of witness testimony and cross-examination; review of motions; and conferences	6	\$50.00	\$300.00
9/11/2006 - General Trial Preparation including: review of files; research of legal issues; preparation of witness testimony and cross-examination; review of motions; and conferences	5	\$50.00	\$250.00
9/13/2006 - General Trial Preparation including: review of files; research of legal issues; preparation of witness testimony and cross-examination; review of motions; and conferences	9	\$50.00	\$450.00
9/15/2006 - Review Juror Questionnaires	6	\$50.00	\$300.00
9/7/2006 - Travel to Perry Correctional and Conference with Client; other general trial preparation	6	\$50.00	\$300.00
9/8/2006 - Review SCDC Records	4	\$50.00	\$200.00
8/11/2006 - Review Files of Steven Sumner	4	\$50.00	\$200.00
8/12/2006 - Research cases relating to Juror Qualification	4	\$50.00	\$200.00
7/24/2006 - Review discovery relating to murder of Irene Grainger	3	\$50.00	\$150.00
7/16/2006 - Review discovery relating to murder of Irene Grainger	5	\$50.00	\$250.00
7/18/2006 - Review discovery relating to murder of Irene Grainger	4	\$50.00	\$200.00
7/10/2006 - Review Proposed Juror Questionnaire	1.5	\$50.00	\$75.00
6/19/2006 - Travel to Lieber; conference with Defendant; Review files and other general trial preparation	11	\$50.00	\$550.00
6/23/2006 - Research other witnesses current criminal situation and other matters indicated by Defendant in conference	8	\$50.00	\$400.00
5/22/2006 - Review files of former counsel including transcripts	6	\$50.00	\$300.00
5/24/2006 - Review files of former counsel including transcripts	6	\$50.00	\$300.00
4/24/2006 - Research and review cases, statutes and manuals regarding death penalty litigation procedure	8	\$50.00	\$400.00

11/27/2006 Research and review cases, statutes and manuals
regarding death penalty litigation procedure

5

\$50.00

\$250.00

Subtotal: \$17,351.25
Sales Tax: \$0.00
Total: \$17,351.25

Subtotal: \$17,351.25

Sales Tax: \$0.00

Total: \$17,351.25

Thank you for your business!

Make all checks payable to Kenneth Gibson

Kenneth C. Gibson
100 Williams Street
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Greenville, South Carolina 29606
Phone (864) 241-6699 Fax (864) 241-6211 kennethcgibson@msn.com

FILED

JAN 25 1995

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

**LARRY W. PROPPS, CLERK
COLUMBIA, S. C.**

COLUMBIA DIVISION

Alexander S., Alfred S., Benny B.,
Christopher M., Lafayette M., and
Ricky S., by and through their
Guardian ad Litem, Lesly A. Bowers,
individually and as representatives of
a class of juveniles,

Plaintiffs;

v.

Flora Brooks Boyd, individually and in her
official capacity as Director of the
Department of Juvenile Justice;
Richard E. McLawhorn, individually
and in his official capacity as former
Commissioner of the Department of
Juvenile Justice for the State of
South Carolina; John F. Henry,
Frank Mauldin, Kathleen P. Jennings,

Joseph W. Hudgens, Karole Jensen and
J.P. Neal, individually and in their
official capacities as former Board
Members for the South Carolina
Department of Juvenile Justice,

Defendants.

C/A No.: 3:90-3062-17

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER**

This is an action initiated by juveniles incarcerated at the four correctional institutions maintained and operated by the South Carolina Department of Juvenile Justice (DJJ). The Plaintiffs initiated this action on December 28, 1990 seeking declaratory and injunctive relief, as well as damages, from the Defendants, the DJJ commissioner and board members. The Plaintiffs challenge numerous conditions of confinement of juveniles housed in the facilities operated by DJJ. They allege that the Defendants, all acting under color of state law, have deprived them of

rights secured by the United States Constitution and various federal statutes.

In their answer, the Defendants admit that DJJ is forced to house more juveniles than the facilities were designed to hold, but deny that the overcrowding rises to the level of a constitutional violation. During the trial of this case, however, counsel for the Defendants admitted that current levels of population exceed minimum constitutional standards and consented to an order requiring a release of juveniles to alleviate overcrowding. In regard to the other allegations of the complaint, the Defendants either deny them or admit them with the qualification that good-faith efforts have been made to secure the necessary funding to improve these conditions. The Defendants further deny that any of the additional violations constitute deprivations of rights secured by the Constitution or various statutory provisions.

Procedural History of the Case

On January 16, 1991, the court appointed a guardian ad litem¹ to represent the purported class. On March 7, 1991, the court certified the class as consisting of all persons presently and in the future housed within the DJJ correctional facilities. On that same date, the court approved the litigation team assembled to represent the Plaintiffs in this action. The court also allowed Richard A. Harpootlian, Solicitor for the Fifth Judicial Circuit of South Carolina, to participate in this action as *amicus curiae*.²

¹ The court initially appointed Inez Moore Tenenbaum as guardian ad litem for the class. After working on the case for several years, Ms. Tenenbaum felt obligated to resign so as to avoid the appearance of a conflict of interest when she entered the race for Lieutenant Governor of South Carolina. The court then appointed Lesly A. Bowers as guardian ad litem to replace Ms. Tenenbaum. Both guardians faithfully represented the interests of their wards in this case.

² Solicitor Harpootlian provided helpful information to the court during the course of this litigation. The court expresses its appreciation to Mr. Harpootlian for his interest in the complex issues presented here and his involvement in the case.

Acting upon the request of both parties, the court entered an order on September 23, 1991 severing the question of overcrowding for a separate trial and indicating that the court would make a "preliminary determination" as to a suitable population ceiling for all DJJ facilities in dispute. That order provided that the parties would thereafter be directed to negotiate the remaining issues in the case "in light of the court's opinion [on population] which, if unchanged, would likely be embodied in any final relief this court might fashion in this case." The court heard testimony on the population question on December 4 and 5, 1991. The court then determined, in an order dated March 31, 1992, that its decision to sever and try separately the population question was in error.³ The court reached this conclusion for two reasons: (1) the court decided that the question of overcrowding could not be considered independently of the other issues relating to conditions of confinement that are presented in this case; and (2) both parties and their expert witnesses based their population ceiling analysis on standards promulgated by the American Correctional Association (ACA). The ACA standards have been rejected as inappropriate models upon which to make constitutional population determinations.⁴ For those two reasons, the court declined to establish firm, or even tentative, population ceilings.

After the March 31, 1992 order was entered, the parties requested that the court stay its

³ Although the court's March 31, 1992 order determined that it was inappropriate to decide the issues presented in this case in a piecemeal fashion, the court did determine that immediate relief was appropriate for a subclass of incarcerated juveniles: those who are seriously mentally ill or seriously mentally retarded. As to the members of this subclass, the court ordered the Defendants to immediately survey the juvenile population at DJJ facilities to identify seriously mentally ill and seriously mentally retarded juveniles and to begin appropriate treatment for those juveniles. The Defendants have complied with this portion of the March 31, 1992 order, and the Plaintiffs do not seek any additional relief for the members of the subclass at this time.

⁴ See pages 45-47 *infra*.

scheduling order to allow the parties an opportunity to discuss an amicable settlement of the case.⁵ These efforts proved to be unsuccessful, and the case was therefore restored to the active docket and scheduled for trial in June 1994.

In the course of preparing for the trial of this case, the court has conducted twenty-two hearings and status conferences and issued fifty-four pretrial orders. In addition, the court has visited all of the DJJ facilities on three separate occasions, totaling more than twenty hours of visits. On two of the visits, the court partook of a meal in the DJJ dining facilities. In an effort to acquaint itself with comparable facilities in other jurisdictions, the court visited the Lorenzo Bean Youth Correctional Center near Atlanta, Georgia operated by the Georgia Department of Children and Youth Services. Also, the court visited the Columbia, South Carolina facility of the Alston Wilkes Society.

In 1992, the court appointed five expert witnesses pursuant to Fed. R. Evid. 706: a juvenile correctional expert, an educator, a medical doctor, a clinical psychologist, and an architect. In addition, the court received a copy of the final report of the South Carolina Juvenile Justice Task Force, a blue-ribbon commission composed primarily of prosecutors, police officers, and family court judges, and headed by South Carolina Associate Supreme Court Justice Jean Toal. The Task Force Report identifies many of the problems the State of South Carolina faces with juvenile crime and contains recommendations for improving the state's juvenile justice

⁵ Few cases involving challenges to the conditions of juvenile correctional facilities have been litigated and, of those that have, most have been settled short of trial. See, e.g., *Bobby M. v. Martinez*, No. TCA 83-7003 (N.D. Fla. July 2, 1987) (final order approving consent decree); *Santiago v. Philadelphia*, No. 74-2589 (E.D. Pa. Jan. 21, 1988) (third amended stipulation in partial settlement); *Jerry M. v. District of Columbia*, No. 1519-85(IFP) (D.C. Super. Ct. July 24, 1986) (consent decree); *In re Interest of G.C. v. Coler*, No. 87-6220-Civ-Gonzalez (S.D. Fla. undated) (settlement agreement); *Anthony C. v. Pima County*, No. Civ-82-0811W (D. Utah Mar. 27, 1984) (consent decree); *Jackson v. Fort Stanton Hosp. & Training Sch.*, No. Civ. 87-0839 JP (D.N.M. Sept. 28, 1990) (memorandum opinion and order).

system.⁶

The non-jury trial of this case began on June 13, 1994 and ended on August 29, 1994. During the course of the trial, the court heard from sixty-six witnesses (including seventeen expert witnesses) and reviewed one hundred and twenty-six exhibits consisting of several thousand pages.

As will be seen from the Findings of Fact and Conclusions of Law which follow, the court has determined that the Plaintiffs have proved that certain conditions of confinement at DJJ facilities violate their constitutional and statutory rights.⁷ Rather than imposing a court-ordered remedial scheme, however, the court has determined that the appropriate course of action is to identify the nature and extent of the violations and then to allow the Defendants a reasonable period of time within which to submit a remedial plan to the court for its review.⁸

⁶ See S.C. Juvenile Justice Task Force, *Juvenile Justice In South Carolina — A Decade for Progress* (April 1994) [hereinafter *S.C. Juvenile Justice Task Force Report*].

⁷ The Plaintiffs initially sought to recover damages on behalf of all members of the class. At the conclusion of the Plaintiffs' case in chief, the court raised, *sua sponte*, the question of whether the Plaintiff class should be decertified as to the damages claim. After discussing the matter thoroughly with counsel, the court entered an order on July 5, 1994 concluding that to allow the damages claim to go forward in the class action would "introduce significant individual liability or defense issues which would require separate hearings for each class member." After observing that Fed. R. Civ. P. 23(c)(1) provides that an order certifying a class "may be altered or amended before the decision on the merits," the court decided to decertify the class in regard to the damages claim. Appropriate notice of the court's decertification order was furnished to all class members. The court expresses no opinion on the merits of any damages claims that might be brought on an individual basis. *But see Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) ("In an action for damages against a professional [operating a state facility for mentally retarded individuals], the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability.").

⁸ After the testimony in this case concluded, the United States Congress passed, and the President signed, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (effective Sept. 13, 1994). Among other things, this legislation limits the jurisdiction of federal courts to entertain Eighth Amendment claims brought by prison inmates challenging the conditions of their confinement. *Id.* § 20409, 108 Stat. at 1827-28 (to be codified at 18 U.S.C. § 3626). This court, acting *sua sponte*, raised with the parties the question of whether this legislation has any application to this case. Both parties conceded that the Violent Crime Control and Law Enforcement Act of 1994 does not bar the court from hearing this case,

Introduction

Before delving into the myriad factual and legal issues presented in this case, the court is compelled to make a few general observations. This case lies at the intersection of two of society's most pressing concerns: children and the increasing crime rate. The court must be mindful, as an initial proposition, that its role in this litigation is not to attempt to construct a paragon or "model" training school program for DJJ. The court's role as to the constitutional claims is limited to establishing minimally acceptable constitutional standards. Although the court announced its views in this regard at the outset of the trial, most of the seventeen expert witnesses who testified at trial nevertheless urged upon the court a version of a remedial plan far beyond what the court has determined to be constitutionally required.⁹ The court is constrained to conclude that many of these proposals are model programs which the state of South Carolina, through its duly elected representatives, might voluntarily choose to establish, but not programs that are required as a matter of constitutional law.¹⁰ Thus, the court will grant to the Plaintiffs some, but not nearly all, of the relief they seek in this case.

Secondly, despite the court's admonition in its March 31, 1992 order and at several later

because the statute limits the court's jurisdiction only with regard to claims arising under the Eighth Amendment to the United States Constitution. Here, the facilities at issue are training schools for juveniles who have not been convicted of a crime, but rather have been adjudicated to be juvenile delinquents. Although the complaint asserts claims under both the Eighth and Fourteenth Amendments, the court has determined that the Due Process Clause of the Fourteenth Amendment applies to the claims asserted here. Because the Fourteenth Amendment provides more protection to the Plaintiffs than does the Eighth Amendment, it is not necessary for the court to reach the Eighth Amendment claims asserted in this case.

⁹ For example, the court heard testimony suggesting that DJJ implement extracurricular activities such as a high school newspaper or athletic teams to compete in inter-scholastic competition. Such programs are not required by the Constitution.

¹⁰ See *O'Connor v. Donaldson*, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring) ("In [deciding issues relating to involuntary commitment], judges are not free to read their private notions of public policy or public health into the Constitution.").

stages of this litigation, both parties continue to argue that the court should adopt the ACA standards as the constitutional minima. The court must reject the parties' invitation to adopt these standards. Although ACA standards might represent desirable goals, it is well established that they do not represent the standards minimally acceptable under the Constitution.

As noted above, the Defendants have, from the outset of this litigation, admitted that their facilities are overcrowded. The Plaintiffs and the Defendants, both focusing upon the ACA standards the court has rejected, have determined between themselves that the rated capacity for the three long-term institutions operated by DJJ is 299 juveniles. Testimony at trial indicated to the court that these institutions routinely hold more than twice that number of juveniles. Thus, most of the testimony at the December 1991 trial and the June 1994 trial centered upon the goal of reducing the juvenile correctional population to a figure approaching the ACA-rated capacity of 299 juveniles.¹¹ The only real areas of dispute in regard to a population ceiling involved the period of time that the court would allow the Defendants to reduce population to this figure, and the appropriate percentage for a "surge factor" by which the Defendants would be allowed to exceed the applicable population ceiling in emergency situations.

As will be seen below, the court has determined that it will not order a release of any juveniles from DJJ facilities, but will instead require the Defendants to develop and implement a program for appropriately training and housing juveniles who are committed to DJJ facilities by the family court judges of South Carolina. The court's decision not to order a release of juveniles stems from two basic observations: (1) the last dormitories at DJJ facilities were constructed in the 1970s; and (2) since the last dormitories were constructed, the population of

¹¹ At the December 1991 hearing, both parties stipulated that the rated capacity was 299 juveniles. By the time of the June 1994 trial, the Defendants had modified their position somewhat, suggesting that the court should order a reduction to no more than 450 to 520 juveniles at the three long-term institutions.

South Carolina has increased by nearly forty percent, and violent juvenile crime has skyrocketed, increasing one hundred and forty-nine percent in South Carolina between 1988 and 1992 alone.¹² The court is reluctant to impose on DJJ facilities a population ceiling that is based on an antiquated capacity level which takes no account of the significant increases in population and juvenile delinquency over the past twenty-five years. Instead of ordering the Defendants to release juveniles who have been committed to DJJ facilities by family court judges and kept there by the Juvenile Parole Board, the court will afford the Defendants the opportunity to develop a plan to adequately house and treat these juveniles. This remedial plan may include, at the Defendants option, additional dormitories at DJJ facilities in Columbia or, alternatively, several regional community-based correctional facilities.

The court's final observation involves programs to rehabilitate juveniles who are committed to DJJ facilities. As articulated in the South Carolina Children's Code, the policy of the state with respect to juvenile delinquents is to attempt to rehabilitate juveniles who have been deprived of their liberty through the commitment process of the family courts of South Carolina.

The court has determined that in many cases the rehabilitative efforts of DJJ are not working and that juveniles are often returned to society more prone to commit crimes than they were before their incarceration.¹³ Compared to the other states in the nation, South Carolina is seventh from the bottom in the amount of money it spends on juvenile corrections and fifth from the top in the

¹² South Carolina Law Enforcement Division, Uniform Crime Reports Division, *Crime in South Carolina 1993*.

¹³ For example, at trial one of the expert witnesses testified about a study in which juveniles at DJJ were administered the Minnesota Multiphasic Personality Inventory (MMPI), a widely used clinical method of testing hostility. The study, which compared the results from MMPI tests given to juveniles shortly after being admitted to DJJ with results from tests given to juveniles shortly before their release from DJJ, demonstrated that juveniles have more hostility and more aggressive tendencies after their confinement at DJJ.

rate of adult violent crime. The court has determined that there likely is a correlation between these two figures and that, in some cases, South Carolina juvenile correctional facilities produce graduates who later swell the populations of adult correctional facilities and figure prominently in the ranks of those who later commit violent offenses as adults. Although exact figures are difficult to obtain, the evidence indicates that between fifty-six and eighty-two percent of DJJ juveniles later commit crimes as adults and are sentenced to adult prisons.¹⁴ The court hastens to add that unsuccessful efforts at rehabilitation stem primarily, if not exclusively, from the lack of adequate funding to devise and implement programs that will allow juveniles to correct their behavior while they are at DJJ facilities.¹⁵

Historical Development of Juvenile Justice

Young offenders have historically presented special problems for the criminal justice system. The idea that juveniles who violate the law should be treated differently from adult offenders originated at the end of the nineteenth century, when Chicago established a separate juvenile court and began to employ the common-law doctrine of *parens patriae* to protect children from themselves and their parents.¹⁶ Within twenty-five years of the passage of the Illinois

¹⁴ The budget for the South Carolina Department of Corrections (SCDC), the state agency charged with operating the adult prison facilities in South Carolina, is easily the fastest growing component of the entire state budget. In the sixteen-year period between 1977-78 and 1993-94, SCDC's operating budget increased by 800% — from \$29.9 million to \$224.7 million. During the same period of time, the adult inmate population increased from 6,667 to 17,182. In addition, during the past decade, South Carolina spent \$202 million to build seven new adult prisons.

¹⁵ The court noted in 1992, after its first visit to the DJJ facilities, that the institutions were "staffed and led by well-meaning, caring individuals, whose good faith efforts [are] severely strained by the sheer numbers of juveniles present." After receiving the evidence in this case and visiting the DJJ facilities on two additional occasions, the court reaffirms its earlier finding that the personnel employed by DJJ are doing the best they can under difficult circumstances.

¹⁶ James O. Finckenauer, *Juvenile Delinquency and Corrections — The Gap Between Theory and Practice* 116 (1984).

Juvenile Court Act of 1899, all but two states had established specialized courts for children.¹⁷

A second revolution in juvenile justice began in 1967, when the United States Supreme Court held that, in juvenile commitment proceedings, juvenile courts must afford to juveniles basic constitutional protections, such as advance notice of the charges, the right to counsel, the right to confront and cross-examine adverse witnesses, and the right to remain silent. *In re Gault*, 387 U.S. 1 (1967). Juveniles are not, however, accorded the full panoply of rights that adult criminal defendants are accorded, such as the right to trial by jury. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). As a result, juvenile courts still process juvenile delinquents in a manner more paternal and diagnostic than that afforded their adult criminal counterparts.

In South Carolina, incarceration of juveniles is said to be for beneficent rather than punitive purposes. See S.C. Code Ann. § 20-7-20 (Law. Co-op. 1985 & Supp. 1993). Exclusive jurisdiction over juveniles who are alleged to be delinquent is vested in the South Carolina Family Court. S.C. Code Ann. § 20-7-400(A)(1)(d), (3) and (4) (Law. Co-op. 1985 & Supp. 1993). ~~When a family court judge makes a determination of delinquency, the judge has a variety of~~ options: place the child on probation (which may include restitution or community service as a condition of probation); impose a fine of up to \$200; order that the child be examined or treated by a physician, psychiatrist, or psychologist; order other care and treatment as the court "considers best"; or commit the child to the custody of a public or private institution. S.C. Code Ann. § 20-7-1330 (Law. Co-op. Supp. 1993).

