

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case Number: 2025-001377

RICKY LEE BLACKWELL, SR.,

V.

STATE OF SOUTH CAROLINA,

PETITIONER,

RESPONDENT.

APPENDIX
VOLUME 10 OF 18

ROSALIND S.D. MAJOR

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S.C. SUPREME COURT

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1 And finally ----

2 **THE COURT:** Well, why I don't just ask Mr. Bulsa to review that
3 order. And, if he still has a problem after that, to let me know.

4 **MR. MCQUIRE:** Sure. Well, I've got the order here and I'll quote
5 from it: "If the examiners find the Defendant competent to stand trial, the
6 report -- the findings shall be provided to the Court only."

7 It's about as clear as it can be. And given the nature the
8 correspondence between us and Mister ----

9 **THE COURT:** I'm aware of that and I would imagine that the
10 prosecutor will abide by the court order. I'll take a look at it. I know Mr.
11 Barnette was involved in that directly.

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

13 **THE COURT:** And so just check with him and I think he can settle
14 it. He's probably correct in quoting the order I think.

15 All right. Anything else, gentlemen?

16 **(Brief Pause)**

17 **MR. MCQUIRE:** Not at this time, Your Honor.

18 **THE COURT:** Okay. And your-- your-- your trial right now is
19 scheduled in September? Give me an idea ----

20 **MR. MCQUIRE:** Well, let me give you as much information as I
21 have.

22 **THE COURT:** All right. That will be fine.

23 **MR. MCQUIRE:** It's -- it's set before Judge Carmen Mullin
24 (phonetic) in Beaufort. It's set to start September 8th right now.

25 We had a September 3rd trial date, but because that's the Labor Day

1 weekend, I think the Court is looking at moving it to the 8th.

2 One of the lawyers involved in the case, the second chair lawyer, is
3 involved in a federal prosecution in Columbia, which will be a six-, seven-week
4 trial.

5 The -- the deadline for his client to plea has passed. So it looks like he
6 is going to trial. And we've not yet gone back to the Court since that deadline
7 passed, which of course, we would probably be asking -- we've had
8 preliminary discussions with the judge along the lines of he's in court six,
9 seven right before trial because it starts in July, the first week of July.

10 So he would be in trial July, August. It would be difficult to get him up to
11 speed for a September trial. So we would ask for probably another three, four
12 weeks, which is back into October.

13 So right now we're set for September 8th, but likely to start perhaps in
14 October sometime.

15 **THE COURT:** All right. I'll take a look at my schedule and the
16 schedule of other judges and we'll see what we can set up.

17 **MR. MCQUIRE:** Yes, sir.

18 **THE COURT:** Thank you very much.

19 **MR. MCQUIRE:** Thank you.

20 **MR. BULSA:** Thank you, Your Honor.

21 **THE COURT:** That's concludes the hearing.

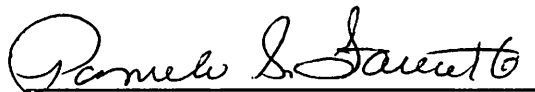
22 **(Whereupon, the hearing concluded at 9:13 a.m.)**
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REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 11, were transcribed by me and represent a true and accurate transcript of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

June 1, 2014

A handwritten signature in cursive script, reading "Pamela S. Faucette", written over a horizontal line.

Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) COURT OF GENERAL SESSIONS

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5 STATE OF SOUTH CAROLINA,) TRANSCRIPT
6 PLAINTIFF,) OF
7 vs.) RECORD
8 RICKY LEE BLACKWELL,) 2009-GS-42-3609
9 DEFENDANT.) 2009-GS-42-3610

10
11
12 August 30th, 2013
13 Spartanburg, South Carolina
14
15
16

17 B E F O R E :

18 THE HONORABLE ROGER L. COUCH, Judge.
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1 A P P E A R A N C E S :

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BARRY BARNETTE
SOLICITOR
Attorney for the State

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DERRICK BULSA
DEPUTY SOLICITOR
Attorney for the State

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RUSSELL GHENT
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Attorney for the State

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WILLIAM MCGUIRE
ESQ.
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Attorney for the Defendant

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PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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I X D E X

(There were no exhibits marked or testimony taken
during this hearing.)

P R O C E E D I N G S

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3 THE COURT: All right. We're on the record in the case
4 of The State of South Carolina versus Ricky Lee Blackwell.

5 We're holding a status conference today. I have
6 informed the attorneys that we expect to have the schedule
7 set in -- next year for this trial to begin at the end of
8 January, the last week in January, and over into the first
9 weeks of February.

10 For that reason I feel that it's important that we get
11 together and do a scheduling order in the case. I do
12 understand that there are some issues that may be before the
13 Court in the near future concerning the defendant's mental
14 capacities and his eligibility or his being subject to the
15 penalties involved in this case.

16 I have received, from the defense, a proposed
17 scheduling order.

18 Mr. Barnette, did you get a copy of what they had
19 proposed?

20 SOLICITOR BARNETTE: Yes, sir, I did, after five
21 o'clock yesterday.

22 THE COURT: All right.

23 SOLICITOR BARNETTE: We're ready today.

24 THE COURT: That's all right. This is what we are here
25 to talk about today.

1 SOLICITOR BARNETTE: Yes, sir.

2 THE COURT: It, it appears to lay out some proposed
3 dates from the defense's prospective, and, of course, also
4 hear -- I want to hear from the State as to their position
5 in regards, in regards to what they would like to do.

6 So, I'll start with the State, and then we'll move to
7 the defense and see if we can't iron out some type of
8 scheduling order that will allow us to proceed in a
9 reasonable fashion in this matter.

10 Mr. Barnette.

11 SOLICITOR BARNETTE: Yes, sir, I looked at the order
12 that they submitted, Your Honor. There's some points we
13 agree and some points we can't agree on.

14 THE COURT: All right.

15 SOLICITOR BARNETTE: Obviously the order they're asking
16 from us is to suppose -- is about the evaluation of their
17 client since they put up an M.R. defense.

18 Your Honor, I would ask for a time to talk to our
19 experts concerning that. I don't think September 6th will
20 be sufficient time in that case. I would propose
21 October 4th, 2013, to talk to the experts about that, Your
22 Honor, and the other concern we've got too, Your Honor,
23 obviously---

24 THE COURT: I'm sorry. Tell me that again.
25 You're proposing what?

1 SOLICITOR BARNETTE: October 4th---

2 THE COURT: October 4th.

3 SOLICITOR BARNETTE: ---2013. And since they're
4 submitting that the Atkins hearing be done the second group
5 of, of -- I believe the dates you gave us, they're
6 submitting that we take the Atkins defense December 30th,
7 31st, 2013.

8 THE COURT: That's what the proposal is?

9 SOLICITOR BARNETTE: Yes, sir, I would submit we can
10 move that back since it's gonna be done the second group of
11 hearings from there.

12 The other issue we got, Your Honor, obviously they're
13 entitled to any report that our experts would generate.
14 Obviously we should be entitled to any report that our
15 experts generate. So, to---

16 THE COURT: You mean their experts generate?

17 SOLICITOR BARNETTE: Well, their experts too as well as
18 our experts. I think, if I read their order right, they
19 want to limit our expert's report to just issues that would
20 show that they're not MRI (sic), and I don't see how that
21 would even be close to being fair in this situation because
22 obviously there -- our experts have examined them. They'd
23 be entitled to our reports our experts generally obviously,
24 but including our experts should be any reports they have
25 that they're gonna submit we should be allowed to use and

1 our experts look at those.

2 THE COURT: All right.

3 SOLICITOR BARNETTE: So, I think that -- I disagree
4 with that in the proposal. I think that -- we'd ask for the
5 date to be moved back. I did change -- they did have
6 December 15th. I think Mr. McGuire just told me that's a
7 typo. That's actually a Sunday, September 5th -- I mean
8 September 15th is. But I would submit October 11th would
9 be enough time for them to submit an order concerning that
10 if they want to.

11 THE COURT: Just, just one second. Let's --.

12 SOLICITOR BARNETTE: I'm sorry. I may be going too
13 fast.

14 THE COURT: Well, I want to get a calendar up so I can
15 look at these dates you're proposing. Just one second.

16 SOLICITOR BARNETTE: Yes, Your Honor.

17 (Pause.)

18 THE COURT: Well, let me, let me ask the defense. I
19 note that you're -- the issue concerning whether or not your
20 reports should be available to the State, let's just talk
21 about that one for a second.

22 MR. MCGUIRE: Sure.

23 THE COURT: I think what you're saying is that they
24 would be entitled to see those reports only if the report --
25 your report takes the position that your client has, has a

1 defense in that regard.

2 MR. MCGUIRE: Not necessarily, Your Honor. I, I sent a
3 letter to Mr. Barnette earlier at the end of July. It was
4 actually pursuant to the Court's request that we alert them
5 whether we were going to pursue an Atkins claim.

6 THE COURT: Yes.

7 MR. MCGUIRE: And we did that in that letter.

8 THE COURT: Uh-huh. (Affirmative).

9 MR. MCGUIRE: And I've had enough consultation with my
10 expert to be satisfied that that is, in fact, an accurate
11 diagnosis of Mr. Blackwell, that we well present testimony
12 in that regard.

13 THE COURT: So, you do intend to pursue the defense
14 fully?

15 MR. MCGUIRE: Fully.

16 THE COURT: Okay. All right. And -- but you're still
17 taking the position the State's not entitled to see those
18 reports?

19 MR. MCGUIRE: Well, Your Honor, first off, we didn't
20 file a Rule 5 in this case. So, we're not bound by any
21 reciprocal discovery duties.

22 THE COURT: I understand that, but this is a little
23 different situation where you've had the Atkins issue coming
24 up.

25 MR. MCGUIRE: Sure. I think, I think the only rule

1 would apply would be if we put up expert testimony, they
2 would be entitled to the raw data that our expert relies
3 upon, and the rule, of course, says that they're not
4 entitled to it until after this person testifies.

5 THE COURT: Okay. That, that may create a difficulty
6 as far as scheduling is concerned if you're saying they
7 don't get that data until after the testimony.

8 MR. MCGUIRE: Well, let me, let me expand on that just
9 a little bit.

10 THE COURT: Well, let's, let's do expand on that a
11 little bit.

12 MR. MCGUIRE: Obviously the Court could order us to
13 turn over raw data a little bit earlier.

14 THE COURT: Yes, sir, I think I probably would, but go
15 head.

16 MR. MCGUIRE: And that would be my expectation as you
17 wouldn't want an expert to testify for say a day and a half,
18 and then turn over everything, and then the State would want
19 a 48 hour continuance to go through it.

20 THE COURT: Or more.

21 MR. MCGUIRE: Or more.

22 THE COURT: Okay.

23 MR. MCGUIRE: So, I agree. Obviously I'm not gonna be
24 able to object to a Court order that would allow that kind
25 of information to be turned over so that the presentation of

1 testimony would be smooth and without a continuance or a
2 break --

3 THE COURT: Uh-huh. (Affirmative).

4 MR. MCGUIRE: -- a substantial break. However, if, if
5 their experts come back and agree that we have an Atkins, an
6 Atkins claim, then the death penalty would obviously be off
7 the table. They'd be no other evidence otherwise.

8 THE COURT: It would probably be likely. I'll say
9 that. I don't know.

10 MR. MCGUIRE: It would be hard for me to think of a
11 situation where if we had all experts agreeing that, that we
12 have an M.R. claim---

13 THE COURT: I understand what you're saying.

14 MR. MCGUIRE: Sure.

15 well, if that's the case, then I could be put in a
16 position where I could try the case straight up and the
17 penalty would be 30 to life or we can perhaps contemplate a
18 plea that would be, if it was on a murder charge, obviously
19 it would be 30 to life. It might be -- we might be able to
20 plead it to something less than that.

21 THE COURT: Oh, I understand that. I'm just concerned
22 about your position that he's not entitled to any
23 information until after the testimony. That won't be
24 acceptable to the Court. I'm---

25 MR. MCGUIRE: Oh, sure.

1 THE COURT: I would issue an order and see that they
2 get the, what data they would be entitled to.

3 MR. MCGUIRE: Right, and that's not my position. My
4 position is that the only rule that would control would be
5 the rule regarding expert testimony and turning over data,
6 and obviously that's subject to a Court order.

7 THE COURT: Well, let me check with Mr. Barnette.

8 Has any Rule 5 request been filed by the defense in the
9 case?

10 SOLICITOR BARNETTE: They initially filed it, Your
11 Honor, and then they withdrew it.

12 THE COURT: It's withdrawn now.

13 SOLICITOR BARNETTE: But my position would be, under
14 Rule 5, see I think it's different parts. I think the alibi
15 and the insanity and not guilty by reason -- I mean guilty
16 but not mentally ill -- I mean guilty but mentally ill is a
17 separate section. That's to make sure discovery is done in
18 these situations ahead of time so we avoid the problem that
19 you're talking about.

20 Of course, I filed a motion, additional motion which
21 obviously we'll deal with at a later time. I know it wasn't
22 scheduled today. But this is to avoid that problem because
23 obviously, if they don't turn it over, if they just turn
24 over raw data, I think that the reports themselves should be
25 turned over because I think that's just the way it is, and

1 that's like, for example, we get bad information, we have to
2 turn it over to them and a report. If it shows that he's
3 M.R. -- shows he's M.R., they're entitled to it.

4 THE COURT: I understand.

5 But we're looking at those hearings, at any rate,
6 according to this schedule if we follow it, end of December.

7 So, now, back to what you were talking about,
8 Mr. Barnette -- just one second.

9 (Pause.)

10 THE COURT: So you're saying that you'd like to have
11 your proposed order concerning an Atkins violation delivered
12 by October 4th?

13 SOLICITOR BARNETTE: Yes, sir, if we could, and that
14 way---

15 THE COURT: Any objection to that deadline being moved
16 back?

17 MR. MCGUIRE: No, sir, Your Honor.

18 THE COURT: All right. Now let's move, let's move to
19 the next issue.

20 What, what else do you have issue with, Mr. Barnette?

21 SOLICITOR BARNETTE: Your Honor, the pretrial motions,
22 I assumed that we all, you know, over this long period of
23 time, had filed all the pretrial motions and the jury
24 questionnaire and so forth by September 22nd. I, I can't
25 imagine why we haven't filed one now.

1 THE COURT: Well, I don't either, but I don't -- is
2 there some problem with giving them until that date to file
3 them?

4 SOLICITOR BARNETTE: Probably not --

5 THE COURT: Okay.

6 SOLICITOR BARNETTE: -- because we're not doing them
7 until December -- November 6th.

8 THE COURT: All right.

9 SOLICITOR BARNETTE: That should give us plenty of
10 time.

11 THE COURT: Does the State have a problem with
12 requiring a response by October 21st?

13 SOLICITOR BARNETTE: Yes, sir, I do because -- a
14 written response because I don't think all the -- if you go
15 through the potential list of, that they, they -- he
16 supplied to them, Your Honor, a lot of these don't even
17 apply to us. A lot of these are Rule 5 issues that they
18 didn't file a Rule 5. So, that's their issue from that
19 standpoint the way I look at it. A lot of this stuff won't
20 even apply to us.

21 THE COURT: Well, what he's -- what they're saying
22 though is, if you have any written responses to their
23 motions, you would have to file those written responses
24 basically within 30 days after they filed their motion.

25 SOLICITOR BARNETTE: I don't have a problem -- if we're

1 gonna file written motions, then we do at that point. I
2 don't have a problem with that.

3 THE COURT: Okay. So --

4 SOLICITOR BARNETTE: But if I understand it, once it's
5 filed---

6 THE COURT: How about a deadline for any State's motion
7 that the State wishes to file, would you like to make that
8 at the same time, September 22nd, so that all written
9 motions would be filed by that date?

10 SOLICITOR BARNETTE: We can. We filed them. So,
11 it's---

12 THE COURT: Any objection to me requiring all written
13 motions to be filed by that date?

14 MR. MCGUIRE: No, Your Honor.

15 THE COURT: Okay.

16 SOLICITOR BARNETTE: Okay. And I would require any
17 responses you have to motions they may have filed to be done
18 by the same date in October. So---

19 MR. MCGUIRE: Yes, sir.

20 THE COURT: ---30 days later, all written responses
21 would have to be filed. That would set us up for motion
22 hearings to occur, if they require to -- testimony, with the
23 exclusion of the Atkins issues, to occur on
24 November 7th through the 8th. I believe I'm scheduled for
25 a term of General Sessions on that time.

1 Let me be sure. I looked it up yesterday. Yes. So, I
2 would be available to do that at that time.

3 Any objection to holding the hearings at that
4 timeframe?

5 SOLICITOR BARNETTE: No, sir, be November 7th and
6 8th or---

7 THE COURT: 6th, 7th, or 8th would be set aside for
8 hearings---

9 SOLICITOR BARNETTE: Okay.

10 THE COURT: ---any hearings that need to be held as a
11 result of the motions filed and the written responses that
12 have been filed.

13 MR. MCGUIRE: Yes, sir, no objections.

14 THE COURT: Okay. Then holding, if necessary, an
15 Atkins hearing on December 30th and 31st. That is a
16 chambers week I believe for me, and, of course, we can get a
17 court reporter and do that that week. I don't have a
18 problem with that.

19 Is there any objection to that from the State?

20 SOLICITOR BARNETTE: None from the State, Your Honor.

21 THE COURT: Any from defense?

22 MR. MCGUIRE: No, Your Honor.

23 THE COURT: All right. And I also -- the proposed jury
24 questionnaire is gonna be required on September 22nd as
25 well.

1 Is that a problem for you, Mr. Barnette?

2 SOLICITOR BARNETTE: No, sir.

3 THE COURT: All right. With the exception then of
4 moving the initial date back to October 4th, I don't see a
5 problem.

6 Now, as far as the exchange of information, is there a
7 motion pending concerning the exchange of information
8 concerning the Atkins issues, the report that you're asking
9 for?

10 SOLICITOR BARNETTE: I don't know if there's a motion
11 per se, Your Honor. I think that we had talked about that
12 if it became an issue, then it would be supplied to us I
13 believe. One thing I did want to point out. I think
14 September 22nd is a Sunday, Your Honor, if I remember
15 right. I was looking at my calendar.

16 THE COURT: December 22nd?

17 SOLICITOR BARNETTE: September 22nd. The
18 September 22nd---

19 THE COURT: All right.

20 SOLICITOR BARNETTE: ---I think is a Sunday.

21 THE COURT: Then it will be that Monday.

22 SOLICITOR BARNETTE: The 23rd, yes, sir. I think I
23 looked on that and saw that.

24 THE COURT: I didn't look at the calendar on that.

25 SOLICITOR BARNETTE: Yes, sir.

1 THE COURT: So, that will be the 23rd then.

2 All right. Get back to my other question as far as a
3 motion concerning the production of these reports.

4 SOLICITOR BARNETTE: Your Honor, we did file a motion.
5 It was actually filed on July 11th, 2012. It was a notice
6 of motion -- State's motion to produce underlying data,
7 documents, facts supported by expert, by any defense witness
8 under Rules 611, 612, and 705.

9 THE COURT: All right. Does the defense wish to have
10 argument on that motion or do you want me to decide it based
11 on briefs?

12 I'll be glad to hear from you.

13 MR. MCGUIRE: Well, I would like to brief it, but I
14 would like to have argument on it.

15 THE COURT: All right. Well, what I'll, what I'll do
16 then is I'll ask that you -- both sides submit a brief
17 concerning the production of that information to me, I'll be
18 glad to allow -- let's see. Where are we?

19 Fourteen days, two weeks from today's date?

20 MR. MCGUIRE: Yes, sir.

21 SOLICITOR BARNETTE: Be fine.

22 THE COURT: And once I've reviewed those, I don't know
23 that I'm gonna require or allow oral argument. Let me look
24 at the briefs. I may just do it on briefs. So, if you'll
25 get that to me, I'll let you know if I feel like oral

1 argument would be necessary.

2 SOLICITOR BARNETTE: And, Your Honor, I may make it
3 more specific concerning the M.R. issue in our brief. I
4 know the motion covered everything from that point.

5 THE COURT: All right. Let's, let's try to narrow our
6 issues if we can.

7 SOLICITOR BARNETTE: I will. I'll try to do it on the
8 mental retardation issue.

9 THE COURT: All right. Are there any other matters the
10 State feels we need to discuss at this time?

11 What I intend to do is take this information. I am
12 going to issue a scheduling order and provide that to
13 everyone in the case.

14 Any other matters the State feels we need to discuss at
15 this time?

16 SOLICITOR BARNETTE: Nothing at this time, Your Honor.

17 THE COURT: All right. Anything from the defense's
18 prospective?

19 MR. MCGUIRE: Your Honor, just very briefly, and I --
20 you can tell me to stop talking anytime you want me to cause
21 this is, this is going a little bit ahead even though I will
22 brief the issue of turning over our data and when should
23 that happen.

24 THE COURT: Uh-huh. (Affirmative).

25 MR. MCGUIRE: Let me just sort of summarize what I'm

1 gonna put in our brief.

2 THE COURT: All right.

3 MR. MCGUIRE: And that is, first off, if the State's
4 expert agrees that we have an M.R. claim, in all likelihood
5 the death penalty is gonna be off the table, and then I
6 would be looking at either a trial and then a sentencing
7 proceeding.

8 THE COURT: Oh, I understand what that would do to the
9 case.

10 MR. MCGUIRE: Sure. Exactly.

11 THE COURT: Yeah.

12 MR. MCGUIRE: And in my M.R. claim is the roadmap to my
13 mitigation evidence, and I'd like to present it without
14 having -- turning it over to the State and have them pick
15 through it and have the advantage. It's my work product.
16 You know, I didn't file a Rule 5. It's, it's the result of
17 countless hours of interviews and research and document
18 gathering, and they're not entitled to it if, if, if they're
19 not using it to cross-examine an expert.

20 THE COURT: Well, I would expect, and I'm not trying
21 to -- I'm just talking myself --

22 MR. MCGUIRE: Sure.

23 THE COURT: -- that the State's brief might include a
24 statement from their expert as to what information he would
25 need in order for him to prepare his opinion on this issue.

1 MR. MCGUIRE: Sure. But they shouldn't be able to
2 stand ---

3 THE COURT: I wouldn't---

4 MR. MCGUIRE: ---on my shoulders to see---

5 THE COURT: I'd wait and see what the brief says.

6 MR. MCGUIRE: Sure. And, and I guess my point would be
7 they shouldn't be able to stand on my shoulders and do it
8 and stand on my research and my document.

9 THE COURT: Oh, I understand your position, but I'm --
10 again, if you would brief it, have it to me in two weeks,
11 and---

12 MR. MCGUIRE: Sure.

13 THE COURT: ---then I'll take a look at it.

14 MR. MCGUIRE: And the only thing else I would add, it
15 would be -- this would be analogous to a Castle Doctrine
16 hearing. If I had -- I mean I can tell you I have another
17 case that does involve a Castle Doctrine hearing, and if I
18 had a crime scene expert go through a house and pull bullets
19 out of walls, and get trajectory angles and caliber analysis
20 and ballistics analysis, tool mark analysis, if I did all
21 that in preparation of a Castle Doctrine hearing, and I
22 didn't file a Rule 5, they'd be entitled to nothing except
23 what the data my expert had in his possession and relied
24 upon so they can cross-examine him, and in that -- we're in
25 that situation.

1 So, I don't think we should be in a situation to turn
2 over anything until we know what their, their expert says
3 about the M.R. claim.

4 THE COURT: All right. well, put that in your brief
5 and I'll consider it.

6 MR. MCGUIRE: Yes, sir.

7 SOLICITOR BARNETTE: If I can just briefly respond,
8 Your Honor?

9 THE COURT: I'll give you a chance because I let him
10 talk, Mr. Barnette.

11 SOLICITOR BARNETTE: Yes, sir, I understand.

12 I disagree. It's not a Castle Doctrine situation.
13 Basically it's an insanity defense or a mental retardation
14 defense. It's a whole mental defense. That's a separate
15 angle from Rule 5, and I think the Rule 5 stands alone on
16 that, that we can ask for that information to avoid this
17 situation.

18 The Castle Doctrine I would agree with him. If he
19 didn't file a Rule 5, it would be -- I don't know if we'd be
20 entitled to that information. But even if he didn't file a
21 Rule 5, I think, under the rules, we are entitled to this
22 since it's a mental defense.

23 THE COURT: All right. Like I say, have briefs to me
24 not this coming Friday, but the next, and then I'll, I'll
25 let you know whether I feel like oral argument would be

1 necessary.

2 All right, gentlemen. Thank you very much today.

3 MR. MCGUIRE: Thank you, Your Honor.

4 SOLICITOR BARNETTE: Thank you, Your Honor.

5 THE COURT: I'll be issuing a scheduling order next
6 week.

7 MR. MCGUIRE: Judge, there was just one thing that's --
8 based on the first date, the September 6th date being
9 changed to October 4th, I think that would necessarily
10 move the second date to October 11th. So, put that on the
11 record. I think that's what Mr. Barnette requested.

12 SOLICITOR BARNETTE: That's correct.

13 THE COURT: Any objection to that, Mr. Barnette?

14 SOLICITOR BARNETTE: No, sir.

15 THE COURT: Okay.

16 SOLICITOR BARNETTE: No, sir.

17 THE COURT: We'll do that. Thank you very much.

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

19 SOLICITOR BARNETTE: Thank you, Your Honor.

20 THE COURT: Oh -- and I've been -- gentlemen, just
21 to -- I've been assured by Court Administration that they
22 will schedule the trial for those two weeks.

23 SOLICITOR BARNETTE: Yes, Your Honor.

24 THE COURT: That, that schedule has not been published
25 yet. So, I'm just going on their reliance, but I'm fairly

1 confident we are looking at those dates for trial.

2 MR. MCGUIRE: Yes, sir.

3 THE COURT: All right. Thank you.

4 SOLICITOR BARNETTE: Yes, sir. Thank you, Your Honor.

5

6 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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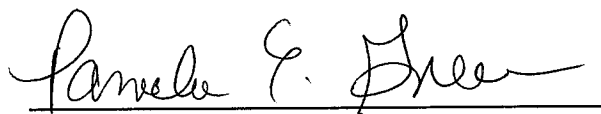
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 30th day of August, 2013.

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

May 8th, 2014

A handwritten signature in cursive script, reading "Pamela E. Green", is written over a horizontal line.

PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) COURT OF GENERAL SESSIONS

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5 STATE OF SOUTH CAROLINA,) TRANSCRIPT
6 PLAINTIFF,) OF
7 VS.) RECORD
8 RICKY LEE BLACKWELL,) 2009-GS-42-3609
9 DEFENDANT.) 2009-GS-42-3610

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12 November 6th, 2013
13 Spartanburg, South Carolina
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17 B E F O R E:

18 THE HONORABLE ROGER L. COUCH, Judge.
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25

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

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4 Attorney for the State

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6 DEPUTY SOLICITOR
7 Attorney for the State

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20 Seventh Judicial Circuit
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P R O C E E D I N G S

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THE COURT: All right. Good morning.

4

MR. MCGUIRE: Morning, judge.

5

SOLICITOR BARNETTE: Morning.

6

THE COURT: We are here to begin the pretrial hearings
7 in the State versus Blackwell case.

8

Based on the emails that my law clerk received, I
9 believe that there is a Jackson v. Denno issue that the
10 defense has raised, is that right?

11

MR. MCGUIRE: That's correct, Your Honor. I'd suggest
12 we do them first to get the officers out of here.

13

THE COURT: I think we probably should since I suspect
14 there are witnesses here to testify in that particular
15 matter.

16

Is that correct?

17

Are you ready?

18

SOLICITOR BARNETTE: Yes, sir, and there was only one
19 witness. He's actually a school teacher now, one of the
20 witnesses on another statement.

21

THE COURT: All right.

22

SOLICITOR BARNETTE: We'd ask to do that this afternoon
23 if that's okay with the Court.

24

THE COURT: Any objection to receiving his testimony
25 when he's available?

1 MR. MCGUIRE: No, sir.

2 THE COURT: All right. You want to state your motion,
3 Mr. McGuire?

4 MR. MCGUIRE: Do you want me to start at the beginning
5 of all pretrial motions or---

6 THE COURT: No, no, no. Just the Jackson v. Denno
7 issue, and then we'll take the others.

8 MR. MCGUIRE: Well, Your Honor, my understanding is
9 that, just based on the review of some information, some
10 discovery documents, that there was a, a response to my
11 client's residence on calls of a shooting. The victim was
12 found at the scene. The Defendant was found sort of behind
13 an adjoining residence. Officers attempted to apprehend
14 him. He turned a pistol on himself, on himself, shot
15 himself in the stomach, was transported to the hospital,
16 and, at the hospital, gave a statement.

17 THE COURT: I see.

18 Is that the---

19 MR. MCGUIRE: I don't recall---

20 THE COURT: Is that the statement you're seeking to
21 suppress?

22 MR. MCGUIRE: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. MCGUIRE: And I'm not -- I don't intend to call
25 witnesses.

1 THE COURT: All right. Thank you.

2 Mr. Barnette, for the State.

3 SOLICITOR BARNETTE: I just want to be specific.

4 The only one he's questioning now is the statement that
5 was given at the hospital to Investigator Williams?

6 THE COURT: That's what I understand. I want to be
7 sure we, we frame the issue.

8 MR. MCGUIRE: Well, that's the only one I'm aware of.
9 Any, any statement to law enforcement we would challenge.

10 THE COURT: All right.

11 SOLICITOR BARNETTE: You mean he hasn't looked at the
12 materials to see what statements are in there, Judge?

13 THE COURT: I don't know.

14 What statements does the State intend to use?

15 SOLICITOR BARNETTE: Your Honor, he made a statement
16 simultaneously at the scene and officer -- Investigator
17 Horton heard that. He had made a statement in the ambulance
18 and Deputy Timmons heard that, Your Honor. Then
19 Investigator Williams talked to him at the ER from that
20 standpoint, Your Honor, and there was also -- he's made
21 numerous phone calls at the jail that I would not be
22 submitted to the Jackson v. Denno. I believe that would be
23 a different situation.

24 THE COURT: That would be a different situation.

25 SOLICITOR BARNETTE: Yes, sir.

Loren Williams - Direct examination
by Solicitor Barnette

1 But there -- I just wanted to make the Court aware of
2 that.

3 THE COURT: Okay.

4 SOLICITOR BARNETTE: As well as the defense aware.

5 THE COURT: Are you challenging all of those
6 statements?

7 MR. MCGUIRE: Yes, sir, all the statements from the
8 scene and to the hospital.

9 THE COURT: All right.

10 SOLICITOR BARNETTE: Your Honor, I'd like to call
11 Investigator Williams. He's present. We can go ahead and
12 handle the Jackson v. Denno on that one.

13 THE COURT: You may do so, sir.

14 Come forward. Please be sworn.

15 LOREN WILLIAMS, having been first
16 duly sworn, testified as follows:

17 THE COURT: Please be seated, sir, and once you're
18 seated, state your name for the record.

19 THE WITNESS: Loren Williams.

20 THE COURT: Thank you.

21 Mr. Barnette, your witness.

22 SOLICITOR BARNETTE: Thank you, Your Honor.

23 DIRECT EXAMINATION

24 BY SOLICITOR BARNETTE:

25 Q Sir, what is your position at the Sheriff's Department?

Loren Williams - Direct examination
by Solicitor Barnette

1 A I'm a violent crime investigator with the Sheriff's
2 office.

3 Q And how long have you been at the Sheriff's Department,
4 sir?

5 A Since 2005.

6 Q Okay. And how long you been in law enforcement, sir?

7 A Since 1993.

8 Q Okay. Back on July 8th, 2009, did you receive a call
9 about a shooting of a child up in the Chesnee area, sir?

10 A Yes, sir, I did.

11 Q And what did you do in response to that call?

12 A Responded to Spartanburg Regional Medical Center.

13 Q Okay. And when you arrived at Regional, what did you
14 find, sir?

15 A The -- Mr. Blackwell had been taken into the trauma
16 bay, and we went into the trauma bay to speak with him.

17 Q Okay. And when you went in the trauma bay, who else
18 was with you, sir?

19 A Investigator Foster was with me, and in -- I'm sorry.

20 Q Okay. And who else was in there with you, sir?

21 A Doctors and nurses, people attending to Mr. Blackwell.

22 Q And they were taking care of Mr. Blackwell at that
23 time?

24 A That's correct.

25 Q Okay. And specifically did you speak to Mr. Blackwell?

Loren Williams - Direct examination
by Solicitor Barnette

- 1 A I did.
- 2 Q And prior to your speaking to him, did you give him a
- 3 rights, Miranda rights?
- 4 A I did. I read him Miranda from a pocket card.
- 5 Q And do you have that pocket card with you, sir?
- 6 A Yes, sir, I do.
- 7 Q If you would, pull that out, and, if you would, read
- 8 specifically what you read to him, sir.
- 9 A You have the right to remain silent. Anything you say
- 10 can be used against you in a court of law. You have the
- 11 right to talk to a lawyer and have him present with you
- 12 while you're being questioned. If you can not afford to
- 13 hire a lawyer one will be appointed to represent you before
- 14 any questioning if you so wish. Do you have -- you have the
- 15 right to stop answering questions at any point. Do you
- 16 understand those rights.
- 17 Q Okay. And when you was talking to him, how close was
- 18 you to him, sir?
- 19 A Right beside him. He was on the -- not a stretcher,
- 20 but the trauma bed, and I was standing directly at his head.
- 21 Q Okay. And where was Investigator Foster at the time?
- 22 A I really don't know exactly where he was at that point.
- 23 Q And was there nurses and doctors and machines and
- 24 everything going around at that time?
- 25 A Yes, sir.

Loren Williams - Direct examination
by Solicitor Barnette

1 Q And did you get close to the Defendant so he could hear
2 you?

3 A Yes.

4 Q And could you get close to where you could hear him?

5 A Absolutely.

6 Q Did he understand your -- when you read the rights to
7 him?

8 A He did.

9 Q And under your understanding, he was not under any
10 medication at that time?

11 A No, sir, I had even asked had he been administered any
12 medications. They told me that everything he had at that
13 point was just to establish an I.V. It was all fluid and no
14 medication had been administered.

15 Q Okay. And when you gave him his rights, did he
16 understand all his rights?

17 A He did. He both said -- he nodded his head and said
18 uh-huh.

19 Q Okay. Did you promise him anything for anything he was
20 gonna tell you?

21 A No, sir.

22 Q Did you threaten him in anyway?

23 A No, sir.

24 Q Did he freely and voluntarily talk to you after that?

25 A He did.

Loren Williams - Direct examination
by Solicitor Barnette

1 Q If you would, tell us what he said after you gave him
2 his rights to him.

3 A Once, once he had been read his, his Miranda warning, I
4 asked him, you know, what had happened that day. I, I had
5 very limited knowledge at that point of what had gone on.
6 We were not -- we weren't at the scene. We were working
7 something else. We were called and asked to go to the
8 hospital. Basically all we knew that we had a juvenile that
9 had been shot and that was pretty much it. Did not know her
10 condition or anything at that point.

11 Got there and he was asked, you know, to, to try to
12 explain what had happened. He went into the fact that he
13 and his ex-wife -- there were some hard feelings there about
14 the breakup, that he wanted to hurt -- the, the child's
15 father to feel the same pain that he had felt. I asked him
16 was this something he had thought about doing for a while,
17 and he said that he had been having sour thoughts, that he
18 did, he did go over there with the gun, and that, that he
19 did, he did shoot the child in the presence of, of the
20 mother, and it was, it was all in retaliation for the
21 breakup.

22 Q Okay. And when you're talking about mother, do you
23 mean his ex-wife?

24 A His ex-wife.

25 Q Okay.

Loren Williams - Direct examination
by Solicitor Barnette

1 A I'm sorry. The father -- the child's -- it was the --
2 oh me. The little girl's father's girlfriend. It would of
3 been his ex-wife she was with to go swimming.

4 Q Okay. And did you put all that information in your
5 report, sir?

6 A I did, yes, sir.

7 Q Okay. During this time, after you spoke to him, what
8 happened then?

9 A The -- like I said, they were, they were attending to
10 him back and forth. We were interrupted while they actually
11 took the C-collar, neck brace off of him. He had -- he had
12 gone through the story, and I basically just asked him again
13 I said, you know, is there anything that, that you want to
14 tell me about this. Is there anything I need to know. Were
15 you, you know, tell me something. You know, tell me why it
16 happened. Tell me, you know, that you're sorry. Tell me
17 something, and that was when he made the statement, he said
18 that the only thing that he sorry about was that he had not
19 done a better job on himself.

20 SOLICITOR BARNETTE: Okay. One moment, Your Honor,
21 please.

22 THE COURT: Yes, sir.

23 (Pause.)

24 Q Okay. And did he state over and over again that he had
25 shot the girl to you?

Loren Williams - Direct examination
by Solicitor Barnette

1 A He did. He did.

2 Q All right. Okay.

3 A The actual problem, you know, that he was, that he was
4 telling me about was that he was trying to get her to
5 reconcile the marriage and that she wouldn't, and that he,
6 he wanted to get back at this man for breaking up his
7 marriage.

8 Q Okay. Thank you, sir. Please answer any questions the
9 defense may have for you or from the Court.

10 THE COURT: Mr. McGuire, your witness.

11 MR. MCGUIRE: Thank you, Your Honor.

12 THE COURT: Yes, sir.

13 CROSS-EXAMINATION

14 BY MR. MCGUIRE:

15 Q Is it Officer Williams?

16 A Investigator, officer, deputy.

17 Q I just want to make sure I don't demote you or promote
18 you by accident.

19 With regard to Mr. Blackwell's affect, how did he
20 appear physically to you?

21 A No different than anyone else that, you know, had been
22 through that situation. I mean he was coherent,
23 acknowledged me, was able to talk to me.

24 Q Okay. And did he appear to be emotion -- he was
25 emotionally upset?

Loren Williams - Cross-examination
by Mr. McGuire

1 A Not really, no, sir.

2 Q Okay.

3 A I mean as, as far as remorse or, or any type of
4 distress as far as what had happened, no.

5 Q Okay. He was only sorry about not doing a better job
6 on himself is what you said with regard to being sorry for
7 something?

8 A That's correct.

9 Q Okay. Is there anything that he said that would be
10 significant that's not in your report that you can remember?
11 Anything at all?

12 A No, sir, not that I recall.

13 Q And how long were you able to talk to him?

14 A The interview started at approximately 14 minutes after
15 4:00 in the afternoon and was concluded at approximately
16 4:25. So, about---

17 Q About ten minutes?

18 A ---eleven minutes.

19 Q Okay. And were you talking to him pretty much
20 constantly going back and forth, give and take, the eleven
21 minutes?

22 A Give and take and with the interruptions from the, the
23 hospital staff.

24 Q Okay. Did you go back and interview any other hospital
25 staff about any statements he may of made earlier?

Loren Williams - Cross-examination
by Mr. McGuire

1 A No.

2 Q Okay. Or after the fact?

3 A No.

4 Q Okay. And with regard to medication, you said they
5 only started an IV?

6 A That's correct.

7 Q Okay. Did you, did you talk to EMS personnel about
8 what they may of given him in the ambulance?

9 A No, but I had asked the -- typically what we do, when
10 we go into the trauma bay, is we try to locate whoever the,
11 the attending physician is to ask them one, is it okay for
12 us to approach them and talk with them. We don't want to
13 get in any, any way of anything going on, and then are they
14 under any type of medication. And it was told to me that
15 they were only fluids started, and that was to establish
16 the, the IV, which is very typical in these situations. But
17 he had been administered no type of pain medication at that
18 point.

19 Q Okay. And do you have any more detail that's not in
20 your report regarding the breakup of his marriage?

21 Did he speak to you in more detail about that than
22 what's in the report?

23 A No.

24 Q Just that it was basically the guy broke up his
25 marriage, he wanted to get back at him?

Loren Williams - Cross-examination
by Mr. McGuire

1 A That's correct.

2 Q Okay. Nothing more than that?

3 A No, I mean it was, it was pretty much just a, a
4 synopsis from him.

5 Q Uh-huh. (Affirmative).

6 A Due to the time and everything that we had, I was just
7 trying to get as much information as, you know, as quickly
8 as possible because I knew that, at some point, they were
9 gonna wrap me up as far as being able to speak with him and
10 he was going to surgery.

11 Q Okay. Did, did you ask him why the girl was at his
12 residence---

13 A I don't---

14 Q ---the victim?

15 A ---recall that, no.

16 Q You don't recall that coming up?

17 A No.

18 Q Do you recall him saying anything about why his wife
19 was at his residence?

20 A Not from him. I remember, you know, from the scene and
21 everything as far as going swimming or whatever the child
22 had come under there -- over there for that reason. But not
23 from him, no.

24 Q And you don't know if the pool was his or a relatives?

25 A No, sir.

Loren Williams - Cross-examination
by Mr. McGuire

1 Q Or next door neighbors?

2 A No, sir.

3 Q Okay. You don't know, and just tell me if, if -- do
4 you know, with regard to the ambulance ride, did you
5 interview anybody in the ambulance or any officers?

6 Did you talk to anybody in the ambulance?

7 A No, sir.

8 Q Okay. How about the history of the gun, did he -- did
9 you talk to him at all about the gun, where it came from,
10 how long he had it, anything like that?

11 A No, sir, he just, he just stated to me that it was his
12 gun and he had brought it with him.

13 MR. MCGUIRE: Okay. Judge, if I could have one second?

14 THE COURT: Yes, sir.

15 (Pause.)

16 Q Investigator, it's been my experience that when
17 somebody's interviewed or interrogated by law enforcement,
18 they're a suspect in a shooting case, the best practice
19 would be to have them sign a Miranda waiver form. Obviously
20 that wasn't done in this case.

21 Correct?

22 A That's correct.

23 Q Okay. And is that because of Mr. Blackwell's
24 condition?

25 A It was because of his condition and the, and the

Loren Williams - Cross-examination
by Mr. McGuire

1 environment we were in at that point in time. It was just
2 not -- it was not practical at all.

3 Q Okay. And the only affirmation that you have from him
4 that he understood Miranda is basically nodding his head and
5 saying uh-huh?

6 A Yes, I think, I think exactly what he said was yeah --

7 Q Okay.

8 A -- when I asked him did he understand.

9 Q Okay. And you never had him -- sometimes an officer
10 will have a suspect or a defendant read back, tell me what
11 that right means.

12 You didn't do that obviously?

13 A No, sir.

14 Q You never had him verbalize his understanding of the
15 rights?

16 A No, sir, it happened exactly like I've already stated.

17 Q Right.

18 Just basically do you understand -- you have this
19 right, you understand that, and he would go uh-huh?

20 A That's correct.

21 Q Okay. Do you know if there was a chaplain present?

22 A No, sir, I don't recall that at all.

23 Q Okay. That's all I have for you, sir. Thank you.

24 A Thank you.

25 THE COURT: Redirect?

Loren Williams - Redirect examination
by Solicitor Barnette

1 SOLICITOR BARNETTE: Just one question, Your Honor.

2 THE COURT: Yes, sir.

3 REDIRECT EXAMINATION

4 BY SOLICITOR BARNETTE:

5 Q Did you find out whether Deputy Timmons had also
6 Mirandized him in the ambulance also, sir?

7 A Yes, sir, I found out later on that, that he had been
8 Mirandized prior to my arrival, but I was unaware of that at
9 the time.

10 Q Right.

11 You didn't find out that until later?

12 A That's correct.

13 Q Okay. Thank you.

14 THE COURT: Anything further---

15 MR. MCGUIRE: Nothing further.

16 THE COURT: ---for recross?

17 Sir, you may step down. Thank you very much.

18 THE WITNESS: Thank you very much.

19 THE COURT: State may call its next witness.

20 SOLICITOR BARNETTE: Your Honor, this is -- on this
21 statement, this will be the showing on the statement made at
22 this point.

23 THE COURT: All right, sir. As to -- do you want to go
24 ahead with the other statements?

25 SOLICITOR BARNETTE: I'm trying -- they're not here yet

1 I don't think, Your Honor. I think Deputy Gillespie is
2 coming as well as Investigator Horton. They're coming at
3 this time. We didn't know if we'd be handling Jackson v.
4 Denno. They're coming on other matters too.

5 THE COURT: Okay. All right.

6 SOLICITOR BARNETTE: They should be coming soon.

7 THE COURT: You want to move on to other motions then?

8 SOLICITOR BARNETT: Yes, sir, if we could.

9 THE COURT: Any particular order the defense would like
10 to take this in?

11 MR. MCGUIRE: Just take them chronologically, Judge.

12 THE COURT: That will be fine.

13 MR. MCGUIRE: And, Judge, the first motion that we
14 filed, number one, was a withdrawal of a previously filed
15 Rule 5 motion.

16 As you know, most Public Defender Offices will file a
17 Rule 5 almost as a matter of course, and after some
18 discussion within the first, actually a couple hours of this
19 case or day, we withdrew that. We withdrew it before the
20 State responded with any information and we've acted as
21 though we're not bound to reciprocal discovery. I don't
22 think that really needs much argument.

23 THE COURT: All right. Does the State have a response
24 to the motion?

25 SOLICITOR BARNETTE: Well, Your Honor, I understand

1 they've withdrew their Rule 5 or whatever, but we think they
2 still have some obligations under Rule 5. I obviously will
3 argue those on some different motions.

4 THE COURT: All right, sir. So, you want to argue that
5 at some other motion?

6 SOLICITOR BARNETTE: Yes, sir, I believe it's -- or we
7 can argue it now, Your Honor.

8 THE COURT: Now -- he's just made the motion. We need
9 argue it -- discuss it at this point in time.

10 MR. MCGUIRE: Fair enough.

11 SOLICITOR BARNETTE: Your Honor, one thing we would
12 make to make sure the record is clear, I think that there
13 has to be some questioning done to the defendant to make
14 sure he understands, when they withdrew the Rule 5 motion,
15 what they were doing from -- cause it is standard practice,
16 from that standpoint, to do a Rule 5 motion. This is
17 really -- this is really the first case I've never -- that
18 I've ever had a situation where they filed a Rule 5 and
19 withdrew it. I've had cases where they've not filed a Rule
20 5. Of course, that's alibi and things like that. But I've
21 never seen anything -- especially in a death penalty.

22 MR. MCGUIRE: Your Honor, I would absolutely object to
23 any questioning of my client, Mr. Blackwell. Whether to
24 engage in reciprocal discovery or not is a tactical matter.
25 It's in the lawyer's hands.

1 As the Court's aware of, you know a defendant has
2 limited decisions that he's completely in control of. One
3 would be to plead guilty or not guilty, have a bench trial
4 or a jury trial, testify, represent himself, and appeal.
5 And beyond those issues, the trial is left in the lawyer's
6 hands. This is not the type of---

7 THE COURT: Well, I note that Mr. Blackwell is present.
8 He obviously is listening to the exchange, and the motions
9 that are being made, and he certainly, I will note, has a
10 right to make a motion on his own if he wishes to --

11 MR. MCGUIRE: Sure.

12 THE COURT: -- if he objects to the representation he's
13 receiving, and he has not done that at this point in time.

14 MR. MCGUIRE: Yes, Your Honor.

15 THE COURT: I don't intend to question him though
16 concerning his relationship with his lawyers or what advice
17 they've given him.

18 SOLICITOR BARNETTE: The only reason I'm bringing it
19 up, Your Honor, you know, and I know Your Honor's heard
20 numerous PCRs, we've all been involved in all these PCRs,
21 and usually they'll come back later and their client says
22 well, the defense, defense attorney didn't do this, they
23 didn't do that, and that's the reason why.

24 THE COURT: Oh, I understand that and I have made the
25 note on the record, and I'm sure Mr. Blackwell has heard me

1 state that he has the right, if he objects to his
2 representation, to make a motion on his own. The Court
3 certainly would entertain any motion made pro se by the
4 defendant. Although the Court will not allow hybrid
5 representation.

6 So, I'm not going to allow him to represent himself in
7 regard to these matters as long as he has lawyers that are
8 present and functioning.

9 I'll grant the State -- the defendant's motion to
10 withdraw the Rule 5.

11 MR. MCGUIRE: Thank you, Your Honor.

12 THE COURT: Now, I have next on my list, I guess it's
13 chronologically done, a motion for an order declaring the
14 defendant to be allowed to examine critical evidence.

15 MR. MCGUIRE: Yes, sir.

16 THE COURT: All right.

17 MR. MCGUIRE: Your Honor, there's a Constitutional
18 basis that allows a defendant access to critical evidence in
19 the State's possession without regard to filing a Rule 5.

20 In this case, we're going to -- we're requesting
21 specifically access to the firearm and autopsy, the autopsy
22 report, and any sort of crime scene diagrams or photographs
23 of the scene.

24 SOLICITOR BARNETTE: Those have already been supplied
25 to him. He's already got all that stuff. We sent it to him

1 months ago.

2 THE COURT: Now, the firearm---

3 SOLICITOR BARNETTE: The evidence is right here.

4 THE COURT: The firearm is with the evidence at the
5 Sheriff's Office, is that right?

6 SOLICITOR BARNETTE: We have it right here. If he
7 wants to examine it today, he's welcome to examine it.
8 We've got Robert Rosenberg here to do it. But the crime
9 scene, all that's been sent to him. We sent all that months
10 ago, Your Honor.

11 MR. MCGUIRE: And I agree with that, but what we don't
12 have -- we haven't checked out the gun.

13 THE COURT: Okay.

14 MR. MCGUIRE: And obviously I'm not gonna do it---

15 THE COURT: Well, he has indicated that that is
16 available to you. So, that motion then is granted.

17 MR. MCGUIRE: Thank you, Your Honor.

18 THE COURT: All right. Next motion I have on my list
19 is the defendant's assertion of Fifth and Sixth Amendment
20 rights and revocation of any prior waiver. I'm not sure
21 that's a motion. I think it's just an assertion.

22 MR. MCGUIRE: It is, Your Honor. It's a notice
23 pleading.

24 THE COURT: And I don't see any reason for me to make a
25 ruling on that. That's in the record.

1 Do you see any reason for a ruling from the Court on
2 that issue?

3 MR. MCGUIRE: I don't---

4 THE COURT: Okay.

5 MR. MCGUIRE: ---Your Honor.

6 THE COURT: All right. The next one I have is a motion
7 for preliminary hearing.

8 MR. MCGUIRE: Your Honor, we made a tactical decision
9 not to pursue that.

10 THE COURT: Okay. So that's been abandoned.

11 The next motion I have is a motion for an order to
12 preserve all evidence to preclude any additional state
13 testing or examination of evidence that would alter, reduce,
14 or destroy evidence without notice to the defense without
15 prior Court approval.

16 MR. MCGUIRE: And, Your Honor, you know, that's filed
17 as a matter of caution to make sure that certain evidence is
18 not destroyed. I'm not aware of any piece of evidence that
19 would be critical that has been destroyed or would be in
20 jeopardy of being destroyed.

21 THE COURT: Normally that would involve things like
22 matters of testing DNA and things of that nature.

23 MR. MCGUIRE: Yes, sir.

24 THE COURT: I don't know if there's -- I don't know
25 enough about the forensics in this case to be able to say

1 whether that exists or not.

2 Can you help me, Mr. Barnette?

3 Is there anything like that?

4 SOLICITOR BARNETTE: Your Honor, one thing I want to
5 put on the record too.

6 We did written responses to all their motions, and
7 obviously we'll make those a part of the record any time we
8 argue a motion in this case on all of these.

9 But basically, Your Honor, we are gonna ask for some
10 DNA from the defendant, non-testimonial that was collected
11 at the scene at the point, but there's nothing at this point
12 that's been destroyed or anything from there, Your Honor,
13 and it will be kept as long---

14 THE COURT: And is there anything that may be in danger
15 of being destroyed such that it would not be able to be
16 tested by the defense?

17 SOLICITOR BARNETTE: Not at this point, no, sir.

18 THE COURT: Okay. I'm informed that's not an issue
19 then, and, so, your motion, to that extent, is granted.

20 MR. MCGUIRE: Thank you, Your Honor.

21 Your Honor, number -- oh, I'm sorry. I didn't mean to
22 cut you off.

23 THE COURT: No, I, I -- the next one I have is a motion
24 for an order to preserve comparative juror analysis.

25 Is that where we are?

1 MR. MCGUIRE: Yes, sir. Yes, sir.

2 Judge, if we, if we engage in a capital trial and we go
3 to voir dire, and the State -- if we, if we, if we move to
4 have a Batson analysis conducted of the jury selection, with
5 regard to peremptory strikes used by the prosecutor, we're
6 gonna have to determine, based on an examination of the
7 record in voir dire, if anybody similarly situated was
8 seated by the prosecutor.

9 THE COURT: Oh, I understand, yes, sir.

10 MR. MCGUIRE: And, and in a capital trial, we might, we
11 might speak in voir dire to 75 people, a hundred people, 120
12 people. We don't know. And, so, to try to make that
13 argument and try to determine if they sat somebody similarly
14 situated on the spot right after selection of the jury is
15 almost impossible, and really the only thing we would be
16 able to do would be, if we had a real time court reporter
17 actually do a transcript of voir dire and produce it on a
18 daily basis, and give us time to review it, along with any
19 record that we might have or if we're gonna be forced to
20 sort of make it on the spot within a matter of minutes. We
21 would just ask that the Court just preserve that issue for,
22 for Appellate Courts and Habeas proceedings.

23 THE COURT: Mr. Barnette.

24 SOLICITOR BARNETTE: Mr. Bulsa actually has this one.

25 SOLICITOR BULSA: At this time---

1 THE COURT: All right. Mr. Bulsa, I'll be happy to
2 hear from you.

3 SOLICITOR BARNETTE: I'm a little puzzled like Your
4 Honor is. I would imagine there would be an accurate
5 transcript available at that appellate stage, if necessary.
6 I'm not quite sure what he's actually asking.

7 THE COURT: Well, what are you asking to, to preserve?
8 You're asking that the State preserve---

9 MR. MCGUIRE: Oh, no, I'm not---

10 THE COURT: ---their background information as to why
11 or how they exercised their strikes?

12 MR. MCGUIRE: No, no. Just that, that the issue be
13 preserved in that we're not viewed as having waived it or
14 not raised it. You know, the way that the Appellate Courts
15 have dealt with this is that they've, they've addressed it
16 in Habeas proceedings and appellate proceedings. Mostly in
17 Habeas proceedings.

18 THE COURT: Uh-huh. (Affirmative).

19 MR. MCGUIRE: And they've pretty much saved the
20 lawyers, and the reasoning is because it's almost impossible
21 to go back and argue the issue directly in Court at that
22 moment unless you're given substantial time to do the proper
23 research. So, traditionally, we've been sort of saved and
24 helped out by the Court in that regard.

25 But in an abundance of caution, I just want the

1 issue -- if we raise the issue, and the Court says well, I'm
2 gonna give you half an hour, and then I come back and I say
3 I don't think that's sufficient for us to do the proper
4 research, I'm just gonna ask you to issue---

5 THE COURT: Well, I would assume that both sides are
6 doing jury research. You probably are gathering information
7 or in the process of being in a position to gather
8 information since the jury list has not yet been prepared.

9 MR. MCGUIRE: Sure. And I'm not asking them to
10 preserve certain documents. The only documents that I would
11 ask them to preserve, and we have another motion on this, is
12 that the prosecutors have access to the criminal records of
13 the potential jurors, and that's a huge expense to us. If
14 we were to do it, it would cost I think about \$5,000.

15 we're a government agency. So, we can get a reduced
16 rate, but it's not free and I'm aware of the case law where
17 it's not a requirement that they turn that over. But if
18 they strike somebody based on a prior arrest or conviction,
19 and we don't have that information, that's gonna throw a
20 wrench in things and slow things down, and we're gonna have
21 to -- A, we're gonna ask that the -- all of the criminal
22 history record be made a part of the record and be filed
23 under seal for PCR purposes or appeal purposes and we're
24 gonna ask that we have access to it to review it at that
25 moment, and, again, that can really slow down the process.

1 we're kind of jumping ahead a little bit.

2 THE COURT: Mr. Bulsa, I think there's a motion
3 concerning that---

4 MR. MCGUIRE: There is.

5 THE COURT: ---also.

6 So, let's talk about it now. I guess we're there now.
7 Let's talk about that one.

8 SOLICITOR BULSA: Yes, sir, Your Honor. We would, of
9 course, object to that. They do have access and ability to
10 do that themselves. That would be considered work product in
11 the State's position.

12 Your Honor, we would, of course, preserve any notes to
13 that effect in our case file for future consideration. We
14 have no -- we have nothing to hide and we don't intend to
15 hide anything.

16 THE COURT: Well, you've raised the issue.

17 Is that what you wanted to do?

18 MR. MCGUIRE: Yes, sir, raise it and preserve it the
19 best I can so I don't fail my client in terms of issue
20 preservation for Habeas purposes.

21 THE COURT: I understand. I don't know there's any
22 relief I can grant at this point on that. So --.

23 MR. MCGUIRE: I think -- yeah, we realize---

24 THE COURT: You're not asking me to order them to do
25 anything at this point---

1 MR. MCGUIRE: Sure.

2 THE COURT: ---on this motion, is that right?

3 MR. MCGUIRE: I understand.

4 THE COURT: Okay. So, the issue's preserved to the
5 extent it can be preserved.

6 MR. MCGUIRE: Yes, sir.

7 THE COURT: All right. Next is an order requiring
8 solicitors respond in writing to each motion, which is
9 contested.

10 I think you have.

11 SOLICITOR BARNETTE: We, we have, Your Honor, and, like
12 I said, I don't know if they respond to every one of our
13 motions, Your Honor, but we have responded to every one of
14 theirs in writing.

15 THE COURT: Well, I'm just saying his motion is to
16 require you to do that and I think you have responded. I've
17 gotten your responses filed in here.

18 SOLICITOR BARNETTE: Yes, sir.

19 THE COURT: So, I think I've seen them.

20 SOLICITOR BARNETTE: We have responded to every motion
21 so far.

22 THE COURT: Okay.

23 All right. So, I don't know that there's anything I
24 need to do in that regard.

25 MR. MCGUIRE: No, sir.

1 THE COURT: They've complied with that.

2 MR. MCGUIRE: Yes, sir.

3 THE COURT: Next is a motion for a gag order. I have
4 issued a gag order in the case.

5 Is there anything additional that needs to be discussed
6 about that or---

7 MR. MCGUIRE: I don't, I don't believe so.

8 THE COURT: Is it---

9 MR. MCGUIRE: There's no issues that have come up, Your
10 Honor.

11 THE COURT: Okay.

12 SOLICITOR BARNETTE: Your Honor?

13 THE COURT: Next is an assertion of -- this is not
14 necessarily a motion, but it says assertion of Fourth
15 Amendment rights and a revocation of prior waivers. That is
16 noted. It is on the record and I don't think it requires
17 the Court to take any action at this point in time.

18 MR. MCGUIRE: Thank you, Your Honor.

19 THE COURT: Next is a motion to require investigative
20 agencies to preserve notes on all interviews and
21 investigative actions.

22 MR. MCGUIRE: Yes, sir.

23 THE COURT: Yes, sir.

24 MR. MCGUIRE: Well, Your Honor, I would just stand with
25 the pleadings. This is a capital case. We filed it back in

1 July. I think it was in 2009 and, you know, we want to
2 do -- we want to have a clean trial, and we want to do it
3 right the first time. We don't want to have collateral
4 relief down the road based on some interviews that were
5 recorded in handwriting and not produced to us by the form
6 of an incident report or supplemental incident report. This
7 is our request that we do it right the first time and we get
8 all the evidence that's relevant.

9 THE COURT: State's position.

10 SOLICITOR BARNETTE: Your Honor, as far as I know, the
11 police -- law enforcement has kept all the notes and
12 everything. Matter of fact, the -- all the case files have
13 been provided to the defense.

14 THE COURT: All right. So, to that extent, I will --
15 if you wish to prepare an order for me to sign requiring
16 those things be preserved, I will do that.

17 MR. MCGUIRE: Yes, sir.

18 THE COURT: Next is my Number 11, which is a motion to
19 change venue. I don't know if we're ripe to hear that at
20 this point in time.

21 I'll hear from you.

22 MR. MCGUIRE: Well, what I would expect is that the
23 Court would want to give it a college try so to speak. Try
24 to pick a jury and see what's, see what's actually out
25 there.

1 THE COURT: What I'll do is I'll note that you've made
2 the motion and preserved your right to pursue that motion
3 once we go through the jury selection.

4 MR. MCGUIRE: Yes, sir.

5 THE COURT: Obviously, if there appears to be a problem
6 in seating a jury, you certainly would have the right to
7 renew that argument at that time.

8 MR. MCGUIRE: Thank you, Your Honor.

9 THE COURT: Next is a motion to show cause why the
10 sheriff should not be required to comply with a lawful
11 subpoena resulting -- requesting production of certain
12 evidence. I don't know where we stand on that.

13 So, I'll hear from you, Mr. McGuire.

14 MR. MCGUIRE: Thank you, Your Honor.

15 Your Honor, specifically that subpoena was for the
16 Sheriff's Department filed on the fire bombing of my
17 client's family member's house, houses. There were two
18 houses fire bombed or Molotov type cocktails. I do have
19 some information on that. I've spoken to the fire
20 department, some investigator on the scene. But when I
21 tried to get the -- subpoena the file from the sheriff, my
22 investigator was told the prosecutors told us no to comply
23 with your subpoena.

24 The piece of information regarding the fire bombing --
25 there's a couple pieces of information that causes me to

1 think that's it's tied to Mr. Bobby Center, the victim's
2 father. In spray paint on one of the residences, a trailer,
3 was graffiti and it said "for the girl," and that was about
4 12 feet from where Brooke Center was found.

5 These two residences were the ones, if you, if you go
6 back and look at the news clips, these were the ones that
7 you can see on the news and they were both fire bombed.
8 They're next door to each other. There was a phone call---

9 THE COURT: Was that one incident or two incidents?

10 MR. MCGUIRE: One incident, Your Honor.

11 THE COURT: One incident.

12 MR. MCGUIRE: Yes, sir, and my client's parents live
13 not far from there. Down the road a piece.

14 THE COURT: Yes, sir.

15 MR. MCGUIRE: And they received a telephone call from a
16 male saying two down, one more to go, and they viewed that
17 as a continuing threat to them that their home would also be
18 fire bombed.

19 You know, I'm trying to be fully prepared to defend my
20 client. I don't know what my investigation in that regard
21 would turn up, but I can tell you that, and I think the
22 Court's probably aware of this, that Mr. Center belongs to a
23 biker gang or a motorcycle club, whatever you want to call
24 it, that, at the funeral, hundreds of bikers showed up. On
25 the memorial of her death, more bikers showed up for a

1 fundraiser to help pay for the funeral from the previous
2 year, and even in some of my motions, I've provided
3 information to the Court that sort of like Harley Davidson
4 type bikers have ridden by my client's family member's
5 houses sort of at a low speed and kind of throwing glances
6 over at the house.

7 I don't know what it would turn it up, but it was a
8 lawful subpoena. It was for information. It's sort of
9 collateral. It's not stuff that I would get normally
10 through discovery. It's not the incident report in this
11 case.

12 I would agree that, if I went to the Sheriff's
13 Department, without filing a Rule 5, and I used the subpoena
14 to get the incident report in this case, that would be
15 violating the discovery rules and that would be kind of
16 going around the rule.

17 This is a collateral matter. This is something that
18 would not necessarily be provided in discovery and that's
19 why we have the subpoena process.

20 THE COURT: Solicitor.

21 SOLICITOR BARNETTE: Your Honor, we did make a motion
22 to quash. I'll let Mr. Ghent go into detail on the motion
23 to quash everything from that.

24 THE COURT: All right. Mr. Ghent.

25 SOLICITOR GHENT: Your Honor, that motion to quash was

1 filed August 11th, 2011.

2 THE COURT: Yes, sir.

3 SOLICITOR GHENT: At that time counsel had made the
4 decision to opt out of discovery.

5 THE COURT: Yes, sir.

6 SOLICITOR GHENT: The Supreme Court has been clear,
7 State versus Miller Robinson, relied on federal precedent,
8 interpreting the federal Freedom of Information Act.

9 There were two F.O.I.A. requests made and two subpoenas
10 issued. The circumstances under which the subpoena was
11 issued was not in compliance with the rule. It was not for
12 a hearing, a proceeding at that time. As a matter of fact,
13 the investigator basically said you can just turn the
14 records over to us in a letter and that will be fine.

15 The problem with that, Your Honor, is that might work
16 in a civil proceeding, but the entire purpose of the Supreme
17 Court's ruling in Robinson and Rule 5 is you get discovery
18 through the proper channels and they did -- they opted out.
19 So, once you've opted out -- and they've been several
20 responses to their motions that I've described as discovery
21 motions. You can't do an end run once you've made the
22 decision that you don't want discovery.

23 So, at this point, they have, on several occasions,
24 tried to go around what they said they had decided to do,
25 and this would be an example.

1 THE COURT: All right. Now, Mr. Ghent, and maybe you
2 can -- anyone can comment from the State's side on this.

3 The -- I suspect that the possible purpose of gathering
4 the information would be concerning the motion to change
5 venue perhaps, something of that nature in this case. But
6 otherwise, the incident is a different criminal act in a
7 different setting.

8 But it is your position then that because it could be
9 used concerning the motion to change venue or some other
10 issue, I'm not aware of the other issues, but there might be
11 other issues---

12 SOLICITOR GHENT: Your Honor, I'm not meaning to bat it
13 back to the solicitor, but I'll go ahead and respond. I
14 would submit that it's twofold or actually threefold.

15 First of all, it goes towards the venue issue.

16 Number two, the solicitor's prepared to argue a third
17 party guilt motion. This would, at least, bring in issues
18 that are completely extraneous, completely speculative, and
19 most importantly of all, he keeps referring to a biker gang
20 in pointing the finger at the victim's father, that somehow
21 this is a biker gang retaliation.

22 we know of no such link and there is a case, Singleton,
23 which was reversed on a Batson issue that the case remains
24 good law, under Payne versus Tennessee, that you can not use
25 evidence to discredit a victim of a crime. Well, the same

1 would apply to the victim's family.

2 In Singleton, the defendant tried to bring out the fact
3 that she was a prostitute. In this instance, it seems clear
4 to the State that what the defense is trying to do is bring
5 out -- bring this biker element into the trial, at some
6 point, to either get an acquittal or, more importantly, to
7 avoid a death sentence. And because of that, we would
8 submit that it's not relevant in these proceedings, and,
9 again, they're trying to go around a discovery proceeding
10 that they have opted out of.

11 I also, if I'm not mistaken, the information they've
12 obtained was, in fact, something that, as victims of what
13 they contend was an arson, they were entitled to go ahead
14 and request. So, I would assume they got that.

15 I don't know whether or not the investigation went any
16 further or whether it was attributable to a biker gang or to
17 anybody affiliated with a biker gang or to anybody who
18 might, in anyway, have anything to do with this case. It's
19 not unheard of. I was involved in a case as a defense
20 attorney where there was a fire bombing of a house, and we
21 were fairly certain that, because of the circumstances, that
22 we could never prove it, that it was -- it, at least, came
23 from the defendant's side of the courtroom.

24 I'm not suggesting in anyway that counsel had anything
25 to do with that. But I am making clear that he's got to do

1 more than just say we want this, we subpoenaed it. It
2 wasn't a valid subpoena. We didn't tell anybody don't give
3 it. We moved to quash. The next step is he sets up a
4 hearing, and this could of been done two years ago.

5 THE COURT: All right. Anything further, Mr. McGuire?

6 MR. MCGUIRE: Yes, sir.

7 First off -- and I put in the -- I put in my pleadings
8 that one of the reasons that we were asking for the
9 information was to determine if there's information there
10 from which we could impeach the investigation or the
11 prosecution of Mr. Blackwell, and it's -- it was that if --
12 if the investigation -- if the deputies and the arson
13 investigators did a thorough investigation, I think that
14 would necessarily include bringing Bobby Center in and
15 interviewing him. I think he would be the main suspect.

16 We have graffiti on the wall, "this is for the girl,"
17 and it's sort of in the public domain that he is a member of
18 a biker gang. The person at the funeral was a, was a Harley
19 Davidson. Multiple groups came out in support. The Highway
20 Dogs came out. The -- they Upstate Marauders came out I
21 believe. There were also some pretty good groups that came
22 out. Some patriotic groups came out too, some Veteran
23 groups. But a number of motorcycle gangs, known gangs did
24 come out.

25 You have the clear graffiti on the, the trailer, as I

1 already stated. That's relating to that this is a
2 retaliatory, retaliatory act, and, you know, I put in the
3 pleadings that we could impeach the, the prosecution of this
4 case if they basically gave Bobby Center a free pass and
5 they didn't even bring him in for questioning.

6 That would be one thing that would be relevant, and
7 also the information that they may have gotten, if they
8 didn't follow-up on it, also may be impeachable. And,
9 again, this is a collateral issue. This is a separate
10 crime.

11 THE COURT: I'd say this is, this is extremely
12 collateral to the issues that are before the Court it would
13 seem.

14 MR. MCGUIRE: Well, I don't disagree, but, again, we're
15 talking about, we're talking about a capital case, and, you
16 know, we want to present a theory that that's -- that the
17 prosecution of Ricky Blackwell is not warranted, and that
18 it's not a reasoned decision to pursue his doubt, and that
19 they would -- the law enforcement authorities were giving
20 Bobby Center a free pass so that it didn't dirty up their
21 case. That would -- you know, that would -- that might be
22 something that we could actually present or at least, at
23 least it's a starting point from which we could keep
24 investigating.

25 Again, it's a collateral matter. So, it wouldn't be

1 something that we would get in discovery.

2 THE COURT: Well, how about the State's argument though
3 that you've opted out of discovery, and you're making --
4 you're telling me, on the one hand, Mr. McGuire, that this
5 is a different case and a different prosecution, but now
6 you're saying well, it really is involved in this case and
7 the issue that's in this case. I'm hearing it coming from
8 both directions.

9 MR. MCGUIRE: Sure.

10 I guess if this was -- you know, we're kind of close to
11 the North Carolina border here. Now, if this was in a
12 county in North Carolina and I used an out-of-state subpoena
13 to get their file, it would be the same thing even if it
14 would be relevant to this case. It's just coincidentally
15 happens to be in the same county.

16 THE COURT: Of course, they're arguing that you've
17 opted out of discovery, and then to use the subpoena to get
18 that discovery is not proper discovery.

19 MR. MCGUIRE: I understand their argument. I just
20 don't agree with it.

21 THE COURT: Okay. Are there any cases that say you can
22 do this?

23 MR. MCGUIRE: Well, I mean -- I mean I think the -- I
24 mean a case on point -- the cases on point are the ones
25 where they actually deal with a subpoena that's used to

1 subvert the discovery process.

2 THE COURT: All right.

3 MR. MCGUIRE: And this would not be -- if the
4 prosecutor didn't turn this over in discovery---

5 THE COURT: I've tried to find a case on point. I
6 haven't found one. This is unusual apparently.

7 MR. MCGUIRE: Well, it doesn't come up much. In the
8 practice of criminal law, you know, the defendants --
9 defendants don't generally opt out of discovery and use the
10 subpoena process.

11 THE COURT: Yes.

12 MR. MCGUIRE: This is rare.

13 THE COURT: Exactly.

14 MR. MCGUIRE: We would frequently do it, but most
15 people don't. In most of the cases, you're correct, Your
16 Honor, deal with the use of a subpoena improperly to skirt
17 discovery. We're not doing that.

18 We've not opted to do it. It's a tactical decision.
19 We're entitled to a lot of---

20 THE COURT: I didn't say you couldn't do that.

21 MR. MCGUIRE: Sure.

22 THE COURT: But it has consequences.

23 MR. MCGUIRE: It does.

24 THE COURT: Yes, sir.

25 MR. MCGUIRE: It does. But -- so, I can't, I can't

1 give you a case on point that says, you know, this -- on
2 this particular factual scenario, we would be entitled to
3 this information.

4 I don't think it's so closely connected with the case
5 that a Court would say that's clearly Rule 5 and you
6 shouldn't of turned it over to them.

7 THE COURT: Another issue the State raised in their
8 argument was that this information is obtainable by proper
9 people, the victims of the crime.

10 MR. MCGUIRE: If they so choose.

11 THE COURT: They have a right to, to look at those
12 files, I think, under the Victims Bill of Rights or other
13 rights that victims have.

14 MR. MCGUIRE: Well, they don't, they don't -- their
15 rights are not unfettered. You know, it's -- technically
16 it's an ongoing investigation cause it was never solved, and
17 no one has been brought to justice or arrested, and
18 generally the police department's policy is they'll give you
19 the first page of an incident report establishing the first
20 part of the case, but when it's an ongoing investigation,
21 they don't turn over anything else as it might jeopardize
22 the investigation.

23 Now, I'll tell you -- I'll be very candid with the
24 Court. I haven't, I haven't even attempted to get the
25 information in that, in that vein.

1 First off, I don't represent those people.

2 THE COURT: I didn't say you did.

3 MR. MCGUIRE: You're right.

4 THE COURT: I was just suggesting that that's a
5 possible---

6 MR. MCGUIRE: Sure.

7 THE COURT: ---solution to the problem.

8 MR. MCGUIRE: Yeah, I'm just saying that, you know, I
9 do not represent those folks. As you might imagine, a lot
10 of folks are hesitant to get involved in capital cases or
11 murder cases, and I haven't even tried to go through that
12 channel. But I don't think I have to.

13 Another point I would raise is that the prosecutor does
14 not represent the sheriff. The sheriff needs to make a
15 motion to quash and have a lawyer come to Court and move to
16 quash the subpoena. The prosecutor doesn't have the
17 authority to sua sponta appoint himself as the lawyer for an
18 entity that he doesn't even want to release information to.