When a family court judge determines that incarceration may be appropriate, the judge must commit the juvenile to the DJJ Reception and Evaluation Center for a period not to exceed forty-five days. At the Reception and Evaluation Center, DJJ social workers perform an

¹⁷ *Id.*

evaluation and make a recommendation to the committing court. The juvenile is then once again taken before the committing judge, who has the option of releasing the juvenile to his or her family or committing the juvenile to one of the three long-term institutions operated by DJJ. By law, the commitment must be for an indeterminate sentence not to extend beyond the juvenile's twenty-first birthday. S.C. Code Ann. § 20-7-2170 (Law. Co-op. Supp. 1993). The actual length of stay for the juvenile is determined by the Board of Juvenile Parole, which authorizes release of juveniles based upon internal guidelines developed by the Board. S.C. Code Ann. §§ 20-7-2095 and 20-7-2125 (Law. Co-op. Supp. 1993). DJJ thus controls neither its front door nor its back door: Admission to the institutions is controlled by the family courts; release is controlled by the Juvenile Parole Board. The average length of stay for juveniles committed to the long-term institutions is seven months.

The DJJ facilities at issue in this litigation are all located behind an escape-resistant fence on a two hundred-acre campus on Broad River Road in Columbia, South Carolina. The oldest facilities date from the late nineteenth century.¹⁸ Historically, the conditions of the juvenile facilities in South Carolina were deficient. In the late 1960s, Howard James, a Pulitzer-prize winning reporter for the *Christian Science Monitor*, investigated juvenile correctional systems across the country and described South Carolina's as among the worst in the nation.¹⁹ In response to James's findings, a special committee of the South Carolina General Assembly conducted a hearing to consider improvements. The testimony of James and others spurred the

¹⁸ According to DJJ's annual report, the first facility in South Carolina was a reformatory for boys, which was constructed in 1875.

¹⁹ In a series of articles entitled "Children in Trouble: A National Scandal," which appeared weekly in the *Christian Science Monitor* from March 31, 1969 to July 7, 1969, James described the poor conditions he found in the South Carolina juvenile justice system, as well as in other juvenile programs across the nation, during this time period.

state legislature to enact reforms and to construct additional youth facilities. Conditions improved so dramatically that, in 1977, in a federal lawsuit over Mississippi's juvenile correctional facilities, the Commissioner of the South Carolina Department of Youth Services²⁰ was called as an expert witness to testify about South Carolina's then state-of-the-art Birchwood facility. *See Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977) (citing expert testimony of Grady A. DeCell, then Commissioner of the South Carolina Department of Youth Services). Since the mid to late 1970s, however, facilities and programs have once again deteriorated, prompting the filing of this litigation in December 1990.

By any measure, juvenile crime has increased dramatically in recent decades. One study by the United States Department of Justice indicates that, nationwide, juvenile arrests for violent crime increased forty-one percent between 1982 and 1991.²¹ In 1990, the total estimated delinquency caseload for the United States was 1.26 million cases.²² The figures in South Carolina are even more staggering. Recent statistics in South Carolina show that the growth rate of juvenile crime has significantly outpaced population growth.

All of the experts who testified at trial suggested that the recent increase in juvenile crime is likely to continue, if for no other reason than demographics. By the year 2005, there will be twenty-three percent more teenagers nationwide than there are today.²³

²⁰ As part of a state government restructuring program in 1993, the name of the agency was changed from the South Carolina Department of Youth Services to the South Carolina Department of Juvenile Justice.

²¹ Office of Justice Programs, U.S. Department of Justice, *Comprehensive Strategy for Serious, Violent and Chronic Juvenile Offenders* 2 (1994).

²² National Council on Crime and Delinquency, *Criminal Justice Newsletter*, Feb. 15, 1994, at 6.

²³ One writer has noted that "although juveniles represent less than fourteen percent of the population in this country, they account for nearly twenty-five percent of individuals arrested for violent crimes such as homicide, rape, robbery and felonious assault." Brian R. Suffredini, Note,

In an effort to identify the causes of the spiralling juvenile crime rate, the court carefully inquired of each of the expert witnesses as to their opinion of the reasons that underlie the increase. The reasons most commonly given may be summarized as follows: a significant increase in the number of single-parent families,²⁴ involvement with alcohol and other drugs, involvement in gangs and other anti-social groups, exposure to violence in entertainment and in the mass media, and access to firearms. Most juveniles who are at greatest risk of becoming extremely aggressive and violent tend to share some of these common experiences or characteristics that appear to place them on what one organization has termed a "trajectory toward violence."²⁵

After receiving the testimony, carefully considering all the evidence, weighing the credibility of the witnesses, reviewing the exhibits and briefs, and studying the applicable law, this court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ.

Juvenile Gunslingers: A Place for Punitive Philosophy in Rehabilitative Juvenile Justice, 35 B.C. L. Rev. 885, 899 (1994).

²⁴ As one writer has observed:

There is a mountain of scientific evidence showing that when families disintegrate, children often end up with intellectual, physical and emotional scars that persist for life. . . . We talk about the drug crisis, the education crisis, and the problem of teen pregnancy and juvenile crime. But all these ills trace back predominantly to one source: broken families.

Karl Zinsmeister, "Raising Hiroko," *The American Enterprise*, March/April 1990. Table 3 appended to this order is a graph depicting the increase in the percentage of births to single mothers in South Carolina since 1950. Table 4 is a similar graph showing the percentages, nationwide, during a similar period. The increases on these charts roughly parallel the increase in juvenile crime during the same time period. According to DJJ records, only twelve percent of juveniles in South Carolina who are incarcerated come from a household in which both natural parents live at home.

²⁵ American Psychological Association, *Violence and Youth: Psychology's Response* 21 (1993).

P. 52. The court notes that to the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent any conclusions of law constitute findings of fact, they are so adopted.

FINDINGS OF FACT

The South Carolina Department of Juvenile Justice is the state agency charged with housing and rehabilitating wayward youth in South Carolina between the ages of twelve and seventeen. DJJ case workers around South Carolina processed 24,767 juveniles in fiscal year 1993-94. Most of these juveniles were either diverted from the juvenile justice system or placed on probation by a family court judge. In 1993-94, just eight percent (2,093) of the juveniles who were screened were actually sent to the Reception and Evaluation Center to be considered for confinement at the long-term institutions. Of these, approximately one-half (994) were actually placed at one of the institutions during the last fiscal year. The vast majority of the juveniles who are recommended for long-term placement are those who have committed offenses that society would generally describe as violent or serious.²⁶

A recent study commissioned by DJJ contains ominous predictions for the future. If present trends in violent juvenile crime continue, by the year 1997 DJJ will need 1,310 beds, and by the year 2002, the department will need a total of 1,899 beds.²⁷ At the time of trial, population at the long-term institutions ranged from 670 to 730 juveniles.

This case involves the juveniles who are temporarily housed at the Reception and

²⁶ Table 1 attached to this order contains a listing of the offenses for which each juvenile was committed to DJJ as of May 4, 1994.

²⁷ Rosser Fabrap, *South Carolina Department of Juvenile Justice Needs Assessment and Master Plan 1-5* (Feb. 1993).

Evaluation Center, as well as those who are confined at the three long-term institutions. These juveniles claim that the basic ambient conditions of confinement — food, shelter, sanitation, living space, health care, recreation, programs, classification, discipline, and personal safety — are so inadequate that exposure to them constitutes a deprivation of their rights secured by the Fourteenth Amendment to the United States Constitution.

As to the internal operation of the institutions, after studying the extensive record in this case, the court has determined that some basic reforms are necessary. The Defendants have already taken steps to implement almost all of these reforms, primarily in response to this lawsuit. These improvements, however, fall far short of the sweeping and intrusive relief the Plaintiffs seek in this case. For the court to grant the full relief sought by the Plaintiffs in this case would be to involve the court in micro-management of the juvenile institutions in a manner neither required nor sanctioned by the Constitution.

As to overcrowding generally, the court has determined that an outright release of juveniles from the institutions — when there are no pre-release centers, halfway houses, or similar facilities available to reintegrate the juveniles into society — is not in the best interest of the juveniles themselves or the public. Alleviation of overcrowded conditions may not be solved by a simplistic meat-ax approach; rather, the Defendants must be ordered to develop new facilities and programs in order to fulfill DJJ's statutory mission.

I

The Reception and Evaluation Center

The Reception and Evaluation Center is the institution designated to receive and evaluate juveniles considered for long-term confinement by the family court. Approximately 2,000 juveniles pass through the institution each year. By law, a juvenile's stay at the Reception and

Evaluation Center may not exceed forty-five days. At the time of trial, the average stay was twenty-one days.

The Reception and Evaluation Center, the oldest of the DJJ institutions, is located separately from the other institutions on Broad River Road. The living units, cafeteria, and school building all appear to have been constructed before the 1950s. The activity building clearly pre-dates World War I. The infirmary and intake operations are housed in what appears to be an old mobile home or portable classroom. Juveniles at this institution are evaluated during their stay, after which they are returned to their home county for disposition by the family court. Disposition is the functional equivalent of sentencing in an adult case. The Reception and Evaluation Center frequently experiences severe overcrowding.

The Defendants have announced their intention to close the Reception and Evaluation Center by January 1996. Its functions will be allocated to three regional Reception and Evaluation Centers for which state bond money has already been committed. The state has already acquired the proposed sites, and construction is anticipated to begin shortly.

Although the testimony indicated that some of the facilities at the current Reception and Evaluation Center are substandard, the court declines to grant affirmative relief as to this aging institution that will be soon replaced. It would represent an unwise use of scarce resources for the Defendants to attempt to improve the structures at the Reception and Evaluation Center when the Defendants have pressing needs at their other institutions. Moreover, the court finds that the constitutional rights of juveniles who are confined to the Reception and Evaluation Center between the date of this order and the date of the closing of the institution will not be violated in light of the fact that the average stay at Reception and Evaluation is twenty-one days, and the maximum stay, by law, may not exceed forty-five days. *Cf. Bell v. Wolfish*, 441 U.S. 520, 543 (1979) ("We simply do not believe that requiring a detainee to share toilet facilities and [an] admittedly

rather small sleeping space with another person for generally a maximum period of sixty days violates the Constitution.").

II

The Long-Term Institutions

The three long-term institutions, or training schools,²⁸ are Willow Lane, John G. Richards, and Birchwood. The long-term institutions generally house between 670 and 720 juveniles. The average length of stay is seven months. Following is a brief description of the physical plant and functions of the three campuses.

Willow Lane houses all of the female juveniles, as well as the less aggressive and younger males. The Willow Lane campus consists of some twenty structures generally constructed in 1966 and 1972. The campus contains five dormitories, a cafeteria, and educational, medical, and administrative facilities. The infirmary (constructed in 1972) and the dental facility (constructed in 1977) serve all three long-term campuses.

John G. Richards houses older male juveniles and contains many of the special program dorms. The John G. Richards campus, which was generally constructed in the early 1970s, consists of five dormitories, a cafeteria, and administrative and recreational facilities. The campus also contains the "Intake/SPU" unit, which serves as a maximum security facility for the John G. Richards and Willow Lane campuses. The cafeteria facility, constructed in 1970, provides food preparation and dining services for the John G. Richards and Birchwood campuses, as well as for the Reception and Evaluation Center.

Birchwood houses the oldest, most aggressive male residents. The Birchwood campus is

²⁸ Throughout this opinion, the terms "juvenile correctional facility" and "training school" are use interchangeably.

the newest of the four campuses. Generally constructed in the mid-1970s, the campus contains four dormitories, administrative offices, and vocational and academic educational facilities. It also has an artificially surfaced playing field, a gymnasium, an auditorium, covered picnic shelters, and a baseball diamond. Also located on the Birchwood campus is the Santee unit, a maximum security facility.

All of the dormitories on the three campuses of DJJ have air conditioning, heating, hot and cold water, fire detection and sprinkler systems, and water fountains. Most residence halls are arranged with several wings of rooms in a dormitory-style configuration, with a central lavatory/shower facility and one or more common areas for daily activities. In many cases, the common areas are utilized for additional bed space. In general, the architecture of the school facilities at the three campuses appears to be comparable to other educational facilities constructed during the same time frame.

Although the Plaintiffs' claims originally included all four institutions at DJJ, as noted earlier, the court has determined that no affirmative relief is necessary with regard to the Reception and Evaluation Center. The remainder of this order, therefore, will address the totality of the conditions of confinement at the three long-term institutions. Except for the deficiencies noted below, the court finds no other constitutional or statutory violations of the Plaintiffs' rights.

A. Discipline

An effective discipline system is necessary in a juvenile correctional institution to aid staff in controlling violence and other inappropriate behavior, to maintain safety and security, and to serve as a training tool for the overall purpose of correcting the juveniles' behavior. The Plaintiffs mount a variety of attacks against the system of discipline in place at DJJ facilities, which depends primarily upon the use of lock-up units and CS gas to punish juveniles for

disciplinary infractions. The Plaintiffs challenge the procedures by which juveniles are placed in lock-up units and the Spartan conditions of the lock-up cells themselves. They also seek to have the court impose a one-hour limitation on the duration of their stay in lock-up facilities. They seek an order of this court imposing "less intrusive and more effective methods of maintaining security and control." The Plaintiffs also seek to have the court prohibit the use of CS gas altogether.

With the exception of the use of CS gas, discussed more fully below, the court has determined that the United States Constitution does not require this court's intervention in the disciplinary procedures at DJJ.

Use of CS Gas

CS gas is a potent form of tear gas used primarily for riot control. It draws its name from Ben Courson and Roger Staughton, the American chemists who developed it. The evidence at trial disclosed that, until recently, DJJ agency policy permitted the use of CS gas to "maintain control," as well as to prevent harm or the threat of harm to individuals. CS gas irritates the mucous membranes of those who are exposed to it. Exposure to the gas causes instant pain and spasms in the eyelids, coughing fits, and breathing problems. Documented studies indicate that CS gas can cause damage to the cornea and potential blindness; damage to the skin, such as chemical burns, blistering, and scarring; and severe complications for asthmatics, including respiratory damage and chronic lung disease.

CS gas has been used on a fairly regular basis in the DJJ institutions. The Defendants' own records indicate that gas was used on juveniles more than 180 times in the 1993 calendar year. To its credit, DJJ requires that strict records be maintained any time gas is used on a juvenile. After reviewing the Defendants' use of force/gas reports, however, the court finds that

gas has been used for purposes other than the protection of staff or others. Indeed, the Defendants' own records indicate that gas was used "to enforce an order" in more than fifty incidents in 1993.

The court finds that the use of CS gas upon juveniles is counterproductive. It causes more anger in the juveniles toward the adults who are supposed to be caring for them. The use of gas as a form of punishment teaches the victims to inflict pain as a method of controlling others and makes the juveniles more volatile, more aggressive, and less likely to respond properly to authority figures. Moreover, the inappropriate use of CS gas may cause long-term medical complications for the juveniles. For these reasons, the court concludes that the indiscriminate use of CS gas violates the juveniles' constitutional rights under the Due Process Clause. Based upon the testimony presented on this issue, the court finds that gas should be used only when a genuine risk of serious bodily harm to another exists and other less intrusive methods of restraint are not reasonably available.

At trial, DJJ Director Flora Brooks Boyd testified that she intended to implement a new policy regarding the use of CS gas consistent with the requirements stated above. She also testified that she plans to maintain a reliable system to monitor gas use and will personally review every incident in which gas is used. The Defendants should therefore include a detailed plan for the use of CS gas, consistent with the requirements of this section, as part of the overall plan submitted in response to this court's order.

Except for the use of CS gas, the court finds no other constitutional deficiencies in the discipline system at DJJ facilities. For this court to intervene in the routine administration of disciplinary programs at DJJ would be to substitute the court's judgment for that of trained penological authorities charged with the administration of DJJ facilities.

B. Fire Safety

The Plaintiffs presented testimony on one issue related to fire safety: whether securing the individual cells of the two lock-up units, known as Santee and the SPU unit, with padlocks creates an unreasonable risk of harm to the juveniles who are confined in these units.

At DJJ, the greatest risk of harm from fires is from mattress fires. Mattress fires emit insufficient heat to set off the sprinkler system, but cause substantial amounts of smoke which can be fatal to the occupants of the units if those juveniles are not removed quickly. In each of the two disciplinary units at DJJ, the thirty individual cells are all secured with individual padlocks. In the event of a fire, each cell must be opened by hand, a time-consuming process which constitutes an unreasonable risk of harm to the Plaintiffs housed in these two units. The court thus concludes that the use of individual padlocks on the cells in the Santee and SPU lock-up units unreasonably infringes upon the Plaintiffs' safety interest. While locking devices are undoubtedly necessary for security and control, there are alternative locking methods available which do not have the same degree of inherent risk to safety. During the trial, the Defendants agreed to install a "gang" locking system for these units, which would allow supervisory personnel to simultaneously unlock all doors in the event of a fire. The court finds that such a system would be adequate to protect the safety interests of the Plaintiffs. The Defendants should include a reasonable timetable for the incorporation of a gang locking system into the two lock-up units as a part of the remedial plan submitted in response to this order.

C. Food Service

Juveniles at the John G. Richards and Willow Lane institutions dine in the dining facilities on those campuses. Neither Birchwood nor the Reception and Evaluation Center has its own cafeteria facility. Food is prepared at John G. Richards and shipped to Birchwood for two meals,

and the juveniles at Birchwood are transported to John G. Richards for the third meal each day. Similarly, food is transported from John G. Richards to the Reception and Evaluation Center for service to the juveniles at that institution.

At trial, several juveniles, and even the food services director, testified that frequently cockroaches and other foreign matter are present in the food served to the juveniles. The court finds that the Defendants have an obligation to provide minimally adequate nourishment to juveniles housed at their institutions, and that food containing cockroaches and other foreign matter falls below what may be deemed minimally adequate.

The Defendants have conceded that they must eliminate these problems and have begun measures to correct them. At trial, the food services director testified that the department has entered into a new contract with an exterminator, has installed new doors and weatherstripping in response to a consultant's suggestion, and has implemented improved procedures for washing utensils and trays. As a part of the remedial plan submitted in this case, the Defendants should furnish a progress report on these and any other improvements that will assure the removal of cockroaches and other foreign matter from food served to juveniles at DJJ.

D. Classification

Classification, for the purposes of this case, is the process of separating aggressive juveniles from passive ones and determining appropriate levels of restraint for each juvenile based upon the threat the juvenile presents to other juveniles and to the public. The juveniles possess a clearly recognized liberty interest in being free from unreasonable threats to their physical safety. *See Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982). On the other hand, the general public is entitled to reasonable protection from juveniles incarcerated at DJJ.

For these reasons, juveniles in DJJ facilities should be screened and classified, so that the

aggressive juveniles are identified and separated from more passive juveniles. The level of restraint to be used for each juvenile should be based upon some rational professional judgment as to legitimate safety and security needs. Inherent in this right is a system of periodic review of the initial placement to evaluate whether subsequent events demonstrate the need for a reclassification of the juvenile's security requirements.

Until recently, a rational and minimally adequate system of classification did not exist at DJJ. Safety to juveniles and to the public was occasionally threatened by this deficiency.

In response to this litigation, the Defendants have recognized their obligation to establish a minimally adequate classification system and, by the time of the court's last visit on October 11, 1994, had begun to fulfill that obligation by placing into operation a special department, known as the Admissions Unit, to appropriately classify and place juveniles in the long-term institutions. The court finds that the Admissions Unit should satisfy the requirements of the Constitution in terms of classification. The full details of the classification system that has been established should be included in the overall remedial plan submitted to the court for its review.

E. Education

The campus of the South Carolina Department of Juvenile Justice is an independent school district subject to all state and federal laws regarding public education. All juveniles in the four institutions attend school from 8:30 a.m. until 3:30 p.m., five days a week. Unlike their counterparts in the traditional school system, however, juveniles at DJJ are required to attend school year round. Students generally attend the school associated with the campus where they reside, although students who are ahead of or behind most of their peers may be transported to another school on the DJJ campus.

At Birchwood High School, vocational education is available in a number of fields, such as graphic art and communication, automobile mechanics and body work, vocational rehabilitation work program, carpentry, building construction, and introduction to personal computers.

Generally speaking, classes at the DJJ schools are small, with a sixteen-to-one student/teacher ratio in regular education and an eight-to-one student/teacher ratio in special education.²⁹ The average DJJ student is three years below his or her expected grade level. The educational program is highly remedial, allowing extensive mainstreaming of juveniles receiving special education.

The court finds that there are a disproportionately high number of juveniles at DJJ school facilities who are suffering from a "disability" as that term is defined in the Individuals with Disabilities Education Act ("IDEA"), 28 U.S.C. § 1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.* As a recipient of federal funds, DJJ is under a legal obligation to identify and evaluate juveniles who are in need of special education and related services. For juveniles who are thus identified, the educational institution must formulate and implement an "Individualized Education Program" (IEP) for the juvenile.

As of the time of trial, the percentage of juveniles in special education programs at DJJ schools ranged between 17.9% (at Birchwood) and 32.5% (at Willow Lane). The Defendants' own educators admitted that perhaps as many as fifty percent of the juveniles at DJJ are in need of special education. The court finds that the Defendants have not adequately identified juveniles in need of special education and, in some instances, have not fully formulated and implemented IEPs for those juveniles who have been identified.

Much of the difficulty that DJJ has experienced in this regard stems from two problems

²⁹ Outside of DJJ institutions, the statewide student/teacher ratio is thirty-to-one for high school and twenty-five-to-one for elementary schools.

not of its own making. First, local school districts around South Carolina have traditionally been reluctant to forward a juvenile's school records when he or she is sent to DJJ. And second, the South Carolina Department of Education has interpreted IDEA and Section 504 rigidly, requiring DJJ to formulate not one but two IEPs for the juvenile: one during the juvenile's brief stay at the Reception and Evaluation Center and another if and when the juvenile is confined to a long-term institution. The court finds that the inability to obtain proper school records and the burdensome requirement of formulating an interim IEP for juveniles at the Reception and Evaluation Center have impaired the Defendants' ability to properly identify and serve juveniles confined to the long-term institutions who are in need of special education services. As will be seen in the Conclusions of Law section of this order, these two impediments to full implementation of IDEA and Section 504 have now been removed. With these obstacles out of the way, the court must expect full compliance with all federal statutes regarding educational needs of students with disabilities.

Aside from the deficiencies noted above, the court finds that no other aspect of the education program at DJJ violates the juveniles' constitutional or statutory rights on a class-wide basis.

F. Medical Services

Among the traditionally recognized liberty interests of the Plaintiff class that survive confinement is the right to minimally adequate health care. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Testimony at trial disclosed that medical resources for the various DJJ institutions are stretched to the limit. The institutions are forced to rely upon only three full-time nurses and a handful of part-time nurses to serve a population totaling almost 900 juveniles. One medical doctor is under contract to visit the facilities once a week for a total of three hours. For this

reason, DJJ is forced to rely upon emergency rooms at local hospitals for matters, such as cuts requiring sutures, that could be handled in house much more efficiently and less expensively.

Both the medical experts and the DJJ medical staff testified that the inadequate number of nurses, nurse practitioners, and physicians prevents DJJ from providing appropriate medical care and places the health of all juveniles in the population at risk. At minimum, DJJ should employ a sufficient number of trained medical staff to provide the basic components of a medical system for the institutions. Central to the issue of medical staffing is the necessity of a supervising physician to assure that the overall system is functioning properly to meet the health needs of the population. Nursing staff should be available to adequately provide daily review of sick call requests, to administer reasonably prompt medical care, and to train other staff members in identifying and monitoring the juveniles' illnesses.

Acting to correct an admittedly deficient system, DJJ has contracted with the South Carolina Department of Health and Environmental Control (DHEC) to run the health care program at the DJJ facilities. At trial, the Defendants were optimistic that the unconstitutional conditions regarding health care would be cured if and when DHEC begins providing services. During the trial of this case, the Defendants were still working out the details of the arrangement with DHEC; therefore, the Defendants must submit the final proposal with DHEC to the court for its review as part of the overall plan submitted in this case.

G. Grievance/Ombudsman System

The court finds no violation of the juveniles' constitutional rights in regard to the operation of the grievance and ombudsman system at DJJ facilities. Were this court to order the reforms to the grievance and ombudsman system suggested by the Plaintiffs' counsel, the court would impermissibly be encroaching upon a policy decision better left to the agency.

H. Access to Legal Assistance

The Plaintiffs contend that they are constitutionally entitled to reasonable access to the courts during their stay at DJJ and that the court should order the Defendants to provide "an adequate law library or adequate assistance from persons trained in the law." Although the Supreme Court has extended such protections to adult prisoners incarcerated for violations of the law, *see Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Court has never extended its holding to juvenile delinquents being housed at training schools for a beneficent purpose. Admittedly, one district court has extended the right of access to courts to juvenile facilities; but it did so primarily because the stipulated record in that case disclosed that most of the juveniles had been committed to the institutions without having been represented by legal counsel. *See Morgan v. Sproat*, 432 F. Supp. 1130, 1158 (S.D. Miss. 1977). Moreover, the court in *Morgan* merely accepted a proposal by the defendants that juveniles be notified that they might contact a community legal services association if they needed legal service.

The situation in South Carolina is quite different. State law provides that any juvenile involved in a delinquency proceeding that may result in commitment to an institution has the right to retain counsel or the right to court-appointed counsel at state expense if he or she cannot afford an attorney. S.C. Code Ann. § 20-7-740 (Law. Co-op. 1985). In like manner, state law provides that juveniles appearing before the Juvenile Parole Board have the right to counsel of their choice or court-appointed counsel if they cannot afford such assistance. S.C. Code Ann. § 20-7-2105 (Law. Co-op. 1985). Furthermore, state law provides that after an initial waiting period, each juvenile has the right to appear before the Juvenile Parole Board every three months for the purpose of parole consideration. S.C. Code Ann. § 20-7-2095 (Law. Co-op. Supp. 1993). In addition, the evidence at trial disclosed that juveniles are permitted periodic contacts with the

outside world and thus would have the ability to secure the services of a legal aid society or other appropriate legal representative. Because the state of South Carolina provides ample opportunity for court-appointed legal representation — both at the time of commitment and as frequently as once every three months for parole consideration — and because DJJ does not prohibit the juveniles from periodic contacts with the outside world, the court finds that the Plaintiffs have not been deprived of a right to reasonable access to the courts.

In regard to the request for a law library, the court finds that the Plaintiffs have no constitutional right to a law library. As a practical matter, juveniles between the ages of twelve and nineteen, who, on average, are three years behind their expected grade level, would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds.

H. Programs

It was apparent from the testimony in this case that programming geared toward correcting the behavior of juveniles is central to the very nature of a juvenile training facility. Virtually every witness who testified in the case asserted that appropriate programming can make a difference and substantially enhance the juveniles' opportunity to succeed upon release from confinement. Ms. Marlene McClain, the Chairman of the Juvenile Parole Board, testified that the Board would release juveniles sooner (and thereby reduce overcrowding) if DJJ maintained a minimally adequate level of programming. Additionally, because such programming improves the juveniles' behavior while confined, it reduces the need for disciplinary lock-up and enhances the safety of the institution for the juveniles and the staff. Without minimally adequate programming, the agency is simply warehousing the juveniles and ignoring the statutory purpose of their confinement. As journalist Howard James observed, "Too often all that society provides

[for juveniles] is storage — like ripe peaches in a warm cellar."³⁰

The court finds that, under the Constitution, a minimally adequate level of programming is required in order to provide juveniles with a reasonable opportunity to accomplish the purpose of their confinement, to protect the safety of the juveniles and the staff, and to ensure the safety of the community once the juveniles are ultimately released. Minimally adequate program services should be designed to teach juveniles the basic principles that are essential to correcting their conduct. These generally recognized principles include: (1) taking responsibility for the consequences of their actions; (2) learning appropriate ways of responding to others (coping skills); (3) learning to manage their anger; and (4) developing a positive sense of accomplishment.

It is in the area of programming that conditions at DJJ have improved most during the pendency of this litigation. When this action was initiated, the Defendants offered the juveniles a very limited number of programs: anger management, drug and alcohol therapy, and, if appropriate, sex offender treatment. Since this lawsuit was filed, however, the Defendants have initiated several innovative programs, including the Junior Reserve Officer Training Corps

(JROTC) Program, the START Program, the Cities in Schools Program, and the Omega Boys Choir.³¹ Juveniles who opt to participate in these programs and who meet the entrance requirements are housed in special dormitories. Preliminary data from all of these programs indicate that the juveniles are much better behaved while in the system, are paroled at their minimum guidelines, and do well after they are released from confinement. The administrators of these programs reported that there is little or no violence in these dorms and that CS gas is not used. None of the twenty-two graduates of the JROTC program has been rearrested, and only

³⁰ Howard James, *Children in Trouble* 32 (1970).

³¹ The JROTC and Cities in Schools Programs at DJJ are the only such programs at a juvenile correctional facility in the United States.

about fifteen percent of the START graduates have returned to confinement. Significantly, all of the juveniles in these special programs are housed in dormitories that exceed, to some extent, the ACA-rated capacity for population. Rehabilitative efforts are successful with these groups of juveniles, however, because the programs take the juveniles out of the overcrowded dormitories for substantial periods of time and provide juveniles with reasonable opportunities to correct their behavior.

At trial, the Defendants conceded that they have an obligation to develop effective programming for all of the juveniles housed at DJJ facilities. The programs described above have been implemented incrementally and presently serve no more than half of the juveniles housed at DJJ facilities. For the juveniles who are not enrolled in these special programs, the Defendants must develop a reasonable timetable for developing minimally acceptable programs, as defined herein, for juveniles during their stay at DJJ.

I. Overcrowding and Staff Levels

At present, the number of juveniles housed in the DJJ long-term institutions remains at a fairly constant level between 670 to 720 juveniles. The Defendants have conceded in their pleadings that the facilities at issue in this litigation are overcrowded in a constitutional sense. Thus, the only questions to be resolved by this court are the extent of the overcrowding and the appropriate remedy. The Plaintiffs seek to have the court adopt standards promulgated by the American Correctional Association, which, if applied to the institutions in dispute here, would yield a total rated capacity of only 299 juveniles. The Plaintiffs would have the court order the periodic release of juveniles until the population at DJJ approaches the ACA figure. The Defendants initially conceded that the ACA standards were applicable in this case, but by the time of the June 1994 trial, they had modified their position so as to assert that a population reduction

to between 450 to 520 juveniles is appropriate.

As will be seen in the Conclusions of Law section of this opinion, the court must respectfully decline the invitation to adopt the ACA standards as the constitutional minimum. The Supreme Court itself has declared that such standards represent "goals" of the sponsoring organization, but do not establish the benchmark from which constitutional determinations may be made.

For this reason, the court's findings regarding overcrowding are based not upon ACA standards, but upon the court's review of the extensive record in this case and its three visits to the institutions under challenge. Additionally, as the court noted in its March 31, 1992 order, the overcrowding issue may not be considered in a vacuum. The issues of population, program effectiveness, physical plant, staffing, security, and other conditions of confinement have a direct bearing upon one another.

The court finds that a reasonable level of population at DJJ is that level which provides the minimum amount of physical space juveniles need for adequate living conditions and does not unreasonably threaten safety or unreasonably frustrate the purpose of confinement. Applying this standard to the facilities at issue here, the court concludes that the long-term institutions at DJJ currently house more juveniles than the Constitution will allow. All of the witnesses, including administration and staff of DJJ, agreed that at current population levels, DJJ's systems relating to security and safety are overburdened to such an extent that DJJ cannot adequately perform its mission. The witnesses agreed that overpopulation interferes with the underlying purpose of correcting the juveniles' behavior and providing safety for the general public. This testimony is corroborated by the current recidivism rate for DJJ adolescents (as high as eighty-two percent) and the periodic escapes of juveniles from the institutions.

As noted previously, the court visited the facilities in dispute on three occasions. These

visits confirmed that many of the dormitories are severely overcrowded. For example, the Moultrie dormitory on the Birchwood campus has twenty individual rooms, but sometimes houses as many as ninety juveniles. At Moultrie, beds are routinely placed in the hallways and in the dayrooms. The beds in the dayrooms are scarcely two feet apart, leaving the juveniles with hardly enough room to maneuver to their beds from the doorway. Occasionally, mattresses must be placed on the floor.

Having determined that the long-term institutions are overcrowded, the court is nevertheless constrained to conclude that an order reducing overpopulation by the simple expedient of releasing juveniles is not in the best interest of the juveniles or the public, nor is it required by the Constitution.

As has been noted, the last dormitories at the long-term institutions began operating in the mid-1970s. In South Carolina, population generally,³² and juvenile crime in particular,³³ have both increased dramatically since that time. It would be an understatement to say that DJJ's building program has not proceeded apace with the significant growth in population and juvenile

delinquency in South Carolina; there has, in fact, been *no* building program for the past twenty-five years. Thus, any effort to reduce overcrowding by working down to the design capacity of

³² The population in South Carolina has increased by forty percent since the last dormitory rooms were constructed at DJJ. See U.S. Bureau of Census, U.S. Department of Commerce, *1970 Census of Population* (1971) and U.S. Bureau of Census, U.S. Department of Commerce *Statistical Abstract of the United States: 1994* (1994).

³³ The unprecedented increase in juvenile crime — particularly violent juvenile crime — in the United States and in South Carolina is well documented. In the ten-year period between 1982 and 1991, the number of juvenile arrests for murder in the United States increased by ninety-three percent and aggravated assault arrests increased by seventy-two percent. Office of Justice Programs, U.S. Department of Justice, *Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders 2* (1994). In South Carolina, violent juvenile crime increased one hundred and forty-nine percent between 1988 and 1992 alone. Uniform Crime Reports Division, South Carolina Law Enforcement Division, *Crime In South Carolina 1993*.

the present buildings is necessarily flawed because it is premised on the indefensible notion that the number of juveniles who need to be incarcerated in South Carolina in 1995 equals the number of bed spaces that were constructed on the DJJ campus a quarter century ago.

The Plaintiffs argue that the court could order an immediate release of 200 juveniles with no threat to public safety. The Plaintiffs base this argument upon the notion that a significant number of juveniles incarcerated at the long-term facilities are "lightweight" offenders who have been sent to DJJ for relatively minor infractions. While the argument that relatively non-violent offenders should immediately be released to alleviate overcrowding has obvious superficial appeal, the court has determined that very few juveniles incarcerated at the long-term facilities fall into this category.³⁴ As previously noted, only about four percent of the approximately 24,000 juveniles who are processed through the family courts of South Carolina each year end up in the long-term institutions. In other words, DJJ intake workers and family court judges exercise their discretion in favor of diversion and probation in an extremely high number of cases, reserving long-term institution beds for more-violent juveniles truly in need of secure confinement.

In an effort to obtain a fair assessment of the types of juveniles committed to the long-term institutions, the court requested the Defendants to provide confinement records of all juveniles who were housed at the long-term institutions one month prior to trial. The Defendants furnished these records, and the court has reviewed them in exhaustive detail. These records reveal that, for the most part, the juveniles confined at the long-term institutions have committed serious offenses and require secure confinement. For example, Table 1 attached to this order summarizes the offenses for which juveniles were committed to DJJ as of May 4, 1994. Although over half

³⁴ As depicted on Tables 1 and 2, only 13 of the 716 juveniles at DJJ as of May 4, 1994 were committed for what were described at trial as the "lightweight" offenses of truancy, shoplifting, and running away from home. None of the juveniles was incarcerated for being incorrigible.

of these juveniles were committed for a "serious/violent" offense as defined by DJJ, the department's definition is underinclusive — it does not accurately reflect the gravity of the offenses for which the other juveniles are committed. As Table 1 indicates, crimes such as carrying a weapon on school grounds, discharging a firearm into a dwelling, and possession of LSD or cocaine with intent to distribute are not classified by DJJ as serious or violent crimes. Contrary to the assertions of some of the witnesses in this case, a relatively insignificant number of juveniles at DJJ have been committed for minor property offenses or status offenses.³⁵ Most of the juveniles who are not classified by DJJ as violent or serious offenders have nevertheless demonstrated severe antisocial conduct dangerous to the general public.

As an additional reason for declining to order a release of juveniles, an outright release of juveniles to their homes would not serve the rehabilitative goal enunciated by the Children's Code. The parties have argued, and the experts have suggested, that juveniles released pursuant to an order of this court could be sent to "community based" facilities to assist them with their ~~reintegration into society. In fact, DJJ has precious few such community-based programs in~~ place,³⁶ and those that are in operation are, like the long-term facilities, stretched to the limit. The evidence disclosed that, outside of the Columbia campuses, DJJ has available a total of ninety-six group home beds, sixty long-term foster care beds, and one hundred and ten marine

³⁵ A recently passed law will prohibit family court judges from sentencing juveniles to DJJ for contempt of court. See Act of June 2, 1994, Act No. 7, § 75, 1995 S.C. Acts ____, ____ (effective Jan. 12, 1995, without signature of the Governor) (to be codified at S.C. Code Ann. § 20-7-2205). In the past, family court judges have occasionally used their contempt power to commit juveniles for repeated episodes of what are generally termed "status" offenses — running away from home, truancy, and incorrigibility. The new legislation simply imposes an absolute prohibition against such contemnners being placed at DJJ facilities. It provides no alternative placement options for family court judges. Because there are so few contemnners currently occupying beds at DJJ, the new law's effect on overcrowding will be negligible.

³⁶ The community-based programs, such as DJJ's group homes and the Marine Institute (run by a private company under a contract with DJJ), are not within the scope of this litigation.

institute beds. These facilities are all operating at maximum capacity levels. Moreover, a large percentage of these slots are in facilities that are owned and operated by private groups who have contracted with DJJ to provide services to a small number of juveniles who meet stringent eligibility criteria. In short, the limited number of community-based programs presently available — all of which are operating at capacity levels — are not capable of absorbing additional juveniles released from the long-term institutions.

Because these community-based alternative programs are operating at full capacity, if the court were to order a release of juveniles from the long-term facilities, the court would, for all practical purposes, be ordering an outright release of juveniles to their homes without even minimal efforts at supervision or rehabilitation. Such a practice would disserve juveniles who would then receive even less rehabilitation than they are currently receiving at DJJ long-term facilities. If this court accepts, as it must, the proposition that the overriding purpose of juvenile commitment in South Carolina is rehabilitation, then the court may not order an outright release of juveniles as a constitutional remedy when such a release would serve no rehabilitative purpose.

Moreover, this court cannot ignore what the Supreme Court has described as the "legitimate and compelling state interest in protecting the community from crime." *Schall v. Martin*, 467 U.S. 253, 264-65 (1984). As the Supreme Court noted in *Schall*, the harm suffered by a violent crime victim "is not dependent upon the age of the perpetrator." *Id.*³⁷

³⁷ Included among the Plaintiffs in this case is a juvenile who wrote the following letter to Donald "Pee Wee" Gaskins. At the time, Gaskins was a death-row inmate at one of South Carolina's adult prisons:

Mr. Gaskins:

June 9, 1991

Howdy! Let me start off by saying my name. My name is ***** I want you to know that you are my hereo [sic] and I admire you very much. I don't care what everybody says about you, but your [sic] the coolest mass murderer I know of. I like your style, background and everything else. I just

For all of the foregoing reasons, the court must to reject any effort to relieve overcrowding that relies upon the simplistic and unwise approach of releasing juveniles back to their communities in an effort to reduce population to the design capacity of the DJJ physical plant constructed in the 1970s. Rather, the court must order the Defendants to construct additional facilities to house juveniles who are committed to DJJ. Because it is well established that the state should be given considerable latitude in developing an appropriate remedial plan, the court will allow the Defendants to decide whether these additional facilities should be comprised of additional dormitories at the central location in Columbia or decentralized, community-based correctional programs throughout South Carolina.

Most of the witnesses who testified at trial advocated a decentralized approach. In fact, most experts in the field of juvenile corrections agree that decentralized alternative facilities are more effective at reducing recidivism. Although regional facilities may be more expensive to maintain, juveniles who are housed at decentralized alternative facilities, such as group homes,

hope your [sic] not a fag or a Yankee. Let me tell you some things about me before I go on. I'm 14 years old . . . and I live in *** . . . I'm at DYS at Willow Lane for a sexual crime with a female. She called rape on me, I'm goind [sic] to kill her and her family when I get out. I've killed before but someone else got the rap for it. I work under Brains. I don't put up with bulls*** either. But back to you. I heard that your [sic] out of appeals and there [sic] thinking of throwing the switch on you. I'd hount [sic] the f***** if they did that to me. Then when they died, beat them all the way to hell.

Maybe you should kill someone else so it would take longer for them to turn you into a chicken. Fry a police man. They'll take time to trial [sic] you on that one. Maybe tie him up and put some TNT around his neck and fix it up so you can go back a couple of steps and watch him get his head bounced around the walls. I wish I could see that. I'd laugh like a motherf*** . . .