19 So, they don't have standing to argue first, and so I
20 am -- I'm asking that the Court order that the sheriff
21 comply with the lawful subpoena.

22 THE COURT: Last word on it.

23 SOLICITOR BARNETTE: Your Honor, one thing I just want
24 to clear up.

25 State versus Sutherland is the case that Mr. Ghent was

1 talking about. I do have a copy of it. It has been
2 overturned by Batson issues.

3 THE COURT: You want to pass that up to my law clerk?
4 I'll take a look at it.

5 SOLICITOR BARNETTE: As you can see, number six talks
6 about -- this is still good law. Evidence of victim's bad
7 character is not admissible in a sentencing phase of victim
8 impact evidence, Your Honor.

9 On a couple of fronts, I think we do have a right to
10 file a subpoena -- I mean a motion to quash in here because
11 obviously this affects discovery in this situation. So, I
12 think it -- we do have standing in that area. I -- and me
13 and Mr. Ghent was planning to argue this a different way
14 because I had the motion in limine, which is actually a
15 state motion concerning all this stuff he's talking about.

16 Here's a perfect example of them trying to just soil
17 the victim. Here's an eight year old girl. She don't
18 have -- I mean anything to do with this so called biker
19 gang. Now he tries to bring the father in, which there's no
20 evidence at this point showing that the father did it. He
21 can make allegations all he wants. Obviously we have hard
22 evidence. You just don't drag somebody in just to question
23 them just because you got suspicion or anything like that
24 from that standpoint.

25 And if you look at all the case law and everything,

1 there's no way this could be admissible for anything in
2 Court. It had nothing to do with this day. This happened
3 weeks afterwards. Even a time period afterwards, and even
4 if you said it was relevant, the prejudicial effect is just
5 unbelievable because, like I said, you're bringing in
6 something this eight year old girl -- I'm not gonna keep on
7 preaching. I think the Court knows which vein I'm going in,
8 and they have not made a showing, in my opinion, that they
9 have a right to -- they're trying to skirt the discovery,
10 like Mr. Ghent was saying, to get to that.

11 THE COURT: All right. I'll take that under
12 advisement.

13 we'll take a short break, about a five minute break.
14 Court will be in recess for a few minutes.

15 Thank you very much.

16 (WHEREUPON, a short recess was taken at this time.)

17 THE COURT: All right. The next motion I have on my,
18 my list is a motion for an order promulgating the
19 defendant's juror questionnaire.

20 MR. MCGUIRE: Yes, sir, Your Honor.

21 THE COURT: I've already issued a juror questionnaire
22 in the case.

23 MR. MCGUIRE: Yes, sir.

24 THE COURT: So, is there anything else that needs to be
25 discussed about it?

1 MR. MCGUIRE: Well, Judge, just to preserve our
2 position, I'll, you know, I've filed our proposed voir dire
3 with the Court before.

4 THE COURT: Yes, sir, you did.

5 MR. MCGUIRE: And the one thing that we would hope to
6 maybe change your mind about would be, and I'm not sure how
7 successful that that might be, but there are no death
8 questions on the questionnaire, and I guess the Court wants
9 to deal with that in voir dire as opposed to a
10 questionnaire.

11 THE COURT: I would prefer dealing with that in the, in
12 the live voir dire.

13 MR. MCGUIRE: Okay. The one issue that I would just
14 raise as a matter of just trying to---

15 THE COURT: Yes, sir.

16 MR. MCGUIRE: ---help the Court, not that you need my
17 help, but in order, in order to try to pick a jury as timely
18 as possible, as fast as possible---

19 THE COURT: Well, I want to pick it as well as
20 possible.

21 MR. MCGUIRE: Well, we're on the same page then.

22 THE COURT: All right.

23 MR. MCGUIRE: And in that, in that vein, we've often
24 moved to have some sort of numbering system and then exclude
25 or push to the back of the panels people that indicate that

1 they are almost always in favor of life or almost always in
2 favor of death, and we've gone back and forth on the wording
3 of that question. Some judges are wanting -- want to have
4 like a small sheet given to the jurors when they come to
5 Court, and they can circle it before they come out to do
6 voir dire, and, you know---

7 THE COURT: I have, I have, I have handled one of these
8 cases before, and, in the past, I have given that, that
9 information to the jury when we bring in the smaller groups
10 for---

11 MR. MCGUIRE: I see.

12 THE COURT: ---for voir dire. They will receive that
13 information and be allowed to read it immediately before
14 coming in to be questioned. And, so, that information will
15 be given to them, but it will be in a more controlled
16 setting. I have a real concern that, with the -- given the
17 level of information that was in your proposed
18 questionnaire, that it would promote jurors maybe doing
19 Internet searches and educating themselves about the case on
20 their own, and, therefore, further make -- making it more
21 difficult to find jurors with an open mind in the case.

22 So, it's a -- I have a real concern if we give too much
23 information. I think your questionnaire even had a proposed
24 statement of the wording of the indictment in it. That that
25 encourages someone -- in order to -- I find most jurors to

1 be conscientious people who want to answer questions as
2 fully as possible, which is good.

3 MR. MCGUIRE: Sure.

4 THE COURT: But -- in todays electronic age, when
5 people can, with the stroke of a key, gather information
6 that might end up disqualifying them as jurors altogether in
7 a case, I don't want good jurors disqualified because they
8 took that route.

9 MR. MCGUIRE: And that's---

10 THE COURT: So, that's the reason my questionnaire was
11 intended not to provide that type of information or elicit
12 answers that might encourage independent investigation.

13 MR. MCGUIRE: And that's a fair concern. We just
14 recently finished a trial where we actually had the name of
15 the case in the questionnaire and we did have some jurors
16 admit to doing some Internet research. Although it was a --
17 it was a small number because the questionnaire did contain
18 an admonition about please don't do any independent
19 research, but we did have a handful that did that.

20 THE COURT: That is a concern of mine and that's the
21 reason I took the approach that I did.

22 MR. MCGUIRE: Okay. And I'm assuming, and correct me
23 if I'm wrong, that there are no death questions on the
24 questionnaire because that would lead the jurors to do
25 research on death penalty cases and --.

1 THE COURT: That's -- that was my idea, and, again, you
2 were given -- you will be given a full opportunity to do
3 one-on-one live questioning.

4 MR. MCGUIRE: Okay.

5 THE COURT: So, that's -- that would be the more
6 appropriate setting when they're -- the jurors then are in a
7 more controlled situation, and the Court can give them
8 face-to-face admonishments on what they should do and should
9 not do during their absence from the courthouse. And, so, I
10 felt that was the best way to approach that.

11 MR. MCGUIRE: Thank you, Your Honor.

12 THE COURT: All right.

13 MR. MCGUIRE: I understand the Court's ruling.

14 THE COURT: All right. Now -- and, so, I, I have -- I
15 guess my ruling is that I have issued a questionnaire and I
16 do intend to use that questionnaire.

17 MR. MCGUIRE: Yes, sir.

18 THE COURT: The next question that -- the next issue is
19 a motion to change venue based on pretrial publicity. I,
20 again, think that might be something we would preserve until
21 after we have gone through the voir dire process, and we see
22 if that becomes an issue at that time.

23 MR. MCGUIRE: Yes, sir.

24 THE COURT: So, I'll allow you to preserve that issue
25 until then.

1 MR. MCGUIRE: Thank you, Your Honor.

2 THE COURT: Next is a motion in limine to admit data
3 life expectancy.

4 MR. MCGUIRE: Yes, sir, this is a pretty novel issue.
5 I---

6 THE COURT: I didn't -- the State does oppose. So,
7 I'll hear from you.

8 MR. MCGUIRE: Sure.

9 Your Honor, I, I contacted the Department of
10 Corrections in an effort to determine the life expectancy of
11 inmates in their custody that are beyond accidents or
12 homicides. These are all deaths of natural causes. So, I,
13 I submitted a F.O.I.A. request to the director, Mr. William
14 Byers, and he responded. I asked for three years of data,
15 and I've received it.

16 It's broken down by race, and, and the age at which the
17 inmate dies of natural causes, and then the numbers are kind
18 of shocking. For a black male, the average is about 50
19 years old. For a white male, it's about 53 years old.

20 Now, the, the reason I would move to admit this data in
21 the penalty phase of a capital case is because, and you'll
22 see it in voir dire, inevitably will have jurors express an
23 opinion about a resistance or reluctance to be comfortable
24 with a defendant living out the rest of their years on tax
25 payer dime, and this information actually goes to the fact

1 that the life expectancy is far shorter in the Department of
2 Corrections than it is in normal society, and I think that
3 it also goes to the fact that, that a life without parole
4 sentence is a harsh sentence.

5 when you're deciding between the two, life without
6 parole and death penalty, the fact that your life expectancy
7 is about 20 years shorter in the Department of Corrections
8 than it is in the general population, I think it's a
9 relevant factor. It goes to life without parole is a harsh
10 and severe punishment and any jurors that would have some
11 sort of resistance to, you know, a lengthy stay of
12 incarceration for somebody that would be expensive for a tax
13 payer. This could alleviate those considerations.

14 I mean -- and I'll just put on the record, my client's
15 in his mid-50s already. Today. I mean he's never gonna be
16 executed by the state.

17 THE COURT: I'll hear from you, Mr. Barnette.

18 SOLICITOR BARNETTE: That's an interesting argument,
19 Your Honor, from that standpoint.

20 I don't think it's relevant because obviously
21 sentencing is left up, you know, to the Court from that
22 standpoint. I know the jury usually takes this into
23 consideration on death penalties, but I think it is
24 prejudicial like I said.

25 For example, that's something I don't think is proper

1 to be in front of the jury to hear and determine that based
2 off of life expectancy. They're suppose to base it off what
3 they hear in Court and what the law is as given to by the
4 Court.

5 THE COURT: Not ruling on the admissibility of any
6 specific evidence. I do -- apparently the information you
7 have is a -- you said it was a three year sampling. I, I --
8 you know, anytime you introduce any type of or allow the
9 introduction of any type of scientific evidence or opinions
10 from an expert witness, and I don't know if you intend to
11 introduce this using some type of demographer or some type
12 of medical testimony or something of that nature, I'm
13 wondering about the science behind the information you just
14 described, which is a three year sampling using only the
15 South Carolina Department of Corrections.

16 MR. MCGUIRE: Well, I can certainly seek to enlarge the
17 sample.

18 THE COURT: Well, I mean I don't know. I don't -- I'm
19 not an expert. I don't know if that's sufficient or
20 something -- a method that's normally used by people who
21 would be determining life expectancies. You know, we have a
22 life expectancy table in our code.

23 MR. MCGUIRE: We do.

24 THE COURT: And it says that in any case where the
25 question of life expectancy is an issue, that you must use

1 that table.

2 SOLICITOR BARNETTE: Your Honor, we might be better --
3 if I can speak real quickly about this?

4 THE COURT: Yes, sir.

5 SOLICITOR BARNETTE: The more I think about it, there's
6 a case, and I got to remember it. The State use to
7 introduce evidence on death penalty cases about how the
8 inmate lived, what they were given, everything like that.

9 THE COURT: Uh-huh. (Affirmative).

10 SOLICITOR BARNETTE: And they struck that down
11 recently. I can't remember the case off the top of my head.

12 THE COURT: Well, I just, I just have a real -- a
13 little bit of a problem given the fact that our Code of Laws
14 has a Code Section that says that this is what you use where
15 the issue of life expectancy is a -- and it's under the
16 evidence section of the code. It's not under civil
17 procedure or something of that nature. It just says that
18 anytime there's a life expectancy issue, that you must use
19 that table.

20 So, it would be departing from the statutory scheme---

21 MR. MCGUIRE: I agree with that.

22 THE COURT: ---and there would have to be some really
23 strong scientific evidence to indicate that the statutory
24 scheme should not apply for some reason before I'd even
25 consider letting it in I think.

1 Are you following what -- when I read that, that's the
2 way my thinking went and---

3 MR. MCGUIRE: Sure.

4 THE COURT: ---I didn't know what you had. I didn't
5 know if you had an expert that was gonna come and say we've
6 examined all of these records from various states and we've
7 boiled it down and here's -- I can give an opinion. An
8 actuarial table is what we're talking about.

9 MR. MCGUIRE: Sure.

10 THE COURT: And life -- you know, insurance companies
11 use them all the time. That's, that's not something that's
12 not done regularly statistically. But it's -- there are
13 certain methodologies that must be followed.

14 MR. MCGUIRE: There are and, you know, I have consulted
15 with a statistician, and I mean I would agree that the
16 sample size probably needs to be larger. I can remedy that.

17 But I guess what I'll -- I'll seek any guidance I can
18 get from the Court. My intention was to call a witness from
19 the Department of Corrections directly and say this is their
20 information.

21 THE COURT: Well, I guess what I'm saying at this point
22 in time, I -- and I'm not required to rule on motions in
23 limine. I can rule on them at the time of trial.

24 MR. MCGUIRE: Sure.

25 THE COURT: But I would have to have additional

1 information before I'd grant that motion at this time.

2 MR. MCGUIRE: Okay. And I'll make an effort to get
3 that.

4 THE COURT: Okay.

5 MR. MCGUIRE: Thank you, Your Honor.

6 SOLICITOR BARNETTE: And, Your Honor, if we---

7 THE COURT: And I'm not saying I'll grant it. I just
8 said I'll listen to the information.

9 SOLICITOR BARNETTE: No problem.

10 Can we supplement our answer to that?

11 THE COURT: Yes, sir, that will be fine.

12 SOLICITOR BARNETTE: Cause, like I said, I just thought
13 about that case with the Department of Corrections cause we
14 use to call that witness. I don't -- we can do that.

15 THE COURT: I'll be happy for any guidance you can
16 provide on that, and that, that issue can be preserved until
17 the time of trial or immediately before. I've got a feeling
18 we'll have a motion period before trial. We can discuss
19 that.

20 All right. The next issue that's in the file is a
21 motion to compel disclosure of juror's criminal history
22 data, and I think we've talked about that briefly already.

23 Is there anything else I need to be aware of on that
24 one?

25 MR. MCGUIRE: Your Honor, I would just state that, you

1 know, it's sort of -- just by a fluke, just by a fluke of
2 access that the prosecutors gonna have this information.
3 It's very valuable information. As Your Honor's probably
4 noticed, prosecutors never show up to select a jury in the
5 case without having a very thick three ring binder with
6 criminal information on all of the jurors.

7 THE COURT: It appears that that's what they do.

8 MR. MCGUIRE: It would appear that that's what they
9 did.

10 THE COURT: I don't know exactly that's what they do.

11 MR. MCGUIRE: It's been my experience and---

12 THE COURT: And I think that's -- they're doing their
13 job. That's what they're suppose to do.

14 MR. MCGUIRE: Oh, and I think they're -- I would, I
15 would say they're -- that I would do that if I was on that
16 side as well.

17 THE COURT: Yes, sir.

18 MR. MCGUIRE: In fact, I'd like to do it on this side.
19 The only thing that's -- I mean I can submit a funding order
20 and I can actually do it. It's just that we're talking
21 about dollars, and the last time I estimated it, based on
22 the potential for---

23 THE COURT: well, would you be seeking your information
24 from any source different than the source that the State
25 has?

1 MR. MCGUIRE: No, sir.

2 THE COURT: So, we're talking about an N.C.I.C. report
3 from the---

4 MR. MCGUIRE: From SLED.

5 THE COURT: From SLED.

6 MR. MCGUIRE: Yeah. I mean we, we, as a State agency,
7 we are given, are given -- we have a reduced rate.

8 THE COURT: Uh-huh. (Affirmative).

9 MR. MCGUIRE: A private company would have to pay more.
10 We get a reduced rate. But because we're not a 501c3
11 charity, we don't get the, the other---

12 THE COURT: Does the State have an objection to just --
13 I'm not asking you to give your opinions on it. I'm just
14 asking you to give the raw data that you get from SLED.

15 So, can we share that or not share that?

16 SOLICITOR BULSA: You mean where we can share it---

17 THE COURT: I assume when you---

18 SOLICITOR BULSA: ---pursuant to SLED guidelines?

19 THE COURT: It appears that -- see, I don't do this.

20 SOLICITOR BULSA: Yes, sir.

21 THE COURT: But it appears that when you put that in
22 there you get a printout.

23 SOLICITOR BULSA: Yes, sir.

24 THE COURT: And it goes over each name or Social
25 Security number you submitted and it gives you a printout as

1 to what the SLED record reveals for that individual.

2 SOLICITOR BULSA: Yes, sir.

3 THE COURT: Is there any -- are you, are you objecting
4 to sharing that information with the defense?

5 SOLICITOR BULSA: Yes, sir, we are.

6 THE COURT: And can you give me some reason why?

7 SOLICITOR BULSA: We feel there's, there's case law
8 that we've cited, Your Honor, that clearly gives the Court
9 authority---

10 THE COURT: Well, I understand you don't have to, and,
11 of course, it's all tax payer money. I guess if we don't
12 mind spending it twice that's fine.

13 SOLICITOR BULSA: Barry wants to add something.

14 SOLICITOR BARNETTE: Your Honor, the only problem we
15 got with that is it's got personal information for every
16 juror that's involved with this, and obviously social
17 Security numbers, dates of birth, all kind of identifying
18 information, and the problem we've ran in the past is
19 when -- obviously get a hearing after the fact and things
20 like that and information gets released, we -- that'd be
21 another reason why we wouldn't agree to do it.

22 MR. MCGUIRE: Well -- and, Judge, we've always agreed
23 to, A, not disseminate the information. That it would be
24 for the lawyer's control and use in selecting a jury only.
25 And rather than destroy it, we give it back to the Court and

1 we put it under seal. So, it's never released. So, it's
2 not an issue.

3 Now, I will be candid with the Court, there's a,
4 there's a lot of -- there's some, there's some concerns with
5 who -- if you have the ability to run these N.C.I.C.
6 reports, if you disseminate them to somebody, there's some
7 restrictions on who you can disseminate them too. But, you
8 know, if, if the issue -- first off, to address your first
9 question is why don't they want to give it to us is because
10 they want to have an advantage in picking a jury. That's---

11 THE COURT: Well, I'm---

12 MR. MCGUIRE: ---clear.

13 THE COURT: You know, like you say, that if you ask for
14 the funding for it you'll probably get it.

15 MR. MCGUIRE: Right. But I can tell you, the, the
16 folks that manage the funds over at OID are not gonna like
17 that, and---

18 THE COURT: Oh, I understand that there's a limited,
19 limited -- not unlimited funds.

20 MR. MCGUIRE: There are not unlimited funds, and this
21 is really just money going from one government coffer to the
22 next, and this is really sort of a political issue because
23 SLED actually makes a lot of money doing this, and they
24 don't want somebody---

25 THE COURT: Well, I'm not gonna comment on that one.

1 So---

2 MR. MCGUIRE: Well, I think that the regulation's there
3 for a very good reason. You know, you don't want somebody
4 who has access to N.C.I.C. reports running them for say a
5 business or a day care---

6 THE COURT: Oh, I understand.

7 MR. MCGUIRE: ---and SLED's not getting the proper
8 funding. So, I think there's a legitimate reason that there
9 are restrictions.

10 But, in this case, we're, you know, we're gonna ask
11 that the, that the criminal history be made part of the
12 clerks record anyway. If it becomes an issue at all in jury
13 selection, we're gonna ask to have access to it at that
14 point.

15 Plus, it's gonna be discoverable. We're gonna ask that
16 it be sealed and be part of the Court's record anyway. And
17 if there's a conviction in the case, then it's gonna be --
18 obviously it's gonna be discoverable at some later point
19 anyway. I mean -- so, this information's going to, in all
20 likelihood, be in the defense lawyer's hands, and the
21 question is do you want it in their hands now so that we can
22 pick a fair jury and not have any issues arise during,
23 during jury selection or do you want to kick the can down
24 the road, and I think we -- the, the smart matter, of
25 course, is to go ahead and take care of it now and allow us

1 access to it, and avoid the transfer of thousands of dollars
2 from the Office of Indigent Defense to SLED.

3 THE COURT: All right. State still opposed?

4 SOLICITOR GHENT: Your Honor, may I point out two I
5 think very valid concerns?

6 THE COURT: Yes, sir.

7 SOLICITOR GHENT: Number one, if we're the conduit
8 between SLED and the defense, and anything winds up wrong,
9 we will be the ones who will be blamed when the can is
10 kicked down the road on that can. We will be the ones who
11 provided erroneous information, which may of led them to
12 claim later we wanted him, but it said right there because
13 we all know that these rap sheets are not always accurate.

14 The second thing that concerns me is that, in the
15 Batson cases, they're like four or five key decisions. One
16 of them, at the very least, says that a juror --
17 the analysis -- it's strange because it says a juror has a
18 Constitutional right to serve. Never mind a duty.

19 So, we will have not only created potential error with
20 respect to this case, but if that juror later finds out,
21 again, we will be to blame. That's all I would point out.

22 THE COURT: Okay.

23 SOLICITOR GHENT: Thank you, sir.

24 THE COURT: State still opposed?

25 SOLICITOR BARNETTE: State's still opposed, Your Honor.

1 THE COURT: All right. I'll make a decision on that---

2 MR. MCGUIRE: Judge, I wanted to---

3 THE COURT: ---at another time.

4 MR. MCGUIRE: Judge, I'm sorry. I didn't mean to cut
5 you off.

6 THE COURT: That's okay. Sure.

7 MR. MCGUIRE: And the only thing I would add is that
8 recently we addressed this issue in another case down in
9 Beaufort County, and the Court did order that it be turned
10 over to us, and the prosecutor eventually said they were
11 comfortable doing it so long as it's under Court order, and
12 I can afford a copy of that order to the Court for your
13 review.

14 THE COURT: All right. Next is a motion for
15 Constitutionally adequate voir dire.

16 MR. MCGUIRE: Yeah. Your Honor, this is one of those
17 motions that I filed where technically it's, it's not ripe,
18 but, you know, I filed it because I just wanted to put
19 everybody on notice. You know, when we select these juries,
20 we get these sort of cliched objections about staking out
21 prejudgment. There seems to be a lot of confusion on what
22 the law is on voir dire, and I think the law is very simple.

23 In the cases that we have in South Carolina that I
24 cited in the motion are Davis and Longworth, and the, the --
25 it's basically as simple as this. If there's anything

1 that's so significant, either in mitigation or aggravation,
2 that it could have the home run weight of a verdict with the
3 juror, then either side gets to ask about it.

4 Now, the issues that we've had in South Carolina are
5 all prosecutor questions and the questions were essentially
6 be would the fact that the defendant is young, 22-years old,
7 prevent you from considering a death sentence, would the
8 fact that the defendant might be found to be not the
9 triggerman, would that prevent you from considering a death
10 sentence, and would the fact, and this is before Atkins,
11 would the fact that the defendant might have a -- be mildly
12 mentally retarded, would that prevent you from considering a
13 death sentence.

14 Now, those are the three questions that specifically
15 address the issues in South Carolina, but they bear out the
16 logic, which is if there's something so significant that
17 could cause a juror to get to the end of the case, and not
18 consider all the circumstances in mitigation and
19 aggravation, fairly consider both penalties, then they can't
20 comply with the juror oath because the juror oath requires
21 them to do exactly that.

22 And the, the other side of the exact same coin is
23 there's something so significant in the State's case that
24 could have the home run weight of death, then we should be
25 able to ask it.

1 Now, I think we would all agree that we're in part of
2 the country where there are some people who subscribe to an
3 eye for an eye. If you take an innocent life, you forfeit
4 yours. So, the elements of murder alone could have the home
5 run weight of a death verdict with some people, and the
6 aggravating circumstance that we have in the case that's
7 really -- there's kidnapping, but that doesn't really --
8 that's not gonna -- that's not gonna -- not important to me.

9 But the fact that the victim is nine years old could be
10 a factor so significant where a juror could say, you know,
11 the elements of murder, the intentional killing of an
12 innocent person with malice aforethought, that alone doesn't
13 cause me to commit to one verdict or another. But when you
14 say that the victim was an innocent, vulnerable child, then
15 I'm gonna vote for death. I believe the death penalty is
16 always warranted in that situation.

17 Clearly those people are out there. The only way we
18 can find them is to ask them questions about it, and that
19 this motion just lays out the logic of that's what we have
20 to do, and just asking -- just asking people can you follow
21 the law. If I told you that the law required you to do
22 this, could you do that, Courts have passed on that question
23 and have found that to be -- you don't really invite one
24 answer. So, it's really not an effective question. That
25 the open ended questions exploring their real views is

1 really the way to, to ferret out any, any bias, and this
2 actually cuts both for the state and the defense.

3 THE COURT: Mr. Barnette.

4 SOLICITOR BARNETTE: Your Honor, I think it's
5 premature. Obviously we're gonna have to pick a jury and go
6 from there, but I would disagree with his analysis from that
7 standpoint.

8 Our analysis, the way I've understood it, and I've been
9 in front of Your Honor on a death penalty case, is basically
10 in life and death, can you be fair, can you be that juror in
11 the middle and consider both sides and both ways from there.
12 Not -- he's asking for certain factors to be instructed --
13 to let -- basically stake out jurors saying well, if you
14 find somebody mentally retarded or if you think they're
15 mentally retarded, can you give them death. I mean that's
16 not what the, the Court's there for but basically just to
17 say if you can give -- be fair to the state, be fair to the
18 defense, that you're not automatically gonna give death or
19 automatically give life. You're gonna be that juror in the
20 middle that considers factors in the case and decide each
21 case based on the merits from there, and that's what the
22 whole procedure is for.

23 I think what he's trying to do is prejudice from Your
24 Honor saying well, I'm gonna ask these certain questions, I
25 want to go ahead and do that, and I don't think that should

1 be allowed and obviously I'm gonna obviously object to those
2 questions because of staking out the juror. We can't do it.
3 They can't do it from that standpoint.

4 THE COURT: All right. I'll take a look at the cases
5 submitted and give you some indication before we begin voir
6 dire as to my feelings on that issue. I don't know that I
7 can rule on specific questions until they've been asked.
8 But I'll give you some indication of where I am.

9 MR. MCGUIRE: Sure. And I don't mean to belabor that
10 point, but, you know, prejudgment staking out, again, those
11 are cliched objections that I talked about when I first got
12 up. Staking out is the defense lawyer making a bargain with
13 the juror. If I was to bring forth evidence indicating that
14 the defendant was blank or went through this as a child, is
15 that something that would cause you to vote life, that's,
16 that's staking out. I don't do that. I don't want to do
17 that.

18 That information is worthless to me cause it's leading.
19 It doesn't give accurate information. I wouldn't do it and
20 I'm not going to put facts in front -- I don't intend to
21 ever put a fact in front of any potential juror. The
22 elements of murder and the statutory aggravating factor is
23 the information that would be fairly put in front of the
24 jury. Not factual scenario. Not usually who or who knows
25 anybody. Any -- that, that would be inappropriate and

1 improper, to go into collateral details.

2 THE COURT: So, you say your questions would be keyed
3 to the statutory mitigating and/or aggravating factors?

4 MR. MCGUIRE: Yes, sir.

5 THE COURT: Okay. I understand where you're coming
6 from.

7 MR. MCGUIRE: Yes, sir, I just didn't want the Court to
8 think that I would want to put a factual scenario in front
9 of the juror and ask them how they would vote based on a
10 factual scenario. I think that would be prejudging. If you
11 give them sort of a, a twenty-five second Hollywood summary
12 of a case, and then ask them what's your vote on that, that
13 would be improper.

14 But I think we would all agree there are some things
15 that are so significant that would cause somebody to be so
16 predisposed to one function or that other, and that both
17 sides would have a right to ask about that.

18 THE COURT: I understand and I'll take a look at it
19 again. We'll give you some indication as to my feelings on
20 that.

21 MR. MCGUIRE: Yes, sir.

22 THE COURT: Next is a motion for a hearing to determine
23 that certain photographic evidence should be suppressed as a
24 danger of unfair prejudice outweighs probative value.

25 Are you talking about specific photographs now or are

1 we talking about photographs in general?

2 MR. MCGUIRE: Well, crime scene photographs and autopsy
3 photographs.

4 THE COURT: I -- again, I don't know. Are we talking
5 about, talking about -- have you seen these photographs?

6 MR. MCGUIRE: They've been produced.

7 THE COURT: Okay. So, are you talking about all of
8 them?

9 MR. MCGUIRE: You know---

10 THE COURT: Because, you know, they're -- some
11 photographs may have some probative value, and they may be
12 prejudicial. But if the probative value outweighs the
13 prejudicial effect---

14 MR. MCGUIRE: Sure.

15 THE COURT: ---then they may be admissible.

16 MR. MCGUIRE: And there might be -- you know, the law
17 generally says that the photograph of the victim, the
18 victim's body at the scene is relevant because it shows how
19 the defendant left the victim.

20 THE COURT: Uh-huh. (Affirmative).

21 MR. MCGUIRE: I understand that's the law. So, there
22 are a number of photographs that, despite the fact they
23 could be inflammatory, would likely be admitted anyway.
24 But -- or the probative value would certainly be rather
25 strong, and I'll concede that. But there are certain things

1 that we can do to maybe limit that. For instance, we could
2 put some photographs in black and white. We can show the
3 victim exactly as she was and in the exact condition without
4 having the gory blood scene or maybe, maybe some of the
5 photographs from a distance that are not so close-up, that
6 sort of thing.

7 I don't know what photographs the prosecution would
8 intend to introduce. In fact, in their response, they
9 indicated that they don't want to deal with this until
10 trial. So --.

11 THE COURT: Well -- and it may be that that's what we
12 have to do. I'm trying to -- that's the reason -- my
13 question was are there specific photographs that you're
14 talking about and I want -- I don't know if there's
15 something for me to really rule on at this point in time.

16 Let me find out from the State's position.

17 SOLICITOR BARNETTE: Your Honor, I think you'd have to
18 rule at trial. Like I said, obviously I'll share that with
19 the defense when we're getting ready to introduce those
20 photographs and everything. Of course, they've got all the
21 photographs and obviously guilt phase and sentencing phase
22 are two different types of evidence---

23 THE COURT: They are.

24 SOLICITOR BARNETTE: ---from there. So, I think it's
25 something that you'll have to listen to the evidence and

1 rule, you know, on the probative value. I think it would be
2 premature.

3 THE COURT: All right. Well, I will ask the solicitor
4 though to reread the Torres case and the Supreme Court's
5 admonition concerning photographs, and since I was involved
6 in that case, I will certainly heed their warnings.

7 SOLICITOR BARNETTE: Yes, sir, I do remember that, yes,
8 sir.

9 THE COURT: All right. Thank you. And I will preserve
10 your right to object to the photographs at the time they
11 attempt to introduce them.

12 MR. MCGUIRE: Thank you, Your Honor.

13 THE COURT: Next is a motion for disclosure of
14 psychiatric history of State's witnesses.

15 MR. MCGUIRE: Yes, sir.

16 THE COURT: Yes, sir.

17 MR. MCGUIRE: I believe that one of the State's
18 witnesses has been hospitalized, and that would be Angie
19 Blackwell, and I can request those records at this time.

20 SOLICITOR BARNETTE: Your Honor, obviously we'd object.
21 As you know, our written motion, you've got all kinds of
22 statutes. You got HIPA. You got everything concerning
23 that. I don't see any relevance to this from that
24 standpoint.

25 THE COURT: Are we talking about a psychiatric

1 admission---

2 MR. MCGUIRE: Commitment.

3 THE COURT: ---post-event or pre-event?

4 MR. MCGUIRE: Post.

5 THE COURT: Post-event.

6 MR. MCGUIRE: And the reason it would be relevant, in
7 fact, despite the fact that it would be post-incident would
8 be who knows what information is in the records regarding
9 the event.

10 THE COURT: I think you've got to give me some
11 information that would indicate that it would lead to
12 admissible evidence or the discovery of admissible evidence.
13 I'm not hearing much that I think would be dis, be
14 admissible at this point in time.

15 MR. MCGUIRE: Well---

16 THE COURT: what possibly could be admissible?

17 MR. MCGUIRE: Sure.

18 well, in the newspaper article, Angie Blackwell
19 indicated that, after shooting the victim, Brooke Center,
20 that the defendant smiled, which is an incredibly
21 prejudicial fact. She might, in counseling records,
22 indicate that she was untruthful about that. That would be
23 certainly relevant. She might indicate that she carries
24 around a great deal of remorse or feels some sense of
25 responsibility with regard to the child's death because --

1 and I'm -- I can tell you that there's -- there was, there
2 was a history of some antagonizing behavior leading up to
3 the event. She can express some, some thoughts about that
4 fact.

5 THE COURT: First of all, does the State even have this
6 information?

7 SOLICITOR BARNETTE: First thing, we don't have it,
8 number one. We don't.

9 THE COURT: Yeah.

10 SOLICITOR BARNETTE: You know, obviously it's news to
11 us if he's got that information from that standpoint.

12 But under Section 16-3-1505, he's not suppose to have.
13 I mean you have to have a hearing in order to get that
14 information on anybody's mental health records, and it would
15 be a violation of HIPA and everything else from that, and,
16 Your Honor, I think the post is the key. I mean it don't
17 have anything to do with nothing prior to this event, and,
18 obviously, you know, she's been traumatized, I guess, from
19 that. To see something like that, I can't imagine.

20 So, you know, we definitely object to this cause I
21 think it would be prying into a key witness from there, and
22 be -- I think it's used basically to intimidate her to try
23 to find -- I don't see any relevance to this, and if it's
24 relevant, it would be highly prejudicial in this case.

25 THE COURT: well, I'm not sure I can order the State to

1 produce something they don't have.

2 MR. MCGUIRE: And I would agree with that, and I filed
3 it, obviously, not knowing what they may of had in their
4 possession and not turned over. I'll put everybody on fair
5 notice that I'm gonna issue another subpoena, and I don't
6 know if the prosecution will ask them to not comply like the
7 sheriff. But that's, that's our intent.

8 THE COURT: We'll see what happens.

9 MR. MCGUIRE: Fair enough.

10 THE COURT: All right.

11 SOLICITOR BARNETTE: Well, Your Honor, I think, under
12 HIPA, he can't do it that way. I mean that's -- I mean---

13 THE COURT: Well, again, I'm gonna let him handle his
14 case.

15 SOLICITOR BARNETTE: I know. I understand.

16 THE COURT: But right now you're telling me you don't
17 have that information---

18 SOLICITOR BARNETTE: No, sir, I don't.

19 THE COURT: ---in your files. It's not in your
20 possession. So, therefore, I'll deny the motion on the
21 basis of the State doesn't have the information.

22 SOLICITOR BARNETTE: Yes, sir. Thank you, Your Honor.

23 THE COURT: Now, the next one is a motion to suppress
24 the statements on Jackson v. Denno. We took that out of
25 order.

1 SOLICITOR BARNETTE: Your Honor, we do have two of the
2 witnesses if you'd like to go ahead and handle that at this
3 point.

4 THE COURT: Well, let -- we're close to finishing the
5 defense motion I think.

6 SOLICITOR BARNETTE: Yes, sir.

7 THE COURT: So, let's go ahead and plow through that
8 and then we'll get back to that one.

9 MR. MCGUIRE: Thank you, Your Honor.

10 Pleading, Pleading Number 21, we requested turning over
11 any confidential informants.

12 THE COURT: Yes, sir.

13 MR. MCGUIRE: That's just so we can prepare and be
14 fully prepared for trial. Obviously there's a ton of
15 impeachment evidence that we have.

16 THE COURT: I think the State's response is there are
17 no confidential informants.

18 MR. MCGUIRE: If that ends it, that ends it.

19 THE COURT: All right. The -- Number 22, motion that
20 the jury not be sequestered.

21 MR. MCGUIRE: Yes, sir.

22 Judge, I think the, the trend in South Carolina now is
23 that we're not sequestering juries. It's extremely costly.
24 In the last -- gosh, in the last five years, I only know of
25 one that's been sequestered. I know that the last three

1 that I did were all not sequestered, and that publicity was
2 not an issue with anyone.

3 The federal government tried Moussaoui without
4 sequestering a jury. So, certainly it can be done in very
5 very high profile cases. It's a financial burden on the
6 clerk and the tax payer. It's not been a problem, in my
7 experience, to let them be able to go home, and the problems
8 it creates when you sequester them is that the normal
9 process of Court seems to change. We work till seven, eight
10 o'clock every night, and the lawyers go on and work till
11 10:00 and show up in the morning bright and early and get
12 them done because we feel this real urge to get them back
13 home, and constricting them and kind of holding them
14 prisoner seems to be adverse to everybody. So, the Court
15 process becomes a little bit difficult and we, we attempt to
16 try to rush through things maybe quicker than we normally
17 would.

18 I can tell you that it seems to work without having
19 them sequestered. Obviously there's no real law. You're
20 not gonna get reversed no matter what you do. It just seems
21 that it's a benefit to our state. It's a benefit to the
22 jurors. It's a benefit to both sides. It just seems to me
23 there's no real reason to do it anymore. I think the old
24 fear that, that publicity was always gonna be a factor is
25 just really not the case.

1 You know, we've, we've tried---

2 THE COURT: Well, I hear what you're saying, but then I
3 also heard you talk about the problems and you've still got
4 an outstanding motion to change venue based on the problems
5 that we had in this case earlier, and, quite frankly, that's
6 one reason the case probably hasn't moved any faster than it
7 has or one of the reasons is because of the concern about
8 the atmosphere in which the trial might be held. And, so,
9 I -- that's---

10 MR. MCGUIRE: Yeah, and my---

11 THE COURT: This case might be a little different than
12 most.

13 MR. MCGUIRE: Perhaps.

14 THE COURT: The case in Beaufort, did it involve
15 alleged fire bombings of people's homes?

16 MR. MCGUIRE: It was an extremely high profile case.

17 THE COURT: Did it involve fire bombings of people's
18 homes?

19 MR. MCGUIRE: It did not.

20 THE COURT: Okay.

21 MR. MCGUIRE: It did not. But also it's my -- sort of
22 my concern with regard to -- my real concern is that a
23 hundred bikers might show up the morning we try to pick a
24 jury in some sort of show of solidarity with Mr. Bobby
25 Center. He's been an---

1 THE COURT: We don't have a room big enough to
2 accommodate, accommodate that number. So, if they did, I
3 doubt they would be allowed in.

4 MR. MCGUIRE: Right. My fear would be---

5 THE COURT: The biggest courtroom in the county right
6 here.

7 MR. MCGUIRE: Right. Right.

8 And my fear would be that the jury being sequestered or
9 not, you're not gonna be able to control that sort of thing
10 if you have a hundred motorcyclist circling the courthouse.
11 I don't know that's gonna happen. But, you know, this case
12 is involved the most significant amount of retaliatory
13 conduct directed towards the victim's family that I've been
14 involved in.

15 THE COURT: Well, that's -- again, that's, that's the
16 reason I'm saying that perhaps that would lean toward
17 sequestration as opposed to non-sequestration.

18 MR. MCGUIRE: And then my fear would be that if
19 somebody was sequestered away from their family, their
20 concern would possibly be with their family, that---

21 THE COURT: Well, I'll hear from the State on this.
22 State's position.

23 SOLICITOR BULSA: Your Honor, as -- the Court has
24 pointed out some concerns we have. I believe if there is
25 some fear of some biker gang coming, the jury can certainly

1 be protected and kept from influence much easier if they are
2 sequestered. They'd be moved as a group as opposed to
3 coming in single handed one at a time through whatever
4 surroundings are outside.

5 So, we, of course, leave it in the Court's discretion.
6 We object based on those -- the arguments and the fears of
7 the defense counsel. We want this case heard and moved
8 forward and handled without any improper influences from the
9 outside.

10 So, if it requires sequestration, then so be it. It's,
11 it's been used in the past. We know it's been lessened in
12 more current cases, but in the past it's not been found
13 unconstitutional or inappropriate. So, we leave it to the
14 Court's discretion.

15 THE COURT: All right. Well, I'll, I'll think about
16 it. I'll just tell you that, at this point in time, I'm
17 leaning towards sequestration. Since -- I do want the case
18 to be handled fairly. I want, I want it to be a fair trial.
19 I do not want the outside influences to have any influence
20 on a jury, and it's my personal belief that sequestration
21 gives the Court more control of that situation than the
22 Court would have otherwise.

23 MR. MCGUIRE: Sure.

24 And if I could just volunteer a method that's been used
25 in the past to deal with juror security when they're not

1 sequestered, and that is that a SLED detail could have the
2 jurors meet at a location and they meet generally at a
3 public building. For instance, like a hospital or a, a
4 library or another government building. They can make --
5 SLED can make arrangements to have some parking spaces for
6 jurors to meet there. Nobody knows where they're meeting
7 except SLED. They come in, SLED secured them straight to
8 the courthouse, they leave with a detail that prevents them
9 from being followed, and then they go back to their homes,
10 and that's how the federal government deals with, with the
11 issue to keep juror anonymity and security. We can refer to
12 jurors not by their name, but when we do voir dire, we just
13 refer to them by their number, and we could actually seal
14 that information as well.

15 THE COURT: All right. I'll consider it, and I've
16 given my thoughts on that.

17 A motion in limine to prevent introduction of evidence
18 of attempted murder of defendant's family members.

19 MR. MCGUIRE: Your Honor, you know, it's sort of, it's
20 sort of a novel issue. I wouldn't, I wouldn't say we would
21 do this to, to sully the character of Mr. Bobby Center
22 unless that became relevant somehow. But, you know, for
23 instance, in the pleading that we talked about earlier about
24 my subpoena on the Sheriff's Department for the fire bombing
25 file, that wasn't just a dirty up his character. I put

1 clearly in there that I can impeach the investigation or the
2 prosecution of Mr. Blackwell.

3 We wouldn't just offer this up just to say that you
4 shouldn't, you shouldn't vote for the death penalty for
5 Mr. Blackwell because Mr. Bobby Center is somehow less
6 deserving of it because he has character flaws. It wouldn't
7 be offered in that vein, but just, just like Tennessee Payne
8 allows us a glimpse of the, the victim's life as to who they
9 are as a unique person and the impact on some family
10 members. You know, also this is affecting Mr. Blackwell's
11 family. You know, his parents, you know, lived in fear
12 thinking their house was gonna be fire bombed after two
13 houses were, in fact, fire bombed.

14 This, this is sort of like, you know, impact on them as
15 well, and I think that if I, if I was to present these
16 people as lay witnesses and just talk about this case and
17 how it's affected them, that would be part of what they
18 would say and I think it's relevant.

19 SOLICITOR BARNETTE: Your Honor, we made the motion in
20 limine too. So, I guess I'm kind of incorporating that
21 into, to limit this type of information.

22 It has no relevance. It doesn't have -- this occurred
23 on July 8th, 2009. Obviously victim impact statement's
24 been done. I mean it's been entered in there, and the State
25 versus Sutherland case talks about, you know, basically

1 evidence of victim's bad character is not admissible in the
2 sentencing phase with victim impact evidence.

3 So, it's pretty clear to me, and I think the Court's
4 ruled on this, the Supreme Court, and the cite on that is
5 316 S.C. Reporter 377, Your Honor, that this area of the --
6 this first thing is relevance. It's highly prejudicial and
7 the laws says it can't be used. So, we'd ask for it to be
8 suppressed and the motion be denied.

9 THE COURT: I'll issue a ruling.

10 Is there any evidence that you'd like to proffer on
11 that point?

12 MR. MCGUIRE: Not at this time, Your Honor, and just a
13 brief summary.

14 That -- just a brief summary that, that this event is
15 been also generally very very hard on the Blackwell family.
16 There's a lot of remorse that they would express for the
17 death of Brooke Center. But there's also -- this is been,
18 this is been a very difficult thing for them in at least --
19 it includes the fact that there were two attempted murders
20 on their family members, and, and, by, by just the skin of
21 their teeth, one fellow got out of the house. One of Mr.
22 Blackwell's relatives was asleep in a bedroom when the
23 Molotov cocktail came through the window. If he didn't have
24 a young son that was up late watching TV, he probably would
25 of died. This would be another murder case.

1 That has affected them greatly, but they're still
2 very -- they don't harbor animus and they're very
3 remorseful. I think that, that just -- that would come out
4 in Court as being kind of who they are and how this is
5 affected them.

6 THE COURT: Well, I'm not sure the family is on trial
7 here. I appreciate what you say about their concerns.

8 MR. MCGUIRE: Yes, sir.

9 THE COURT: I understand that, and, however, we are
10 trying Mr. Ricky Lee Blackwell.

11 A Rule to Show Cause regarding prosecutors ordering
12 entities not to comply with defense subpoenas.

13 Is that the same thing we've been talking about with
14 the sheriff?

15 MR. MCGUIRE: Yes, sir.

16 THE COURT: Okay. All right. I've heard that.

17 All right. That -- I believe -- that's all I have that
18 when we went through the file earlier this week for defense
19 motions except -- just one second. I'm told there may be
20 one more.

21 A motion in limine to suppress certain physical
22 evidence. That one we received I believe yesterday. Be
23 Number 25.

24 MR. MCGUIRE: Yes, sir.

25 SOLICITOR BARNETTE: Your Honor, could I be heard on

1 that quickly, Your Honor?

2 THE COURT: Yes, sir, this is -- yes, sir.

3 SOLICITOR BARNETTE: I would object to it for a couple
4 of reasons, Your Honor. First, it's not -- they didn't
5 follow the scheduling order. I mean they were suppose to
6 file it, you know, I believe on September 24th I believe
7 or---

8 THE COURT: Yes, sir, we had a deadline for filing
9 pretrial motions.

10 SOLICITOR BARNETTE: And they filed it yesterday.

11 And another thing, it's very vague. It don't even talk
12 about what evidence they're looking to suppress or anything
13 like that. So, we'd ask for a more definite motion to be
14 filed if it's gonna be filed. we would object cause it
15 hadn't been filed in a timely manner. Of course, we
16 scrambled and tried to make sure we covered everything we
17 covered, but---

18 THE COURT: well, I -- what, what physical evidence are
19 we talking about?

20 MR. MCGUIRE: Yeah, I think it's limited to a knife at
21 this point. I don't---

22 THE COURT: To a what?

23 MR. MCGUIRE: A knife.

24 THE COURT: A knife.

25 Is there a knife involved in the case?

1 SOLICITOR BARNETTE: There was a knife found at the
2 scene, you know, beside the defendant when he shot himself
3 there, and they found it, you know, with other evidence
4 there along with the gun.

5 THE COURT: And you want to suppress the knife?

6 MR. MCGUIRE: In an abundance of caution, yes, sir. I
7 mean I'll be candid with the Court, I don't have the
8 strongest argument. You know, it's an instrument---

9 THE COURT: Well, it's---

10 MR. MCGUIRE: ---found at the scene.

11 THE COURT: Mr. Barnette, I understand your, your
12 concern about the motion being filed late. But, of course,
13 if you attempt to introduce the knife at trial, he still has
14 the right to object to it. So, the issue's gonna come up at
15 some point in time. If you don't want me to address it now,
16 I can preserve that till the time of trial. If you want me
17 to address it now, I'll be glad to do that. So -- and I
18 agree, it's not filed in a timely fashion. I can say he has
19 to -- that has to be held at the time of trial.

20 SOLICITOR BARNETTE: Yes, sir, what, what it is, Sean
21 Nix will be the one testifying to the collection of it and
22 everything, and he's got several items he'll be testifying
23 to. Just not that. So, it might be something to deal with
24 at another point in time if that's okay.

25 THE COURT: All right. I'll preserve that to the time

1 of the trial.

2 SOLICITOR BARNETTE: Yes, sir, thank you.

3 THE COURT: All right. And I believe that completes
4 the defense motions that we had in the file at this time.

5 Is that correct, Mr. McGuire?

6 MR. MCGUIRE: Judge, now actually, actually I drafted
7 two more. One would be a response to the State's request
8 for underlying data, documents, and facts supporting our
9 expert testimony regarding mental retardation or Atkins
10 investigation, and then I filed another one.

11 THE COURT: Now, that's a response to a State requested
12 one?

13 MR. MCGUIRE: It is.

14 THE COURT: Okay.

15 MR. MCGUIRE: It is.

16 THE COURT: I'm gonna go on to the next one, but go
17 ahead.

18 MR. MCGUIRE: Okay. And---

19 THE COURT: That wasn't a motion that you made. It's a
20 response I believe.

21 MR. MCGUIRE: It is. It is.

22 THE COURT: Okay.

23 MR. MCGUIRE: I'm happy---

24 THE COURT: Any other motions that you're making?

25 MR. MCGUIRE: Number 27 is a motion that we, we allow

1 the DDSN evaluator to complete his evaluation, Doctor Edgar
2 Brown, and then we not have the trial until maybe 28 days
3 after that. I'm not asking for a lot of time, and I know
4 that the Court's not inclined to do that. But there are a
5 number of expert witnesses that I'm gonna have to prepare
6 their testimony, and it's gonna involve substantial work and
7 substantial hours.

8 THE COURT: Well, I understand that. But, you know,
9 the process for getting this testing is been drawn out
10 because of various things. Some of which were the defense
11 questions or issues and---

12 MR. MCGUIRE: Sure.

13 THE COURT: ---we're trying to get it done in a timely
14 fashion, but I think you'll have sufficient time to digest
15 his report once we get ready.

16 MR. MCGUIRE: Well---

17 THE COURT: You know---

18 MR. MCGUIRE: But I don't think I'll have time to -- I
19 don't think I can postpone preparing certain expert
20 witnesses that would only be relevant in a penalty phase. I
21 think I'm gonna have to do that before the report's issued.

22 THE COURT: Well, again, I'm gonna -- we're gonna give
23 you some time, but I'm not gonna say it's gonna be 28 days.

24 MR. MCGUIRE: Okay. Well, we're set for
25 January 27th now.

1 THE COURT: Yes, we are and I, I intend to keep it on
2 that schedule.

3 MR. MCGUIRE: Okay. Cause my reading of the emails
4 from DDSN and their representatives indicated that their
5 evaluation is not gonna be done until mid-January.

6 THE COURT: Well, we've talked about that with them. I
7 don't know if they -- that was a concern, I think in the
8 emails that I read, that the examiner had another death
9 penalty case that was going to come up at about that time.

10 MR. MCGUIRE: I think he was scheduled to testify.

11 THE COURT: I'm not sure his report won't be ready
12 before that time.

13 MR. MCGUIRE: Oh, well, that might be fine then. I
14 mean we're gonna be ready.

15 THE COURT: I mean it was concerning scheduling a
16 hearing on the issue---

17 MR. MCGUIRE: Okay.

18 THE COURT: ---is what, what -- and I'm trying to get
19 that done before the mid week in January.

20 MR. MCGUIRE: I see. Well, we'll certainly -- you
21 know, we would of been ready for December 30th. We'll be,
22 we'll be ready.

23 THE COURT: Okay.

24 MR. MCGUIRE: I was just trying to look out for the
25 State's resources and we didn't have to---

1 THE COURT: As soon as that report is available, I've
2 got a feeling Mr. Barnette will see that you get it.

3 Is that correct, Mr. Barnette?

4 Will you have an, have an opportunity to review that
5 report since it's a Court appointed examiner?

6 MR. MCGUIRE: It should be made available to all the
7 parties.

8 SOLICITOR BARNETTE: It should be made available to
9 both parties, Your Honor.

10 MR. MCGUIRE: All right.

11 SOLICITOR BARNETTE: And, Your Honor, I do have a
12 written response to his motion I'd like to hand up to the
13 Court.

14 THE COURT: You may do so.

15 Yes, sir.

16 SOLICITOR BARNETTE: And, Your Honor, just falling
17 between making -- and obviously all of the returns were
18 made -- I'd like to make part of the record.

19 Your Honor, we oppose on several grounds. Obviously he
20 didn't follow the scheduling order again. The
21 misrepresentation, he already says is -- the one thing that
22 bothered me about his motion was he stated that the State
23 submitted its proposed order at the times. We did that and
24 he kind of takes issue when he said the State did not submit
25 a proposed order for appropriate independent evaluation of

1 the defendant very recently.

2 well, we did within a timely manner and I believe their
3 proposal was the one that was used, and the other thing that
4 bothered me, I called it's, I think, Ms. Vanderberg or
5 Vanderbilt.

6 THE COURT: Vanderbilt was the general counsel for that
7 agency.

8 SOLICITOR BARNETTE: And I initially wanted -- she, she
9 initially -- of course, we sent all the materials we had to
10 her. You know, the school records and everything. I do
11 have -- I'd like to make that attachment number one for the
12 record and give us a copy. I believe they were -- got a
13 copy of all this just to make sure.

14 Ricky Blackwell's jail, school, work records, C.D.L.,
15 everything involving him, we put that on a disk, and I'd
16 like to make that Exhibit No. 1 with this motion, Your
17 Honor, sent to that and she called me and said why didn't
18 y'all call and talk to us about scheduling or anything else,
19 and I said, ma'am, we didn't ask for y'all to do the
20 evaluation, and obviously they didn't contact her to see
21 what they needed and what was needed done since before they
22 did the proposed order.

23 THE COURT: We were working with them as late as
24 yesterday afternoon to try to get the information to the
25 examiner who was doing the examination yesterday --

1 SOLICITOR BARNETTE: Yes, sir.

2 THE COURT: -- from the defense.

3 SOLICITOR BARNETTE: Yes, sir.

4 THE COURT: Go ahead.

5 SOLICITOR BARNETTE: And I understand.

6 And the other thing, Your Honor, that he gives you this
7 scenario about the IQ of the defendant. Well, there was a
8 test given October 20th, 1967. He scored an 87 on that
9 test. It's the California Short Form Test of Mental
10 Maturity. It's in the materials that's all there. So --
11 and plus he's had a C.D.L. license. He has had numerous
12 jobs. There's all kinds of factors that show he's not M.R.
13 in this case, and we would submit that. That's another
14 reason I submitted that to the Court.

15 THE COURT: Well, I understand that, but they have
16 raised that as a possible defense. So, we've got to address
17 it at a hearing or some -- before the trial.

18 SOLICITOR BARNETTE: Oh, no question. I just want to
19 make sure the Court gets the full page. I understand the
20 Court has to hear it. They've raised that as an allegation
21 and everything. They keep talking about the mid sixties.
22 They keep talking about his family, keep talking about
23 everything, but they don't talk about the other things and
24 especially his IQ test of 87 that was given when he was
25 eight years old, and they keep talking about their recent

1 testing.

2 well, that's common knowledge. If you look at the
3 D.S.M., it's got to be 18 -- before 18 years old is when you
4 determine the IQ, and a lot of times they can learn how to
5 avoid the test and everything else before that -- I mean
6 afterwards when they're older, and I just wanted to make
7 sure that's put on the record.

8 I know the Court's aware of that. But I keep reading
9 all the materials. They keep talking about all that. Well,
10 there's this also in there, and, of course, we submitted
11 those materials that we sent to DDSN as well as any other
12 experts we may use in this case.

13 THE COURT: well, again, I'm going to urge the State
14 examiner to get the report to the Court as quickly as
15 possible. As soon as it's available, it will be made
16 available to both sides in the case.

17 SOLICITOR BARNETTE: And the other thing concerned me,
18 Your Honor, if you read the last paragraph in his motion, I
19 don't know if they've supplied everything to DDSN that their
20 experts have done, and I've got a real concern about that.

21 THE COURT: well, the issue yesterday I believe that my
22 law clerk was dealing with -- I wasn't directly involved in
23 that. My law clerk was involved with it. There was a
24 question as to what testing had been done so that they
25 didn't have to repeat tests. I think the information was

1 provided by the defense yesterday.

2 SOLICITOR BARNETTE: Okay. I just wanted to make sure
3 cause on his motion, if you read that last paragraph, it
4 appears that the stuff was held back.

5 THE COURT: Well, again, if there's, if there's delay
6 in the testing, I would say that there's been foot dragging
7 or at least not people being forthcoming as quickly as
8 possible in this matter.

9 SOLICITOR BARNETTE: Yes, sir.

10 THE COURT: I can assure you the Court's trying to move
11 it along.

12 SOLICITOR BARNETTE: Oh, no, I know the Court is. What
13 worries me is---

14 THE COURT: I'm doing everything I can to get it moved
15 along.

16 SOLICITOR BARNETTE: Yes, sir. Thank you, Your Honor.

17 THE COURT: All right. Now, is there -- what is the
18 ruling that you're asking me for?

19 MR. MCGUIRE: Well, Judge, in the -- you know, we're,
20 we're, quite frankly, a little bit undecided by how to
21 approach DDSN. I've worked with them in the past. In some
22 cases I've turned over everything voluntarily.

23 THE COURT: That's the group you asked for.

24 MR. MCGUIRE: Well, that's the---

25 THE COURT: I've granted your request.

1 MR. MCGUIRE: Sure. No, no, I'm not criticizing them
2 at all.

3 THE COURT: Okay. Go ahead.

4 MR. MCGUIRE: It's just that -- it's actually the
5 prosecutors that, that causes some degree of hesitancy about
6 turning information over. You know, most of the prosecutors
7 that I've dealt with M.R. issues have a very non-adversarial
8 position like let's just go see what DDSN says and that's
9 gonna be it, and it's a -- it's not a very adversarial
10 situation.

11 You know, I'm not an expert in mental retardation, but
12 I have an expert that tells me that my client does have an
13 intellectual disability that would prevent him from being
14 death penalty eligible, and I am -- I'm hesitant to turn
15 over information that's basically my mitigation case.

16 THE COURT: Well, now the---

17 MR. MCGUIRE: Although---

18 THE COURT: Yesterday the difficulty we had, from
19 what's been reported to me, is that there was -- we were
20 asking or seeking -- we -- I say we. Not we. The testing
21 agency was seeking what tests have been run on him in
22 evaluating him and could that information be made available
23 to them.

24 MR. MCGUIRE: Actually---

25 THE COURT: And usually these testing -- my experience

1 with this psychological testing is that it, it's -- you have
2 standardized tests to do these things with. They're not
3 fact specific, specific to this case or to any particular
4 individual.

5 MR. MCGUIRE: That's true.

6 THE COURT: And, so, I was not aware that any of that
7 information would have any affect on your case specifically
8 other than to have him tested.

9 MR. MCGUIRE: Oh, sure. And -- well, let me---

10 THE COURT: And that it was concerning to me that that
11 information was -- it was difficult to get that information
12 to the tester.

13 MR. MCGUIRE: Well, first off, just---

14 THE COURT: And, so, that was concerning to me.

15 MR. MCGUIRE: Sure. I understand that, but---

16 THE COURT: Especially when I've got a case scheduled
17 for the end of January.

18 MR. MCGUIRE: Sure. But let me, let me -- just to make
19 the record clear --

20 THE COURT: Yes, sir.

21 MR. MCGUIRE: -- I was the one that contacted DDSN and
22 said I want to assist you to make sure you don't duplicate
23 efforts. We have a recent test, and I want to -- it's a,
24 it's the gold standard in testing for M.R. and intellectual
25 disabilities, and that there are certain protocols that have

1 to be followed with regard to, once a test is administered,
2 there's a, there's a reliability issue if you administer the
3 same test, and in an effort -- voluntarily on our part. We
4 had no obligation to do this. I wanted to make sure they
5 weren't given the same test so we wouldn't have a
6 reliability issue, and I was just being fair to both sides.
7 I'm the one that volunteered that.

8 So, I -- in an effort to help, I---

9 THE COURT: Well, now, I think it will move the process
10 along if that information is available.

11 MR. MCGUIRE: Sure. And, and it also -- the last thing
12 that I wanted was to have an IQ score that was artificially
13 inflated because it -- there's a practice of fact. There is
14 a known practice of fact with certain IQ tests. Some are --
15 the practice effect is greater on some than others. But
16 it's a phenomena that exists and I didn't want DDSN to run
17 into a problem by defending that issue, and I was, I was
18 just trying to be helpful.

19 So, now I can't, I can't have a psychologist give us
20 raw data cause it's a violation of the agreement. When
21 they, when they purchase these instruments to be able to
22 give them to people, they're -- they have to sign an
23 agreement that it's not disseminated to the general public,
24 that sort of thing. So, I can't get it.

25 So, I have to have it disseminated from the

1 psychologist to another psychologist, and we made all the
2 arrangements for that, for that to be done.

3 THE COURT: Okay.

4 MR. MCGUIRE: So -- and we've complied with all that.

5 THE COURT: Well, my concern was that he was scheduled
6 to be down there yesterday, and it just jeopardized the
7 evaluation being done yesterday.

8 MR. MCGUIRE: Oh, no, no. The, the -- there was no --
9 I'm sorry. I didn't mean to cut you off, Judge. But the,
10 the -- any formal testing, my understanding was that was not
11 scheduled until the 14th.

12 THE COURT: All right.

13 MR. MCGUIRE: That this was an initial first meeting.
14 There are gonna be at least two or three, and that the
15 November 14th date was the date that was given to me as,
16 as in testing.

17 THE COURT: Again, back to what are you, what are you
18 asking me to rule on?

19 MR. MCGUIRE: Well, to prevent the State from
20 requesting all of our, our -- basically our entire, entire
21 Atkins investigation. They're not entitled to it and we
22 have a, a---

23 SOLICITOR BARNETTE: I don't think that's the motion.

24 THE COURT: No, I don't think that was the motion.

25 What -- the motion, what was it, Mr. Barnette?

1 SOLICITOR BARNETTE: I think, I think he was making a
2 motion -- I still don't know -- basically a continuance
3 motion is what I think he was making.

4 THE COURT: A what?

5 SOLICITOR BARNETTE: Continuance motion to save money
6 for the State. I think that was his original motion.
7 That's kind of what---

8 THE COURT: Well, I don't see a reason for a
9 continuance at this point in time.

10 MR. MCGUIRE: Okay. And what I was gonna do, what I
11 was gonna offer was to turn over our Atkins investigation if
12 we got the 28 days --

13 THE COURT: All right.

14 MR. MCGUIRE: -- which the State gets---

15 THE COURT: The State, are you interested in doing
16 that?

17 SOLICITOR BARNETTE: If he'll give it to us we'll take
18 it.

19 THE COURT: No, he says -- but he wants the 28 day
20 continuance.

21 MR. MCGUIRE: And I will give it to -- just to be
22 clear, to DDSN. Not the State directly.

23 SOLICITOR BARNETTE: Well, the question -- is he gonna
24 give us everything they've got?

25 THE COURT: You -- why don't y'all take a moment and

1 talk --

2 SOLICITOR BARNETTE: Okay.

3 THE COURT -- and see if that's something you want to
4 resolve---

5 SOLICITOR BARNETTE: Okay.

6 THE COURT: ---with Mr. McGuire.

7 SOLICITOR BARNETTE: Okay.

8 THE COURT: I'll take a short break. I'll stay on the
9 bench.

10 SOLICITOR BARNETTE: Okay.

11 THE COURT: If you need to step outside, please do.

12 SOLICITOR BARNETTE: Yes, sir. Thank you.

13 THE COURT: Thank you.

14 (WHEREUPON, a short recess was taken at this time.)

15 THE COURT: Were you able to make any progress in your
16 discussions?

17 SOLICITOR BARNETTE: No, sir, we weren't.

18 THE COURT: Okay. All right.

19 MR. MCGUIRE: I mean just for the record, Judge, we
20 offered to -- we offered to supply everything that would be
21 relevant to an Atkins determination to DDSN by
22 November 21st, and turn it over to the State a week before
23 any scheduled Atkins hearing, and that was rejected.

24 SOLICITOR BARNETTE: Yes, sir, I said I'll take it at
25 the same time DDSN gets it. I think that would be fair in

1 that situation. You know, November 21st, I don't have a
2 problem with that. I don't see what advantage we would gain
3 from that, from that standpoint.

4 THE COURT: Okay. All right. Anything else I need to
5 consider from the defense?

6 MR. MCGUIRE: Well, only that, in an attempt to clarify
7 the State's position before we came back in, I, I asked
8 if -- so, my understanding is -- the offer on the table
9 would be to hand it over to you on the same day that we gave
10 it to DDSN, you would agree to the 28-day postponement, and
11 then they said well, no, we don't want to talk about it
12 anymore. So, they kind of didn't agree to anything.

13 THE COURT: Well, I understand that, and---

14 SOLICITOR BARNETTE: Well, Your Honor, I made my terms.
15 If he won't agree at the same time DDSN gets it, I think
16 that's only fair from that standpoint. I mean that's
17 suppose to be their agency from that standpoint. I think
18 that information -- first thing, I think we should be
19 provided it anyway, but, you know, that way it may be easier
20 for the Court in this situation.

21 THE COURT: Well, I, I -- is this something that I need
22 to take a look at in chambers?

23 Is there gonna be an issue as to what the State gets to
24 look at?

25 MR. MCGUIRE: No, I don't believe so.

1 THE COURT: Then I'm just gonna leave it as it is.

2 SOLICITOR BARNETTE: Okay.

3 THE COURT: Whenever it's turned over to DDSN, it will
4 be available -- it's a Court appointed examiner. Once they
5 get it, then I want to be sure everybody has the
6 information.

7 SOLICITOR BARNETTE: Yes, sir.

8 THE COURT: Do you object, Mr. McGuire?

9 MR. MCGUIRE: Yes, sir.

10 THE COURT: Why?

11 MR. MCGUIRE: Because, as the Court's noted previously,
12 that I asked for DDSN and the reason I asked for DDSN is
13 because it is, in fact, an independent evaluation.

14 THE COURT: It's a state agency.

15 MR. MCGUIRE: State agency.

16 THE COURT: Yes, sir.

17 MR. MCGUIRE: Bigsby, Locklear, the cases I---

18 THE COURT: I granted, I granted your request.

19 MR. MCGUIRE: Sure. Cause that's the law.

20 THE COURT: Uh-huh. (Affirmative).

21 MR. MCGUIRE: And the State's not entitled to a
22 partisan evaluation, and, again---

23 THE COURT: It's decided.

24 MR. MCGUIRE: Sure. And -- but here's the thing. This
25 is -- and I'm not sure, I'm not sure if Mr. Barnette

1 understands it.

2 The reason I would give information to DDSN is because
3 they're not adversarial. They're not trying to kill my
4 client. They have a job to do and they're gonna be an
5 independent entity that's gonna do it.

6 Me giving information to the side that's trying to kill
7 my client is problematic to me. He has a complete Sixth
8 Amendment right and a Fifth Amendment right not to present
9 any evidence, and he has no duty whatsoever to assist the
10 State in any investigation whatsoever.

11 Now, I may decide voluntarily to assist DDSN in its
12 independent investigation. But if I turn something over to
13 DDSN, I don't expect it to be just given to the State. If
14 I'm doing that voluntarily to try to get a proper
15 evaluation, it's---

16 THE COURT: All right. And what, what information in
17 there do you object to the State having?

18 MR. MCGUIRE: Well, it would be---

19 THE COURT: Can you supply me with a list so I can
20 review it?

21 MR. MCGUIRE: I can do that.

22 THE COURT: I don't know how I'll make a determination
23 unless I know what it is.

24 MR. MCGUIRE: Sure. What I can tell you is this.

25 With regard to, with regard to standardized testing,

1 got no problem with that. We've already made efforts to get
2 all that turned over, and we're not gonna hold back anything
3 in that regard.

4 But I can tell you that in my dealings with DDSN, and I
5 do respect them, but I've dealt with Doctor Edgar Brown in
6 the past. I find him to be a very reputable gentleman of
7 integrity, and the fact of the matter is he is overworked
8 and he's underpaid and he's swamped over there at DDSN, and
9 they're not likely to do the thorough interviews that we are
10 able to do with regard to trying to track down supervisors
11 at jobs from 20 years ago, 15 years ago, people that my
12 client's worked with 12 years ago. That sort of thing is
13 just not gonna happen, and, and while that goes to the
14 Atkins issue --

15 THE COURT: Yes, it does.

16 MR. MCGUIRE: Certainly it does. But also a lot of
17 this is just plain old mitigation evidence, and that's my
18 mitigation investigation, and there's no requirement that I
19 turn it over to the State. In fact, all the law sides on
20 in---

21 THE COURT: No, is the State not given an opportunity
22 to examine the basis for the expert's opinions, the reasons
23 why they have -- may have opinions or hold opinions?

24 MR. MCGUIRE: Sure. That's in the, that's in the Rules
25 of Evidence. When the expert testifies, the rule actually

1 says that the expert may be forced to reveal the basis upon
2 which he formed an opinion on cross-examination, and the
3 rule doesn't actually provide for any earlier discovery or
4 any other earlier date from that -- where an expert would
5 have to turn over the raw data they're basing their opinion
6 on. The rule actually contemplates that it comes out on
7 cross.

8 Now, in one of my pleadings, I volunteered not to, to
9 try to help the Court be efficient, and not have a break, a
10 long break in the trial, that we would turn the information
11 over a day before our expert testifies so the State can
12 review it with their expert, and -- but there's no
13 requirement on us to do that. That was just me voluntarily
14 doing it so we didn't have a jury out there waiting for
15 hours and hours and hours so they can review hundreds of
16 documents.

17 THE COURT: Mr. Barnette.

18 SOLICITOR BARNETTE: Your Honor, he could simply -- the
19 November 21st, if he's gonna give it to DDSN, just give it
20 to us and I'll agree to the continuance for 28-days. That's
21 easy from that standpoint.

22 But I agree with the Court. I don't think it's fair to
23 hold it back from them, when you're giving it to this
24 agency, they've given this information too that's gonna be
25 submitted, and another thing is -- I know we're getting

1 ahead on the motions, but he keeps talking about he's trying
2 to protect his mitigation. We're gonna have an Atkins
3 hearing on the 30th or the 31st. That's at least a month
4 ahead of the scheduled trial.

5 So, we're gonna, you know, at least have it then. He's
6 not protecting it for mitigation purposes. He's protecting
7 it for the Atkins hearing, and actually I think it needs to
8 be given in advance from that standpoint to be dealt with in
9 the Atkins hearing. If he just merely would agree to, to
10 give it to us on the 21st, he'd get the extra 28-days, and
11 it may save the State some money. I don't know. I don't
12 know what Doctor Brown's assessment is gonna be. But from
13 that standpoint, he has that option available to him.

14 MR. MCGUIRE: I'll take it. We'll agree.

15 THE COURT: So now do we have an agreement?

16 MR. MCGUIRE: We do. But I -- that -- so long as the
17 trial's postponed from January 27th 28-days from that so I
18 can try to save the agency about \$15,000, yeah, I'll take
19 that.

20 SOLICITOR BARNETTE: Does he have any conflicts before
21 we go through that?

22 I don't have a problem doing the continuance.

23 MR. MCGUIRE: We don't.

24 SOLICITOR BARNETTE: We can figure out a date today?

25 THE COURT: Well, we will do that during our lunch

1 break.

2 SOLICITOR BARNETTE: Yes, sir.

3 THE COURT: We'll just hold this and then we'll talk
4 about this.

5 SOLICITOR BARNETTE: But I understand November 21st is
6 when we'll get everything he's got on Atkins?

7 THE COURT: That's what I just heard.

8 SOLICITOR BARNETTE: Yes, sir, I just wanted to make
9 sure that's on the record.

10 THE COURT: Okay.

11 MR. MCGUIRE: And just so the Court knows, I don't have
12 any conflicts until -- I have a Castle Doctrine hearing in
13 early April.

14 THE COURT: Of course, the Court also has a schedule.
15 So, I'll have to take a look at that as well.

16 MR. MCGUIRE: Not unmindful of that, Judge.

17 THE COURT: All right. Now, does that complete the
18 defense issues?

19 MR. MCGUIRE: Yes, Your Honor.

20 THE COURT: All right. Are you prepared to go forward
21 on the Jackson v. Denno testimony?

22 SOLICITOR BARNETTE: Yes, sir, we have two of the
23 officers here. I'm gonna let Mr. Bulsa call his witness
24 first and then I'll follow up after that.

25 THE COURT: All right.

1 SOLICITOR BULSA: Micah Horton.

2 THE COURT: All right. Call your witness, Mr. Bulsa.

3 SOLICITOR BULSA: Micah Horton.

4 THE COURT: Come forward, sir.

5 MICAH HORTON, having been first duly
6 sworn, testified as follows:

7 THE COURT: Sir, once you're seated, state your name
8 for the record please.

9 THE WITNESS: Micah Horton. Excuse me.

10 THE COURT: I'm sorry.
11 what?

12 THE WITNESS: Investigator Micah Horton---

13 THE COURT: Thank you.

14 THE WITNESS: ---with Spartanburg County Sheriff's
15 Office.

16 THE COURT: Thank you, sir.

17 DIRECT EXAMINATION

18 BY SOLICITOR BULSA:

19 Q Investigator---

20 THE COURT: Mr. Bulsa.

21 Q Investigator Horton, did you have an occasion to go to
22 Ridings Road on July the 8th of 2009?

23 A I did, sir.

24 Q And while there, did you have an occasion to come into
25 contact with the defendant in this case?

Micah Horton - Direct examination
by Solicitor Bulsa

- 1 A Yes, sir, I did.
- 2 Q What was taking place when you came into contact with
3 him?
- 4 A During the process of on scene, we were in the process
5 of securing a residence that was a concern that the suspect
6 may of fled to. While in the process of doing that, the
7 suspect walked from the wood-line behind this residence at
8 which point myself and several other officers confronted him
9 and took him into custody after he, after he shot himself in
10 the stomach area.
- 11 Q So, he came out of a wood-line carrying a weapon?
- 12 A Yes, sir, he had a pistol in his right-hand.
- 13 Q And subsequently fired at himself?
- 14 A Yes, sir.
- 15 Q And did he injure himself?
- 16 A Yes, sir, he shot himself in the stomach area.
- 17 Q And he dropped where he was shot?
- 18 A Yes, sir.
- 19 Q Okay. And did you approach him at that point?
- 20 A Yes, sir, I did.
- 21 Q What did you do?
- 22 A I, I assisted in securing him and placing handcuffs on
23 him and searching him for additional weapons.
- 24 Q Did another officer secure the weapon?
- 25 A Yes, sir.

Micah Horton - Direct examination
by Solicitor Bulsa

- 1 Q Okay. Now, you said you placed him in handcuffs.
2 Did you, at anytime, attempt to speak to him?
- 3 A No, sir. No, as far as you know, just put your hands
4 behind your back, commands, that nature, but---
- 5 Q Okay.
- 6 A ---nothing other than that.
- 7 Q You weren't asking him any questions?
- 8 A No, sir.
- 9 Q So, I take it he was conscious?
- 10 A Yes, sir.
- 11 Q He seemed to be aware of what was taking place?
- 12 A Yes, sir.
- 13 Q How many other officers were around him?
- 14 A I can't give you an accurate number. I would just
15 guess and say ten to twelve.
- 16 Q Okay. And of those ten to twelve, how many actually
17 had personal contact with him?
- 18 A I couldn't answer that. As far as---
- 19 Q when you were there.
- 20 A If I recall correctly, that was approximately three of
21 us---
- 22 Q Okay.
- 23 A ---including myself that was actually put hands on him
24 to secure him and search him.
- 25 Q Okay. So, three of you secured him and did EMS arrive

Micah Horton - Direct examination
by Solicitor Bulsa

1 to assist him?

2 A Yes, sir.

3 Q Okay. Were they already at the scene?

4 A If I recall correctly, I believe they were already at
5 the scene.

6 Q Cause they had been called---

7 A If not, if not on the scene, they were standing by the
8 scene, you know, just close waiting for us to secure to --
9 the all clear to come into the scene.

10 Q Okay. But they were called as a result of the young
11 girl being killed?

12 A That's correct.

13 Q All right. So then they moved over to treat
14 Mr. Blackwell.

15 while being treated, did you overhear him say anything?

16 A I did, sir. While EMS was treating him, I stood beside
17 Mr. Blackwell while EMS was treating him. And while
18 standing there, I heard him say I shouldn't of -- I
19 shouldn't have done that, done it. Not to get, not to get
20 back at him.

21 Q Okay. And was that in response to any question from
22 anyone?

23 A No, sir, I did not question him at any point.

24 Q Was anybody else questioning him?

25 A No, sir, not to my knowledge. There was -- the only

Micah Horton - Direct examination
by Solicitor Bulsa

1 person there that was directly in contact with him was the
2 EMS rider.

3 Q Okay. And you documented that in a report?

4 A I did, sir.

5 Q I believe you -- what you stated, were those the exact
6 words he said?

7 A Yes, sir.

8 Q Okay. Thank you. That's all I have.

9 THE COURT: Any questions?

10 MR. MCGUIRE: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. MCGUIRE:

13 Q Is it officer or detective?

14 A Detective Horton.

15 Q Detective?

16 A Uh-huh. (Affirmative).

17 Q Just trying to see if it was still morning. I guess
18 morning or afternoon. I'm not sure. Morning.

19 The wood-line you described is actually a peach grove,
20 isn't it?

21 Isn't it?

22 A I couldn't give you an accurate answer on that. I'm
23 not familiar. I mean I'm not familiar with what exactly is
24 growing back there.

25 Q Okay. So, when you say wood-line, are you talking

Micah Horton - Cross-examination
by Mr. McGuire

1 about like a forest like a wild forest?

2 A What, what I'm describing as a wood-line would be an
3 area where there's a field of grass and it turns into trees,
4 shrubbery, something that's not flat and clear. It's not a
5 cleared area at that point.

6 Q Sure.

7 You don't remember that this was actually a farm or
8 peach orchard?

9 A No, sir, I can't tell you what kind of trees are around
10 it.

11 Q Okay. Who directed you to this area?

12 A I can't give you a specific person's name as far as --
13 it was just -- you have to understand we're at a scene like
14 this. There's -- we're attempting to secure a residence
15 where the suspect possibly could of fled to.

16 Q Sure.

17 A In the process of doing that, you know, it's basically
18 attention was turned, turned toward the rear of the
19 residence where the suspect was coming from the woods and
20 everyone just made their way to that, to that area.

21 Q Okay. Let me help you out a little bit. This might
22 jog your memory.

23 Do you know if it was a family member of Mr. Blackwell
24 who gave you information as to where he was, a civilian?

25 A Not me directly, no, sir.

Micah Horton - Cross-examination
by Mr. McGuire

- 1 Q Oh, okay.
- 2 Okay. And you might not know the answer to that.
- 3 A I don't.
- 4 Q Okay. And when you saw him, what was his affect?
- 5 what did he look like, sort of his facial expression?
- 6 A As far as whenever he was coming from the wood-line?
- 7 Q Uh-huh. (Affirmative).
- 8 Yeah.
- 9 A To the best I recall, it was basically just a blank
- 10 facial expression. There was no -- if you're asking if he
- 11 was smiling or frowning or I don't recall anything of that
- 12 nature.
- 13 Q Just kind of a blank affect?
- 14 A Yes, sir.
- 15 Q Okay. And did you actually see him turn the gun on
- 16 himself?
- 17 A I did.
- 18 Q And did he say anything right before he did that?
- 19 A If he did I did not hear it.
- 20 Q Okay. And who was he looking -- where was he looking
- 21 when he did that if you remember?
- 22 A I can't, I can't testify to exactly where his eyes were
- 23 looking.
- 24 Q And what was his affect when he pulled the trigger?
- 25 A It was no expression as far as I could tell.

Micah Horton - Cross-examination
by Mr. McGuire

- 1 Q Just kind of a blank affect?
- 2 A Yes, sir.
- 3 Q Okay. And then when he fires the shot, what do you do?
- 4 A well, we immediately go to him to secure him.
- 5 Q Okay. And you handcuffed him behind his back?
- 6 A After, after -- you know, after the shot was fired, you
- 7 know, we continued to tell him not to touch the gun, stuff
- 8 like that, until we made or even approach him and secured
- 9 him at that point.
- 10 Q Okay. He never threatened any officers with the gun?
- 11 A No, sir.
- 12 Q I mean he never pointed it at you?
- 13 A No, sir.
- 14 Q Or any other officer?
- 15 A No, sir.
- 16 Q He only pointed it at himself that you saw?
- 17 A Yes, sir.
- 18 Q And he only harmed himself?
- 19 A Yes, sir.
- 20 Q And his statement was I shouldn't have done that to get
- 21 back at him?
- 22 A That's correct.
- 23 Q Okay. Did you -- and did you have any further
- 24 conversation at all beyond that?
- 25 A I didn't have any conversation with him period.

Micah Horton - Cross-examination
by Mr. McGuire

- 1 Q Okay.
- 2 A That was just the statements that he made.
- 3 Q Okay. Okay. And after he shoots himself, what's his
- 4 facial affect at that point?
- 5 A It was a grimace.
- 6 Q In pain?
- 7 A Yes, sir.
- 8 Q Okay. And did he holler or call out in pain or cry?
- 9 A I couldn't, I couldn't recall.
- 10 Q Okay.
- 11 A If anything was said, exactly what was said, or if he
- 12 screamed or anything. Like I don't recall that.
- 13 Q Okay. But his facial affect would be sort of a grimace
- 14 reflecting pain?
- 15 A Yes, sir.
- 16 Q And that would of been the face that he would of had on
- 17 when he said I shouldn't have done that to get back at him?
- 18 A No, sir.
- 19 Q He went back to the blank affect?
- 20 A We -- you have to understand, whenever he initially
- 21 shot himself, he had a, he had a different expression and,
- 22 you know, I can, I can only assume that, upon initially
- 23 being shot, the pain was intense.
- 24 Q Sure.
- 25 A I don't know. I can't describe what his pain was after

Micah Horton - Cross-examination
by Mr. McGuire

1 that. If you're asking me if it's the same grimace, he
2 continued to hold the same expression as the point when he
3 initially shot himself until the time he left me, no, sir.

4 Q Okay. Well, if you could, describe that then cause I'm
5 asking about sort of his physical affect when he makes the,
6 the statement.

7 A You know, I would say he appeared to be in pain the
8 entire time he was there.

9 Q Okay.

10 A I don't know that he had an actual facial expression as
11 far as anything abnormal at the time when he made that. He
12 was in pain, from what I observed, the entire time he was on
13 the ground.

14 Q Okay.

15 A But nothing abnormal or, you know, for the situation he
16 was in at the time he made that statement.

17 Q Okay. That's all I have for you. Thank you, sir.

18 A Thank you, sir.

19 THE COURT: Mr. Bulsa, any other questions?

20 SOLICITOR BULSA: Just briefly.

21 REDIRECT EXAMINATION

22 BY SOLICITOR BULSA:

23 Q Officer, how long were you actually with him?

24 A From the time that he was -- to the time that he shot
25 himself till the time he was taken away by EMS. If I had to

Micah Horton - Redirect examination
by Solicitor Bulsa

1 guess, I don't have an accurate time, but ten, maybe ten,
2 fifteen minutes at the most.

3 Q Okay. So, it was a short period of time?

4 A Oh, yes, sir, just enough time for them just to
5 stabilize him on scene and get a stretcher to him and get
6 him to the truck.

7 Q Okay. And did you follow him to the ambulance?

8 A No, sir.

9 Q Okay. So, your contact was limited to when you saw him
10 shoot himself and EMS was treating him on the ground?

11 A Yes, sir, once he got placed on the ambulance and taken
12 away, other officers went with him to the ambulance.

13 Q Okay.

14 A Thank you. Nothing further.

15 THE COURT: Anything on recross?

16 RECROSS EXAMINATION

17 BY MR. MCGUIRE:

18 Q Obviously, when you see a gun, you must of ordered
19 something about put down the gun or something like that,
20 right?

21 A Yes, sir.

22 Q Can you tell me how that went?

23 A Yes, sir, whenever he -- when he come out of the
24 wood-line?

25 Q Sure.

Micah Horton - Recross examination
by Mr. McGuire

1 A Yes, sir, I had my pistol pointed at him and was
2 ordering him to drop the gun.

3 Q Okay. Did he discard anything else, any other
4 property, go into his pockets, or did you see anything like
5 that?

6 A No, sir, I didn't see him do that.

7 Q Okay. But you were basically telling him to drop the
8 gun and be -- to render himself unarmed?

9 A Yes, sir.

10 Q Okay. That's all I have. Thanks.

11 A Yes, sir.

12 THE COURT: Anything further, Mr. Bulsa?

13 SOLICITOR BULSA: No, sir.

14 THE COURT: You may step down. Thank you.

15 THE WITNESS: Thank you, sir.

16 SOLICITOR BARNETTE: Your Honor, I'd like to call
17 Deputy Gillespie to the stand.

18 THE COURT: All right, sir. Come forward please. Be
19 sworn.

20 SOLICITOR BARNETTE: And, Your Honor, this is actually
21 a separate statement from the events that day.

22 THE COURT: I understand.

23 You said officer Gillespie?

24 SOLICITOR BARNETTE: Yes, sir.

25 THE COURT: Thank you.

Josh Gillespie - Direct examination
by Solicitor Barnette

1 JOSH GILLESPIE, having been first
2 duly sworn, testified as follows:

3 THE COURT: Sir, state your name please.

4 THE WITNESS: Deputy Josh Gillespie.

5 THE COURT: Mr. Barnette, your witness.

6 SOLICITOR BARNETTE: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY SOLICITOR BARNETTE:

9 Q Where do you work at, sir?

10 A Spartanburg County Detention Facility.

11 Q And what's your position there, sir?

12 A Deputy three.

13 Q And how long have you worked there, sir?

14 A Roughly six, six and a half years.

15 Q Okay. Back on February 4th, 2012, was you working
16 that day, sir?

17 A Yes, sir.

18 Q And at that time did you have a -- did you meet or
19 actually talk to Ricky Blackwell or did he talk to you?

20 A He talked to me.

21 Q If you would, tell us the events or tell us how that
22 occurred, sir.

23 A I reported to his housing to canteen that day. And
24 once I arrived at his cell, I observed he was crying, and I
25 did ask him are you okay. In return he told me I killed

Josh Gillespie - Direct examination
by Solicitor Barnette

1 that little girl.

2 Q And what did you do then after he told you that?

3 A I'd have to refer to my report a little bit. I did
4 ask -- I did tell him any information that you give me can
5 be used against you in Court. He said I understand. I
6 proceeded to hook him up in restraints, handcuffs, belly
7 chains, legs irons, and proceeded to take him to canteen at
8 that point.

9 Q Did he say anything else to you?

10 A After he said he understood that, you know, information
11 could be used in Court, he did say I killed that little
12 girl, I can't live with it. Like I said, I was escorting
13 him down the hall at that time, and he did state a couple
14 more times I don't know why I killed her. I told that woman
15 to leave me alone and I snatched that little girl up and
16 killed her.

17 Q Okay. And like I said, you weren't asking him
18 questions or anything?

19 A No.

20 Q He was just stating this as you was walking down with
21 him?

22 A Yeah, I was just clearly listening to him and wasn't
23 really asking him no questions at all. The only question I
24 did ask was was he okay cause I observed him cry.

25 Q And that's the reason why you asked him that question?

Josh Gillespie - Direct examination
by Solicitor Barnette

1 A Right. Just because he was, you know, emotionally
2 crying.

3 Q And you wrote these statements in a report and provided
4 them, is that correct?

5 A Yes, sir.

6 Q Okay. Thank you. If you would, please answer any
7 questions the defense may have for you, sir.

8 A Okay.

9 THE COURT: Yes, sir, Mr. McGuire, your witness.

10 MR. MCGUIRE: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. MCGUIRE:

13 Q It's Officer Gillespie?

14 A Yes, sir.

15 Q Hey. Good morning.

16 Again, the reason you engaged Mr. Blackwell in
17 conversation was because he was crying?

18 A Yes, sir.

19 Q Was he standing up, laying down?

20 A No, he was sitting beside his desk in his cell.

21 Q He was just sitting crying?

22 A Yeah.

23 Q Tearful?

24 A I didn't -- can't really recall seeing any tears, but,
25 you know, I assumed possibly, yes.

Josh Gillespie - Cross-examination
by Mr. McGuire

1 Q Okay. But he was, in your words, crying?

2 A Well, the sound he was making, yes.

3 Q Okay. Kind of like a sobbing?

4 A Yeah, kind of a sobbing. Yeah, like a child, you know,
5 crying over a loss of toys or something.

6 Q Okay. Well, I've got, I've got two six year old twin
7 boys and they cry pretty loud when they lose a toy.

8 This was -- did you hear it through the cell door---

9 A No.

10 Q ---or you were already going to take him to canteen?

11 A I, I didn't really hear it till I arrived at his door
12 and started opening his door. The officer at the desk
13 actually unlocked it and I pulled the door open. That's
14 when I could hear him.

15 Q Okay. So, you didn't go there because you heard him
16 crying?

17 You had gone there on the purpose of getting him for
18 canteen?

19 A Yes, sir.

20 Q And when you got close to the door, you could hear him
21 sobbing?

22 A Yeah, about the time I actually reached the door and
23 stuff.

24 Q Okay. And, and then you inquired about him, his
25 like -- his well being. You must of said something like are

Josh Gillespie - Cross-examination
by Mr. McGuire

1 you okay or something like that.

2 A Yeah, I asked him if he was okay just to make sure he
3 wasn't hurt, injured, sick, ill, anything of that nature.

4 Q Right.

5 And in response to that, he, he, he says what?

6 A He immediately responds I killed that little girl.

7 Q Okay. And you took that -- you took that, I assume, as
8 that's the -- he was giving you his reason for his crying?

9 A Correct.

10 Q Okay. And he was remorseful about that?

11 A I would, I would assume.

12 Q Well, he's -- if he's crying, that would---

13 A That or upset about it --

14 Q Right.

15 A -- you know.

16 Q I mean it was a pretty plain physical manifestation of
17 being upset over this subject, correct?

18 A Yeah, he appeared to be upset.

19 Q Okay. And he couldn't let it go. He, he -- even
20 after, even after you told him he could hurt himself in
21 Court, even after he knew that, he couldn't let it go, he
22 continued to talk about it, correct?

23 A Correct.

24 Q And he appeared to be sad about it?

25 A Yeah, he stopped crying once he exited the cell. He

Josh Gillespie - Cross-examination
by Mr. McGuire

1 talked to me as a normal person as we talk about it.

2 Q Sure.

3 But he wasn't flippant or happy?

4 A No, he wasn't, you know, smiling about it or, you know,
5 jumping up and down, no.

6 Q I mean his emotional affect was appropriate that he was
7 rather somber about it?

8 A Right. Just a, you know, a low, dull tone of voice to
9 me.

10 Q Right.

11 Okay. Was this the first time you saw him crying?

12 A Not -- I couldn't recall. He's been there for quite
13 sometime.

14 Q Sure.

15 And then -- and you have a ton of inmates and---

16 A Right. You know, at any given time I'm around 180
17 inmates there.

18 Q Right.

19 So, I mean -- so, it would be difficult for you to
20 think back on his behavior in jail and, and try to come up
21 with other instances of him being---

22 A Of being emotional, yes.

23 Q You do remember that?

24 A I wouldn't be able to look back and say have I seen him
25 crying multiple times, no.

Josh Gillespie - Cross-examination
by Mr. McGuire

1 Q Okay. And that's because the number of inmates and
2 your job and---

3 A Uh-huh. (Affirmative).

4 Q ---this being four years?

5 A (Witness nods affirmatively.)

6 Q Okay. And the only reason you remember this particular
7 instance is because you actually wrote it up in a report
8 basically?

9 A I remember incidents, but I didn't remember
10 word-for-word the conversation or how it played out.

11 Q Sure. Right.

12 A You know, that's why I did do a report for
13 informational purposes, yes, sir.

14 Q Sure.

15 And if I hear your testimony correctly, what I hear you
16 saying is he may of been in this condition before, he may of
17 been crying before, but you just can't remember?

18 A Not to my knowledge, no.

19 Q Okay. Did you take any -- did you take any steps to
20 get mental health counseling or have anybody talk to him or
21 anything like that?

22 A He did ask me, when I did return him to his cell, he
23 did make statements that he believed this was anxiety
24 related. Asked me if I would talk to the nurse for him to
25 see about getting him some medication for that condition and

Josh Gillespie - Cross-examination
by Mr. McGuire

1 I did. I talked to a nurse, Crystal, at the time, and she
2 informed me that he was already on medication for anxiety.

3 Q That's true.

4 Okay. But, but he requested some sort of mental health
5 assistance and you tried to help?

6 A Not from me.

7 Q Not from you?

8 A Not from me, no. But he, he requested it through me
9 directly---

10 Q Sure.

11 A ---that I talk to the nurse to see if he can get some
12 type of anxiety medication or help for anxiety.

13 Q Right, right. I didn't mean to imply that he was
14 asking you to treat him for mental health issues.

15 But he made a mental health request and asked you to
16 relay it?

17 A And, you know, that was forwarded to medical.

18 Q Sure.

19 I think that's all I have. Thank you.

20 A Okay.

21 SOLICITOR BARNETTE: No further questions for this
22 witness, Your Honor. Ask that he be excused.

23 MR. MCGUIRE: No objection.

24 THE COURT: You may step down, sir. You're free to go.

25 THE WITNESS: Thank you.

1 THE COURT: And your other witness?

2 SOLICITOR BARNETTE: We do have one more, but that's
3 the teacher, Your Honor.

4 THE COURT: I see.

5 Okay. All right. Let's go into -- let's take about a
6 five minute break and then we'll start with the State's
7 motions.

8 Court will be in recess for about five to ten minutes.

9 (WHEREUPON, a short recess was taken at this time.)

10 THE COURT: All right. The first motion I have from
11 the State that I will consider is a motion against third
12 party guilt evidence.

13 SOLICITOR BARNETTE: Your Honor, we're making that
14 motion -- I don't think there's gonna be any third party
15 guilt, but I thought I'd make that motion out of an
16 abundance of caution.

17 MR. MCGUIRE: I'll keep looking for somebody, but---

18 THE COURT: But you haven't found it yet?

19 Is that what I'm hearing?

20 MR. MCGUIRE: Nope.

21 THE COURT: Okay. Then that -- we won't have to make a
22 ruling on that at this time.

23 Motion for expert witness for defendant to disclose
24 data.

25 SOLICITOR BARNETTE: Your Honor, I think we've---

1 THE COURT: I think you may of worked that out.

2 SOLICITOR BARNETTE: Yes, sir, provided, you know, that
3 he give it to us I think November 21st we're fine. That's
4 what---

5 THE COURT: I checked my schedule while I was out, and
6 the first two weeks in March are General Sessions weeks for
7 me anyway here.

8 SOLICITOR BARNETTE: That's March the 1st, 2nd?

9 THE COURT: It's the first -- very first week in March,
10 the second week in March.

11 SOLICITOR BARNETTE: Okay. All right.

12 THE COURT: Now, if you want to -- I don't know if you
13 need to clear that with any of your witnesses.

14 SOLICITOR BARNETTE: If we can check, Your Honor.
15 we're gonna definitely do it then if we can unless something
16 major comes up.

17 THE COURT: All right. Motion in limine, limine
18 involving the incidents after the murder and father's
19 character.

20 SOLICITOR BARNETTE: Yes, sir, we -- we've touched on
21 that already from that standpoint. We're making a motion in
22 limine cause we don't think any of the -- obviously it's
23 irrelevant. It happened well after the events occurred with
24 Brooke Center. The father wasn't even there.

25 They keep talking about the biker gangs or anything.

1 That has no relevance to what happened that night. They
2 weren't there when the eight year old was killed.

3 THE COURT: You said -- when you say the father, you're
4 talking about the father of the victim?

5 SOLICITOR BARNETTE: The father of the victim, yes,
6 sir.

7 THE COURT: All right.

8 SOLICITOR BARNETTE: I mean he wasn't even there. He
9 wasn't even in the vicinity, Your Honor, and we just feel
10 like it's irrelevant. Even if it was relevant, it's highly
11 prejudicial and has no -- the probative value will be nil.
12 So --.

13 THE COURT: I've taken that under advisement and I'll
14 issue an order on that.

15 SOLICITOR BARNETTE: Yes, sir.

16 THE COURT: A motion for non-testimonial evidence.

17 SOLICITOR BARNETTE: Yes, sir, I do have a witness
18 here. I've got -- Investigator Bryant's gonna testify to
19 that, Your Honor. He does have an affidavit with him that
20 we'd like to present to the Court at the appropriate time
21 too.

22 would you like him to be sworn in?

23 THE COURT: Yes, if you want to take testimony from
24 him. Bring him up.

25 SOLICITOR BARNETTE: Sergeant Bryant.

1 THE COURT: Come on up and be sworn please. Thank you,
2 sir.

3 JASON BRYANT, being first duly
4 sworn, testified as follows:

5 THE COURT: Have a seat. Once you're seated, state
6 your name for me, sir.

7 THE WITNESS: Thank you, sir.

8 THE COURT: Yes, sir. Thank you.

9 THE WITNESS: My name's Jason Bryant and I'm with the
10 Spartanburg County Sheriff's Office.

11 THE COURT: All right. Thank you.

12 Mr. Barnette, your witness.

13 SOLICITOR BARNETTE: Okay. Thank you, Your Honor.

14 DIRECT EXAMINATION

15 BY SOLICITOR BARNETTE:

16 Q What's your position at the Sheriff's Department, sir?

17 A I'm a homicide investigator. I'm the supervisor over
18 the violent crime division.

19 Q Yes, sir.

20 How long have you been at the Spartanburg County
21 Sheriff's Department?

22 A Since 1996.

23 Q Back on July 8th, 2009, was you involved in the
24 investigation involving the death of Brooke Center?

25 A Yes, sir, I was.

Jason Bryant - Direct examination
by Solicitor Barnette

- 1 Q Based off -- was there evidence that was collected from
2 the defendant or from the scene that could be---
- 3 A There was.
- 4 Q ---could be tested for DNA and so forth?
- 5 A Yes, sir, there were.
- 6 Q And you prepared an affidavit with a synopsis of what
7 the case, the facts of this case would be for Your Honor?
- 8 A I have.
- 9 Q In this case -- do you have it in front of you, sir?
- 10 A I do.
- 11 Q I've provided a copy to the defense, Your Honor.
12 If you would, would you swear that that document is
13 correct?
- 14 A Yes, sir, I do.
- 15 Q I'd ask you to sign in the presence of the judge and
16 let Judge Couch see you sign it and everything. Let him
17 swear to it if you would.
- 18 A Yes, sir.
- 19 Q Do you need a pen, sir?
- 20 A (Witness complies.)
- 21 THE COURT: Are you swearing that that's true?
- 22 THE WITNESS: Yes, sir, I do.
- 23 THE COURT: All right. Thank you.
24 You may proceed, Mr. Barnette.
- 25 Q And this is a short summary of the investigation

Jason Bryant - Direct examination
by Solicitor Barnette

1 involving the death of Brooke Center, is that right---

2 A It is.

3 Q ---involving Ricky Blackwell, the defendant?

4 A Yes, sir, that's correct.

5 SOLICITOR BARNETTE: Okay. Your Honor, I'm not gonna
6 ask anymore questions at this time. I think he's made the
7 showing with the affidavit and we'd ask for the, an order to
8 get a DNA, Buccal swabs from the defendant in this case. I
9 didn't know if the defense would ask any questions or not.

10 THE COURT: I'll allow the defense an opportunity to
11 cross-examine.

12 MR. MCGUIRE: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 CROSS-EXAMINATION

15 BY MR. MCGUIRE:

16 Q Morning, Investigator---

17 A Bryant.

18 Q Bryant.

19 A Yes, sir.

20 Q Good morning, sir.

21 A Thank you.

22 Q Your affidavit mentions several items that were handled
23 or warn by Mr. Blackwell.

24 What are they?

25 A Those were -- and if I can refer to the affidavit

Jason Bryant - Cross-examination
by Mr. McGuire

1 itself?

2 Q Sure.

3 A Items that were taken were, if I remember correctly,
4 there was clothing, a weapon that was recovered at the
5 scene, and other items -- if I could refer to evidence
6 sheets or anything such as that.

7 Q Sure. Take whatever you need.

8 A Okay.

9 SOLICITOR BARNETTE: May I approach the witness, Your
10 Honor, with his book?

11 Q But generally your recollection right now is clothing?

12 A That's correct.

13 SOLICITOR BARNETTE: May I approach the witness, Your
14 Honor?

15 THE COURT: You may.

16 A Thank you. And also a weapon that was recovered at the
17 scene.

18 Q Okay. And are you one of the lead investigators on
19 this case?

20 A No, sir. Not -- no, sir, not in that sense.

21 Q Okay. But you prepared the affidavit and that was a
22 summary of the law enforcement investigation?

23 A That's correct.

24 Q And your understanding is that Mr. Blackwell's accused
25 of shooting Brooke Center?

Jason Bryant - Cross-examination
by Mr. McGuire

1 A That's correct.

2 Q In the driveway of a residence?

3 A Correct.

4 Q That this was allegedly witnessed by Angie Blackwell,
5 his estranged wife?

6 A That's correct.

7 Q That she not only saw it, but also relayed Mr.
8 Blackwell's verbal comments as the incident was happening,
9 correct?

10 A And I did interview her and she did provide a voluntary
11 statement.

12 Q And you---

13 A That's correct.

14 Q Okay. And she is an eye witness very close to the, the
15 shooting?

16 A That's correct.

17 Q And the, the identification that she made of the
18 shooter is her estranged husband?

19 A Correct.

20 Q And not -- she's not confused about that in anyway?

21 A Not at all.

22 Q Okay. And that it was, in fact, a shooting that a gun
23 was used, that's not in dispute at all?

24 A Correct.

25 Q Correct.

Jason Bryant - Cross-examination
by Mr. McGuire

1 And you, you might be aware, you might not be aware,
2 that obviously the gun has been matched to the fatal
3 bullets?

4 A I've not seen any SLED reports or anything such as
5 that---

6 Q Okay.

7 A ---also.

8 Q But you're aware that's a general procedure?

9 A That's correct.

10 Q Okay. And you're just not aware that's been done or
11 not?

12 A Correct.

13 Q Okay. And you are aware, of course, that the clothing
14 at issue, that would be taken off of Mr. Blackwell that,
15 that would of been removed from his person, I mean he was
16 actually wearing it at the time?

17 A Correct.

18 Q Okay. No dispute that the clothing came from his body?

19 A No, sir, not to my knowledge. Not at all.

20 Q Okay. This is not clothing that came from his house or
21 down the road or anything?

22 A That's correct.

23 Q It came from his body?

24 A Correct.

25 Q And the gun came basically from his hand because an

Jason Bryant - Cross-examination
by Mr. McGuire

1 officer saw him turn the gun on himself and shoot himself?

2 A That's correct.

3 Q Okay. And how does DNA help solve or buttress any of
4 these questions?

5 A Well, DNA would solidify the case as far as that goes
6 through the proper identification channels of the matches.

7 Q Okay. Well -- and what are we matching?

8 A Well, along with blood that was found at the scene or
9 anything such as that. Blood in the area. If I remember
10 correctly, evidentiary information at the autopsy of the
11 deceased and anything such as that.

12 Q Tell me more about that. That's not in your affidavit.

13 A I'm not aware or not sure if, at that time, Doctor Wren
14 and those performed any methods or measurements of touch DNA
15 for analysis.

16 Q So, are you, are you saying that the forensic
17 pathologist swabbed the victim's body for touch DNA?

18 A I was not present at the autopsy during that time.

19 Q So, you don't know if this happened or not?

20 A That's correct.

21 Q Okay. So, we don't know if that's an issue or not?

22 A I do not know that, sir.

23 Q Okay. So, the only -- excuse me.

24 Now, what -- in order to test for DNA, obviously you
25 either have to have the object that the DNA's on or you have

Jason Bryant - Cross-examination
by Mr. McGuire

1 to swab it, correct---

2 A Right.

3 Q ---or take a cutting of it?

4 For instance, blood on blue jeans, you'd have to have
5 either the blue jeans or you'd have to swab it, right?

6 A Or of my understanding, a cutting of the item.

7 Q Exactly.

8 well, that would just be a smaller part of the blue
9 jeans?

10 A Correct.

11 Q So, the items that could have DNA on it, as far as we
12 know right now, is a gun and some clothing that the
13 defendant wore, correct?

14 A That's correct.

15 Q Anything else?

16 A If I could refer to---

17 Q Sure.

18 A ---the evidence sheets?

19 Q Sure.

20 SOLICITOR BARNETTE: May I also approach the witness
21 with this, Your Honor, and make clear some things?

22 THE COURT: You may do so.

23 SOLICITOR BARNETTE: I think Mr. McGuire has seen this.

24 MR. MCGUIRE: Yeah.

25 SOLICITOR BARNETTE: May I approach, Your Honor?

Jason Bryant - Cross-examination
by Mr. McGuire

1 THE COURT: You may.

2 THE WITNESS: Thank you.

3 A Okay.

4 Q So, my understanding is the prosecutor -- we should
5 probably mark this for identification, Judge, just to make a
6 complete record, Judge.

7 THE COURT: I don't know which document you're talking
8 about.

9 SOLICITOR BARNETTE: I know. It was handed -- the
10 prosecutor handed it to, to the investigator. We probably
11 need to mark it for -- as a Court's Exhibit so we know what
12 we're referring to.

13 SOLICITOR BARNETTE: Court Exhibit 1, Your Honor. I'll
14 be glad to submit that. I was gonna do it on redirect.

15 THE COURT: You want to agree that it should be made an
16 exhibit?

17 SOLICITOR BARNETTE: Yes, sir, I agree.

18 THE COURT: Any objection?

19 MR. MCGUIRE: No objection. Of course not.

20 THE COURT: It will be marked as Court's Exhibit for
21 purposes of the hearing.

22 (WHEREUPON, the letters from SLED were marked as
23 Court's Exhibit No. 1 and received into evidence for
24 purposes of this hearing only at this time.)

25 Q Just so we're clear for the record and everybody knows

Jason Bryant - Cross-examination
by Mr. McGuire

1 what we're talking about, I want to hand you back what's
2 been marked Court's Exhibit No. 1.

3 That appears to be a SLED document?

4 A That is correct.

5 Q Okay. And I believe on there there's an indication
6 that the gun at issue, a .357 caliber gun, was test fired
7 with a -- and a bullet from the test firing was compared to
8 the known bullet from this case, and that the conclusion was
9 that the gun that SLED had that y'all submitted to them was,
10 in fact, the gun that fired the fatal bullet or the bullet
11 recovered from the victim, Brooke Center.

12 Is that a fair enough statement?

13 It's kind of long, but is it fair?

14 A It states that Item 5 listed here was fired by Item 6.

15 Q Okay. And I think a closer review might reveal that,
16 that they are, in fact, talking about the gun as being the
17 item firing---

18 A That's correct.

19 Q ---known bullets?

20 So, that's the, that's the .357 gun that's at issue in
21 this case?

22 A That's correct.

23 Q That Angie Blackwell saw Mr. Blackwell use to shoot
24 Brooke Center?

25 A That's correct.

Jason Bryant - Cross-examination
by Mr. McGuire

1 Q That's her statement, right?

2 And that's the gun that Mr. Blackwell turned on
3 himself?

4 A That's correct.

5 Q Shot himself and was recovered immediately next to his
6 body?

7 A That's correct.

8 Q Next to his person?

9 A That's correct.

10 Q Okay. And obviously being an officer of some
11 experience, a normal chain of custody would exist between
12 your department and SLED?

13 A Absolutely.

14 Q So, that's the gun we're talking about?

15 A Absolutely.

16 Q So, it shouldn't be any doubt about that?

17 A Not that one, no, sir.

18 Q Okay. And the SLED document also indicates that
19 there's some sort of request for a blood sample or Buccal
20 swab?

21 A That is correct.

22 Q Yeah.

23 Who are they asking that come from?

24 A That is a -- this requires a routine analysis by SLED.
25 DNA case work department has not been met. The -- basically

Jason Bryant - Cross-examination
by Mr. McGuire

1 it's a request for a known DNA standard.

2 Q Yeah.

3 From who?

4 From who?

5 A From the -- Mr. Blackwell.

6 Q Okay. And do you know why they made that request?

7 A It is requested that they're not submitted and that
8 for -- if you'll let me refer here.

9 Q Sure. Take your time.

10 A This is sent in regards to the request of the DNA
11 analysis of the evidence.

12 Q Okay. But you don't know what piece of evidence
13 they're talking about, do you?

14 A On this particular item, according to the evidence
15 sheet, there were other items that were taken such as a
16 plastic gun case and other items.

17 Q Sure.

18 Now, correct me if I'm wrong, but my experience dealing
19 with SLED is that there's a request, but there's not a whole
20 lot of background that goes with it. For instance, all your
21 interview summaries, your police report, that doesn't
22 generally go to SLED with the items.

23 A The statements are anything such as that would not go.
24 But they would be corroboration and cooperation between SLED
25 analysis and entities of the Sheriff's office that would

Jason Bryant - Cross-examination
by Mr. McGuire

1 communicate and correspond with each other in regards to
2 what they need to fulfill the duties with their job.

3 Q Sure.

4 And it looks like that might be sort of the very first
5 step is their contacting you guys and saying we'd like a
6 swab from the subject?

7 A Correct.

8 Q And there's not been any further conversation that
9 you're aware of after that?

10 A That I'm aware of, no, sir.

11 Q Right.

12 To figure out exactly the importance of the swab or why
13 they want it?

14 A Or the other evidence and items that are to be tested.

15 Q Sure.

16 For instance, to give you sort of an analogy, in a, a
17 sexual assault case where a rape kit's performed on a rape
18 victim, DNA analysis might be performed on swabs from the
19 rape kit, right?

20 A I've never worked CSC cases.

21 Q Okay.

22 A I wouldn't want to speak in regard to what their
23 policies---

24 Q Sure.

25 A ---or procedures were.

Jason Bryant - Cross-examination
by Mr. McGuire

1 Q Well, I'm just asking in your experience.

2 For instance, in a case like that where you have, you
3 have what are called degrees of intimacy or degrees of
4 proximity -- I'm not sure you've heard that language from
5 SLED before cause you're looking at me like you haven't.

6 A I'm not aware of their terminology as far as---

7 Q Okay.

8 A ---as---

9 Q Okay. Well, for instance, in the hypothetical with
10 regard to a rape case, let's say there's a cigarette
11 recovered from outside the apartment and it's recovered.

12 A Sure.

13 Q SLED would probably contact law enforcement and say we
14 don't see the need to test the cigarette for DNA because we
15 have a more intimate sample with regard to the semen.

16 Has that been your experience or not?

17 A Well, no, sir, during the course of several unsolved
18 homicides that I've had the opportunity to work that were
19 later solved during the course of DNA analysis, they were
20 willing and able to test anything that would help us to
21 guide us to a suspect to lead to a successful conclusion to
22 a case.

23 Q Okay. And that's when it's unsolved and you don't have
24 a suspect, right?

25 A Well -- or suspect confirmation or clarification.

Jason Bryant - Cross-examination
by Mr. McGuire

1 Q Okay. You've never had them say because we have these
2 multiple samples---

3 A No, sir.

4 Q ---we're gonna, we're gonna go ahead and test the ones
5 that are important and not this one?

6 A I've never had any issues where SLED was not willing to
7 test anything that I requested them to.

8 Q Okay. And you've never had those conversations about
9 the importance or degree of proximity or intimacy with
10 regard to samples?

11 A I mean I've had several conversations with -- as a
12 matter of fact, Jennifer Clayton and those on, on several
13 different occasions and they've always been willing to
14 assist and help in anyway that they could.

15 Q Okay. And it sounds like that's kind of the track
16 we're on right now. It's a request by you guys to test and
17 they're saying we're willing, but we need the sample.

18 A Sure.

19 Q Okay. But -- and that's at, that's at your request,
20 right?

21 A Sure.

22 Q Okay. And that's regarding, as far as we know right
23 now, just limited to the gun and the clothing?

24 A Well, and other items that were taken at the scene and
25 processed.

Jason Bryant - Cross-examination
by Mr. McGuire

1 Q well, see my review of the materials indicates that the
2 only thing we're talking about are clothes and a gun.

3 Is there anything else?

4 A well, there were several items that were taken such as
5 a gun case, keys, sunglasses, comb, money, wallets, key
6 ring, cell phone, lock blade knife.

7 Q Yeah, I agree with you about all that. Let me take a
8 look at that.

9 A Sure.

10 Q Is this it?

11 A Absolutely.

12 Q If I could borrow this for a second?

13 A Sure.

14 Q The, the Samsung cell phone, where was that recovered?

15 A If I can see the---

16 Q Oh, sure.

17 A ---document?

18 Q Yeah, I think I, I know the answer. I just guess -- I
19 need you to say it.

20 A 248 Ridings Road.

21 Q Okay. And, so, these would all be items recovered from
22 the scene?

23 A Correct.

24 Q Okay. And that would include a plastic, a plastic gun
25 case?

Jason Bryant - Cross-examination
by Mr. McGuire

- 1 A Correct.
- 2 Q A key ring, right, with 13 keys and a, and a charm?
- 3 A Sure.
- 4 Q Sunglasses?
- 5 A Sure.
- 6 Q Some money?
- 7 A Correct.
- 8 Q Not a lot of money.
- 9 Sixteen dollars?
- 10 A That's what it appears.
- 11 Q Okay. A comb?
- 12 A Yes, sir.
- 13 Q Like a hair comb?
- 14 A Sure. A little bit more money.
- 15 Q A little bit more money there.
- 16 A Okay.
- 17 Q \$1,268.00, right?
- 18 A Sure.
- 19 Q Okay. But that's not involved in this criminal charge
- 20 at all, is there?
- 21 A Not that I know of.
- 22 Q Okay. Wallet with Mr. Ricky Blackwell's ID. So, we
- 23 can assume that's a probably driver's license, some credit
- 24 cards.
- 25 Right?

Jason Bryant - Cross-examination
by Mr. McGuire

1 A Correct.

2 Q Probably has his name on it, right?

3 A Probably.

4 Q And paperwork and that would, that would be another
5 connection that this is, in fact, Mr. Blackwell's wallet,
6 correct?

7 A It would indicate.

8 Q Okay. And then we have the cell phone and the, the,
9 the pocketknife?

10 A Correct.

11 Q Okay. And you want DNA testing to say all this is Mr.
12 Blackwell's?

13 A Well, I would think that the plastic gun case,
14 information such as that, would be beneficial to the
15 prosecution of the case.

16 Q Okay. Can you tell the Judge why?

17 A It could establish, it could establish who was in or
18 who had access to the, who had access to the gun case per se
19 and possibly even the ability to determine if any or anyone
20 else or anything such as that had messed with it.

21 Q The gun case?

22 A That's correct and I'm sorry. I was reviewing some of
23 these other evidence sheets.

24 Q Oh, sure, sure. Take your, take your time. Take your
25 time.

Jason Bryant - Cross-examination
by Mr. McGuire

1 But did you see the gun case?

2 A I did not.

3 Q Okay. Do you know if it's been swabbed and swabs sent
4 to SLED?

5 A I don't have the forensic---

6 Q Yeah.

7 A ---information with it.

8 Q Okay. My understanding is it hasn't been, but you
9 can't confirm that?

10 A I can't confirm that.

11 MR. MCGUIRE: Judge, if I could just have one second?

12 THE COURT: Yes, sir.

13 (Pause.)

14 MR. MCGUIRE: Ma'am, if I could have this marked
15 Court's No. 2.

16 (Whereupon, a diagram was marked as Court's Exhibit No.
17 2 for identification purposes only at this time.)

18 Q It is Bryant, right?

19 A Uh-huh. (Affirmative).

20 Q Okay. Sir, I want to show you what's been Court's,
21 marked Court's Exhibit No. 2 just so everybody knows what
22 we're looking at.

23 Have you ever seen that before?

24 A I've not seen that diagram, no, sir.

25 Q Okay. But can you see that the, the building marked is

Jason Bryant - Cross-examination
by Mr. McGuire

1 248 Ridings Road?

2 A That's correct.

3 Q Okay. And you're familiar with---

4 SOLICITOR BARNETTE: Your Honor, I'm gonna object to
5 the diagram. He don't have any personal knowledge about the
6 diagram at this point unless he establishes it.

7 THE COURT: well, it's just been marked for
8 identification purposes and he's going over it. We'll see
9 how it works out.

10 You may proceed.

11 SOLICITOR BARNETTE: Yes, sir.

12 MR. MCGUIRE: Thank you.

13 Q And you've, you've been on the scene?

14 A Somewhat, yes, sir. I've not been all over the entire
15 scene.

16 Q Sure.

17 But you -- you're familiar with the general layout?

18 A I'm familiar with where the victim was located.

19 Q Okay. And would you agree that would be over here?

20 A To the best of my recollection it would be in that
21 area.

22 Q Okay. In fact, if you see number one right there, it
23 indicates victim, Brooke Center, and number one is marked
24 over there, right?

25 A Correct.

Jason Bryant - Cross-examination
by Mr. McGuire

- 1 Q So, that, that coincides with your memory?
- 2 A That's correct.
- 3 Q Okay. And then are you familiar that Mr. Blackwell was
- 4 apprehended here?
- 5 A No, sir.
- 6 Q You don't have any knowledge of that?
- 7 A No, sir, not where he was located. I was dealing with
- 8 other aspects and interviewing people at the scene.
- 9 Q Okay. Regarding the, the, the pieces of evidence that
- 10 your affidavit indicates were collected at the scene, I
- 11 believe you included lock blade knife?
- 12 A That's correct.
- 13 Q Samsung cell phone?
- 14 A That's correct.
- 15 Q Key ring with some keys?
- 16 A Correct.
- 17 Q wallet and the contents?
- 18 A Yes, sir.
- 19 Q A gray and white comb?
- 20 A Correct.
- 21 Q U.S. Currency?
- 22 A Correct.
- 23 Q Sunglasses?
- 24 A Yes.
- 25 Q Another key ring with 13 keys and a charm?

Jason Bryant - Cross-examination
by Mr. McGuire

1 A That's correct.

2 Q Okay. And all of those items are -- were recovered in
3 one little place over there?

4 A Correct. But also located where the body was located
5 would of been the deceased clothes, which would of been pink
6 short sleeve shirt, panties, gray sweat pants, and purple
7 tube top that was recovered at the morgue that she was
8 wearing at that location.

9 Q Sure.

10 But regarding the, the evidence that you say might help
11 the case by being submitted to SLED was the items---

12 A I add that with it also.

13 Q And that would be the property that came from---

14 A Oh, the, the---

15 Q ---Brooke Center?

16 A ---the deceased, that's correct.

17 Q Okay. So, you would add that.

18 Does that appear in your affidavit, the property of
19 Miss, Miss Center or would that just be included in --?

20 A That would just be common to process all the evidence
21 in regards to the case.

22 Q Okay. And you were the one that interviewed Ms. Angie
23 Blackwell, correct?

24 A That's correct.

25 Q And she gave you a statement?

Jason Bryant - Cross-examination
by Mr. McGuire

- 1 A That's correct.
- 2 Q And it was reduced to writing?
- 3 A I apologize?
- 4 Q Reduced to writing?
- 5 A At that time I believe she did.
- 6 If I can get a copy of it---
- 7 Q Sure. Sure.
- 8 A ---to check for you.
- 9 Q Sure.
- 10 A I just want to be able to confirm times for you---
- 11 Q Sure.
- 12 A ---when she did provide it to writing.
- 13 Q That's fair. I want you to, I want you to have that.
- 14 SOLICITOR BARNETTE: May I approach, Your Honor?
- 15 THE COURT: You may.
- 16 SOLICITOR BARNETTE: And, Your Honor, I guess we may
- 17 need to make this a Court Exhibit too if --.
- 18 MR. MCGUIRE: Thank you.
- 19 Yes, sir, No. 3.
- 20 SOLICITOR BARNETTE: Can we make a copy?
- 21 THE COURT: Any objection to it being made an exhibit?
- 22 SOLICITOR BARNETTE: Can we make this, a copy of this,
- 23 Your Honor?
- 24 This actually is the original. If we can make a copy
- 25 and---

Jason Bryant - Cross-examination
by Mr. McGuire

1 MR. MCGUIRE: I've got no objections for a copy to be
2 substituted later --

3 THE COURT: Okay. Thank you.

4 MR. MCGUIRE: -- or now.

5 (WHEREUPON, the statement was marked as Court's Exhibit
6 No. 3 and received into evidence for purposes of this
7 hearing only at this time.)

8 Q Investigator Bryant, I'm gonna go ahead and provide you
9 with that voluntary statement there.

10 A Thanks.

11 Q I'm sorry. Lost your paperclip.

12 And that's the statement you took from Ms. Angie
13 Blackwell?

14 A That's correct.

15 Q Okay. And, and just so we're clear, Ms. Blackwell was
16 never charged with a crime regarding this incident, correct?

17 A Ms. Blackwell?

18 Q Right. Ms. Angie Blackwell.

19 A No, sir.

20 Q Or Angela Blackwell?

21 A No, sir.

22 Q Okay. So, she would have no Fifth Amendment
23 protections?

24 Nobody read her her rights or anything like that?

25 A No, sir.

Jason Bryant - Cross-examination
by Mr. McGuire

1 Q Because it wasn't necessary?

2 A No, sir.

3 Q Because she was just a witness?

4 A Correct.

5 Q And not ever a subject or a suspect?

6 A Correct.

7 Q And certainly not a defendant?

8 A Correct.

9 Q Okay. And as far you know, she's available to come and
10 testify?

11 A From the best of my knowledge, yes, sir.

12 Q Okay. And, and her expected testimony, if it's
13 consistent with that statement, is that she's an eye witness
14 to Mr. Blackwell putting his arm around Brooke Center --

15 A Correct.

16 Q -- and using the gun, the .357---

17 A Correct.

18 Q ---to shoot her fatally?

19 A Correct.

20 MR. MCGUIRE: Okay. If I could have just one second,
21 Judge?

22 THE COURT: Yes, sir.

23 (Pause.)

24 Q I think you've been given a hard assignment today.
25 With regard to DNA comparison, how familiar are you

Jason Bryant - Cross-examination
by Mr. McGuire

1 with that?

2 A Not much---

3 Q Okay.

4 A ---as far as that goes.

5 Q Okay. But in order -- let's say, let's say the State
6 was able to get a sample of Mr. Blackwell's DNA through a
7 Buccal swab?

8 A Correct.

9 Q Just sluffed off skin cells from the inside of his
10 mouth.

11 They would have to have something to compare that to to
12 determine if it's him or not him, right?

13 A Correct.

14 Q For instance, you would expect his DNA to be on the
15 gun, right?

16 A Correct.

17 Q Because we saw his hand on the gun, right?

18 A Correct.

19 Q And you would expect his blood to be on his clothes,
20 correct?

21 A Correct.

22 Q Cause we saw his blood on his clothes?

23 A That's right.

24 Q And officers saw him shoot himself, right?

25 A Correct.

Jason Bryant - Cross-examination
by Mr. McGuire

1 Q Okay. Are you aware that, as far as we can tell, SLED
2 doesn't have a DNA profile to compare his DNA to?

3 A That's correct.

4 Q Okay. So, what would you propose to compare his DNA
5 too?

6 A Well, I think it would corroborate her statement and
7 strengthen the case if possibly touch DNA was found on her
8 shirt, any of her clothes, or anything such as that. That
9 would go into and, and strengthen the statements and
10 everything such as that that she is made.

11 Q Okay. So---

12 A You wouldn't expect his DNA to be on her shirt or he
13 had grabbed her as far as that goes or on her clothing.

14 Q Sure.

15 Based on the theory of the case, Miss Brooke Center
16 having arrived with Mr. Blackwell from an off location, and
17 Mr. Blackwell not having custody of this child or
18 interacting with this child on a regular basis, you would
19 not expect his DNA to be on her shirt, right?

20 A Correct.

21 Q But Angie Blackwell describes his arm being around the
22 child?

23 A That's correct.

24 Q Okay. So, from, from what I'm hearing you saying, and
25 just tell me if I'm wrong here, the DNA is really just extra

Jason Bryant - Cross-examination
by Mr. McGuire

1 confirming what we already know?

2 A Well, it would corroborate her statement.

3 Q Right. And that's -- when you use the word

4 corroborate, I'm using the word extra, but I think we're on
5 the same page here.

6 The DNA's not gonna show you anything you don't know
7 right now?

8 A Well, it would strengthen and corroborate and be more
9 evidence in regards to the prosecution of this case.

10 Q Right.

11 But it wouldn't, it wouldn't reveal a new fact to you?

12 A It would improve per se the ability for the State to
13 show her truthfulness in regards to her statement.

14 Q Ms. Blackwell?

15 A Correct.

16 Q Do you, do you suspect that she's lying?

17 A No, sir.

18 Q Okay.

19 A Not at all.

20 Q So, again, are -- the expectations in this case is that
21 DNA comparison will not lead to a new fact at all?

22 A It would corroborate facts that were already known.

23 Q Okay. I'm gonna take that---

24 A And, and add more evidence to that.

25 Q All right. I'm gonna take that as a no. So -- and I

Jason Bryant - Cross-examination
by Mr. McGuire

1 want to ask you to hone in here and answer yes or no and
2 feel free to explain it as much as you want after you give
3 me the yes or no, but I want to ask you do that. Okay. Yes
4 or no.

5 As far as we know, DNA analysis, comparison of Mr.
6 Blackwell's DNA to evidence in the case would not reveal a
7 fact currently not known to law enforcement?

8 A This case was never about---

9 Q Ah.

10 A ---suspect -- well, you want me to answer your
11 question.

12 Q Yes.

13 A I don't -- I want to answer your question.

14 Q Okay. I'm not being hard with you and I'm not -- I
15 don't mean to be difficult.

16 But yes or no, DNA analysis will, will compare Mr.
17 Blackwell's DNA to the evidence you have, as far as you
18 know, will not reveal a new fact in the case, just
19 corroborate other stuff?

20 A It would not reveal a new suspect. It would
21 corroborate information in regards to information that we
22 already had.

23 Q Okay. With regard to a new fact, if I asked you, tell
24 me, based on your experience and your training in law
25 enforcement, if I asked you just point blank is there any --

Jason Bryant - Cross-examination
by Mr. McGuire

1 do you think there's any new fact that can be revealed by
2 DNA testing, what would you say?

3 A It could lead to more evidence against Mr. Blackwell.

4 Q I think we're, we're in a rut in the ground with the
5 circle we're in here. I'm gonna take that as a no, that
6 there's no new fact you can point to that would be revealed
7 by DNA comparison and correct me otherwise.

8 A It would lead to more evidence -- could lead to more
9 evidence.

10 SOLICITOR BARNETTE: Your Honor, I'm gonna have to
11 object to the form of the question now.

12 THE COURT: I'm gonna sustain -- I'm gonna allow the
13 witness to explain his answer, and Mr. McGuire knows I'll
14 allow him to do that.

15 MR. MCGUIRE: Of course.

16 THE COURT: You can't make him answer yes or no without
17 explanation. So, he's gonna be allowed to explain his
18 answer.

19 Q Sure. And I would never cut you off. I would always
20 give you that right. I want you to rack your brain and
21 think about a new fact that might be revealed based on DNA
22 comparison.

23 A Possibly more evidence.

24 Q What more evidence?

25 A Corroborated evidence of Ms. Blackwell's statement

Jason Bryant - Cross-examination
by Mr. McGuire

1 through touch DNA analysis of other items that were taken
2 into evidence.

3 MR. MCGUIRE: Okay. Okay. If I could have a second?

4 THE COURT: Yes, sir.

5 (Pause.)

6 Q Do you know if touch DNA has been recovered from Brooke
7 Center's clothing?

8 A No, sir, I do not.

9 Q So, it may not even exist?

10 A May not.

11 Q And I think we could agree that asking for Mr.
12 Blackwell's DNA to see if it's on Brooke Center's clothing
13 might be premature until we find out if it's on Brooke
14 Center's clothing?

15 A SLED would, as they've requested before, would rather
16 have the standard while they went ahead and tested
17 everything such as the items that they've already taken---

18 Q Yeah.

19 A ---and tested.

20 Q Sure.

21 But you don't know -- you've had no conversation --
22 beyond seeing that piece of paper there, you've had no
23 conversation with SLED?

24 A No, sir.

25 Q Okay. You don't know what they have?

Jason Bryant - Cross-examination
by Mr. McGuire

1 A No, sir.

2 Q Don't know what they don't have?

3 A Correct.

4 Q And as you sit there, you're unaware of whether or not
5 they have touch DNA from Brooke Center's clothing?

6 A That's correct.

7 Q Okay. So, we don't even know if we could compare Mr.
8 Blackwell's DNA to DNA recovered from Miss Center's
9 clothing, right?

10 A That's correct.

11 Q All right.

12 A I do know they requested the standard and would want
13 the standard when they did the further testing of items that
14 were taken into evidence.

15 Q Sure.

16 But as far as you know, that could just be based on a
17 submittal of a gun saying please submit this to trace
18 evidence and DNA evidence department?

19 A It could be.

20 Q I mean it could just be based on that submission alone
21 could trigger that document?

22 A It could be.

23 Q Okay. That's all I've got for you. Thank you.

24 SOLICITOR BARNETTE: Just a couple on---

25 THE COURT: Yes, sir, Mr. Barnette.

Jason Bryant - Cross-examination
by Mr. McGuire

1 SOLICITOR BARNETTE: Your Honor, the first thing, I'd
2 like to move all the exhibits that's been entered in to make
3 that, supplement the affidavit.

4 THE COURT: Any objections?

5 MR. MCGUIRE: No, sir.

6 THE COURT: They'll be admitted as marked.

7 SOLICITOR BARNETTE: Thank you.

8 (WHEREUPON, Court's Exhibit No. 2 was received into
9 evidence for purposes of this hearing only at this time.)

10 REDIRECT EXAMINATION

11 BY SOLICITOR BARNETTE:

12 Q The t-shirt that was submitted was from actually Mr.
13 Blackwell, is that right, the black t-shirt that was listed?

14 I think it's gonna be Court Exhibit No. 1. I think
15 it's the second page.

16 A T-shirt. That is correct.

17 Q That was the t-shirt that Mr. Blackwell was wearing at
18 the time?

19 A From the best of my knowledge, that is correct, yes,
20 sir.

21 Q So, one reason they'd want a sample there is just, if
22 there's blood on the shirt, if it's Brooke Center's blood or
23 if that's his blood, is that right?

24 A That's correct.

25 Q And obviously that'd corroborate the story that was

Jason Bryant - Cross-examination
by Mr. McGuire

1 told or the testimony to be given by Ms. Blackwell?

2 A That's correct.

3 Q Okay. Thank you.

4 That's all the questions I have.

5 MR. MCGUIRE: Very briefly.

6 THE COURT: Yes, sir.

7 RECROSS EXAMINATION

8 BY MR. MCGUIRE:

9 Q So, to determine if Brooke Center's blood is on Mr.
10 Blackwell's t-shirt, you need Brooke Center's DNA, don't
11 you?

12 A If I could refer to my notes right quick?

13 Q Sure.

14 And you're aware that that's routinely taken at an
15 autopsy through a blood sample?

16 A That's correct.

17 Q Okay.

18 A They, they did. That's what I wanted to make sure.

19 Q Sure.

20 A That's correct.

21 Q Okay. So, to -- so, to determine, based on even just a
22 cursory review of DNA comparison, I mean I think we can
23 agree to determine if Brooke, Brooke Center's blood is on an
24 item of clothing and we have Brooke Center's DNA, that's
25 pretty much -- that's what we need, right?

Jason Bryant - Recross examination
by Mr. McGuire

1 A That's correct.

2 Q Okay. Don't need Mr. Blackwell's DNA for that?

3 A Well, we need Mr. Blackwell's DNA for comparison with
4 the other items.

5 Q And the other items we talked about?

6 A That's correct.

7 Q Oh, yeah. Okay. Okay. We already talked about that.

8 But with regard just to the black t-shirt that was
9 mentioned, if -- any clothing, if we want to determine if
10 Brooke Center's blood is on a piece of clothing, any
11 clothing, the best route is to get Brooke Center's DNA
12 sample and compare it to?

13 A We do have the standard of the victim.

14 Q Perfect.

15 That's all I got. Thank you, sir.

16 SOLICITOR BARNETTE: Just one document. We're gonna
17 submit the SLED document that shows DNA, that Brooke
18 Center's DNA was also sent off.

19 THE COURT: All right. Be sure he has no objection.

20 MR. MCGUIRE: No objection.

21 THE COURT: All right. Without objection it will be
22 admitted.

23 SOLICITOR BARNETTE: I believe that's gonna be Court's
24 Exhibit No. 4.

25 THE COURT: All right. No. 4.

1 (WHEREUPON, the SLED forensics report was marked as
2 Court's Exhibit No. 4 and received into evidence for
3 purposes of this hearing only at this time.)

4 SOLICITOR BARNETTE: Thank you, Your Honor. That's the
5 only thing. We're submitting that and make that part of the
6 affidavit also, Your Honor.

7 THE COURT: All right. I believe you can step down
8 now, sir. Thank you.

9 THE WITNESS: Your Honor, do you want the affidavit and
10 the items---

11 THE COURT: The affidavit needs to go into the record,
12 yes, sir.

13 I suppose it ought to be marked as an exhibit as well
14 for the Court, the affidavit.

15 SOLICITOR BARNETTE: Yes, sir, we can make that Court
16 Exhibit No. 5.

17 THE COURT: All right, sir.

18 (WHEREUPON, the affidavit was marked as Court's Exhibit
19 No. 5 and received into evidence for purposes of this
20 hearing only at this time.)

21 THE COURT: State wish to make any additional showing?

22 SOLICITOR BARNETTE: No, sir.

23 THE COURT: Well, it's your motion. I'll allow you to
24 argue it first.

25 SOLICITOR BARNETTE: Yes, sir.

1 The reason why for it, and I know Mr. McGuire says how
2 much is how much, well, for example, you know, they're
3 always pulling out, how many times I've heard in cases where
4 we don't bring fingerprint evidence. We don't bring DNA
5 evidence. Why didn't the State do this, why didn't the
6 State do that.

7 I understand the evidence is overwhelming that Mr.
8 Blackwell did this to Brooke Center. But, like I said,
9 we're gonna try to get every piece of evidence to show that
10 there's no question about this, and the DNA would be part of
11 it, and, of course, if he held her and shot her, the blood
12 that would be found on the shirt could of came from her.
13 Plus, also, you know, he obviously shot himself later. The
14 blood that came from him. So that way we wouldn't have any
15 unknown samples.

16 SLED requires us, when we have a suspect, to go ahead
17 and submit that. It wasn't submitted in the original group.
18 I actually filed the motion shortly after this happened, and
19 followed up with it, and we had sent down for testing and
20 SLED said they could do it in a fairly quick manner.

21 THE COURT: All right. Yes, sir, Mr. McGuire.

22 MR. MCGUIRE: Well, Your Honor, I mean I think we can
23 all agree that there's, there's no need for DNA comparison
24 here. The testimony, as it stands right now, is that this
25 would just help corroborate statements, eye witness

1 statements.

2 I mean this would be sort of like a police officer
3 watching somebody rob a convenience store, get money from
4 the clerk in a bag, the guy -- the perpetrator run out of
5 the store, the police officer grab him, and the guy
6 confesses and said I did it, and then somehow they wanted
7 DNA testing in that case. I mean it's absurd.

8 We have an eye witness they're gonna put up who has no
9 Fifth Amendment protections. She's gonna be compelled to
10 testify. She can't refuse to testify. She's an eye witness
11 that will allegedly say that I saw, with my own eyes, my
12 husband of 30 years use a gun to shoot Brooke Center. Also
13 talk about what he may of said during the incident.
14 Officers will testify clearly that they actually physically
15 saw him turn a gun, the gun on himself. The SLED document
16 indicates they matched the gun that he turned on himself and
17 was taken from his person to the fatally fired bullet.

18 I mean I'm not even gonna address the comb and the
19 wallet and the money and the keys. There's just no need for
20 DNA here. I mean if they -- if there is blood on his torso
21 area, which you would expect, he did shoot himself there, if
22 they want to say some of it is Brooke Center's, well, that,
23 that profile has to be run. As far as we know it hasn't
24 even been run yet.

25 If it comes back, all -- if it comes back as to what's

1 called a single source sample, meaning it's not a mixture of
2 more than one person, and by the chromosome, all DNA
3 analysis includes a test for sex chromosomes, and then it
4 comes back a single source sample, all male, we know it's
5 not, not Brooke, Brooke Center's and there's no need for DNA
6 comparison at all in any event. We're not even to that step
7 yet. Not even to the point yet because the appropriate
8 testing hasn't even been done.

9 So, I would just say it's premature. Based on what we
10 have now, it's completely inappropriate and this is an
11 invasion into an orifice of a person's body. The standards
12 are higher than say rolling fingerprints cause, you know,
13 it's completely different. It's an invasion of a person's
14 body even though it has changed from a blood sample to a
15 Buccal swab, which is skin cells of the mouth, but it's
16 still an invasion of a person's body and the case law, going
17 back to Schmerber, says there has to be a balancing of
18 necessity for the evidence and the invasion of a person's
19 body and here there's no necessity.

20 THE COURT: Mr. Barnette, final word.

21 SOLICITOR BARNETTE: Yeah.

22 Your Honor, based on Mr. McGuire, why are we even
23 having a trial cause basically he's saying his client's
24 guilty in this case.

25 THE COURT: Well, my understanding is there's been no

1 guilty plea entered. So---

2 SOLICITOR BARNETTE: That's -- and I think that's the
3 reason why the State has to proceed and try and get evidence
4 as much as they can to show the -- and obviously the jury's
5 gonna ask about that if it's not brought up.

6 THE COURT: All right. I'll approve the most -- the
7 least intrusive method of Buccal swab. I would not approve
8 the blood test.

9 Prepare an order.

10 SOLICITOR BARNETTE: I will, Your Honor. Thank you.

11 THE COURT: Thank you.

12 SOLICITOR BARNETTE: I'll send a copy to the defense
13 and let them review it before I give you a copy.

14 THE COURT: All right. Finally, I have the State's
15 request for notice of alibi and/or insanity defense or plea
16 of guilty but, but mentally ill.

17 I'm unaware of any such defenses that have been raised
18 thus far.

19 MR. MCGUIRE: No, sir.

20 THE COURT: Is there -- do you anticipate raising any
21 of those defenses?

22 MR. MCGUIRE: No, sir.

23 THE COURT: Okay. Anything else we need on that,
24 Mr. Barnette?

25 SOLICITOR BARNETTE: No, sir.

1 THE COURT: All right. Any other matters that we need
2 to cover as far as pretrial motions?

3 We have the testimony from the one gentleman who's
4 gonna come this afternoon?

5 SOLICITOR BARNETTE: Yes, sir, that's the only thing
6 that I know we have outstanding, Your Honor. Your Honor, I
7 guess we ask for an order ordering that the Atkins
8 information be given to us as well.

9 THE COURT: Well, I'm gonna ask you folks to do a
10 consent order, which I will approve.

11 SOLICITOR BARNETTE: Yes, sir.

12 THE COURT: And I've told you that I would approve
13 trial dates for the first of March and the second week in
14 March.

15 MR. MCGUIRE: Yes, sir.

16 THE COURT: Dates are March 3rd and March 10.

17 SOLICITOR BARNETTE: Thank you, Your Honor.

18 THE COURT: If that's the agreement.

19 MR. MCGUIRE: Yes, sir.

20 SOLICITOR BARNETTE: Yes, sir.

21 THE COURT: And I think that will remove some issues
22 that perhaps would otherwise exist if we tried to go sooner
23 than that. So, I will approve that.

24 SOLICITOR BARNETTE: Yes, sir.

25 THE COURT: All right. Then we'll reconvene.

1 when do you expect your witness to be available,
2 Mr. Barnette?

3 SOLICITOR BULSA: May I call him over lunch?

4 I believe he gets out around 1:45.

5 THE COURT: Okay. We'll anticipate reconvening at two,
6 two o'clock or shortly thereafter.

7 SOLICITOR BARNETTE: Yes, sir.

8 THE COURT: All right.

9 MR. MCGUIRE: Thank you, Judge.

10 THE COURT: Court's in recess.

11 SOLICITOR BARNETTE: Thank you, Your Honor.

12 (WHEREUPON, Court was in recess for the lunch hour.)

13 THE COURT: All right. Mr. Barnette, has the witness
14 arrived?

15 SOLICITOR BARNETTE: He has.

16 THE COURT: All right.

17 SOLICITOR BARNETTE: Actually Mr. Bulsa is gonna handle
18 this.

19 THE COURT: All right. Mr. Bulsa, you may call the
20 witness.

21 SOLICITOR BARNETTE: State calls Tim Timmons.

22 THE COURT: Sir, come forward to my left and be sworn
23 please, sir.

24 TIM TIMMONS, having been first duly
25 sworn, testified as follows:

Tim Timmons - Direct examination
by Solicitor Bulsa

1 THE COURT: Have a seat please, sir, and once you're
2 seated, state your name please.

3 THE WITNESS: My name is Tim Timmons.

4 THE COURT: Mr. Bulsa, your witness.

5 SOLICITOR BULSA: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY SOLICITOR BULSA:

8 Q Mr. Timmons, were you formerly a reserve officer or are
9 you actually still a reserve officer with the County---

10 A Yes, sir.

11 Q ---Sheriff's office?

12 Okay. How long have you been a reserve officer?

13 A Since 2003.

14 Q Okay. And on the date of July the 8th, 2009, did you
15 have an occasion to go to Ridings Road?

16 A I did.

17 Q Were you in the capacity of an officer?

18 A I was.

19 Q And on that date did you have an occasion to come into
20 contact with the defendant at the ambulance that he was,
21 that was being used to transport him to the hospital?

22 A I did.

23 Q Okay. And how did you come to be in the ambulance with
24 him?

25 A When it came time to transport him, Sergeant Pridgeon

Tim Timmons - Direct examination
by Solicitor Bulsa

1 asked me would, would going with him to the hospital --.

2 Q Okay. And would you describe what took place in the
3 ambulance?

4 A We were -- it was, it was up in the northern part of
5 the county. It's a pretty long ride. I was sitting with,
6 facing him. He was lying down. His head was at my knees.
7 The EMT was working on him. He seemed to be in, in some
8 distress, and I asked the EMT to let me know if it looked
9 like he was in danger of not making it to the hospital
10 alive, and I wanted to, to, if he started, you know, getting
11 really really bad, to ask him, you know, to get a statement
12 from him.

13 The EMT told me that, that he was getting a lot worse
14 and was in jeopardy. I got my Miranda card and went through
15 the, each right of the Miranda rights.

16 Q Okay. For the record, I need you to read that as you
17 read it to him.

18 A Well, I asked him, I said Mr. Blackwell, can you hear
19 me, and he was -- responded that he could. I said I'm gonna
20 read you your rights, and I said you have the right to
21 remain silent. Do you understand that right, and he audibly
22 said I do.

23 I said anything you say can be used against you in
24 Court. Do you understand that. He said I do.

25 I said you have the right to talk to a lawyer for

Tim Timmons - Direct examination
by Solicitor Bulsa

1 advice before we ask you any questions and to have him with
2 you during questioning. Do you understand that right. He
3 said he did.

4 I said if you can not afford a lawyer, one will be
5 appointed for you before questioning if you wish. Do you
6 understand that right. He said that he did.

7 I said if you decide to answer any questions now
8 without a lawyer present, you will still have the right to
9 stop questioning at anytime until you talk to a lawyer. Do
10 you understand that right. He said that he did.

11 I said do you understand what I've read to you. He
12 said I did. He said that he did.

13 I asked the EMT, Mr. Patton, did he hear him respond to
14 each one that he waived his rights and he said yes, he heard
15 him, and I said well, Mr. Blackwell, I want to ask you some
16 questions. Can you -- I said, first, can you tell me what
17 happened, and he said his ex-wife drove up and he grabbed
18 that little girl, and I said which little girl was that, and
19 he said I called her Brooke.

20 Q Okay.

21 A And I went -- I asked him another question and he, at
22 that time, had become unresponsive.

23 Q When you say he become unresponsive, what do you mean?

24 A He would not answer -- he, he looked like he went
25 unconscious to me. I mean I don't -- he didn't make anymore

Tim Timmons - Direct examination
by Solicitor Bulsa

1 sounds---

2 Q Okay.

3 A ---after that.

4 Q Okay. And you continue with him to the hospital?

5 A I stayed with him till we got to the hospital on into
6 the emergency room, and then when they moved him up to
7 surgery, I went up to surgery with him.

8 Q Do you, do you recall a detective coming into one of
9 the rooms to speak to him?

10 A When we were in the ER, there was a Detective Williams
11 that came in and talked to him while they were working on
12 during, during -- in the ER.

13 Q Were you in a position to hear what was being said?

14 A I was not.

15 Q Okay. And why is that?

16 A I, I was staying back out of the way. There were a
17 couple, three doctors. I couldn't tell who was a doctor and
18 who was a what. But they were taking x-rays. They were,
19 you know, prepping him for this and checking him for that
20 and trying to save his life it looked like and I stayed out
21 of the way.

22 Q Okay. Thank you. Answer any questions defense counsel
23 has.

24 THE COURT: Your witness, Mr. McGuire.

25 MR. MCGUIRE: Thank you, Your Honor.

Tim Timmons - Cross-examination
by Mr. McGuire

1 CROSS-EXAMINATION

2 BY MR. MCGUIRE:

3 Q You were tasked with the, the ambulance ride duty?

4 A Yes, sir.

5 Q By another officer?

6 A Yes, sir.

7 Q When you first saw Mr. Blackwell, where was it?

8 A When I first saw him he was coming out of the wood-line
9 with a gun in his hand.

10 Q Okay. So, you actually saw him shoot himself?

11 A Yes, sir.

12 Q And did -- were you able to hear anything he may of
13 said after he shot himself?

14 A No, sir, as soon as he shot himself I left to get some
15 crime scene tape.

16 Q Okay. When you saw -- the wood-line, is that
17 accurately more -- is it better described as a peach grove
18 or a peach orchard?

19 A It was trees in the back of the trailer.

20 Q Okay.

21 A It's where the trees stopped and the yard started.

22 Q Yeah.

23 You don't remember if it's a peach tree farm or not?

24 A I do not know what kind of trees it was.

25 Q Okay. Fair enough.

Tim Timmons - Cross-examination
by Mr. McGuire

1 when he came out of the wood-line, was it because
2 somebody -- because he was hiding and somebody called him
3 out or he just walked out?

4 A I didn't see him come out of the wood-line.

5 Q Okay. You saw him---

6 A My, my, my back was to, to that. I was trying to keep
7 some people that had come up to the trailer to see what was
8 going on out of the way.

9 Q Sure.

10 A And I heard my partner shout out drop your gun, get on
11 the ground, drop your gun, get on the ground. As soon as I
12 heard that I turned around and went to help with that and---

13 Q Okay.

14 A ---he was already stepped out of the trees.

15 Q Who is your partner?

16 A Officer Tate. Jamie Tate.

17 Q Okay. And, so, when you heard put the gun down, put
18 the gun down, you spun around and went to take care of that
19 situation?

20 A Yes, sir.

21 Q Mr. Blackwell never pointed the gun at an officer that
22 you saw?

23 A He was, he was presenting a firearm and there were
24 officers, several officers. I couldn't tell if he was
25 presenting a firearm or just had it up.

Tim Timmons - Cross-examination
by Mr. McGuire

1 Q Okay. I think the last thing you said was you couldn't
2 tell if he was presenting it or just had it up?

3 A Presenting it at an officer.

4 Q Okay. You, you---

5 A I, I called that when you point it at an officer is
6 presenting it. I may be misspeaking, but I could not tell
7 if he was pointing it at an officer. There was so many
8 officers in like a semicircle. You know, I don't know if he
9 was pointing it at an officer or not.