See Ya

Your not so secret admire [sic]

may be eligible for federal medicaid funds and other programs that could reduce the impact on the DJJ budget.³⁸ Additionally, decentralized facilities can serve as multi-purpose operations, such as "stepdown programs" or halfway houses for juveniles returning to their communities after confinement at the long-term institutions, or perhaps as alternative sites for lightweight offenders who need to be confined in a less restrictive environment for a relatively short period of time.³⁹

Two recent studies in South Carolina have advocated decentralizing juvenile correctional facilities in an effort to move to community-based programs. Specifically, the Juvenile Justice Task Force Report strongly advocates the decentralization of correctional facilities and the use of innovative community-based corrections approaches in an effort to stem the rising tide of juvenile crime in South Carolina. The Task Force concluded that "large, centralized facilities . . . are inherently less effective than smaller, regional facilities in altering juvenile behavior." *Juvenile Justice Task Force, Report, supra*, at 17.⁴⁰

Similarly, in a 1992 report prepared at the request of DJJ, Rosser Fabrap, a private consulting group, recommended building three regional youth centers — each in two phases —

to deal with the problem of juvenile delinquency and overcrowding in South Carolina. The

³⁸ The recently passed Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (effective Sept. 13, 1994), contains provisions for federal grants to states to implement community-based correctional facilities for juveniles. *E.g., id.* § 30701(a), 108 Stat. at 1855.

³⁹ Regional facilities could also be used for status offenders and contemnners who are now prohibited by law from being confined at DJJ's Columbia facilities. *See supra* note 38; *see also* H.R.J. Res. 434, 110th Leg., 2d Sess., 1994 S.C. Acts 4811, 4812 (effective May 27, 1994) (recommending that DJJ evaluate facilities vacated by base closings in the state for possible use as residential facilities for shock incarceration and job training programs for nonviolent juveniles between the ages of fifteen and eighteen).

⁴⁰ The neighboring state of Georgia has opted to decentralize its juvenile facilities. In Georgia, there are twenty-one short-term regional youth detention centers operating in eight regions (twenty are state operated; one is operated by Fulton County and is partially state subsidized). In addition, Georgia maintains four long-term centers, known as Youth Development Centers.

Rosser Fabrap report was the product of an intensive study of juvenile crime trends in South Carolina and of the facilities currently available at DJJ.

Several countervailing considerations militate in favor of additional facilities at the DJJ Columbia campus. First, the department already owns 200 acres of land, most of it behind an escape-resistant fence, and the addition of dormitories and related facilities to this campus would benefit from economies of scale. Furthermore, because South Carolina is a relatively small state, families of juveniles can travel a fairly short distance to visit their children at the Columbia campus. Many states, such as New York, Texas, and California, that have moved to decentralize their juvenile correctional facilities have done so in an effort to place the facilities nearer to the homes of juveniles. Obviously, this is not as significant a factor in South Carolina.

In any event, this court will not attempt to suggest to the Defendants which approach is preferable. Decisions about the type, location, and structure of additional facilities are quintessentially decisions that should be made by the state's elected policymakers, not by this court.⁴¹ For now, this court will simply declare that the juvenile population at the three long-

term DJJ facilities is unconstitutionally overcrowded and will allow the Defendants a reasonable opportunity to develop a plan to alleviate the overcrowding. This plan should not include an outright release of juveniles to their homes. The court declines to establish a minimum square-footage requirement per juvenile, because the Supreme Court has indicated that a rigid mechanical test is inappropriate. As this court has noted, overcrowding may be determined only in light of

⁴¹ In the crime bill that became effective on January 12, 1995, the South Carolina General Assembly apparently expressed its preference for decentralized juvenile correctional facilities. See Act of June 2, 1994, Act No. 7, § 63(i), 1995 S.C. Acts ____, ____ (effective Jan. 12, 1995, without the signature of the Governor). Although neither party in this case brought this provision to the court's attention, the Act directs the Department of Juvenile Justice to develop a long-term plan to decentralize the DJJ "facilities in Columbia and reduce the number of secure beds utilized for nonviolent, nonrepeat offenders through the use of programs involving more intense supervision and treatment services at the community level." *Id.*

many conditions of confinement, such as time spent outside of the room, the types of programs in place, and the amount of common area available. When the remedial plan required by this order is submitted to the court, the court will review the overcrowding question, as it should be reviewed, within the broader context of the overall remedial plan submitted.

In addition, the court finds that staffing levels at DJJ facilities, like the physical plant, are geared towards the needs of the 1970s era. As new facilities are constructed, DJJ must employ sufficient numbers of appropriately trained staff (including juvenile correctional officers, social workers, and psychologists) to adequately supervise and rehabilitate juveniles committed to the custody of DJJ. Like the issue of overcrowding, staff ratios may not be examined in a vacuum, but must be considered in the context of the overall conditions and programs at DJJ facilities. For this reason, the court will decline to impose rigid mathematical formulae on the Defendants, but will instead allow the Defendants to submit a staffing proposal, which will be considered in the context of the overall remedial plan to be implemented in this case.

CONCLUSIONS OF LAW

This court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343(3), and declaratory and injunctive relief are authorized pursuant to 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 65.

I.

The Constitutional Standard

Courts around the country are not in agreement as to the appropriate federal standard by which to judge state juvenile detention facility conditions. The Seventh Circuit has applied the cruel and unusual punishment test of the Eighth Amendment. *Nelson ex rel. Nelson v. Heyne*, 491 F.2d 352, 355 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *cf. Morales v. Turman*, 562

F.2d 993, 998-99 (5th Cir. 1977) (in dictum, expressing doubt about juveniles' right to treatment under the Due Process Clause, but recognizing that the Eighth Amendment may afford relief to the plaintiffs). The First, Ninth, Tenth, and Eleventh Circuits have applied the Due Process Clause of the Fourteenth Amendment. *Gary H. v. Hegstrom*, 831 F.2d 1430, 1431-32 (9th Cir. 1987); *H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080, 1084-85 (11th Cir. 1986); *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984); *Milonas v. Williams*, 691 F.2d 931, 942 & n.10 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). The United States Supreme Court has not decided the issue. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977) (expressly reserving the question whether the Cruel and Unusual Punishment Clause applies to juvenile institutions).

After reviewing these authorities, the court has determined that the Due Process Clause of the Fourteenth Amendment, which implicitly encompasses the protections of the Eighth Amendment, is the appropriate standard for reviewing the conditions at the DJJ facilities.

~~Adoption of the more stringent Due Process Clause is appropriate in this case because the~~
juveniles incarcerated at DJJ facilities have, with few exceptions, not been convicted of a crime; rather, they have merely been adjudicated to be juvenile delinquents. *See Santana*, 714 F.2d at 1179 ("[J]uveniles . . . who have not been convicted of crimes[] have a due process interest in freedom from unnecessary bodily restraint which entitles them to closer scrutiny of their conditions of confinement than that accorded convicted criminals."); *cf. Ingraham v. Wright*, 430 U.S. at 671-72 n.40 ("Eighth Amendment scrutiny is appropriate only after the state has complied with the constitutional guarantees traditionally associated with criminal prosecutions.").

South Carolina law clearly establishes that the purpose of confining juveniles who violate the law is not to punish them, but to provide training and services to correct their delinquent behavior — that is to say, to rehabilitate them. For example, the Children's Code, the statutory

authority for confining juveniles at DJJ facilities, declares as a part of its "Children's Policy" that "[f]or children in need of services, care and guidance, the State shall secure those services as are needed to serve the emotional, mental and physical welfare of the children and the best interests of the community." S.C. Code Ann. § 20-7-20(D) (Law. Co-op. 1985). Furthermore, this policy applies to "children . . . who by their circumstance or action violate the laws of this State and are found to be in need of treatment or rehabilitation." S.C. Code Ann. § 20-7-20(B) (Law. Co-op. 1985).⁴²

In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Supreme Court held that, in the non-criminal setting, there must be a relationship between the purpose for which an individual's liberty is taken and the treatment provided to that person. In *Jackson*, a case involving a mentally retarded individual, the Court stated: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738.

Numerous district courts have relied upon the rationale employed by the Supreme Court in *Jackson* to hold that where, as in South Carolina, the purpose of incarcerating juveniles in a state training school is treatment and rehabilitation, the Due Process Clause "requires that the conditions and programs at the school must be reasonably related to that purpose." *Morgan v. Sproat*, 432 F. Supp. 1130, 1135 (S.D. Miss. 1977); *see also Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972) ("Where the State, as *parens patriae*, imposes such detention, it can

⁴² The overriding goal of juvenile rehabilitation was recognized by the Supreme Court in *Kent v. United States*, 383 U.S. 541, 554-55 (1966):

The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge.

meet the Constitution's requirement of due process . . . if, and only if, it furnishes adequate treatment to the detainee."); *Pena v. New York State Div. for Youth*, 419 F. Supp. 203, 206-07 (S.D.N.Y. 1976). *But see Santana v. Collazo*, 714 F.2d at 1176-77 (refusing to recognize constitutional right to rehabilitative treatment for juveniles); *Morales v. Turman*, 562 F.2d 993, 997-98 (5th Cir. 1977) (same).⁴³

⁴³ Traditionally, courts that have recognized a constitutional right to rehabilitative treatment for incarcerated juveniles have generally employed two basic theories to divine such a right. These theories were initially developed in the context of mentally ill or retarded persons committed to state mental institutions or hospitals. Courts extended these theories to the context of juvenile delinquents incarcerated in training schools, because juveniles, like mentally incompetent or retarded individuals, generally fall within the same *parens patriae* authority of the state. *See generally Santana v. Collazo*, 533 F. Supp. 966, 972 (D.P.R. 1982) (discussing the development of the "right to treatment" theories, although eventually rejecting them), *aff'd*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

The first theory, which is adopted by this court, finds support in the Supreme Court's pronouncement in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." As stated previously, when a state incarcerates juveniles for the purpose of treatment or rehabilitation, as does South Carolina, due process requires that the conditions of confinement be reasonably related to that purpose. *See, e.g., Morgan v. Spröat*, 432 F. Supp. at 1135-36.

The second theory is known as the *quid pro quo*, or mutual compact, theory. Under this approach, courts have held that states are required to rehabilitate incarcerated juveniles as consideration for affording juveniles fewer procedural safeguards than those afforded to adult criminal defendants. In other words, the *quid pro quo* theory provides that because juvenile delinquency proceedings generally do not involve the full range of procedural due process protections of a criminal trial, the state must provide rehabilitation to incarcerated juveniles to make up for the difference. *See generally Santana*, 533 F. Supp. at 969-70 (discussing the *quid pro quo* theory, although eventually rejecting it).

The validity of the *quid pro quo* theory is now quite suspect. In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), Chief Justice Burger's concurring opinion specifically rejects the theory. 422 U.S. at 585-89 (Burger, C.J., concurring). *O'Connor* involved an action under 42 U.S.C. § 1983 by a former patient of a state mental hospital who was confined to the hospital for almost fifteen years. The Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members and friends." *Id.* at 576. Although the Court declined to reach the more difficult constitutional issues relating to a confined individual's right to treatment, *id.* at 573, Chief Justice Burger in his concurring opinion specifically disposed of the respondent's arguments for a constitutional right to treatment.

In *O'Connor*, Chief Justice Burger analyzed the court of appeals' statement that "where . . . the rationale for confinement is the '*parens patriae*' rationale that the patient is in

In addition, the Due Process Clause guarantees to juveniles who are incarcerated the right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, and minimally adequate training to protect those interests. *Youngberg v. Romeo*, 457 U.S. 307 (1982).⁴⁴

need of treatment, the due process clause requires that minimally adequate treatment be in fact provided.'" 422 U.S. at 581 (quoting circuit court opinion). Significantly, though, the Chief Justice did not question the principle that one who is committed specifically for purposes of treatment is entitled under the Due Process Clause to minimally adequate treatment. Rather, he merely challenged the lower court's assumption that the respondent's need for treatment was the sole rationale for his commitment. As Chief Justice Burger noted, the state statute authorizing commitments did not require that a patient be treated. However, because the court of appeals did not explain its conclusion that the respondent was committed solely because he needed treatment, Chief Justice Burger determined that "the premise of the Court of Appeals' first theory must have been that, at least with respect to persons who are not physically dangerous, a State has no power to confine the mentally ill except for the purpose of providing them with treatment." *Id.* Burger concluded that this premise is flawed because the state's traditional authority as *parens patriae* allows it to confine individuals for reasons other than treatment, such as providing them with a more humane place of confinement. *Id.* at 581-82.

In *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984), the First Circuit Court of Appeals applied Chief Justice Burger's concurring opinion in *O'Connor v. Donaldson* and concluded (as did the district court below) that no constitutional right to rehabilitation exists for incarcerated juvenile delinquents. 714 F.2d at 1176-77; *see also Morales v. Turman*, 562 F.2d 993, 997-98 (5th Cir. 1977) (in dictum, rejecting constitutional right to treatment for juvenile offenders). The court of appeals in *Santana* rejected both theories described above and held that juveniles incarcerated under the state's *parens patriae* authority have no due process right to treatment, because the state "may legitimately confine individuals solely to protect society from them." 714 F.2d at 1176.

This court agrees that the *quid pro quo* doctrine is no longer valid in light of the Chief Justice's concurring opinion in *O'Connor*. However, the *Santana* court seems to have read the Burger concurrence too broadly with regard to the first theory. Although Chief Justice Burger recognized in *O'Connor* that states may confine individuals for reasons other than to provide treatment, he did not state that individuals who are confined for purposes of treatment have no constitutional right to receive that treatment. Indeed, such a pronouncement would apparently run afoul of the Supreme Court's mandate in *Jackson v. Indiana*, *supra*, that nature of confinement be reasonably related to the purpose of the confinement.

Accordingly, because South Carolina's policy behind incarcerating juvenile delinquents is to provide them with rehabilitation, the court has determined that the juveniles at DJJ are entitled under the Constitution to rehabilitative treatment.

⁴⁴ *Youngberg*, like *Jackson*, involved a challenge by a mental retardate to the conditions of his confinement. Although *Youngberg* is not squarely applicable to juveniles, this court has determined that the *Youngberg* analysis is appropriate in a juvenile correctional setting because

Safety, in the context of this case, encompasses the Plaintiffs' right to reasonable protection from the aggression of others, whether "others" be juveniles or staff. *Thomas S. ex rel. Brooks v. Flaherty*, 699 F. Supp. 1178, 1200 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir.), *cert. denied*, 498 U.S. 951 (1990).

The interest in freedom from unreasonable bodily restraint includes freedom from unnecessary bodily restraint through mechanical devices as well as unreasonably restrictive conditions of confinement. Unreasonably restrictive conditions of confinement are those which unduly restrict the juveniles' freedom of action and are not reasonably related to legitimate security or safety needs of the institution.

The right to minimally adequate training is more difficult to define. As noted by the Supreme Court in *Youngberg*:

It is not feasible . . . to define or identify the type of training that may be required in every case. A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case.

457 U.S. at 319 n.25. Additionally, as noted by the *Youngberg* court, when a court is called upon to decide what is reasonable under the circumstances presented, the court

must show deference to the judgment exercised by a qualified professional. . . . [T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

juvenile delinquents, like mental retardates, have been deprived of their liberty because of their status. Additionally, the three parts of the *Youngberg* test are all based upon a determination of what is reasonable under the circumstances — an elastic concept that allows for appropriate adjustments in view of the fact that some juvenile delinquents have demonstrated a propensity toward violence.

Id. at 323.

The court must emphasize that its role in this litigation is to identify minimally acceptable standards for treatment and rehabilitation. In other words, it is not necessary that the state provide the best possible services and training available to the Plaintiffs. The test in this case is whether the state is providing minimally adequate or reasonable services and training necessary to ensure the protected interests of the Plaintiffs. It is not appropriate that the state be held to a standard which imposes an affirmative duty to succeed in the purpose of correcting the juveniles' behavior. Although such a standard may be desirable, it is not constitutionally mandated. All that is required is that the juveniles be housed under conditions that provide them with a reasonable opportunity to correct their behavior. Obviously, this standard incorporates the security, program, and service functions that are basic to juvenile corrections. These basic services include sufficient numbers of adequately trained staff so that the purpose of the confinement may be advanced, minimal levels of programming reasonably geared toward aiding juveniles to correct their behavior, and other services that are minimally necessary to give the Plaintiffs a reasonable opportunity to accomplish the purpose of the confinement while protecting the other recognized interests in safety and reasonable restraint.

In deciding minimum constitutional requirements for the institutions under challenge here, this court is not bound by standards promulgated by organizations such as the American Correctional Association. As noted by the United States Supreme Court in *Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979), "[W]hile the recommendations of these various groups [including the American Correctional Association] may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization

in question."⁴⁵ Lower courts have also rejected efforts to impose ACA standards as constitutional minima. For example, in *Gary H. v. Hegstrom*, 831 F.2d 1430 (9th Cir. 1987), the district court entered a decree establishing, on federal constitutional grounds, guidelines for managing a facility for adolescent wards for the juvenile court. In so doing, the court relied upon expert testimony and the standards for incarceration adopted by professional associations. The Ninth Circuit Court of Appeals rejected the district court's "wholesale adoption of various professional associations' concepts for model institutions." *Id.* at 1433. The court determined that these standards were not constitutionally mandated and concluded that the trial court's order "far exceed[ed] anything remotely required by the fourteenth amendment." *Id.*; see also *Miles v. Bell*, 621 F. Supp. 51, 60 (D. Conn. 1985) ("Although the ACA and APHA standards constitute appropriate goals formulated by experts in the field, and may provide guidance for prison administrators or other branches of the government, they do not establish constitutional minima.") (citing *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981), and *Bell v. Wolfish*, 441 U.S. at 543-44 n.27). ~~The court must, therefore, reject the invitation by the Plaintiffs and the Defendants~~ in this action to adopt ACA standards for purposes of fashioning relief in this case.

Similarly, this court is not bound to accept the recommendations of all the expert witnesses who have testified in this case. In *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Supreme Court cautioned against "assuming that opinions of experts as to desirable prison conditions suffice to establish [Constitutional standards]." *Id.* at 348 n.13. Although *Rhodes* involved a constitutional challenge to conditions encountered by adult prison inmates subject only to the Eighth Amendment's prohibition of cruel and unusual punishment, the rationale underlying

⁴⁵ *Bell* involved a constitutional challenge to conditions of confinement brought by pretrial detainees. Although the case did not involve juvenile correctional facilities, the Court in *Bell* was called upon to establish constitutional minimum standards for pretrial detainees who are protected, as are the Plaintiffs in this litigation, by the Due Process Clause. 441 U.S. at 536.

the quoted portion of the *Rhodes* decision is applicable here: This court must be the final arbiter of minimum constitutional standards, and although opinions of experts in the field are helpful, they are not binding on the court.

As to the discrete issue of overcrowding, the number of square feet allotted to each juvenile is not determinative of the constitutionality of the available space. Other factors, such as the amount of common area available and the amount of time spent outside the cells, must also be considered. See *Bell v. Wolfish*, 441 U.S. 520 (1979); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Stewart v. Gates*, 450 F. Supp. 583 (C.D. Cal. 1978); *Rutherford v. Puchess*, 457 F. Supp. 104 (C.D. Cal. 1978); *Jordan v. Wolke*, 460 F. Supp. 1080 (E.D. Wis. 1978), *rev'd*, 615 F.2d 749 (7th Cir. 1980).

Finally, in fashioning relief in this case, the court must be mindful of the Supreme Court's admonition that

The "legitimate and compelling state interest" in protecting the community from crime cannot be doubted. [The Supreme Court has] stressed before that crime prevention is "a weighty social objective," and this interest persists undiluted in the juvenile context. The harm suffered by the victim of a crime is not dependent upon the age of the perpetrator. And the harm to society generally may be even greater in this context given the high rate of recidivism among juveniles.

Schall v. Martin, 467 U.S. 253, 264-65 (1984) (citations omitted). In *Schall*, the Court upheld, against a constitutional challenge, a New York law requiring the pretrial detention of all juveniles arrested for committing an offense. In doing so, the Court stressed that the importance of crime prevention outweighed the statute's punitive effects, especially in light of the high recidivism rate among juveniles.⁴⁶

⁴⁶ In *McEiver v. Pennsylvania*, 403 U.S. 528 (1971), the Supreme Court quoted with approval the following passage from a 1967 report of a presidential task force:

B. The Statutory Standards

Juveniles attending the training schools operated by DJJ are potentially covered by three federal education statutes: the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"); and the Americans with Disabilities Act, 42 U.S.C. § 1201 *et seq.* ("ADA").

IDEA

The purpose of the IDEA is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c). For purposes of the IDEA, the term "children with disabilities" is defined to include children

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services.

20 U.S.C. § 1401(a)(1)(A). "Special education" has been defined to include "[i]nstruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings." 34 C.F.R. § 300.17(a)(1)(i).

The spirit that animated the juvenile court movement was fed in part by humanitarian compassion for offenders who were children. . . . [This compassion] should [not] be allowed to outrun reality. The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community. . . . The juvenile court, like other courts, is therefore obliged to employ all the means at hand, not excluding incapacitation, for achieving that protection. What should distinguish the juvenile from the criminal courts is greater emphasis upon rehabilitation, not preoccupation with it.