10 Q Are -- you, you just couldn't see at that time?

11 A I saw the gun --

12 Q Right.

13 A -- and I knew that was a problem.

14 Q Okay. And you saw him shoot himself?

15 A I did.

16 Q And then when -- I mean there's some time obviously
17 between that and the ambulance ride.

18 Tell me what happens between there.

19 A Well, like I say, I went back to get some crime scene
20 tape to start, you know, blocking everything out, out of the
21 trunk of the car. While I was going to get it, I saw
22 another officer going up there with a roll of tape, and
23 there was an elderly couple, I believe Mr. Blackwell's
24 parents, who were trying to get up to where he was, and I
25 stopped them where they were --

Tim Timmons - Cross-examination
by Mr. McGuire

- 1 Q Okay.
- 2 A -- and was keeping them out of, out of the way.
- 3 Q Okay. If I told you their names, would that help you
- 4 jog your memory about talking to them, Cleatus, Mildred?
- 5 A I mean they were his parents I mean.
- 6 Q Oh, okay.
- 7 A I mean---
- 8 Q Okay.
- 9 A ---I don't know their names.
- 10 Q Sure.
- 11 Okay. So, when you first start having the opportunity
- 12 to speak to Mr. Blackwell, that is actually in the
- 13 ambulance?
- 14 A Yeah, I didn't, I didn't speak to him until as I
- 15 related a while ago.
- 16 Q which is where?
- 17 A When, when the EMT told me that it looked like he might
- 18 not make it to the hospital.
- 19 Q And are you in the ambulance stationary or are you in
- 20 route?
- 21 A We're in route.
- 22 Q Okay. And you tell the EMT's you let me know if it
- 23 looks like he might not make it cause I don't want to lose
- 24 my opportunity to talk to him?
- 25 A In so many words.

Tim Timmons - Cross-examination
by Mr. McGuire

1 Q More or less?

2 A Yes, sir.

3 Q And they actually said you might want to talk to him
4 now?

5 A Yes, sir.

6 Q Because that he was -- he could not make it?

7 A Well, he, he wasn't certain that he couldn't make it,
8 but he felt he was in jeopardy of not making it.

9 Q Sure.

10 And he told you that?

11 A In so many words.

12 Q Okay. And that's when you got out the Miranda card---

13 A Yes, sir.

14 Q ---to, to read Mr. Blackwell his rights?

15 A Yes, sir.

16 Q Now, obviously Mr. Blackwell didn't sign a waiver of
17 Miranda?

18 A He was not able to do that.

19 Q Right.

20 And did he ever -- did you ever ask him to tell me what
21 that right means to you, you have a right to a lawyer, if
22 you can't afford---

23 A I said it just like I said it a while ago. I read him
24 the rights and asked him did he understand and he said he
25 did.

Tim Timmons - Cross-examination
by Mr. McGuire

- 1 Q what, what language did he use to say he did?
- 2 A English.
- 3 Q Was it just a uh-huh or a nod?
- 4 A English.
- 5 Q And what were his exact words?
- 6 A I do or yes or it was an audible. It was more than
- 7 just a nod.
- 8 Q Okay.
- 9 A It was words.
- 10 Q Okay. And obviously you don't remember the specific
- 11 words?
- 12 A No, sir.
- 13 Q Okay. And tell me again the exact words, as best you
- 14 can remember, the statement that he made?
- 15 A Best I can remember, I said what happened, can you tell
- 16 me what happened, Mr. Blackwell, and he said my ex-wife
- 17 drove up, I grabbed that little girl, and I said which
- 18 little girl was that, and he said I call her Brooke.
- 19 Q And, at that point, he goes basically into being
- 20 unconscious?
- 21 A Seemed like it.
- 22 Q Well, I mean were his eyes opened?
- 23 A No, sir.
- 24 Q Okay. So, he closed his eyes and he didn't communicate
- 25 further?

Tim Timmons - Cross-examination
by Mr. McGuire

- 1 A Right.
- 2 Q And he didn't speak further?
- 3 A No, sir.
- 4 Q Was he responsive to any, any further questioning from
5 you at all?
- 6 A No, sir.
- 7 Q Okay. And obviously there's a lot going on in the
8 ambulance at this time. People are---
- 9 A It wasn't a whole lot. I mean it's just me and the EMT
10 and Mr. Blackwell in the back. He was just laying there.
- 11 Q Okay. The things -- maybe I misunderstood.
12 Things got a little more frantic at the emergency room?
- 13 A Yes, sir.
- 14 Q And that's when you got out of the way cause people
15 were moving around doing stuff?
- 16 A Right.
- 17 Q Okay. I think that's all I have for you. Thank you.
- 18 THE COURT: Anything further, Mr. Bulsa?
- 19 SOLICITOR BULSA: No, sir.
- 20 THE COURT: All right, sir, and you may step down.
- 21 SOLICITOR BULSA: We ask that he be excused.
- 22 THE COURT: Any objection---
- 23 MR. MCGUIRE: No.
- 24 THE COURT: ---to his being excused?
- 25 MR. MCGUIRE: No objection.

1 THE COURT: All right. Any other witnesses from the
2 state concerning the Jackson v. Denno matter?

3 SOLICITOR BARNETTE: No, sir, not, not at this time.

4 THE COURT: All right. Defense wish to call any
5 witnesses?

6 MR. MCGUIRE: No, sir.

7 THE COURT: All right. You wish to argue the motions?

8 MR. MCGUIRE: I don't have an argument.

9 SOLICITOR BARNETTE: Your Honor, I think it's -- we've
10 made a showing. I think obviously it's met the burden or
11 whatever and should be submitted to the jury at the
12 appropriate time.

13 THE COURT: All right. I'm gonna find that the
14 statements would be admissible under the rules that govern
15 that. It does appear that the defendant was apprised of his
16 rights prior to the statements or statements were given by
17 him without specific interrogation or questioning.

18 So, if you would like to prepare an order, Mr.
19 Barnette, to that effect, I'll review it. If it appears to
20 be in -- complies with my ruling I'll sign it.

21 SOLICITOR BARNETTE: Be glad to, Your Honor.

22 THE COURT: Thank you very much.

23 MR. MCGUIRE: Your Honor, one---

24 THE COURT: Now---

25 MR. MCGUIRE: I'm sorry. Go ahead.

1 THE COURT: Go ahead.

2 MR. MCGUIRE: The one other thing that I was going to,
3 to raise that, that I was hoping Mr. Barnette could put in
4 the order, my understanding, from looking at the discovery,
5 is there's not gonna be anything further on this issue, and
6 if this could be the Court's final ruling on the issue so I
7 can be preserved without having to further object at trial.

8 THE COURT: It would be my final ruling on the matter.

9 SOLICITOR BARNETTE: It would be, Your Honor. The only
10 thing would be the telephone calls between the jail. Of
11 course, that's a whole different ball game.

12 THE COURT: That's a whole different issue. I
13 understand.

14 Okay. All right. Have we -- do we -- I've checked my
15 calendar. So, the first two weeks of March are okay.

16 Any difficulty?

17 SOLICITOR BARNETTE: As far as we know, Your Honor,
18 obviously I've got to check with our witnesses, but it looks
19 good for us from that standpoint. So, we'd like to proceed
20 the. I've actually given a draft order over to defense
21 counsel.

22 THE COURT: Okay. If y'all can agree on that, I'd like
23 for you to sign a consent and then I'll be happy to sign it.

24 All right. Thank you very much, gentlemen.

25 MR. MCGUIRE: Thank you, Your Honor.

1 THE COURT: That concludes the pretrial hearings thus
2 far.

3 MR. MCGUIRE: Thanks, Judge.

4
5 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 6th day of November, 2013.

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

January 1st, 2014



PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS

3
4 THE STATE)
5 -vs-) TRANSCRIPT OF RECORD
6 RICKY (RICKEY) LEE) 2009-GS-42-03609
7 BLACKWELL, SR.,) 2009-GS-42-03610
8) JANUARY 6, 2014
9 GAFFNEY, SOUTH CAROLINA
10
11 DEFENDANT.

12 B E F O R E:

13 THE HONORABLE ROGER COUCH, JUDGE.
14

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

16 BARRY J. BARNETTE, SOLICITOR
17 DEREK BULSA, DEPUTY SOLICITOR
18 RUSSELL GHENT, ASSISTANT SOLICITOR
19 ATTORNEYS FOR THE STATE

20 WILLIAM S. MCGUIRE, ESQUIRE
21 CLAY ALLEN, PUBLIC DEFENDER
22 ATTORNEYS FOR THE DEFENDANT

23
24 MICHAEL R. WATTS
25 CIRCUIT COURT REPORTER

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EXHIBITS

	NO.	DESCRIPTION	ID.	EV.
1				
2				
3	CT-1	MEMORANDUM I SUPPORT OF MOTION		
4		TO ENFORCE AGREEMENT/ORDER	4	
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1 (PROCEEDINGS, JANUARY 6, 2014)

2 (Memorandum in Support of Motion to Enforce
3 Agreement/Order marked as Court's Exhibit No. 1 for
4 identification)

5 THE COURT: All right, we are on the record in the
6 case of the State versus Ricky Lee Blackwell, Sr..

7 I believe I have a motion from the State in front
8 of me at this time.

9 MR. BARNETTE: You do, Your Honor.

10 We have also added a memo to it. I think I
11 forwarded to that to the court, as well as defense counsel,
12 on Friday, Your Honor.

13 THE COURT: I received a copy of that this
14 morning.

15 MR. BARNETTE: And, Your Honor, I would like to
16 make that Court Exhibit 1 for the matter of this hearing. I
17 know we have had several court exhibits, but make it Court
18 Exhibit 1 for this hearing today, on the 6th.

19 THE COURT: Any objection to it having been made
20 an exhibit?

21 MR. MCGUIRE: I think it should be filed.

22 THE COURT: Okay.

23 MR. BARNETTE: I would be glad to file it.

24 THE COURT: Well, file it with the clerk.

25 MR. BARNETTE: We will. I'll go ahead and just

1 make it for part of the record and then I'll file it with
2 the clerk too.

3 THE COURT: That would be fine.

4 Yes, sir, Mr. Barnette.

5 MR. BARNETTE: Your Honor, basically I think it's
6 a very simple question in this case. I believe we had the
7 last hearing November 6th, 2013, in front of Your Honor. We
8 had agreed to all Atkins information being turned over and
9 there was a consent order signed to that I believe we have
10 also put on the record in front of the court. You have a
11 copy of that transcript and I think it was fairly
12 straightforward that it ought to be turned over. Well, we
13 received one of the doctor's reports, we did not receive Dr.
14 McKee's report and his reporting information, reports and so
15 forth. I received an e-mail from Mr. McGuire saying well,
16 he didn't think he would be using him in the Atkins Hearing.
17 The problem I have got, though, but potentially used later.
18 Well, that's not what was agreed to in court; that we was
19 entitled to everything. In the meanwhile the U.S. Supreme
20 Court has ruled in the Kansas v. Cheever case basically we
21 can use that information in reply, in rebuttal. I think it
22 becomes very straightforward. It even becomes more
23 meaningful than it ever has before in this situation.

24 And the other concern we have got is we don't know
25 if DDSN has been supplied that information. It appears -- I

1 don't know for sure, because it appears from his e-mail that
2 has applied at the DDSN, which would be used in the
3 evaluation of Mr. Blackwell by them. I thought that was
4 agreed to also, so that's the basis --

5 THE COURT: The doctor that you don't have, he is
6 a psychiatrist?

7 MR. BARNETTE: Yes, sir, I believe in a letter
8 that was sent to the court, and it was on July 29th, 2013,
9 that says Dr. Ginger Calloway, which we did receive her
10 information.

11 THE COURT: Uh-huh.

12 MR. BARNETTE: And Geoffrey McKee will present
13 expert testimony regarding Ricky Blackwell's diagnosis being
14 mildly mentally retarded, and they supplied that to the
15 court. And that's what they represented all the way up to
16 the point that we received the e-mail, and we didn't receive
17 the information on November 21st that was ordered by the
18 court to be provided to us.

19 THE COURT: Let's hear from the defense.

20 MR. MCGUIRE: Judge, they have got everything.
21 My e-mail response was directly on point, which
22 was at the moment we may not use Dr. McKee. If he does
23 something, if he generates a report, they will get it.

24 THE COURT: What was the purpose in having -- what
25 has he done? What has Dr. McKee done?

1 MR. MCGUIRE: Well, he's had some very brief
2 conversations with me. That's about it.

3 THE COURT: He's done no evaluations?

4 MR. MCGUIRE: No, sir.

5 THE COURT: At all?

6 MR. MCGUIRE: No, sir.

7 THE COURT: No testing?

8 MR. MCGUIRE: No, sir.

9 THE COURT: So there is no report?

10 MR. MCGUIRE: No, sir, nor is there a basis for
11 it.

12 THE COURT: Mr. Barnette?

13 MR. BARNETTE: Your Honor, I find that very -- I
14 mean, he's an officer of the court representing to the court
15 that this doctor hasn't done anything on this case?

16 THE COURT: Earlier correspondence indicated that
17 he would be involved with this particular case.

18 MR. MCGUIRE: Yeah, I can tell the court --

19 THE COURT: And that's confusing to me.

20 MR. MCGUIRE: Well, I didn't mean to confuse the
21 court or Mr. Barnette.

22 I can tell you that based on my interactions with
23 Dr. McKee in other cases that I have been involved with,
24 where I have hired him, in cases that I have not been
25 involved in, and some ongoing cases in other jurisdictions,

1 am I confident if I was to bring him in and have him review
2 the materials that I have and do some testing, would he come
3 to court and testify that my client was mentally retarded?
4 I'm very confident in that. I was very confident in that
5 when I wrote that letter.

6 Now, we have a situation with Dr. Edgar Brown's
7 report from DDSN --

8 THE COURT: Let's stop right there. You are
9 saying that he -- maybe I misunderstood what you just said.
10 You are saying that this gentleman has done no testing, he's
11 not interviewed your client, he's not done anything on this
12 case, but you are sure of what his ultimate decision, his
13 finding would be?

14 MR. MCGUIRE: Well, I'm not sure. I'm confident.

15 But without regard to that, I was confident when I
16 wrote the letter, and maybe I wasn't articulate. I should
17 have said I would anticipate these two providing testimony.
18 I think I couched it in terms of a little bit more certain,
19 but that's more semantics than anything else.

20 I have funding where Dr. McKee is, of course,
21 aware, and I'll be talking to him.

22 If Dr. Brown's report comes in and Dr. Brown's
23 report takes the position contrary to Dr. Calloway's report,
24 then I may engage Dr. McKee to help me prepare
25 cross-examination for Dr. Brown. I may have him do followup

1 testing. I may have him call for a specific point with
2 regard to other I.Q. tests that are given in the course of a
3 person's education. Obviously these are very short version
4 tests. They are given in mass groups and they don't have
5 the reliability of like a WAIS-4 test, so I may use him in a
6 variety of context. He still may testify, but if he does
7 something, if he issues a report, they will get it. They
8 have everything.

9 THE COURT: Mr. Barnette, he's representing to the
10 court this physician has not been involved thus far.

11 MR. BARNETTE: Well, let me make sure I'm clear.
12 They are not his expert right now, is that correct?

13 MR. MCGUIRE: Well, I think when I get funding for
14 him and I speak to him about the case and give him a factual
15 scenario --

16 THE COURT: Well, has he been retained?

17 MR. MCGUIRE: Yes.

18 THE COURT: So he has been paid something?

19 MR. MCGUIRE: Well, he's -- he's been notified
20 that he -- he's been notified that funding exists for his
21 services and that I would like to engage him. This is a
22 year ago -- over a year ago. I have had some very brief
23 conversations with him about that and we are following up.

24 MR. BARNETTE: So they have no objection if we
25 contact and talk to the doctor?

1 THE COURT: Any objections to the State talking
2 with the doctor?

3 MR. MCGUIRE: Absolutely.

4 THE COURT: In what respect?

5 MR. MCGUIRE: Well, I think when -- I think the
6 defendant has --

7 THE COURT: If he's never been involved in the
8 case thus far, I'm trying to figure out what the problem is.
9 Maybe I'm missing something.

10 MR. MCGUIRE: Well, he's -- he's gotten some facts
11 from me. I related some factual information to him, and I
12 have funding for him, and I have told him I'm engaging his
13 services, and we actually have a meeting set up later this
14 month. He knows --

15 THE COURT: Mr. McGuire, we are not playing the
16 game of Hide and Seek here. Maybe we are. I'm trying to
17 figure out exactly where we are on this, because it's very
18 unclear.

19 If you are telling me you already know what his
20 opinion is going to be, or you are very confident of what
21 his opinion is going to be, then he must have evaluated
22 something already, to me, because that's a little strange.

23 MR. MCGUIRE: Well, then that's my fault, and
24 that's my fault for using the language I used in the letter
25 predicting that he would come into court and testify without

1 putting a qualifier on it. You know, to be -- to have been
2 completely accurate I should have just said I anticipate it,
3 and I left it off and I take full responsibility for that.

4 MR. BARNETTE: Your Honor, and I know the court --
5 maybe I'm confused as the court is right now. I mean, to me
6 this case is scheduled for March the 3rd.

7 THE COURT: Yes, sir, it is.

8 MR. BARNETTE: And he's not even talked to the
9 doctor?

10 THE COURT: It's scheduled before that. We have
11 got the hearing on the Atkins issues.

12 MR. BARNETTE: I mean, we do. We have that at the
13 end of January and --

14 THE COURT: End of this month.

15 MR. BARNETTE: And I can't believe he's
16 representing to the court that he's -- basically on July
17 29th, 2013, that Dr. Calloway and McKee -- and what's
18 interesting, all the cases that I have been involved with,
19 usually doctors go together and do their analysis, both
20 these type doctors in this case, and that very rarely they
21 go one at a time in this situation. And I just can't
22 imagine Dr. Calloway, especially since she's had this
23 temporary license at the time, didn't have a permanent
24 license. I'm not saying there is anything wrong, and we are
25 not going to attack her in any way about that, but usually

1 you are going to have a doctor that's licensed here in the
2 state going with you when you do that.

3 And I just want to make sure Mr. McGuire is very
4 sure what he's represented to this court, because to me when
5 I represent something to the court, I want to make sure I'm
6 correct about it and I don't want any issue --

7 THE COURT: I think he's -- I hope that he is at
8 this point in time we are worried about.

9 MR. MCGUIRE: Judge, I have been candid with the
10 court at every term. I have never been anything less than
11 completely candid with the court.

12 I think that -- I think that I would say that
13 the -- the only mistake that would have been made would be
14 that I didn't put a qualifier on I anticipate, or I would
15 expect, or something like that. I left it off and I
16 apologize, but if he's looking for a black helicopter where
17 McKee has some sort of adverse opinion or information that
18 would help the State, it doesn't exist.

19 THE COURT: All right. Well, Mr. Barnette, I'm
20 going to ask you to prepare an order setting out what my
21 position of the court is at this point in time.

22 MR. BARNETTE: Yes.

23 THE COURT: If there is no information to produce,
24 I can't require that it be produced. It doesn't prevent
25 you, if this person is ever presented to testify at any

1 hearing, from inquiring into those matters, and certainly
2 you have a right to do that. It's not a finding by this
3 court. What I want it to be is that that was what this
4 court was represented to this court. And based on those
5 representations, there is no information at this point in
6 time that the court can order released. That doesn't mean
7 that in the future there might be that that occur.

8 Now, Mr. McGuire, I'm going to caution you that
9 this case has been continued on several occasions and the
10 timing of producing this gentleman as an expert should not
11 interfere with the timing of the trial. Do you follow me?
12 You have had this fellow identified for some time. You have
13 had a lot of time in which to develop an opinion from him.
14 And if somehow what -- since I'm not clear what purpose he
15 might appear for at this time, it would not be looked on
16 favorably by the court, in my opinion, in an effort to get a
17 continuance because this particular witness is not prepared,
18 given the schedule that we have set so far. Do you
19 understand what I'm saying?

20 MR. MCGUIRE: Oh, absolutely, Your Honor, and we
21 would never -- never do that.

22 You know, in fact, I need to address something.
23 In the memorandum passed up to the court by the State, to
24 the court there is language in there that we have gamed the
25 discovery process and that tactics have added unnecessary

1 expenses, delays for pretrial process, in addition to other
2 actions by the defendant's attorney, which they don't
3 specify, and having impeded the administration of justice in
4 this case.

5 And my understanding is that in the summer of
6 2012, which is about three years after the case started, we
7 brought up the issue of the Atkins investigation, and we did
8 it in good faith. I mean, I'm not a mental retardation
9 expert.

10 I will tell you, to explain -- just to put things
11 in context, we had three separate mitigation investigators
12 on the case. I think the judge -- the court is aware of
13 that based on --

14 THE COURT: There is no need in arguing this at
15 this point in time. The point is that I've given you time
16 to explore the defense.

17 MR. MCGUIRE: Sure.

18 THE COURT: But the point I'm trying to make at
19 this point in time is that this doctor was identified July
20 of last year, and you are telling me at this -- and funding
21 has been approved for sometime for his services. We already
22 know when the Atkins Hearing is set. We already know when
23 the case is set for trial. If you have not consulted with
24 him at this point in time and you have not developed
25 whatever his testimony is going to be, if you were to come

1 to court and ask for a continuance or to allow this witness
2 time to develop whatever opinions he wishes to develop, that
3 would not be looked upon favorably by this court.

4 MR. MCGUIRE: But I can tell --

5 THE COURT: So if you are going to use him, use
6 him now is what I'm saying.

7 MR. MCGUIRE: Sure. But, judge, I feel compelled
8 to respond to these issues, not just for the court's
9 benefit, but the -- I need -- I need to address that and I
10 need to make a record on it, because this is going to be a
11 public record.

12 So we had three mitigation investigators initially
13 on the case. The first one left my office to pursue other
14 employment, so we had to get another investigator.

15 We hired -- well, without naming her, we hired a
16 woman who previously worked for the State at DDSN is one of
17 the places, who was qualified, and she came -- she was
18 diagnosed with cancer. And we worked with her as best we
19 could and we struggled through that for some time and we
20 got -- then -- but we couldn't keep her on, of course, and
21 that was sad.

22 We got our third mitigation investigator, who
23 picked up the ball, and despite numerous requests for
24 educational records -- and my client is 55 years old right
25 now. Despite numerous requests for school records, we were

1 told repeated they don't exists. Well, she didn't take no
2 for an answer, and so at one point she actually darkened the
3 door of these buildings to have to ask people, please, just
4 go look on the shelves and we got them. We got the records.
5 And as soon as we got the records, then we started looking
6 at the cases for the Atkins issue, and then we alerted the
7 court as soon as -- I think in a very reasonable amount of
8 time, and that's -- that's the context we are in.

9 Now, the State uses some very harsh language that
10 these delays are all --

11 THE COURT: That's through a memo and that's their
12 position. I'm not making any rulings on that.

13 MR. MCGUIRE: Well, they make -- I understand, but
14 they make conclusionary statements. So that's the first
15 three year delay, and they characterize that as a delay.

16 There is no speedy trial motions in this case.
17 There is no correspondence to set the case. There is no
18 effort whatsoever on the State's part to schedule the case.
19 And if I'm representing somebody who faces the death penalty
20 and the State wants to mosey along at their own pace, I'm
21 happy to have them do it. That's their timetable.

22 THE COURT: Well, there was some issues involved
23 in this case earlier on raised by the defense that perhaps
24 required some time.

25 MR. MCGUIRE: Yes, sir, that was the first time it

1 was ever continued was when we put the State on notice and
2 the court on notice that we had an Atkins issue. The case
3 was set for October, and then the summertime before that we
4 alerted everybody of the Atkins issue. It was continued,
5 and I think fairly so. The last thing we want is to try a
6 partially investigated case and have it come back on PCR. I
7 think the court very responsibly gave us the time necessary
8 to finish the Atkins investigation, which we have done.

9 Now, there was a newspaper story that came out in
10 the summer of '13 and it mentions the time period being four
11 years, and there was flurry of activity then to try to
12 reschedule the case. And the court's first shot at
13 scheduling it was November 4th of that year. I was
14 currently scheduled to start a capital case in Beaufort
15 October 14th, and I expected it to run right up against that
16 October -- I mean November 4th start date. And I think the
17 court very responsibly said well, that's not appropriate, to
18 have a capital defense lawyer go from one case, work for
19 several weeks and then go straight into another one. Even
20 the statute gives us ten days, and I think the court fairly
21 recognized that. That's the only time this case has been
22 continued or rescheduled based on my schedule, and yet it
23 states in here that this case has of necessity been
24 compelled to often delay the matter for the convenience of
25 me. That's just true.

1 THE COURT: Again, I'm not addressing that issue
2 today. I think you have addressed it.

3 MR. MCGUIRE: Well --

4 THE COURT: If you would like to submit a brief
5 yourself, you can do so about it.

6 MR. MCGUIRE: Sure. But judge, it's not --

7 THE COURT: I'm through on that.

8 MR. MCGUIRE: Okay, but it's not just for the
9 court's benefit. When these are public documents, I have
10 to --

11 THE COURT: I told you to submit a memo in
12 response, if you would like to. I have no problem with
13 that. I'm on other issues today.

14 MR. MCGUIRE: I understand, but, judge, it's not
15 just the court's benefit.

16 THE COURT: I didn't say it was for my benefit. I
17 just said you have the right to submit a brief on the -- a
18 contrary brief or a memo, if you would like to do so.

19 MR. MCGUIRE: Okay.

20 THE COURT: Let's move on to something else.

21 Now, if this witness that I'm here dealing with
22 today, doctor --

23 MR. MCGUIRE: McKee.

24 THE COURT: Yes, McKee, if that witness does
25 produce a report, does do any testing, does produce any

1 information that would have bearing on the Atkins issue, as
2 part of that agreement, even though it didn't exists at the
3 time the agreement was made, the court is going to require
4 that that be turned over.

5 MR. MCGUIRE: Could you repeat that?

6 THE COURT: I said if this witness should produce
7 information that would have bearing on that Atkins issue,
8 reports, testing, whatever --

9 MR. MCGUIRE: Okay.

10 THE COURT: -- that is information that should be
11 turned over to the State.

12 MR. MCGUIRE: But, of course, if there is any
13 testing that produces raw data, there is a new report --

14 THE COURT: Again, any reports. Anything that
15 would have bearing on the Atkins issue, that has to be
16 turned over to the State.

17 MR. MCGUIRE: We would turn it over.

18 THE COURT: Because that was the agreement.

19 MR. MCGUIRE: Sure, we would turn over any
20 documents, of course.

21 THE COURT: Okay. Any information that comes in
22 your possession that would have bearing on that issue.

23 Include that in the order, Mr. Barnette?

24 MR. BARNETTE: Yes, sir, I can.

25 THE COURT: All right.

1 MR. BARNETTE: We appreciate it.

2 THE COURT: All right. Anything else, Mr.

3 Barnette?

4 MR. BARNETTE: Your Honor, I would just like that
5 part of our argument be the memo that we handed in there. I
6 know I didn't go through the whole memo. I'm not going to.
7 Like I say, we are just here on one specific --

8 THE COURT: It's been filed with the clerk. It's
9 in the record. Again, if you would like to file a contrary
10 memo, you certainly have the right to do so.

11 MR. MCGUIRE: We will.

12 THE COURT: Okay.

13 MR. BARNETTE: And, Your Honor, just in response
14 to him now saying it's a public record, we had agreed that
15 we could seal the record and they did not want it sealed. I
16 remember it many hearings back, so --

17 THE COURT: All right. Thank you very much,
18 gentlemen.

19 MR. MCGUIRE: Thank you.

20 MR. BARNETTE: Thank you.

21 THE COURT: Mr. Barnette, if you would send a copy
22 to the other side.

23 MR. BARNETTE: Yes, sir.

24 THE COURT: I would appreciate that.

25 (END OF REQUESTED TRANSCRIPT OF RECORD)

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, in the Court of General Sessions for CHEROKEE County, South Carolina, on the 6th day of January, 2014.

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

JANUARY 18, 2014



Michael R. Watts
Circuit Court Reporter

1 STATE OF SOUTH CAROLINA)
 2 COUNTY OF SPARTANBURG) COURT OF GENERAL SESSIONS

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 5 STATE OF SOUTH CAROLINA,) TRANSCRIPT
 6 PLAINTIFF,) OF
 7 VS.) RECORD
 8 RICKY LEE BLACKWELL,) 2009-GS-42-3609
 9 DEFENDANT.) 2009-GS-42-3610

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 12 January 28th, 2014
 13 Spartanburg, South Carolina
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17 B E F O R E:

18 THE HONORABLE ROGER L. COUCH, Judge.
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1 A P P E A R A N C E S :

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PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>Court's Exhibit</u>		
C-1	Doctor's Statement		18

P R O C E E D I N G S

1
2
3 THE COURT: All right. Good morning. We're on the
4 record in the case of the state versus Blackwell.

5 I was informed yesterday about lunchtime that
6 Mr. Blackwell had entered the hospital.

7 Is that still his condition?

8 MR. ALLEN: Yes, Your Honor, it is. I did call the
9 jail this morning at about a quarter of 9:00 and was
10 informed that he was still there. The jail -- I relayed to
11 the jail your request for a doctor's note --

12 THE COURT: Right.

13 MR. ALLEN: -- and they did email me a doctor's note.

14 THE COURT: Have you shown that to the, to the
15 prosecution?

16 MR. ALLEN: I have provided them a copy.

17 THE COURT: All right. Pass that up to me please.

18 MR. ALLEN: Yes, Your Honor.

19 THE COURT: All right. And I had, I had inquired,
20 through my law clerk yesterday, as to whether or not the
21 defense would waive Mr. Blackwell's presence at the Atkins
22 hearing. I was informed that you would not.

23 Is that still your position this morning?

24 MR. ALLEN: That's still our position, Your Honor, yes,
25 sir.

1 THE COURT: All right. Anything further you need to
2 make me aware of, Mr. Allen?

3 MR. ALLEN: I did try calling the hospital last night,
4 but they wouldn't talk to me citing HIPA concerns. So --.

5 THE COURT: Well, I understand that is, is a concern.
6 I would hope that Mr. Blackwell would be willing to make the
7 information necessary available to the Court for us to
8 schedule this matter appropriately.

9 MR. ALLEN: Oh, I'm sure he would once I can get, get
10 to him and that's a---

11 THE COURT: I understand.

12 So, you've not visited him in the hospital?

13 MR. ALLEN: I have not visited him at the hospital. I
14 was informed shortly before I emailed the Court, which was
15 around lunchtime as the Court indicated, when I sent a
16 request for some people to be allowed to see Mr. Blackwell
17 yesterday, and the jail called me and said we can not honor
18 my request, and they needed to talk to me in, you know,
19 verbally, to tell me why and that's when we learned of the
20 situation.

21 THE COURT: All right. According to this doctor's
22 statement, the discharge date for his condition right now is
23 unknown.

24 I'll hear from the State concerning the matter if the
25 State wishes to inform me of anything?

1 SOLICITOR BARNETTE: Your Honor, just on this matter, I
2 think obviously we get consent. We probably need to know
3 exactly what the condition is, and I think the Court has the
4 ability, under HIPA, if, if, in order to schedule the trial,
5 to request those medical records if he did sign a release.

6 THE COURT: I see.

7 Well, I'm gonna ask that and direct that, that, Mr.
8 Allen, at some point in time today you visit Mr. Blackwell.

9 MR. ALLEN: Yes, sir.

10 THE COURT: Let me know if there's any problem in his
11 signing some type of a release so that we can get enough
12 information at least to be able to schedule this hearing---

13 MR. ALLEN: Yes, sir, Your Honor.

14 THE COURT: ---to determine our schedule for the future
15 hearings that we're going to have. If he refuses to sign
16 such a release, please let me know and I'll explore what
17 avenues I have to explore in order to gather this
18 information so this Court can proceed.

19 MR. ALLEN: I understand. I don't anticipate signing
20 releases to be a problem.

21 THE COURT: All right. Anything else that the parties
22 feel that I should take up at this point in time?

23 SOLICITOR BARNETTE: Your Honor, we just had one matter
24 just to put on the record or whatever.

25 We'd received an email earlier last week about

1 supplemental reports and information by Doctor Galloway. We
2 filed our motion I believe with the Court.

3 THE COURT: I received a motion to compel in my office
4 I believe Friday maybe --

5 SOLICITOR BARNETTE: Yes, sir.

6 THE COURT: -- of last week.

7 SOLICITOR BARNETTE: And two hours after that, Mr. Clay
8 Allen complied. He gave us the supplemental report. He
9 gave us the information and everything.

10 The only concern I had was me and Mr. Allen was talking
11 briefly, and I think he's gonna comply with this. The
12 interview of Ricky Lee Blackwell June 2013 by Lee Conley
13 that was on the supplemental report, we do not have that
14 unless he sent it to me this morning.

15 THE COURT: Can you provide that?

16 MR. ALLEN: If I haven't -- they say I haven't.

17 SOLICITOR BARNETTE: Yes.

18 MR. ALLEN: I'm gonna say I haven't.

19 THE COURT: Okay.

20 MR. ALLEN: It was an oversight and I will comply.

21 THE COURT: All right.

22 SOLICITOR BARNETTE: And, Your Honor, the only other
23 thing I'd like the Court to inquire again is there anything
24 else. I know this case---

25 THE COURT: Is there anything else, Mr. Allen, that

1 we're aware of that any -- do you anticipate any other
2 reports from any of the examining parties, physicians, or
3 psychologist -- I don't know if they're all physicians.
4 Psychologist, psychiatrist.

5 MR. ALLEN: I don't anticipate any other reports.

6 THE COURT: Okay.

7 MR. ALLEN: I have made an effort and the material I
8 think the solicitor will acknowledge is quite voluminous
9 that we've provided. I'm trying to give them everything
10 that's referred to in the reports and everything else that I
11 know of. If they'd be so kind, as they have been, to let me
12 know specifically if there's something that they think that
13 I've omitted, I will do what I can to get the answer on
14 that.

15 THE COURT: All right.

16 MR. ALLEN: I'm not trying to---

17 THE COURT: Well, I'm gonna put the burden on you to
18 give them everything you've got. I'll put it that way.

19 But in any rate --

20 MR. ALLEN: Yes, sir.

21 THE COURT: -- if there's anything else, Mr. Barnette?

22 SOLICITOR BARNETTE: Mr. Ghent wanted to bring up a
23 matter, Your Honor. In reviewing the records, there's just
24 one other matter about some medical records I believe.

25 SOLICITOR GHENT: Yes, sir.

1 May it please the Court?

2 THE COURT: Yes, sir.

3 SOLICITOR GHENT: Your Honor, they have provided us
4 with records, in particular, that pertain to an involuntary
5 commitment I believe of Mr. Blackwell in March of 1990 as a
6 result of an attempted or it's unclear whether you would
7 call it, and, again, this is the doctor's expertise, not
8 mine, but whether it's a suicidal ideation or whether an
9 attempt. He shot a .357 Magnum through the roof of the
10 mobile home in which he was living with his wife.

11 It's our understanding, from the records, that this
12 occurred after he had been diagnosed with Hodgkins lymphoma,
13 a form of cancer. He was very distraught about that, and he
14 was in Patrick B. Harris for a period of I think about two
15 weeks. He was then released and, specifically, in the final
16 release, it says that he is being referred to Doctor Ken
17 wells, a psychiatrist, and we have no records of that. It
18 has the date of the appointment. It has the time of the
19 appointment and that that is the referral.

20 My concern is, first of all, if they haven't got them,
21 it seems curious because it's a very voluminous amount of
22 records we've been through. So, it may bear on, if not the
23 diagnosis testified to by Doctor Calloway, it may later on
24 bear on issues at guilt or at mitigation. So, we need to
25 know what happened there.

1 The other thing that is, is very puzzling and this goes
2 back, I guess, to a civil background as well, but I noticed
3 on the records that have been provided, with respect to the
4 now deceased brother of the defendant, Donald Blackwell, who
5 suffered from schizophrenia, who suffered from
6 hallucinations, auditory as well as visual, and the
7 diagnosis at his death, it kind of varied in terms of the
8 medical examiner. The bottom line is it appears that his
9 death may of had to do with an involuntary overdose of
10 either Oxycontin or Oxycodone.

11 Here's the point I'm going towards, Your Honor. Pages
12 that are Bates stamped 100 through I believe about 268,
13 that's 168 pages are Bate stamped. Those would not be Bate
14 stamped by medical facilities. That is like a red flag of
15 litigation and other missing records. So, that is yet
16 another source where I would like to know for purposes,
17 again, of this issue as well as the issue of guilt as well
18 as the issue of sentencing.

19 Your Honor, I would refer the Court to Von Dohlen,
20 D-O-H-L-E-N. We do not want to later find out that any of
21 these experts will come back on PCR and find that if I had
22 only had these. So, we're not suggesting right now that
23 anybody's done it on purpose, but it certainly appears
24 there's another trail there, and that we would like to know
25 about any other records whatsoever.

1 Thank you, sir.

2 THE COURT: Mr. Allen.

3 MR. ALLEN: Okay. I'm not sure what they're talking
4 about any records whatsoever. I thought the agreement was
5 and the Court's order was anything that relates to the
6 Atkins investigation is what we've got to turn over
7 information from our experts and we're trying to do that.

8 THE COURT: Uh-huh. (Affirmative).

9 MR. ALLEN: As far as Doctor Wells, I'm not sure if
10 we've got those -- I don't know of the records. We've given
11 them the medical records.

12 THE COURT: Well, wouldn't those records though be
13 subject to subpoena by the State as well?

14 SOLICITOR BARNETTE: No, sir, I think those are HIPA
15 issues. Again, we could ask the Court---

16 THE COURT: Well, you could ask me to issue an order.

17 SOLICITOR BARNETTE: We could if you'd like us to go
18 that way. I just assumed that that would be part of their
19 Atkins investigation.

20 THE COURT: Well, he's telling me they have no Doctor
21 Wells records. So, if I -- what I'm hearing.

22 MR. ALLEN: One second please.

23 THE COURT: Yes, sir.

24 (Pause.)

25 MR. ALLEN: My mitigation investigator tells me that

1 she's looked into it and was informed that they were
2 destroyed by apparently the medical provider.

3 THE COURT: Okay. Well, if you, if you would like to
4 pursue that with -- through a Court order, you certainly
5 have the right to make a motion. I will consider it and
6 then we'll see how that turns out.

7 SOLICITOR GHENT: Your Honor, we would, for the simple
8 reason that -- and, again, I'm not disputing, but that's
9 curious because this was someone who had been referred after
10 a suicide---

11 THE COURT: Well, I'm not saying---

12 SOLICITOR GHENT: ---commitment.

13 THE COURT: ---that you're not entitled to it. In
14 fact, I'm leaning toward that you are entitled to, to pursue
15 that. They apparently have and there's -- the records don't
16 exist. If you'd like to confirm that through my, a Court
17 order from the Court, I'll be happy to review it, and, if
18 it's appropriate, I'll issue the order.

19 SOLICITOR GHENT: Yes, sir, and with respect to the
20 records of Donald Blackwell, again, the way that Doctor
21 Calloway is going about addressing the matter---

22 THE COURT: Well, is -- are you aware of any litigation
23 that resulted from Donald Blackwell's death that---

24 MR. ALLEN: I'm not aware of any litigation that arose
25 from Donald Blackwell's death. We -- the -- the OID or the

1 Capital Litigation Bates stamped and we -- we're getting a
2 lot of stuff through emails and other things and they were
3 stamping them and Bates numbering them just like the
4 Solicitor's Office date stamps things when they provide us
5 discovery I presume.

6 SOLICITOR GHENT: I assume he's talking about Bates
7 stamping them.

8 THE COURT: Uh-huh. (Affirmative).

9 SOLICITOR GHENT: My question would be then if we're
10 going with respect to Donald Blackwell, and if we're going
11 with respect to records having to do with how his history
12 bears on the defendant's mental retardation, why do we have
13 a selected group of 168 documents that were Bate stamped now
14 we're being told by the Capital Litigation Group, and that
15 would certainly suggest that other records having to do with
16 Donald Blackwell and whatever it was were not provided to
17 us.

18 MR. ALLEN: A lot of these records are being---

19 THE COURT: You want to take a second and talk with
20 her?

21 MR. ALLEN: Yes, sir.

22 THE COURT: I'll let you do that.

23 MR. ALLEN: Yes, Your Honor.

24 (Pause.)

25 MR. ALLEN: My understanding is the dates stamped is

1 when we got a large group of records at one time.

2 THE COURT: Well, Bate stamping is when you stamp it
3 and it puts a consecutive number on the page numbers so that
4 we -- it's a page numbering system.

5 MR. ALLEN: Right.

6 THE COURT: Right.

7 MR. ALLEN: So, we do that apparently when we got a
8 large volume for easy reference.

9 THE COURT: All right.

10 MR. ALLEN: But when we collected or when the
11 investigators have collected smaller groups, if you will,
12 they weren't necessarily putting a Bates stamp on that
13 fashion.

14 THE COURT: Uh-huh. (Affirmative).

15 MR. ALLEN: I think we've provided them everything
16 we've got in connection with either Donald Blackwell or the
17 information, information that was provided to the experts in
18 connection with the---

19 THE COURT: Atkins matter?

20 MR. ALLEN: ---Atkins matter. I mean I'm not aware of
21 anything in particular that they're missing. I do know
22 that, prior to making copies, I, for my own purpose, were
23 putting things in folders myself so I may of gotten some of
24 the pages out of order. I don't know.

25 THE COURT: Okay.

1 MR. ALLEN: But I mean I've made an effort to provide
2 them what we've got.

3 THE COURT: Are you seeking any relief from the Court
4 today?

5 SOLICITOR GHENT: Well, Your Honor, we would like to
6 include that in a motion. I'll point out why. The
7 information---

8 THE COURT: This -- maybe we're delaying our trial if
9 we're gonna go off on a discovery matter. If the State
10 wants to go there, I'll be glad to.

11 SOLICITOR BARNETTE: Your Honor, if I could ask. They
12 said the 1 through 99 was a mistake at this point from that
13 standpoint, Your Honor.

14 THE COURT: That's what he just said.

15 SOLICITOR BARNETTE: Okay.

16 THE COURT: So, I mean I don't -- again, if you want to
17 go into a discovery issue or battle, we can do that.

18 SOLICITOR BARNETTE: Your Honor, one other thing, I
19 think we would like to make a motion for the doctor's
20 records that we talked about earlier. I don't know if they
21 oppose that or not to---

22 MR. ALLEN: Doctor Wells?

23 THE COURT: Yes.

24 Any opposition to my ordering that Doctor Wells turn
25 over any records?

1 MR. ALLEN: No.

2 THE COURT: Okay. They indicate -- I think that's a
3 no.

4 MR. MCGUIRE: That's a no.

5 MR. ALLEN: We do not object.

6 THE COURT: Can I get that on the record?

7 Thank you.

8 Okay. So, if you'd like to submit an order for me to
9 order Doctor Wells office to release any records concerning
10 the brother, I mean, excuse me, the appointment that he
11 should of kept, I'll be glad to do that.

12 SOLICITOR BARNETTE: No problem.

13 SOLICITOR GHENT: Thank you, Your Honor.

14 SOLICITOR BARNETTE: Thank you.

15 THE COURT: Other matters you want to seek relief from,
16 let me know.

17 SOLICITOR BARNETTE: Yes, sir.

18 THE COURT: If you want to go down that road, that may
19 mean we have some other hearings we have to hold.

20 SOLICITOR BARNETTE: We were just asking the question
21 to make sure the record's covered, Your Honor.

22 THE COURT: Okay.

23 All right. Now, at this point in time, again, I'm
24 gonna ask that you talk with Mr. Blackwell. See if he will
25 sign a release so that the Court can have access to

1 information such that it would allow us to schedule the
2 case.

3 MR. ALLEN: Yes, Your Honor.

4 THE COURT: Anything else I need to take up at this
5 point in time?

6 MR. MCGUIRE: Your Honor, if I could have just a
7 moment. I notice that Doctor Edgar Brown is in the
8 courtroom. Last week we served a subpoena. I think we
9 might have a little bit of a difference of opinion as to
10 what he might be willing to turn over. If I can just
11 consult with him briefly, and see what he's prepared to turn
12 over, and then we can bring it up with the Court.

13 THE COURT: Is he in the courtroom?

14 He's not. That's not him.

15 MR. MCGUIRE: Okay. Sorry. I recognized the wrong
16 fellow.

17 THE COURT: No, he's not in the room. I know that
18 fellow.

19 MR. MCGUIRE: He looks a lot like Doctor Brown.

20 THE COURT: He might take that designation for the day.
21 I don't know.

22 MR. MCGUIRE: He's a handsome man. Trust me. The good
23 Doctor Brown is a handsome man. You're in good company, and
24 it's been -- it has been two years since I've seen him, and
25 he does look a lot like you. But we do have a subpoena. We

1 can just -- we'll contact his office and bring that up with
2 the Court later.

3 THE COURT: All right. Let me know if there's any
4 problem in that regard. Then I will continue the case at
5 this time. I'm not resetting it based on the doctor's
6 statement. I will ask that I be allowed to have a brief
7 conference -- conversation with counsel in chambers at this
8 point in time. But at this point in time I'll adjourn the
9 Blackwell hearing for this morning.

10 Thank you very much.

11 MR. ALLEN: Thank you.

12 SOLICITOR GHENT: Thank you, Your Honor.

13 THE COURT: By the way, gentlemen, I'm gonna have the
14 doctor's statement made an exhibit for purposes of this
15 hearing.

16 MR. ALLEN: Yes, Your Honor.

17 SOLICITOR GHENT: Yes, sir.

18 THE COURT: Thank you.

19 (WHEREUPON, the doctor's statement was marked as
20 Court's Exhibit No. 1 and received into evidence at this
21 time.)

22

23

24 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

25

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 28th day of January, 2014.

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

February 15th, 2014



PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF SPARTANBURG)

COURT OF GENERAL SESSIONS

3
4
5 STATE OF SOUTH CAROLINA,)

6 PLAINTIFF,)

7 VS.)

8 RICKY LEE BLACKWELL,)

9 DEFENDANT.)

TRANSCRIPT

OF

RECORD

2009-GS-42-3609

2009-GS-42-3610

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12 February 18th, 2014
13 Spartanburg, South Carolina
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17 B E F O R E :

18 THE HONORABLE ROGER L. COUCH, Judge.
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1 A P P E A R A N C E S :

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PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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E X H I B I T

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>

Court's Exhibit

C-1	Jury Instruction	42	

P R O C E E D I N G S

1
2
3 THE COURT: Good morning, gentlemen.

4 SOLICITOR BARNETTE: Morning, Your Honor.

5 MR. MCGUIRE: Morning, Judge.

6 MR. ALLEN: Morning, Your Honor.

7 SOLICITOR GHENT: Morning, Your Honor.

8 THE COURT: How's everyone?

9 MR. MCGUIRE: Good, sir.

10 THE COURT: All right. The first thing we probably
11 ought to address is the fact that I received an email from
12 the defense counsel concerning Mr. Blackwell's condition.
13 As part of that I was informed that you were waiving his
14 presence at today's hearing. So, let's put that on the
15 record and be sure we've got that taken care of.

16 MR. MCGUIRE: Yes, sir, I'll put that on the record.

17 THE COURT: All right.

18 MR. MCGUIRE: Of course, the Court's aware Mr.
19 Blackwell was taken to the hospital recently for some
20 internal organ issues mostly related to his pancreas. We
21 alerted the Court as soon as we thought there was a problem
22 with his ability to come to Court and assist counsel and
23 that's when we took the steps to have the jail doctors see
24 him.

25 The jail doctor has, in fact, seen him. There's been a

1 cursory note in the chart that he's doing well. That left
2 us kind of lacking specific information enough to satisfy us
3 that he was ready to come to Court. So, we actually had our
4 own doctor come in and evaluate him, assess him.

5 THE COURT: When you say your own doctor, who was that?

6 MR. MCGUIRE: Doctor Donna Schwartz-Watts---

7 THE COURT: Okay.

8 MR. MCGUIRE: ---who's an MD. She's a psychiatrist and
9 a doctor.

10 THE COURT: All right.

11 MR. MCGUIRE: Well, a doctor and she, she spent about
12 two hours with him --

13 THE COURT: Uh-huh. . (Affirmative).

14 MR. MCGUIRE: -- and we were also present. There are
15 some issues. Our client's been able to stay awake for about
16 four or five hours consecutively maximum since his release
17 from the hospital. He's fighting fatigue. He's got some
18 balance issues. He's been moved from one pod to another so
19 that he doesn't have to negotiate stairs. So, the jail's
20 taking it fairly seriously as well.

21 He's got a loss of volume in his blood, which causes
22 the dizziness. I think ostolic (phonetic) osteolic
23 (phonetic) was the word that Doctor Schwartz-Watts used I
24 think.

25 THE COURT: Say that word again.

1 MR. MCGUIRE: I'm not gonna try that. I was very
2 reluctant to even give it a shot, and---

3 THE COURT: Well, I'm sure---

4 MR. MCGUIRE: Hopefully I---

5 THE COURT: I'm sure the court reporter will figure
6 that one out.

7 Go ahead.

8 MR. MCGUIRE: I can check Doctor Schwartz-Watts email
9 or call her if we need that exact spelling. However, she
10 was fairly satisfied that he would, in fact, be able to come
11 to Court and participate as long as the day was not a full
12 day. We made arrangements for him to, to, to take breaks,
13 to have caffeine available, to have Gatorade as well.

14 And with regard to today's hearing, she actually told
15 us that it would be best if he stayed at the jail and
16 didn't, didn't make the trip, let him rest up so he can get
17 better. He's on the mend. We're -- those were her less
18 technical words.

19 THE COURT: Uh-huh. (Affirmative).

20 MR. MCGUIRE: And we concur in that and we thought it
21 would be a good idea to have him not come to Court today.

22 THE COURT: He's aware of the hearing though, is that
23 correct?

24 MR. MCGUIRE: He's aware of the hearing.

25 THE COURT: Uh-huh. (Affirmative).

1 MR. MCGUIRE: We talked about it. We talked about the
2 likely issues that would come up, and we found them mostly
3 collateral. We doubt that anything regarding contested
4 facts in the case would come up where we would have to rely
5 on him for some, for some primary information.

6 THE COURT: All right.

7 MR. MCGUIRE: That it's mostly legal and collateral
8 issues.

9 THE COURT: Uh-huh. (Affirmative).

10 MR. MCGUIRE: He agreed it would be a good, a good idea
11 to rest up and try to get better and we're in agreement with
12 that as well.

13 THE COURT: I understand.

14 State have any comments?

15 SOLICITOR BARNETTE: No comments, Your Honor. Thank
16 you.

17 THE COURT: All right. I will, of course, take up with
18 Mr. Blackwell; when he appears next, the fact that he did
19 agree not to be present. Not doubting your word, but I do
20 want to be sure he is on the record himself waiving his
21 presence at this hearing. But---

22 MR. MCGUIRE: Yes, sir.

23 THE COURT: ---we'll proceed given the counsel's
24 representations concerning Mr. Blackwell's condition, and
25 his ability to attend the hearing.

1 I want to go over some matters with you so perhaps we
2 can make the trial a little more streamlined if at all
3 possible. Of course, if it's not possible, that's, that's
4 fine.

5 First of all, has counsel discussed any exhibits or
6 stipulations as to exhibits or do you intend to do so?

7 I'll hear from the State first.

8 SOLICITOR BARNETTE: Your Honor, obviously, I think we
9 brought the exhibits over for one of the hearings we had
10 earlier. They looked at the exhibits or whatever. We do
11 have pictures that we would submit. Obviously we'll be glad
12 to share that with him, let them look at it, and see if they
13 consent to it or stipulate to them. Be glad to do that.

14 THE COURT: All right. Well, I'm gonna ask you to do
15 that this week.

16 SOLICITOR BARNETTE: Yes, sir.

17 THE COURT: Get them copies of whatever exhibits you do
18 intend to use at trial or copies of -- documents, whatever
19 they are. I don't know what you have, and let's see if we
20 can agree on those.

21 Defense?

22 MR. MCGUIRE: The only thing that I, that I know that
23 we would have an objection to, without having seen the --
24 well, I don't know how, what form they would take as an
25 exhibit, but autopsy photographs we certainly pose an

1 objection to actually based on the language in Torres, and
2 that was maybe a near miss with all due respect. The
3 language in there is not very comforting with regard to
4 autopsy photographs and also the---

5 THE COURT: Well, I think what the, what the Court is
6 looking for is, is the probative value outweighing the
7 prejudicial effect.

8 MR. MCGUIRE: Sure.

9 THE COURT: And, so, that would depend on what the
10 photographs are of and what they tend to show or prove. So,
11 I think we would have to review that and in light of the
12 probative value as opposed to the prejudicial effect that
13 might occur.

14 MR. MCGUIRE: Sure.

15 SOLICITOR BARNETTE: Your Honor, two things. One
16 thing, I think they've got all these pictures ahead of time
17 cause we did supply discovery to them. So, they should
18 already have these pictures we was discussing.

19 The autopsy pictures, we wouldn't deal with them until
20 sentencing anyway from that standpoint.

21 THE COURT: You wouldn't what?

22 SOLICITOR BARNETTE: We wouldn't be dealing with those
23 until sentencing anyway.

24 THE COURT: Oh, I understand that. We're -- I'm
25 anticipating possibly trying the entire case. So, let's

1 look at everything. I don't know what the results will be,
2 but we'll stop whenever it's appropriate. But at any rate,
3 the---

4 SOLICITOR BARNETTE: Yes, sir.

5 THE COURT: If, if you do have autopsy photographs, I
6 would ask that you submit those specifically to the defense
7 and that you inform them of what probative value you think
8 they may have on any factual issue that's in the case so
9 that they'll be in a position for us to discuss those issues
10 at the, at the time they're presented.

11 SOLICITOR BARNETTE: Yes, sir, be glad to.

12 THE COURT: All right.

13 MR. MCGUIRE: And, Judge --

14 THE COURT: Yes.

15 MR. MCGUIRE: -- if I could just briefly be heard on
16 that?

17 THE COURT: Yes, sir.

18 MR. MCGUIRE: In -- obviously the Court's aware that
19 there is some probative value in crime scene photographs.
20 The language that's usually used is it, it captures the, the
21 manner in which the defendant left the victim, and obviously
22 I would have to concede that there's some, some probative
23 value with that.

24 However, you know, this case does involve a nine year
25 old child shot multiple times in the, in the head area, and

1 we don't have the original, you know, disk or film with
2 regard to these pictures. And what I would say is,
3 conceding that there is gonna be some probative value and
4 that some of these photographs will likely come in, we would
5 move that perhaps black and white photographs would be less
6 prejudicial and this is a very, a very emotionally charged
7 case just based on the nature of the victim in the case.

8 So, I want to give the Court a heads-up on that and the
9 prosecutor a heads-up on that that that's a request we would
10 make.

11 THE COURT: well, again, it would depend on whether or
12 not the black and white photographs somehow affects the
13 probative value. I don't know---

14 MR. MCGUIRE: Sure.

15 THE COURT: ---whether they do or not since I haven't
16 seen the photographs yet.

17 MR. MCGUIRE: Yes, sir.

18 THE COURT: So, we'll, we'll hash that out, but I think
19 the State should be, you know, given the language in Torres,
20 I certainly have read it, the, that we should, should review
21 the, those photographs in light of what probative value they
22 might have as opposed to their prejudicial effect. Look at
23 what you're planning to prove with them, and let's try to do
24 it in the least prejudicial fashion if we can.

25 SOLICITOR BARNETTE: Yes, sir.

1 THE COURT: That's what I'm gonna instruct you to do.

2 Now, as to any evidentiary issues that the State is
3 aware of that the Court should be prepared to address?

4 SOLICITOR BARNETTE: Your Honor, the only other thing,
5 we did file a motion I believe yesterday. I think the Court
6 got a copy of it. The defense probably got a copy of it
7 too.

8 We just had some concern, Doctor Galloway, in the email
9 she sent to Doctor Brown, she mentioned writings and I
10 notice in the last order the Court signed---

11 THE COURT: Mentioned, I'm sorry, what?

12 SOLICITOR BARNETTE: Writings. I don't know if you saw
13 the copy of the email that was attached to it, but she
14 mentioned that she had -- one of these items has been
15 satisfied. I think Mr. Allen's talked to Mr. Ghent about
16 this after -- concerning the stuff that was number three in
17 the motion in there talking about the five day -- page or
18 supplemental report. I think we've taken care of that.

19 But she mentions in here specifically in her email that
20 she don't plan to bring them until tomorrow morning, which
21 is a concern because obviously we're planning to have the
22 hearings tomorrow, and then she talks about various notes on
23 wednesday, February 19th. Please be advised the eight,
24 the eight individuals to whom I'm administering the ABAS.
25 There was additional interviews given. Each of those

1 interviews are roughly ten to fifteen pages of handwritten
2 notes on notebook paper. There was two other individuals
3 interviewed for who -- the interview notes consisted of two
4 of four pages from there.

5 An order that was filed and signed by the Court
6 January 22nd, and on page -- well, the last page of that,
7 the last paragraph, the Court orders the defense has any
8 witness, including Dock McKee, who does not produce a report
9 does not even test -- doesn't do any testing, does produce
10 any information bearing on the Atkins issue as part of that
11 agreement, even though it didn't exist at the time the
12 agreement was made, be turned to the State immediately upon
13 that report testing and information being generated or
14 reduced to writing.

15 Obviously it was reduced to writing. It was never
16 provided to us.

17 THE COURT: well, my understanding was that -- did I
18 read that you do intend to produce it when she arrives?

19 MR. MCGUIRE: Oh, sure. Yes, sir.

20 THE COURT: when, when is she going to arrive?

21 MR. MCGUIRE: well, she's, she's in Court today is my
22 understanding.

23 THE COURT: She's in Spartanburg?

24 MR. MCGUIRE: In Durham.

25 THE COURT: Oh, in Durham.

1 MR. MCGUIRE: Yes, sir.

2 THE COURT: Okay.

3 MR. MCGUIRE: And my understanding is she'll be able to
4 leave first thing tomorrow morning to get here. She's
5 always indicated her willingness to turn over these notes.
6 She's just said that, based on her report schedule and the
7 constraints of her time, she's just gonna bring them with
8 her.

9 THE COURT: All right. Now, State's concern?

10 SOLICITOR BARNETTE: The State's concern, Your Honor,
11 obviously we got to do a proper cross-examination of her and
12 obviously---

13 THE COURT: Well, they intend to produce it, I
14 understand that.

15 Are you asking for a continuance of the Atkins hearing?

16 SOLICITOR BARNETTE: Well, I don't know if we're asking
17 for a continuance on that, Your Honor. We were just
18 concerned because, like I said, I know the Court's asking
19 several times we have for everything and it keeps -- some
20 keeps popping up it seems like time and time again.

21 THE COURT: Well, I understand that, but we're gonna
22 try to get the, the case -- my arms around it tomorrow.

23 SOLICITOR BARNETTE: Yes, sir.

24 THE COURT: The -- now, I certainly will not require
25 that you cross-examine her until you've had an adequate

1 opportunity to review those notes.

2 SOLICITOR BARNETTE: Yes, sir.

3 THE COURT: So, I know that the State -- the defense is
4 asking for a delay until lunchtime.

5 Can we -- Durham's four hours?

6 MR. MCGUIRE: Yes, sir.

7 THE COURT: So, I can get them to you before the
8 hearing starts if we start at lunchtime.

9 SOLICITOR BARNETTE: Yes, sir, we're just concerned is
10 just have enough time. We appreciate the Court's time.

11 THE COURT: And if you need, need additional time, then
12 I can continue the hearing.

13 SOLICITOR BARNETTE: Yes, sir, I don't think we're
14 willing to do that.

15 THE COURT: But I'm not gonna exclude the witness.

16 SOLICITOR BARNETTE: Yes, sir, I understand. Well, I
17 understand. We just wanted to make the motion cause, like I
18 said, we feel like we've asked time and time again and we
19 can't---

20 THE COURT: Oh, I don't disagree with you. I wish that
21 it had been provided in a timely fashion, and I, I can get
22 things moving in a timely fashion. But I certainly don't --
23 am not going to require that you cross-examine the witness
24 until you've had an opportunity to review those notes.

25 SOLICITOR BARNETTE: All right. Thank you, Your Honor.

1 MR. MCGUIRE: Judge, the only thing -- and the only
2 thing I would add is that actually our expert hasn't been
3 able to review Doctor Brown's notes either cause he, he did
4 not comply with the subpoena that we put on him with regard
5 to his notes. He turned over some other documents, but he
6 was---

7 THE COURT: Well, they've been turned over now, haven't
8 they?

9 MR. MCGUIRE: They have.

10 THE COURT: They were turned over last week?

11 MR. MCGUIRE: Sure. And the only point that I make is
12 they were turned over right before our expert went into
13 Court hearings on another case, and she's got---

14 THE COURT: She's got a weekend. I'm not sure that---

15 MR. MCGUIRE: Sure.

16 THE COURT: ---she spent all weekend working on one
17 case. I would be surprised if she did.

18 MR. MCGUIRE: Well---

19 THE COURT: It's possible. But if she, you know --
20 and, again, if she needs to look at those before she
21 testifies, she'll get an opportunity to do that.

22 MR. MCGUIRE: Sure. And, and the only thing that we
23 were going to -- because we were kind of late in getting
24 Doctor Brown's notes as well. It took sometime before he
25 communicated with Tana Vanderbilt, who is counsel at DDSN,

1 he got the green light eventually. But we -- so, we got
2 them eventually. But that is right before our expert
3 witness went into other Court hearings, and our -- what we
4 were gonna do is just suggest that if the record had to be
5 left open for any reason with regard to hashing out other
6 issues with either experts' notes, we could---

7 THE COURT: Well, obviously, if the record's left open,
8 that delays the Court's decision.

9 MR. MCGUIRE: If necessary.

10 THE COURT: We're approaching trial.

11 MR. MCGUIRE: Sure and we're ready.

12 THE COURT: So, I would like to get the thing moving
13 as -- in as expeditiously a fashion as possible, but I do
14 want to cover it thoroughly.

15 MR. MCGUIRE: Yes, sir.

16 THE COURT: So, we'll -- what I'll do is, as soon as
17 she arrives tomorrow, those notes should be turned over to
18 you, and then if you wish to have a delay in cross-examining
19 her, you certainly would have a right to do so. Wouldn't
20 prevent us from taking her direct testimony though in a
21 timely fashion.

22 SOLICITOR BARNETTE: Thank you, Your Honor.

23 THE COURT: All right. And it does appear -- I will
24 start the case at one o'clock tomorrow, start the Atkins
25 hearing at one o'clock tomorrow. That will give her time to

1 arrive in time for you to receive those notes.

2 SOLICITOR BARNETTE: Your Honor, just to -- and will
3 y'all contact Doctor Brown or do we need to do that
4 concerning what time he needs to be here?

5 we'll be glad to do that.

6 THE COURT: I suppose we'll contact him. We've been in
7 contact -- he's, he's a Court's witness. So, I'll contact
8 him and tell him when we're starting.

9 SOLICITOR BARNETTE: Yes, sir, and---

10 THE COURT: He was not going to be the first witness up
11 anyway, was he?

12 I mean I think they have to go first.

13 MR. MCGUIRE: Yes, sir.

14 SOLICITOR BARNETTE: Yes, sir, and that's what I was
15 gonna make sure, and Doctor -- do you want to try to finish
16 it all tomorrow from that standpoint?

17 THE COURT: I'm gonna try to get to -- well, the rest
18 of the week I'm in Nonjury General Sessions. So, I can put
19 off guilty pleas and stay in it as long as I have to.

20 SOLICITOR BARNETTE: Okay. I just wondered cause I
21 know we have other---

22 THE COURT: I'll probably go to 5:00, 5:30 tomorrow and
23 then we'll see where we are.

24 SOLICITOR BARNETTE: Okay. Thank you, Your Honor.

25 THE COURT: I guess that -- a lot of that has to do

1 with how long you gentlemen question the witnesses and how
2 many times we beat certain dead horses that may be laying
3 around in here. I don't know how that's gonna come up --
4 come out. So, we'll see how that works.

5 All right. Now, I had asked that if the counsel had
6 any particular voir dire or information that you would like
7 for the court to have prior to questioning the jury that
8 that be provided.

9 SOLICITOR BARNETTE: Your Honor, we'd have our standard
10 request.

11 THE COURT: All right. If you'll pass that up and give
12 it to my law clerk, I'll be glad to review it.

13 SOLICITOR BARNETTE: I have a copy of it.

14 THE COURT: And does defense have any specific
15 requests?

16 MR. MCGUIRE: No, sir.

17 THE COURT: All right. I have copies of a standard
18 sentencing phase instruction that -- and I'll be glad to
19 provide you a copy of it. I have not made it specific to
20 this case because obviously I do not know -- it will depend
21 on the proof as to the aggravating and mitigating
22 circumstances that are proven. You're welcome to take a
23 look though at my standard -- what, what I intend to use as
24 a framework for that charge. Be glad to provide you with a
25 copy of it so that you can be reviewing that before the

1 trial.

2 MR. MCGUIRE: Yes, sir.

3 THE COURT: Now, as to the jury questionnaires, I did
4 want to go over with you what we have received thus far.

5 If I can get counsel, at least one member of the
6 counsel to approach, I can give you copies of what we have.
7 I'll go -- I'll explain that to you in a minute.

8 SOLICITOR BULSA: Okay.

9 THE COURT: However, there's another one up here.

10 SOLICITOR BULSA: Okay.

11 THE COURT: All right. That's it.

12 SOLICITOR BULSA: Thank you, Your Honor.

13 THE COURT: The first document that I've given you with
14 the handwritten notes down the right-hand side, those are
15 jurors that have been excused through the Clerk's Office
16 thus far with my permission. I've -- they use a code, I
17 guess it's a code, initials, so I went -- over to the right
18 I had my law clerk write down what those various mean,
19 various codes mean as to the excuse. Most -- a good number
20 of them are nonresidents of the county and we've been able
21 to verify that. So, they are -- they have been released.

22 The other reasons given were unable to locate, someone
23 who had been on Circuit Court jury within the last three
24 years, someone convicted and sentenced for a crime more than
25 one year. There's a doctor's excuse for a physical

1 condition in there. We had one child care and one primary
2 caregiver that I have excused.

3 So, their information is available in the Clerk's
4 office if you'd like to get it. But I'll make you aware of
5 those are the jurors that have been excused thus far.

6 Now, the second one are people who have requested to be
7 excused, but have not yet been excused, and most of those
8 meanings I think are on there. I think it's decipherable.
9 What I intend to do, as to certain of those, require
10 affidavits to be signed in the Clerk's Office before I would
11 excuse any of them. There are several for age. Obviously
12 if they verify they're over 65 and they want out, I'll be
13 excusing those as well.

14 But I'll make you aware that those are the ones who are
15 requesting excuse. If there's any objections to those,
16 please let me know this week because I'll, I'll be making
17 those people -- informing them next week so that they do not
18 have to appear.

19 So, if you'll take a look at those, let me know -- let
20 my clerk know if you have any issues with any of those juror
21 requests.

22 Now, the questionnaires are here that have been
23 returned. They're available to you if you'd like to look at
24 them. They're copyable through the Clerk's Office. So,
25 those are available if you'd like to take a look at those or

1 get copies of them.

2 Are there any questions or issues that you'd like to
3 take up concerning the jury panel thus far?

4 SOLICITOR BARNETTE: None from the State at this point,
5 Your Honor.

6 THE COURT: Defense.

7 MR. MCGUIRE: Just briefly, Your Honor.

8 With regard to the conviction of Juror Number 283 --

9 THE COURT: Yes, sir.

10 MR. MCGUIRE: -- is that based on his report or a rap
11 sheet or do we know?

12 THE COURT: I'd have to get the -- the clerk's -- why
13 don't you go get her and let's find out?

14 MR. MCGUIRE: It's just that so many times, you know,
15 John Smith has a rap sheet and---

16 THE COURT: Well, usually -- the clerk has the records
17 of convictions. So, maybe they verified it. I don't know.
18 We'll find out.

19 MR. MCGUIRE: Well, then, Judge, my only other point
20 would be that we actually go ahead and state our positions
21 with regard to the Court's excusing folks before we actually
22 see the questionnaires so that doesn't influence our
23 argument.

24 But I can tell you our position would be to follow
25 exactly what the Court said. If there's proof of age, proof

1 of a doctor's excuse, that sort of thing, just cut them
2 loose. You don't even have to talk to us. You know, we
3 would agree with that.

4 THE COURT: Okay.

5 MR. MCGUIRE: Anybody that, that's paid for vacation,
6 hotel rooms, if they can prove they paid for it, we got no
7 problem with them going either.

8 THE COURT: Well, what I'm planning -- intend to do for
9 the remainder of them is require -- and most of these --
10 most of them that have already been excused, excused are
11 either---

12 MR. MCGUIRE: Statutory---

13 THE COURT: ---prior jury duty, which the clerk has a
14 record of. We've got a -- most of them are nonresidents.
15 They've been able to verify residence in another county.
16 Obviously we don't have jurisdiction over those folks. We
17 can't make them come.

18 MR. MCGUIRE: Right, and we have no objection to those
19 people.

20 THE COURT: All right.

21 Hi, how you doing. I had a question about -- there's
22 one juror, 283, shows as having a conviction.

23 THE CLERK: Yes.

24 THE COURT: Can you tell me what you did to confirm
25 that?

1 THE CLERK: I did. I have an email here from Lisa
2 Garrett. I always check with Lisa Garrett in the
3 solicitor's office with every person who checks that.

4 THE COURT: Why don't you show them, show them what you
5 got on here?

6 THE CLERK: Sure. I only have one copy here. Right
7 here is her confirmation and what she ran.

8 MR. MCGUIRE: We would just ask to see the rap sheet.

9 THE COURT: All right. Would you provide them a copy
10 of the rap sheet on that juror?

11 He's asking to see a copy of the rap sheet.

12 SOLICITOR BULSA: We can get one.

13 SOLICITOR BARNETTE: We can get one, Your Honor. We
14 can verify and share with the Court.

15 THE COURT: All right.

16 MR. MCGUIRE: And I would just have a question for the,
17 the young lady if I can.

18 THE CLERK: Sure.

19 MR. MCGUIRE: How, how were you alerted to that
20 particular juror as to run a rap sheet?

21 THE CLERK: When they return the summons, they check
22 off. There's a spot on the bottom of the summons that
23 specifies that they have been convicted of a year or more
24 sentencing. I don't go by their word. I check with the
25 solicitor's office.

1 MR. MCGUIRE: Sure.

2 Okay. So, there, there could be folks with rap sheets,
3 with records that didn't check the box?

4 THE CLERK: That is correct.

5 THE COURT: Okay. And we're gonna go over those when
6 you qualify the jury.

7 THE CLERK: The Solicitor's Office checks those, yes.

8 MR. MCGUIRE: Sure.

9 Okay. Thank you so much, Judge.

10 THE CLERK: My pleasure.

11 THE COURT: If you'll provide that for him, Mr.
12 Barnette --

13 SOLICITOR BARNETTE: We will, Your Honor, on that one
14 juror.

15 THE COURT: -- the rap sheet on that particular juror.

16 SOLICITOR BARNETTE: Yes, sir.

17 THE COURT: All right. Now, does the defense have any
18 particular issues with courtroom security?

19 MR. MCGUIRE: Yes.

20 THE COURT: Yes, sir.

21 MR. MCGUIRE: I think we're gonna actually request some
22 security for us in addition to whatever the courtroom plan
23 you have. We've -- we were told by the -- an employee of
24 the detention center that, when our client was taken to the
25 hospital, that that information got out somehow, and that

1 they received a tip that there was gonna be a -- basically a
2 hit on him while he was at the hospital and he would be
3 killed.

4 You know, I think the Court's already aware, based on
5 previous hearings, that two of the homes of our client's
6 relatives were fire bombed with Molotov Cocktails with one
7 adult barely escaping with his life, and, you know, this --
8 we take this very seriously, and I don't want to be walking
9 out of the courthouse and have a nice interaction with a
10 biker gang, which is the -- the father of the victim, of
11 course, is a known biker and multiple biker gangs were at
12 the funeral, and not only the funeral, but it's lived on in
13 their culture because they have annual poker runs and biker
14 drives to raise money. In fact, the funeral was not paid
15 for for sometime and they were fund raisers with these
16 multiple biker gangs that went on for sometime.

17 Based on all of that and based on the attempted murder
18 of, of at least two families of our client, and the very
19 recent attempt that the jail had with regard to a hit on our
20 client while he was in the hospital, we're gonna request
21 security for us.

22 Obviously we want the courtroom very secure as well,
23 but we would also not want a wall of SWAT team behind us to
24 make us look like our client's very dangerous, and, you
25 know, we're just gonna ask the Court to use your good

1 judgment.

2 THE COURT: Well, I'm gonna ask for your suggestions in
3 that regard because there have been cases where defense
4 attorneys object to uniform officers in the courtroom---

5 MR. MCGUIRE: Sure.

6 THE COURT: ---things of that nature. And, so, I'm
7 gonna ask for your suggestions in that regard because if the
8 courtroom simply makes a plan, and then you object to that
9 plan, then we go round and round. I'm not gonna chase my
10 tail on this. I want the courtroom to be secure. I want
11 you to be secure. I want me to be secure. I understand
12 those things.

13 MR. MCGUIRE: Right.

14 THE COURT: I can, I can ask the sheriff for that type
15 of security. However, I can tell you that generally they
16 wear uniforms in the courtroom.

17 MR. MCGUIRE: Sure.

18 SOLICITOR BARNETTE: If that's an issue for you or if
19 that's a problem, now's the time for us to make that plan.
20 So, that's the reason I brought that issue up.

21 MR. MCGUIRE: Okay. And, and I do have some
22 information on that.

23 With regard to security behind either table, I would
24 ask that it just be symmetrical. So, whatever you see over
25 here you see over here. It's the same. If the client gets

1 up from the, the table, that if any security officers rise
2 over here, they also rise over there. That if -- it's a
3 uniform action so that it's not drawing attention to our
4 side of our client, and I would ask that the officers be
5 plain clothes.

6 THE COURT: All right. Mr. Barnette.

7 SOLICITOR BARNETTE: Your Honor, obviously---

8 THE COURT: Well, I'm gonna tell you this. Not all of
9 them will be plain clothes. I would like for all people to
10 be aware of police presence.

11 MR. MCGUIRE: Oh, sure.

12 THE COURT: And, so, all guards in the courtroom will
13 not be plain clothes. But I understand what you mean by
14 there's -- there becomes some point where it's overbearing,
15 and---

16 MR. MCGUIRE: Of course.

17 THE COURT: ---I understand that we don't want to get
18 to that point.

19 Yes, sir, Mr. Barnette.

20 SOLICITOR BARNETTE: Your Honor, I understand the need
21 for the security. I want to be secure too from that
22 standpoint, but I think being, having uniforms in the
23 courtroom identifies who they are. I think that's very
24 important from that standpoint. I'd just like the Court to
25 be presented there.

1 But if you go under the scenario the defense has
2 presented, and if you have the plain clothes people stand up
3 and the uniform people stand up, I don't think it's gonna
4 take too much of a juror to figure out which one's a police
5 officer, which one's not. That's the only problem I've got
6 with his plan from that standpoint.

7 THE COURT: Well, I'm gonna discuss it with the
8 security personnel here at the courthouse, and we will
9 provide -- I will try to not allow the uniform presence to
10 be overbearing. However, I want everyone to be aware that
11 we are taking extraordinary care for the courtroom to be
12 secure. And, so, we will do that.

13 Obviously, once we get here, if there's objections,
14 I'll hear those. I don't mind hearing from you. But I do,
15 I do want the courtroom to be secure. If there is a -- I
16 was unaware of any threats that might have been made against
17 your client when he went to the hospital.

18 Did that come from the police, the information that
19 that occurred?

20 MR. MCGUIRE: The information we got was from an
21 employee at the jail who just mentioned it to us, and went
22 into some detail about the fact that he was moved around a
23 little bit when he was at the hospital, you know, obviously
24 with armed guards.

25 THE COURT: Okay. I just want to be sure that the

1 police are aware of that and are taking proper precautions.

2 SOLICITOR BARNETTE: Just one other note, Your Honor.

3 I know you're aware of this or whatever, Mr. McGuire I know
4 may not be aware of this, our security here is very good.

5 THE COURT: Oh, I think it is, and I'm not, and I'm not
6 being critical of them. I -- however, I want to be sure
7 that this is conducted in a safe fashion, but not in such a
8 fashion as would be prejudicial to the defense if we can
9 avoid it, and I have arranged with SLED to take charge of
10 the jury. So, SLED will be providing the security for the
11 jury, and we have -- I have ordered sequestration of the
12 jury. That will occur.

13 All right. Any other matters that the State wishes to
14 take up at the pretrial, at the pretrial hearing before
15 tomorrow's hearing?

16 SOLICITOR BARNETTE: Your Honor, one thing I know. We
17 had a discussion I think in one of the previous hearings,
18 you want all motions filed, is that correct, in this case?

19 SOLICITOR BARNETTE: Yes, sir.

20 THE COURT: Okay.

21 SOLICITOR BARNETTE: Just wanted to verify that.

22 THE COURT: All right.

23 MR. MCGUIRE: And, Judge, you, you requested from us
24 what statutory mitigating circumstances we have.

25 THE COURT: Yes, sir, I was gonna get to that, and then

1 I also want to put on the record your educational
2 qualifications.

3 MR. MCGUIRE: That's true.

4 THE COURT: Although I think you're both immanently
5 qualified, I want to be sure that we've got on the record
6 that you are.

7 MR. MCGUIRE: Sure.

8 THE COURT: So, let's talk about your qualifications
9 and then we'll talk about the mitigation circumstances.

10 MR. MCGUIRE: Sure.

11 I sent an email around, which is just a bio from CLE's
12 where I've taught in the past. I did my undergraduate at
13 Coastal Carolina College in Conway, South Carolina. I went
14 on to USC Law School. Graduated in '95. I was Moot Court,
15 Wig & Robe, American Jurisprudence Award for the highest
16 grade in Con Law.

17 I clerked for two separate judges, Judge Rodney Peeples
18 who's now retired from Circuit Court. I clerked for Judge
19 Daniel Pieper when he was on the Circuit Court Bench. He's
20 now retired from the Court of Appeals. I was a public
21 defender in Charleston for about five years. I worked with
22 Andy Savage in Charleston as an associate doing primarily
23 criminal defense, almost exclusively criminal defense with
24 Andy, and I was a part-time judge in Hanahan for sometime,
25 and I would say I was in private practice for a short period

1 of time.

2 I was a capital defender in Georgia where I handled
3 nothing but capital cases all over the State of Georgia and
4 a number of them. I came back to South Carolina. I run the
5 trial division, the Capital Trial Division of the South
6 Carolina Commission of Indigent Defense. I've probably
7 tried four or five capital cases all the way to the end, and
8 I've been involved in a couple dozen of them I guess.

9 THE COURT: All right. Mr. Allen.

10 MR. ALLEN: Your Honor, my educational background is
11 I'm a 1976 graduate of Wofford College Summa Cum Laude with
12 high honors in history. 1979 graduate of the University of
13 South Carolina School of Law.

14 I was admitted to practice and before the South
15 Carolina Courts in November of 1979. Also been admitted to
16 the United States District Court for the District of South
17 Carolina and the United States Court of Appeals for the
18 Fourth Circuit, and, in 1980, United States Court of
19 Military Appeals.

20 I served four years in the United States Army Judge
21 Advocate General's Corps where a part of my service was one
22 year as a trial counsel, which is a prosecutor, and two
23 years as a trial defense attorney defending primarily
24 soldiers who were charged with Court Martial offenses in
25 Courts Martial.

1 other relevant experience, Your Honor, was three years
2 as an assistant public defender in Richland County where I
3 represented clients from both felony cases as well as
4 misdemeanor cases. In 1991, I was -- I opened a private
5 practice in Greenville where I, for ten years, was on the
6 contract system where I provided public defender type work
7 for indigent clients again representing both clients that
8 are charged with serious felonies as well as misdemeanor
9 cases.

10 In 2001 I became assistant public defender of
11 Spartanburg County and served in that capacity until 2006
12 when I was promoted to the Spartanburg County Public, Chief
13 Public Defender position, and I held that position until
14 2008 when I became the Seventh Judicial Circuit Public
15 Defender, and have served in that capacity since.

16 In December of 2003 I was -- I received my
17 certification to serve as lead counsel in death penalty
18 cases from the South Carolina Supreme Court. I've also
19 attended CLE's in criminal, not only in criminal law, but
20 also for the past several years I've attended CLE's dealing
21 solely with death penalty cases and death penalty defense.

22 THE COURT: All right. All right. I'll find that both
23 counsel are qualified, Mr. McGuire as first chair, Mr. Allen
24 as second chair.

25 All right. Now as to the mitigating circumstances.

1 MR. MCGUIRE: We've produced them in writing, Your
2 Honor.

3 THE COURT: All right. Pass those up please.
4 And is the State prepared to give me the aggravating
5 circumstances?

6 SOLICITOR BARNETTE: Yes, sir, and we've actually filed
7 them. We filed them June 8th, 2012, Your Honor.

8 THE COURT: All right. Pass up a copy to my law clerk
9 please.

10 SOLICITOR BARNETTE: And I believe I already got a copy
11 of it. Let me make sure.

12 THE COURT: All right.

13 SOLICITOR BARNETTE: And, Your Honor, for the record,
14 on the aggravating circumstances, we have continuously give
15 them information in discovery. I know they haven't filed a
16 Rule 5, but we would include that in with any of this
17 notices of the aggravating circumstances. Anything we
18 provided them since this notice has been given to them---

19 THE COURT: All right.

20 SOLICITOR BARNETTE: ---in discovery.

21 THE COURT: Thank you.

22 All right. Anything further that the State would like
23 to take up at this time?

24 SOLICITOR BARNETTE: Nothing at this time, Your Honor.

25 THE COURT: Anything from the defense?

1 MR. MCGUIRE: Judge, we actually do have a very short
2 motion to not allow any testimony with regard to the motive
3 or the alleged motive in this case.

4 As you'll recall, at the Jackson Denno hearing, there
5 was some evidence produced that the motive for killing this
6 child was to get back at her father, which was the paramour
7 of his estranged wife, and to kill an innocent nine year old
8 child, that motive we think is just so inflammatory that it
9 could, with regard to a 403 analysis, that that evidence is
10 so -- the danger for unfair prejudice is so high, and the
11 probative value is so low because he did kill her and he
12 could die and I mean that's gonna be a fact.

13 I think you have a good feeling of the evidence is that
14 he, he put a headlock around this child and produced a
15 pistol and shot her right in front of a witness just feet
16 away. So, it's not gonna be a who done it.

17 And, so, the motive to prove that it's more likely than
18 he's the actual shooter is -- there's no probative value to
19 it, and it's just so inflammatory that it, that it would
20 fly -- it would run contrary to a 403 analysis with regard
21 to the danger of unfair prejudice and probative value, and
22 then I would also just say that it's so inflammatory that it
23 could infect the trial with unfair fairness and violate the
24 defendant's Constitutional rights under the Sixth and
25 Fourteenth Amendment and the Fifth Amendment.

1 THE COURT: Does the State wish to argue that at this
2 time?

3 SOLICITOR BARNETTE: Your Honor, the only thing I would
4 say, my objection would be this. I know you have a
5 scheduling order in place for all pretrial motions. The
6 motions we filed has been about Atkins period. Not about
7 anything else from that standpoint.

8 Now they bring in one to talk about motive, which is --
9 should of been dealt with in November or during the Jackson
10 v. Denno hearings. Now they want to bring it in.
11 Obviously---

12 THE COURT: well, the Jackson v. Denno hearings was to
13 determine the admissibility of the statements that he made
14 at the scene primarily.

15 SOLICITOR BARNETTE: Yes, sir.

16 So, I remember we had like twenty some motions if I
17 remember right from that standpoint.

18 THE COURT: There, there were a large number. I
19 will -- is this in the form of a motion in limine?

20 Is that what you're making?

21 MR. MCGUIRE: Yes, sir, and we've reduced it to
22 writing. Mr. Allen and I will provide it.

23 SOLICITOR BARNETTE: And it was served on us yesterday
24 afternoon, Your Honor.

25 THE COURT: Okay.

1 SOLICITOR BARNETTE: I got a copy yesterday afternoon
2 probably around three o'clock or 3:30.

3 THE COURT: Well, do you wish to take some time before
4 you argue the motion?

5 We don't have to argue it today.

6 SOLICITOR BARNETTE: Yes, sir, but my -- well, I just
7 want to state my objection to it.

8 THE COURT: Oh, I understand you're objecting to it for
9 that reason, but if you wish to address the merits of it,
10 I'll give you some time since it was just served on you --

11 SOLICITOR BARNETTE: Yes, sir.

12 THE COURT: -- or we can take it up now if you'd like.

13 SOLICITOR BARNETTE: I'd really like to have some time
14 in which to study it from that standpoint, Your Honor.

15 THE COURT: All right. Then I'll provide time to do
16 that before trial.

17 All right. Anything else?

18 MR. MCGUIRE: Not at this time I don't think, Your
19 Honor. Obviously, you know, we haven't gotten through the
20 Atkins hearing. So, we don't really know if we're gonna
21 have a bifurcated trial.

22 THE COURT: Oh, I agree. I had planned to do that
23 hearing weeks ago, but I didn't, didn't get there for some
24 reason.

25 MR. MCGUIRE: This is clearly not your fault. There,

1 there's a lot of blame to go around, but it's not on you
2 that's sure.

3 THE COURT: Well, I'm not blaming anybody. I'm just
4 saying it's just a -- we had planned to do this in a
5 different fashion.

6 MR. MCGUIRE: Sure.

7 THE COURT: I had planned to do it.

8 MR. MCGUIRE: So, I actually held back doing a couple
9 of things like jury instructions, that sort of thing with
10 regard to penalty issues, but because some penalty issues
11 have come up today, just to give the Court as much heads-up
12 as possible, if we do find ourselves in a, in a capital
13 trial, but we'll have a bifurcated proceeding, we would
14 actually ask that it be trifurcated, and that the first
15 part, after the guilt phase, be whether or not Mr. Blackwell
16 is retarded or mentally retarded or does he suffer from an
17 intellectual disability, that that should be decided in a
18 vacuum and not on the heels of aggravation evidence or
19 victim impact evidence because obviously if it ends there,
20 there's not even the -- we don't even have to call a number
21 of witnesses, which would save the State, the State, the
22 Court a ton of time and, quite frankly, a lot of money.

23 THE COURT: Does the State have a position on that one?

24 SOLICITOR BARNETTE: Yes, sir, we'd object, Your Honor.
25 That's totally different from any formats used in South

1 Carolina at this time, and, obviously, we've been through
2 the---

3 THE COURT: If you have any authority for, for a Court
4 doing that, I'll be glad to look at it.

5 MR. MCGUIRE: Oh, yes, sir, I'll pass up a case where
6 they did that.

7 THE COURT: Okay. And where is -- what jurisdiction is
8 it from?

9 MR. MCGUIRE: It's Federal.

10 THE COURT: Federal.

11 Okay. All right. I'll be glad to take a look at it.
12 Have not considered it until just now. So, I'll be glad to
13 take a look at it.

14 All right. I'll email, email you the, the charge --
15 the generic charge so you'll have that this afternoon, and
16 put a copy in the record.

17 All right. We plan to start at one o'clock tomorrow on
18 the Atkins hearing.

19 Anything further, Mr. Barnette?

20 SOLICITOR BARNETTE: Just from a scheduling standpoint,
21 Your Honor, the only thing I'm worried about is I don't
22 know -- I'd love to get done tomorrow, don't get me wrong,
23 but I'm just anticipating that we probably won't because I
24 know they got to put up their case first and, if possible,
25 we got to respond to it.

1 THE COURT: That's right.

2 SOLICITOR BARNETTE: I know Doctor Harrison I think has
3 been subpoenaed by them, and obviously is gonna come. I
4 don't know if she -- I don't know if we'll get it all done
5 tomorrow. I was wondering if we could bring her the next
6 day.

7 THE COURT: well, again, it's, it's -- I don't know how
8 long this is gonna take since I have not read the reports.
9 I don't know what you intend -- maybe you guys can tell me
10 what you think the timeframe is that this is gonna take. I
11 intend to get it done this week. Let's put it that way.

12 SOLICITOR BARNETTE: Yes, sir, I think we---

13 THE COURT: I'm in, I'm in General Sessions Nonjury all
14 week, and if it takes the rest of the week, that's what I'm
15 here for.

16 MR. MCGUIRE: That's, that's, that's a finish line we
17 can, we can cross. We -- but we won't cross it tomorrow
18 afternoon. I would expect Doctor Calloway's testimony to be
19 around eight to ten hours, maybe a little bit longer, and
20 to, to help the State with Doctor Harrison, I think it would
21 be advisable that she not come until the second day.

22 SOLICITOR BARNETTE: That be --

23 THE COURT: There we go.

24 SOLICITOR BARNETTE: First I hate to see her come up
25 here and then have to come back again. That's the only

1 thing.

2 THE COURT: I understand.

3 All right.

4 MR. MCGUIRE: In fact, Doctor Brown---

5 THE COURT: Doctor Brown, the same thing?

6 MR. MCGUIRE: Doctor Brown is the same thing.

7 THE COURT: He can show up on Thursday.

8 SOLICITOR BARNETTE: Just handle Galloway and basically
9 their case tomorrow, Your Honor, and then we---

10 THE COURT: That sounds like what, what we're looking
11 at, at least.

12 MR. MCGUIRE: Okay. We won't, we won't finish our
13 first witness tomorrow.

14 THE COURT: Okay. All right. Well, tell them to be
15 here on Thursday.

16 Thank you.

17 SOLICITOR BARNETTE: Thank you, Your Honor.

18 THE COURT: Thank you, gentlemen.

19 MR. MCGUIRE: Thank you, Your Honor.

20 Oh, Judge, did you want a witness list?

21 THE COURT: If you have that, yes, sir.

22 MR. MCGUIRE: We do.

23 THE COURT: Pass it up.

24 SOLICITOR BARNETTE: Your Honor, I'd like to give it to
25 you at a later date. We're still working on it cause we

1 have different witnesses we're looking at. Be glad to
2 provide it to you later.

3 THE COURT: Pass it up. I'm trying to get my notes
4 together for jury qualification and that would be helpful.

5 MR. MCGUIRE: And our understanding, Your Honor, is
6 this is just for the Court at this time.

7 THE COURT: Oh, I understand.

8 MR. MCGUIRE: Okay.

9 THE COURT: I just want to -- again, it's -- I want
10 what I need for jury qualification. I've got to get ready
11 to do that. The jury questionnaires are available. I'm
12 gonna take them back to the clerk who's handling that jury.
13 So, if you need to see her, she's available if you'd like to
14 see her to go over any of that.

15 MR. MCGUIRE: Yes, sir, thank you.

16 THE COURT: Thank you.

17 (WHEREUPON, the jury instruction was marked as Court's
18 Exhibit No. 1 for identification purposes only at this
19 time.)

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22 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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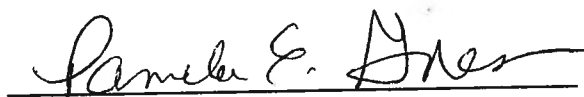
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I, Pamela E. Green, official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 18th day of February, 2014.

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

February 18th, 2014



PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA)
 2 COUNTY OF SPARTANBURG) COURT OF GENERAL SESSIONS

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5 STATE OF SOUTH CAROLINA,) TRANSCRIPT
 6 PLAINTIFF,) OF
 7 VS.) RECORD
 8 RICKY LEE BLACKWELL,) 2009-GS-42-3609
 9 DEFENDANT.) 2009-GS-42-3610

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13 March 11th, 2014
 14 Spartanburg, South Carolina

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18 B E F O R E:

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20 THE HONORABLE ROGER L. COUCH, Judge.

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

2

3 BARRY BARNETTE
4 SOLICITOR
Attorney for the State

5

6 DERRICK BULSA
DEPUTY SOLICITOR
Attorney for the State

7

8 RUSSELL GHENT
ASSISTANT SOLICITOR
Attorney for the State

9

10 WILLIAM MCGUIRE
11 ESQ.
Attorney for the Defendant

12

13 CLAY ALLEN
PUBLIC DEFENDER
Attorney for the Defendant

14

15 BOYD YOUNG
16 ESQ.
Attorney for the Defendant

17

18

19

20 PAMELA E. GREEN
21 Circuit Court Reporter
Seventh Judicial Circuit

22

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24

25

1 Tuesday, March 11th, 2014

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3 (WHEREUPON, the following is the jury selection
4 process.)

5 THE COURT: Madam Clerk, you can begin the jury
6 selection process.

7 THE CLERK: Juror, Juror Number 134, Martin Kimmons.
8 (Juror comes forward.)

9 THE CLERK: What says the State?

10 SOLICITOR BARNETTE: Please present the juror.

11 THE CLERK: What says defense?

12 MR. YOUNG: Please excuse Mr. Kimmons

13 THE CLERK: Number 237, Lonny Smith.
14 (Juror comes forward.)

15 THE CLERK: What says the State?

16 SOLICITOR BARNETTE: Please present the juror.

17 THE CLERK: What says defense?

18 MR. YOUNG: Please excuse Mr. Smith.

19 THE CLERK: Number 70, Michael Estes.
20 (Juror comes forward.)

21 THE CLERK: What says the State?

22 SOLICITOR BARNETTE: Please present the juror.

23 THE CLERK: What says defense?

24 MR. YOUNG: Please excuse Mr. Estes.

25 THE CLERK: Number 264, Ronald Unger.

1 (Juror comes forward.)
2 THE CLERK: what says the State?
3 SOLICITOR BARNETTE: Please excuse this juror.
4 THE CLERK: Number 162, Robert Martin.
5 (Juror comes forward.)
6 THE CLERK: what says the State?
7 SOLICITOR BARNETTE: Please present the juror.
8 THE CLERK: what says defense?
9 MR. YOUNG: Please excuse Mr. Martin
10 THE CLERK: Number 165, Eric McCraw.
11 (Juror comes forward.)
12 THE CLERK: what says the State?
13 SOLICITOR BARNETTE: Please present the juror.
14 THE CLERK: what says defense?
15 MR. YOUNG: Please swear the juror.
16 THE COURT: Sir, you'll have a seat in the box.
17 (Juror complies.)
18 THE COURT: Thank you.
19 THE CLERK: Number 290, Tommy Williams.
20 (Juror comes forward.)
21 THE CLERK: what says the State?
22 SOLICITOR BARNETTE: Please present the juror.
23 THE CLERK: what says defense?
24 MR. YOUNG: Please excuse Mr. Williams.
25 THE CLERK: Number 154, Donald Lowe.

1 (Juror comes forward.)
2 THE CLERK: what says the State?
3 SOLICITOR BARNETTE: Please present the juror.
4 THE CLERK: what says defense?
5 MR. YOUNG: Please excuse Mr. Williams.
6 THE CLERK: Number 192, Donald Patterson.
7 (Juror comes forward.)
8 THE CLERK: what says the State?
9 SOLICITOR BARNETTE: Please present the juror.
10 THE CLERK: what says defense?
11 MR. YOUNG: Please swear the juror.
12 THE CLERK: Number 43, Donald Champion.
13 (Juror comes forward.)
14 THE CLERK: what says the State?
15 SOLICITOR BARNETTE: Please present the juror.
16 THE CLERK: what says defense?
17 MR. YOUNG: Please swear the juror.
18 THE CLERK: Number 160, Diane Marcotte.
19 (Juror comes forward.)
20 THE CLERK: what says the State?
21 SOLICITOR BARNETTE: Please excuse this juror.
22 THE CLERK: Number 188, Stephanie Partridge.
23 (Juror comes forward.)
24 THE CLERK: what says the State?
25 SOLICITOR BARNETTE: Please present the juror.

1 THE CLERK: what says defense?
2 MR. YOUNG: Please swear the juror.
3 THE CLERK: Number 140, George Lamb, Jr.
4 (Juror comes forward.)
5 THE CLERK: what says the State?
6 SOLICITOR BARNETTE: Please present the juror.
7 THE CLERK: what says defense?
8 MR. YOUNG: Please swear the juror.
9 THE CLERK: Number 29, Angela Bradley.
10 (Juror comes forward.)
11 THE CLERK: what says the State?
12 SOLICITOR BARNETTE: Please present the juror.
13 THE CLERK: what says defense?
14 MR. YOUNG: Please swear the juror.
15 THE CLERK: Number 69, Andrea Dendy
16 (Juror comes forward.)
17 THE CLERK: what says the State?
18 SOLICITOR BARNETTE: Please present the juror.
19 THE CLERK: what says defense?
20 MR. YOUNG: Please swear the juror.
21 THE CLERK: Number 78, Caroline Fritch.
22 (Juror comes forward.)
23 THE CLERK: what says the State?
24 SOLICITOR BARNETTE: Please present the juror.
25 THE CLERK: what says defense?

1 MR. YOUNG: Please excuse the juror.
2 THE CLERK: Number 3, Richard Anderson.
3 (Juror comes forward.)
4 THE CLERK: What says the State?
5 SOLICITOR BARNETTE: Please present the juror.
6 THE CLERK: What says defense?
7 MR. YOUNG: Please excuse the juror.
8 THE CLERK: Number 69, Ferrall Erickson.
9 (Juror comes forward.)
10 THE CLERK: What says the State?
11 SOLICITOR BARNETTE: Please present the juror.
12 THE CLERK: What says defense?
13 MR. YOUNG: Please swear the juror.
14 THE CLERK: Number 266, Willem Van Der Platt.
15 (Juror comes forward.)
16 THE CLERK: What says the State?
17 SOLICITOR BARNETTE: Please present the juror.
18 THE CLERK: What says defense?
19 MR. YOUNG: Please swear the juror.
20 THE CLERK: Number 241, Robert Stephens.
21 (Juror comes forward.)
22 THE CLERK: What says the State?
23 SOLICITOR BARNETTE: Please present the juror.
24 THE CLERK: What says defense?
25 MR. YOUNG: Please swear the juror.

1 THE CLERK: Number 168, Michael McIntyre.
2 (Juror comes forward.)
3 THE CLERK: what says the State?
4 SOLICITOR BARNETTE: Please present the juror.
5 THE CLERK: what says defense?
6 MR. YOUNG: Please excuse the juror.
7 THE CLERK: Number 50, Barbara Collins.
8 (Juror comes forward.)
9 THE CLERK: what says the State?
10 SOLICITOR BARNETTE: Please present the juror.
11 THE CLERK: what says defense?
12 MR. YOUNG: Please swear the juror.
13 THE CLERK: Number 215, Terrance Richardson.
14 (Juror comes forward.)
15 THE CLERK: what says the State?
16 SOLICITOR BARNETTE: Please present the juror.
17 THE CLERK: what says defense?
18 MR. YOUNG: Please excuse the juror.
19 THE CLERK: Number 88, Laura Matherly.
20 (Juror comes forward.)
21 THE CLERK: what says the State?
22 SOLICITOR BARNETTE: Please excuse this juror.
23 THE CLERK: Number 45, Cory Cheeks.
24 (Juror comes forward.)
25 THE CLERK: what says the State?

1 SOLICITOR BARNETTE: Please excuse, excuse this juror
2 from service.

3 THE CLERK: Number 60, Todd Danielson.
4 (Juror comes forward.)

5 THE CLERK: what says the State?

6 SOLICITOR BARNETTE: Please present the juror.

7 THE CLERK: what says defense?

8 MR. YOUNG: Please swear the juror.

9 THE COURT: We're now selecting the first alternate.
10 State has one strike. Defense has two.

11 THE CLERK: Number 79, Stacy Fullenwinder.
12 (Juror comes forward.)

13 THE CLERK: what says the State?

14 SOLICITOR BARNETTE: Please excuse this juror.

15 THE CLERK: Number 219, Ray Rothenburg.
16 (Juror comes forward.)

17 THE CLERK: what says the State?

18 SOLICITOR BARNETTE: Please present the juror.

19 THE CLERK: what says defense?

20 MR. YOUNG: Please excuse the juror.

21 THE CLERK: Number 261, Karen Trejo.
22 (Juror comes forward.)

23 THE CLERK: what says the State?

24 SOLICITOR BARNETTE: Please present the juror.

25 THE CLERK: what says defense?

1 MR. YOUNG: Please excuse the juror.
2 THE CLERK: Number 224, Keith Sanders.
3 (Juror comes forward.)
4 THE CLERK: What says the State?
5 SOLICITOR BARNETTE: Please present the juror.
6 THE CLERK: What says defense?
7 MR. YOUNG: Please swear the juror.
8 THE COURT: Now picking the second alternate.
9 THE CLERK: Number 92, Edward Grabarkiewicz.
10 (Juror comes forward.)
11 THE CLERK: What says the State?
12 SOLICITOR BARNETTE: Please present the juror.
13 THE CLERK: What says defense?
14 MR. YOUNG: Please excuse the juror.
15 THE CLERK: Number 147, John Lindsey.
16 (Juror comes forward.)
17 THE CLERK: What says the State?
18 SOLICITOR BARNETTE: Please excuse the juror.
19 THE CLERK: Number 98, Christopher Guenther.
20 (Juror comes forward.)
21 THE CLERK: What says the State?
22 SOLICITOR BARNETTE: Please present the juror.
23 THE CLERK: What says the defense?
24 MR. YOUNG: Please excuse the juror.
25 THE CLERK: Number 208, Pamela Pruitt.

1 (Juror comes forward.)

2 THE CLERK: What says the State?

3 SOLICITOR BARNETTE: Please present the juror.

4 THE CLERK: What says defense?

5 MR. YOUNG: Please swear the juror.

6 THE CLERK: Number 19, David---

7 THE COURT: We've completed the jury selection. Thank
8 you.

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11 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 11th day of March, 2014.

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

December 31st, 2014

PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF SPARTANBURG)

COURT OF GENERAL SESSIONS

3
4
5 STATE OF SOUTH CAROLINA,)

TRANSCRIPT

6 PLAINTIFF,)

OF

7 VS.)

RECORD

8 RICKY LEE BLACKWELL,)

2009-GS-42-3609

9 DEFENDANT.)

2009-GS-42-3610

10
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12 March 20th, 2014
13 Spartanburg, South Carolina
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17 B E F O R E:

18 THE HONORABLE ROGER L. COUCH, Judge.
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1 A P P E A R A N C E S :

2 BARRY BARNETTE
3 SOLICITOR
4 Attorney for the State

5 DERRICK BULSA
6 DEPUTY SOLICITOR
7 Attorney for the State

8 RUSSELL GHENT
9 ASSISTANT SOLICITOR
10 Attorney for the State

11 WILLIAM MCGUIRE
12 ESQ.
13 Attorney for the Defendant

14 CLAY ALLEN
15 PUBLIC DEFENDER
16 Attorney for the Defendant

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18 PAMELA E. GREEN
19 Circuit Court Reporter
20 Seventh Judicial Circuit
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I N D E X

(There were no exhibits marked or testimony taken
during this hearing.)

P R O C E E D I N G S

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3 THE COURT: Yesterday -- we're on the record in the
4 case of The State versus Ricky Lee Blackwell, Senior.

5 Court had arranged for Mr. Blackwell to be transported
6 to the Court for this hearing. On yesterday I received
7 communications from the defense that Mr. Blackwell did not
8 wish to attend the hearing and that he would be waiving his
9 presence.

10 So, if we can put that on the record first?

11 MR. ALLEN: Yes, Your Honor.

12 We appreciate the Court arranging transportation for
13 Mr. Blackwell. Initially we thought we would want him
14 present. However, a member of the team had communication
15 with him, direct communication by telephone and
16 Mr. Blackwell really expressed a desire to remain where he
17 was. He's got some things going on up there, evaluation
18 with a psychiatrist, and he requested not to be present for
19 today. It was explained to him the purpose of today's
20 hearing, and he has waived his appearance and has asked us
21 to inform the Court of his waived appearance.

22 THE COURT: All right. I'll accept the waiver then and
23 we'll proceed.

24 When we broke on Sunday evening the defense made me
25 aware that you wished to put on the record or have, have

1 time to place on the record certain post-trial motions, and
2 so, at this point, I'll give you an opportunity to do that.

3 MR. ALLEN: Thank you very much, Your Honor.

4 At this point we'd move for a new trial on the grounds
5 as previously stated during our motions and objections that
6 were made during the course of trial including, but not
7 limited to the following:

8 The Court's order which the Court found that the
9 defense had not proven to a preponderance of the evidence --
10 this was the Court's pretrial order --

11 THE COURT: Yes, sir.

12 MR. ALLEN: -- where we had not proven to a
13 preponderance of the evidence the -- that our client was
14 mentally retarded.

15 THE COURT: Referred to as the Atkins.

16 MR. ALLEN: Yes, Your Honor.

17 THE COURT: Yeah.

18 MR. ALLEN: The Atkins hearing. Basically we're moving
19 for a new trial based on our position and the Court's
20 finding otherwise, that we had not proven our case at the
21 Atkins hearing.

22 We're also asking for a new trial based on the Court's
23 rulings concerning our strikes for cause against several
24 jurors, which those -- which were overruled specifically and
25 I've gone back through my notes. Specifically as it relates

1 to Jurors Numbers 134, 237, 162, 290, 78, 3, 168, and 215.
2 Also our objection to the State's strike for cause, which
3 was granted by the Court, over our objection as to Juror
4 286.

5 Making these motions on the grounds as previously
6 stated on the record and which I can go into more fully if
7 the Court requires, but I think---

8 THE COURT: I don't require it. I think you did --
9 those, those objections were stated at the time.

10 MR. ALLEN: Yes, Your Honor. Thank you.

11 THE COURT: They're part of the record.

12 MR. ALLEN: Furthermore, Your Honor, we move for a new
13 trial based on the Court's ruling on our use of mental
14 health records and use of testimony from a mental health
15 professional concerning a prosecution witness specifically
16 that of Angie Davis. Essentially we had evidence of prior
17 inconsistent statements of Ms. Davis about the events of the
18 day of the incident. That being the day of July 8th of
19 2009, and we wish to place that into or we wish to
20 cross-examine her on that and to present testimony and
21 records concerning her prior statements to that effect.

22 The Court ruled that we could not use that as well as
23 the Court's ruling on our, on our request to proffer of that
24 information as well, and we---

25 THE COURT: well, again, at that time I made the ruling

1 and asked you to present any authority that you might have
2 that she had either waived the privileged information or any
3 authority that privileged information could be used for any
4 purpose at a trial. I never received any further authority
5 from you on that point.

6 MR. ALLEN: That's correct, Your Honor.

7 THE COURT: So, my ruling stands.

8 MR. ALLEN: Yes, Your Honor. Thank you.

9 And, of course, while I'm on that particular subject,
10 also the Court's ruling on the use of the same testimony and
11 records that we renewed and made during the penalty phase as
12 well.

13 THE COURT: I understand.

14 MR. ALLEN: Thank you, Your Honor.

15 Also the Court's ruling concerning the admissibility of
16 the reports of Doctor Calloway. I forgot the specific
17 defense exhibit numbers. I think they were two -- either 2
18 or 3 or 3 and 4. But specifically the two reports as
19 redacted, as I redacted the first report that were offered,
20 that we attempted -- that we wanted to offer into evidence
21 and the Court's ruling on that.

22 Also the Court's ruling concerning our use of the photo
23 of our client at his grandfather's funeral, which I believe
24 was Defense Exhibit 20 if I'm not mistaken.

25 Also the Court's ruling concerning our use of a record

1 from our client's Spartanburg Regional mental, excuse me,
2 Spartanburg Regional Medical Health Systems record.
3 specifically, the -- that, that record which indicates what
4 he said to a chaplain. I believe it was Abi Moon, which was
5 offered into evidence as a defense exhibit that we offered
6 during the penalty phase. Specifically in that record that
7 he indicated remorse and he was sorry for what he had done,
8 and we had offered that in as a record during the penalty
9 phase.

10 Also, Your Honor, we're asking for a new trial based on
11 the denial of our request to charge that the burden of proof
12 in -- for mental retardation was specifically when we
13 requested that be proven beyond -- that the Court charged
14 the jury that it be proven beyond a reasonable doubt that
15 the defendant was not mentally retarded. Again, we ask that
16 acknowledging---

17 THE COURT: Frankly my charge was that they had to, to
18 make a finding by the preponderance of the evidence.

19 MR. ALLEN: Yes, Your Honor, but if the Court
20 remembers, in our, in our several requests to charge, I
21 think the first one -- I think that was talked about on the
22 record we have requested for the record even though we
23 understood State v. Laney is against us, but we ask for
24 that.

25 THE COURT: well, the language indicated differently in

1 that case.

2 MR. ALLEN: Yes, sir.

3 THE COURT: In the sentencing phase, perhaps they take
4 a different view. Apparently they did. But I don't know if
5 they meant to do that or not, but they did.

6 MR. ALLEN: Yes, Your Honor, and, furthermore, we're
7 asking for a new trial based on our objection to the Court's
8 and our exception to the Court's charge concerning the
9 burden of proof of mental retardation must be proven to a
10 preponderance of the evidence.

11 THE COURT: Yes, sir.

12 MR. ALLEN: We -- again, we view that as not being
13 specifically allowed in Laney although we understand the
14 Court's struggle with that, and, and also that it was burden
15 shifting, shifting the burden upon the defense. Although we
16 understand the Court did not specifically say the defense
17 must prove, but that rather I think it was more of the -- if
18 I remember my grammar right---

19 THE COURT: I indicated they had to make a finding by
20 the preponderance of the evidence.

21 MR. ALLEN: Yes.

22 And we take -- and, again, those are the specific
23 grounds that I wish to point out to the Court.

24 If I may consult with counsel one more second?

25 THE COURT: Yes, please.

1 (Pause.)

2 MR. ALLEN: I neglected to mention and, and counsel
3 pointed to me that on that same record that we offered into
4 evidence concerning, you know, what chaplain's recording of
5 what our client said---

6 THE COURT: Yes, sir.

7 MR. ALLEN: ---concerning remorse, it was not only the
8 chaplain, Abi Moon, but also a chaplain, Virginia Hess.

9 THE COURT: Yeah, there were two different statements
10 or entries into the records is the way to put it I guess.

11 MR. ALLEN: Yes, Your Honor.

12 THE COURT: Two different individuals. I remember, I
13 remember that.

14 MR. ALLEN: Yes, Your Honor, and those are the basis---

15 THE COURT: For the post-trial motions?

16 MR. ALLEN: For motions -- for the motion for a new
17 trial.

18 THE COURT: All right. State wish to make any argument
19 as to any of those?

20 SOLICITOR BARNETTE: Your Honor, we -- you've seen our
21 return to the previous arguments concerning and the Court's
22 ruled on those, Your Honor. If you need any additional
23 information, be glad to do that, but I think the Court's
24 actually covered all those areas, and I think our return to
25 motions and return to their motions have been filed and the

1 previous case law and statutory law that was presented in
2 the case.

3 THE COURT: All right. All right. I'll rule on those
4 momentarily. There were some issues that came up in regards
5 to sentencing.

6 On the sentencing sheets, apparently the warrant
7 numbers were transposed, is that correct?

8 SOLICITOR BARNETTE: That's my understanding, Your
9 Honor, and I apologize when I printed those out.

10 THE COURT: You want to take a look at those and we'll
11 show you what we're talking about?

12 MR. ALLEN: I think I know what you're talking about,
13 in the upper corner.

14 THE COURT: Yes, sir, there's a, there's a place for
15 warrant numbers.

16 (Pause.)

17 MR. ALLEN: Oh, I see. Your Honor, I also apologize
18 for not trying to catch that error as well. They were
19 presented to us and it's more of a --.

20 THE COURT: It's in the nature of a scribner's error
21 perhaps.

22 I just want to know if there's any objection to the
23 Court making that amendment to the sentencing sheets at this
24 time so that they can be sent to the DOC?

25 MR. ALLEN: No, Your Honor, I, I do not see where we

1 can make an objection. I mean the Court recorded the, as
2 far as I can tell, recorded the sentence based on the charge
3 that was shown on the sentencing sheet and the indictment
4 number that was on the sentencing sheet, which matches. So
5 --.

6 THE COURT: All right. If you'll pass those up to me.

7 THE CLERK: Yes, sir.

8 THE COURT: One other question arose.

9 (Pause.)

10 THE COURT: Also it was pointed out to the Court, when
11 I announced my sentence, that I had sentenced the defendant
12 to a 30 year sentence on kidnapping, and ran it concurrent
13 with the death sentence. I have since learned that the
14 proper word for that process is, let me get it here,
15 subsumed into the death sentence, and so I'm, I prepared a
16 sentencing order reaffirming the death sentence and
17 subsuming that sentence into the death sentence.

18 I'll pass this down and ask you to take a look at that
19 and see if there's any objection.

20 SOLICITOR BARNETTE: No objection from the State, Your
21 Honor.

22 MR. ALLEN: No objection as to the form of the Court's
23 order. Of course, all this subject to our earlier motion
24 that we made.

25 THE COURT: Oh, I understand, I understand---

1 MR. ALLEN: Yes, sir.

2 THE COURT: ---subject to earlier motions, and in that
3 regard, I had previously signed an affirmation of the death
4 sentence indicating that it was not a result of prejudice,
5 passion, or any arbitrary factor. I am -- because I'm now
6 changing the sentencing, I am reaffirming the death sentence
7 as of today since I'm reissuing those sentences.

8 One other matter I want to announce at this time. I
9 had previously sealed the Atkins order in this case. I did
10 that because I did not want the press publishing the -- my
11 findings concerning the Atkins order. I felt it may somehow
12 prejudice a jury in their findings. So, therefore, I'd
13 ordered it sealed for that purpose so that there would be no
14 publication of my findings prior to a jury making their own
15 determination on that issue.

16 I am, at this time, signing an order unsealing that
17 Atkins order. So, I'll just make you aware that that's been
18 done. I know you had said you had sent it to some people.
19 You have the right to send it to anybody you'd like to send
20 it to, to at this point in time.

21 So, do you understand what I'm doing as far as that
22 order is concerned?

23 MR. ALLEN: Yes, Your Honor. I understand that. Thank
24 you.

25 THE COURT: All right. At this time I will reaffirm my

1 rulings in the case concerning the issues raised by the
2 defense. Based on my reaffirmation of my previous rulings,
3 I will deny the motion for a new trial. I am reissuing the
4 sentencing sheets indicating the change in the indictment
5 numbers so that they are properly referred to.

6 I am specifically amending the, the kidnapping
7 sentencing sheet to reference my sentencing order of today,
8 the one I showed you concerning the subsummation of this
9 sentence into the death sentence and -- let's see. And as I
10 said, I am refiling an affirmation of sentence at this time.

11 Anything further that we need to take up from the
12 State's prospective?

13 SOLICITOR BARNETTE: None from the State, Your Honor.

14 THE COURT: Anything from the defense prospective?

15 MR. ALLEN: One other matter.

16 Concerning the, the exhibit with the ABAS test pages
17 that were offered into evidence---

18 THE COURT: Yes, I, I ordered that sealed during the
19 trial, and it remains sealed at this time.

20 How are we handling that, Ms. Camp, in the Clerk's
21 office?

22 THE CLERK: We put those in a separate package and---

23 THE COURT: So, they've been put in a pouch as they
24 were before for this jury trial now?

25 THE CLERK: Yes, sir.

1 THE COURT: Okay. So, what they've been -- it's just
2 like they did before, they've been put in a separate pouch,
3 taped shut, and sealed, but they're still an exhibit in the
4 trial.

5 MR. ALLEN: I -- yes, Your Honor. I just want to make
6 sure it's been sealed as we had discussed.

7 THE COURT: Yes, sir, I'm informed that it has been.
8 So that's been---

9 THE CLERK: Yes, sir.

10 THE COURT: ---been taken care of.

11 MR. ALLEN: Okay. Thank you, Your Honor.

12 THE COURT: All right. Anything further?

13 MR. ALLEN: I don't have anything further, Your Honor.

14 THE COURT: All right. Anything further from the
15 State?

16 SOLICITOR BARNETTE: No, sir.

17 THE COURT: All right. That concludes the hearing
18 then.

19 Thank you very much for your assistance in taking care
20 of these matters for me.

21 SOLICITOR BARNETTE: Thank you, Your Honor.

22 SOLICITOR GHENT: Thank you, Your Honor.

23 MR. ALLEN: Thank you.

24 THE COURT: Yes, sir.

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* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 20th day of March, 2014.

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

May 5th, 2014



PAMELA E. GREEN, Court Reporter

WITNESSES

Spartanburg County Sheriff's Office

*T. H. Tullotson*1. SENTENCE MADE ☒2. REPORT ENDED ☒3. CARD FILLED ☒ARREST WARRANT NUMBER ☒5. CHECKED WARRANTS ☒M-088434 6. CHECKED SIGNATURE ☒7. ASSESSMENT AND
FINE CARD MADE ☒8. TRAFFIC VIOLATION COPY ☒

ACTION OF GRAND JURY

*True Bill*Foreperson of Grand Jury
Date: *17 Jul 09*

VERDICT

*GUILTY*Foreperson of Petit Jury
Date: *17 Jul 09*

R211112014

09-GS-42-3609

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

July 20, 2009

TERM

THE STATE
vs.

RICKY LEE BLACKWELL, SR.

Indictment for
KIDNAPPING

SC Code: 16-03-910

CDR Code: 0095

Class FEL-A

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

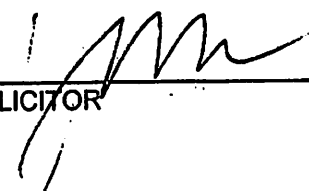
INDICTMENT

At a Court of General Sessions, convened on July 17, 2009, the
Grand Jurors of Spartanburg County present upon their oath:

KIDNAPPING

The Defendant, Ricky Lee Blackwell, Sr., did in Spartanburg County, on or about July 8, 2009, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Heather Br [REDACTED] without authority of law, all in violation of Section 16-3-910, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

T. K. T. T. T.
8. TRAINING ACTION COPY

**7. ASSESSMENT AND
FINE CARD MADE**

6 CHECKED SIGNATURE

~~S. CHICKEN~~

ARREST WARRANT NUMBER

M-088424

3. CARD PULLED

~~2. REPORT ENDED~~

1. SENTENCE MADE

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

VERDICT

GUILTY

Foreperson of Petit Jury

Date: 12 MAY 2014

09-GS-42-3610

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JULY 20, 2009 TERM

THE STATE
vs.

RICKY LEE BLACKWELL, SR.

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

APR 27 11:51 AM '61
JANE RICHES

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

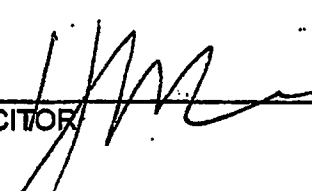
INDICTMENT

At a Court of General Sessions, convened on July 17, 2009, the
Grand Jurors of Spartanburg County present upon their oath:

MURDER

The Defendant, Ricky Lee Blackwell, Sr., did in Spartanburg County on or about July 8, 2009, feloniously, willfully, and with malice aforethought, kill one Heather Brooke [REDACTED] by shooting her, and the victim died as a proximate result thereof, all in violation of Section 16-3-0010, 0020, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.


SOLICITOR

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

ORIGINAL
RECEIVED
FEB 27 2018
S.C. SUPREME COURT
RESPONDENT,

V.

RICKY LEE BLACKWELL,

APPELLANT

Appellate Case No. 2014-000610

MOTION FOR A STAY OF EXECUTION AND
FOR THE APPOINTMENT OF A
POST-CONVICTION RELIEF JUDGE

Counsel for Ricky Lee Blackwell moves this Court for a stay of execution and to appoint a post-conviction relief judge so that post-conviction counsel can be appointed by that judge.

I.

This Court affirmed petitioner's convictions and death sentence in State v. Ricky Lee Blackwell, 420 S.C. 127, 801 S.E.2d 713 (2017).

II.

A petition for writ of certiorari to the United States Supreme Court, Ricky Lee Blackwell v.

South Carolina, No. 17-6882, was then filed on October 27, 2017. The Court denied certiorari in its order dated February 20, 2018. A copy of that order is attached to this motion as Exhibit A.

III.

Petitioner will raise numerous grounds of ineffective assistance of counsel in an application for post-conviction relief. See In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). In his application for post-conviction relief, while reserving the right to amend once counsel is appointed, petitioner intends to assert, at a minimum, the following grounds:

1.

Was defense counsel ineffective, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, in failing to investigate and present evidence on the circumstances surrounding petitioner's acquisition of a commercial driver's license, where this fact was used against him by the State to claim petitioner was not intellectually disabled?

2.

Was defense counsel ineffective, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, for failing to call the hospital chaplain to testify regarding petitioner's remorse, where such evidence was excluded by the trial judge when trial counsel attempted to introduce the chaplain's notes as a business record?

This list is not exhaustive, and will likely expand, once appointed post-conviction counsel has had the opportunity to investigate. The above grounds are merely offered to show that issues of ineffective assistance of counsel exist that petitioner intends to raise in this case.

IV.

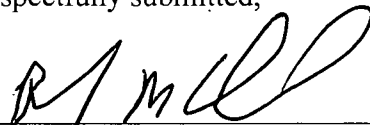
Present counsel cannot take a position on possible issues of ineffective assistance of appellate counsel. That is a matter for post-conviction counsel and the post-conviction court to determine.

VII.

Based on the above, petitioner requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel. This will allow petitioner to pursue his state court post-conviction relief action in the Spartanburg County Court of Common Pleas.

WHEREFORE, counsel for Ricky Lee Blackwell requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel so that petitioner can pursue post-conviction relief with the assistance of counsel in the Spartanburg County Court of Common Pleas upon the grounds of ineffective assistance of counsel, and any other grounds that may arise from post-conviction counsel's investigation of this case.

Respectfully submitted,

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

Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

February 27, 2018

EXHIBIT A

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

Scott S. Harris
Clerk of the Court
(202) 479-3011

February 20, 2018

Mr. Robert M. Dudek
South Carolina Commission on Indigent Defense
P.O. Box 11589
Columbia, SC 29211-1589

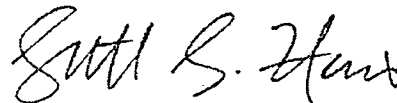
Re: Ricky Lee Blackwell
v. South Carolina
No. 17-6882

Dear Mr. Dudek:

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

The petition for a writ of certiorari is denied.

Sincerely,



Scott S. Harris, Clerk

RECEIVED

FEB 26 2018

APPELLATE DEFENSE

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

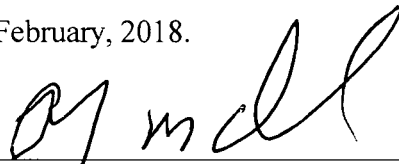
RICKY LEE BLACKWELL,

APPELLANT

Appellate Case No. 2014-000610

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion for a stay of execution and to appoint a post-conviction relief judge in the above-referenced case has been served upon opposing counsel, Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of February, 2018.



Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 27th day of February, 2018.

Paul Newberry (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA
In the Supreme Court

CAPITAL CASE

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

RECEIVED

MAR 02 2018

S.C. SUPREME COURT

The State of South Carolina,

Respondent,

v.

Ricky Lee Blackwell,

Petitioner.

Appellate Case No. 2014-000610

**RETURN TO MOTION FOR A STAY OF EXECUTION AND
FOR APPOINTMENT OF A POST-CONVICTION RELIEF JUDGE**

Respondent State of South Carolina hereby makes a Return to Petitioner's motion for a stay of execution and for appointment of a post-conviction relief judge. Based on the representations in the motion, it appears Petitioner can meet the conditions for the granting of a stay as outlined *In Re Stays of Execution In Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996); thus, Respondent does not oppose the motion. Further, Respondent does not oppose the assignment of a judge. In support of this position, Respondent would respectfully show the Court:

1. In *In Re Stays of Execution In Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), this Court set out the circumstances under which such a stay would be appropriate. The Court will generally grant a motion for stay requested "within ten (10) days of the date of the issuance of the execution notice" that "set[s] forth the issues intended to be raised in the application for

post-conviction relief....” *Id.*, 321 S.C. at 546, 471 S.E.2d at 141.¹ The Court will also “assign a circuit judge to the case” who will hold a hearing not more than thirty (30) days from the stay of execution to “determine the defendant’s desires regarding counsel and issue an order” regarding appointment of counsel. *Id.*

2. While the execution notice has not yet been issued, the direct appeal concluded when the Supreme Court of the United States denied Petitioner’s petition for writ of certiorari on February 20, 2018. (Motion, p. 2 and Exhibit A). There is no further step available for direct appeal review; however, Petitioner does have post-conviction remedies available should he choose to pursue them. Petitioner has offered at least one potential issue of ineffective assistance of trial counsel in his motion which he asserts will be raised in an application for post-conviction relief. (Motion, p. 2). Generally, these types of claims are appropriate for post-conviction relief actions under the Uniform Post-Conviction Relief Act. *See, e.g., Al-Shabazz v. State*, 338 S.C. 354, 367,

¹ The relevant portion is quoted below with the addition of the bracketed phrase which is not included in the Westlaw copy, but is part of the original Order:

If the defendant desires a stay to pursue state post-conviction relief, the defendant must, within ten (10) days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief. **[If the general nature of the issues are appropriate for post-conviction relief]**, this Court will assign a circuit judge to the case and issue a stay of execution. Within thirty (30) days of the date of the stay order, the judge shall determine the defendant’s desires regarding counsel and issue an order which either sets forth the name of the counsel that the defendant has retained, appoints counsel for the defendant if he or she is indigent, or determines that the defendant will be allowed to proceed *pro se* based on a knowing and intelligent waiver of the right to counsel after being warned of the dangers and disadvantages of proceeding *pro se*...

527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(a), and finding “A typical PCR claim of ineffective assistance of counsel falls into this category....”). Therefore, having generally met the requirements for a stay as set forth in *In re Stays*, Respondent does not oppose Petitioner’s motion for a stay of execution.

3. Moreover, as *In re Stays* provides for the appointment of a post-conviction relief judge, Respondent likewise does not oppose this portion of Petitioner’s motion.

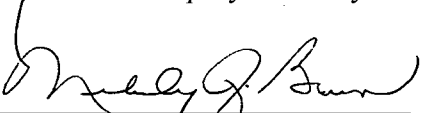
THEREFORE, for all the foregoing reasons, Respondent does not oppose the requested stay of execution and appointment of a post-conviction relief judge.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

BY: 

MELODY J. BROWN
SC Bar No. 14244

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

March 2, 2018.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Supreme Court

CAPITAL CASE

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

RECEIVED

MAR 02 2018

S.C. SUPREME COURT

The State of South Carolina,

Respondent,

v.

Ricky Lee Blackwell,

Appellant.

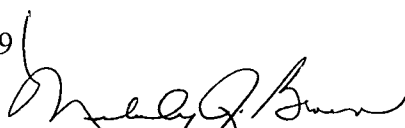
Appellate Case No. 2014-000610

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served Respondent's *Return to Motion for a Stay of Execution and for the Appointment of a Post-conviction Relief Judge* on Petitioner by depositing one copy of same in the United States mail, postage prepaid, to counsel of record, addressed as follows:

Robert M. Dudek, Chief Appellate Defender
David Alexander, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

This 2nd day of March, 2018.


MELODY J. BROWN
Senior Assistant Deputy Attorney General
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

The State, Respondent,

v.

Ricky Lee Blackwell, Appellant.

Appellate Case No. 2014-000610

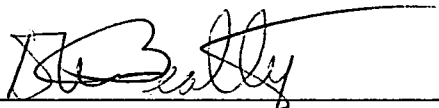
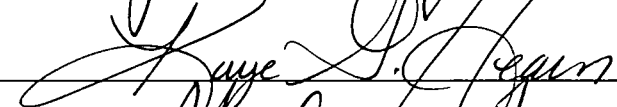
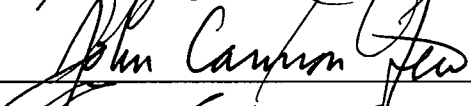
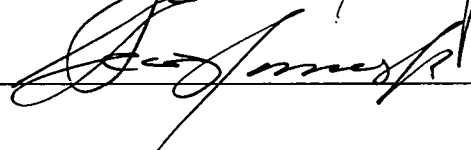
ORDER

Appellant was convicted of kidnaping and murder, and was sentenced to death. *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017). On February 20, 2018, the United States Supreme Court denied appellant's petition for a writ of certiorari. Appellant now seeks a stay of execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not oppose the motion.

The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases*.

The Honorable Daniel Hall is hereby assigned to the PCR action appellant has filed. Judge Hall shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled. Judge Hall shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge Hall shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court, and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under *In re Stays of Execution in Capital Cases, supra*, Judge Hall is requested to provide the Clerk of this Court

and Court Administration with an update on the status of this matter every one hundred and twenty days.

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina

March 29, 2018

cc:

Robert Michael Dudek, Esquire
Barry Joe Barnette, Esquire
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
David Alexander, Esquire
John W. McIntosh, Esquire
Donald J. Zelenka, Esquire
Lindsey Danielle Jacobs, Esquire
Patricia Standaert Ravenhorst, Esquire
Meliah Bowers Jefferson, Esquire
The Honorable M. Hope Blackley
The Honorable Daniel Hall
South Carolina Court Administration

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Ricky Lee Blackwell, #6033,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.

2018CP4200928

APPLICATION FOR POST-
CONVICTION RELIEF

CLERK OF COURT
SPARTANBURG COUNTY
2018 MAR 14 PM 2:23
HOPE BLACKLEY

1. Place of Detention: Kirkland Correctional Institution, 4344 Broad River Rd, Columbia, SC 29210.
2. Name and location of Court which imposed sentence: Spartanburg County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2009-GS-42-3910—murder; 2009-GS-42-3609—kidnapping.
5. The date upon which sentence was imposed and the terms of the sentence: March 12, 2014 - death sentence for murder; kidnapping sentenced subsumed in death sentence.
6. A finding of guilty was made: after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. The Courts to which applicant appealed:
 - (a) The Supreme Court of South Carolina.
 - (b) The Supreme Court of the United States.

The result in each Court to which applicant appealed:

- (a) Sentence and conviction affirmed.
- (b) Petition for Writ of Certiorari denied.

The date of each result:

- (a) May 31, 2017.

(b) February 20, 2018.

Citations of any written opinion or orders entered pursuant to such results:

- (a) *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (S.C. 2017).
- (b) *Blackwell v. South Carolina*, 138 S. Ct. 491 (2017).

9. Not applicable.

10 & 11 GROUND(S) FOR RELIEF WITH SUPPORTING FACTS

10(a) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during his *Atkins* (intellectual disability) and sentencing hearings.**

11(a) **Supporting Facts:** Counsel failed to investigate, develop, and present a constitutionally adequate case that Applicant was a person with intellectual disability who could not be executed pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Counsel's performance was both unreasonable and prejudicial, *see Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

- (1) Counsel failed to investigate and present evidence that purported IQ scores in the developmental period were not valid measures of intellectual functioning, *see Hall v. Florida*, 134 S. Ct. 1986 (2014); *Wiggins v. Smith*, 583 U.S. 510 (2003);
- (2) Counsel failed to investigate the circumstances under which Applicant obtained a commercial driver's license and other certifications relied upon by the State to argue he was not a person with intellectual disability; *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- (3) Counsel failed to investigate, develop and present applicant's case for intellectual disability through a thorough investigation of Applicant's significantly subaverage intellectual functioning, deficits in adaptive functioning and onset before the age of 18, including but not limited to objecting to the trial judge's deviation from clinical consensus and practice in the determination that Applicant was not a person with intellectual disability. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

10(b) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the capital trial proceedings.**

11(b) **Supporting Facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

- (1) Counsel failed to call hospital chaplains to testify regarding Applicant's remorse shortly after the crime where records from the chaplains were excluded by the trial judge as inadmissible hearsay;
12. (a) Applicant has not filed any petition in state court other than the mandatory appeal to the South Carolina Supreme Court.
- (b) Applicant has not previously filed an application for post-conviction relief or petition for a writ of habeas corpus in State or Federal court.
- (c) Applicant has not filed any petitions to the United States Supreme Court other than the petition already specified *supra* in (8).
- (d) Applicant has not filed any motions, petitions, or applications in this or any other Court.
13. Not applicable.
14. Applicant has not raised any ground set forth in (10) in this or any other court.
15. Not Applicable.
16. These grounds rely on additional facts outside the record which was before the previous courts.
17. Applicant was previously represented by counsel.
18. Applicant was represented at trial by William Sean McGuire, South Carolina Commission on Indigent Defense, 1330 Lady St., PO Box 11433 Columbia, SC, 29211; Clay T. Allen, Spartanburg Circuit Public Defender, 366 N. Church St. Ste. 3000, Spartanburg, SC 29349, and Boyd Young, South Carolina Commission on Indigent Defense, 1330 Lady St., PO Box 11433 Columbia, SC, 29211.
- On direct appeal applicant was represented by Robert M. Dudek and David Alexander, of the South Carolina Office of Appellate Defense, 1330 Lady Street, Columbia, SC 29201.
19. Applicant seeks relief from his conviction and sentence.
20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully prepared by,

E. CHARLES GROSE

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LINDSEY S. VANN

Justice360
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Columbia, South Carolina 29201
(803) 765-1044

BY: Lindsey S. Vann

March 12, 2018

STATE OF SOUTH CAROLINA)

)

VERIFICATION

County of Richland)

)

CLERK OF COURT
SPARTANBURG COUNTY
2018 MAR 14 PM 2:23
M. HOPE BLACKLEY

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

Ricky L Blackwell

SWORN to and subscribed before me this 12th
day of March, 2018.

Lindsey S. Vann (L.S.)
Notary Public

My Commission Expires: 2/21/2024

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

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

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

Ricky L Blackwell
Applicant

SWORN or affirmed to and subscribed before me this
12th day of March, 2018.

Loddy John
Notary Public

My Commission Expires: 2/21/2024

CLERK OF DISTRICT COURT
SPARTANBURG COUNTY
2018 MAR 14 PM 2:23
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Ricky Lee Blackwell, #6033,	)	C/A No. 2018-CP-42-00928
	)	(Capital PCR)
Applicant,	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, pursuant to the provisions of S.C. Code § 17-27-160 (B), hereby makes a return to the application for post-conviction relief filed March 14, 2018.¹ In making the return, and in support of its motion, Respondent would respectfully show the Court:

PROCEDURAL HISTORY

Applicant, Ricky Lee Blackwell, was indicted by a Spartanburg County Grand Jury in July 2009 for the kidnapping and murder of eight-year-old [REDACTED] R. pp. 4829 - 4832 [indictments 2009-GS-42-3609 and 3610]). The State served and filed its notice of intent to seek the death penalty on August 11, 2011. The State subsequently served and filed its notice of statutory aggravating circumstances on June 8, 2012. William Sean McGuire, Esq., of the South Carolina Commission on Indigent Defense, Capital Trial Division, along with Clay T.

¹ The application was filed prior to the appointment of the PCR judge and appointment of counsel. On March 29, 2018, the Supreme Court of South Carolina appointed the Honorable Daniel Hall to preside over the PCR proceedings. On April 16, 2018, Judge Hall held a hearing to determine Applicant's desires on proceeding forward with post-conviction relief and for appointment of counsel. At that time the Court qualified and appointed counsel. It was also determined at the hearing that the return would be made within seven (7) days. Thus, the instant return is timely made.

Further, at the same hearing, the Court set a scheduling order. Therefore, the required status conference pursuant to S.C. Code § 17-27-160(C) has been satisfied in advance of the filing of this return, and Respondent does not make a contemporaneous request for same.

Allen, Public Defender for the Seventh Judicial Circuit, represented Applicant on the charges. S. Boyd Young, Esq., also of the South Carolina Commission on Indigent Defense, Capital Trial Division, assisted during trial. The Honorable Barry J. Barnette, Solicitor of the Seventh Judicial Circuit, with Deputy Solicitor Derick B. Bulsa, and Assistant Solicitor Russell Ghent represented the State. The South Carolina Supreme Court assigned the Honorable Roger L. Couch exclusive jurisdiction over the capital proceedings.

On February 19, 2014, a hearing began pursuant to *Franklin v. Maynard*, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003), on Applicant's claim of intellectual disability.² Judge Couch heard competing opinions and arguments over three days. After detailed questions of his own, Judge Couch resolved Applicant had failed to carry his burden of proof of showing intellectual disability by a preponderance of the evidence. (Supp. R. pp. 1-14 [February 25, 2014 Order]).

After expanded capital *voir dire* proceedings, a jury was selected and a capital trial began on March 11, 2014. The case was sent to the jury on March 12, 2014. The jury began deliberations at 4:08 pm and returned a guilty verdict at 4:29 pm. (R. p. 2600, lines 18-20; p. 2602, lines 1-8). Applicant waived the statutory twenty-four (24) hour break afforded between phases, and the penalty phase began at 1:30 pm on the afternoon of March 13, 2014. (R. p. 2603, line 15 – p. 2604, line 18; p. 2606, line 21 – p. 2607, line 13). At the conclusion of penalty phase deliberations on March 16, 2014, the jury returned. The jury's first finding reflected Applicant failed to show by a preponderance of the evidence that he was intellectually disabled (R. p. 3257, lines 16-22). The jury's second finding reflected the State had proven beyond a reasonable doubt, the following circumstances in aggravation:

² Respondent acknowledges this specific condition is now termed "intellectual disability," but was previously known as "mental retardation." See *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). As the term "mental retardation" was used throughout the trial and in Applicant's appellate brief, Respondent will occasionally use the prior term as it was previously used.

- 1) The murder of a child eleven years of age or under;
- 2) The murder was committed while in the commission of the crime of kidnapping.

(R. p. 3257, l. 23 – p. 3258, l. 11).³

The jury made its binding recommendation that Applicant be sentenced to death. (R. p. 3258, lines 12-25). Judge Couch thereafter sentenced Applicant to death, noting the sentence for kidnapping was subsumed by statutory provisions. (R. p. 3262, line 14 – p. 3263, line 5; R. pp. 4823 and 4825). On March 20, 2014, Judge Couch denied post-trial motions. Applicant served his notice of intent to appeal on March 21, 2014.

Applicant originally filed an initial brief on January 8, 2015. The State moved to seal or strike his brief; moved to strike the designation of matter; moved for “An Order to Prohibit Inclusion of Privilege Medical Records of a Witness and/or Information from the Privileged Records in the Briefs and the Record on Appeal,” and also for an order directing him to file an amended initial brief consistent with any such order.

On May 20, 2015, the Supreme Court of South Carolina granted in part and denied in part, the State’s motion. The Court directed Applicant to file a redacted brief omitting reference to privileged records, and to submit the records under seal.

On March 7, 2016, Applicant filed his redacted final brief of appellant, and his redacted final reply brief. (Attachments 2 and 4). He raised the following issues on appeal:

1.
[Redacted]
2.
[Redacted]

³ See S.C. Code Ann. § 16-3-20 (C)(a)(10) and (C)(a)(1)(b).

3.

Whether the trial court erred in finding that appellant was not mentally retarded at the pretrial hearing pursuant to *Atkins v. Virginia* and *Franklin v. Maynard*, and therefore sentencing appellant to death violates his rights under the Eighth Amendment?

4.

Whether the trial court erred in refusing to charge the jury that the state had the burden to prove appellant was not mentally retarded beyond a reasonable doubt and, alternatively, charging the jury that it was required to find appellant was mentally retarded by a preponderance of the evidence, all of which impermissibly shifted the burden of proof to appellant and resulted in verdict forms that were hopelessly confusing in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution?

5.

Whether the trial court erred in refusing to admit evidence of appellant's remorse contained in the records of a hospital chaplain pursuant to Rule 803(6), SCRE, in mitigation, and in response to testimony from a police officer who claimed appellant said "the only thing that I'm sorry about is that I didn't do a better, job on myself," since the exclusion of this relevant evidence violated appellant's Eighth Amendment rights?

6.

Whether the court erred by ruling the state presented racially neutral reasons for striking black male jurors Cheeks and Fullenwider where the state did not strike similarly situated white jurors who also had a criminal record, or had pending criminal charges in the same county, and the treatment of alleged "pro-life" black and white jurors by the solicitor was also disparate?

7.

Whether the court erred by qualifying Juror #43, Donna Champion, because her position that the defense had to prove appellant deserved a life sentence rather the death penalty was burden shifting, inconsistent with the law, and her entire voir dire showed she would not consider certain categories of mitigating evidence?

(Attachment 2, pp. 7-8).

Respondent also filed its redacted brief in response on March 7, 2016. (Attachment 3).

In an opinion issued on May 31, 2017, the Supreme Court of South Carolina affirmed the convictions and sentence. *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017). (See also Attachment 5). Applicant did not seek rehearing. Applicant next petitioned the Supreme Court of the United States for a writ of certiorari on October 27, 2017.⁴ Applicant presented the following issues:

1.

In concluding that petitioner, whose IQ was scored at 63 and 68 by both sides' expert witnesses, is not intellectually disabled and his execution not forbidden by the Eighth Amendment, did the South Carolina Supreme Court's blatant disregard for expert opinion and methodology violate this Court's precedents in *Hall v. Florida* and *Moore v. Texas*?

2.

(Redacted pursuant to Motion to File Petition for Certiorari and Appendix Under Seal)

(Attachment 8, Petition for Writ of Certiorari, p. i).

Respondent filed a Brief in Opposition on December 27, 2017. (Attachment 9).

Respondent's restatement of the questions presented was as follows:

1.

Where a trial court critically examines the evidence presented by competing expert testimony on the issue of intellectual disability within the recognized clinical framework and assessing credibility based on same, does either *Hall v. Florida* or *Moore v. Texas* mandate that the capital defendant's expert be credited?

2.

Does the Confrontation Clause bestow the right to unfettered access and unconditional use of a witness's privileged

⁴ In the interim, Applicant moved in the Supreme Court of South Carolina to unseal the briefs and record on appeal. The State opposed the motion. By Order dated September 1, 2017, the Supreme Court denied the motion to unseal the briefs and record on appeal. For the convenience of this Court, Respondent notes all the publically available filings may be accessed through the South Carolina Appellate Case Management C-Track database as made available on the S.C. courts judicial website, <http://ctrack.sccourts.org>. (Appellate Case No. 2014-000610).

mental health records for any reason? If so, did the Supreme Court of South Carolina err in establishing a procedure by which a defendant is to request the records, with notice to the individual who holds the privilege, for initial consideration by the court in order to balance the need for release with the privilege of privacy?

(Attachment 9, p. ii).⁵

Applicant's petition to the U.S. Supreme Court was denied February 20, 2018.

(Attachment 10).

Attached and incorporated by reference are the following documents:

1. Redacted, non-sealed volumes of Record on Appeal (Vols. 1-7);
2. Redacted, Final Brief of Appellant;
3. Redacted, Final Brief of Respondent;
4. Redacted, Reply Brief;
5. Opinion No. 27722 (S.C. Sup. Ct. filed May 31, 2017);

⁵ Respondent noted that it declined, again, to review the privileged materials submitted under seal to the Supreme Court and would rely upon matter in the published opinion:

In his petition to this Court, Petitioner attached another copy of the privileged mental health records and asked they be accepted under seal. (See Motion for Leave to File Petition for Certiorari and Appendix Under Seal). Respondent State of South Carolina has not reviewed those records either at trial or on appeal. Respondent has consistently maintained that would be a violation of the privilege that has been continually upheld. However, the legal issue is clearly before the Court and may be easily considered by reliance on the facts and summaries contained in the direct appeal opinion which Petitioner did not challenge by way of a petition for rehearing. Thus, the uncontested summary is adequate and provides the essential facts. It is those facts which Respondent relies upon without further damage to the privilege.

(Attachment 9, p. 18).

Similarly, Respondent maintained this position at the initial hearing before this Court on April 16, 2018. Respondent advised the PCR court that there were privileged documents included in the direct appeal, and that Respondent would rely only on the public record in making its return.

6. June 16, 2017 Remittitur;
7. Order, Supreme Court of South Carolina, dated September 1, 2017 (denying motion to unscal);
8. Redacted, Petition for Writ of Certiorari (SCOTUS);
9. Brief in Opposition (SCOTUS);
10. Notice of Denial of Petition for Writ of Certiorari (to SCSC from SCOTUS), dated February 20, 2018.

STATEMENT OF FACTS

A Spartanburg County jury found Applicant guilty of the kidnapping and murder of eight-year-old [REDACTED]. After hearing all the evidence of the crime, and the evidence submitted in the separate sentencing proceeding, the jury recommended a sentence of death. The jury considered the following facts in guilt and sentencing:

Guilt Phase

On July 8, 2009, William Meyer, a patrol deputy with Spartanburg County Sheriff's Office, received a call at approximately 3:00 in the afternoon. He was advised a child had been shot at a home in the Chesnee area of Spartanburg County. When he arrived just minutes later, he saw a woman frantically trying to direct him to the child. The child was lying face down on the ground near the front of a vehicle. The child was not responsive. Deputy Meyer noticed a "red spot" on her back, then a "gaping wound ... on her left leg." While attempting to check her pulse, Officer Meyer "realized there was blood pouring out of [her] ear." There were no signs of life. He called for assistance. (R. p. 2357, lines 1-23; p. 2374, lines 4-11; p. 2376, lines 12-16). He then met the visibly shaken homeowner, M [REDACTED] who informed Deputy Meyer that Ricky Blackwell was the shooter. (R. p. 2358, lines 1-21; p. 2363, lines 9-12). Deputy Meyer testified

he was also informed of Applicant's "direction of travel" which was behind the residence and directed other responding deputies toward the area. (R. p. 2363, line 16- p. 2364, line 6).

Deputy John Smoak testified that he arrived after Deputy Meyer. He testified that he also checked [REDACTED] for signs of life and did not find any. (R. p. 2493, line 14 – p. 2494, line 2). Armed with a description of Applicant, he then searched the area and was joined by other officers. (R. p. 2494, lines. 4-23; 2498, lines. 1-14). Applicant came out of the wood line toward the officers. He was still armed. (R. p. 2498, line 17 – p. 2499, line 10). He stayed behind a children's play set, out of sight of the officers. Applicant eventually placed the gun at his abdomen and shot himself. Though repeatedly instructed to drop the gun, he did not do so until the gun slipped from his hand after he shot himself. (R. p. 2500, line 4 – p. 2501, line 23). Deputy Smoak retrieved and secured the gun. (R. p. 2501, lines 19-21; p. 2502, lines 5-17).