403 U.S. at 546 n.6 quoting President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 9 (1967)).

To be eligible for federal assistance under the IDEA, states must ensure that a "free appropriate public education" is available to meet the child's identified needs. 20 U.S.C. § 1412(2)(B); 34 C.F.R. § 300.121. The state must have a policy in effect to identify, locate, and evaluate children who have a disability or who are suspected of having a disability. 20 U.S.C. § 1412(1) & (2)(C); 34 C.F.R. § 300.128.

The IDEA provides that

[t]he State educational agency shall be responsible for assuring that the requirements of [IDEA] are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet educational standards of the State educational agency.

20 U.S.C. § 1412(6); *see also* 34 C.F.R. § 300.600. The regulations make it clear that the reference to "all programs" includes state correctional facilities and that the requirements of the IDEA apply to such facilities. 34 C.F.R. § 300.2(b)(4).

Section 504

Section 504 provides that no otherwise qualified individual with a disability shall, solely because of that disability, be excluded from participation in or subject to discrimination "under any program or activity" receiving federal financial assistance. The phrase "programs or activity" includes all of the operations of a department, agency, special purpose district, or other instrumentality of a state or local government. 29 U.S.C. § 794(b)(1)(A). Therefore, the requirements of Section 504 are similarly applicable to the children with disabilities located in the correctional facilities of DJJ.

The centerpiece of the IDEA and Section 504 is the "Individualized Education Program" or IEP. *See* 20 U.S.C. §§ 1401(a)(20), 1414(a)(5). Each public agency is responsible for

initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability. The meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services. The IEP must be implemented as soon as possible following the meetings to develop or revise the IEP. 34 C.F.R. § 300.342. A meeting must be held to review and, if appropriate, revise each child's IEP periodically, but not less than annually. 20 U.S.C. § 1414(a)(5); 34 C.F.R. § 300.343. The IEP must be in effect at the beginning of each school year and before special education and related services are provided to a child. When a child moves to a new school district, a new IEP must be formulated and implemented.

Because DJJ is an independent school district, the reassignment of a juvenile from his or her home school district to DJJ facilities triggers the obligation by DJJ to screen the juvenile for special education needs and, if necessary, develop a new IEP for the juvenile. Development of appropriate IEP's for these juveniles has proved to be extremely difficult for DJJ, often for reasons beyond its control. First, the school districts from which the juveniles are transferred

have often refused to send the juveniles' school records to DJJ, citing the Family Education Rights and Privacy Act, 20 U.S.C. § 1232 ("FERPA"). Without the school records, DJJ educators are unable to properly develop an IEP. Secondly, South Carolina Department of Education officials who audit DJJ schools have mandated that DJJ formulate not one, but two IEPs for the juveniles: one when the juvenile is received at the Reception and Evaluation Center and a second IEP if and when the juvenile is later confined to one of the three long-term institutions.

As noted previously, by state law, a juvenile's stay at the Reception and Evaluation Center may not exceed forty-five days, and, at the time of trial, the average stay was twenty-one days. The requirement imposed by the South Carolina Department of Education that a new IEP be

developed for the juvenile's relatively brief stay at the Reception and Evaluation Center is a burdensome one. The IEP planning meeting cannot occur until the juvenile has been at the facility at least seven days, because the parents of the juvenile must be given seven days advance notice of the meeting.⁴⁷ Thus, for juveniles at the Reception and Evaluation Center, even under the best of circumstances, the new IEP would be of short duration. Moreover, the majority of juveniles who are evaluated at the Reception and Evaluation Center do not matriculate to the long-term institutions. Just over two thousand juveniles pass through Reception and Evaluation each year, but only approximately half of them end up in the long-term institutions. The South Carolina Department of Education's requirement that *new* IEP's be formulated for the two thousand Reception and Evaluation juveniles — most of them to be implemented for a mere fourteen days on average — struck the court as one elevating form over substance.

At trial, it became apparent to the court that these two problems have caused a tremendous drain on the resources and staff of DJJ officials and have prevented them from doing an adequate job of developing IEPs for juveniles who are committed to the long-term institutions and who undoubtedly need these programs.⁴⁸ The court suggested that some method be devised by which DJJ would not be required to develop IEPs for the juveniles during their short stay at the Reception and Evaluation Center; however, the Plaintiffs maintain, as they have throughout this litigation, that the IEPs are required by federal law for these juveniles as well as for those who are ultimately confined to the long-term institutions.

After the trial was concluded, this court contacted the United States Department of

⁴⁷ Testimony at trial indicated that DJJ must exert considerable effort to arrange for the parental meeting: letters are often returned undelivered, and parents often refuse to attend the meetings.

⁴⁸ As noted previously in the court's Findings of Fact, a disproportionate number of juveniles confined to the long-term institutions are in need of special education services.

Education to determine whether any type of administrative solution to these two problems was available. The Department has responded by way of an interpretative memorandum sent to this court from the United States Department of Justice, Civil Rights Division. The memorandum has been made a part of the record in this case. In its memorandum, the Department of Education observes that "[n]either Section 504 of the Rehabilitation Act of 1973 nor IDEA specifically addresses the question of what services a child with a disability is to be provided in the interim period [while confined at the Reception and Evaluation Center], before a new IEP is developed and implemented [at the long-term facilities.]" Statement of Interest of the U.S. Dep't of Education 4 (Nov. 30, 1994). After examining the relevant law, the Department of Education concluded:

In the case of short-term, temporary confinement, the State may meet its obligation under IDEA and Section 504 . . . by implementing the IEP from the previous school district or placement instead of developing a new one. The IEP must be implemented to the extent possible in the temporary setting. To the extent the implementation of the old IEP is impossible, services that approximate, as close as possible, the old IEP must be provided.

Id. at 5-6.

This court adopts the conclusion reached by the Department of Justice and will, for this reason, not require that a new IEP be developed for juveniles who are incarcerated at the Reception and Evaluation Center. Rather, the IEP formulated by the transferor school district must be utilized and implemented, to the extent possible. A new IEP must, however, be formulated in accordance with the statutory law if and when the juvenile is later sent to one of the three long-term institutions.

The Department of Justice memorandum also indicates that school districts around South Carolina have erroneously concluded that FERPA prevents them from sending school records to DJJ without the consent of the parents of the juveniles affected. The memorandum states:

[A]n educational agency or institution may disclose education records, or personally identifiable information from education records, without prior consent if the disclosure is, subject to the requirements of § 99.34, to officials of another school . . . where the student seeks or intends to enroll.

Id. at 6.

The memorandum further indicates that the school district sending the records must make a reasonable attempt to notify the parent or eligible student of the fact that the records have been forwarded and, upon request, must send to the parent or student a copy of the records that were disclosed.

In an effort to eliminate this problem, the court will require the Defendants to disseminate the relevant portions of this order, together with the Department of Justice memorandum, to all school districts in South Carolina so that it will be clear in the future that neither parental nor juvenile consent is required for the school districts to forward school records to DJJ when a juvenile is confined there. The only obligations upon transferor school districts are the obligations to provide reasonable notice to the parent that the student's records have been transferred and, if requested, to provide copies of the records that have been sent.

The evidence at trial disclosed that in some cases, the Defendants have not adequately identified, located, and evaluated children with disabilities who are in need of special education and related services. The evidence also indicated that, in some cases, appropriate IEPs were not developed for those juveniles that were identified. Finally, the evidence disclosed that, at least in some cases, the IEPs that were developed were not fully implemented. As noted above, much of the difficulty the Defendants have experienced in fully complying with the mandates of the IDEA and Section 504 stems directly from the lack of cooperation from local school districts and from the onerous requirement that IEPs be formulated for juveniles during their short stay at the Reception and Evaluation Center. Now that these two obstacles have been removed, the court

must expect the Defendants to bring themselves into strict compliance with the IDEA and Section 504.

ADA

Congress enacted the ADA on July 26, 1990 to eliminate all forms of discrimination against individuals with disabilities. Through this legislation, the federal government extended the nondiscrimination principles of the Rehabilitation Act, applicable to institutions receiving federal funds, to a much wider array of institutions, including programs and services provided by all units of state and local government. The ADA was intended to, and does, build upon the protections afforded disabled persons under federal, state, or local laws. *See* 42 U.S.C. § 12201.

Under subchapter II of the ADA, which applies to public entities, "no qualified individual with a disability shall, by reason of such disability, be excluded from participating in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132. Under the ADA, "disability," with

respect to an individual, means a physical or mental impairment that substantially limits one or more of the major life activities of such individuals. 28 C.F.R. § 35.104 (1993); 45 C.F.R. § 84.3(j) (1993). As the Defendants have conceded, the facilities at DJJ are subject to the requirements of the ADA and the regulations promulgated thereunder.

With respect to the educational component of DJJ, the parties have not demonstrated, nor could this court discern, any additional requirements imposed by the ADA beyond those imposed by Section 504 and the IDEA.

The more familiar provisions of the ADA relate to barrier-free architectural design for public accommodations under subchapter III of the Act. The Defendants have conceded that the ADA barrier free requirements apply to DJJ facilities.

The evidence at trial disclosed several isolated, often technical, violations of the IDEA, Section 504, and the ADA that apparently produced no significant injury on a class-wide basis. Some of these violations resulted from confusion, on the part of the Defendants, as to whether they were subject to the provisions of these statutes. Now that the court has made it clear that all three laws apply to the facilities operated by DJJ, the court must expect full compliance in the future, and the court-appointed monitor designated to oversee the implementation of this order shall ensure that the statutory mandates are fulfilled.

Remedial Plan

Having determined that certain constitutional and statutory deficiencies exist at facilities operated by DJJ, the court must determine an appropriate method for devising and implementing a remedial plan. The Plaintiffs have invited the court to devise and impose a judicially created plan based on the record before it. The court has concluded, however, that it must first afford the state of South Carolina the opportunity to correct the deficiencies that have been brought to light by this litigation and identified in this order.

It is well settled that under principles of comity and federalism, this court must decline the Plaintiffs' invitation to impose a broad and sweeping remedy upon the Defendants, but must instead allow the Defendants an opportunity to devise a plan of their own for remedying the constitutional violations. *See Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988) ("It is now established beyond challenge that upon finding a particular standard, practice, or procedure to be contrary to either a federal constitutional or statutory requirement, the federal court *must* grant the appropriate state or local authorities an opportunity to correct the deficiencies."); *see also Faulkner v. Jones*, 10 F.3d 226, 240 (4th Cir. 1993) (Hamilton, J., dissenting) ("Federal jurisprudence not only dictates, but demands that, upon finding a constitutional violation, federal

courts must first afford the responsible state authorities an opportunity to devise and implement their own corrective action before imposing a judicially-created remedy.").

The doctrine of allowing a state the opportunity to correct constitutional deficiencies is particularly applicable when reviewing the adequacy of state correctional facilities. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the United States Supreme Court stated:

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.

Id. at 491-92.

The United States Court of Appeals for the Fourth Circuit has recently cautioned against federal courts "immers[ing] themselves in the management of state prisons or substitut[ing] their judgment for that of trained penological authorities charged with the administration of such facilities." *Taylor v. Freeman*, 34 F.3d 266, 268 (4th Cir. 1994). In *Taylor*, the Fourth Circuit

stated that "federal courts should proceed cautiously and incrementally in ordering remediation so as not to assume the role of prison administrators." *Id.* at 269. The *Taylor* court reversed a district court decision imposing, as the Plaintiffs would have the court do here, specific population ceilings and target dates for achieving them. The court of appeals observed that "sweeping intervention in the management of state prisons is rarely appropriate when exercising the equitable powers of the federal courts." *Id.* The Fourth Circuit indicated that the district court should have afforded the state of North Carolina the opportunity to correct the constitutional deficiencies before imposing a court-ordered remedial scheme.

Although both *Preiser* and *Taylor* involved adult prison settings, the principles of comity and federalism that underlie those decisions are no less applicable when a court reviews conditions

of confinement of juveniles incarcerated at juvenile training schools.

Accordingly, the Defendants shall, within one hundred and twenty days from the date of this order, prepare and submit to the court a written plan designed to remedy the constitutional and statutory deficiencies identified herein. The court is mindful of the fact that the Defendants have already begun to develop — and in some cases, to implement — new programs designed to address some of the deficiencies. At trial, however, most of these programs were still in their formative stages. Some programs, such as the new admissions unit, were just being implemented as the testimony in the trial concluded; others, such as the new policy regarding the use of CS gas, were actually developed in the courtroom during the course of the trial; and others, such as the proposed contract with the South Carolina Department of Health and Environmental Control to operate the health care component at DJJ facilities, were still in the embryonic stages when the case was tried. The testimony about the scope and extent of these remedial programs was somewhat incomplete. Thus, although some of these programs that have been developed in response to this litigation may well pass constitutional muster, the court will be in a better position to review the adequacy of these programs, and others developed in accordance with this order, if they are presented in a formal, detailed, written plan.

Appointment of Monitor

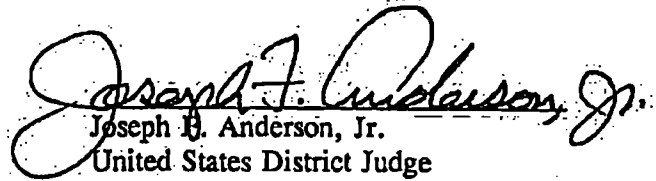
After an acceptable plan is developed, the court intends to appoint the Honorable Robert Burnside, a South Carolina family court judge, as its special master pursuant to Fed. R. Civ. P. 53, to oversee the implementation of the program. Judge Burnside has announced his intention to retire from the bench effective May 31, 1995. Judge Burnside is a former state legislator and an eighteen-year veteran of the family court bench. The court is confident that Judge Burnside's wealth of experience in dealing with juvenile justice issues will enable him to oversee the

implementation of the remedial plan.

Conclusion

For all of the foregoing reasons, the Defendants are hereby ordered to submit to the court, within one hundred and twenty days, a detailed plan to remedy the constitutional and statutory deficiencies identified in this order.

IT IS SO ORDERED.


Joseph B. Anderson, Jr.
United States District Judge

January 25, 1995
Columbia, South Carolina

Table 1

The following table summarizes the most serious offense for which each juvenile at the DJJ long-term institutions was being confined as of May 4, 1994. The table, which was compiled by the court from the May 4, 1994 Daily Roster of DJJ, reflects only current commitments and includes only one offense per juvenile. Many of the juveniles have an extensive record of prior criminal offenses or were being confined for multiple charges; however, these two facts are not reflected in the table.

<u>Serious/Violent Offenses</u>	Birchwood	John G. Richards	Willow Lane	Total
Armed robbery	32	8	6	46
Assault (and battery) of a high and aggravated nature	30	6	25	61
Assault (and battery) with intent to kill	20	5	11	36
Assault with intent to commit criminal sexual conduct	6	2	4	12
Burglary, first or second degree	29	53	33	115
Criminal sexual conduct	15	1	6	22
Criminal sexual conduct with a minor	12	8	25	45
Drug trafficking	0	1	1	2
Involuntary manslaughter	1	0	4	5
Kidnapping	2	0	3	5
Lynching	3	2	3	8
Murder	6	0	3	9
Voluntary manslaughter	0	3	3	6
Other acts against persons	0	0	1	1
Total Serious/Violent Offenses	156	89	128	373

<u>Other Offenses</u>	Birchwood	John G. Richards	Willow Lane	Total
Accessory after the fact	2	1	1	4
Accessory before the fact	7	1	2	10
Arson, second degree	0	0	2	2
Assault on police officer while resisting arrest	1	1	3	5
Breaking into automobile or fuel tank	0	4	1	5
Burglary, third degree	0	2	4	6
Carrying pistol unlawfully	3	2	4	9

<u>Other Offenses (continued)</u>	Birchwood	John G. Richards	Willow Lane	Total
Carrying weapon on school grounds	2	3	6	11
Contempt of court**	0	24	16	40
Criminal conspiracy	0	1	1	2
Criminal domestic violence	2	0	3	5
Damaging property by explosive or incendiary device	1	1	0	2
Discharging firearm into dwelling	4	1	1	6
Displaying firearm in public building or adjacent areas	1	0	1	2
Failure to stop for blue light	0	3	0	3
Felony driving under the influence	0	0	1	1
Grand larceny	1	5	1	7
Grand larceny, automobile	1	5	4	10
Indecent exposure	1	0	0	1
Lewd act	5	0	6	11
Malicious injury to personal property	0	0	2	2
Malicious injury to real property	0	0	2	2
Parole violation**	5	8	3	16
Pointing firearm	4	0	2	6
Possession of alcohol by minor	0	1	1	2
Possession of LSD or cocaine	0	6	3	9
Possession of LSD or cocaine with intent to distribute	6	35	5	46
Possession of sawed-off shotgun, rifle or machine gun	2	0	1	3
Possession of schedule I controlled substance (e.g., marijuana)	0	2	1	3
Possession of unlawful weapons	4	0	1	5
Possession with intent to distribute controlled substance in proximity of school	0	1	0	1
Probation violation**	13	13	16	42
Public disorderly conduct	0	0	1	1
Public drunkenness	0	0	1	1
Purse snatching	1	0	0	1
Receiving stolen goods	0	5	1	6
Reckless homicide	1	0	0	1
Resisting an officer	1	3	1	5
Runaway	0	0	1	1
Shoplifting	0	2	4	6
Simple assault (and battery)	9	1	5	15
Strong-arm robbery	10	2	1	13
Trespass	0	3	1	4

<u>Other Offenses (continued)</u>	Birchwood	John G. Richards	Willow Lane	Total
Truancy	0	0	1	1
Use of car without owner's consent	0	4	5	9
Total Other Offenses	87	140	116	343
Total Juvenile Population	243	229	244	716

* For purposes of statistical data, the Department of Juvenile Justice defines violent/serious offenses to include: murder; sexual conduct, first and second degree; assault and battery with intent to kill; kidnapping; voluntary manslaughter; armed robbery; arson first degree; burglary, first and second degree; drug trafficking; and all additional offenses categorized in the South Carolina Code of Laws as Acts Against Persons. Offenses included in the latter category are found in Chapter 3 of Title 16 of the South Carolina Code of Laws, S.C. Code Ann. § 16-3-10 *et seq.* (Law. Co-op. 1985 & Supp. 1993).

** For the offenses of contempt of court, parole violation, and probation violation, Table 2 immediately following this table summarizes the most serious offense for which the juvenile was originally sanctioned by the court, from which the juvenile was paroled, or for which the juvenile was placed on probation.

Table 2

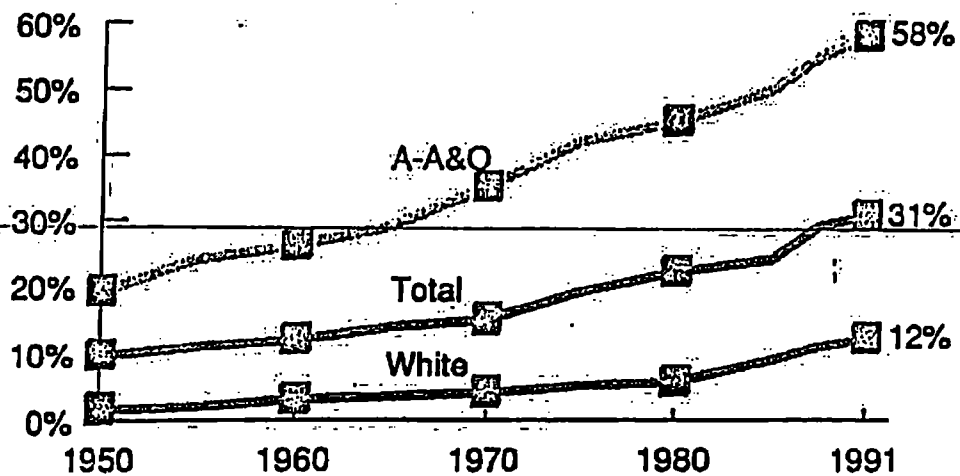
For those juveniles whose committing offense as of May 4, 1994 was contempt of court, parole violation, or probation violation (as identified in Table 1), the following table summarizes the most serious offense for which the juvenile was originally sanctioned by the court, from which the juvenile was paroled, or for which the juvenile was placed on probation. This table was also compiled by the court from the May 4, 1994 Daily Roster of DJJ.