[REDACTED] witnessed the shooting [REDACTED] was formerly married to Applicant. Since their separation, Ms. [REDACTED] had been seeing [REDACTED] father [REDACTED] (R. p. 2378, line 24 – p. 2379, line 2; p. 2396, line 23- p. 2397, line 16). The day of the murder, [REDACTED] testified that she had [REDACTED] with her, and had intended to pick up her grandchildren to return to [REDACTED] home for them to play. (R. p. 2381, lines 14 – 24). As she arrived at her daughter [REDACTED] home, not seeing a car, she was turning to leave. She testified "Ricky jumped out and flagged me down, and he said I thought you was picking up the boys," and she replied she was, but her daughter's car was not there. (R. p. 2382, line 25 – p. 2383, line 4). She testified Applicant told her the grandchildren were with their father in the home "waiting for you." (R. p. 2383, lines 5-7). She turned back around and headed back toward the home. When stopped, she saw a small dog and turned to [REDACTED] saying, [REDACTED], honey, don't get out of this car until I get this dog cause I don't want you to get dog bit." [REDACTED] stayed in the car and [REDACTED]

exited and grabbed the dog. As she "turned back around he had her." (R. p. 2383, lines 11-23). Applicant, still upset at the breakup of his marriage, grabbed the child, held her, and pointed a gun at the child's head. [REDACTED] testified that she pleaded with Applicant to take her instead of the child. (R. p. 2386, lines 1-11). Ms. [REDACTED] testified:

... he was walking around the car and I was screaming let her go, Ricky, please, its me you want, take me, and let [REDACTED] take her home, and he said no and he took the gun and pointed it toward -- on the car, and he said you've pushed this too far. You did this. You tell me what Bobby thinks of this, and then the gun went off, and then it went off again.

(R. p. 2386, lines. 9-15).

[REDACTED] testified she saw Applicant place the child on the ground and she ran into her daughter's home to call 911. She grabbed her granddaughter, who was crying, and ran out the back of the home. She heard another shot. She ran. Applicant followed. She testified a neighbor let her in and she called 911 once again. (R. p. 2386, line 17- p. 2387, line 25). She identified not only Applicant, who had asked them to go to their daughter's home that day, but also the gun he used. It was a gun she had purchased for him "earlier in our marriage" as a gift. (R. p. 2388, lines. 14-15; p. 2392, lines. 9-18; p. 2393, line 22 – p. 2394, line 14).

[REDACTED] the Blackwells' son-in-law, confirmed that Applicant was in the area around the home earlier that day. (R. p. 2471, line 18 – p. 2472, line 16). He also confirmed he saw [REDACTED] pull into the yard and told his sons that their grandmother has arrived. He testified by the time he turned back around and went to the door, he saw Applicant with his arm around [REDACTED]'s neck/chest area and saw a gun. (R. p. 2474, line 14- p. 2475, line 25; p. 2487, line 24 – p. 2488, line 3). He tried to pull his children back into the home and heard two shots. (R. p. 2476, line 9 – p. 2477, line 8). He testified his mother-in-law went in the house as he was trying to get his children inside, and she called 911. (R. p. 2477, lines 10-24). He testified his

mother-in-law ran out the back with his daughter and he picked up the phone and spoke to the 911 operator. She told him to check on the child, which he did [REDACTED] was face down and not moving. (R. p. 2477, line 12- p. 2479, line 15). He confirmed that Applicant ran after his mother-in-law across the back of the home. (R. p. 2478, lines 11-15; p. 2483, lines 20-25). Mr. [REDACTED] testified that he told the responding officer that Applicant had shot [REDACTED] and described Applicant. (R. p. 2480, line 17 – p. 2481, line 15). He testified that [REDACTED] had been married to Applicant's daughter for approximately fifteen (15) years at the time of trial, (R. p. 2471, lines 1-7), and knew Applicant had a gun, but had only seen the gun two times – “when I first met my wife, and the day of the incident.” (R. p. 2478, lines 16-18).

Pathologist David Wren testified that he conducted the autopsy of [REDACTED] on July 9, 2009. (R. p. 2536, lines 7-10). Dr. Wren recorded the following injuries:

... There were nine gunshot wounds to the body... some of them were through and through and the reentries. Specifically there was a gunshot wound to the right side of the head that exited in the left temple. There was a gunshot wound in the right cheek, a grazing gunshot wound and a deep grazing wound in the right neck that went under the skin and came back out and went in her left arm where it fractured her humerus and I recovered a bullet from that area, and then she had a gunshot wound in the back that communicated with the one on her cheek, and she had a through and through gunshot wound to the left leg.

(R. p. 2537, lines 3-15).

From tracking the injuries to the child's body, Dr. Wren opined there were four gunshots: “One to the head, one to the back, one to the leg and a grazing” wound to the cheek and neck which went into her arm. (R. p. 2540, line 13 – p. 2541, line 8). He opined:

... the immediately fatal wound was the one to the head. Any, any of those individually or collectively could of caused her death. If they're not immediately fatal, there are lots of complications that can occur. So, we actually assigned those as potentially fatal if

they're not immediately fatal. So, I put down the cause of death as gunshot wounds to the head and body.

(R. p. 2541, lines 11-17).

Suzanne Cromer of the South Carolina Law Enforcement Division ("SLED") was qualified as expert in the field of ballistics and tool mark identification. (R. p. 2558, lines 4-7). She opined the bullet recovered from the child's body was fired by the gun recovered from Applicant. (R. p. 2559, line 16 – p. 2561, line 13). That particular gun would require "three and a quarter to 4 pounds" for single action firing, and "ten and three-four[th]s pounds to eleven and fourth pounds of pressure" for double action firing. (R. p. 2562, line 1 – p. 2563, line 11).

The State argued not just that Applicant shot the child, but that he "finish[ed] off" the child, shooting her four times to ensure she was dead. (R. p. 2576, lines 9-11). The defense conceded guilt, but attacked [REDACTED] testimony, accusing her of using Applicant for money after their separation and embellishing her testimony to demonstrate her "heroic" action during the shooting. (R. p. 2578, line 10- p. 2579, line 11).

The case was sent to the jury on March 12, 2014. The jury began deliberations at 4:08 pm and returned a guilty verdict at 4:29 pm. (R. p. 2600, lines 18-20; p. 2602, lines 1-8). The jury then turned their attention to the sentencing evidence.

Penalty Phase

As noted, the jury considered the above facts and found Applicant guilty of the kidnapping and murder of eight-year-old Brooke. The above evidence was also moved into the penalty phase. (R. p. 2608, lines 13-25).

In addition, the State presented a glimpse of the young victim's life. The State presented [REDACTED] baseball coach. [REDACTED] testified that "[REDACTED] was the only girl on the team, and was friends with [REDACTED]s son. The eight-year-old was the son's first "girlfriend,"

and the two would “hold[] hands in the outfield.” (R. p. 2626, line 13- p. 2627, line 12). He described her play and in particular her first run. (R. p. 2628, line 1- p. 2629, p. 14). N [REDACTED] also described the memorial for her at the sports complex. (R. p. 2630, line 7 – p. 2631, line 15).

The State also presented N [REDACTED] the principal at Reidville Elementary School, the elementary school eight-year-old Brooke attended [REDACTED] testified that she had known [REDACTED] from kindergarten through the end of second grade, after which she was listed as “withdrawn” due to her death. (R. p. 2633, lines. 6-18). [REDACTED] testified that [REDACTED] was a loving child, with “a special spark and a special light that the children felt and knew,” a leader even at an early age, demonstrating “integrity ... kindness, and caring.” (R. p. 2633, line 6 – p. 2635, line 24). She testified that [REDACTED] parents had been outstanding, “not a single bit of negativity and a whole heck of a lot of love,” even when going through a hard time personally (apparently referencing the couple’s separation), and that [REDACTED] “saw that and felt that too.” (R. p. 2636, lines 5-25). [REDACTED] also testified [REDACTED] murder was difficult for the faculty, especially in trying to begin a new school year without her, and they honored her memory in a ceremony at their science center, and in an annual. (R. p. 2637, lines 1-19; p. 2638, lines 14-24). She testified [REDACTED] was an outstanding and loving student. (R. p. 2639, line 9 – p. 2641, line 4).

As to Applicant, the State presented evidence of Applicant’s indictment for breaking into a gasoline tank and petty larceny, and his 1981 guilty plea to those charges, (R. p. 2647, lines 3-24), and two disciplinary actions in the Spartanburg County Detention Facility (possession of contraband – Clorox in a baby bottle – and possession of contraband – unauthorized medication, hoarding medication in a candy wrapper), (R. p. 2650, line 4 – p. 2651, line 21; p. 2655, lines 2-22).

As to the circumstances of the crime, in addition to the incorporated evidence, the State presented [REDACTED] Mrs. [REDACTED] testified that her daughter and [REDACTED] were with her the morning of the crime, and she had fixed breakfast for them. Mrs. [REDACTED] testified Applicant initiated a conversation about insurance; [REDACTED] advised she intended to take a three month leave of absence and each of them would have to pay \$100.00 a month to keep the insurance active. She testified that Applicant then requested [REDACTED] "go over there and see the grandbabies today," [REDACTED] agreed to do so. Applicant left at that time stating he was "leaving to go pay some bills, and he was gonna go shopping." She testified her husband [REDACTED] asked Applicant to stay and play cards, but he declined citing other obligations. However, he promised to return. [REDACTED] explained that her husband and Applicant often played rummy together. She also testified that it was not her impression that Applicant was "grieving" over the breakup of his marriage, and noted that he came over almost every day, and was "kidding with [REDACTED] laughing and joking and cutting up and playing cards and stuff." (R. p. 2658, lines 2-9; p.2662, line 19 – p. 2666, line 17).⁶

⁶ The defense objected to [REDACTED] testimony on the basis that it corroborated Ms. Davis' testimony from the first phase. However, as the State correctly argued, the testimony went to premeditation, essentially, the extent of malice, which is a proper sentencing phase consideration. *See, e.g., State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003) ("The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender."). The State noted that the defense had essentially conceded guilt in the first phase and it was unnecessary to call all available witnesses at that time. The defense conceded the evidence was otherwise admissible, but objected at this point only because it had not been submitted previously. The judge rejected the argument and allowed the testimony. (R. p. 2659, l. 9- p. 2662, l. 6). The defense also attempted to keep the photographs of Brooke away from the jury determining sentencing, arguing "all these photographs ... depicting these wounds on this very young child, they all invoke the Fourteenth Amendment, due process clause, because they're so prejudicial and it renders the, the penalty phase fundamentally unfair" and, given "the concession of guilt," they were "not necessary to prove anything at all." (R. p. 2701, line 19 – p. 2703, line 17).

Deputy Micah Horton testified that he stood by Applicant at the crime scene while EMS treated him for his self-inflicted gunshot wound. He testified Applicant asserted, without questioning or prompting by anyone: "... I shouldn't have done it, not to get back at him...." (R. p. 2669, lines 2-15).

Reserve Officer Tim Timmons testified that he was instructed to ride in the ambulance with Applicant. He testified that he consulted with the EMT to determine if Applicant was in jeopardy of dying and wanted to give him the opportunity to give a statement. He did so and Officer Timmons read Applicant his Miranda rights which Applicant acknowledged and waived. Officer Timmons asked what had happened and Applicant responded: "... my ex-wife drove up and I grabbed her boyfriend's little girl..." The office asked Applicant to identify the little girl, to which he replied, "... I called her Brooke." (R. p. 2676, line 6 – p. 2677, line 10).

Investigator Lorin Williams testified he went directly to the hospital after receiving information Applicant was being transported. He testified, after checking with medical personal to ensure Applicant was stable and not heavily medicated, that he read Applicant his Miranda rights which Applicant acknowledged. (R. p. 2682, line 8 – p. 2684, line 17). He then asked Applicant what happened and why. Applicant responded:

... he and his wife had been having problems, and that he was trying to get her to reconcile their marriage. Basically that, that she was continuously throwing up her boyfriend to him, and he said that, that he had been having sour thoughts about how to get back at this man for breaking up his marriage.

... he went on and I asked him about the sour thoughts. ... I told him, I said, well, you know, can you - - is there something that you can tell me, is there, is there a reason that you can give me to help me understand you know, how this could happened to a child of this age ...I need some help in helping me understand what, what would make you do this ... why this would happen. And he just basically said, again, you know, that ... it was his way of getting back at, at her dad for breaking up the marriage, and I said ... is

there something you can tell me, tell me it was an accident, tell, tell me you were sorry, tell me anything like that. And he just looked at me, he said the only thing that I'm sorry about is that I didn't do a better job on myself.

(R. p. 2684, line 19 – p. 2685, line 25). The investigator testified that Applicant never asked about [REDACTED] was okay, what her condition was, had, had no concern and showed no concern whatsoever for anything but, but his condition at that point.” (R. p. 2686, lines 1-6).

The State also called Dr. Wren to further discuss the injuries to [REDACTED]⁷ Dr. Wren discussed the nature of the wounds reflecting the details of the shots, including closeness of the shots and angles. (R. p. 2711, lines 15 – p. 2720, line 17). Dr. Wren opined the shot to [REDACTED] head was inflicted “probably very close, but not tight contact and most probably not loose contact.” (R. p. 2713, lines 3-8). Dr. Wren testified the shot to the back had abrasion characteristics that indicated consistency with being shot while bent over and falling down. (R. p. 2715, line 20 – p. 2716, line 22). The shot to the neck area indicated charring which comes from a contact wound, “... the barrel gets immediately hot and it burns the skin where it goes in.” (R. p. 2717, line 5 – p. 2718, line 14). The remaining shot was to [REDACTED] leg hitting “solid tissues” and exiting near her knee. (R. p. 2720, lines 8-19). Dr. Wren opined that given the nature of the wounds [REDACTED] would have been moving during some of the shots, with the inability to move after infliction of the head shot. (R. p. 2720, line 24; p. 2721, line 6). He confirmed that “these are not all exactly at the same time.” (R. p. 2721, lines 10-11).

⁷ The State carefully selected the additional photographs to be used in this phase in camera with the trial judge and defense counsel. (See R. p. 2692, line 13 – p. 2693, line 8). The trial judge placed on the record: “I’ll note, in making the ruling, that the State has shown restraint in presenting the photographs that they have presented by offering black and white photographs of the appropriate situations, and also not a seeking to introduce a rather large number of similar photographs in the case. The Court does note that in making its ruling.” (R. p. 2707, lines 15-21).

As further evidence of the details of the crime and how Applicant left [REDACTED] Sergeant David Hogsed identified and explained the pictures from the crime scene reflecting that (before being moved by EMS) [REDACTED] was face down on the ground. He identified another photograph that showed "basically the mid section to the top of her knees" reflecting injuries and that the child had "urinated on herself at the incident..." (R. p. 2728, line 3 – p. 2729, line 20).

Returning to [REDACTED], the State presented several other witnesses from the elementary school she attended. [REDACTED] was the school nurse who administered [REDACTED]'s asthma medication and would sooth the child as she struggled to breath. [REDACTED] testified to [REDACTED] smile, her beauty, maturity and love of flowers. She also testified that "her mom and dad were, were always available ... [v]ery protective, very caring, very loving towards [REDACTED]. Always, always there as soon as I needed them." (R. p. 2731, line 4 – p. 2732, line 23). Ms. [REDACTED] testified she could not "make it to the funeral. It was just really too hard for me," but she was able to go to the grave site and retrieve one of the flowers which she pressed and kept. (R. p. 2733, lines 13-20). She testified that Brooke's "dad painted [REDACTED] house bright yellow because that was her favorite color" and that "every morning [she would] pass [REDACTED] house going to work and I pass it in the afternoon and there's the bright yellow house," that "brings a smile to [her] face," reminding her of being "happy and cheerful," the "kind of child she was." (R. p. 2733, lines 21-25).

[REDACTED] second grade teacher, testified to her recollection of "just a precious, sweet, kind, loving little girl," and read a story that [REDACTED] had written, a story with emphasis on family fun and inspiration. [REDACTED] testified that [REDACTED]'s own parents, [REDACTED] a [REDACTED], "were very supportive, very loving," and she would see them not just at school but also at [REDACTED]'s baseball games. She testified Brook greatly enjoyed baseball, and she recalled

seeing the memorial to Brooke at the field. (R. p. 2736, line 9 – p. 2743, line 2). N [REDACTED] also shared a letter [REDACTED] wrote to a soldier to express thanks to the soldier as part of a class project. She testified she kept [REDACTED]'s letter to help other students the following year. She testified [REDACTED] "wanted everybody to be friends and she was a peacemaker," and that "she holds a special place in [her] heart." (R. p. 2744, line 6 – p. 2745, line 23). She noted, "... I feel like people that didn't know her were really robbed of a chance to get to know of a wonderful girl." (R. p. 2746, lines 3-5).

Defense Mitigation

The defense called [REDACTED] who testified she had been a work supervisor for both Applicant and his wife, [REDACTED]. (R. p. 2757, line 18 – p. 2758, line 21). [REDACTED] described Applicant as "gentle, humble," "very tender hearted," "compassionate," and a reliable compliant worker. (R. p. 2759, line 11 – p. 2760, line 2; p. 2770, lines 1-4). She described his "anguish" at the breakup of his marriage. (R. p. 2768, lines 12-24).

The defense also called Dr. Ginger Calloway to again make a presentation about intellectual disability. (R. p. 2810, lines 21-22). Dr. Calloway opined Applicant "fell into a mildly retarded range," and "this disability was manifested before the age of 18...." (R. p. 2915, lines 2-6). She testified in her opinion, Applicant was intellectually disabled. (R. p. 2916, lines 1-5).

Also for the defense, Dr. Donna Schwartz-Watts, an expert in forensic psychiatry, testified that she "treated [Applicant's] depression and his anxiety and helped to manage that in the detention center." (R. p. 2985, lines 7-10). She reviewed prior medical records treated Applicant at the Spartanburg County Detention Center, which included two psychiatric hospitalizations and a prior diagnosis of depression, testified:

... in my opinion, he's had a history of major depression before. He's had two episodes before when he was hospitalized, and it's clear, from looking at Doctor Jackson's records, that he remained depressed before this incident, and it's very clear that, since I treated him at the jail, he had had symptoms of depression as well.

(R. p. 2985, lines 10-18). She noted when asked about his thoughts about the murder:

...the words that he usually uses with me are he can't believe he's done this. It's very hard for him to accept what happened and what he's done, and he, he has a lot of anxiety. He has nightmares about it. He has a difficult time dealing with what he's done and he's very sad about it.

(R. p. 2987, lines 5-16).

The defense also presented Applicant's cousin [REDACTED] who testified Applicant was "like a brother" and was "loving," "gentle," and "always trying to help people." (R. p. 2990, line 17-23). She recounted kind gestures and family moments. She testified "we love him with all our hearts and need him. So, just understand he is a good man." (R. p. 2994, lines 1-3). Ms. [REDACTED] described her reaction to having heard Applicant had murdered the eight-year-old child: "It wasn't Ricky. They wasn't our Ricky. It was no way that was our Ricky. Something went wrong. It was not our Ricky that did that." (R. p. 2994, lines 6-10).

The defense also called [REDACTED] Applicant's daughter. She described her father as "a kind caring man" to her and the family, even taking in his son's "baby mama" when needed. (R. p. 3000, line 9- p. 3001, line 6). She testified Applicant loved his wife and treated her well, and that he loved and played with his grandchildren. (R. p. 3002, lines 3-24). She testified that as her mother began to see [REDACTED] s father [REDACTED], her mother began to change: "... she started drinking, she started smoking, she started dressing more inappropriately...." (R. p. 3004, lines 5-15). She testified that Bobby had a Harley Davidson motorcycle, and her mother got a tattoo on her lower back with "a Harley Davidson logo that said Harley in the middle of it."

(R. p. 3004, line 20 – p. 3005, line 2). [REDACTED] testified they had had a loving household before, and provided “a little clip” from home movies, which she then explained. (R. p. 3007, line 2 – p. 3009, line 17). She testified her father remains a religious man and has studied the Bible, even while incarcerated at the county jail. (R. p. 3009, line 19 – p. 3010, line 13). She also reviewed multiple family pictures, explaining the events and people. (R. p. 3011, line 20 – p. 3015, line 11). [REDACTED] testified her father still loves her mother and would accept her back if he could. (R. p. 3015, lines 18-22). She recalled when Applicant found out her mother was intimate with [REDACTED], Applicant left only to return minutes later with a “bottle of pills in his hand....” Both [REDACTED] and her mother attempted to ensure he would not harm himself. (R. p. 3017, lines 1-9). She described her mother as “mean” to him, having “bragged about having sex with Bobby,” and [REDACTED] would sympathize with Applicant. (R. p. 3017, line 22 – p. 3018, line 21). [REDACTED] testified she had advised her mother to call before coming to Ms. [REDACTED] house, and not to bring [REDACTED] because it hurts daddy ... and she told me she would not do that.” (R. p. 3019, lines 3-8). When asked if it hurt Applicant to see her mother “paying so much attention to [REDACTED] family and not you,” she responded, “Yes, sir, it did.” (R. p. 3019, lines 12-14). [REDACTED] testified her mother would call [REDACTED] her “new daughter,” her “perfect daughter,” and “angel.” (R. p. 3019, lines 15-21). She testified that her mother was not seeing her own grandchildren at that time. (R. p. 3019, lines 22-24). She previously testified her daughter has special needs. (R. p. 3003, lines 2-7). She concluded with telling the jury that Applicant:

... was always a kind, gentle, caring man. He was not the man that they're trying to make him out to be today. My daddy would of never done that. My daddy was pushed to the extinct (sic) to do what he did, and he regrets what he had done. He suffers from that every day.

(R. p. 3020, lines 7-11).

When asked if he cries about what he has done, [REDACTED] responded, "Yes, sir." (R. p. 3020, lines 12-13).

On cross-examination, [REDACTED] admitted her two sons witnessed the murder, the "oldest one witnessed it a little bit more," but they both had to receive counseling, and that it still affects them. (R. p. 3021, lines 8-22). She also admitted upon questioning that he played pool very well, having won several tournaments. (R. p. 3022, lines 1-6).

[REDACTED] testified for Applicant, as well. She was the "baby mama" Applicant took in and helped. She testified Applicant helped with the baby "did everything for him ... changed diapers, fed him, whatever there was to be done." (R. p. 3025, lines 17- p. 3026, line 13). She testified that she loves Applicant and described him as: "Amazing... great. Very kind hearted ... give the shirt off his back" kind of man. (R. p. 3026, lines 16-20). [REDACTED] left to live with Ir [REDACTED] testified that Applicant would come by to play cards with [REDACTED] and would express that he missed his wife and wanted her back. He was sad, and would plead with her to return. (R. p. 3027, line 9- p. 3028, line 13). She testified his wife would speak harshly to him in response. (R. p. 3028, lines 14-15). [REDACTED] testified Applicant was heartbroken over her leaving. (R. p. 3028, lines 16-20). She testified [REDACTED] changed her appearance after leaving, "dressing more like she was a teenager with some short clothes, low cut shirts." (R. p. 3028, line 21 – p. 3029, line 2). She testified [REDACTED] "started drinking and things like that, going to the bars." (R. p. 3029, lines 3-4). She would "flirt" with Applicant, but it only "hurt him a lot because she ... gave him hope" she would return. (R. p. 3029, lines 7-12). She testified Applicant had "been there" for her, that he was great, and "very kind hearted." [REDACTED] testified she was shocked and could not

believe that he murdered eight-year-old [REDACTED]. She had "never heard him argue with [REDACTED]." (R. p. 3029, lines 15-25).

[REDACTED] fellow church member with Applicant, testified Applicant was "a good friend, kind of easy going, laid back, but deliberate in his speech." He testified he "never knew him to be other than easy to get along with," and a gentle man. (R. p. 3031, lines 1-19). Mr. [REDACTED] testified Applicant loved his wife and treated her well. (R. p. 3031, line 20 – p. 3032, line 2). He recalled how Applicant "wept" in the parking lot while telling [REDACTED] about the breakup of his marriage, and [REDACTED] testified, "it jerked at my heart strings." (R. p. 3032, lines 7-10). [REDACTED] testified as to Applicant's religion, he "would say he was a good Christian believer in our midst." (R. p. 3033, lines 4-7). He, too, testified that he could not believe Applicant had murdered eight-year-old [REDACTED]. He stated he did not think Applicant could be stirred to anger. (R. p. 3033, lines 10-15). He stated Applicant was in "anguish" over the breakup. (R. p. 3035, lines 11-14).

Applicant's father, [REDACTED] testified that Applicant was a "good boy when he was a kid ... never give us any trouble...." (R. p. 3037, lines 23-25). He was humble ... good ... never did bother nobody." (R. p. 3038, lines 2-7). He testified Applicant loved his wife, his children and grandchild, and treated them well. He played with his grandchildren. (R. p. 3038, line 18 – p. 3039, line 6). [REDACTED] testified Applicant was "real depressed" and spent days crying when his wife left. [REDACTED] testified "he wasn't Ricky," agreeing with defense counsel that "he just wasn't the same man anymore." (R. p. 3039, lines 9-16). [REDACTED] testified that when [REDACTED] would come around, "it would tear him up." (R. p. 3039, lines 23-24). It would give him hope then cause despair. (R. p. 3040, lines 2-8). He testified that when he learned Applicant had murdered the child, "it tore me up" and he

"just couldn't believe it." (R. p. 3040, line 12). [REDACTED] also went through several photographs and explained their family and events. (R. p. 3041, line 6 – p. 3046, line 20). Mr. [REDACTED] asked the jury to spare his son's life, that he "was always a good boy" and "Ricky wasn't Ricky when this happened. Ricky wouldn't hurt nobody if he's, if he was in his right mind." He testified "Ricky wants to live till the Lord calls him home. I know it won't be no pleasant life, but he wants to live, and my sympathy goes out for the little girl's family." (R. p. 3047, lines 13-22). On cross-examination, M [REDACTED] admitted the gun Applicant used to murder [REDACTED] had been locked in a gun case at [REDACTED]'s home. Applicant had to go to [REDACTED] home to retrieve the gun before he could use it in the murder. (R. p. 3048, line 16 – p. 3052, line 4; p. 3054, lines 1-20).

The defense also presented [REDACTED] Applicant's brother-in-law. [REDACTED] is married to M [REDACTED]'s sister. He testified that Applicant was "always a really good person. Kind, gentle, like everybody said." (R. p. 3057, lines 9-11). After [REDACTED] left Applicant, Applicant would go by [REDACTED] salvage yard and garage business. He would help out, and no one had a "mean word" to say about him, nor did he have a "mean word" to say about anyone else. (R. p. 3057, line 17 – p. 3059). However, Applicant was so distraught over the breakup of his marriage that he became a distraction to the work. [REDACTED] son expressed that he considered not allowing Applicant to help in a later car sale event as Applicant's crying was a distraction. (R. p. 3059, line 4 – p. 3060, line 3). [REDACTED] testified he could not believe Applicant had shot an eight-year-old child, indicating "I don't know what happened, and I mean he done a bad thing ... it just wasn't ... Ricky...." (R. p. 3060, lines 8-23).

Applicant also presented [REDACTED] who had worked with Applicant and had grown close to both Applicant and [REDACTED] (R. p. 3062, lines 3-23). [REDACTED] testified

Applicant was distraught over the breakup.⁸ (R. p. 3064, lines 15-18). [REDACTED] testified that, on the day of the shooting, [REDACTED] stopped by her house with [REDACTED]. She introduced [REDACTED] as her daughter, and insisted [REDACTED] knew [REDACTED]'s father, [REDACTED] though Ms. [REDACTED] could not recall [REDACTED] (R. p. 3064, line 19 – p. 3067, line 7). She recalled that [REDACTED]'s appearance changed after she left Applicant. She testified [REDACTED] lost weight and began wearing short “Daisy Dukes” and bared her midriff. She also changed her hair color. (R. p. 3067, line 12 – p. 3068, line 17).⁹ [REDACTED] then returned to describing Applicant's character. She noted that Applicant had been very good to her husband as he was dying from cancer. (R. p. 3069, lines 2-13). She expressed that she “didn't believe it,” when she heard Applicant had shot a child. (R. p. 3069, lines 18-21). She testified she “struggled” with the news as the “Ricky [she] knew” would not have hurt a little girl. (R. p. 3073, lines 1-5).

[REDACTED] Applicant's pastor, also testified for the defense. [REDACTED] testified that Applicant had attended his church while his children were small, then began attending again when “Angie” left him. (R. p. 3072, line 7 – p. 3073, line 12). (See also R. p. 3085, line 14 – p. 3086, line 10; p. 3088, lines 9-22). [REDACTED] testified Applicant cried to him over the breakup and his emotional state began to deteriorate. Applicant lost weight and reported sleeping on the floor in his home. (R. p. 3073, line 15 – p. 3074, line 3). [REDACTED] testified that he advised Applicant:

... if this is what she wants to do you're not gonna win her back by chasing after her. She wanted money for rent, for an apartment that she had rented. He gave her money for food. I said you're

⁸ She would later testify in cross-examination that she did not know the cause of the breakup. (R. p. 3070, lines 15-20).

⁹ This testimony was allowed over the objection of the State. (R. p. 3067, line 24 – p. 3068, line 2). The State argued the testimony “has nothing to do with mitigation. It's just poor mouthing Angie.” (R. p. 3067, line 24 – p. 3068, line 1).

just helping the matter along. I mean she's not gonna come back as long as you're paying her way, and he finally went to his mom and dad's to spend the night....

(R. p. 3074, lines 6-12). He also identified several pamphlets that the church would provide so its members could use it in study at home which had belonged to Applicant. He recalled that he once took material to Applicant's home, and saw Applicant with a family Bible, and Applicant's wife with a dictionary and pad of paper. He testified "she was looking up words they didn't understand." (R. p. 3081, line 9 – p. 3083, line 7). After Applicant was incarcerated, [REDACTED] sent Applicant a children's Bible so he could better understand the scripture. (R. p. 3083, line 10-23). [REDACTED] testified he spoke with Applicant at the jail:

... the first time I went to the jail to talk with him, he honestly said, he said I did it, but I don't remember doing it. Said I only - - the first I remember of what happened I was in the hospital, and I talked to him about forgiveness. I told him that God forgave David for murder, and God can forgive him, and I took him down the road of repenting, and prayed with him, and he said he'd - - the burden of guilt was gone. The next time I went to see him he said I've - - God's forgiven me, but I can't forgive myself.

(R. p. 3084, lines 3-12). He testified that he was "surprised" to hear about the shooting. [REDACTED]

[REDACTED] testified: "I knew he was emotionally disturbed. He wasn't the man that I first met and - - but I couldn't believe he did it. I just couldn't believe it." (R. p. 3086, line 24 – p. 3087, line 1).

Lastly, Applicant called his mother, [REDACTED] who identified and presented more family photographs. (R. p. 3101, line 9 – p. 3104, line 18). She also testified that Applicant receives a multitude of letters and cards at the jail, and demonstrated a box full of items representing those items as a portion of the mail received. (R. p. 3105, lines 1-22). Further, she identified Applicant's voice on a telephone recording from the jail, and testified the conversation was between Applicant and "Angie's" father, [REDACTED] wherein he

expressed concern over M [REDACTED] failing health. (R. p. 3106, lines 2-6; p. 3192, lines 9-

17). She asked for mercy for her son:

He's a wonderful son ... if you only knew my son like I have for 55 years that he's been here with me you would say he's a wonderful son. I couldn't of asked for a better son than what I've got, and ... I just love to ask you to spare his life because I know that something happened to him that day, and he would of never did that to that child cause he loved children too good and children love him too good, and I'd love for y'all to spare his life.

(R. p. 3110, line 22 – p. 3111, line 5).

State's Reply

In reply, the State recalled [REDACTED] to clarify that he knew an individual by the name of [REDACTED] though he denied knowing such an individual earlier believing his name to be [REDACTED] (R. p. 3121, lines 10-22). He did not recall telling [REDACTED] that he had taken possession of Applicant's guns because he was afraid Applicant would hurt someone, or that Applicant had broken into the gun cabinet to obtain a gun. (R. p. 3122, lines 11-20).

[REDACTED] testified that he worked in trucking with [REDACTED] and went on many trips with him. He testified he was "very fond" of [REDACTED] and it was "extremely hard" to testify at the trial. (R. p. 3126, lines 14-25). Even so, [REDACTED] testified concerning a conversation with [REDACTED] on one trip approximately three weeks after the murder:

[REDACTED] and I had many discussions about Ricky, Ricky being in jail, his wife, you know, not sleeping, being upset. One occasion he told me that - - we were discussing what happened, how, and he said that Ricky had broke in and broke into his gun case, that they had got the guns from Ricky because he was afraid he was gonna hurt himself or someone, and said that Ricky had broke into the gun case, got the gun, and bang, you know, the next day or so it happened.

(R. p. 3127, lines 9-17). On cross-examination, he noted the surety of his recollection though he underscored the difficulty in testifying: "... when something happens to a child, I didn't want to

say anything. It's eat on me for five years, and I know exactly because I went home and discussed it with my wife ... that day." (R. p. 3129, lines 10-17). He further testified *in camera* that [REDACTED] had talked about Applicant's relationship with Angie:

... that he was very possessive over her. He couldn't handle her leaving for another man, about how she brought that child to torment Ricky to go swimming that day, and it was her fault that the child was killed because she was getting back at Ricky. That's mainly what he discussed with me on many occasions.

(R. p. 3133, line 20 – p. 3134, line 1). Also *in camera*, the defense asked if [REDACTED] had said Applicant, "Ricky carried the gun because he was afraid of [REDACTED]" to which [REDACTED] responded, "he never talked about Ricky being afraid of anyone." (R. p. 3134, lines 13-15). Defense counsel also asked if [REDACTED] said anything about being afraid "his house was gonna burn down?" to which Mr. Frye answered, "No.... Never heard that." (R. p. 3134, lines 13-20). The State objected and no further questions were asked by defense counsel given the trial court's ruling that [REDACTED] was offered for "impeachment purposes because [REDACTED] did not admit that he made a prior statement." (R. p. 3135, lines 12-16).

Charge on Aggravating Circumstances and Mitigating Circumstances

The judge instructed the jury that aggravating circumstances must be proven by the State beyond a reasonable doubt. Further, the judge instructed the jury it could consider only two circumstances: (1) murder of a child under eleven years of age; and (2) murder during the commission of the crime or act of kidnapping. (R. p. 3226, line 10- p. 3227, line 14). The judge instructed that only if one or both of the aggravating circumstances are found could the jury consider sentencing. (R. p. 3227, line 15- p. 3229, line 23). However, he also instructed that even if the jury found one or more statutory aggravating circumstances, they were not required to recommend death. (R. p. 3230, line 23 – p. 3231, line 19; p. 3239, lines 14-25; p. 3240, lines 12-

18). The judge also instructed the jury could consider any statutory mitigating circumstance supported by the evidence and charged the jury on five (5) such circumstances to consider: (1) no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (4) the age or mentality of the defendant at the time of the crime; and (5) evidence of mental retardation. (R. p. 3237, lines 5-24). The judge also instructed the jury it may consider any nonstatutory mitigator supported by the evidence, but that it “need not find the existence of such a circumstance by proof beyond a reasonable doubt or any other level of proof.” (R. p. 3239, line 13). The judge also instructed that apart from statutory or nonstatutory mitigating circumstances, the jury could also return a life sentence as an act of mercy. (R. p. 3240, lines 1-18). (See also R. p. 3241, line 23- p. 3243, line 4). The judge cautioned, however, that the decision must be made “without bias and without prejudice to any party” and may not “be governed by sympathy, prejudice, passion, public opinion, or any other arbitrary factor.” (R. p. 3243, lines 5-12). He instructed that “[b]oth the State and the defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in the case, and that you will follow the law as ... explained” (R. p. 3243, lines 12-15).

Sentencing

The jury considered and rejected, as Judge Couch had independently done before the trial, Applicant’s suggestion he was intellectually disabled. Next, the jury reported that it found, beyond a reasonable doubt, both of the submitted circumstances in aggravation – (1) murder of a child under eleven years of age; and (2) murder during the course of kidnapping – and

recommended death.¹⁰ (R. p. 3257, line 23 – p. 3258, line 25). As noted, Judge Couch imposed a sentence of death. (R. p. 3262, line 19 – p. 3263, line 5).

ALLEGATIONS

- 1) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during his *Atkins* (intellectual disability) and sentencing hearings.

Supporting Facts: Counsel failed to investigate, develop, and present a constitutionally adequate case that Applicant was a person with intellectual disability who could not be executed pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Counsel's performance was both unreasonable and prejudicial, *see Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

- a) Counsel failed to investigate and present evidence that purported IQ scores in the developmental period were not valid measures of intellectual functioning, *see Hall v. Florida*, 134 S. Ct. 1986 (2014); *Wiggins v. Smith*, 583 U.S. 510 (2003);
- b) Counsel failed to investigate the circumstances under which Applicant obtained a commercial driver's license and other certifications relied upon by the State to argue he was not a person with intellectual disability; *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- c) Counsel failed to investigate, develop and present applicant's case for intellectual disability through a thorough investigation of Applicant's significantly subaverage intellectual functioning, deficits in adaptive functioning and onset before the age of 18, including but not limited to objecting to the trial judge's deviation from clinical consensus and practice in the determination that Applicant was not a person with intellectual disability. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

¹⁰ The jury was clearly instructed its recommendation will be followed by the sentencing court. (R. p. 3223, lines 20-22; p. 3250, lines 7-10).

- 2) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20— during the capital trial proceedings.

Supporting Facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are: (1) Counsel failed to call hospital chaplains to testify regarding Applicant's remorse shortly after the crime where records from the chaplains were excluded by the trial judge as inadmissible hearsay;

DISCUSSION

The scope of this Court's jurisdiction in post-conviction relief matters is set out in S.C. Code Ann. § 17-27-20(A), which provides:

- (A) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(2) That the court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this

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section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

Section (B) further limits the jurisdiction of the PCR court as follows: “This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.” S.C. Code Ann. § 17-27-20(B). Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“Errors in a petitioner’s trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.”); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“The Simmons rule gives effect to the Legislature’s clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”).

While previously heard or unheard freestanding trial or direct appeal issues are not cognizable, the general factual basis for the previously unheard issues may be reached by and through an allegation of ineffective assistance of counsel. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 (“Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.”). Ineffective assistance of counsel claims constitute the general nature of issues appropriate for post-conviction relief actions. *See, e.g., Al-Shabazz v. State*, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(A), and finding “A typical PCR claim of ineffective assistance of counsel falls into this category....”).

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. *Strickland, supra*. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.*

The standard of “prejudice” differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove “prejudice” in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the court instructed that prejudice may be found in a capital sentencing proceeding “when ‘there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’” 332 S.C. at 333, 504 S.E.2d at 823 (quoting *Strickland*, 466 U.S. at 695). Again, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

To effect a fair review of counsel's performance, a reviewing court must “eliminate the distorting effects of hindsight” and attempt “to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689.

When reviewing Applicant's issues under the above standards, the record shows Applicant is not entitled to any relief on the issues presented.

Applicant's Allegation 1(a):

Counsel failed to investigate and present evidence that purported IQ scores in the developmental period were not valid measures of intellectual functioning.

Defense counsel, through its qualified experts, conducted an investigation in order to develop a case that Applicant was a person with intellectual disability. Defense counsel presented evidence to the trial judge, and subsequently to the jury, which counsel offered as supportive of the claim of intellectual disability. Specifically, defense counsel acquired the services of Dr. Ginger Calloway. Dr. Calloway, after evaluation, opined Applicant was intellectually disabled. *See State v. Blackwell*, 420 S.C. at 137-38, 801 S.E.2d at 718 ("Ginger Calloway, a forensic psychologist who was offered by the defense, opined that Blackwell met the definition of 'mental retardation' because he exhibited: sub-average intellectual ability based on his I.Q. scores; significant deficits in adaptive functioning such as communication, home living, social interaction, self-direction, and functional academics; and that these deficits existed prior to the age of eighteen...."). As is relevant to the instant claim, Applicant raised an argument in the direct appeal regarding the use of school testing in consideration of the claim of intellectual disability. Respondent made the following observation in the Final Brief of Respondent:

Though the witnesses and the parties referred to these as IQ tests, there was some question as to whether they were more general scholastic tests. Dr. Calloway did not discount these scores entirely as appellant would argue should be done; rather, both Dr. Calloway and Dr. Brown indicated they could be considered as broad indicators. (See R. p. 3874, lines 12-18; p. 4183, lines 10-17). In fact, Dr. Calloway depended on school testing in opining family members had indicators of mental retardation. (See R. p. 3872, line 1 - p. 3873, line 9, appellant's father's IQ test from school scores indicated as 60; p. 3874, lines 12-18, appellant's brother school test scores indicated 73 and 74; p. 3875, line 11 - p.

Exhibit 27 Pg 1 of 1

3876, line 5, appellant's daughter's school scores at 57 and 71). Additionally, Dr. Harrison also considered the school testing scores though she acknowledged that any score could have been incorrect. (R. p. 3797, lines 15-21; p. 3800, lines 4-20; p. 3809, lines 5-11; p. 3821, line 13 - p. 3822, line 13). In regard specifically to appellant's testing, Dr. Harrison noted that it would not be unusual to begin school with a depressed ID if not intellectually stimulated at home, and the following year have a significant leap, which is indicated in appellant's record, and is not indicative of mental retardation. (R. p. 3786, lines 1-10).

Appellant's attempt to cast the testimony as an agreement of evidence for "prong one" is incorrect, (see FBOA, p. 44), as the relevant determination is not present day, but that manifested before the age of eighteen. Appellant must continually admit that he focuses only on current evidence not conducive to finding agreement in the relevant developmental period. (See, for example, FBOA pp. 44, 49, 64 and 75). As Dr. Brown testified, ["the age of onset has to be prior to the age of 18 or in the developmental period," therefore, "we have to go back and look at what records are available, and for most people, it's going to be school records when we can get them. That's going to give us the most useful information in that regard." (R. p. 4189, lines 10-22).

(Attachment 3, pp. 79-80 n. 29).

The Supreme Court of South Carolina found in regard to Applicant's argument challenging the rejection of his claim of intellectual disability:

... we believe Blackwell merely seeks for this Court to re-evaluate the testimony and evidence presented during the pre-trial *Atkins* proceedings. Under this Court's highly deferential standard of review, we find the trial court correctly determined that Blackwell failed to prove by a preponderance of the evidence that he is mentally retarded and, thus, ineligible to receive the death penalty.

Initially, we note the trial court correctly identified and made its determination applying the statutory definition of "mental retardation." Moreover, contrary to Blackwell's claim, the trial court did not base its decision solely on the fact that Blackwell was able to successfully obtain a commercial driver's license and be employed as a truck driver. The court relied on other factors, including Blackwell's school performance and full employment history. Additionally, the court explained why it gave greater

weight to Dr. Brown's report, noting that the report was directed at an evaluation of Blackwell's "formative years" and was consistent with the "functional adaptations" required by the statutory definition of "mental retardation." The court also discounted some of Dr. Calloway's findings as it questioned whether "adequate information" was used and believed Dr. Calloway improperly "made subjective determinations concerning the results obtained and weighted responses of various informants differently."

We also find the trial court's factual determinations are supported by evidence in the record. Admittedly, it is concerning that Blackwell, at 54 years old, scored 63 and 68 on the I.Q. tests given in preparation of the *Atkins* hearing. However, in terms of "significantly sub-average general intellectual functioning," the trial court readily acknowledged the recent I.Q. scores but was persuaded by evidence that: (1) Blackwell, prior to the age of 18, scored between 68 and 87 on standard school I.Q. tests; (2) Blackwell made "reasonably sufficient grades during his school career"; (3) at the age of 18, Blackwell was found to read at the 5.8 grade level, completed arithmetic problem solving at the 6.6 level, and completed arithmetic computation at the 5.2 level; and (4) Blackwell dropped out of high school in the eleventh grade despite having earned significant credits toward graduation.

The court also recognized that Blackwell's recent I.Q. scores may have been caused by events in his adult life that adversely affected his current cognitive ability. For example, the court accurately referenced the fact that Blackwell received chemotherapy for Hodgkin's Lymphoma in 1986, had an accident in 2003 or 2004 while riding a four wheeler which rendered him unconscious for approximately 15 to 20 minutes, had several major depressive episodes that resulted in involuntary commitments in 1990 and 2008, and was taking Thorazine, an anti-psychotic medication, at the time of his *Atkins* evaluation.

With respect to Blackwell's adaptive behavior, the court found "no evidence that he was unable to function at his home during the time before his eighteenth birthday." Although the court acknowledged evidence that Blackwell had difficulty living independently after the dissolution of his marriage, the court declined to find this translated into deficits in Blackwell's adaptive behavior. Rather, the court accepted the testimony of Dr. Calloway that Blackwell's major depressive episodes after the separation were the cause of Blackwell's inability to function normally. The court also found that Blackwell adapted to life well as he was able to achieve his goal of becoming a commercial truck driver,

Additionally, the court found significant the fact that Blackwell was never diagnosed with mental retardation until the Atkins issue was raised and also noted that Dr. Harrison, who evaluated Blackwell as to his competency to stand trial, reported no finding of mental retardation.

After thoroughly reviewing the record, we conclude Blackwell has not shown the trial court committed an error of law or that its decision is unsupported by the evidence or against its preponderance. Accordingly, we find the case properly proceeded as a capital trial.

State v. Blackwell, 420 S.C. at 141-43, 801 S.E.2d at 720-22.

Applicant continued to argue about the use of school testing scores in his petition to the Supreme Court of the United States. In response, the State summarized Applicant's argument and set out the relevant records citations supporting the error in Applicant's logic in the following passage from the Brief in Opposition:

Petitioner essentially argues the higher scores were misused as IQ tests. (See Petition, p. 8-9). This is an incorrect assertion. The disagreement was over the value of indicators at the relevant time - the developmental period. Both experts agreed the tests could be used for that limited purpose. The defense expert, Dr. Calloway, did not discount these scores entirely; rather, both Dr. Calloway and the court appointed expert, Dr. Brown, indicated they could be considered as broad indicators. (See R. p. 3874, lines 12-18; p. 4183, lines 10-17). In fact, Dr. Calloway depended on school testing in opining family members had indicators of mental retardation. (See R. pp. 3872-3876, (Petitioner's father's IQ test from school scores; his brother school test scores indicated 73 and 74; his daughter's school scores at 57 and 71). Petitioner would have the Court agree they could be used when such indicators are not contrary to his position, (see Petition, p. 15), but not used if contrary. Petitioner cannot be right on both arguments. Even so, as Dr. Brown testified, the age of onset has to be prior to the age of 18 or in the developmental period," therefore, "we have to go back and look at what records are available, and for most people, it's going to be school records when we can get them. That's going to give us the most useful information in that regard." (R. p. 4189). Such scores are properly considered in that context.

(Attachment 9, pp. 13-14 n. 7).

(Attachment 9, pp. 13-14 n. 7).

In sum, the record shows the basis for this claim of ineffective assistance has been repeatedly addressed. Respondent submits Applicant cannot show *Strickland* deficient performance or prejudice. This claim should be summarily dismissed.

Applicant's Allegation 1(b):

Counsel failed to investigate the circumstances under which Applicant obtained a commercial driver's license and other certifications relied upon by the State to argue he was not a person with intellectual disability.

Applicant's Allegation 1(c):

Counsel failed to investigate, develop and present applicant's case for intellectual disability through a thorough investigation of Applicant's significantly subaverage intellectual functioning, deficits in adaptive functioning and onset before the age of 18, including but not limited to objecting to the trial judge's deviation from clinical consensus and practice in the determination that Applicant was not a person with intellectual disability.

Respondent addresses these claims together as the proof showing lack of *Strickland* error is related. As referenced in the above-quoted passage from the direct appeal opinion, the Supreme Court of South Carolina rejected Applicant's position on appeal that his commercial driver's license was the key to finding Applicant failed in his burden of proof. Specifically, the Court found:

...contrary to Blackwell's claim, the trial court did not base its decision solely on the fact that Blackwell was able to successfully obtain a commercial driver's license and be employed as a truck driver. The court relied on other factors, including Blackwell's school performance and full employment history. Additionally, the court explained why it gave greater weight to Dr. Brown's report, noting that the report was directed at an evaluation of Blackwell's "formative years" and was consistent with the "functional adaptations" required by the statutory definition of "mental retardation."

State v. Blackwell, 420 S.C. at 141, 801 S.E.2d at 72.

In short, the fact that Applicant did obtain a commercial driver's license is not at issue, and there is no indication of a failure to investigate this fact. But again, it is only one part of the whole of the analysis:

With respect to Blackwell's adaptive behavior, the court found "no evidence that he was unable to function at his home during the time before his eighteenth birthday." Although the court acknowledged evidence that Blackwell had difficulty living independently after the dissolution of his marriage, the court declined to find this translated into deficits in Blackwell's adaptive behavior. Rather, the court accepted the testimony of Dr. Calloway that Blackwell's major depressive episodes after the separation were the cause of Blackwell's inability to function normally. The court also found that Blackwell adapted to life well as he was able to achieve his goal of becoming a commercial truck driver, maintain employment with consistent increases in his earnings, and raise two children during his twenty-six-year marriage. [FN 11]. Additionally, the court found significant the fact that Blackwell was never diagnosed with mental retardation until the *Atkins* issue was raised and also noted that Dr. Harrison, who evaluated Blackwell as to his competency to stand trial, reported no finding of mental retardation.

[FN 11] Although the trial court did not have the benefit of the USSC's recent decision in *Moore v. Texas*, — U.S. —, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017), we find the court's analysis comports with this decision. In *Moore*, the defendant was convicted of capital murder and sentenced to death for fatally shooting a store clerk during a robbery that occurred when the defendant was twenty years old. *Id.* at 1044. Subsequently, the defendant sought state habeas relief. *Id.* Pursuant to *Atkins* and *Hall*, a Texas habeas court determined that the defendant was intellectually disabled and, therefore, recommended to the Texas Court of Criminal Appeals ("CCA") that the defendant be granted relief. *Id.* at 1045-46. The CCA disagreed with the recommendation and found the habeas court erred by not following the CCA's decision in *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), wherein the CCA adopted the definition of and standards for assessing intellectual disability based on a 1992 edition of the American Association on Mental Retardation manual. *Id.* at 1046. The USSC granted certiorari "to determine whether the CCA's adherence to superseded medical standards and its reliance on *Briseno* comply with the Eighth Amendment" and the Court's precedents. *Id.* at 1048. The USSC vacated the CCA's

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judgment, finding “[t]he CCA’s consideration of [the defendant’s] adaptive functioning ... deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply.” *Id.* at 1050. Further, the USSC rejected the CCA’s use of the *Briseno* factors, which the Court deemed an “invention of the CCA untied to any acknowledged source.” *Id.* at 1044.

Here, the trial court made no reference to the impermissible *Briseno* factors. Furthermore, given the fact that Blackwell’s I.Q. scores were at the lower end of the spectrum, the court correctly considered Blackwell’s adaptive functioning using the current clinical standards presented by the medical experts. The court, as required by *Moore*, carefully considered and weighed Blackwell’s adaptive strengths against his adaptive deficits. While the dissent may believe the trial court overemphasized Blackwell’s adaptive strengths, any significance assigned to these adaptive strengths was based on the court’s assessment and credibility determination of the expert testimony.

State v. Blackwell, 420 S.C. at 143, 801 S.E.2d at 721.

As the Court’s footnote indicates, the *Moore* opinion had not been issued at the time of trial, but the Court resolved *Moore*’s holding did not affect the consideration of the claim. Moreover, Applicant again raised the specter of *Moore* error (*i.e.*, rejection of clinical practice standards) in this petition for writ of certiorari to the Supreme Court of the United States. As Respondent similarly argued in its brief in opposition, the plain record shows there is no such error:

Further, Petitioner has utterly failed to show *Hall* or *Moore* error. To the contrary, the record reflects adherence to *Hall* and *Moore*, in particular in considering all the evidence when the range of intelligence testing suggests further inquiry: “... in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual’s IQ score, adjusted for the test’s standard error, falls within the clinically established range for intellectual-functioning deficits.” *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017).

(Attachment 9, p. 16).

Respondent submits Applicant cannot carry his burden of proof to show *Strickland* deficient performance and prejudice. Applicant's claim that defense counsel was ineffective for failing to adequately develop and present evidence of his alleged intellectual disability and/or argue "the trial judge deviated from clinical practice" is without merit. Moreover, the basis for this claim has been thoroughly considered, and Applicant's position rejected, in the direct appeal. These claims should also be summarily dismissed.

Applicant's Allegation 2:

Applicant was denied the right to effective assistance of counsel— Counsel failed to call hospital chaplains to testify regarding Applicant's remorse shortly after the crime where records from the chaplains were excluded by the trial judge as inadmissible hearsay.

Similarly to the above claims, the factual basis for this claim was developed at trial and addressed in the direct appeal. The record shows before the witness was called, defense counsel advised the trial judge of the State's objection to the substance of the testimony regarding the notes. The trial judge held a hearing on the objection outside the presence of the jury. (R. p. 2960, lines 18-25). Defense counsel advised that he would present Ms. Gracie Williams, a record custodian from the Spartanburg Regional Hospital. (R. p. 2961, lines 4-5). He sought to introduce the notes of two hospital chaplains who spoke with appellant after his self-inflicted wound, and relied upon the business records exception for admissibility. (R. p. 2962, lines 11-18; p. 2965, lines 3-5). The substance of the notes were described as follows:

... the patient was struggling with guilt, and wanted to tell his grandchildren he loved them...

...He was struggling with his actions and what had been done, and then the second indicates - - second statement . . . was sad, had some prayers in his heart, asked for prayers for the family. We prayed ... the Lord's Prayer together.

(R. p. 2961 , line 25 - p. 2962, line 2; p. 2963, line 24 - p. 2964, line 6).

The State objected noting the information was not in the nature of a diagnosis; the witnesses were available; and, lastly, the notes were more prejudicial than probative. (R. p. 2962, line 20 - p. 2963, line 4; p. 2964, lines 14-23). The State relied upon *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct.App. 1997), which found statements not necessary to medical treatment or diagnosis were inadmissible hearsay. Defense counsel offered that "we interviewed the chaplains and ... [t]hey didn't have much memory actually of this event. So, their notes are actually the best evidence of it...." (R. p. 2963, lines 17-19). The trial judge found that the chaplain's notes were not admissible:

...I assume the pertinent portions are the parts that I discussed earlier that state the patient was struggling with guilt, grandchildren he loved them. He was struggling with his actions and what had been done, and another entry, the next day, by a different individual said but he was sad, had some prayers in his heart, asked for the family. We prayed the Lord's Prayer together.

The case cited by Mr. Barnette does appear to be on point. Also the exception to the hearsay rule for regularly kept business records states that matters which are in the nature of an opinion will not be admitted as an exception to the hearsay rule from a regularly kept business record.

It appears that the quotes in here that describe the defendant would be in the form of opinions given by the individuals involved, and therefore, I'll grant the State's motion.

(R. p. 2965, line 15 - p. 2966, line 6).

On appeal, Applicant argued the trial judge erred in not allowing him to present his evidence of remorse. (Attachment 2, p. 93). Our Supreme Court disagreed. The Court found not only that the trial judge did not err, but even if the ruling had been error, it would only have been harmless in light of other evidence of record:

...we find the trial court correctly excluded the document as it contained inadmissible subjective opinions and judgments, in

particular the notations that Blackwell was “struggling with guilt” and “struggling with his actions.”

Nonetheless, even if the trial court erred in excluding the chaplains’ notes, we find the error harmless as the evidence was cumulative to other evidence in the record of Blackwell’s remorse. See *State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 881 (2007) (“Although it was error to exclude the letter written from Appellant to Ms. Northcutt expressing remorse, the error was harmless. The record contains evidence of Appellant’s remorse. Appellant was not prejudiced, nor was the outcome of the trial affected.”).

Specifically, as mitigation evidence, Blackwell presented: (1) Dr. Donna Schwartz-Watts, a psychiatrist who evaluated Blackwell, who testified that “[i]t’s very hard for [Blackwell] to accept what happened and what he’s done,” and “he’s very sad about it”; (2) Heather Bryant, his daughter, who testified that “he regrets what he has done” and “suffers from that every day”; and (3) Ken Rice, his pastor, who testified that Blackwell told him “God’s forgiven me but I can’t forgive myself.”

State v. Blackwell, 420 S.C. at 160, 801 S.E.2d at 730–31.

In short, whether counsel erred or not, given the omission could only have been harmless, Applicant cannot satisfy his *Strickland* prejudice burden of proof. Moreover, the record supports that Applicant would likely not even be able to carry his *Strickland* deficient performance burden of proof. Defense counsel explained their reason for not calling the witnesses – they possessed little to no memory of the counseling they had provided. Thus, counsel had specific, reasonable cause not to present the witnesses. This informed decision is unlikely to support a finding of deficient performance. See *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) (Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel). Again, the record is conclusive that this claim of error is without merit. The claim should be summarily dismissed.

OTHER CLAIMS OF ERROR

To the extent the application may be read as raising additional claims of error not addressed in this return, Respondent denies same, and would demand clarification in a more definite statement pursuant to Rule 12(c), SCRCP.

CONCLUSION

WHEREFORE, having made its return, Respondent submits the two issues currently presented are without merit, and may be fully resolved by reliance on the record. These claims are ripe for summary dismissal. Respondent acknowledges that an evidentiary hearing has been set for the week of November 5, 2018. If the application is not amended, Respondent notifies Applicant that it will move for summary judgment on the pleadings.

Respectfully submitted,

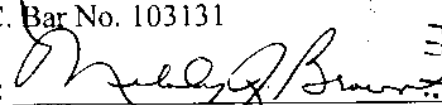
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April 23, 2018
Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

Ricky Lee Blackwell, #6033,)
)
Applicant,)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C/A No. 2018-CP-42-00928
(Capital PCR)

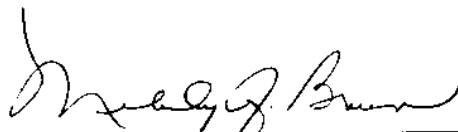
CERTIFICATE OF SERVICE

I, Melody J. Brown, hereby certify that I have served the Return in the foregoing action
by deposition a copy in the United States Mail to counsel for Applicant addressed as follows:

E. Charles Grose, Jr., Esq.
Grose Law Firm
404 Main Street
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Lindsey S. Vann, Esq.
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201

This 23rd day of April 2018.



MELODY J. BROWN
Senior Assistant Deputy Attorney General
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2018 APR 27 PM 1:01

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Ricky Lee Blackwell, #6033)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-42-00928

~~Proposed~~ Order Appointing Counsel

FILED
 IN THE COURT
 OF COMMON PLEAS
 SPARTANBURG COUNTY
 2018 MAY 2 AM 11:51
 M. HODGSON BLACKLEY

This matter is before the court on Applicant Ricky Lee Blackwell’s request for the appointment of counsel in this post-conviction relief (“PCR”) proceeding. This Court held a hearing on April 16, 2018 to determine Applicant’s desire, and qualification, for court appointed counsel. This Court finds Applicant desires counsel, but is indigent. Therefore, the Court appoints Charles Grose and Lindsey S. Vann, pursuant to S.C. Code § 17-27-160, to represent Applicant in these PCR proceedings.

For the purposes of appointment, this Court finds Attorneys Grose and Vann are both qualified to serve as counsel under the qualification requirements set forth in S.C. Code § 17-27-160(B). In support of this finding, the Court make the following findings of fact:

1. Mr. Grose represented John Kennedy Hughey in his capital post-conviction relief case, subsequent appeals, and resentencing to life imprisonment. *Hughey v. State*, Abbeville County Case No. 1996-GS-01-220 and 2000-CP-01-210 and *Hughey v. State*, (S.C.S.Ct. Op. No. 2015-UP-029) (Filed May 13, 2015) *cert. denied South Carolina v. Hughey*, 136 S. Ct. 1659 (2016). In addition to Mr. Hughey’s capital post-conviction relief case, Mr. Grose’s is currently capital post-conviction relief counsel in *William O. Dickerson, Jr. v. State*, Charleston County Cases Number 2012-CP-10-3216, *Jerry Buck Inman v. State*, Pickens County Case Number 2012-CP-39-00918,

and *Stephen Cory Bryant v. State*, Sumter County Case No. 2016-CP-43-828. He is counsel in *Donald Jones v. State*, Lancaster County Case No. 2001-CP-29-1030, a competency to be executed proceeding. Mr. Grose is federal *habeas* counsel in *Stephen Corey Bryant v. Sterling et. al.*, Case No. 9:15-mc-00217-DCN-BM and *Mikal Deen Mahdi v. Sterling, et. al.*, Case No. 8:16-cv-03911-TMC-JDA.

2. Mr. Grose has received significant death penalty training, including but not limited to federal habeas training, through the Annual National Federal *Habeas Corpus* Seminar, (2017, 2015, 2014, 2013, and 2011); NAACP Legal Defense & Educational Fund, Inc.'s Annual Capital Punishment Training Conference, Airlie Conference Center, Warrenton, VA (2012, 2011, and 2005); and Capital Case Initiative, sponsored by South Carolina Commission on Indigent Defense (2013, 2012, 2011, and 2010).¹

3. Ms. Vann is the Executive Director of Justice 360, a non-profit organization dedicated to representing death-sentenced inmates in South Carolina. Ms. Vann has been appointed by South Carolina courts as PCR counsel for Stephen C. Stanko in Horry County in the circuit court and the South Carolina Supreme Court on appeal, *Stanko v. State*, No. 2014-CP-26-035; *Stanko v. State*, No. 2017-002281, and in Georgetown County, *Stanko v. State*, No. 2008-CP-22-01446, James Nathaniel Bryant, III, *Bryant v. State*, No. 2013-CP-26-6631, Abdiyyah Ben Alkebulanyahh, *Alkebulanyahh v. State*, No. 2014-CP-07-2994, and Richard Moore, *Moore v. State*, No. 2015-CP-42-5040. She has also been appointed in the federal district court for the District of South Carolina

¹ Additionally, Mr. Grose is a past chair and current member of the Board of Directors of Justice 360, which was formerly known as the Death Penalty Resource & Defense Center and the Center for Capital Litigation, and was designated by this Court as a Community Defender Organization authorized to provide representation, assistance, information and other matters related to federal death penalty *habeas corpus* cases. See *In re: Amendments to the Plan on the United States District Court for the District of South Carolina for Implementing the Criminal Justice Act*, filed May 25, 2010.

and the Fourth Circuit Court of Appeals to represent multiple death sentenced inmates pursuing federal habeas relief pursuant to 28 U.S.C. § 2254 (Johnny O’Landis Bennett, *Bennett v. Stirling*, No. 2013-CV-03191 (D.S.C.) & No. 16-3 (4th Cir.); Abdiyyah Ben Alkebulanyahh, *Alkebulanyahh v. Byars*, No. 6:13-cv-918-TLW-KFM (D.S.C.) & No. 15-3 (4th Cir.); Richard Bernard Moore, *Moore v. Stirling*, No. 4:14-cv-4691-MGL-TER (D.S.C.); and Anthony Woods, *Woods v. Stirling*, No. 5:18-cv-00144-DCN-KDW (D.S.C.)). Additionally, Ms. Vann has provided investigative, research and consultation services in numerous other capital cases.

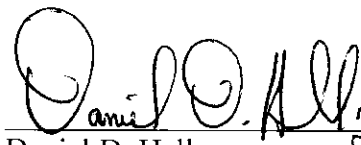
4. Over the past two years, Ms. Vann has completed over thirty hours of South Carolina Bar approved continuing legal education in the field of capital post-conviction defense by attending the National Federal Habeas Corpus Seminar in 2016 and 2017. Ms. Vann has also served as a faculty member and speaker at multiple state and national capital training conferences and has authored several publications designed to assist other attorneys in their representation of clients facing the death penalty in state and federal court.

IT IS THEREFORE ORDERED THAT:

Attorneys Charles Grose and Lindsey S. Vann are appointed to represent Applicant in these capital PCR proceedings.

IT IS SO ORDERED.

Date: 4-26-18


Daniel D. Hall
Circuit Judge

2018 MAY -2 AM 11:51
M. HOPE BLANCHLEY
CLERK OF THE COURT
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Ricky Lee Blackwell, #6033,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

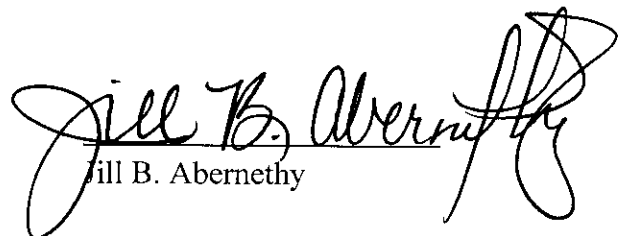
IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No. _____

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Order Appointing Counsel was mailed today by first class United States mail, postage prepaid, this 30th day of April 2018, upon the following:

Donald J. Zelenka
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211


Jill B. Abernethy

FILED
IN THE COURT
OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
2018 MAY -2 AM 11:51
M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

May 2, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Rickey Lee Blackwell
Applicant # *6033*

7TH JUDICIAL CIRCUIT

CASE# *2018-CP-42-928*

VS
Stall
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the

In this action dated *4-26-2018* on

Order Appointing Counsel
5-2-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Megan Jamison
Charles Carose Jr.

5-2-18
(Date)

Carrie Shay
(Signature)

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Ricky Lee Blackwell, #6033,)
)
Applicant,)

Case No. 2018-CP-42-00928

**AMENDED APPLICATION FOR POST-
CONVICTION RELIEF**

vs.)
)

State of South Carolina,)
)
Respondent.)
_____)

1. Place of Detention: Kirkland Correctional Institution, 4344 Broad River Rd, Columbia, SC 29210.
2. Name and location of Court which imposed sentence: Spartanburg County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2009-GS-42-3910—murder; 2009-GS-42-3609—kidnapping.
5. The date upon which sentence was imposed and the terms of the sentence: March 12, 2014 – death sentence for murder; kidnapping sentenced subsumed in death sentence.
6. A finding of guilty was made: after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. The Courts to which applicant appealed:
 - (a) The Supreme Court of South Carolina.
 - (b) The Supreme Court of the United States.

The result in each Court to which applicant appealed:

- (a) Sentence and conviction affirmed.
- (b) Petition for Writ of Certiorari denied.

The date of each result:

- (a) May 31, 2017.
- (b) February 20, 2018.

Citations of any written opinion or orders entered pursuant to such results:

- (a) *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (S.C. 2017).
- (b) *Blackwell v. South Carolina*, 138 S. Ct. 491 (2017).

9. Not applicable.

10 & 11 GROUNDNS FOR RELIEF WITH SUPPORTING FACTS

10(a) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that Applicant is a person with intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

11(a) Supporting Facts: Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which manifested before he was eighteen years old, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003); S.C. Code § 16-3-20(C)(b)(10).

10(b) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-30—during his pre-trial and sentencing phase *Atkins* (intellectual disability) hearings.

11(b) Supporting Facts: Counsel failed to investigate, develop, and present a constitutionally adequate case that Applicant is a person with intellectual disability who could not be executed pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Counsel's performance was both unreasonable and prejudicial, see *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions, include, but are not necessarily limited to, the following:

- (1) Counsel failed to investigate and present all relevant evidence on the issue of intellectual disability including evidence of Applicant's significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset before the age of 18, *Atkins v. Virginia*, 536 U.S. 304 (2002); *Wiggins v. Smith*, 583 U.S. 510 (2003);
- (2) Counsel failed to object to the trial judge's reliance on stereotype and deviation from clinical consensus and practice in the determination that Applicant was not a person with intellectual disability, see *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S. Ct. 1986 (2014);
- (3) Counsel failed to investigate and present evidence that some of Applicant's purported IQ test scores in the developmental period were not legitimate,

individualized measures of general intellectual functioning and thus were not inconsistent with intellectual disability, *see Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Wiggins v. Smith*, 583 U.S. 510 (2003);

- (4) Counsel failed to investigate and present the circumstances under which Applicant obtained a commercial driver's license and other certifications to refute the trial judge and jury's reliance on the certifications in finding that Applicant was not a person with intellectual disability, *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- (5) Counsel failed to investigate and present evidence to the trial judge and jury that Applicant's depression and cancer treatment (including chemotherapy) had no demonstrable effect on IQ scores establishing significantly subaverage intellectual functioning;
- (6) Counsel failed to adequately inform and educate the trial judge and jury about potentially prejudicial and preconceived misconceptions and stereotypes related to intellectual disability, *See Moore v. Texas*, 137 S. Ct. 1039 (2017).
- (7) Counsel failed to object to the Solicitor's sentencing phase closing argument endorsing improper stereotypes toward people with intellectual disability when the Solicitor stated: "I mean it's an insult to people that had truly – have a mental disability for them to bring this kind of defense up to try to spare his life trying to use that excuse," Tr. 3169, and "He's not disabled, and, like I say, it's an insult to people that's mentally – I mean that truly has that kind of condition." Tr. 3171. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2007), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d (2004).

10(c) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during pre-trial proceedings.

11(c) Supporting Facts: Counsel failed to adequately question prospective jurors in voir dire to identify prospective jurors with pre-formed beliefs about and stereotypes and biases against a defendant with an intellectual disability. Trial counsel's performance during pre-trial proceedings was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(d) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the penalty phase of the proceedings.

11(d) **Supporting Facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are

- (1) Counsel failed to adequately investigate and present the full range of mitigating evidence concerning Applicant's social and life history, *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- (2) Counsel failed to adequately investigate and present all available mitigating evidence concerning Applicant's mental health prior to and at the time of the capital offense, *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- (3) Counsel failed to investigate and present mitigating evidence concerning Applicant's lack of future dangerousness, adaptability to confinement, and good character, *Skipper v. South Carolina*, 476 U.S. 1 (1986);
- (4) Counsel failed to adequately investigate and present scientific evidence demonstrating that the fact the victim urinated on herself was a natural result of death as opposed to resulting from fear while alive during the incident;
- (5) Counsel failed to object to misleading jury instructions, in violation of the Sixth and Eighth Amendments to the United States Constitution, which did not properly advise the jurors that whatever sentence they recommended would be the sentence imposed by the court rather than a recommendation to the court about the sentence to be imposed, *see Hurst v. Florida*, 136 S. Ct. 616(2016); *Ring v. Arizona*, 536 U.S. 584 (2002); *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985); *see also State v. Bellamy*, 293 S.C. 103, 259 S.E.2d 63 (1987), *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991);
- (6) Counsel failed to investigate and present evidence of remorse and acceptance of responsibility including, but not limited to, failure to call a hospital chaplain to testify regarding Applicant's remorse shortly after the crime when the chaplain's records documenting the remorse were excluded by the trial judge as inadmissible hearsay;
- (7) Counsel failed to object to the Solicitor's closing argument that Applicant did not have any remorse for killing Brooke Center, including but not limited to Tr. 3169 ("not once did he cry about Brooke. Not once did he show any remorse for Brooke. Doesn't even show one concern about Brooke."), Tr. 3180-81, under circumstances where the Solicitor successfully objected to trial counsel introducing evidence of Applicant's remorse. *See Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002);

- (8) Counsel failed to object to the Solicitor's improper closing arguments, including but not limited to the following:

"Everything they rolled out yesterday, I mean, I got mad. I tried to keep my composure over there, but here he is, he's saying he's mentally retarded." Tr. 3168.

"He's not mentally retarded, and the reason why I'm going so much over this, and the judge is going to charge you about mental retardation, that if you make a finding that he is mentally retarded from there, it's a bar to the death penalty if it's by a preponderance of the evidence. They have to show it by that amount. Preponderance means by the greater weight of the evidence." Tr. 3171-72.

See, e.g. Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2007), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d (2004).

10(e) **Applicant's right to due process of law—guaranteed by the Fourteenth Amendment to the United States Constitution—was violated as a result of the** knowing presentation of false or misleading information by a state agent. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Napue v. People of State of Ill.*, 360 U.S. 264 (1959); *see also Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Alcorta v. State of Texas*, 355 U.S. 28, 78 (1957).

11(e) **Supporting Facts:** Spartanburg County Sheriff Office Investigator Lorin Williams testified Mr. Blackwell did not have remorse for killing Brooke Center. Tr. 2679-86. During closing argument, the Solicitor relied on the testimony of Investigator Williams to argue Mr. Blackwell "[d]idn't show any remorse" for Brooke Center's death, Tr. 3180-81. despite evidence from hospital chaplains and others present that Applicant did show remorse. Investigator Williams's testimony was false, and even if the Solicitor did not knowingly solicit such false evidence, the Solicitor allowed it to go uncorrected. *See Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); *Napue v. People of State of Ill.*, 360 U.S. 264, 79 S. Ct. 1173, 3. L. Ed 1217 (1959); *see also Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Alcorta v. State of Texas*, 355 U.S. 28, 78 (1957).

12. (a) Applicant has not filed any petition in state court other than the mandatory appeal to the South Carolina Supreme Court.
- (b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.
- (c) Applicant has not filed any petitions to the United States Supreme Court other than the petition already specified *supra* in (8).
- (d) Applicant has not filed any motions, petitions, or applications in this or any other Court.

13. Not applicable.
14. Applicant has not raised any ground set forth in (10) in this or any other court.
15. Not Applicable.
16. These grounds rely on additional facts outside the record which was before the previous courts.
17. Applicant was previously represented by counsel.
18. Applicant was represented at trial by William Sean McGuire, South Carolina Commission on Indigent Defense, 1330 Lady St., PO Box 11433 Columbia, SC, 29211; Clay T. Allen, Spartanburg Circuit Public Defender, 366 N. Church St. Ste. 3000, Spartanburg, SC 29349, and Boyd Young, South Carolina Commission on Indigent Defense, 1330 Lady St., PO Box 11433 Columbia, SC, 29211.

On direct appeal applicant was represented by Robert M. Dudek and David Alexander, of the South Carolina Office of Appellate Defense, 1330 Lady Street, Columbia, SC 29201.

19. Applicant seeks relief from his conviction and sentence.
20. Applicant is not under sentence from any other court that he has not challenged.

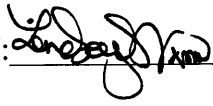
Respectfully prepared by,

E. CHARLES GROSE

Grose Law Firm
404 Main Street
Greenwood, SC 29646
(864) 538-4466

LINDSEY S. VANN

Justice360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044

BY: 

February 19, 2019.