Offense	Birchwood	John G. Richards	Willow Lane	Total
Accessory before the fact	0	0	1	1
Armed robbery	1	0	1	2
Assault (and battery) of a high and aggravated nature	1	1	3	5
Assault (and battery) with intent to kill	0	0	2	2
Assault on police officer while resisting arrest	0	0	1	1
Breaking into automobile or fuel tank	0	1	0	1
Burglary, first or second degree	0	12	8	20
Carrying pistol unlawfully	2	2	2	6
Carrying weapon on school grounds	0	2	1	3
Criminal conspiracy	0	0	1	1
Criminal domestic violence	0	1	0	1
Criminal sexual conduct	3	0	0	3
Criminal sexual conduct with a minor	2	0	0	2
Discharging firearm into dwelling	0	1	0	1
Disturbing schools	0	0	1	1
Grand larceny	1	3	3	7
Grand larceny, automobile	0	3	1	4
Lewd act	1	0	0	1
Lynching	1	3	0	4
Making bomb threat	0	0	1	1
Malicious injury to personal property	0	0	2	2
Malicious injury to real property	0	1	0	1
Petty larceny	0	1	0	1
Pointing firearm	0	1	1	2
Possession of LSD or cocaine	0	1	0	1
Possession of LSD or cocaine with intent to distribute	0	2	0	2
Possession of unlawful weapons	0	1	0	1

Offense (continued)	Birchwood	John G. Richards	Willow Lane	Total
Possession with intent to distribute controlled substance in proximity of school	0	1	0	1
Resisting an officer	0	0	1	1
Runaway	0	1	0	1
Shoplifting	0	2	0	2
Simple assault (and battery)	3	3	2	8
Strong-arm robbery	3	0	0	3
Threatening school teacher	0	1	0	1
Truancy	0	1	2	3
Use of car without owner's consent	0	0	1	1
 Total Contempt, Parole, or Probation Violations	 18	 45	 35	 98

Table 3

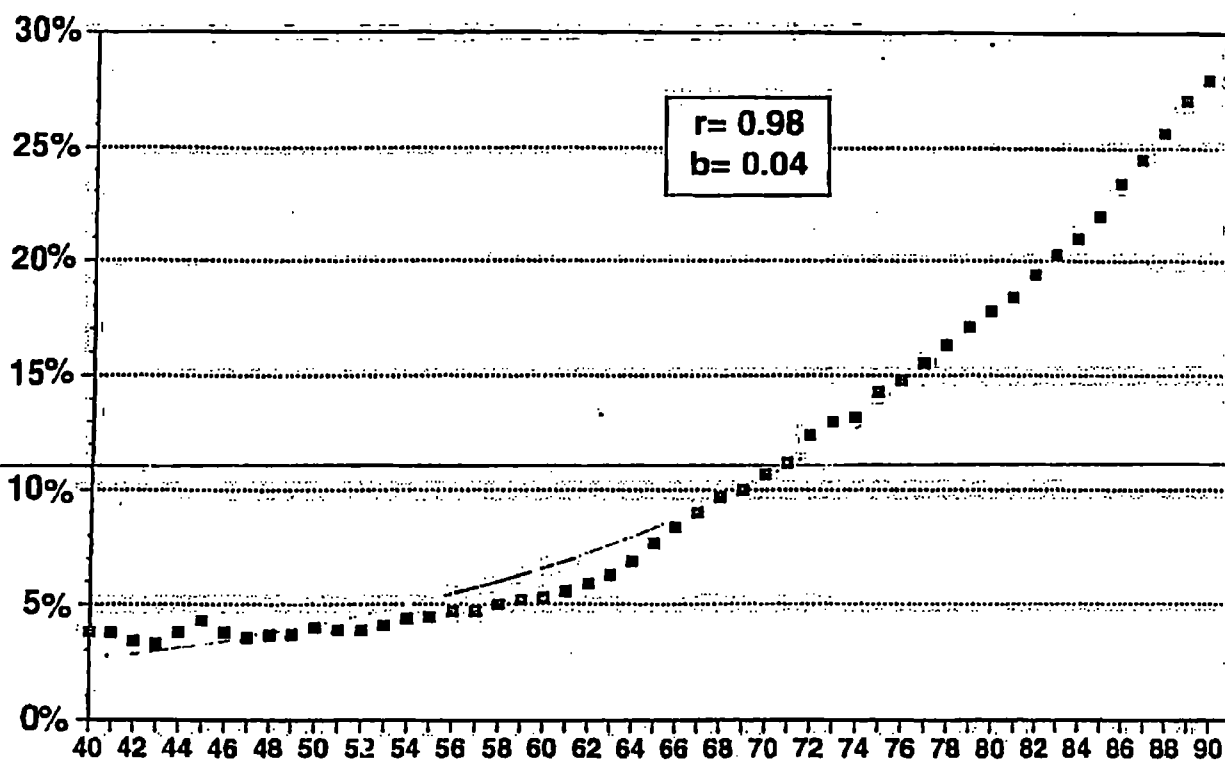
BIRTHS TO SINGLE MOTHERS (Percentage of all births 1950-91)



SOURCE: S.C. Department of Health and Environmental Control

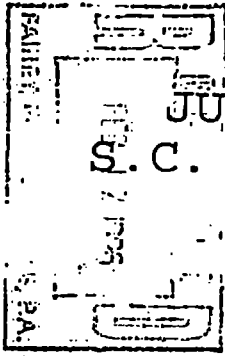
Table 4

Births to Unmarried Women 1940-1991



- The data fits an exponential regression $y = ae^{bx}$
- The statistic "r", called the correlation coefficient, indicates how closely a particular regression line fits the data. The 0.98 correlation coefficient indicates an almost perfect fit.
- The statistic "b", called the slope, indicates how rapidly a line is rising or falling.

870140-00 18

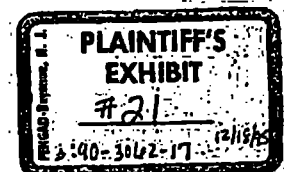


INJURIES ATTRIBUTED TO
JUVENILE-ON-JUVENILE VIOLENCE
S.C. DEPARTMENT OF JUVENILE JUSTICE

A Descriptive Analysis of the Juvenile
Population Incarcerated at the S.C.
Department of Juvenile Justice as on
November 10, 1995

—PREPARED BY THE DIVISION OF
BIOSTATISTICS
OFFICE OF PUBLIC HEALTH/STATISTICS AND
INFORMATION SYSTEMS...
S.C. DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL

DECEMBER 1995



PREFACE

This report represents the findings of a study on injuries at D.J.J. conducted by staff of the Division of Biostatistics. As we embarked on this project, our goal was to conduct a survey statistical precise as possible given the limitations of time and the resources available. We have tried to address the issues and limitations of this study fairly with each analysis.

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I. INTRODUCTION

On November 9, 1995, the South Carolina Department of Health and Environmental Control was contacted by the Governor's Office and asked to provide statistical assistance to their legal staff in determining the number of injuries due to violence among juveniles incarcerated at the South Carolina Department of Juvenile Justice (D.J.J.). The results of this study would assist the legal staff in determining the extent of violence at these facilities. D.J.J. located on Broad River Road, Columbia, consists of a Reception and Evaluation Unit (R&E), and the three longer term facilities which house the juveniles (Willow Lane, John G. Richards, and Birchwood).

II. PURPOSE OF STUDY

This study attempted to measure the extent of violence by examining the injury rates within the facilities. The legal staff requested that this project be focused on the incidence of injuries attributed to juvenile-on-juvenile violence as reflected in the medical records.

III. METHODOLOGY

SAMPLING DESIGN:

Design: A simple random sample of all juveniles incarcerated on the main campus of D.J.J. as of November 10, 1995.

Frame: A list of the juveniles incarcerated at D.J.J. on November 10, 1995 was given to the Division of Biostatistics. This list, which contained the names of 1003 juveniles, was used as the sampling frame of the study.

Sample Size: The required sample sizes for the simple random sample were determined for combinations of three precision levels (.01, .05, and .10) and three alpha levels (.01, .05, and .10) (see Appendix A). The estimated sample percent was set at 50, which maximizes the variance, as well as the required sample size. An alpha of .05 and a precision level of .05 were decided upon, resulting in a sample size of 278 juveniles from the 1003 incarcerated at the main campus. Excluding non-sampling errors, this sample size ensures, with 95% confidence or 95% probability, that the "true" percent is within 5 percentage points plus or minus, of the sample percent. There is a 5% chance (alpha level) that the "true" percent differs from the sample percent by more than five percentage points (precision level).

Sample Selection: The sample was determined utilizing a simple random sample technique. This assured every juvenile had a known, non-zero, equally likely, probability of being selected. The names of the juveniles on each list were number sequentially, providing a unique identification for each juvenile. These identification numbers were entered into a computer program, which utilized a random number function of the Statistical Analysis System (SAS) package to select the identification numbers of those juveniles in the sample.

CASE DEFINITION:

A case was defined as an injury resulting from an act of juvenile-on-juvenile violence (i.e. hitting, fighting, stabbing, sexual assaults, etc). Only those injuries that were clearly documented on the Infirmary Admittance Form that were the result of juvenile-on-juvenile violence were recorded. Any unknown causes of injuries were not recorded. Any juvenile-on-staff, staff-on-juvenile, self-inflicted injuries were not recorded.

ASSUMPTIONS/DATA QUALIFICATIONS:

The assumptions for this study were the following:

- ▶ While serious injuries are likely to be seen at the infirmary, those involving minor cuts or bruises may be reported less frequently.
- ▶ The recording in the medical records of injuries from juvenile-on-juvenile violence was consistent over time.

This study did not attempt to address the extent or type of injuries.

DATA COLLECTION:

The medical files of the juveniles were reviewed for the recording of an injury on the "Infirmary Admittance Form." The Infirmary Admittance Form is completed when the juvenile is admitted to the infirmary. The top section of the sheet is completed by the juvenile in which he or she explains the reason for the visit. Reasons for admittance to the infirmary range from a simple cold to a cut hand. The remaining sections of the form is completed by the medical administrative staff, in which the nature of the visit and diagnosis are explained in more detail.

On November 30, December 1, and December 11, 1995 six staff

members from the Division of Biostatistics abstracted the medical records from the main infirmary. All injuries reported before November 10, 1995 were recorded on the survey sheet (see Appendix B). Information on the date and nature of injury were recorded also. These injuries were then entered into a database via EpiInfo.

Originally, the juveniles in the R&E unit of D.J.J. were included in the study. A separate sample had been planned for these juveniles. Due to time constraints of this project and the fact that the R&E unit is not part of the main campus at D.J.J., it was agreed not to research injuries to juveniles at R&E. Since R&E was treated as a separate sampling frame, deleting these juveniles from the study did not affect the precision levels of the findings for the three facilities of the main campus. It was also discovered during record abstraction that the computer list of juveniles included some labeled as "Transitions." These juveniles were in the processes of being admitted to D.J.J.'s main campus. These juveniles are located in a facility near the R&E unit. Since the study focused on the injuries on the main campus, it was decided not to include these juveniles in the study. Deleting these Transitions juveniles from the study slightly changed the precision level from an original 0.050 to 0.053 (see Appendix C). There were 32 Transitions deleted bringing the final sample size down to 246.

IV. RESULTS

Of the 246 juveniles in the sample of the main campus, we were able to abstract the medical records of 242 juveniles (98%). Table 1 describes the number of medical records not found by facility name.

Table 1.
Number of Medical Records Abstracted by Facility Name

Facility	N	n	# of charts not found	% of charts not found
Birchwood	353	94	1	1.1%
John G Richard	214	65	1	1.5%
Willow Lane	322	87	2	2.3%
Total	889	246	4	1.6%

Our sample was predominately male (92%) and African-American (70%). The 4 juveniles that we were unable to find their medical records were then deleted from the denominator for further analyses in this report.

Of those 242 juveniles, 101 (41.7%) had an injury resulting from another juvenile (95% CI: 36.4,47.0). Table 2 and 3 show the distribution of the number of injuries.

Table 2.
Distribution of Injuries

Number of Injuries	Number of Juveniles	Percent	Cumulative Percent
0	141	58.3	58.3
1	54	22.3	80.6
2	23	9.5	90.1
3	11	4.5	94.6
4	5	2.1	96.7
5	1	0.4	97.1
6	3	1.2	98.3
7	1	0.4	98.8
9	1	0.4	99.2
10	2	0.8	100.0
TOTAL	242	100.0	

Table 3.
Selected Statistics for Number of Juveniles Injured

Mean	0.876
Variance	2.499
Standard Deviation	1.581
Standard Error	0.102

Although over 41% of the sample had an injury, these numbers may under-represent the number of injuries. We did not have any information on the number of injuries that were not seen by infirmary staff nor injuries that were not clearly recorded as juvenile-on-juvenile violence.

Of those 101 juveniles with an injury, the average number of injuries per juvenile was 2.1 (95% CI: 1.7,2.5). Of those juveniles with an injury, most of them had only 1 injury (see Table 4).

Table 4.
Distribution of Juveniles with Injuries

Number of Injuries	Number of Juveniles	Percent	Cumulative Percent
1	54	53.5	53.5
2	23	22.8	76.2
3	11	10.9	87.1
4	5	5.0	92.1
5	1	1.0	93.1
6	3	3.0	96.0
7	1	1.0	97.0
9	1	1.0	98.0
10	2	2.0	100.0
TOTAL	101	100.0	

This study focused on past injuries to juveniles enrolled at D.J.J. on November 10, 1995. At the time of this study, some of these juveniles had been incarcerated at D.J.J. for several years. Table 5 describes when these injuries occurred to the juveniles enrolled on November 10, 1995.

Table 5.
Distribution of Department of Juvenile Justice
Injuries Due to Violence
Number of Juveniles Injured per Month

MONTH	TOTAL INJURIES BY YEAR						
	1989	1990	1991	1992	1993	1994	1995
January	-	-	-	1	-	2	7
February	-	-	-	1	-	5	4
March	-	-	-	1	-	3	7
April	-	-	-	-	2	-	7
May	-	-	-	-	3	4	10
June	-	-	-	1	1	7	8
July	-	-	-	-	-	5	15
August	-	-	-	1	1	3	12
September	-	-	-	3	2	4	12
October	-	-	1	1	-	4	11
November	-	-	1	1	2	7	9
December	1	-	1	2	2	7	-
Total	1	-	3	12	13	51	102

The earliest injury of the sample occurred in 1989, while the vast majority occurred during 1995 involving 74 juveniles. When interpreting Table 5, caution should be used since this only represents when these injuries occurred to juveniles enrolled on November 10, 1995. This may not represent a true time trend analysis of injuries at D.J.J. since the analysis does not include information on injuries to juveniles that have been admitted and released prior to November 10, 1995.

The literature was searched to find comparative studies on this topic. The only comparative study found was a survey conducted in 1991 by the Office of Juvenile Justice and Delinquency Prevention¹. They surveyed 984 public and private juvenile detention centers to assess conditions of confinement for juveniles (see Appendix D). The researchers measured the success of internal security by examining injury rates within facilities. The mail survey asked facilities to report the number of injuries to juveniles and staff during the previous 30 days. They found

¹ Office of Juvenile Justice and Delinquency Prevention. Conditions of Confinement: Juvenile Detention and Correction Facilities Research Report, August 1994.

the average juvenile-on-juvenile injury rate per 100 juveniles was 3.12. To compare to this national study, the number of injuries from October 12, 1995 through November 10, 1995 and divided this number by the sample size. Our results indicated an injury rate of 7.02 per 100 juveniles (95% CI: 3.80, 10.24). However, this may not be comparable comparison since we did not have information on those juveniles that were at D.J.J. during this month but were released prior to November 10, 1995. Furthermore, the respondent's methodology used to provide answers to this national study are unknown.

APPENDIX A
TABLE OF REQUIRED SAMPLE SIZES
FOR VARIOUS SAMPLING RELIABILITY LIMITS

$$N=1003 \quad p=.50 \quad n_0 = \frac{Z^2_{(1-\alpha)} (p) (q)}{d^2}$$

α	$\pm d$	d^2	n_0	$1 + n_0/N$	n
.10	.10	.0100	67.7500	1.067547	64
.05	.10	.0100	96.0000	1.095713	88
.01	.10	.0100	165.7500	1.165254	143
.10	.05	.0025	271.0000	1.270189	214
.05	.05	.0025	384.0000	1.382851	278
.01	.05	.0025	663.0000	1.661017	400
.10	.01	.0001	6775.0000	7.754736	874
.05	.01	.0001	9600.0000	10.571286	909
.01	.01	.0001	16575.0000	17.525423	946

where $n = \left(\frac{n_0}{1 + \frac{n_0}{N}} \right)$

[illegible]

Appendix C

Precision Levels for Selected Frame and Sample Sizes
(alpha = .05, p=.50)

	Original	Less Transition	Responses
Sample n	278	246	242
Frame N	1003	889	889
$p(1-p)/(n-1)$	0.0009	0.001	0.0010
$1 - n/N$	0.7228	0.7233	0.7278
Variance	0.0006	0.0007	0.0008
Standard Error	0.0255	0.0272	0.0275
Precision	0.050	0.053	0.054

Table 5A-12

Attempted and Successful Escape Rates Over Last 30 Days,
by Conformance to the Count Criteria
(Conformance means three or more counts per day)^a

	Detention Centers		Training Schools		Ranches	
	Non Conform N=2,814 -2,831	Conform N=16,861 -16,963	Non Conform N=6,041 -6,122	Conform N=26,849 -26,911	Non Conform N=2,434 -2,606	Conform N=4,450 -4,462
Attempted escape rate per 100 juveniles	1.06	.78	2.45	1.10*	3.71	.89*
Escape rate per 100 juveniles	.74	.51	2.03	1.16	3.90	2.23

Source: Mail Survey, 1991

* $p \leq .05$

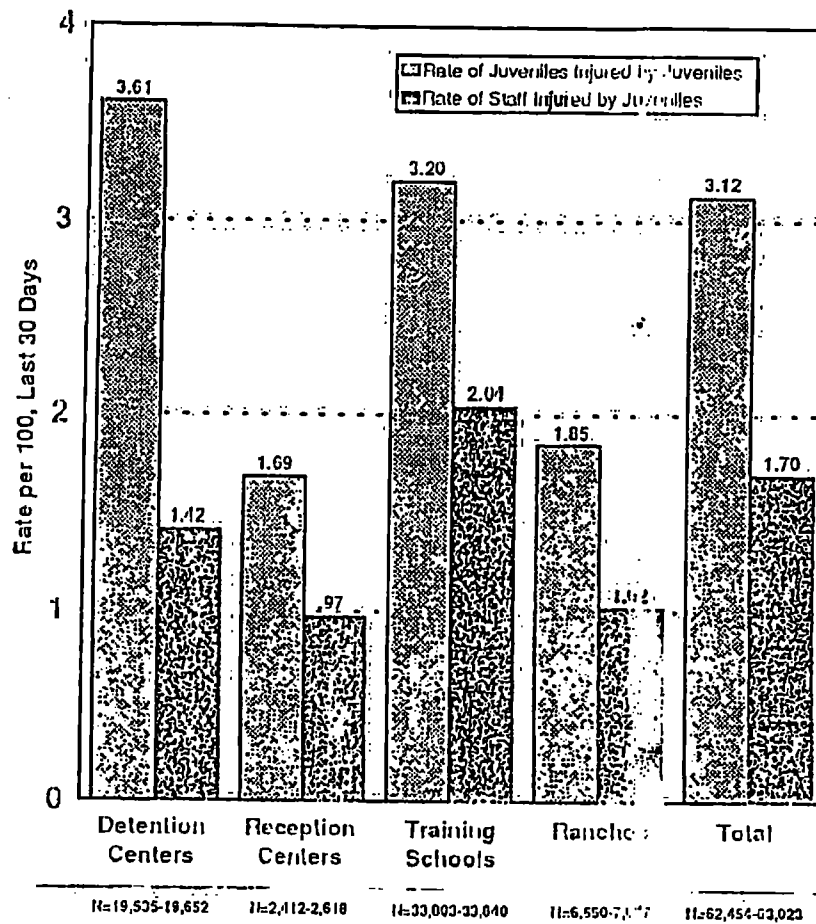
^a There were too few reception centers for meaningful analysis.

Injury rates. We also measured the success of internal security by examining injury rates within facilities. The mail survey asked facilities to report the number of injuries to juveniles and staff during the previous 30 days.¹⁵ The number of injuries was broken down into three categories: juveniles injured by staff, juveniles injured by other juveniles, and staff injured by juveniles. Injuries to juveniles by staff are examined in Chapter 7, Section B, "Limits on Staff Discretion." Figure 5A-2 shows rates of injuries sustained during a 30-day period in the two remaining categories.

Nearly 2,000 confined juveniles and 651 staff were injured in the 30 days before the mail survey. On average, about 3 percent of juveniles were injured by other juveniles in the previous month. About 1.7 percent of staff were injured by juveniles in the same period.

¹⁵ We have no indication of the seriousness of these injuries based on mail survey data, but site visitors observed juveniles with cuts, bruises, and scrapes, which were said to be the result of fights. In addition, we have no data on the level of unreported injuries. While serious injuries are likely to be reported, those involving minor cuts or bruises may be reported less frequently. Staff cannot report what they do not observe. During interviews several juveniles indicated that staff observed only a small percentage of the fights that occurred between juveniles. One juvenile reported he had been in 20 fights during his 5 months of confinement and that training school staff had observed only 3 of them. If staff ratios were to decline, it seems likely that the percentage of fights observed by staff would diminish.

Figure 5A-2
Average Juvenile and Staff Injury Rates,
Last 30 Days, by Facility Type



Source: Mail Survey, 1991

Violence affects many aspects of staffing inside facilities, making it harder for correctional facilities to recruit and retain quality staff. It also increases the need for replacement and coverage staff to replace injured workers. Facility expenses may increase due to workman's compensation costs, insurance payments, and staff lawsuits. Violence also increases the need to provide emergency medical care outside juvenile facilities (Table 4B-8).

Thirty-six percent of confined juveniles were held in facilities that reported no incidents of juvenile injuries caused by other juveniles in the last 30 days. Fifty-four percent of confined juveniles were housed in facilities which reported that no staff were injured by juveniles in the last 30 days. On the other hand, a small number of facilities had extremely high injury rates. For example, about 10 percent of juveniles were in facilities that had juvenile-on-juvenile injury rates of 8 per 100 juveniles or higher. One percent of juveniles were in facilities that had rates over 25 per 100. The highest reported

juvenile-on-juvenile injury rate was 59.26 per 100 juveniles per month. Likewise, the situation in a small number of facilities also appeared to be especially dangerous for staff. About 10 percent of juveniles were in facilities where the juvenile-on-staff injury rate was 4.88 or higher per month. About 1 percent of juveniles were in facilities in which the juvenile-on-staff injury rate was 16.7 per 100 staff members or higher. The highest reported juvenile-on-staff injury rate was 66.7 per 100 staff members per month.

Rates of injuries to staff at the hands of juveniles are highest in detention centers followed by training schools. For juveniles injured by juveniles, the injury rate was highest for juveniles in training schools, followed by detention centers. Interestingly, the regression analyses of Chapter 8 did not find any substantial or significant reduction in juvenile injuries associated with either classification or staffing ratios. The most important factor was the percentage of juveniles housed in dormitory sleeping rooms with 11 or more juveniles. Having a wall surrounding the facility was also associated with a significantly higher rate of juvenile injuries by other juveniles. Injuries to staff were significantly higher in facilities with crowded conditions. Again, although staffing ratios were not associated with the rate of staff injuries, turnover was. Higher supervision staff turnover was associated with more injuries to (presumably less experienced) staff.

Juveniles' Feelings of Safety. Personal safety is extremely important to youth in custody. When asked to rank how important personal safety was to them on a scale of 1 to 5, with 1 being "extremely important" and 2 being "very important," juveniles ranked safety as 1.5 ($\pm .2$). Most juveniles were satisfied with their level of personal safety. When asked to rank how well the facility did in providing for their personal safety on a scale of 1 to 5, with 2 being "very good" and 3 being "satisfactory," juveniles rated safety as 2.3 ($\pm .1$).

During interviews, juveniles also were asked if they felt safe in the facility. Across all facilities, 20 percent (± 4 percent) of confined youth said they did not feel safe inside the facility. Of those that did not feel safe, 69 percent (± 10 percent) stated that they feared other juveniles who were confined with them. Only 10 percent of juveniles in ranches did not feel safe, compared to over one-fourth of those in training schools.

As site visitors found in conversations with juveniles, however, juveniles' perceptions of safety are relative to their outside environment. After indicating to a visitor that he felt safe, one youth explained that the only worry he had in a facility was getting punched in the face or hit over the head with a chair, whereas at home he feared getting shot. Realizing there is essentially no danger of being shot inside a facility, he felt perfectly safe.

Summary Regarding Security

Larger facilities give more emphasis to tight security and control. On the measures of both the classification and counts criteria, larger facilities are more likely to conform. Conformance to security staffing ratios is extremely low, especially in large facilities. Larger facilities are more likely to try to achieve security by use of hardware.

Escapes or runaways are a problem in many facilities, particularly those with minimum security features. Ranches, the facility type with the lowest level of security, had the greatest rate of escapes and attempted escapes. Perimeter walls or fences are significantly associated with reduced rates of attempted and actual escapes in training schools. Training schools and ranches which conformed to the count criteria of three or more per day also had significantly fewer attempted escapes.

8. How many juveniles in your facility are **currently** taking prescribed psychotropic medication on a regular basis?

_____ Juveniles are taking prescribed psychotropics

57-58

9. Does the facility have a written suicide prevention plan?

1 Yes

60

2 No

10. How often do staff monitor juveniles deemed to be high suicide risks by direct, in-person observation (not by video camera)? (Circle one number, and fill in lines where appropriate)

1 Continuously

61

2 Once every _____ minutes

62-63

3 Once every _____ hour(s)

6 Other (SPECIFY) _____

11. Complete the following items for the **past 30 days**.

a. Number of **juveniles** who attempted suicide, or who engaged in suicide gestures or self-mutilations during the past 30 days: _____

64-65

b. Total number of **attempted suicides, suicide gestures or self-mutilations** by juveniles during the past 30 days: (Count each attempt, including multiple attempts by the same juvenile.) _____

66-68

12. Please complete the following items based on occurrences within the **past 30 days**.

a. Number of staff injured by juveniles during the past 30 days: _____

69-71

→ b. Number of juveniles injured by other juveniles during the past 30 days: _____

72-74

c. Number of juveniles injured by staff during the past 30 days: _____

75-77

78-80

SECURITY AND SAFETY

CARD 05

10-1005

For each of the following security arrangements, circle the codes that best describe the situation at your facility.

1. Perimeter has a security wall or fence surrounding the entire facility

1 Yes (Go To Question 1A)

20

2 No (Skip To Question 2)

1A. The wall or fence is... (Circle All That Apply)

1 Over 12 feet tall

21

2 Equipped with razor wire or barbed wire

22

3 Equipped with climb-resistant curves or mesh

23

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FEB 16 1996

LARRY W. PROPPS, CLERK
COLUMBIA, S. C.

Alexander S., et. al.,

Plaintiffs,

v.

Flora Brooks Boyd, et. al.,

Defendants.

C/A No.: 3:90-3062-17

**INTERIM ORDER
ON
STAFFING ISSUES
AND ATTORNEYS' FEES**

The present order is issued as an interim measure while the court considers what, if any, further modifications are necessary to the defendants' plan for correcting unconstitutional conditions at the Department of Juvenile Justice ("DJJ"). This order is addressed primarily to the issue of adequate staffing as raised by plaintiffs' Emergency Motion for Temporary Relief (filed August 28, 1995) and plaintiffs' Motion to Modify the Plan (filed September 22, 1995). This order also addresses attorneys fees incurred from the time of trial through the hearing on plaintiffs' present motions.

Because this order grants interim relief, the motion shall be treated as granted in part, but will be subject to later reconsideration. The clerk shall so mark the docket. The court may order further relief on its own or renewed motion of plaintiff's as noted herein (p. 9).

PROCEDURAL HISTORY

This action was filed on December 28, 1990. It came before the court for an extended non-jury trial beginning on June 13, 1994, and ending on August 29, 1994. As a result of that trial, this court found that the defendants had failed to satisfy certain constitutional minimums in the care and custody of the juveniles incarcerated by DJJ. Order filed January 25, 1995.

ENTERED & MAILED
2/21/96 2/16/96 GDH
cc: Bowers, Lide, Woodward, JFA
L. McAnnick, Batson, Dan

Staffing was among the areas identified by this court as inadequate in its January 25, 1995 order. Order at 30-39. The court also found constitutional inadequacies in the areas of programing and overcrowding which, necessarily, have an impact on the issue of adequate staffing. Order at 28-39. In deference to the State and the expertise of the defendants, however, the court did not specify a given staff-juvenile ratio or other specific means to cure the deficiencies. Rather, the court allowed defendants to propose a plan to remedy the various deficiencies. Order filed January 25, 1995 at 5 & 55-57. The court expressly declined to impose a population cap as part of any remedy.¹

The defendants' plan was submitted on May 25, 1995, was supplemented on June 23, 1995, and was approved by the court by order filed June 28, 1995. The court retained jurisdiction to oversee implementation of the plan. Order filed June 28, 1995 at 3.

Central to defendants' plan to improve overcrowding and staffing levels was an expectation that they could "reduce the population of the current long-term facilities by 100 as of July 15, 1996, and by a total of 200 as of July 15, 1997." Plan at 4-5. This reduction would be relative to the

¹ This court has repeatedly declined to place a population cap on the number of juveniles incarcerated in the juvenile justice facilities. See Order dated January 25, 1995 at 7-8. Such a move would be a disservice not only to the general public but to the juveniles themselves who are, according to the laws of the State, placed in these facilities for purposes of rehabilitation rather than punishment. See Order dated January 25, 1995 at 10-11. As noted in this court's January 25, 1995 order, the last facilities in DJJ were built in the 1970's, bringing the total "rated capacity" to 299. The construction of these facilities at that time corrected what were apparently major deficiencies. *Id.* at 11-12. While it is difficult to locate precisely comparable statistics, it is abundantly clear that the significant increase in the general population and, more particularly, the increase in violent and serious juvenile crime, since the 1970's necessitates a far greater capacity than what was built in the 1970's to remedy inadequacies existing at that time. See generally *id.* at 12. The State cannot, realistically, expect to treat this decade's juvenile justice problems with facilities and budgets of twenty or more years ago and this court will not encourage such a shortsighted remedy by providing the "easy" solution of a population cap. Indeed, it appears various entities within state government are making progress towards developing realistic long-term solutions.

population at the time of trial, which then ranged from 670 to 730 juveniles at the long-term institutions which had an overall "rated capacity" of 299. Order filed January 25, 1995 at 14. The benefits of this population reduction were to be augmented in one or more of the following ways: hiring of additional staff; acquisition of additional facilities; and shifting of population to the Department of Corrections. Plan at 4-5. The additional staff was reported to the court to be in place as of or shortly after the time the plan was approved.

FACTORS LEADING TO THE PRESENT MOTION

On August 30, 1995, the court held a status conference on this case. At that conference, the court's monitor, Retired Family Court Judge Robert Burnside, reported to the court that defendants had made significant improvements in various areas covered by the plan. He further reported, however, that the combination of overcrowded conditions and under staffing caused him to fear for the safety of the juveniles, particularly in dormitories lacking special programs.

Shortly before this status conference, on August 28, 1995, plaintiffs filed their Emergency Motion for Temporary Relief which alleged that the unconstitutional conditions, particularly related to staffing issues, had not improved. On September 22, 1995, plaintiffs superseded this motion by filing their Motion to Modify the Plan. In their supporting memorandum, plaintiffs reported that as of July 13, 1995, the juvenile population at DJJ had risen to 851, rather than declining as anticipated by defendants' plan. Defendants opposed plaintiffs motion primarily on the grounds that the plan had only recently been approved and had had little chance to prove its effectiveness. Memorandum in Opposition filed September 12, 1995 at 3-5. Nonetheless, defendants did not

contest that the number of incarcerated juveniles was rising dramatically.²

Given the seriousness of the issues raised by plaintiffs' motions the court scheduled a hearing on the limited issue of staffing levels as they related to the safety of the juveniles. A brief period for discovery was allowed before the hearing which was held beginning on December 18, 1995 and continuing through December 20, 1995.

TESTIMONY

Plaintiffs presented witnesses who testified to unsafe conditions caused by lack of staffing. These witnesses included a number of juveniles who testified to various altercations occurring on campus. The testimony of plaintiffs' witnesses would support the conclusion that there were problems with inadequate staff which problems were exacerbated by increasingly overcrowded conditions and by the lack of organized activities for the juveniles. In particular, several witnesses testified that most altercations occurred on the weekends or during evening hours when all juveniles were in the dorms and not engaged in programs.

Defendants attempted to discredit the testimony of a number of plaintiffs' witnesses by demonstrating that juveniles who became involved in altercations were usually engaged in inappropriate activities such as the sale of contraband or association with on-campus "gangs." Defendants suggested that such activities increased the likelihood juveniles would be involved in fights. Of course, defendant's argument here would cut both ways as the opportunity to engage in

² In a letter to the court dated November 28, 1995, defendants' counsel stated: "DJJ continues to be hampered by overcrowding, reaching a record high of some 1000 juveniles at the three long term institutions last week. . . . The disturbing fact is that overcrowding is increasing rather than decreasing or staying level since the case was tried."

prohibited activities itself suggests lack of adequate supervision.

The court need not, however, draw any conclusions from the testimony of plaintiffs' witnesses at this stage because the need for greater staff was admitted by defendants' own witnesses. Moreover, defendants implementation of a modified plan at or near the time of the hearing limits the usefulness of the testimony of plaintiffs' witnesses who necessarily would not have had an opportunity to observe the impact of the modified plan.³

Both the Director of the Department of Juvenile Justice, Ms. Flora Brooks Boyd, and her Assistant Deputy Director for Institutional Operations, Mr. George Hampton, testified that the juvenile population had increased rather than decreased since the trial one year earlier. According to Ms. Boyd, the population as of the time of the December 1995 hearing was at 1,025. Notably, this is over three times the "rated capacity" of the dorms (299), at least a forty percent (40%) increase over the population at the time of the original trial (then ranging from 670 to 730), and even a twenty percent (20%) increase over the population reported by plaintiffs when they sought modification of the plan (851 juveniles).

Despite their opposition to plaintiffs' motion to modify the plan, defendants conceded that modification was necessary. Defendant Boyd and her Deputy Director both agreed that more staff was needed in order to protect the juveniles from each other given the significant increase in population. Mr. Hampton presented a plan to the court which called for significant increases in the

³ The court is not suggesting that plaintiffs acted too hastily in bringing the present motion or that they should not have pursued it after filing. Rather, as discussed below, the timing of the defendants' disclosure and implementation of its modified staffing plan suggests that the plaintiffs' actions were instrumental in bringing about staffing changes which defendants now concede were necessary.

number of staff on site in the dormitories, particularly during times when all juveniles assigned to the dorms are present and not engaged in supervised activities. He testified that these staffing increases were *the minimum needed to insure safety*. The precise number and resulting staff-juvenile ratio varied depending on the programs available to each dorm and the type population in the dorm.

Mr Hampton testified that the plan he presented to assign additional staff to dorms had been in force for week days since a few weeks before the hearing (beginning on or about December 1, 1995). As to weekend hours, the decision to add staff was apparently not made until after the December 18, 1995 hearing began and was apparently based on the testimony of some of plaintiffs' witnesses.

Ms. Boyd agreed that the plan testified to by Mr. Hampton was the minimum necessary to insure safety. She testified that even greater staffing (approximately forty-two additional full time positions) would be needed to provide counseling, not just security, to the juveniles.

After hearing testimony of all the witnesses, the court asked defendants to submit a summary of their proposed staffing and program plan. This plan was filed with the court on January 16, 1996 and is found at Attachment A to this order.

INTERIM FINDINGS AND CONCLUSIONS

The defendants have admitted that significant increases have occurred in the population at the juvenile justice facilities. They have conceded that increased staffing is necessary to insure juvenile safety. Defendants have, in fact, testified to a specific plan which includes significant increases in staffing as the minimum level necessary to insure safety. Given this testimony by

defendants, this court finds that the plan should be modified to require *at least* that level of staffing set forth in defendants' plan, Attachment A hereto. It is the court's understanding that, consistent with defendants' testimony regarding the plan, this plan will insure that extra staff is provided for each dormitory for all hours when substantially all assigned juveniles are regularly in the dormitory.⁴

This finding is, however, only interim and is subject to further modification after an appropriate amount of time has passed to allow evaluation of defendants' modified staffing plan. The staffing plan as presented by defendants' witnesses was, as noted above, so new as of the date of the hearing that the plan had not previously been presented to the court, its monitor, or, apparently, the plaintiffs' counsel. The court was also unaware of other plans impacting on the related issues of overcrowding and programs which were presented by defendant in testimony and in Attachment A hereto. Significantly, during the very week of the hearing, meetings were being held by a special task force formed by the Governor to study and recommend further solutions to the juvenile justice problems. Thus, the information presented was not only new and somewhat complex, but also evolving.

Because defendant had not implemented this plan until shortly before (or in some regards after) the hearing, the testimony of plaintiffs' witnesses necessarily relates to a period before the

⁴ The court recalls Mr. Hampton's testimony as being that the extra staff would be on site for all times when all or most of the assigned juveniles were actually in the dormitory other than hours when they should be asleep. The written plan, however, shows the extra staff only on Saturday, Sunday and School holidays as well as during a portion of the second shift hours. Because of a split school schedule as well as the post-wake-up but preschool morning hours, there may well be other hours when substantially all juveniles would be in the dorm and not engaged in organized activities. It is unclear from the written plan whether there are such hours and, if so, how the dorms will be staffed during these hours. Defendants shall clarify the plan in this regard.

present plan went into effect. The court, therefore, cannot evaluate the effectiveness of the defendants' modified plan based on the testimony provided at the hearing and will need additional information in order to reach a final determination on plaintiffs' present motions.

Moreover, other state initiatives such as those under consideration by the Governor's task force, may well generate other improvements which may eliminate the need for further action by this court. As this court has previously indicated, it prefers a course of allowing the State the first opportunity to select the means to correct deficiencies. This not only allows those with the greater expertise in the area to offer more effective and innovative solutions but, hopefully, encourages improvements which go beyond the constitutional minimum.

For these reasons, and to insure better future communication between the defendants, the court, its monitor and the plaintiffs' counsel, the court has requested monthly reports from defendant as to all matters covered in Defendants' Response to the Court's Order for Production of Information (filed January 16, 1996). Attachment A. The requested report will include information as to whether the stated staffing requirements have been met, as to the defendants' progress on the various program plans, as to any injuries sustained by juveniles, and as to any population shifts or added dormitory space which might impact on overcrowding. Order filed January 9, 1996 at 3. Defendants have elected to provide these reports on the tenth of each month for the previous calendar month. To the extent other initiatives are adopted which go beyond those set forth in the plan, the defendants should appraise the court of these in the same report. The court will rely, in part, on these reports to determine the effectiveness of the modified staffing plan as proposed by defendants.

After a minimum of three months of data has been accumulated, the court will review these

reports and, if it deems necessary, ask for additional testimony. Absent urgent circumstances, plaintiffs' should not renew their motion for relief on the staffing issues prior to three months. In the interim, the court's monitor will randomly confirm the validity of the reports and report to the court on related issues.⁵

ATTORNEYS FEES

1. Fees related to the present motion.

Plaintiffs brought this motion shortly after the court approved defendants' plan. Despite the recency of the court's approval of the plan, plaintiffs argued that modification was necessary due to a change of conditions. The uncontested evidence at the hearing proved plaintiffs' position correct. In particular, defendants' original plan centered on a goal of reducing the population over the course of two years. As defendants conceded at the hearing, the population was moving rapidly in the opposite direction.

Defendants also conceded at the hearing that staffing levels significantly higher than those set forth in their plan were the minimum necessary to insure the safety of the juveniles. Notably, this concession was not made at any time prior to the hearing. Rather, defendants opposed plaintiffs' motion, arguing that their original plan should be given time to work. Memorandum in Opposition at 3 (filed September 12, 1995).

⁵ One area of concern is defendants' long-term reliance on overtime to fulfill the added staffing requirements. While there are obvious benefits to such an arrangement in the short-term, including the ability to avoid additional training and benefit expenses, there are corollary disadvantages to long-term use such as the potential that defendants will find themselves operating with an overworked, fatigued and disinterested staff. Experience of several months will allow the court and the parties to evaluate the effectiveness of defendants' plan in this regard.

The timing of defendants' implementation of the changes is also significant. Most of the changes were not implemented until just before the hearing on the present motion. Other changes, in particular increased staffing on the weekends, were not implemented until after the hearing and appeared to have been a response to plaintiffs' witnesses' testimony.

Under these circumstances, the court finds that plaintiffs' advancement of the present motions and continued advocacy of them through the hearing were necessary to preserving the benefits gained in the initial litigation and to obtaining further benefits. For these reasons, plaintiffs are entitled to an award of attorney's fees related to the pursuit of this motion. *E.g., Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990) (affirming award of fees for plaintiff's unsuccessful opposition to defendant's motion to modify a consent decree because plaintiff's counsel had an obligation to attempt to preserve the gains previously won); *Duran v. Carruthers*, 885 F.2d 1492, 1496 (10th Cir. 1989) (rejecting argument that plaintiff's did not prevail on a motion which they filed but withdrew after a stipulated agreement). The court will separately address plaintiffs' fee request to the extent it relates to general monitoring activities. The procedures to be followed for submission of documentation supporting the fee request is also addressed below.