2019 FEB 21 PM 1:11
CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Ricky Lee Blackwell, #6033,)
Applicant,)

Case No. 2018-CP-42-00928

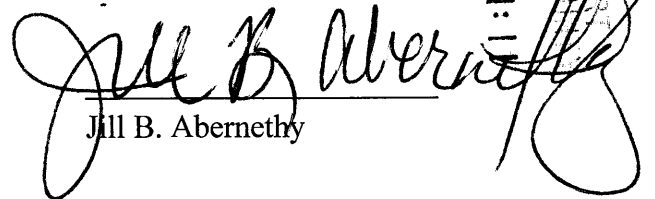
vs.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)
_____)

The undersigned certifies that a copy of the Amended Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 19th day of February 2019, upon the following:

Melody Brown
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211


Jill B. Abernethy

2019 FEB 21 PM 1:11

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Ricky Lee Blackwell, #6033,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

Case No. 2018-CP-42-00928

**SECOND AMENDED APPLICATION
FOR POST-CONVICTION RELIEF**

1. Place of Detention: Kirkland Correctional Institution, 4344 Broad River Rd, Columbia SC 29210.
2. Name and location of Court which imposed sentence: Spartanburg County Court General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2009-GS-42-3910—murder; 2009-GS-42-3609—kidnapping.
5. The date upon which sentence was imposed and the terms of the sentence: March 12, 2014 – death sentence for murder; kidnapping sentenced subsumed in death sentence.
6. A finding of guilty was made: after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. The Courts to which applicant appealed:
 - (a) The Supreme Court of South Carolina.
 - (b) The Supreme Court of the United States.

The result in each Court to which applicant appealed:

- (a) Sentence and conviction affirmed.
- (b) Petition for Writ of Certiorari denied.

The date of each result:

- (a) May 31, 2017.
- (b) February 20, 2018.

2019 FEB 22 PM 4:31
CLERK OF COURT
SPARTANBURG COUNTY

Citations of any written opinion or orders entered pursuant to such results:

- (a) *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (S.C. 2017).
- (b) *Blackwell v. South Carolina*, 138 S. Ct. 491 (2017).

9. Not applicable.

10 & 11 GROUND S FOR RELIEF WITH SUPPORTING FACTS

10(a) **Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that Applicant is a person with intellectual disability.** *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

11(a) **Supporting Facts:** Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which manifested before he was eighteen years old, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003); S.C. Code § 16-3-20(C)(b)(10).

10(b) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during his pre-trial and sentencing phase *Atkins* (intellectual disability) hearings.**

11(b) **Supporting Facts:** Counsel failed to investigate, develop, and present a constitutionally adequate case that Applicant is a person with intellectual disability who could not be executed pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Counsel's performance was both unreasonable and prejudicial, *see Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions, include, but are not necessarily limited to, the following:

- (1) Counsel failed to investigate and present all relevant evidence on the issue of intellectual disability including evidence of Applicant's significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset before the age of 18, *Atkins v. Virginia*, 536 U.S. 304 (2002); *Wiggins v. Smith*, 530 U.S. 412 (2000);
- (2) Counsel failed to object to the trial judge's reliance on stereotype and deviation from clinical consensus and practice in the determination that Applicant was not a person with intellectual disability, *see Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S. Ct. 1986 (2014);
- (3) Counsel failed to investigate and present evidence that some of Applicant's purported IQ test scores in the developmental period were not legitimate,

individualized measures of general intellectual functioning and thus were not inconsistent with intellectual disability, *see Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Wiggins v. Smith*, 583 U.S. 510 (2003);

- (4) Counsel failed to investigate and present the circumstances under which Applicant obtained a commercial driver's license and other certifications to refute the trial judge and jury's reliance on the certifications in finding that Applicant was not a person with intellectual disability, *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- (5) Counsel failed to investigate and present evidence to the trial judge and jury that Applicant's depression and cancer treatment (including chemotherapy) had no demonstrable effect on IQ scores establishing significantly subaverage intellectual functioning;
- (6) Counsel failed to adequately inform and educate the trial judge and jury about potentially prejudicial and preconceived misconceptions and stereotypes related to intellectual disability, *See Moore v. Texas*, 137 S. Ct. 1039 (2017).
- (7) Counsel failed to object to the Solicitor's sentencing phase closing argument endorsing improper stereotypes toward people with intellectual disability when the Solicitor stated: "I mean it's an insult to people that had truly – have a mental disability for them to bring this kind of defense up to try to spare his life trying to use that excuse," Tr. 3169, and "He's not disabled, and, like I say, it's an insult to people that's mentally – I mean that truly has that kind of condition." Tr. 3171. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2007), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d (2004).

10(c) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during pre-trial proceedings.

11(c) Supporting Facts: Counsel failed to adequately question prospective jurors in voir dire to identify prospective jurors with pre-formed beliefs about and stereotypes and biases against a defendant with an intellectual disability. Trial counsel's performance during pre-trial proceedings was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(d) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the penalty phase of the proceedings.

11(d) **Supporting Facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are

- (1) Counsel failed to adequately investigate and present the full range of mitigating evidence concerning Applicant's social and life history, *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- (2) Counsel failed to adequately investigate and present all available mitigating evidence concerning Applicant's mental health prior to and at the time of the capital offense, *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- (3) Counsel failed to investigate and present mitigating evidence concerning Applicant's lack of future dangerousness, adaptability to confinement, and good character, *Skipper v. South Carolina*, 476 U.S. 1 (1986);
- (4) Counsel failed to adequately investigate and present scientific evidence demonstrating that the fact the victim urinated on herself was a natural result of death as opposed to resulting from fear while alive during the incident;
- (5) Counsel failed to object to misleading jury instructions, in violation of the Sixth and Eighth Amendments to the United States Constitution, which did not properly advise the jurors that whatever sentence they recommended would be the sentence imposed by the court rather than a recommendation to the court about the sentence to be imposed, *see Hurst v. Florida*, 136 S. Ct. 616(2016); *Ring v. Arizona*, 536 U.S. 584 (2002); *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985); *see also State v. Bellamy*, 293 S.C. 103, 259 S.E.2d 63 (1987), *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991);
- (6) Counsel failed to investigate and present evidence of remorse and acceptance of responsibility including, but not limited to, failure to call a hospital chaplain to testify regarding Applicant's remorse shortly after the crime when the chaplain's records documenting the remorse were excluded by the trial judge as inadmissible hearsay;
- (7) Counsel failed to object to the Solicitor's closing argument that Applicant did not have any remorse for killing Brooke Center, including but not limited to Tr. 3169 ("not once did he cry about Brooke. Not once did he show any remorse for Brooke. Doesn't even show one concern about Brooke."), Tr. 3180-81, under circumstances where the Solicitor successfully objected to trial counsel introducing evidence of Applicant's remorse. *See Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002);

- (8) Counsel failed to object to the Solicitor's improper closing arguments, including but not limited to the following:

"Everything they rolled out yesterday, I mean, I got mad. I tried to keep my composure over there, but here he is, he's saying he's mentally retarded." Tr. 3168.

"He's not mentally retarded, and the reason why I'm going so much over this, and the judge is going to charge you about mental retardation, that if you make a finding that he is mentally retarded from there, it's a bar to the death penalty if it's by a preponderance of the evidence. They have to show it by that amount. Preponderance means by the greater weight of the evidence." Tr. 3171-72.

See, e.g. Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2007), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d (2004).

10(e) Applicant's right to due process of law—guaranteed by the Fourteenth Amendment to the United States Constitution—was violated as a result of the knowing presentation of false or misleading information by a state agent. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Napue v. People of State of Ill.*, 360 U.S. 264 (1959); *see also Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Alcorta v. State of Texas*, 355 U.S. 28, 78 (1957).

11(e) Supporting Facts: Spartanburg County Sheriff Office Investigator Lorin Williams testified Mr. Blackwell did not have remorse for killing Brooke Center. Tr. 267-86. During closing argument, the Solicitor relied on the testimony of Investigator Williams to argue Mr. Blackwell "[d]idn't show any remorse" for Brooke Center's death, Tr. 3180-81. despite evidence from hospital chaplains and others present that Applicant did show remorse. Investigator Williams's testimony was false, and even if the Solicitor did not knowingly solicit such false evidence, the Solicitor allowed it to go uncorrected. *See Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); *Napue v. People of State of Ill.*, 360 U.S. 264, 79 S. Ct. 1173, 3. L. Ed 1217 (1959); *see also Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Alcorta v. State of Texas*, 355 U.S. 28, 78 (1957).

10(f) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the appellate proceedings.

11(f) Supporting Facts: Appellate counsel's performance during the appellate phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also Evitts v. Lucey*, 469 U.S. 387 (1985); *Southerland v. State*, 337 S.C. 610, 615, 524

S.E.2d 833, 836 (1999). Counsel's specific unreasonable and prejudicial acts or omissions are:

- (1) Appellate counsel failed to adequately raise and brief all legal and factual grounds for challenging the trial court's ruling that Applicant was not intellectually disabled, *see Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002);
 - (2) Appellate counsel failed to raise the issue that the trial court erred in admitting prejudicial autopsy photographs and close-up photographs from the crime scene, including a photograph of the victim after she her body was moved, U.S. Const. amends. V, VIII; Rule 403, SCRE;
 - (3) Appellate counsel failed to raise the issue that the trial court erred in allowing Reggie Frye to testify during the penalty phase of Applicant's trial when Frye's testimony was not relevant and impermissible hearsay, Rule 401, SCRE; Rule 613(b), SCRE; Rule 802, SCRE.
12. (a) Applicant has not filed any petition in state court other than the mandatory appeal to the South Carolina Supreme Court.
- (b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.
- (c) Applicant has not filed any petitions to the United States Supreme Court other than the petition already specified *supra* in (8).
- (d) Applicant has not filed any motions, petitions, or applications in this or any other Court.
13. Not applicable.
14. Applicant has not raised any ground set forth in (10) in this or any other court.
15. Not Applicable.
16. These grounds rely on additional facts outside the record which was before the previous courts.
17. Applicant was previously represented by counsel.
18. Applicant was represented at trial by William Sean McGuire, South Carolina Commission on Indigent Defense, 1330 Lady St., PO Box 11433 Columbia, SC, 29211; Clay T. Allen, Spartanburg Circuit Public Defender, 366 N. Church St. Ste. 3000, Spartanburg, SC 29349, and Boyd Young, South Carolina Commission on Indigent Defense, 1330 Lady St., PO Box 11433 Columbia, SC, 29211.

On direct appeal applicant was represented by Robert M. Dudek and David Alexander, of the South Carolina Office of Appellate Defense, 1330 Lady Street, Columbia, SC 29201.

19. Applicant seeks relief from his conviction and sentence.
20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully prepared by,

E. CHARLES GROSE

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404 Main Street
Greenwood, SC 29646
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LINDSEY S. VANN

Justice360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044

BY: _____

Lindsey S. Vann

February 20, 2019.

2019 FEB 22 PM 1:31
SOUTH CAROLINA COURT

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Ricky Lee Blackwell, #6033,)
Applicant,)

Case No. 2018-CP-42-00928

vs.)

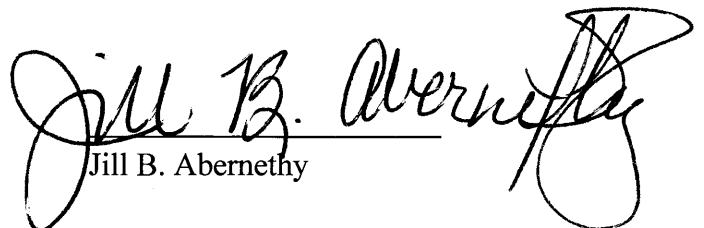
CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)
_____)

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CLERK OF COURT
SPARTANBURG COUNTY

The undersigned certifies that a copy of the Second Amended Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 20th day of February 2019, upon the following:

Melody Brown
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211


Jill B. Abernethy

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Ricky Lee Blackwell, #6033,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C/A No. 2018-CP-42-00928
(Capital PCR)

**RETURN AND MOTION
FOR A MORE DEFINITE STATEMENT**

Respondent, above-named, hereby makes a Return to the second amended application for post-conviction relief ("APCR"), filed by Ricky Lee Blackwell ("Applicant") on February 22, 2019.¹ Respondents respectfully request a hearing on the motions to dismiss and for summary judgment in the instant action. In making the return, and in support of its motion, Respondent would respectfully show the Court:

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PROCEDURAL HISTORY

Applicant, Ricky Lee Blackwell, was indicted by a Spartanburg County Grand Jury in July 2009 for the kidnapping and murder of eight-year-old [REDACTED] (R. 4829 - 4832 [indictments 2009-GS-42-3609 and 3610]). The State served and filed its notice of intent to seek the death penalty on August 11, 2011. The State subsequently served and filed its notice

¹ Applicant's initial application for post-conviction relief was filed on March 14, 2018. On March 29, 2018, the Supreme Court of South Carolina appointed the Honorable Daniel Hall to preside over the PCR proceedings. On April 16, 2018, Judge Hall held a hearing to determine Applicant's desires on proceeding forward with post-conviction relief and for appointment of counsel. At that time the Court qualified and appointed counsel. Judge Hall issued a Scheduling Order dated April 19, 2018. Thereafter, Respondent timely submitted a return to the application on April 23, 2018. In compliance with the Scheduling Order, a status conference was held by telephone on September 17, 2018. Another conference by phone was held December 4, 2018. On February 21, 2019, Applicant filed an amended application for post-conviction relief. An on the record status conference was held at the Richland County Courthouse on February 20, 2019. Thereafter, Applicant filed a second amended application on February 22, 2019.

of statutory aggravating circumstances on June 8, 2012. William Sean McGuire, Esq., of the South Carolina Commission on Indigent Defense, Capital Trial Division, along with Clay T. Allen, Public Defender for the Seventh Judicial Circuit, represented Applicant on the charges. S. Boyd Young, Esq., also of the South Carolina Commission on Indigent Defense, Capital Trial Division, assisted during trial. The Honorable Barry J. Barnette, Solicitor of the Seventh Judicial Circuit, with Deputy Solicitor Derick B. Bulsa, and Assistant Solicitor Russell Ghent represented the State. The South Carolina Supreme Court assigned the Honorable Roger L. Couch exclusive jurisdiction over the capital proceedings.

On February 19, 2014, a hearing began pursuant to *Franklin v. Maynard*, 356 S.C. 76, 279, 588 S.E.2d 604, 606 (2003), on Applicant's claim of intellectual disability.² Judge Couch heard competing opinions and arguments over three days. After detailed questions of his, Judge Couch resolved Applicant had failed to carry his burden of proof of showing intellectual disability by a preponderance of the evidence. (Supp. R. 1-14 [February 25, 2014 Order]).

After expanded capital *voir dire* proceedings, a jury was selected and a capital trial began on March 11, 2014. The case was sent to the jury on March 12, 2014. The jury began deliberations at 4:08 pm and returned a guilty verdict at 4:29 pm. (R. 2600, lines 18-20; 2602, lines 1-8). Applicant waived the statutory twenty-four (24) hour break afforded between phases, and the penalty phase began at 1:30 pm on the afternoon of March 13, 2014. (R. 2603, line 15 – 2604, line 18; 2606, line 21 – 2607, line 13). At the conclusion of penalty phase deliberations on March 16, 2014, the jury returned. The jury's first finding reflected Applicant failed to show by a preponderance of the evidence that he was intellectually disabled. (R. 3257, lines 16-22). The

² Respondent acknowledges this specific condition is now termed "intellectual disability," but was previously known as "mental retardation." See *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). As the term "mental retardation" was used throughout the trial and in Applicant's appellate brief, Respondent will occasionally use the prior term as it was previously used.

jury's second finding reflected the State had proven beyond a reasonable doubt, the following circumstances in aggravation:

- 1) The murder of a child eleven years of age or under;
- 2) The murder was committed while in the commission of the crime of kidnapping.

(R. 3257, l. 23 – 3258, l. 11).³

The jury made its binding recommendation that Applicant be sentenced to death. (R. 3258, lines 12-25). Judge Couch thereafter sentenced Applicant to death, noting the sentence for kidnapping was subsumed by statutory provisions. (R. 3262, line 14 – 3263, line 5; 4823, & 4825). On March 20, 2014, Judge Couch denied post-trial motions. Applicant served his notice of intent to appeal on March 21, 2014.

Applicant originally filed an initial brief on January 8, 2015. The State moved to seal or strike his brief; moved to strike the designation of matter; moved for “An Order to Prohibit Inclusion of Privilege Medical Records of a Witness and/or Information from the Privileged Records in the Briefs and the Record on Appeal,” and also for an order directing him to file an amended initial brief consistent with any such order.

On May 20, 2015, the Supreme Court of South Carolina granted in part and denied in part, the State's motion. The Court directed Applicant to file a redacted brief omitting reference to privileged records, and to submit the records under seal.

On March 7, 2016, Applicant filed his redacted final brief of appellant, and his redacted final reply brief. (Attachments 2 and 4). He raised the following issues on appeal:

1.
[Redacted]

³ See S.C. Code Ann. § 16-3-20 (C)(a)(10) and (C)(a)(1)(b).

2.
[Redacted]

3.
Whether the trial court erred in finding that appellant was not mentally retarded at the pretrial hearing pursuant to *Atkins v. Virginia* and *Franklin v. Maynard*, and therefore sentencing appellant to death violates his rights under the Eighth Amendment?

4.
Whether the trial court erred in refusing to charge the jury that the state had the burden to prove appellant was not mentally retarded beyond a reasonable doubt and, alternatively, charging the jury that it was required to find appellant was mentally retarded by a preponderance of the evidence, all of which impermissibly shifted the burden of proof to appellant and resulted in verdict forms that were hopelessly confusing in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution?

5.
Whether the trial court erred in refusing to admit evidence of appellant's remorse contained in the records of a hospital chaplain pursuant to Rule 803(6), SCRE, in mitigation, and in response to testimony from a police officer who claimed appellant said "the only thing that I'm sorry about is that I didn't do a better, job on myself," since the exclusion of this relevant evidence violated appellant's Eighth Amendment rights?

6.
Whether the court erred by ruling the state presented racially neutral reasons for striking black male jurors Cheeks and Fullenwider where the state did not strike similarly situated white jurors who also had a criminal record, or had pending criminal charges in the same county, and the treatment of alleged "pro-life" black and white jurors by the solicitor was also disparate?

7.
Whether the court erred by qualifying Juror #43, Donna Champion, because her position that the defense had to prove appellant deserved a life sentence rather the death penalty was burden shifting, inconsistent with the law, and her entire voir dire showed she would not consider certain categories of mitigating evidence?

(Attachment 2, pp. 7-8).

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Respondent also filed its redacted brief in response on March 7, 2016. (Attachment 3).

In an opinion issued on May 31, 2017, the Supreme Court of South Carolina affirmed the convictions and sentence. *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017). (See also Attachment 5). Applicant did not seek rehearing. Applicant next petitioned the Supreme Court of the United States for a writ of certiorari on October 27, 2017.⁴ Applicant presented the following issues:

1.

In concluding that petitioner, whose IQ was scored at 63 and 68 by both sides' expert witnesses, is not intellectually disabled and his execution not forbidden by the Eighth Amendment, did the South Carolina Supreme Court's blatant disregard for expert opinion and methodology violate this Court's precedents in *Hall v. Florida* and *Moore v. Texas*?

2.

(Redacted pursuant to Motion to File Petition for Certiorari and Appendix Under Seal)

(Attachment 8, Petition for Writ of Certiorari, p. i).

Respondent filed a Brief in Opposition on December 27, 2017. (Attachment 9).

Respondent's restatement of the questions presented was as follows:

1.

Where a trial court critically examines the evidence presented by competing expert testimony on the issue of intellectual disability within the recognized clinical framework and assessing credibility based on same, does either *Hall v. Florida* or *Moore v. Texas* mandate that the capital defendant's expert be credited?

⁴ In the interim, Applicant moved in the Supreme Court of South Carolina to unseal the briefs and record on appeal. The State opposed the motion. By Order dated September 1, 2017, the Supreme Court denied the motion to unseal the briefs and record on appeal. For the convenience of this Court, Respondent notes all the publically available filings may be accessed through the South Carolina Appellate Case Management C-Track database as made available on the S.C. courts judicial website, <http://ctrack.sccourts.org>. (Appellate Case No. 2014-000610).

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2.

Does the Confrontation Clause bestow the right to unfettered access and unconditional use of a witness's privileged mental health records for any reason? If so, did the Supreme Court of South Carolina err in establishing a procedure by which a defendant is to request the records, with notice to the individual who holds the privilege, for initial consideration by the court in order to balance the need for release with the privilege of privacy?

(Attachment 9, p. ii).⁵

Applicant's petition to the U.S. Supreme Court was denied February 20, 2018.

(Attachment 10).

Attached and incorporated by reference are the following documents:

1. Redacted, non-sealed volumes of Record on Appeal (Vols. 1-7);
2. Redacted, Final Brief of Appellant;
3. Redacted, Final Brief of Respondent;
4. Redacted, Reply Brief;

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⁵ Respondent noted that it declined, again, to review the privileged materials submitted under seal to the Supreme Court and would rely upon matter in the published opinion:

In his petition to this Court, Petitioner attached another copy of the privileged mental health records and asked they be accepted under seal. (*See* Motion for Leave to File Petition for Certiorari and Appendix Under Seal). Respondent State of South Carolina has not reviewed those records either at trial or on appeal. Respondent has consistently maintained that would be a violation of the privilege that has been continually upheld. However, the legal issue is clearly before the Court and may be easily considered by reliance on the facts and summaries contained in the direct appeal opinion which Petitioner did not challenge by way of a petition for rehearing. Thus, the uncontested summary is adequate and provides the essential facts. It is those facts which Respondent relies upon without further damage to the privilege.

(Attachment 9, p. 18).

Similarly, Respondent maintained this position at the initial hearing before this Court on April 16, 2018. Respondent advised the PCR court that there were privileged documents included in the direct appeal, and that Respondent would rely only on the public record in making its return.

5. Opinion No. 27722 (S.C. Sup. Ct. filed May 31, 2017);
6. June 16, 2017 Remittitur;
7. Order, Supreme Court of South Carolina, dated September 1, 2017 (denying motion to unseal);
8. Redacted, Petition for Writ of Certiorari (SCOTUS);
9. Brief in Opposition (SCOTUS);
10. Notice of Denial of Petition for Writ of Certiorari (to SCSC from SCOTUS), dated February 20, 2018.
11. Supplemental authority submitted by Division of Appellant Defense the South Carolina Supreme Court on September 12, 2016, March 29, 2017, and May 4, 2017.
12. Supplemental Record on Appeal, Vol. I, pp. 1-14(Judge Couch's Order Denying Applicant's Intellectual Disability Claim).
13. Portions of sealed volumes of Record not subject to privilege—R. 3729-4483

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STATEMENT OF FACTS

A Spartanburg County jury found Applicant guilty of the kidnapping and murder of eight-year-old [REDACTED] After hearing all the evidence of the crime, and the evidence submitted in the separate sentencing proceeding, the jury recommended a sentence of death. The jury considered the following facts in guilt and sentencing:

Guilt Phase

On July 8, 2009, William Meyer, a patrol deputy with Spartanburg County Sheriff's Office, received a call at approximately 3:00 in the afternoon. He was advised a child had been shot at a home in the Chesnee area of Spartanburg County. When he arrived just minutes later, he saw a woman frantically trying to direct him to the child. The child was lying face down on

the ground near the front of a vehicle. The child was not responsive. Deputy Meyer noticed a "red spot" on her back, then a "gaping wound ... on her left leg." While attempting to check her pulse, Officer Meyer "realized there was blood pouring out of [her] ear." There were no signs of life. He called for assistance. (R. 2357, lines 1-23; 2374, lines 4-11; 2376, lines 12-16). He then met the visibly shaken homeowner, Mr. Bryant, who informed Deputy Meyer that Ricky Blackwell was the shooter. (R. 2358, lines 1-21; 2363, lines 9-12). Deputy Meyer testified he was also informed of Applicant's "direction of travel" which was behind the residence and directed other responding deputies toward the area. (R. 2363, line 16- 2364, line 6).

Deputy John Smoak testified that he arrived after Deputy Meyer. He testified that he also check [REDACTED] for signs of life and did not find any. (R. 2493, line 14 -2494, line 2). Armed with a description of Applicant, he then searched the area and was joined by other officers. (R. 2494, lines. 4-23; 2498, lines. 1-14). Applicant came out of the wood line toward the officers. He was still armed. (R. 2498, line 17 - 2499, line 10). He stayed behind a children's play set, out of sight of the officers. Applicant eventually placed the gun at his abdomen and shot himself. Though repeatedly instructed to drop the gun, he did not do so until the gun slipped from his hand after he shot himself. (R. 2500, line 4 -2501, line 23). Deputy Smoak retrieved and secured the gun. (R. 2501, lines 19-21; 2502, lines 5-17).

[REDACTED] witnessed the shooting. [REDACTED] was formerly married to Applicant. Since their separation, [REDACTED] had been seeing [REDACTED] father, [REDACTED] (R. 2378, line 24 -2379, line 2; 2396, line 23- 2397, line 16). The day of the murder, [REDACTED] testified that she had [REDACTED] with her, and had intended to pick up her grandchildren to return to [REDACTED] home for them to play. (R. 2381, lines 14 - 24). As she arrived at her daughter [REDACTED] home, not seeing a car, she was turning to leave. She testified "Ricky jumped out and flagged me

down, and he said I thought you was picking up the boys,” and she replied she was, but her daughter’s car was not there. (R. 2382, line 25 – 2383, line 4). She testified Applicant told her the grandchildren were with their father in the home “waiting for you.” (R. 2383, lines 5-7). She turned back around and headed back toward the home. When stopped, she saw a small dog and turned to [REDACTED] saying [REDACTED], honey, don’t get out of this car until I get this dog cause I don’t want you to get dog bit.” [REDACTED] stayed in the car and [REDACTED] exited and grabbed the dog. As she “turned back around he had her.” (R. 2383, lines 11-23). Applicant, still upset at the breakup of his marriage, grabbed the child, held her, and pointed a gun at the child’s head. [REDACTED] testified that she pleaded with Applicant to take her instead of the child. (R. 2386, lines 1-11). Ms. Davis testified:

... he was walking around the car and I was screaming let her go, Ricky, please, its me you want, take me, and let [REDACTED] take her home, and he said no and he took the gun and pointed it toward -- on the car, and he said you’ve pushed this too far. You did this. You tell me what [REDACTED] thinks of this, and then the gun went off, and then it went off again.

(R. 2386, lines. 9-15).

[REDACTED] testified she saw Applicant place the child on the ground and she ran into her daughter’s home to call 911. She grabbed her granddaughter, who was crying, and ran out the back of the home. She heard another shot. She ran. Applicant followed. She testified a neighbor let her in and she called 911 once again. (R. 2386, line 17 - 2387, line 25). She identified not only Applicant, who had asked them to go to their daughter’s home that day, but also the gun he used. It was a gun she had purchased for him “earlier in our marriage” as a gift. (R. 2388, lines. 14-15; 2392, lines. 9-18; 2393, line 22 – 2394, line 14).

[REDACTED] son-in-law, confirmed that Applicant was in the area around the home earlier that day. (R. 2471, line 18 – 2472, line 16). He also confirmed he saw

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██████████ pull into the yard and told his sons that their grandmother has arrived. He testified by the time he turned back around and went to the door, he saw Applicant with his arm around ██████████ neck/chest area and saw a gun. (R. 2474, line 14- 2475, line 25; 2487, line 24 – 2488, line 3). He tried to pull his children back into the home and heard two shots. (R. 2476, line 9 – 2477, line 8). He testified his mother-in-law went in the house as he was trying to get his children inside, and she called 911. (R. 2477, lines 10-24). He testified his mother-in-law ran out the back with his daughter and he picked up the phone and spoke to the 911 operator. She told him to check on the child, which he did. ██████████ was face down and not moving. (R. 2477, line 12- 2479, line 15). He confirmed that Applicant ran after his mother-in-law across the back of the home. (R. 2478, lines 11-15; 2483, lines 20-25). ██████████ testified that he told the responding officer that Applicant had shot ██████████ and described Applicant. (R. 2480, line 17 – 2481, line 15). He testified that had been married to Applicant's daughter for approximately fifteen (15) years at the time of trial, (R. 2471, lines 1-7), and knew Applicant had a gun, but had only seen the gun two times – “when I first met my wife, and the day of the incident.” (R. 2478, lines 16-18).

Pathologist David Wren testified that he conducted the autopsy on Brooke on July 9, 2009. (R. 2536, lines 7-10). Dr. Wren recorded the following injuries:

... There were nine gunshot wounds to the body... some of them were through and through and the reentries. Specifically there was a gunshot wound to the right side of the head that exited in the left temple. There was a gunshot wound in the right che[e]k, a grazing gunshot wound and a deep grazing wound in the right neck that went under the skin and came back out and went in her left arm where it fractured her humerus [sic] and I recovered a bullet from that area, and then she had a gunshot wound in the back that communicated with the one on her cheek, and she had a through and through gunshot wound to the left leg.

(R. 2537, lines 3-15).

From tracking the injuries to the child's body, Dr. Wren opined there were four gunshots: "One to the head, one to the back, one to the leg and a grazing" wound to the cheek and neck which went into her arm. (R. 2540, line 13 – 2541, line 8). He opined:

... the immediately fatal wound was the one to the head. Any, any of those individually or collectively could of caused her death. If they're not immediately fatal, there are lots of complications that can occur. So, we actually assigned those as potentially fatal if they're not immediately fatal. So, I put down the cause of death as gunshot wounds to the head and body.

(R. 2541, lines 11-17).

Suzanne Cromer of the South Carolina Law Enforcement Division ("SLED") was qualified as expert in the field of ballistics and tool mark identification. (R. 2558, lines 4-7). She opined the bullet recovered from the child's body was fired by the gun recovered from Applicant. (R. 2559, line 16 – 2561, line 13). That particular gun would require "three and a quarter to 4 pounds" for single action firing, and "ten and three-four[th]s pounds to eleven and fourth pounds of pressure" for double action firing. (R. 2562, line 1 – 2563, line 11).

The State argued not just that Applicant shot the child, but that he "finish[ed]" the child, shooting her four times to ensure she was dead. (R. 2576, lines 9-11). The defense conceded guilt, but attacked [REDACTED] testimony, accusing her of using Applicant for money after their separation and embellishing her testimony to demonstrate her "heroic" action during the shooting. (R. 2578, line 10 - 2579, line 11).

The case was sent to the jury on March 12, 2014. The jury began deliberations at 4:08 pm and returned a guilty verdict at 4:29 pm. (R. 2600, lines 18-20; 2602, lines 1-8). The jury then turned their attention to the sentencing evidence.

Penalty Phase

As noted, the jury considered the above facts and found Applicant guilty of the kidnapping and murder of eight-year-old [REDACTED]. The above evidence was also moved into the penalty phase. (R. 2608, lines 13-25).

In addition, the State presented a glimpse of the young victim's life. The State presented [REDACTED] baseball coach, [REDACTED] testified that [REDACTED] "was the only girl on the team, and was friends with M [REDACTED]'s son. The eight-year-old was the son's first "girlfriend," and the two would "hold[] hands in the outfield." (R. 2626, line 13- 2627, line 12). He described her play and in particular her first run. (R. 2628, line 1- 2629, l. 14). [REDACTED] also described the memorial for her at the sports complex. (R. 2630, line 7 – 2631, line 15).

The State also presented [REDACTED] the principal at Reidville Elementary School, the elementary school eight-year-old [REDACTED] attended. [REDACTED] testified that she had known [REDACTED] from kindergarten through the end of second grade, after which she was listed as "withdrawn" due to her death. (R. 2633, lines. 6-18). [REDACTED] testified that [REDACTED] as a loving child, with "a special spark and a special light that the children felt and knew," a leader even at an early age, demonstrating "integrity ... kindness, and caring." (R. 2633, line 6 – 2635, line 24). She testified that [REDACTED]'s parents had been outstanding, "not a single bit of negativity and a whole heck of a lot of love," even when going through a hard time personally (apparently referencing the couple's separation), and that [REDACTED] "saw that and felt that too." (R. 2636, lines 5-25). [REDACTED] also testified [REDACTED] murder was difficult for the faculty, especially in trying to begin a new school year without her, and they honored her memory in a ceremony at their science center, and in an annual. (R. 2637, lines 1-19; 2638, lines 14-24). She testified [REDACTED] is an outstanding and loving student. (R. 2639, line 9 – 2641, line 4).

As to Applicant, the State presented evidence of Applicant's indictment for breaking into a gasoline tank and petty larceny, and his 1981 guilty plea to those charges, (R. 2647, lines 3-24), and two disciplinary actions in the Spartanburg County Detention Facility (possession of contraband – Clorox in a baby bottle – and possession of contraband – unauthorized medication, hoarding medication in a candy wrapper), (R. 2650, line 4 – 2651, line 21; 2655, lines 2-22).

As to the circumstances of the crime, in addition to the incorporated evidence, the State presented [REDACTED] mother, [REDACTED] testified that her daughter and [REDACTED] were with her the morning of the crime, and she had fixed breakfast for them. [REDACTED] testified Applicant initiated a conversation about insurance; [REDACTED] advised she intended to take a three month leave of absence and each of them would have to pay \$100.00 a month to keep the insurance active. She testified that Applicant then requested [REDACTED] to go over there and see the grandbabies today," and [REDACTED] agreed to do so. Applicant left at that time stating he was "leaving to go pay some bills, and he was gonna go shopping." She testified her husband, [REDACTED] asked Applicant to stay and play cards, but he declined citing other obligations. However, he promised to return. [REDACTED] explained that her husband and Applicant often played rummy together. She also testified that it was not her impression that Applicant was "grieving" over the breakup of his marriage, and noted that he came over almost every day, and was "kidding with [REDACTED] laughing and joking and cutting up and playing cards and stuff." (R. 2658, lines 2-9; 2662, line 19 – 2666, line 17).⁶

⁶ The defense objected to [REDACTED] testimony on the basis that it corroborated [REDACTED] testimony from the first phase. However, as the State correctly argued, the testimony went to premeditation, essentially, the extent of malice, which is a proper sentencing phase consideration. *See, e.g., State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003) ("The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender."). The State noted that the defense had essentially conceded guilt in the first phase and it was unnecessary to call all

Deputy Micah Horton testified that he stood by Applicant at the crime scene while EMS treated him for his self-inflicted gunshot wound. He testified Applicant asserted, without questioning or prompting by anyone: "... I shouldn't have done it, not to get back at him...." (R. 2669, lines 2-15).

Reserve Officer Tim Timmons testified that he was instructed to ride in the ambulance with Applicant. He testified that he consulted with the EMT to determine if Applicant was in jeopardy of dying and wanted to give him the opportunity to give a statement. He did so and Officer Timmons read Applicant his Miranda rights which Applicant acknowledged and waived. Officer Timmons asked what had happened and Applicant responded: "... my ex-wife drove up and I grabbed her boyfriend's little girl..." The office asked Applicant to identify the little girl, to which he replied, "... I called her Brooke." (R. 2676, line 6 – 2677, line 10).

Investigator Lorin Williams testified he went directly to the hospital after receiving information Applicant was being transported. He testified, after checking with medical personnel to ensure Applicant was stable and not heavily medicated, that he read Applicant his Miranda rights which Applicant acknowledged. (R. 2682, line 8 – 2684, line 17). He then asked Applicant what happened and why. Applicant responded:

... he and his wife had been having problems, and that he was trying to get her to reconcile their marriage. Basically that, that she was continuously throwing up her boyfriend to him, and he said that, that he had been having sour thoughts about how to get back at this man for breaking up his marriage.

available witnesses at that time. The defense conceded the evidence was otherwise admissible, but objected at this point only because it had not been submitted previously. The judge rejected the argument and allowed the testimony. (R. 2659, l. 9 - 2662, l. 6). The defense also attempted to keep the photographs of Brooke away from the jury determining sentencing, arguing "all these photographs ... depicting these wounds on this very young child, they all invoke the Fourteenth Amendment, due process clause, because they're so prejudicial and it renders the, the penalty phase fundamentally unfair" and, given "the concession of guilt," they were "not necessary to prove anything at all." (R. 2701, line 19 – 2703, line 17).

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... he went on and I asked him about the sour thoughts. ... I told him, I said, well, you know, can you - - is there something that you can tell me, is there, is there a reason that you can give me to help me understand you know, how this could happened to a child of this age ...I need some help in helping me understand what, what would make you do this ... why this would happen. And he just basically said, again, you know, that ... it was his way of getting back at, at her dad for breaking up the marriage, and I said ... is there something you can tell me, tell me it was an accident, tell, tell me you were sorry, tell me anything like that. And he just looked at me, he said the only thing that I'm sorry about is that I didn't do a better job on myself.

(R. 2684, line 19 – 2685, line 25). The investigator testified that Applicant never asked about [REDACTED], “if [REDACTED] was okay, what her condition was, had, had no concern and showed no concern whatsoever for anything but, but his condition at that point.” (R. 2686, lines 1-6).

The State also called Dr. Wren to further discuss the injuries to [REDACTED]⁷ Dr. Wren discussed the nature of the wounds reflecting the details of the shots, including closeness the shots and angles. (R. 2711, lines 15 – 2720, line 17). Dr. Wren opined the shot to [REDACTED]'s head was inflicted “probably very close, but not tight contact and most probably not loose contact.” (R. 2713, lines 3-8). Dr. Wren testified the shot to the back had abrasion characteristics that indicated consistency with being shot while bent over and falling down. (R. 2715, line 20 – 2716, line 22). The shot to the neck area indicated charring which comes from a contact wound, “... the barrel gets immediately hot and it burns the skin where it goes in.” (R. 2717, line 5 – 2718, line 14). The remaining shot was to [REDACTED] leg hitting “solid tissues” and exiting near her knee. (R. 2720, lines 8-19). Dr. Wren opined that given the nature of the wounds, [REDACTED] would

⁷ The State carefully selected the additional photographs to be used in this phase in camera with the trial judge and defense counsel. (See R. 2692, line 13 – 2693, line 8). The trial judge placed on the record: “I’ll note, in making the ruling, that the State has shown restraint in presenting the photographs that they have presented by offering black and white photographs of the appropriate situations, and also not a seeking to introduce a rather large number of similar photographs in the case. The Court does note that in making its ruling.” (R. 2707, lines 15-21).

have been moving during some of the shots, with the inability to move after infliction of the head shot. (R. 2720, line 24; 2721, line 6). He confirmed that “these are not all exactly at the same time.” (R. 2721, lines 10-11).

As further evidence of the details of the crime and how Applicant left [REDACTED] Sergeant David Hogsed identified and explained the pictures from the crime scene reflecting that (before being moved by EMS), Brooke was face down on the ground. He identified another photograph that showed “basically the mid section [sic] to the top of her knees” reflecting injuries and that the child had “urinated on herself at the incident....” (R. 2728, line 3 – 2729, line 20).

Returning to [REDACTED], the State presented several other witnesses from the elementary school she attended. [REDACTED] was the school nurse who administered [REDACTED] asthma medication and would sooth the child as she struggled to breath. [REDACTED] testified to [REDACTED] smile, her beauty, maturity and love of flowers. She also testified that “her mom and dad were, were always available ... [v]ery protective, very caring, very loving toward [REDACTED] Always, always there as soon as I needed them.” (R. 2731, line 4 – 2732, line 23). [REDACTED] testified she could not “make it to the funeral. It was just really too hard for me,” but she was able to go to the grave site and retrieve one of the flowers which she pressed and kept. (R. 2733, lines 13-20). She testified that [REDACTED] “dad painted [REDACTED] house bright yellow because that was her favorite color” and that “every morning [she would] pass [REDACTED] house going to work and I pass it in the afternoon and there’s the bright yellow house,” that “brings a smile to [her] face,” reminding her of being “happy and cheerful,” the “kind of child she was.” (R. 2733, lines 21-25).

[REDACTED] s second grade teacher, testified to her recollection of “just a precious, sweet, kind, loving little girl,” and read a story that [REDACTED] had written, a story with

emphasis on family fun and inspiration. [REDACTED] testified that [REDACTED] own parents, [REDACTED], "were very supportive, very loving," and she would see them not just at school but also at [REDACTED] baseball games. She testified [REDACTED] greatly enjoyed baseball, and she recalled seeing the memorial to [REDACTED] at the field. (R. 2736, line 9 – 2743, line 2). [REDACTED] also shared a letter [REDACTED] wrote to a soldier to express thanks to the soldier as part of a class project. She testified she kept [REDACTED] letter to help other students the following year. She testified [REDACTED] wanted everybody to be friends and she was a peacemaker," and that "she holds a special place in [her] heart." (R. 2744, line 6 – 2745, line 23). She noted, "... I feel like people that didn't know her were really robbed of a chance to get to know of a wonderful girl." (R. 2746, lines 3-5).

Defense Mitigation

The defense called [REDACTED] who testified she had been a work supervisor for both Applicant and his wife [REDACTED]. (R. 2757, line 18 – 2758, line 21). [REDACTED] described Applicant as "gentle, humble," "very tender hearted," "compassionate," and a reliable compliant worker. (R. 2759, line 11 – 2760, line 2; 2770, lines 1-4). She described his "anguish" at the breakup of his marriage. (R. 2768, lines 12-24).

The defense also called Dr. Ginger Calloway to again make a presentation about intellectual disability. (R. 2810, lines 21-22). Dr. Calloway opined Applicant "fell into a mildly retarded range," and "this disability was manifested before the age of 18...." (R. 2915, lines 2-6). She testified in her opinion, Applicant was intellectually disabled. (R. 2916, lines 1-5).

Also for the defense, Dr. Donna Schwartz-Watts, an expert in forensic psychiatry, testified that she "treated [Applicant's] depression and his anxiety and helped to manage that in the detention Center." (R. 2985, lines 7-10). She reviewed prior medical records treated

Applicant at the Spartanburg County Detention Center, which included two psychiatric hospitalizations and a prior diagnosis of depression, testified:

... in my opinion, he's had a history of major depression before. He's had two episodes before when he was hospitalized, and it's clear, from looking at Doctor Jackson's records, that he remained depressed before this incident, and it's very clear that, since I treated him at the jail, he had had symptoms of depression as well.

(R. 2985, lines 10-18). She noted when asked about his thoughts about the murder:

...the words that he usually uses with me are he can't believe he's done this. It's very hard for him to accept what happened and what he's done, and he, he has a lot of anxiety. He has nightmares about it. He has a difficult time dealing with what he's done and he's very sad about it.

(R. 2987, lines 5-16).

The defense also presented Applicant's cousin, [REDACTED], who testified Applicant was "like a brother" and was "loving," "gentle," and "always trying to help people." (R. 2990, line 17-23). She recounted kind gestures and family moments. She testified "we love him with all our hearts and need him. So, just understand he is a good man." (R. 2994, lines 1-3). Ms. [REDACTED]

described her reaction to having heard Applicant had murdered the eight-year-old child: "It wasn't Ricky. They wasn't our Ricky. It was no way that was our Ricky. Something went wrong. It was not our Ricky that did that." (R. 2994, lines 6-10).

The defense also called [REDACTED] Applicant's daughter. She described her father as "a kind caring man" to her and the family, even taking in his son's "baby mama" when needed. (R. 3000, line 9- 3001, line 6). She testified Applicant loved his wife and treated her well, and that he loved and played with his grandchildren. (R. 3002, lines 3-24). She testified that as her mother began to see [REDACTED] father, Bobby, her mother began to change: "... she started drinking, she started smoking, she started dressing more inappropriately...." (R. 3004,

lines 5-15). She testified that [REDACTED] had a Harley Davidson motorcycle, and her mother got a tattoo on her lower back with "a Harley Davidson logo that said Harley in the middle of it." (R. 3004, line 20 – 3005, line 2). [REDACTED] testified they had had a loving household before, and provided "a little clip" from home movies, which she then explained. (R. 3007, line 2 – 3009, line 17). She testified her father remains a religious man and has studied the Bible, even while incarcerated at the county jail. (R. 3009, line 19 – 3010, line 13). She also reviewed multiple family pictures, explaining the events and people. (R. 3011, line 20 – 3015, line 11). [REDACTED] testified her father still loves her mother and would accept her back if he could. (R. 3015, lines 18-22). She recalled when Applicant found out her mother was intimate with [REDACTED] Applicant left only to return minutes later with a "bottle of pills in his hand...." Both [REDACTED] and her mother attempted to ensure he would not harm himself. (R. 3017, lines 1-9). She described her mother as "mean" to him, having "bragged about having sex with [REDACTED]" and [REDACTED] would sympathize with Applicant. (R. 3017, line 22 – 3018, line 21). [REDACTED] testified she had advised her mother to call before coming [REDACTED]'s house, and not to bring "[REDACTED]" because it hurts daddy ... and she told me she would not do that." (R. 3019, lines 3-8). When asked if it hurt Applicant to see her mother "paying so much attention [REDACTED]'s family and not you," she responded, "Yes, sir, it did." (R. 3019, lines 12-14). [REDACTED] testified her mother would call [REDACTED] her "new daughter," her "perfect daughter," and "angel." (R. 3019, lines 15-21). She testified that her mother was not seeing her own grandchildren at that time. (R. 3019, lines 22-24). She previously testified her daughter has special needs. (R. 3003, lines 2-7). She concluded with telling the jury that Applicant:

... was always a kind, gentle, caring man. He was not the man that they're trying to make him out to be today. My daddy would of never done that. My daddy was pushed to the extinct (sic) to do

what he did, and he regrets what he had done. He suffers from that every day.

(R. 3020, lines 7-11).

When asked if he cries about what he has done, [REDACTED] responded, "Yes, sir." (R. 3020, lines 12-13).

On cross-examination [REDACTED] admitted her two sons witnessed the murder, the "oldest one witnessed it a little bit more," but they both had to receive counseling, and that it still affects them. (R. 3021, lines 8-22). She also admitted upon questioning that he played pool very well, having won several tournaments. (R. 3022, lines 1-6).

[REDACTED] testified for Applicant, as well. She was the "baby mama" Applicant took in and helped. She testified Applicant helped with the baby "did everything for him... changed diapers, fed him, whatever there was to be done." (R. 3025, lines 17- 3026, line 13). She testified that she loves Applicant and described him as: "Amazing... great. Very kind hearted ... give the shirt off his back" kind of man. (R. 3026, lines 16-20). [REDACTED] left to live with [REDACTED] mother). [REDACTED] testified that Applicant would come by to play cards with [REDACTED] and would express that he missed his wife and wanted her back. He was sad, and would plead with her to return. (R. 3027, line 9- 3028, line 13). She testified his wife would speak harshly to him in response. (R. 3028, lines 14-15). [REDACTED] testified Applicant was heartbroken over her leaving. (R. 3028, lines 16-20). She testified [REDACTED] changed her appearance after leaving, "dressing more like she was a teenager with some short clothes, low cut shirts." (R. 3028, line 21 – 3029, line 2). She testified [REDACTED] "started drinking and things like that, going to the bars." (R. 3029, lines 3-4). She would "flirt" with Applicant, but it only "hurt him a lot because she ... gave him hope" she would return. (R. 3029, lines 7-12). She testified Applicant had "been there" for her, that he was great,

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and "very kind hearted." [REDACTED] testified she was shocked and could not believe that he murdered eight-year-old [REDACTED]. She had "never heard him argue with [REDACTED]." (R. 3029, lines 15-25).

[REDACTED], a fellow church member with Applicant, testified Applicant was "a good friend, kind of easy going, laid back, but deliberate in his speech." He testified he "never knew him to be other than easy to get along with," and a gentle man. (R. 3031, lines 1-19). [REDACTED] testified Applicant loved his wife and treated her well. (R. 3031, line 20 – 3032, line 2). He recalled how Applicant "wept" in the parking lot while telling [REDACTED] about the breakup of his marriage, and [REDACTED] testified, "it jerked at my heart strings." (R. 3032, lines 7-10). [REDACTED] testified as to Applicant's religion, he "would say he was a good Christian believer in our midst." (R. 3033, lines 4-7). He, too, testified that he could not believe Applicant had murdered eight-year-old [REDACTED]. He stated he did not think Applicant could be stirred to anger. (R. 3034, lines 10-15). He stated Applicant was in "anguish" over the breakup. (R. 3035, lines 11-14).

Applicant's father, [REDACTED] testified that Applicant was a "good boy when he was a kid ... never give us any trouble...." (R. 3037, lines 23-25). He was humble ... good ... never did bother nobody." (R. 3038, lines 2-7). He testified Applicant loved his wife, his children and grandchild, and treated them well. He played with his grandchildren. (R. 3038, line 18 – 3039, line 6). [REDACTED] testified Applicant was "real depressed" and spent days crying when his wife left. [REDACTED] testified "he wasn't Ricky," agreeing with defense counsel that "he just wasn't the same man anymore." (R. 3039, lines 9-16). [REDACTED] testified that when [REDACTED] would come around, "it would tear him up." (R. 3039, lines 23-24). It would give him hope then cause despair. (R. 3040, lines 2-8). He testified that when he learned Applicant had murdered the child, "it tore me up" and he "just couldn't believe

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it.” (R. 3040, line 12). [REDACTED] also went through several photographs and explained their family and events. (R. 3041, line 6 –3046, line 20). [REDACTED] asked the jury to spare his son’s life, that he “was always a good boy” and “Ricky wasn’t Ricky when this happened. Ricky wouldn’t hurt nobody if he’s, if he was in his right mind.” He testified “Ricky wants to live till the Lord calls him home. I know it won’t be no pleasant life, but he wants to live, and my sympathy goes out for the little girl’s family.” (R. 3047, lines 13-22). On cross-examination, [REDACTED] admitted the gun Applicant used to murder [REDACTED] had been locked in a gun case at [REDACTED]’s home. Applicant had to go to [REDACTED]’s home to retrieve the gun before he could use it in the murder. (R. 3048, line 16 – 3052, line 4; 3054, lines 1-20).

The defense also presented [REDACTED] Applicant’s brother-in-law. [REDACTED] married to [REDACTED]’s sister. He testified that Applicant was “always a really good person. Kind, gentle, like everybody said.” (R. 3057, lines 9-11). After [REDACTED] left Applicant, Applicant would go by [REDACTED]’s salvage yard and garage business. He would help [REDACTED] out, and no one had a “mean word” to say about him, nor did he have a “mean word” to say about anyone else. (R. 3057, line 17 – 3059). However, Applicant was so distraught over the breakup of his marriage that he became a distraction to the work [REDACTED]’s son expressed that he considered not allowing Applicant to help in a later car sale event as Applicant’s crying was a distraction. (R. 3059, line 4 – 3060, line 3). [REDACTED] testified he could not believe Applicant had shot an eight-year-old child, indicating “I don’t know what happened, and I mean he done a bad thing ... it just wasn’t ... Ricky....” (R. 3060, lines 8-23).

Applicant also presented [REDACTED], who had worked with Applicant and had grown close to both Applicant and Ms. Davis. (R. 3062, lines 3-23). [REDACTED] testified Applicant

was distraught over the breakup.⁸ (R. 3064, lines 15-18). [REDACTED] testified that, on the day of the shooting, [REDACTED] stopped by her house with [REDACTED]. She introduced [REDACTED] as her daughter, and insisted M [REDACTED] knew [REDACTED] father [REDACTED] though [REDACTED] could not recall [REDACTED] (R. 3064, line 19 – 3067, line 7). She recalled that M [REDACTED] s appearance changed after she left Applicant. She testified [REDACTED] lost weight and began wearing short “Daisy Dukes” and bared her midriff. She also changed her hair color. (R. 3067, line 12 – 3068, line 17).⁹ [REDACTED] then returned to describing Applicant’s character. She noted that Applicant had been very good to her husband as he was dying from cancer. (R. 3069, lines 2-13). She expressed that she “didn’t believe it,” when she heard Applicant had shot a child. (R. 3069, lines 18-21). She testified she “struggled” with the news as the “Ricky [she] knew” would not have hurt a little girl. (R. 3073, lines 1-5).

[REDACTED] Applicant’s pastor, also testified for the defense. [REDACTED] testified that Applicant had attended his church while his children were small, then began attending again when [REDACTED] left him. (R. 3072, line 7 – 3073, line 12). (See also R. 3085, line 14 – 3086; line 10; 3088, lines 9-22). [REDACTED] testified Applicant cried to him over the breakup and his emotional state began to deteriorate. Applicant lost weight and reported sleeping on the floor in his home. (R. 3073, line 15 – 3074, line 3). [REDACTED] testified that he advised Applicant:

... if this is what she wants to do you’re not gonna win her back by chasing after her. She wanted money for rent, for an apartment that she had rented. He gave her money for food. I said you’re just helping the matter along. I mean she’s not gonna come back

⁸ She would later testify in cross-examination that she did not know the cause of the breakup. (R. 3070, lines 15-20).

⁹ This testimony was allowed over the objection of the State. (R. 3067, line 24 – 3068, line 2). The State argued the testimony “has nothing to do with mitigation. It’s just poor mouthing Angie.” (R. 3067, line 24 – 3068, line 1).

as long as you're paying her way, and he finally went to his mom and dad's to spend the night....

(R. 3074, lines 6-12). He also identified several pamphlets that the church would provide so its members could use it in study at home which had belonged to Applicant. He recalled that he once took material to Applicant's home, and saw Applicant with a family Bible, and Applicant's wife with a dictionary and pad of paper. He testified "she was looking up words they didn't understand." (R. 3081, line 9 – 3083, line 7). After Applicant was incarcerated, [REDACTED] sent Applicant a children's Bible so he could better understand the scripture. (R. 3083, line 10-23).

[REDACTED] testified he spoke with Applicant at the jail:

... the first time I went to the jail to talk with him, he honestly said, he said I did it, but I don't remember doing it. Said I only - - the first I remember of what happened I was in the hospital, and I talked to him about forgiveness. I told him that God forgave David for murder, and God can forgive him, and I took him down the road of repenting, and prayed with him, and he said he'd - - the burden of guilt was gone. The next time I went to see him he said I've - - God's forgiven me, but I can't forgive myself.

(R. 3084, lines 3-12). He testified that he was "surprised" to hear about the shooting. [REDACTED] testified: "I knew he was emotionally disturbed. He wasn't the man that I first met and - - but I couldn't believe he did it. I just couldn't believe it." (R. 3086, line 24 – 3087, line 1).

Lastly, Applicant called his mother, [REDACTED] who identified and presented more family photographs. (R. 3101, line 9 – 3104, line 18). She also testified that Applicant receives a multitude of letters and cards at the jail, and demonstrated a box full of items representing those items as a portion of the mail received. (R. 3105, lines 1-22). Further, she identified Applicant's voice on a telephone recording from the jail, and testified the conversation was between Applicant and [REDACTED] father, [REDACTED] wherein he expressed

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concern over [REDACTED] failing health. (R. 3106, lines 2-6; 3192, lines 9-17). She asked for mercy for her son:

He's a wonderful son ... if you only knew my son like I have for 55 years that he's been here with me you would say he's a wonderful son. I couldn't of asked for a better son than what I've got, and ... I just love to ask you to spare his life because I know that something happened to him that day, and he would of never did that to that child cause he loved children too good and children love him too good, and I'd love for y'all to spare his life.

(R. 3110, line 22 – 3111, line 5).

State's Reply

In reply, the State recalled [REDACTED] to clarify that he knew an individual by the name of [REDACTED], though he denied knowing such an individual earlier believing his name to be [REDACTED]. (R. 3121, lines 10-22). He did not recall telling [REDACTED] that he had taken possession of Applicant's guns because he was afraid Applicant would hurt someone, that Applicant had broken into the gun cabinet to obtain a gun. (R. 3122, lines 11-20).

[REDACTED] testified that he worked in trucking with [REDACTED] and went on many trips with him. He testified he was "very fond" of [REDACTED] and it was "extremely hard" to testify at the trial. (R. 3126, lines 14-25). Even so [REDACTED] testified concerning a conversation with [REDACTED] on one trip approximately three weeks after the murder:

[REDACTED] and I had many discussions about Ricky, Ricky being in jail, his wife, you know, not sleeping, being upset. One occasion he told me that - - we were discussing what happened, how, and he said that Ricky had broke in and broke into his gun case, that they had got the guns from Ricky because he was afraid he was gonna hurt himself or someone, and said that Ricky had broke into the gun case, got the gun, and bang, you know, the next day or so it happened.

(R. 3127, lines 9-17). On cross-examination, he noted the surety of his recollection though he underscored the difficulty in testifying: "... when something happens to a child, I didn't want to

say anything. It's eat on me for five years, and I know exactly because I went home and discussed it with my wife ... that day." (R. 3129, lines 10-17). He further testified *in camera* that M [REDACTED] had talked about Applicant's relationship with [REDACTED]

... that he was very possessive over her. He couldn't handle her leaving for another man, about how she brought that child to torment Ricky to go swimming that day, and it was her fault that the child was killed because she was getting back at Ricky. That's mainly what he discussed with me on many occasions.

(R. 3133, line 20 – 3134, line 1). Also *in camera*, the defense asked if [REDACTED] had said Applicant, "Ricky carried the gun because he was afraid of [REDACTED]" to which [REDACTED] responded, "he never talked about Ricky being afraid of anyone." (R. 3134, lines 13-15). Defense counsel also asked if [REDACTED] said anything about being afraid "his house was gonna burn down?" to which [REDACTED] answered, "No.... Never heard that." (R. 3134, lines 13-20). The State objected and no further questions were asked by defense counsel given the trial court's ruling that [REDACTED] was offered for "impeachment purposes because Cletus did not admit that he made a prior statement." (R. 3135, lines 12-16).

Charge on Aggravating Circumstances and Mitigating Circumstances

The judge instructed the jury that aggravating circumstances must be proven by the State beyond a reasonable doubt. Further, the judge instructed the jury it could consider only two circumstances: (1) murder of a child under eleven years of age; and (2) murder during the commission of the crime or act of kidnapping. (R. 3226, line 10- 3227, line 14). The judge instructed that only if one or both of the aggravating circumstances are found could the jury consider sentencing. (R. 3227, line 15- 3229, line 23). However, he also instructed that even if the jury found one or more statutory aggravating circumstances, they were not required to recommend death. (R. 3230, line 23 – 3231, line 19; 3239, lines 14-25; 3240, lines 12-18). The

judge also instructed the jury could consider any statutory mitigating circumstance supported by the evidence and charged the jury on five (5) such circumstances to consider: (1) no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (4) the age or mentality of the defendant at the time of the crime; and (5) evidence of mental retardation. (R. 3237, lines 5-24). The judge also instructed the jury it may consider any nonstatutory mitigator supported by the evidence, but that it “need not find the existence of such a circumstance by proof beyond a reasonable doubt or any other level of proof.” (R. 3239, line 13). The judge also instructed that apart from statutory or nonstatutory mitigating circumstances, the jury could also return a life sentence as an act of mercy. (R. 3240, lines 1-18). (See also R. 3241, line 23 and line 4). The judge cautioned, however, that the decision must be made “without bias and without prejudice to any party” and may not “be governed by sympathy, prejudice, passion, public opinion, or any other arbitrary factor.” (R. 3243, lines 5-12). He instructed that “[b]oth the State and the defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in the case, and that you will follow the law as ... explained” (R. 3243, lines 12-15).

Sentencing

The jury considered and rejected, as Judge Couch had independently done before the trial, Applicant’s suggestion he was intellectually disabled. Next, the jury reported that it found, beyond a reasonable doubt, both of the submitted circumstances in aggravation – (1) murder of a child under eleven years of age; and (2) murder during the course of kidnapping – and

recommended death.¹⁰ (R. 3257, line 23 – 3258, line 25). As noted, Judge Couch imposed a sentence of death. (R. 3262, line 19 – 3263, line 5).

ALLEGATIONS

10(a) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that Applicant is a person with intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

11(a) Supporting Facts: Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive function, both of which manifested before he was eighteen years old, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003); S.C. Code § 16-3-20(C)(b)(10)

10(b) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during his *Atkins* (intellectual disability) and sentencing hearings.

11(b) Supporting Facts: Counsel failed to investigate, develop, and present a constitutionally adequate case that Applicant was a person with intellectual disability who could not be executed pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Counsel's performance was both unreasonable and prejudicial, see *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

- 1) Counsel failed to investigate and present all relevant evidence on the issue of intellectual disability including evidence of Applicant's significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset before the age of 18. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Wiggins v. Smith*, 530 U.S. 510 (2003);

¹⁰ The jury was clearly instructed its recommendation will be followed by the sentencing court. (R. 3223, lines 20-22; 3250, lines 7-10).

- 2) Counsel failed to object to the trial judge's reliance on stereotype and deviation from clinical consensus and practice in the determination that Applicant was not a person with intellectual disability, *see Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S.Ct. 1986 (2014);
- 3) Counsel failed to investigate and present evidence that some of Applicant's purported IQ test scores in the developmental period were not legitimate, individualized measures of general intellectual functioning and thus were not inconsistent with intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S.Ct. 1986 (2014); *Wiggins v. Smith*, 583, U.S. 510 (2003);
- 4) Counsel failed to investigate and present circumstances under which Applicant obtained a commercial driver's license and other certifications in finding Applicant was not a person with intellectual disability, *see Wiggins v. Smith*, 583, U.S. 510 (2003);
- 5) Counsel failed to investigate and present evidence to the trial judge and jury that Applicant's depression and cancer treatment (including chemotherapy) had no demonstrable effect on IQ scores establishing significantly subaverage intellectual functioning;
- 6) Counsel failed to adequately inform and educate the trial judge and jury about potentially and preconceived misconceptions and stereotypes related to intellectual disability, *See Moore v. Texas*, 137 S. Ct. 1039 (2017);
- 7) Counsel failed to object to the Solicitor's sentencing phase closing argument endorsing improper stereotypes toward people with intellectual disability when the Solicitor stated: "I mean it's an insult to people that had truly—have a mental disability for them to bring this kind of defense up to try to spare his life trying to use that excuse," Tr. 3169, and "He's not disabled, and, like I say, it's an insult to people that's mentally—I mean that truly has that kind of condition." Tr. 3171. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2007), overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d (2004).

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10(c) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20— during the capital trial proceedings.

11(c) Supporting Facts: Counsel failed to adequately question prospective jurors in voir dire to identify prospective jurors with pre-formed beliefs about and stereotypes and biases against a defendant with an intellectual disability. Trial counsel's performance during pre-trial proceedings was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(d) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20— during the capital trial proceedings.

11(d) Supporting Facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are

- 1) Counsel failed to adequately investigate and present the full range of mitigating evidence concerning Applicant's social and life history, *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- 2) Counsel failed to adequately investigate and present all available mitigating evidence concerning Applicant's mental health prior to and at the time of the capital offense, *see Wiggins v. Smith*, 583 U.S. 510 (2003);
- 3) Counsel failed to investigate and present mitigating evidence concerning Applicant's lack of future dangerousness, adaptability to confinement, and good character, *Skipper v. South Carolina*, 476 U.S. 1 (1986);
- 4) Counsel failed to adequately investigate and present scientific evidence demonstrating that the fact the victim urinated on herself was a natural result of death as opposed to resulting from fear while alive during the incident;
- 5) Counsel failed to object to misleading jury instructions, in violation of the Sixth and Eighth Amendments to the United States Constitution, which did not properly advise the jurors that whatever sentence they recommended would

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be the sentence imposed by the court rather than a recommendation to the court about the sentence to be imposed, *see Hurst v. Florida*, 136 S. Ct. 616 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002); *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985); *see also State v. Bellamy*, 293 S.C. 103, 259 S.E.2d 63 (1987), *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991);

- 6) Counsel failed to investigate and present evidence of remorse and acceptance of responsibility including, but not limited to, failure to call hospital chaplain to testify regarding Applicant's remorse shortly after the crime when the chaplain's records documenting the remorse were excluded by the trial judge as inadmissible hearsay;
- 7) Counsel failed to object to Solicitor's closing argument that Applicant did not have any remorse for killing Brooke Center, including but not limited to Tr. 3169 ("not once did he cry about Brooke. Not once did he show any remorse for Brooke. Doesn't even show one concern for Brooke."), Tr. 3180-81, under circumstances where the Solicitor successfully objected to trial counsel introducing evidence of Applicant's remorse. *See Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), *reversed on other ground by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002);
- 8) Counsel failed to object to the Solicitor's improper closing arguments, including but not limited to the following:

"Everything they rolled out yesterday, I mean, I got mad. I tried to keep my composure over there, but here he is, he's saying he mentally retarded." Tr. 3168.

"He's not mentally retarded, and the reason why I'm going so much over this, and the judge is going to charge you about mental retardation, that if you make a finding that he is mentally retarded from there, it's a bar to the death penalty if it's by a preponderance of the evidence. They have to show it by that amount. Preponderance means by the greater weight of the evidence." Tr. 3171-72.

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See, e.g. Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2007), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d (2004).

10(e) Applicant's right to due process of law—guaranteed by the Fourteenth Amendment to the United States Constitution—was violated as a result of the knowing presentation of false or misleading information by a state agent. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Napue v. People of State of Ill.*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed 1217 (1959); *see also Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Alcorta v. State of Texas*, 355 U.S. 28, 78 (1957).

11(e) Supporting Facts: Spartanburg County Sheriff Office Investigator Lorin Williams testified Mr. Blackwell did not have remorse for killing Brooke Center. Tr. 2679-86. During closing argument, the Solicitor relied on the testimony of Investigator Williams to argue Mr. Blackwell “[d]idn’t show any remorse” for Brooke Center’s death, Tr. 3180-81. despite evidence from hospital chaplains and others present that Applicant did show remorse. Investigator William’s testimony was false, and even if the Solicitor did not knowingly solicit such false evidence, the Solicitor allowed it to go uncorrected. *See Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); *Napue v. People of State of Ill.*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed 1217 (1959); *see also Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Alcorta v. State of Texas*, 355 U.S. 28, 78 (1957).

10(f) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the appellate proceedings.

11(f) Supporting Facts: Appellate counsel’s performance during the appellate phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also Evitts v. Lucey*, 469 U.S. 387 (1985); *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Counsel’s specific unreasonable and prejudicial acts of omissions are:

- 1) Appellate counsel failed to adequately raise and brief all legal and factual grounds for challenging the trial court’s ruling that Applicant was not intellectually disabled, *see Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S.Ct. 1986 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002);

- 2) Appellate counsel failed to raise the issue that the trial court erred in admitting prejudicial autopsy photographs and close-up photographs from the crime scene, including a photograph of the victim after her body was moved, U.S. Const. amends. V, VIII; Rule 403 SCORE;
- 3) Appellate counsel failed to raise the issue that the trial court erred in allowing Reggie Frye to testify during the penalty phase of Applicant's trial when Frye's testimony was not relevant and impermissible hearsay, Rule 401, SCORE; Rule 613(b), SCORE; Rule 802, SCORE.

Petitioner's Second Amended Application for Post-Conviction Relief, pp. 2-6

DISCUSSION

The scope of this Court's jurisdiction in post-conviction relief matters is set out in S.C.

Code Ann. § 17-27-20(A), which provides:

- (A) Any person who has been convicted of, or sentenced for, a crime and who claims:
 - (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
 - (2) That the court was without jurisdiction to impose sentence;
 - (3) That the sentence exceeds the maximum authorized by law;
 - (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
 - (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
 - (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may

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institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

Section (B) further limits the jurisdiction of the PCR court as follows: “This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.” S.C. Code Ann. § 17-27-20(B). Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“Errors in a petitioner’s trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.”); *see also Drayton v. Evatt*, 312 S.C. 478, 430 S.E.2d 517, 520 (1993) (“The Simmons rule gives effect to the Legislature’s clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”).

While previously heard or unheard freestanding trial or direct appeal issues are not cognizable, the general factual basis for the previously unheard issues may be reached by and through an allegation of ineffective assistance of counsel. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 (“Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.”). Ineffective assistance of counsel claims constitute the general nature of issues appropriate for post-conviction relief actions. *See, e.g., Al-Shabazz v. State*, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(A), and finding “A typical PCR claim of ineffective assistance of counsel falls into this category....”).

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. *Strickland, supra*. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.*

The standard of “prejudice” differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove “prejudice” in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the court instructed that prejudice may be found in a capital sentencing proceeding “when ‘there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’” 332 S.C. at 333, 504 S.E.2d at 823 (quoting *Strickland*, 466 U.S. at 695). Again, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

To effect a fair review of counsel's performance, a reviewing court must “eliminate the distorting effects of hindsight” and attempt “to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689.

When reviewing Applicant's issues under the above standards, the record shows Applicant is not entitled to any relief on the issues presented.

11(a) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that Applicant is a person with intellectual disability.

The allegation contained in the above claim is not an appropriate claim for post-conviction relief. Applicant raises a freestanding claim that Applicant's death sentence violates the Eighth Amendment prohibition of cruel and unusual punishment based upon the fact Applicant is intellectually disabled. S.C. Code Ann § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that have been raised at trial and on direct appeal may not be raised in PCR.

Applicant's trial occurred after the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 306 (2002) and after the South Carolina Supreme Court's decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). In *Franklin*, the South Carolina Supreme Court addressed how the issue of mental retardation should be handled after the United States Supreme Court's decision in *Atkins*:

Regarding the procedures to be used in making the mental retardation determination in post-*Atkins* cases, we conclude the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. *Cf. State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998) (defendant bears burden of proving incompetence by preponderance of evidence); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998)4 (same).

If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is not

mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. *See* S.C.Code Ann. § 16-3-20(C)(b)(10) (2003). If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

Franklin, 356 S.C. at 279, 588 S.E.2d at 605 (footnotes omitted); *see State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006).

Additionally, the PCR Statute and supporting case law do not support Applicant's position that his intellectual disability claim may be heard under the jurisdictional limitations on free-standing claims. In *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993), the Court held:

S.C.Code Ann. § 17-27-20(b) (1985) of the Uniform Post-Conviction Procedure Act provides that post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal. *Peeler v. State*, 277 S.C. 70, 283 S.E.2d 826 (1981); *see also Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979); *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973); *Sellers v. Boone*, 261 S.C. 462, 200 S.E.2d 686 (1973). Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel. *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983).

Drayton, 312 S.C. at 8–9, 430 S.E.2d at 520; *see also Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); *Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979).

Clearly, the procedures outlined by the South Carolina Supreme Court show that mental retardation as a freestanding claim can only be properly raised before the trial court in post-*Franklin* trials. This claim should be summarily dismissed.

11(b)(1) Counsel failed to investigate, develop, and present a constitutionally adequate case that Applicant was a person with intellectual disability who could not be executed pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

Applicant claims that Defense Counsel was ineffective for failing to investigate and present an adequate case of Applicant's intellectual disability. Applicant is unable to satisfy the deficiency prong under *Strickland* as the Record would support that trial counsel rendered a constitutionally sufficient representation in presenting the case of Applicant's intellectual disability. The proper evaluation of counsel's conduct is from the perspective at the time trial, not in hindsight. See *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) ("[I]n applying *Strickland*, hindsight is discounted by pegging adequacy to counsel's perspective at the time investigative decisions are made and by giving a heavy measure of deference to counsel's judgments." (citation omitted) (quoting *Strickland*, 466 U.S. at 689) (internal quotation marks omitted)) This guidance is most crucial given the dismissal of Applicant's intellectual disability claim at trial.

Unlike the majority of capital convictions reviewed under post-conviction relief, Applicant's Defense Counsel pursued a theory of intellectual disability. The potential of this claim was recognized early in the representation of Applicant. Prior to trial, Applicant was evaluated, at the request of Defense Counsel, and deemed competent to stand trial. R. 3779; 3789. Thereafter, Counsel presented the claim that Applicant was intellectually disabled and, therefore, ineligible to receive the death penalty pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002).

Defense Counsel then acquired the services of forensic psychologist Dr. Ginger Calloway to assist in supporting Applicant's intellectual disability claim. R. 3827-3828. Dr. Calloway received her doctorate in psychology from North Carolina State University. R. 3828. She had practiced primarily as a forensic psychologist for the 15-20 years prior to the hearing. R. 3829.

She had testified on numerous other *Atkins* hearings prior to Applicant's trial.¹¹ R. 3966. Dr. Calloway opined that appellant was intellectually disabled. Furthermore, Dr. Calloway issued a forty-page report and eight-page supplemental report in support of her determination. R. 4358-4405. She reviewed Applicant's medical records, school records, and testing done on both Applicant and members of his family. R. 4362 - 4363. She conducted her own testing regarding intellectual functioning and adaptive behaviors on both Applicant and the people she could find who were the most familiar with him, including members of his family, employers, and associates. R. 4362 - 4363.

As a result of Defense Counsel's *Atkins* claim, a pre-trial hearing was held pursuant to *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). R. 3772. During the hearing, Defense Counsel called Dr. Calloway to present her findings and professional opinion that Applicant was intellectually disabled. Dr. Galloway defined intellectual disability as "significantly subaverage general intellectual functioning;" (2) "the presence of adaptive deficits in two of ten areas identified by the DSM-IV-TR;" and (3) "onset of the disability before the age of 18." R. 3834. She testified that Applicant's IQ placed him with the range of subaverage intellectual functioning. When confronted with the higher IQ scores originating from a test administer to Applicant during grade school, Dr. Calloway testified that they were not true IQ scores in that they required no specialized expertise to administer. R. 3891, ll. 16-22. She further testified that the test measured achievement and was "not so much an individually administered IQ test." R. 4004. In regards to deficits in adaptive functioning, Dr. Calloway detailed her approach in reaching her determination, and presented her conclusion that Applicant displayed

¹¹ See Ginger C, Calloway, Ph.D., 2011 WL 5927498 (curriculum vitae submitted to Federal District Court for the Eastern District of North Carolina during *Walton v. N. Carolina Dep't of Agric. & Consumer Servs.*, No. 5:09-CV-302-FL, 2011 WL 883579, at *1 (E.D.N.C. Mar. 11, 2011)).

deficits in six of the ten areas of adaptive functioning R. 3843-3937. Lastly, as to the final intellectual disability prong, Dr. Calloway testified that “a number of different sources” showed that Applicant’s intellectual functioning was subaverage before the age of 18. R. 3852. Dr. Calloway partly relied on the school information to determine that appellant’s mental retardation onset before age 18. R. 3961- 3962.