2. Monitoring activities.

Plaintiffs have requested approval for fees related to monitoring activities. For the reasons set forth below the court will allow plaintiffs to submit a request for payment of fees to cover a limited amount of monitoring activities.

Although they did not prevail on all issues, plaintiffs were prevailing parties in the underlying case. The court found various constitutional violations and allowed defendants to propose a plan to remedy those violations. Defendants' plan, as adopted by this court on June 28,

1995 and as modified by this order, by its own terms requires time for full implementation. Plaintiffs' counsel must have some role in insuring that implementation occurs in order to assure their clients of the benefits gained in this action. *Diaz v. Romer*, 961 F.2d 1508, 1511 (10th Cir. 1992) ("Case law and the plain language of 42 U.S.C. § 1988 clearly state that attorney's fees can be awarded for post-judgment monitoring and other efforts to ensure compliance with court orders in a civil rights case"). The present motion is evidence of this need.

The appointment of a court monitor does not take this role away from plaintiffs' counsel, although it may impact on the scope of plaintiffs' monitoring role. *Duran v. Carruthers*, 885 F.2d 1492, 1495 (10th Cir. 1989) (in case in which plaintiffs' counsel had a monitoring role under the consent decree, fact that the court and defendant both had monitors in place did not eliminate plaintiffs' counsel's role); *Keith v. Volpe*, 833 F.2d 850, 857-58 (9th Cir. 1987) (consent decree's creation of separate monitoring entity did not preclude award to plaintiffs counsel for monitoring activities which were not duplicative of the activities of the decree-created monitor). As noted in *Duran*, "As in other institutional reform litigation, the entry of the Court's judgment has not terminated the role of the plaintiffs' counsel. . . . Without determined, competent and dedicated representation, the provisions of this Consent Decree might have little practical significance for the class members." *Duran*, 885 F.2d at 1496 quoting *Brewster v. Dukakis*, 544 F. Supp. 1069, 1072 (D. Mass.) modified on other grounds 786 F.2d 16 (1st Cir. 1986).

The department to be monitored in this case is a large entity undergoing significant changes in structure, population and staff. Monitoring its progress is, inherently, no small task. The court has directed defendants to provide certain reports which should aid in the monitoring process. These reports must be reviewed by the court, its monitor, and plaintiffs counsel. A reasonable

amount of checking behind these reports as well as other monitoring is also reasonable to insure compliance. The court finds that it is appropriate both for the court's monitor and for plaintiffs' counsel to play some role in this monitoring process.

The court's indication that it will consider fee applications for monitoring activity is not, however, *carte blanche* to invest uncontrolled amounts of time in monitoring. Neither is it prior approval of any fee request. The court will carefully scrutinize any fee application for monitoring services to insure that it is not duplicative of the activities performed by the court's monitor, and does not relate to matters beyond the court's order.⁶ Although the court will set neither a floor nor a cap on plaintiffs' monitoring fees, the court anticipates that such fees should, on average, not exceed \$3,000 per month. Should plaintiffs discover matters requiring either new motions on their part, such as is presently before the court, or should they be placed in a position of opposing a motion to modify the plan, related fees and expenses should be justified and dealt with separately from the monitoring activity.

3. Fee application procedures.

Plaintiffs have previously provided the court with copies of billing documents related to their attorneys fees incurred in pursuit of the present motion and various monitoring activities. These documents were not, however, filed with the court, apparently based on a belief that an

⁶ Plaintiffs have pursued various forms of relief which the court has previously rejected. Activities directed towards again seeking such relief would be beyond any monitoring role. Similarly, any activities of counsel which relate to damages claims which are pending or may be brought on behalf of individual juveniles are also beyond the monitoring role. While the court recognizes that one activity may lead to the other, the court directs counsel to carefully review their time records before submission to eliminate any requests for time which go beyond the pure monitoring role.

CONCLUSION

For the reasons stated above, the court will order interim relief to plaintiffs by requiring defendants to comply with the staffing plan set forth in Attachment A hereto. Defendants shall supplement this plan as noted in footnote 4 above and shall provide the reports required as noted herein and in the court's order filed January 9, 1996, on a monthly basis. The court will review the adequacy of the staffing based on these reports, the reports of the court's monitor, and such further information as the court may request. The court's review shall be conducted no earlier than April 15, 1996, absent exigent circumstances.

The court further finds that plaintiffs are entitled to fees for pursuit of this motion and related to monitoring activities. Plaintiffs shall submit their fee application as set forth herein.

IT IS SO ORDERED.



Joseph F. Anderson, Jr.
United States District Judge

February 16, 1996
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

)
)
)

AFFIDAVIT

Ms. Drucy Glass, who appeared personally before me, affirms and states the following:

1. My name is Drucy Glass. I live part of the year in Lexington, South Carolina and part of the year in Ithaca, New York. My addresses are Lexington, South Carolina, 29072, and Ithaca, New York, 14850.
2. I worked as a mitigation investigator on the case of *State v. Freddie Owens* during the 1999 trial and the 2003 capital re-sentencing proceeding.
3. During the ordinary course of my mitigation investigation, I requested and obtained various social history records related to Mr. Owens and his family members, including school records, DSS records, medical records, and arrest and criminal records. I maintained those records in a legal file box, which was placed in storage after my work on this case was complete. Upon request, I recently made this box available to Mr. Owens' post-conviction counsel.
4. I do not recall having any contact with Mr. Owens' 2006 capital defense team. I have been informed that the time sheet for Ms. Paige Tarr states that she spoke with me by phone on November 1, 2006, but I do not have any independent recollection of that phone call.
5. On November 1, 2006, I was at my home in Ithaca, New York, and my files for the *Owens* case were in a storage facility in Columbia, South Carolina. If anyone from Mr. Owens' 2006 defense team had asked me to make my files available for their use, I would have gladly made arrangements for someone in Columbia to get my files out of storage and provide them to Mr. Owens' defense team.

Further affiant sayeth naught.

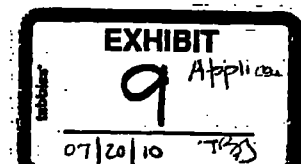
Drucy Glass
DRUCY GLASS

Sworn to and subscribed before me

This 9th day of July, 2010

Notary Public for the State of South Carolina

My commission expires: 08/01/2011



09-4-47833 248-25-5141

MASON, BORA DIANNE

71121C

029

[illegible]

P

TE

NURSING ASSESSMENT

TIME: 0125 ☐ SEE FLOW SHEET

☐ SEE FLOW SHEET

TIME: 0125 ☐ SEE FLOW SHEET *Involved in altercation tonight - was struck about head & fist. Present now to nose pain. Deformity to osseous to nose. Small abrasion to nose and (L) upper lip. Chem. LAC, awake oriented X3. fence.*

IMPLEMENTATION NOTES

Wet | It stings she feels better

WILLIAMS & SON

Comfort St near park

ENDS IN GEORGE'S

↑ comfort etc. pt. verbalization
of pain while in etc.

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☐ GLASSES ☐ CONTACT LENSES ☐ DENTURES-UPPER ☐ LOWER ☐

☐ JEWELRY

☐ WALLET ☒ OTHER

☐ CHECKED/ENVELOPE #

VALUES TO

TIME: 0125

PHOTOGRAPHY BY VITA DESIGNS

[illegible]

NURSES & NATURE(S)

Wm. Lyndell P. (Wm.)
Goal Mt.

EVALUATION

REPORT
CALLED TO

PLATE 1130

1950-1951
1952-1953

22-58861-10000



GREENVILLE HOSPITAL SYSTEM
Greenville, S.C. 29603

OUTPATIENT REGISTRATION

PATIENT'S NAME MASON, DORA DIANNE		MAIDEN/BIRTH NAME		EMERGENCY		PRIVATE REFERRAL		RECURRING		ED ROOM NO.	
RESIDENT STREET		RESIDENT CITY GREENVILLE		STATE SC		ZIP CODE 29601		COUNTY CLAY		PHONE NO.	
CURRENT MEDICAL RECORD NO. 248355141		ARRIVAL (HOW BROUGHT IN - BY WHOM) WK		REFERRING/ATTENDING PHYSICIAN & LICENSE NO. 00001 AGG CLINIC DOCTORS		SOCIAL SECURITY NO.		F/C		ACCOUNT NUMBER	
ACCIDENT DATE		JOB REL. NO		DATE OF SERVICE 08/26/89		TIME 23:54		NEXT OF KIN, NAME MASON, ALEX		RELATIONSHIP SIBLING	
COMPLAINT ASSAULTED		SPEC. CODE 002		NOTIFIED		POLICE		SHERIFF		ST. HWY.	
PATIENT'S EMPLOYER MEDICAID		INSURED'S NAME - PRIMARY MASON, DORA DIANNE		POLICY NO. 2037, 8001		CERTIFICATE NO.		ST. HWY.		FAMILY	
803		INSURANCE COMPANY - PRIMARY MEDICAID		EMPLOYER		SEND CLAIM TO:		ED		OP DIAG	
GUARANTOR MASON, DORA DIANNE		VERIFICATION NAME & PHONE NO.		LAWYER'S NAME		ED		OP DIAG		MM-DED.	
GREENVILLE		INSURED'S NAME - SECONDARY		POLICY NO.		CERTIFICATE NO.		ED		OP DIAG	
29601 803 232-1815		INSURANCE COMPANY - SECONDARY SELF PAY		EMPLOYER		ED		OP DIAG		MM-DED.	
GUARANTOR'S EMPLOYER MEDICAID		SEND CLAIM TO:		VERIFICATION NAME & PHONE NO.		ED		OP DIAG		MM-DED.	
803		ED		OP DIAG		MM-DED.		ED		OP DIAG	
		OP SURG		MM-PCNT		ED		OP SURG		MM-PCNT	
		VERIFIED/BY		VERIFIED/BY		VERIFIED/BY		VERIFIED/BY		VERIFIED/BY	
		DATE		DATE		DATE		DATE		DATE	

CONSENT TO OUTPATIENT SERVICES

A. CONSENT FOR TREATMENT I hereby consent to and authorize any attending physician or any member of the Emergency Department Staff (which includes Emergency Department Physicians, Members of the Hospital Staff or their Assistants and Designees) of the Greenville Hospital System to perform such examinations, treatments and operations which in his or her opinion may deem necessary or advisable.

B. AUTHORIZATION TO RELEASE INFORMATION I authorize the hospital and attending physician(s) to release (1) any information acquired in the course of my examination and treatment in connection with this hospital stay to insurance companies and their agents, Medicare, Medicaid, OCHAMPUS and their agents, or other sponsoring agents; (2) any information acquired in the course of my examination and treatment in connection with this hospital stay to nursing homes, intermediate care facilities, home health care, boarding homes, Health Departments, Visiting Nurse Association, other health care institutions and physicians responsible for my continued care after discharge from this hospital.

C. AUTHORIZATION TO PAY INSURANCE BENEFITS I hereby authorize payment directly to the hospital of the individual (Personal) and Group Basic, Major Medical and Medicare Hospitalization (insurance) Benefits otherwise payable to me but not to exceed the hospital's regular charges for this period of hospitalization. I understand that I am responsible to the hospital for charges not covered by this authorization.

D. STATEMENT TO PERMIT PAYMENT OF HOSPITAL AND MEDICAL INSURANCE BENEFITS TO HOSPITAL I certify that the information given by me in applying for payment of benefits under Title XVIII of the Social Security Act, PL87-97 is correct. I authorize release of any information needed to act on this request. I request that payment of authorized benefits be made in my behalf.

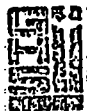
I assign payment for the unpaid charges of the physician(s) for whom the hospital is authorized to bill in connection with its services. I understand that I am responsible for any health insurance deductibles and 20 percent of the remaining reasonable charges.

E. PATIENT AUTHORIZATION I authorize the refund of overpaid insurance benefits in accordance with my insurance policy conditions where my coverages are subject to a coordination of benefits clause. I authorize the hospital to act in my behalf as attorney in fact in (1) the collection of benefits from any responsible third party through whatever means may be deemed necessary; and (2) in the endorsement of benefit checks made payable to myself and/or the hospital. I authorize the Greenville Hospital System to apply any overpayment for subject account to any previous hospital account(s) which have not been paid and for which I am responsible. I certify that all Group Insurance has been assigned to the hospital. (FEP Blue Cross Subscriber.)

Dora D. Mason Alex Mason
PATIENT (and GUARANTOR) REL. & RESPONSIBLE PARTY

DATE _____

0767-89
B



GREENVILLE HOSPITAL SYSTEM
Greenville, SC 29605
EMERGENCY DEPARTMENT

08-11-7833 248-55-5141
MASON, DORA DIANNE
CLINIC
M/B/F 029 TE
MEDICAID

DISCHARGE INSTRUCTIONS

The Greenville Hospital System Emergency Departments are available twenty-four hours daily. The examination and treatment you have received in the Emergency Department has been rendered on an emergency basis only and is not intended to be a substitute for or an effort to provide complete medical care. It is important that you keep your follow-up appointment as directed and that you report any new or remaining problems to the physician who sees you for follow-up care. Follow the instructions below as indicated for you. You may return to the Emergency Department if your problem worsens or your physician is unavailable.

☐ **CASTS:** Casts take twenty-four to forty-eight hours to dry. Do not bend or bear weight on cast until it is dry. Keep cast dry at all times. Do not put anything between your skin and the cast. Wiggle toes or fingers frequently to help prevent swelling. Notify your doctor if you have cold fingers or toes, numbness or tingling of injured limbs, purple or blue skin of fingers or toes, sore or pressure areas, great increase in pain, or a broken cast.

☐ **CULTURE RESULTS:** You have had a _____ culture done. The results will be available in approximately forty-eight hours. If results are positive, we will contact you at the phone number you provide. If results are negative, you will not receive a call.

☐ **EAR INFECTIONS:** For middle-ear infections, the doctor will prescribe an antibiotic. Finish ALL this medication using the routine prescribed. Pain can usually be controlled with aspirin or tylenol. For ear canal infections, ear drops should be used as prescribed.

☐ **FEVER:** Use thermometer to measure your temperature. For a temperature over 101 F, take aspirin or Tylenol as directed. In children, aspirin should NOT be used in cases of chickenpox or flu. If a child with high fever (over 103 F) seems uncomfortable, bathe in cool to lukewarm water to bring the temperature down. Avoid rubbing alcohol or ice water baths. Drink PLENTY of fluids and do not overdress.

☐ **GYN PROBLEMS:** For infection, take ALL medication prescribed. Stay at rest until pain is gone and temperature returns to normal. Do not have sexual relations until you have checked with your physician. Call your physician if: temperature reaches 102 F; vomiting or diarrhea occur; pain is unrelieved by medications or worsens. For vaginal bleeding, call your physician or come to the Emergency Department if your menstrual period lasts longer than 10 days, or if you are pregnant.

☐ **HEAD INJURY:** Check person every two hours for the next twenty-four hours (if asleep, wake up). If any of the following occurs, immediately return to the Emergency Department or call your physician: Unusually sleepy-hard to awaken; mentally confused; very restless, disturbed, or agitated behavior; nausea/vomiting; severe headache; weakness of arms, legs; difference in size of pupils; seizures, convulsions; or, fluid draining from ears or nose. Home care: May be up and around, may eat or drink anything except alcohol. Ask physician about taking prescribed medications or pain medications.

☐ **HIGH BLOOD PRESSURE:** Your blood pressure was found to be higher than expected for your age. Take any medication that may have been prescribed and have your physician check this as soon as possible.

☐ **NAUSEA/VOMITING/DIARRHEA:** Rest quietly. Restrict intake to clear broth, gatorade, flat soda pop or sweetened weak tea. Use medication as prescribed.

☐ **SPRAINS:** Elevate the injured part above the heart to decrease pain and swelling. Use the injured part only as directed by your physician. Use ice packs the first twenty-four hours after injury; then apply heat unless otherwise directed. If ace wraps are used, wrap snugly, not too tight or too loose.

☐ **URINARY TRACT INFECTIONS:** Take medications as directed, drink plenty of fluids and contact your physician if any of the following occur: persistent fever; shaking chills; pain on urination forty-eight hours after beginning medication; vomiting; diarrhea; or, abdominal pain. Be sure to take ALL of the antibiotic your physician has prescribed for you.

☐ **WOUND CARE FOR BURNS/ABRASIONS/SUTURED LACERATIONS:** Keep dressing clean and dry. Remove dressing, clean wound as directed and apply another dressing ONLY if directed by the physician. Observe wound for any signs or symptoms of infection such as: increasing pain; drainage of pus, swelling or redness. Immediately call your physician or return to the Emergency Department if you develop chills, fever or red streaking around the wound.

TETANUS BOOSTER given (date) _____

☐ **XRAY INSTRUCTIONS:** Your x-rays have been read by the Emergency Physician and/or a Radiologist. For your protection, your x-rays will be reread by our Radiology Department. If any clinically significant differences are noted between the first and final readings, you or your physician will be contacted.

Other Discharge Instructions: _____

YOUR FOLLOW-UP REFERRAL is _____

Address/phone _____

GREENVILLE HOSPITAL SYSTEM

SCHOOL/WORK EXCUSE: Day(s) excused _____

May return on _____

Light activity for _____

OTHER COMMENTS/RESTRICTIONS _____

Attending physician/discharge nurse _____

Date 8-27-82

I have read and understand the discharge instructions and have received all of my valuables and clothing.

Patient X _____



GREENVILLE HOSPITAL SYSTEM
Greenville, SC 29605
EMERGENCY DEPARTMENT

08-494-33 248-35 141
MASON, C. A. DIANNE
PAGE 1141C
TE

PHYSICIAN ASSESSMENT

MANNER OF ARRIVAL: ☒ EMS ☐ STRETCHER ☐ WHEELCHAIR ☒ WALKING ☐ CARRIED

DATE: 8-2-89 TIME: 2:42 AGE: 28 SEX: F RACE: E HT: 5'00 WT: 120 DOB: 12/20/60

CHIEF COMPLAINT: assaulted hit in face with fist approx 2300. Swelling to nose.

Dependent earlier none at present

SIGNATURE: [Signature]

PHYSICIAN ASSESSMENT

TIME: 0139

28 yo B F hit c fist -> (R) side

of nose. Denies difficulty c breathing.

(+) epistaxis stopped now.

PE => Bridge of nose displaced to

(L), mildly tender to palpation.

No neurologic findings or septal hematoma.

No other injuries x small (4mm) lac in

midline of bridge of nose. NO Rupture of Periorbital

NO Rupture of Periorbital

NO Rupture of Periorbital

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DATE: 8-2-89 TIME: 042

NAME: Daria Mason

PHYSICIAN: [Signature]

TIME: 0125

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HOSPITAL CODE

OUTPATIENT REGISTRATION

GREENVILLE HOSPITAL SYSTEM
Greenville, S.C. 29605

MEDICAL RECORD

☐ EMERGENCY		☐ PRIVATE REFERRAL		☐ RECURRING		ED ROOM NO.	
PATIENT'S NAME MASON, DORA DIANNE		MAIDEN/BIRTH NAME		AGE 049	DATE OF BIRTH 04/20/80	SEX F	RELIGION BAP
PATIENT STREET A WOODLAND HOMES		RESIDENT CITY GREENVILLE		STATE SC	ZIP CODE 29601	COUNTY 023	REG. CLERK 90
ARRIVAL (HOW BROUGHT IN - BY WHOM) ALONE				REFERRING/ATTENDING PHYSICIAN & LICENSE NO. 00001 THE CLINIC DOCTORS			
PATIENT DATE 7/7	JOB REL NO	D.O.A. 06/07/89	DATE OF SERVICE 10:47	NEXT OF KIN, NAME MASON, ALEX		RELATIONSHIP SPOUSE	
COMPLAINT T STS HEADACHE X 2 MONTHS ** LAST ER DATE 032189 **				SPEC. CODE 043			
PATIENT'S EMPLOYER MEDICAID				POLICY NO.			
803				CERTIFICATE NO. SQU			
INSURED'S NAME - PRIMARY MASON, DORA DIANNE				EMPLOYER			
INSURANCE COMPANY - PRIMARY MEDICAID				ED			
SEND CLAIM TO:				OP DIAG			
VERIFICATION NAME & PHONE NO				MM-DED:			
INSURED'S NAME - SECONDARY				PT			
INSURANCE COMPANY - SECONDARY SELF PAY				OP SURG			
SEND CLAIM TO:				MM-PCNT			
VERIFICATION NAME & PHONE NO.				SURGERY CODE			

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Signature: Dora Mason Alex Mason
FAMILY (AND/OR GUARDIAN) INSURED (AND/OR RESPONSIBLE PARTY)

WITNESS DATE

07301-89
VMS