Defense Counsel also called Dr. Calloway to testify in accordance with *Franklin v. Maynard* as to her findings during the penalty phase of the trial. R. 2799. Her testimony there was largely repetitive of the testimony offered during the *Atkins* hearing. However, Dr. Calloway adapted her testimony in order to address several issues that arose in the prior hearing. Dr. Calloway first testified to the necessity of interviewing multiple individuals for purpose of determining social adaptability rather than confining the investigation to an interview with the defendant. R. 2825-2826. This was in notable response to Dr. Brown’s *Atkins* testimony regarding his social adaptability investigation which was shaped by Applicant’s disclosures. The examination then transitioned into Dr. Calloway’s intellectual disability determination. In support of her conclusion, the Defense presented the results of a recent WAIS-IV IQ test that was administered to Applicant by Dr. Calloway in which he scored a 63. Dr. Calloway opined that this placed Applicant in the range of mild mental retardation. R. 2847-2848. Thereafter, Dr. Calloway testified to Applicant’s school records reflecting Applicant’s poor academic performance. These, included “IQ tests” administered during grade school. R. 2846-2867. She also offered the results of a recently administered Wide Range Achievement Test which placed Applicant’s current math, reading and comprehension level between a fourth and seventh grade level. R. 2868-2869. Dr. Calloway later presented her findings in regards to Applicant’s adaptive functioning as determined through the use of the Adaptive Behavioral Assessment System

(ABAS). She addressed the purpose of adaptive functioning, how the ABAS was performed, and the results she attained and scored, reflecting significant deficits in adaptability. R. 2882-2915. Dr. Calloway concluded her testimony to the jury by offering her opinion that Applicant was intellectually disabled under the clinical definition. R. 2916.

Despite the fact that Applicant inevitably failed to carry his burden of proof on intellectual disability, the Record clearly supports that Defense Counsel investigated, developed, and presented a well-prepared case of intellectual disability with reliance on a credentialed expert. *Atkins*, 536 U.S. at 317 (“Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.”). The record makes clear that Defense Counsel recognized the possible defense, gathered voluminous records, and interviewed numerous witnesses in support of the intellectual disability finding. Furthermore they obtained the services of a social worker and an accomplished mental-health expert who also conducted multiple interviews with Applicant and his family, performed psychological evaluations, and reviewed medical records. R. 3779; 3780-3781; 3816. Counsel competently relied on their conclusions in formulating and presenting their case for Applicant’s intellectual disability. *Smith v. Cockrell*, 311 F.3d 661, 676–77 (5th Cir. 2002), overruled on other grounds by *Tennard v. Dretke*, 542 U.S. 274 (2004) (“Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so.”); *see also Turner v. Epps*, 412 Fed.Appx. 696, 704 (5th Cir. 2011) (“While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an

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expert, counsel should be able to rely on that expert to alert counsel to additional needed information....”).

Applicant cites to *Wiggins v. Smith*, 539 U.S. 510 (2003) as grounds for relief. The Court in *Wiggins* held:

Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report.

Wiggins, 539 U.S. at 511.

The circumstances of Applicant's trial are distinct from those presented in *Wiggins*. As noted above, Defense Counsel in Applicant's trial acquired the services of both a social worker and forensic psychologist. These two experts conducted an extensive investigation into Applicant's intellectual disability. Given Defense Counsel's investigation and reliance on a reasonable expert evaluation, Applicant cannot overcome the strong presumption that Counsel's representation fell within the wide range of reasonable professional assistance.

11(b)(2) Counsel failed to object to the trial judge's reliance on stereotype and deviation from clinical consensus and practice in the determination that Applicant was not a person with intellectual disability.

Applicant is unable to meet his burden under *Strickland*, as the Record does not support that the trial judge deviated in his assessment of Blackwell's intellectual capacity. The Record supports that the trial judge correctly reviewed the evidence presented as demonstrated by his fourteen (14) page order issued on February 25, 2014. Supp. R. 1-14. Applicant has repeatedly cited error in the trial judge's consideration that Applicant was employed as a commercial truck driver. However, the Record reflects that the trial judge considered much more than the simple fact Applicant's was a truck driver. In fact, Applicant's work history was not even mentioned

until page 8 of the 14 page report. Supp. R. 1-14. That reference was not simply to driving a truck, but Applicant's stated goal of becoming a truck driver and his accomplishment:

... Within five years of leaving school he had achieved his vocational goal of getting his commercial driver's license and gotten a job driving trucks. He seems to have realized that goal in the early 1980's. In doing so, Blackwell was required to take and pass the exam for a Commercial Driver's License. Also, he took and passed the additional exam to obtain his license to drive tankers of hazardous materials. Those exams require extensive reading writing and practical skills. A commercial driver must be able to not only operate a truck, but is responsible for being able to perform inspections of his vehicle and recognize defects in the vehicle for safety purposes.

14. Mr. Blackwell drove trucks for KNS Trucking, Hess Corporation, and Belue Trucking. The record related by Dr. Brown indicates that Blackwell was cited for such work related problems as failing to keep proper logs, letting family members ride in a leased truck and failing to come to work on one occasion. Also, it appears that he may have been terminated by Hess and Belue for accidents, but it was not shown to this Court that they were at-fault accidents of Mr. Blackwell. Also, those employers later rehired Blackwell. Blackwell reported that he traveled while driving a commercial truck as far west as El Paso Texas and as far north as Canada. In a job application, Blackwell wrote that he had experience in driving semi-tractor-trailers, and tanker trucks in several other states which included Texas, Oklahoma, New York and New Jersey.

15. His work history was interrupted by a diagnosis of cancer. As a result of the disease and its treatment he was out of work from 1987 to 1997.

16. Blackwell returned to work in 1998 with Springs Industries as a fork lift driver.

(Supp. R. 8-9).¹²

The trial judge went on to describe income reported during Applicant's work history, and his family relationships, noting his former wife, [REDACTED]¹³ "handled the management of the

¹² See *Com. v. Hackett*, 99 A.3d 11, 34-35 (Pa. 2014) (criticizing evaluation failing to consider work skills); *United States v. Williams*, 1 F.Supp.3d 1124, 1164-67 (D. Hawai'i 2014) (finding credible an expert's testimony crediting defendant's work and accomplishments, including being able to drive long distances, as evidence of adaptive functioning not consistent with mental retardation and criticizing another expert's failure to consider " 'real world' functioning").

household by paying all the bills and writing all the checks.” (Supp. R. 10).¹⁴ Again, this is far more than relying on the simple fact that appellant drove a truck.

Moreover, the trial judge considered evidence of school performance (“made reasonably sufficient grades during his school career”)¹⁵; though ranked 113 out of 113 in his class, Applicant had dropped out and may have received a successions of zeros; had four IQ tests before age eighteen, which reflected 68 (first grade); 87 (third grade); 86 (sixth grade); and 72 (ninth grade)¹⁶; and, that after the age of eighteen he had had a head injury from an accident and had been treated for cancer and depression with strong drugs which may have impacted intellectual functioning (later testing near time of trial showing 63 and 68). (Supp. R. 6-7). Accordingly, the Records supports that the trial judge’s assessment of Applicant intellectual capacity did not deviate from the clinical consensus. When a trial court’s determination is

¹³ [REDACTED] declined to speak with defendant’s expert, (see R. 4051, lines 13-22), and the Court’s expert considered contact with Ms. Davis but cited concern over “ethical issues” reaching out to her, (R. 4218– 4219). At any rate, neither expert spoke to [REDACTED] as a person who possibly could have “provided some really useful information.” (R. 4218).

¹⁴ The defense admitted that they failed to turn over all evidence to Dr. Brown as they were ordered to do. (R. 4256– 4258). This shows more material was gathered than what Counsel wished to share with the State. One may reasonably assume that such evidence was not supportive of Applicant’s intellectual disability claim.

¹⁵ See R. 4244, lines 3-14 (Dr. Brown’s testimony that appellant had the required unit numbers needed to be on track for graduation).

¹⁶ Though the witnesses and the parties referred to these as IQ tests, there was some question as to whether they were more general scholastic tests. Dr. Calloway did not discount these scores entirely as Applicant would argue should be done; rather, both Dr. Calloway and Dr. Brown indicated they could be considered as broad indicators. (See R. 3874; 4183). In fact, Dr. Calloway depended on school testing in opining family members had indicators of mental retardation. (See R. 3872– p. 3875, appellant’s father’s IQ test from school scores indicated as 60; appellant’s brother school test scores indicated 73 and 74; appellant’s daughter’s school scores at 57 and 71).

properly based on the weight and validity of two competing expert opinion, what possible grounds did Defense Counsel have to object?

Additionally, the substance of this claim was addressed by the South Carolina Supreme Court in its opinion dismissing Applicant's direct appeal:

[W]e note the trial court correctly identified and made its determination applying the statutory definition of "mental retardation." Moreover, contrary to Blackwell's claim, the trial court did not base its decision solely on the fact that Blackwell was able to successfully obtain a commercial driver's license and be employed as a truck driver. The court relied on other factors, including Blackwell's school performance and full employment history. Additionally, the court explained why it gave greater weight to Dr. Brown's report, noting that the report was directed at an evaluation of Blackwell's "formative years" and was consistent with the "functional adaptations" required by the statutory definition of "mental retardation." The court also discounted some of Dr. Calloway's findings as it questioned whether "adequate information" was used and believed Dr. Calloway improperly "made subjective determinations concerning the results obtained and weighted responses of various informants differently."

We also find the trial court's factual determinations are supported by evidence in the record. Admittedly, it is concerning that Blackwell, at 54 years old, scored 63 and 68 on the I.Q. tests given in preparation of the *Atkins* hearing. However, in terms of "significantly sub-average general intellectual functioning," the trial court readily acknowledged the recent I.Q. scores but was persuaded by evidence that: (1) Blackwell, prior to the age of 18, scored between 68 and 87 on standard school I.Q. tests; (2) Blackwell made "reasonably sufficient grades during his school career"; (3) at the age of 18, Blackwell was found to read at the 5.8 grade level, completed arithmetic problem solving at the 6.6 level, and completed arithmetic computation at the 5.2 level; and (4) Blackwell dropped out of high school in the eleventh grade despite having earned significant credits toward graduation

Blackwell, at 142, 801 S.E.2d at 721.

The thoroughness of Judge Couch's order, supplemented by conclusion reached by our Supreme Court in *State v. Blackwell*, leaves little doubt that the determination Applicant failed in his burden of proving intellectual disability was not based on stereotypes but was instead based

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on the clinical evidence presented during Applicant's *Atkins* hearing. Accordingly, Applicant cannot show deficiency on the part of Counsel for failing to object.

Applicant cites to *Moore v. Texas* in a strained attempt to cast doubt on the conclusions reached by the trial court. See *Moore v. Texas*, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017) (*Moore I*); and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*). *Moore I* was an opinion specifically target toward Texas's use of non-clinical, court created tests, for determining intellectual disability in capital cases. See *Moore I*, 137 S. Ct. at 1044 (holding that the *Briseno* factors adopted by Texas Court of Criminal Appeals, for evaluating an *Atkins* claim, are based largely on superseded non-medical standards that create an unacceptable risk that a person with intellectual disabilities will be executed). There the Court held that "adjudications of intellectual disability should be 'informed by the views of medical experts.'" *Id.* (citing *Hall v. Florida*, 572 U.S. 701, 721 (2014)). *Moore II* was an error correction again targeted to Texas's continued use of arbitrary factors in intellectual disability determinations and an overall disregard of the Court's opinion in *Moore I*. See *Moore*, 139 S. Ct. at 670.

In a concurring opinion to *Moore II*, Chief Justice Roberts again faults the majority opinion in not providing sufficient explanation to the states on how a proper intellectual disability determination is achieved by courts. See *Moore*, 137 S.Ct. at 1048–1050 ("When this case was before us two years ago, I wrote in dissent that the majority's articulation of how courts should enforce the requirements of *Atkins*, lacked clarity. It still does.") (internal citations omitted). However, both *Moore I* and *Moore II* provide a glimpse into what is permissible under *Atkins*. Specifically, courts should rely on clinical standards. However, that is not a direction that the courts must accept all clinical opinions without challenge. The Record would support that this was the proper reasoning Judge Couch implemented in denying Applicant's *Atkins* claim.

Additionally, Applicant missuses “stereotypes” by substituting generality for a proper argument based on a critical assessment of facts. For instance, it would be reliance on a general stereotype to reject intellectual disability because a defendant’s records reflect gainful employment. Employment in-and-of itself neither contributes nor detracts from a finding of intellectual disability. What properly supports a determination of intellectual disability is strengths and weaknesses exhibited throughout the defendant’s employment that reflect on a either a deficit or strength in adaptability—i.e. was the individual timely and prompt, was he responsible, did he assert management qualities, etc. In short, generalities neither contribute nor support a finding of intellectual disability. Applicant’s reference to stereotype is insufficient to challenge the Trial Court’s thoughtful consideration of two competing clinical opinions with supporting factual basis.

11(b)(3) Counsel failed to investigate and present evidence that some of Applicant’s purported IQ test scores in the developmental period were not legitimate, individualized measures of general intellectual functioning and thus were not inconsistent with intellectual disability.

Applicant next alleges that Defense Counsel was deficient in failing to adequately discredit I.Q. scores that reflected Applicant’s higher intellectual capacity. However, the Record supports that Defense Counsel, through its qualified experts, investigated these I.Q. tests that were administered to Applicant during his grade school years, and attempted to rebut their veracity. Defense Counsel presented evidence to the trial judge, and subsequently to the jury, which Counsel offered as supportive of the claim of intellectual disability. Specifically, defense counsel acquired the services of Dr. Ginger Calloway. Dr. Calloway, after evaluation, opined Applicant was intellectually disabled. *See State v. Blackwell*, 420 S.C. at 137–38, 801 S.E.2d at 718 (“Ginger Calloway, a forensic psychologist who was offered by the defense, opined that Blackwell met the definition of ‘mental retardation’ because he exhibited: sub-average

intellectual ability based on his I.Q. scores; significant deficits in adaptive functioning such as communication, home living, social interaction, self-direction, and functional academics; and that these deficits existed prior to the age of eighteen....”).

During examination of Dr. Calloway at the *Atkins* hearing, Counsel referenced several tests administered to Applicant during his grade school years which reflected an I.Q. level higher than that required for intellectual disability. Dr. Calloway acknowledged the test but stated, “[i]t’s used to go at IQ, but it’s a group administered test, and group measures of IQ are typically not as accurate as individually administered measure of IQ.” R. 3872. Later, in regards to another similar test, Dr. Calloway testified “it’s considered a measure of general aptitude, but that can include achievement as well. So, no, it’s not strictly speaking an intelligence test that you would use for placement purposes.” R. 3891. During cross-examination the State cited to these same test. Dr. Calloway again responded on behalf of the Defense, “this is still a measurement of mental maturity, i.e. achievement, not so much an individually administered IQ test.” R. 4003-4004.

She went even further in her assessment of these tests during the States recross-examination.

. . . The Short Test of Mental Maturity is a measure of cognitive ability. That is not equal to IQ and intellect despite the fact that an IQ score is reported.

[. . .]

At one point in the development of IQ tests, and the Binet uses a mental age to talk about IQ test or did, mental age - - IQ was calculated as mental age over chronological age.

Okay. That’s not how it’s calculated any longer because we have more sophisticated statistical way of figuring out IQ scores.

R. 4118-4119.¹⁷

Dr. Calloway provided similar testimony to the jury during the penalty phase of trial. She testified that the "I.Q. tests" administered to Applicant and family members during grade school were not clinically accurate I.Q. determinations. R. 2840-2842. She reiterated this conclusion to the jury during the Defense's presentation of Applicant's school records.

The, the — he was given some — many, many measures of, of — there's some measures of mental maturity, which are not the same as individually administered IQ tests, but they do give us some rough idea of where he might fall within these ranges that I've been talking about, the lower two percentile of functioning.

[...]

So, we wouldn't give them the weight, those measures that report IQ, we wouldn't give them the kind of weight that we would give to a Wechsler Test or there's another test called the Stanford Binet that's also an individually administered scientifically recognized measure of IQ, but we, but we look at them. We, we look at them and we try to determine, you know, do they give us any indication that he had an impairment in the area of functional academics.

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R. 2847-2850. Furthermore, she made additional assertions throughout her testimony to the jury.

R. 2861-2862 ("It's a, it's a [sic] - - more like a academic academic [sic] achievement or mental maturity. Mental maturity tests don't measure the same thing as a individualized IQ test.").

¹⁷ Further negating from a finding of prejudice, the State's expert Dr. Brown provided a similar assessment to that reached by Dr. Calloway during his testimony at the *Atkins* hearing:

Well, again, I think that goes back to what's been discussed in previous testimony regarding the fact that those are not really IQ scores. They're more measures of scholastic aptitude, more measure of achievement. They can be roughly equivalent to an IQ score, but as a psychologist, I can't say that I would trust these scores of I think 86 and 87 as being necessarily an indication that he would not be [intellectually disabled].

R. 4183.

Despite Applicant's claim, the Record would support that Defense Counsel adequately investigated and presented evidence to support its position that these particular test scores were not individualized measures of general intellectual functioning equal to formal IQ testing. *See Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Furthermore, Applicant raised an argument in the direct appeal regarding the use of school testing in consideration of the claim of intellectual disability. Respondent made the following observation in the Final Brief of Respondent:

Though the witnesses and the parties referred to these as IQ tests, there was some question as to whether they were more general scholastic tests. Dr. Calloway did not discount these scores entirely as appellant would argue should be done; rather, both Dr. Calloway and Dr. Brown indicated they could be considered as broad indicators. (See R. 3874, lines 12-18; 4183, lines 10-17). In fact, Dr. Calloway depended on school testing in opining family members had indicators of mental retardation. (See R. 3872, line 1 - 3873, line 9, appellant's father's IQ test from school scores indicated as 60; 3874, lines 12-18, appellant's brother school test scores indicated 73 and 74; 3875, line 11 - 3876, line 5, appellant's daughter's school scores at 57 and 71). Additionally, Dr. Harrison also considered the school testing scores though she acknowledged that any score could have been incorrect. (R. 3797, lines 15-21; 3800, lines 4-20; 3809, lines 5-11; 3821, line 13 - 3822, line 13). In regard specifically to appellant's testing, Dr. Harrison noted that it would not be unusual to begin school with a depressed ID if not intellectually stimulated at home, and the following year have a significant leap, which is indicated in appellant's record, and is not indicative of mental retardation. (R. 3786, lines 1-10).

Appellant's attempt to cast the testimony as an agreement of evidence for "prong one" is incorrect, (see FBOA, p. 44), as the relevant determination is not present day, but that manifested before the age of eighteen. Appellant must continually admit that he focuses only on current evidence not conducive to finding agreement in the relevant developmental period. (See, for example, FBOA pp. 44, 49, 64 and 75). As Dr. Brown testified, ["the age of

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onset has to be prior to the age of 18 or in the developmental period,” therefore, “we have to go back and look at what records are available, and for most people, it’s going to be school records when we can get them. That’s going to give us the most useful information in that regard.” (R. 4189, lines 10-22).

(Attachment 3, pp. 79-80 n. 29).

The Supreme Court of South Carolina found in regard to Applicant’s argument challenging the rejection of his claim of intellectual disability:

... we believe Blackwell merely seeks for this Court to re-evaluate the testimony and evidence presented during the pre-trial *Atkins* proceedings. Under this Court’s highly deferential standard of review, we find the trial court correctly determined that Blackwell failed to prove by a preponderance of the evidence that he is mentally retarded and, thus, ineligible to receive the death penalty.

Initially, we note the trial court correctly identified and made its determination applying the statutory definition of “mental retardation.” Moreover, contrary to Blackwell’s claim, the trial court did not base its decision solely on the fact that Blackwell was able to successfully obtain a commercial driver’s license and be employed as a truck driver. The court relied on other factors, including Blackwell’s school performance and full employment history. Additionally, the court explained why it gave greater weight to Dr. Brown’s report, noting that the report was directed at an evaluation of Blackwell’s “formative years” and was consistent with the “functional adaptations” required by the statutory definition of “mental retardation.” The court also discounted some of Dr. Calloway’s findings as it questioned whether “adequate information” was used and believed Dr. Calloway improperly “made subjective determinations concerning the results obtained and weighted responses of various informants differently.”

We also find the trial court’s factual determinations are supported by evidence in the record. Admittedly, it is concerning that Blackwell, at 54 years old, scored 63 and 68 on the I.Q. tests given in preparation of the *Atkins* hearing. However, in terms of “significantly sub-average general intellectual functioning,” the trial court readily acknowledged the recent I.Q. scores but was persuaded by evidence that: (1) Blackwell, prior to the age of 18, scored between 68 and 87 on standard school I.Q. tests; (2) Blackwell made “reasonably sufficient grades during his school

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career”; (3) at the age of 18, Blackwell was found to read at the 5.8 grade level, completed arithmetic problem solving at the 6.6 level, and completed arithmetic computation at the 5.2 level; and (4) Blackwell dropped out of high school in the eleventh grade despite having earned significant credits toward graduation.

The court also recognized that Blackwell’s recent I.Q. scores may have been caused by events in his adult life that adversely affected his current cognitive ability. For example, the court accurately referenced the fact that Blackwell received chemotherapy for Hodgkin’s Lymphoma in 1986, had an accident in 2003 or 2004 while riding a four wheeler which rendered him unconscious for approximately 15 to 20 minutes, had several major depressive episodes that resulted in involuntary commitments in 1990 and 2008, and was taking Thorazine, an anti-psychotic medication, at the time of his *Atkins* evaluation.

With respect to Blackwell’s adaptive behavior, the court found “no evidence that he was unable to function at his home during the time before his eighteenth birthday.” Although the court acknowledged evidence that Blackwell had difficulty living independently after the dissolution of his marriage, the court declined to find this translated into deficits in Blackwell’s adaptive behavior. Rather, the court accepted the testimony of Dr. Calloway that Blackwell’s major depressive episodes after the separation were the cause of Blackwell’s inability to function normally. The court also found that Blackwell adapted to life well as he was able to achieve his goal of becoming a commercial truck driver, maintain employment with consistent increases in his earnings, and raise two children during his twenty-six-year marriage. Additionally, the court found significant the fact that Blackwell was never diagnosed with mental retardation until the *Atkins* issue was raised and also noted that Dr. Harrison, who evaluated Blackwell as to his competency to stand trial, reported no finding of mental retardation.

After thoroughly reviewing the record, we conclude Blackwell has not shown the trial court committed an error of law or that its decision is unsupported by the evidence or against its preponderance. Accordingly, we find the case properly proceeded as a capital trial.

State v. Blackwell, 420 S.C. at 141–43, 801 S.E.2d at 720–22.

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Applicant continued to argue about the use of school testing scores in his petition to the Supreme Court of the United States. In response, the State summarized Applicant's argument and set out the relevant records citations supporting the error in Applicant's logic in the following passage from the Brief in Opposition:

Petitioner essentially argues the higher scores were misused as IQ tests. (*See* Petition, p. 8-9). This is an incorrect assertion. The disagreement was over the value of indicators at the relevant time – the developmental period. Both experts agreed the tests could be used for that limited purpose. The defense expert, Dr. Calloway, did not discount these scores entirely; rather, both Dr. Calloway and the court appointed expert, Dr. Brown, indicated they could be considered as broad indicators. (*See* R. p. 3874, lines 12-18; 4183, lines 10-17). In fact, Dr. Calloway depended on school testing in opining family members had indicators of mental retardation. (*See* R. 3872-3876, (Petitioner's father's IQ test from school scores; his brother school test scores indicated 73 and 74; his daughter's school scores at 57 and 71). Petitioner would have the Court agree they could be used when such indicators are not contrary to his position, (*see* Petition, p. 15), but not used if contrary. Petitioner cannot be right on both arguments. Even so, as Dr. Brown testified, the age of onset has to be prior to the age of 18 or in the developmental period," therefore, "we have to go back and look at what records are available, and for most people, it's going to be school records when we can get them. That's going to give us the most useful information in that regard." (R. 4189). Such scores are properly considered in that context.

(Attachment 9, pp. 13-14 n. 7).

In sum, the record shows the basis for this claim of ineffective assistance has been repeatedly addressed. Respondent submits Applicant cannot show *Strickland* deficient performance or prejudice. This claim should be summarily dismissed.

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11(b)(4) Counsel failed to investigate and present circumstances under which Applicant obtained a commercial driver's license and other certifications in finding Applicant was not a person with intellectual disability.

Applicant submits a claim of ineffective assistance for failing to adequately investigate and address Applicant's acquisition of a commercial driver's license. As referenced in the above-quoted passage from the direct appeal opinion, the Supreme Court of South Carolina rejected Applicant's position on appeal that his commercial driver's license was the key to finding Applicant failed in his burden of proof. Specifically, the Court found:

...contrary to Blackwell's claim, the trial court did not base its decision solely on the fact that Blackwell was able to successfully obtain a commercial driver's license and be employed as a truck driver. The court relied on other factors, including Blackwell's school performance and full employment history. ***Additionally, the court explained why it gave greater weight to Dr. Brown's report, noting that the report was directed at an evaluation of Blackwell's "formative years" and was consistent with the "functional adaptations" required by the statutory definition of "mental retardation."***

State v. Blackwell, 420 S.C. at 141, 801 S.E.2d at 72 (emphasis added).

In short, the fact that Applicant did obtain a commercial driver's license is not an issue, and there is no indication of a failure to investigate this fact. But again, it is only one part of the whole of the analysis:

With respect to Blackwell's adaptive behavior, the court found "no evidence that he was unable to function at his home during the time before his eighteenth birthday." Although the court acknowledged evidence that Blackwell had difficulty living independently after the dissolution of his marriage, the court declined to find this translated into deficits in Blackwell's adaptive behavior. Rather, the court accepted the testimony of Dr. Calloway that Blackwell's major depressive episodes after the separation were the cause of Blackwell's inability to function normally. The court also found that Blackwell adapted to life well as he was able to achieve his goal of becoming a commercial truck driver, maintain employment with consistent increases in his earnings, and raise two children during his twenty-six-year marriage. [FN 11].

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Additionally, the court found significant the fact that Blackwell was never diagnosed with mental retardation until the *Atkins* issue was raised and also noted that Dr. Harrison, who evaluated Blackwell as to his competency to stand trial, reported no finding of mental retardation.

[FN 11] Although the trial court did not have the benefit of the USSC's recent decision in *Moore v. Texas*, — U.S. —, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017), we find the court's analysis comports with this decision. In *Moore*, the defendant was convicted of capital murder and sentenced to death for fatally shooting a store clerk during a robbery that occurred when the defendant was twenty years old. *Id.* at 1044. Subsequently, the defendant sought state habeas relief. *Id.* Pursuant to *Atkins* and *Hall*, a Texas habeas court determined that the defendant was intellectually disabled and, therefore, recommended to the Texas Court of Criminal Appeals ("CCA") that the defendant be granted relief. *Id.* at 1045-46. The CCA disagreed with the recommendation and found the habeas court erred by not following the CCA's decision in *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), wherein the CCA adopted the definition of and standards for assessing intellectual disability based on a 1992 edition of the American Association on Mental Retardation manual. *Id.* at 1046. The USSC granted certiorari "to determine whether the CCA's adherence to superseded medical standards and its reliance on *Briseno* comply with the Eighth Amendment" and the Court's precedents. *Id.* at 1048. The USSC vacated the CCA's judgment, finding "[t]he CCA's consideration of [the defendant's] adaptive functioning ... deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply." *Id.* at 1050. Further, the USSC rejected the CCA's use of the *Briseno* factors, which the Court deemed an "invention of the CCA untied to any acknowledged source." *Id.* at 1044.

Here, the trial court made no reference to the impermissible *Briseno* factors. Furthermore, given the fact that Blackwell's I.Q. scores were at the lower end of the spectrum, the court correctly considered Blackwell's adaptive functioning using the current clinical standards presented by the medical experts. The court, as required by *Moore*, carefully considered and weighed Blackwell's adaptive strengths against his adaptive deficits. ***While the dissent may believe the trial court overemphasized Blackwell's adaptive strengths, any significance assigned to these adaptive strengths was based on the court's assessment and credibility determination of the expert testimony.***

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State v. Blackwell, 420 S.C. at 143, 801 S.E.2d at 721 (emphasis added).

As the Court's footnote indicates, the *Moore* opinion had not been issued at the time of trial, but the Court resolved *Moore*'s holding did not affect the consideration of the claim. Moreover, Applicant again raised the specter of *Moore* error (i.e., rejection of clinical practice standards) in his petition for writ of certiorari to the Supreme Court of the United States. As Respondent similarly argued in its brief in opposition, the plain record shows there is no such error:

Further, Petitioner has utterly failed to show *Hall* or *Moore* error. To the contrary, the record reflects adherence to *Hall* and *Moore*, in particular in considering all the evidence when the range of intelligence testing suggests further inquiry: "... in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017).

(Attachment 9, p. 16).

Respondent submits Applicant cannot carry his burden of proof to show *Strickland* deficient performance and prejudice. Applicant's claim that defense counsel was ineffective for failing to adequately develop and present evidence of his alleged intellectual disability is without merit. Moreover, the basis for this claim has been thoroughly considered, and Applicant's position rejected, in the direct appeal. The claims should summarily dismissed.

11(b)(5) Counsel failed to investigate and present evidence to the trial judge and jury that Applicant's depression and cancer treatment (including chemotherapy) had no demonstrable effect on IQ scores establishing significantly subaverage intellectual functioning

Applicant's now claims that Defense Counsel was ineffective in not discrediting that Applicant's depression and cancer treatment were the result of his low I.Q. scores. Applicant is unable to show ineffective assistance in this regard as the Record supports that Counsel was

aware of these factor and attempted to rebut the State's theory that either treatment were responsible for Applicant's low I.Q.

During the State's cross-examination of Defense of Dr. Calloway, during the *Atkins* hearing, the State called attention a particular antipsychotic medication Applicant was prescribed. It thereafter sought to call into question whether Applicant's low I.Q. was not the result of intellectual disability, but instead caused by the side effects of the prescribed medication. R. 4017-4024. The State later cited to a psychotic incident in which Applicant made suicidal gestures during the time he was undergoing treatment for cancer. R. 4070-4076. During examination of the State's expert, Dr. Brown, Defense Counsel took the opportunity to counter the questions raised by the State as to the affect depression and cancer treatment could have had on Applicant's intellectual capacity:

Q Okay. Well, specifically you mentioned a couple of environmental factors, chemotherapy, four wheeler accident, and alcohol and drug use, and you kind of — you seem to speculate that they could have some cause of Mr. Blackwell's

A I'm saying they could have.

Q And you have absolutely no evidence of that though?

A That's correct.

Q Okay. For instance, you didn't go and interview anybody to see if there was a change in his personality after the four wheeler accident?

A No, I did not.

Q And that's a — that's common, in head injuries, to see if there's an effect with somebody, see if their, their mood or temperament has changed, for instance?

A Correct.

Q You could do, right?

A Correct.

Q And, of course, in this case, there is no evidence of any change in Mr. Blackwell after the four wheeler accident?

Q Not that I'm aware of, no.

Q Right.

And there's no evidence in the record that his IQ was affected or, or affected negatively by chemotherapy?

A No evidence, no.

Q Okay, or alcohol and drug use, there's no evidence that we can rely on to say that that negatively affected his IQ?

A That's correct.

Q Okay, so, with regard to these environmental factors, we really only have speculation with regard to did it possibly affect his IQ?

A I would agree with that.

R. 4195-4196.

During the penalty phase of Applicant's trial, Defense Counsel adapted its intellectual disability presentation to further attempt to discredit this theory. During examination of Dr. Calloway, Counsel specifically questioned the possible affect Applicant's depression treatment, specifically Thorazine, could have on his IQ. R. 2933. Dr. Calloway responded:

A [Y]es, he was taking it and I was concerned not because of his behavior because when someone is overdosing on or if they have too much Thorazine, it's very obvious event to a lay person. Their words are slurred. They can't walk very well. They can, they can barely keep their eyes open. You know, they're - - just look not right.

But I was concerned because it is a medication that was popular 30 years, 40 years ago, a lot — some number of years ago, and it's been replaced by earlier medications. So, I, I was concerned about it from that point of view and I wanted to ask his attorneys about it.

I did, after I was here February 19th through the 21st, I went and consulted a forensic psychiatrist about the dosage that he was on at the time and he was

actually on a very low dose, according to this forensic psychiatrist, of the Thorazine. So, I looked — a dose actually lower than what children are given in inpatient facilities. So — and this forensic psychiatrist also told me some other ways in which the Thorazine is being used, so, it's not maybe quite as uncommon as I had thought, but I was concerned and I brought it to the attorney's attention.

Q Now, based on what you've been able to do and, and what you know and your consult, do you believe the Thorazine affected his scores on the WAIS-4 or any of these scores?

A I don't think so. He, he did not look overmedicated to me. What I did learn, from the forensic psychiatrist, was that he's at such a low dose that the forensic psychiatrist would of expected, if anything, that dosage of Thorazine would of helped him to be more alert than be less alert.

R. 2833-2834. Clearly, the Record would support that Defense Counsel made a satisfactory attempt to contradict any questions raised by the State as to the affect mental health and cancer treatments had on Applicant's intellectual capacity.

Furthermore, there can be no finding of prejudice in this regard as Defense Counsel presented vast amounts of evidence in support of the early onset theory. The Defense provided during both the *Atkins* hearing and trial examples of Applicant's substandard performance during grade school. R. 3852-3853; 2812-2918. The Defense presented standardized tests from Applicant's school records reflecting low I.Q. scores during cross-examination of DDSN Psychologist Kimberly Harrison. R. 3795-3802; 3890-3902; 2861-2866. Additionally, Dr. Calloway testified to Applicant's poor performance in grade school, his enrollment in adjunct classes, and his eventual drop out in the eleventh grade. R. 3871; 3882-3883; 2851-2861. She also made reference to a basic learning exam administered to Applicant when he was seventeen years old, which indicated that he was functioning academically between a fifth and sixth grader. R. 2855; 2867. She then correlated these to a similar test that she had recently administered

which placed Applicant at a similar academic range. R. 2868-2870. Dr. Calloway also attempted to relate several of the alleged deficits in social adaptability back to Applicant's childhood. She testified that interviews with family and acquaintances indicated that Applicant had difficulty making friends and was often taken advantage of. R. 3927-3928.

Careful consideration of the Record does not support Applicant's claim that Counsel was ineffective for failing to investigate and present evidence to the trial judge and jury that Applicant's depression and cancer treatment had no demonstrable effect on IQ scores. Instead the Record would support that Counsel, through qualified experts, were aware and attempted to debunk the allegation. Furthermore the Record would not support a finding of prejudice as Counsel submitted adequate evidence of early onset, countering the State's theory. Applicant is unable to satisfy his burden under *Strickland* and the claim should be dismissed.

11(b)(6) Counsel failed to adequately inform and educate the trial judge and jury about potentially and preconceived misconceptions and stereotypes related to intellectual disability

Applicant next faults Defense Counsel for failing to educate the judge and jury about intellectual disabilities in general. Nevertheless, the Record would support that Counsel took affirmative measure to educate both the judge and jury in regards to potential misconceptions and stereotypes. During Defense's Counsel extensive examination of Dr. Calloway at Applicant's *Atkin's* hearing the following testimony was presented:

Q Can somebody be mild mentally retarded and drive a truck?

A Yes .

Q forklift?

A Yes .

Q Be a welder?

A Yes .

Q Get a GED?

A Yes.

Q Read?

A Yes.

Q Write?

A Yes .

Q Write letters?

A Yes.

Q Use the telephone?

A Yes.

Q Use an ATM machine?

A Yes.

Q Have a child?

A Yes .

Q Marry?

A Yes

Q Do household chores?

A Yes

Q Cook?

A Yes .

Q Shop?

A Yes.

Q Count money?

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A Yes .

Q Make change?

A Yes.

Q Buy clothes?

A Yes.

Q Dress themselves?

A Yes.

Q Maintain hygiene?

A Yes.

Q Work?

A Yes .

Q Be a mechanic?

A Yes.

Q Be a pizza delivery driver?

A Yes.

Q Have a driver's license?

A Yes.

Q Get a CDL?

A Yes.

Q Can you rule out mental retardation by pointing to these skills and say the person's not M.R.?

A No, because that's not the way, in our profession, that we go about assessing adaptive functioning. It's not a rule out. *It's looking at the entire picture of who the person is with regard to strengths and deficits and identifying those deficits in terms of these skill areas.*

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(R. 3838-3840) (emphasis added).

Immediately after, Dr. Calloway presented to the trial court a detailed analysis on how mental health professionals investigate and determine intellectual disability. R. 3840-3845 . Dr. Calloway also cautioned the court on the “cloak of competency” exhibited by individuals with mild mental retardation:

For several reasons. People who are suspected of having intellectual disability, particularly people who fall within the mild range of intellectual disability, are people who are — have sufficient awareness to know that they are not as bright, if you want to put it that way, they’re not as capable, they don’t have as much intellect as other people, and this is for — this is a shameful thing in our society not to be bright, not to be capable, it’s shameful.

So, there is a — there’s a way in which people who have intellectual disability, particularly people with the mild form of it, will want to cover what they, what they don’t know and pretend that they do know. There’s a book called *The Cloak of Competence* in which this man did a study of a number of people in California with intellectual disability, and he came up with this concept of *The Cloak of Competence* .

So, this describes the way in which, if you will, like somebody would put on a coat to cover themselves, *The Cloak of Competence* is what people with mild M.R. or mild I.D. do in order to pass, in order to look like that they are average normal people.

R. 3845-3846.

Defense Counsel further endeavored to mitigate the fact that Applicant held a Commercial Driver’s License and had a career in trucking. Through Dr. Calloway, Defense Counsel provided a comprehensive assessment of the tribulations Applicant experienced during his driving career. Dr. Calloway detailed during the *Atkins* hearing and trial the accident history and disciplinary records from Applicant’s various employers. R. 3884-3890; 2947-2948. In addition, Dr. Calloway reflected on comments made by one of Applicant’s prior employers:

But Mr. Bagwell said if you could drive at all you could drive those trucks, and this is down at the latter part of that paragraph. He said later you don’t need a Ph.D or college degree to drive a truck, and he thought that [Applicant] didn’t drive tanker trucks, which required a greater amount of paperwork to be completed by the driver.

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R. 3932.

Defense Counsel also took several more opportunities to educate the jury during the penalty phase about the realities of intellectual disability. Dr. Calloway began her testimony by informing the jury that individuals with mild intellectual disabilities often appear normal. She again explained the “cloak of competence” intellectually disabled individuals often exhibit in order to maintain a normal appearance. R. 2826. Dr. Calloway also expressed the importance of clinical judgment in reaching an intellectual disability determination. R. 2827-2828. Defense Counsel later offered the question on an intellectually disabled individual’s ability to read, to which Dr. Calloway affirmed that individuals with mild mental retardation have the capability to both learn and read. R. 2867-2868. Similarly, Defense Counsel asked during presentation of Applicant’s work history, whether the mildly mentally retarded could work. Dr. Calloway responded:

They can be - - they are in educable sorts of classes, educable classes for special ed children, and so they can be taught, and they can be taught through routines and they can be taught through assistance, and they can be - - they can work. There’s no reason they shouldn’t be able to work.

R. 2876-2877.

Dr. Calloway further affirmed her belief that a mildly mentally retarded could be trained to drive a commercial truck, a forklift, attain a commercial driver’s license and to keep logs of their activities. R. 2877. She concluded this line of questioning with the following statement:

Again, I - - you know, the, the distinguishing thing about mildly mentally retarded people is that, just by looking at them and *just by looking at some of their activities*, would not be sufficient - - a sufficient way to diagnose mental retardation because they are capable of doing many things.

R. 2877 (emphasis added).

Applicant is unable to satisfy his burden under *Strickland*, as the Record wholly contradicts any allegation that Defense Counsel was deficient in its attempts educate all parties on misconceptions and stereotypes. Defense Counsel took advantage of repeated opportunities to educate both the court and jury on the nature of intellectual disability and to dispel any preconceived stereotypes or misconceptions.

11(b)(7), 11(d)(7), & 11(d)(8) Counsel failed to object to the Solicitor's improper closing arguments regarding Applicant's alleged intellectual disability, arguments endorsing improper stereotypes toward people with intellectual disability, and argument that Applicant did not have any remorse.

Applicant's next claims that Defense Counsel was ineffective for not objecting to Solicitors closing arguments regarding the veracity of Applicant's intellectual disability claim and lack of remorse. Applicant is unable to show trial counsel was deficient as the contents of the Solicitor's closing argument was appropriately confined to the record and not overly prejudicial.

“[I]t is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another.” *United States v. Robinson*, 485 U.S. 33, 33 (1988). “A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “[I]ts content should stay within the record and reasonable inferences that may be drawn therefrom.” *Id.* at 609–10, 602 S.E.2d at 744.

In *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975), our Supreme Court set forth the parameters that attorney's must abide by in putting forth permissible closing arguments. Citing to the 23A C.J.S. Criminal Law § 1107, the Court found that while closing arguments have been held improper when reliant upon personal bias or arousing passions and prejudices of the jury, there is no error if the attorney stays within the record and the reasonable inferences that can be

drawn therefrom. *Id.* at 92, 212 S.E.2d at 590. Post-conviction relief will not be granted if an applicant cannot show both deficient performance and prejudice resulting from an alleged improper closing argument. *Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009).

Applicant is unable to show ineffective assistance for not objecting because the closing argument was carefully tailored to the issues presented at trial. The Defense relied heavily on Applicant's intellectual capacity during mitigation. In response the State pointed to several noted social strengths to reinforce its theory that Applicant's was not intellectually disabled. The Solicitor's closing argument is a clear expression of this theory. In addition, the issue of Applicant's remorse was clearly before the jury. Various witnesses provided contradicting testimony regarding Applicant's level of remorse in the murder of Brooke Center. *See* R. 2987 (Dr. Maddox: "He has a difficult time dealing with what he's done and he's very sad about it."); R. 3020 (Heather Bryant: "My daddy was pushed to the extinct [sic] to do what he did, and he regrets what he has done. He suffers from that everyday."); R. 3084 (Ken Rice: "The next time I went to see him he said I've - - God's forgiven me, but I can't forgive myself."). Accordingly, the Solicitor's comments on the topic were appropriately confined to the record.

Moreover, a criminal defendant is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). *See also Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument"); *State v. Brisbon*, 323 S.C. 324, 474 S.E.2d 433 (1996) (The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to

the extent that he was denied a fair trial). The standard in *Donnelly* is a very high standard for a defendant to meet. “ ‘[I]t is not enough that the remarks were undesirable or even universally condemned.’ ” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). *See also Parker v. Matthews*, 567 U.S. 37, 47-48 (2012); *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). “In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor’s remarks, but must also take into account defense counsel’s opening salvo.” *United States v. Young*, 470 U.S. 1, 12 (1985).¹⁸ Further, the Supreme Court in *Donnelly* admonished that “a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.” *Donnelly*, 416 U.S. at 647.

Applying this standard to the challenged comments, it is clear that Applicant cannot show prejudice under *Strickland* because he has not proven that the challenged remarks were so prejudicial that they deprived him of a fair trial under *Donnelly*. *See* 416 U.S. at 637; *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. During closing argument, the Solicitor merely referenced the fact that Applicant’s intellectual and adaptive strengths undermined confidence in any logical opinion on adaptive deficits and that the State’s evidence negated any finding of remorse. The circumstances addressed by the Solicitor were argued at trial and were already before the jury. Applicant is unable to meet his burden deficient performance and prejudice under *Strickland*.

¹⁸ As the Court explained in *United States v. Robinson*, 485 U.S. 25, 33 n. 5 (1988): “In *United States v. Young* and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor’s personal opinion as to the defendant’s guilt were improper, but we held that, in context, those statements did not necessitate reversal.”

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11(c) Counsel failed to adequately question prospective jurors in voir dire to identify prospective jurors with pre-formed beliefs about and stereotypes and biases against a defendant with an intellectual disability.

Applicant alleges that Defense Counsel was deficient in failing to question and identify specific jurors with beliefs and biases against persons with intellectual disability. There can be no finding of ineffective assistance as such questions would have been beyond the permissible scope of *voir dire*. “[V]oir dire is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular predispositions.” *State v. Poindexter*, 314 S.C. 490, 431 S.E.2d 254, n. 2 (1993) (citing *People v. Hundley*, 227 Ill.App.3d 1056, 169 Ill.Dec. 399, 591 N.E.2d 903 (1992)). “While the Sixth and Fourteenth Amendments to the United States Constitution provide a defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. The Constitution, after all, does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.” *State v. Stanko*, 376 S.C. 571, 576, 658 S.E.2d 94, 96–97 (2008) (citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)).

A defendant is entitled to question a prospective juror *on the general subject of mitigating circumstances*, in order to determine if such juror would follow the instructions of the trial judge, i.e. to consider mitigating circumstances. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222. However, a defendant does not have the right to question jurors whether or not they would consider *specific mitigating circumstances*, or what their opinion is of any *specific mitigating circumstance*. *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998); *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116 (1998); *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996). The underlying rationale for limiting such questioning is that it might cause a juror to believe that he has pledged or committed himself to a future course of action when considering evidence of such mitigating circumstances. *Powers*, 331 S.C. 37, 501 S.E.2d 116, referencing *State v. Skipper*, 337 N.C. 1,

446 S.E.2d 252, *cert. denied* 513 U.S. 1134, 115 S.Ct. 953 (N.C. 1995); *State v. Wilson*, 74 Ohio St.3d 381, 659 N.E.2d 292 (1996); *State v. Drutzer*, 928 S.W.2d 854 (Mo. 1996); *Hill*, 331 S.C. 94, 501 S.E.2d 122; *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997). While Applicant characterizes such questions a probing bias, in reality, Applicant would have sought for Defense Counsel to question jurors for the purpose of seeking out those who were predisposed to finding in favor of intellectual disability. This would have been improper questioning during the *voir dire*. Therefore, Defense Counsel cannot be found deficient for failing to present such questions.

11(d)(1) Counsel failed to adequately investigate and present the full range of mitigating evidence concerning Applicant's social and life history

-And-

11(d)(2) Counsel failed to adequately investigate and present all available mitigating evidence concerning Applicant's mental health prior to and at the time of the capital offense.

Applicant now claims that counsel performance was deficient for failing to investigate and present the full range of mitigating evidence, and Applicant's mental health prior to and at the time of the capital offense. However, for purposes of investigating and presenting the case for intellectual disability, Counsel was also able to develop and present Applicant's social and life history, as well as his mental health at the time of the murder. Counsel utilized the services of both a trained social worker and forensic psychologist for the purpose of investigating Applicant's social and life history. Together they conducted numerous interviews family member, past employers, grade school teachers, and acquaintances. R. 3779; 3780-3781; 3816. In addition, they collected grade school, employment, and social security records. R. 2831-2837. They also collected and reviewed Applicant's health and psychiatric records, and various school and mental health records for Applicant's immediate family. R. 2835-2838. Utilizing this information, Defense Counsel, through its qualified experts, presented a detailed accounting of

Applicant's social and family history which was presented during both the *Atkins* hearing and at trial. R. 3871-3890. These finding were further detailed in Dr. Calloway's report. R. 3871.

During the penalty phase of Applicant's trial, Dr. Calloway detailed Applicant's life history dating from adolescence up until the murder. This included detailed recounting of educational and occupational history. R. 2848-2868; 2873-2877. Dr. Calloway also listed Applicant's other family members who suffered from various levels of lower intellectual functioning and psychiatric disorders. R. 2838-2841. As to Applicant's mental health, Dr. Calloway detailed Mr. Blackwell's psychiatric records, including his several diagnoses for depressive disorder, previous suicidal gestures and resulting psychiatric commitments. R. 2843-2844.

In addition, during trial Defense Counsel called forensic psychiatrist Dr. Donna Schwartz-Watts (now Dr. Maddox) to testify further on Applicant's mental health history. R. 2973. She provided additional testimony to Applicant's history of depression and prior suicidal gestures. R. 2976-2977. She detailed how Applicant fired a gun through the roof of his trailer and was subsequently committed to a psychiatric facility. 2976-2977. She also detailed a later psychotic event in which Applicant overdosed on medication in response to his wife leaving him. This resulted in him again being committed. R. 2977-2978. Dr. Maddox also confirmed Applicant's diagnosis of depression disorder. R. 2979. In addition, she detailed the difficulties Applicant had experienced with his physical health, including his battle with cancer, and back and blood pressure issues. R. 2982-2984. In regards to Applicant's mental health at the time the murder, Dr. Maddox testified:

So, the only opinion I'm able to give today would be that, in my opinion, he's had a history of major depression before. He's had two episodes before when he was hospitalized, and it's clear, from looking at Doctor Jackson's records, that

he remained depressed before this incident, and it clear that, since I treated him at the jail, he had symptoms of depression as well.

So, the opinion that I could offer to you-all was that he was suffering from a major depression at that time.

R. 2985.

Applicant is unable to maintain his burden in regards to ineffective of assistance of counsel as the Record supports that Defense Counsel, through its experts, conducted a detailed and adequate investigation into Applicant's history and mental health. Moreover, the Record reflects that this information was adequately utilized during Defense's mitigation.

11(d)(3) Counsel failed to investigate and present mitigating evidence concerning Applicant's lack of future dangerousness, adaptability to confinement, and good character

Applicant claim's that trial counsel was ineffective for failing to adequately investigate and present expert testimony regarding Applicant's ability to adapt to incarceration. Evidence of adaptability to prison life can be demonstrated in a number of ways, including the provision of evidence and testimony that a defendant has been a well-behaved and disciplined prisoner in jail. *See Skipper v. South Carolina*, 476 U.S. 1, 7 n. 2 (1986). Further, "[a] defendant who alleges a failure to investigate by counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome...." *United States v. Green*, 882 F.2d 999, 1003 (5th Cir.1989).

Defense Counsel presented several character witnesses during the penalty phase of Applicant's trial, including a pastor, former employer, a church acquaintance, Applicant's cousin, daughter, father, and mother. These witnesses testified extensively to Applicant's good character and gentle demeanor. Applicant's former employer, Gail Shook, testified that Applicant was "the most gentle, humble man that I've ever met including my husband." R. 2759.

Applicant's cousin, Sherry Wofford offered that Applicant was "a loving man," and "[j]ust as gentle, always caring about everybody, doing everything he can for anybody." R. 2990. Applicant's daughter testified that Applicant was "kind, gentle, caring man." R. 3020. Brittany Fowler, the mother of Applicant's grandson, described Applicant as "[v]ery kind hearted," and stated that he "would give you the shirt off his back." R. 3026. Norm Uber, an acquaintance from church, described Applicant as a "gentle man." R. 3031. Cletus Blackwell, Applicant's father, testified that Applicant was "a good boy," and no trouble. R. 3037. He further iterated that Applicant did not fight others as a kid despite being larger. R. 3038. Applicant's brother-in-law described Applicant as "a really good person," and "[k]ind and gentle." R. 3057. Applicant's pastor provided the following testimony regarding Applicant:

Well, Ricky is - - I summarize his personality as being phlegmatic maybe, laid back, easy going, did not like to be at any conflicts. He was always smiling, had a little grin all the time, easy going, very cooperative, gentle. Just a lot of good qualities.

R. 3072. Moreover, witnesses repeatedly emphasized that in their opinion this murder was directly tied to the breakup of Applicant's marriage. *See* R. 3020; 3035; 3060; 3086. Lastly, in regards to testimony provided by the detention officer concerning Applicant's hoarding of detergent and medication, Defense Counsel conducted a thorough crossexamination for the purpose of minimizing any judgment on Applicant's ability to adapt to prison. *See* R. 2650-2652.

Applicant is unable to demonstrate that Defense Counsel was deficient in failing to present Applicant's lack of future dangerousness, his adaptability to confinement, and good character. The testimony given by Applicant's character witnesses were more than satisfactory toward presenting these issues to the jury. Therefore, Applicant has failed to provide any evidence of deficient performance under *Strickland*.

11(d)(4) Counsel failed to adequately investigate and present scientific evidence demonstrating that the fact the victim urinated on herself was a natural result of death as opposed to resulting from fear while alive during the incident

Applicant is unable to show that Defense Counsel was ineffective for failing to contest the State's assertion that the victim urinated herself out of fear. Counsel can hardly be deemed deficient for seeking to avoid further attention to an already inflammatory aspect of the case. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 530, 531 (1992) (reasonable trial strategy will not be held ineffective). Further, the Applicant is unable to show that the result of the proceeding would have been different but for counsel's alleged error. First, Applicant is unable to conclusively demonstrate that the victim did not urinate herself out of fear. *See Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998); *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). Second, Applicant is unable to show *Strickland* prejudice based simply on the prospect of speculative evidence that the victim may or may not have urinated herself prior to the murder. This claim is without merit and should be summarily dismissed.

11(d)(5) Counsel failed to object to misleading jury instructions, in violation of the Sixth and Eighth Amendments to the United States Constitution, which did not properly advise the jurors that whatever sentence they recommended would be the sentence imposed by the court rather than a recommendation to the court about the sentence to be imposed.

Applicant now claims ineffective assistance of counsel for failure to object to the trial court's jury charge. However, Applicant cannot show error in the charge given. "A jury instruction must be viewed in the context of the overall charge." *Sigmon v. State*, 403 S.C. 120, 133, 742 S.E.2d 394, 401 (2013) (quoting *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998)). "The test to determine the propriety of the trial judge's charge is what a reasonable juror

would have understood the charge to mean.” *Id.* (quoting *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991)).

Applicant’s reliance on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985), and *State v. Davis*, 306 S.C. 246, 411 S.E.2d 220 (1991), to show the statutory language is facially invalid and constitutionally wrong as included in the charge is misplaced. These cases cannot afford relief primarily because it is undisputed that the trial court here plainly instructed the jury that it was the jury’s decision on the sentence that was controlling. Indeed, the very reasons supporting reversal in *Caldwell* and *Davis*, which is so far removed from the factual basis here, well-demonstrate the flaw in Applicant’s allegation of error.

In *Caldwell*, the Supreme Court found “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” 472 U.S. at 328–29, 105 S.Ct. 2633. There the prosecution pointedly told the jury its sentencing decision was “not the final decision,” that its “job is reviewable” and “the decision you render is automatically reviewable by the Supreme Court.” *Id.* at 325–26, 105 S.Ct. 2633. Additionally, the trial judge endorsed and supported those comments in stating, “I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands.” *Id.* at 325, 105 S.Ct. 2633. Concluding that “the State sought to minimize the jury’s sense of responsibility for determining the appropriateness of death,” the Supreme Court vacated the death penalty:

This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its “truly awesome responsibility.” In this case, the State sought to minimize the jury’s sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not

meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. 472 U.S. at 341, 105 S. Ct. 2633. *See also California v. Ramos*, 463 U.S. 992, 1011, 103 S. Ct. 3446, 3459, 77 L. Ed. 2d 1171 (1983) (“advising jurors that a death verdict is theoretically modifiable, and thus not ‘final,’ may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers”).

Our State Supreme Court applied the *Caldwell* rule in *Davis*. The Court found reversal necessary based upon: (1) the trial court’s *refusal* to tell the jury “its sentencing recommendation would be accepted by the judge and the sentence imposed accordingly;” and (2) the observance that “nowhere in the record does the trial judge refer to the jury’s sentencing decision as anything more than just a recommendation.” 306 S.C. at 250, 41 1 S.E.2d at 222. To avoid any misunderstanding, the trial court here, unlike the trial court in *Davis*, actually charged the jury that it would follow the jury’s recommendation and underscored the jury’s duty:

[T]here are two verdicts that you will consider in this case as to the sentencing. One is the death penalty, which, in this state, is by electrocution, electrocution [sic] or by lethal injection, at the option of the defendant, and the other is life imprisonment without the possibility of parole. ***I will advise you that your sentencing recommendation in this case would be followed — will be followed by the Court.***

(R. 3223) (emphasis added). (*See also* R. 3250, “I will tell you now that I’m going to ask you to retire to begin your deliberations, and when a recommendation is submitted to the court, I will advise you that the court will follow that recommendation.”).

It is long been held that juries are presumed to follow the law as given in the instructions.¹⁹ Applicant shows no cause to depart from that long standing principle. Critically, the trial judge here expressly informed the jury that its sentencing recommendation “will be followed” which is in sharp contrast to *Davis*. It is also completely consistent with established case law on this issue. *See State v. Sims*, 304 S.C. 409, 421-22, 405 S.E.2d 377, 384 (1991) (holding the instruction “whatever you recommend, will be the sentence that will be given to a defendant” informed the jury “that it was to make the ultimate decision as to [the defendant’s] fate.”); *State v. Middleton*, 295 S.C. 318, 325-26, 368 S.E.2d 457, 461(1988) (concluding the instruction, “the ultimate punishment of the defendant will be in your hands if you as a member of the trial jury have found the defendant guilty” told the jury it was vested with making a decision as to the defendant’s fate); *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (“The idea should be conveyed to the jury that its sentencing recommendation will be followed.”); *State v. Linden*, 276 S.C. 304, 310-11, 278 S.E.2d 335, 338-39 (1981) (“To instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the jurors responsibility at this phase of trial”). It is so in other jurisdictions where the statute similarly sets out the jury recommends and the judge imposes the sentence. *See, for example, Brockman v. State*, 739 S.E.2d 332, 358 (Ga. 2013) *cert.*

¹⁹ *See State v. Dunlap*, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct App. 2001), *aff’d as modified on writ of cert.*, 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting *Fove v. State*, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) (“A jury is presumed to [have followed the trial judge’s] instructions.”); *State v. Ard*, 332 S.C. 370, 386, 505 S.E.2d 328, 336 (1998) (holding in a capital case that jurors are presumed to follow the trial court’s instructions); *State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986) (finding jurors are presumed to follow the law as instructed); *see also Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (holding in a capital case that “a jury is presumed to follow its instructions.”).

denied 134 S.Ct. 521 (2013) (finding, in the alternative, procedurally barred claim was without merit where “it was clear from the charge that the recommendation would be binding on the trial court”); *Treadway v. State*, 924 N.E.2d 621, 639 (Ind. 2010) (“merely referring to the jury’s determination as a ‘recommendation’—the term used in the statute—did not run afoul of *Caldwell* because there was no intimation to the jury that its recommendation was ‘only a preliminary step’ and no suggestion that the jury was ‘not responsible’ for the ultimate sentence.”). Applicant’s allegation of ineffective assistance (or any error in regard to the charge) necessarily fails as a matter of law.

Lastly, in regards to Applicant’s citation to *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002), *Hurst* applied *Ring* to invalidate a statutory scheme that allowed an advisory opinion by the jury for sentencing. *Hurst v. Fla.*, 136 S. Ct. 616, 622, 193 L. Ed. 2d 504 (2016) (“As with *Ring*, a judge increased Hurst’s authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst’s sentence violates the Sixth Amendment”). As noted in the parenthetical, this scheme resulted in factual determinations by the trial judge in violation of the right to a jury trial. The statute here, the case law in this jurisdiction, and the charge and sentence in this case specifically show there is no like circumstances here. Again, though the word recommendation is used, it was underscored clearly to the jury that its determination would be followed and was in fact followed in sentencing. There is no Sixth Amendment violation. *Ring* and *Hurst* are not applicable and will not support prejudice under a *Strickland* analysis.

To put a fine point on the ineffective assistance claim, nothing demonstrates that counsel’s failure to challenge the statutory language and/or charge was “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. To the

contrary, given the established state of the law, counsel had no reason to challenge the constitutionality of Section 16-3-20, either on its face or on these facts. *See, e.g., Maryland v. Kulbicki*, ___ U.S. ___, ___, 136 S. Ct. 2, 3 (2015) (summarily reversing the Court of Appeals of Maryland for failing to view counsel's representation as of the time of trial); *Harrington v. Richter*, 562 U.S. 86, 107, 131 S.Ct. 770 (2011) (finding error where "the Court of Appeals failed to 'reconstruct the circumstances of counsel's challenged conduct' and 'evaluate the conduct from counsel's perspective at the time.'").²⁰

11(d)(6) Counsel failed to investigate and present evidence of remorse and acceptance of responsibility including, but not limited to, failure to call hospital chaplain to testify regarding Applicant's remorse shortly after the crime when the chaplain's records documenting the remorse were excluded by the trial judge as inadmissible hearsay;

The factual basis for this claim was developed at trial and addressed in the direct appeal. The record shows before the records custodian was called, Defense Counsel advised the trial judge of the State's objection to the substance of the testimony regarding the notes. The trial judge held a hearing on the objection outside the presence of the jury. (R. 2960, lines 18-25). Defense Counsel advised that he would present Ms. Gracie Williams, a record custodian from the Spartanburg Regional Hospital. (R. 2961, lines 4-5). He sought to introduce the notes of two hospital chaplains who spoke with appellant after his self-inflicted wound, and relied upon the business records exception for admissibility. (R. 2962, lines 11-18; 2965, lines 3-5). The substance of the notes were described as follows:

... the patient was struggling with guilt, and wanted to tell his grandchildren he loved them...

²⁰ Indeed, since its 1984 decision in *Strickland*, the Supreme Court has consistently applied the rule of contemporary assessment of counsel's conduct. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 381, 125 S.Ct. 2456 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527 (2003); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838 (1993); *Burger v. Kemp*, 483 U.S. 776, 789, 107 S.Ct. 3114 (1987); *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574 (1986).

...He was struggling with his actions and what had been done, and then the second indicates - - second statement . . . was sad, had some prayers in his heart, asked for prayers for the family. We prayed ... the Lord's Prayer together.

(R. 2961 , line 25 - 2962, line 2; 2963, line 24 - 2964, line 6).

The State objected noting the information was not in the nature of a diagnosis; the witnesses were available; and, lastly, the notes were more prejudicial than probative. (R. 2962, line 20 - 2963, line 4; 2964, lines 14-23). The State relied upon *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997), which found statements not necessary to medical treatment or diagnosis were inadmissible hearsay. Defense counsel offered that "we interviewed the chaplains and ... [t]hey didn't have much memory actually of this event. So, their notes are actually the best evidence of it...." (R. 2963, lines 17-19). The trial judge found that the chaplain's notes were not admissible:

...I assume the pertinent portions are the parts that I discussed earlier that state the patient was struggling with guilt, grandchildren he loved them. He was struggling with his actions and what had been done, and another entry, the next day, by a different individual said but he was sad, had some prayers in his heart, asked for the family. We prayed the Lord's Prayer together.

The case cited by Mr. Barnette does appear to be on point. Also the exception to the hearsay rule for regularly kept business records states that matters which are in the nature of an opinion will not be admitted as an exception to the hearsay rule from a regularly kept business record.

It appears that the quotes in here that describe the defendant would be in the form of opinions given by the individuals involved, and therefore, I'll grant the State's motion.

(R. 2965, line 15 - 2966, line 6).

On appeal, Applicant argued the trial judge erred in not allowing him to present his evidence of remorse. (Attachment 2, p. 93). Our Supreme Court disagreed. The Court found

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not only that the trial judge did not err, but even if the ruling had been error, it would only have been harmless in light of other evidence of record:

..we find the trial court correctly excluded the document as it contained inadmissible subjective opinions and judgments, in particular the notations that Blackwell was “struggling with guilt” and “struggling with his actions.”

Nonetheless, even if the trial court erred in excluding the chaplains’ notes, we find the error harmless as the evidence was cumulative to other evidence in the record of Blackwell’s remorse. *See State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 881 (2007) (“Although it was error to exclude the letter written from Appellant to Ms. Northcutt expressing remorse, the error was harmless. The record contains evidence of Appellant’s remorse. Appellant was not prejudiced, nor was the outcome of the trial affected.”).

Specifically, as mitigation evidence, Blackwell presented: (1) Dr. Donna Schwartz-Watts, a psychiatrist who evaluated Blackwell, who testified that “[i]t’s very hard for [Blackwell] to accept what happened and what he’s done,” and “he’s very sad about it”; (2) Heather Bryant, his daughter, who testified that “he regrets what he has done” and “suffers from that every day”; and (3) Ken Rice, his pastor, who testified that Blackwell told him “God’s forgiven me but I can’t forgive myself.”

State v. Blackwell, 420 S.C. at 160, 801 S.E.2d at 730–31.

In short, whether counsel erred or not, given the omission could only have been harmless, Applicant cannot satisfy his *Strickland* prejudice burden of proof. Moreover, the record supports that Applicant would likely not even be able to carry his *Strickland* deficient performance burden of proof.²¹ Defense counsel explained their reason for not calling the witnesses – they possessed little to no memory of the counseling they had provided. Thus, counsel had specific, reasonable

²¹ As noted above, several witness were introduced during the penalty phase of trail who testified to Applicant’s remorse. (Dr. Maddox: “He has a difficult time dealing with what he’s done and he’s very sad about it.”); R. 3020 (Heather Bryant: “My daddy was pushed to the extinct [sic] to do what he did, and he regrets what he has done. He suffers from that everyday.”); R. 3084 (Ken Rice: “The next time I went to see him he said I’ve - - God’s forgiven me, but I can’t forgive myself.”).

cause not to present the witnesses. This informed decision is unlikely to support a finding of deficient performance. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) (Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel). Again, the record is conclusive that this claim of error is without merit. The claim should be summarily dismissed.

11(e) Applicant's right to due process of law was violated as a result of the know presentation of false or misleading information by a state agent.

Respondent moves for a more definite statement in regards to the above claim. Applicant's claim has failed to present evidence indicating that the testimony given by Investigator Williams was false, much less that the State was aware of such falsity. The claim, as presented, does not rise beyond mere speculation. *See Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Respondent requests more detailed supporting facts so that it may properly respond.

11(f)(1) Appellate counsel failed to adequately raise and brief all legal and factual grounds for challenging the trial court's ruling that Applicant was not intellectually disabled

Contrary to Applicant's allegation, the records before this Court confirm that Appellant Counsel adequately raised and briefed the issue of Applicant's intellectual capacity. "Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel." *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999)). "Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate

counsel's deficient performance.” *Id.* In order to show that he was prejudiced by appellate counsel's performance, a PCR applicant must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

On Direct Appeal, Applicant was represented by Chief Appellant Defender Robert Dudek. Attorney Dudek was assisted by Appellant Defender David Alexander, who provided supplemental authority to the South Carolina Supreme Court on September 12, 2016, March 29, 2017, and May 4, 2017.²² (Attachment 11). In regards to the Brief of Appellant, Attorney Dudek raised seven separate and distinct issues spanning one hundred and eleven pages. One of the issues raised was:

The trial court erred in finding that appellant was not mentally retarded at the pretrial hearing pursuant to *Atkins v. Virginia* and *Franklin v. Maynard*, and therefore sentencing appellant to death violates his rights under the Eighth Amendment.

(Final Brief of Appellant).

Attorney Dudek devoted forty-five pages to this particular argument. In it, he thoroughly addressed each prong required for a finding of intellectual disability. *See* Section 16-3-20(C)(b)(10) (defining mental retardation as: “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.”). Attorney Dudek further detailed the strength of Applicant’s case in regards to each prong, as well as the investigation conducted and conclusion reached by Applicant’s expert, Dr. Calloway. Attorney Dudek presented a constitutionally sufficient analysis detailing Applicant’s theory that the trial court incorrectly weighed the experts’

²² The supplements provided by Appellant Defender Alexander cited and referenced both *Hall v. Florida*, 134 S.Ct. 1986 (2014) and *Moore v. Texas*, 137 S.Ct. 1039 (2017). (Attachment 11).

testimony and opinions. Despite Appellant Counsel's adequate presentation of the issue, Applicant's direct appeal was dismissed upon review by the South Carolina Supreme. There the Court found that the trial court credibility determination in regards to the experts was appropriate and supported by the record:

Initially, we note the trial court correctly identified and made its determination applying the statutory definition of "mental retardation." Moreover, contrary to Blackwell's claim, the trial court did not base its decision solely on the fact that Blackwell was able to successfully obtain a commercial driver's license and be employed as a truck driver. The court relied on other factors, including Blackwell's school performance and full employment history. Additionally, the court explained why it gave greater weight to Dr. Brown's report, noting that the report was directed at an evaluation of Blackwell's "formative years" and was consistent with the "functional adaptations" required by the statutory definition of "mental retardation." The court also discounted some of Dr. Calloway's findings as it questioned whether "adequate information" was used and believed Dr. Calloway improperly "made subjective determinations concerning the results obtained and weighted responses of various informants differently."

We also find the trial court's factual determinations are supported by evidence in the record. Admittedly, it is concerning that Blackwell, at 54 years old, scored 63 and 68 on the I.Q. tests given in preparation of the Atkins hearing. However, in terms of "significantly sub-average general intellectual functioning," the trial court readily acknowledged the recent I.Q. scores but was persuaded by evidence that: (1) Blackwell, prior to the age of 18, scored between 68 and 87 on standard school I.Q. tests; (2) Blackwell made "reasonably sufficient grades during his school career"; (3) at the age of 18, Blackwell was found to read at the 5.8 grade level, completed arithmetic problem solving at the 6.6 level, and completed arithmetic computation at the 5.2 level; and (4) Blackwell dropped out of high school in the eleventh grade despite having earned significant credits toward graduation.

The court also recognized that Blackwell's recent I.Q. scores may have been caused by events in his adult life that adversely affected his current cognitive ability. For example, the court accurately referenced the fact that Blackwell received chemotherapy for Hodgkin's Lymphoma in 1986, had an accident in 2003 or 2004 while riding a four wheeler which rendered him unconscious for approximately 15 to 20 minutes, had several major depressive episodes that resulted in involuntary commitments in 1990 and 2008, and was taking Thorazine, an anti-psychotic medication, at the time of his Atkins evaluation.

With respect to Blackwell's adaptive behavior, the court found "no evidence that he was unable to function at his home during the time before his eighteenth birthday." Although the court acknowledged evidence that Blackwell

had difficulty living independently after the dissolution of his marriage, the court declined to find this translated into deficits in Blackwell's adaptive behavior. Rather, the court accepted the testimony of Dr. Calloway that Blackwell's major depressive episodes after the separation were the cause of Blackwell's inability to function normally. The court also found that Blackwell adapted to life well as he was able to achieve his goal of becoming a commercial truck driver, maintain employment with consistent increases in his earnings, and raise two children during his twenty-six-year marriage. Additionally, the court found significant the fact that Blackwell was never diagnosed with mental retardation until the Atkins issue was raised and also noted that Dr. Harrison, who evaluated Blackwell as to his competency to stand trial, reported no finding of mental retardation.

After thoroughly reviewing the record, we conclude Blackwell has not shown the trial court committed an error of law or that its decision is unsupported by the evidence or against its preponderance. Accordingly, we find the case properly proceeded as a capital trial.

State v. Blackwell, 420 S.C. 127, 141–43, 801 S.E.2d 713, 720–22 (2017).

Applicant cites to *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002) in support of his claim of ineffective assistance of appellate counsel. There the South Carolina Supreme Court found ineffective assistance of appellant counsel after counsel “devoted three short paragraphs to [the issue on appeal], did not give any useful analysis, and only cited one case.” *Id.* 349 S.C. at 208, 562 S.E.2d at 611. The appeal argument at issue clearly does not fit the same mold as that found in *Patrick*. Again, Dudek devoted forty-five pages of analysis to the intellectual disability issue and cited to over thirteen different cases, including *Hall v. Florida*, 134 S.Ct. 1986 (2014), which Applicant has also cited. Applicant again cites to *Moore v. Texas*, 137 S.Ct. 1039 (2017), however, this case was clearly not available prior to Applicant’s appeal. *See Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law....” (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), overruled on other grounds by *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765 (“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at

the time of the trial.”). However, as noted above, the Court was provided notice of these cases from the Office of Appellant Defense in the form of a supplement. Additionally, these cases were largely the focus of Applicant’s denied petition to the Supreme Court of the United States.

The Record would support that Appellant Counsel’s provided constitutionally sufficient representation on direct appeal. Furthermore, the independent assessment reached by the Court that Applicant failed in his burden of proving intellectual disability all but forecloses a finding of prejudice.

11(f)(2) Appellate counsel failed to raise the issue that the trial court erred in admitting prejudicial autopsy photographs and close-up photographs from the crime scene, including a photograph of the victim after her body was moved, U.S. Const. amends. V, VIII; Rule 403 SCRE;

-And-

11(f)(3) Appellate counsel failed to raise the issue that the trial court erred in allowing Reggie Frye to testify during the penalty phase of Applicant’s trial when Frye’s testimony was not relevant and impermissible hearsay, Rule 401, SCRE; Rule 613(b), SCRE; Rule 802, SCRE.

When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine “whether appellate counsel failed to present significant and obvious issues on appeal.” *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

In regards to the first issue, during the punishment phase of Applicant’s trial, the Defense moved pursuant to SCRE 403 to suppress State’s Exhibit No. 60-72, which consisted of photos that depicted the deceased victim. The Defense argued that other photos of the victim had already been admitted and the current photos were taken after the body had been moved. R. 2695-2698. R. 2704-2705. The trial court granted some of the Defense’s motion, excluding

State's Exhibit No. 61, 62, 63 and 64. However, after authentication by forensic pathologist, the judge admitted remaining photographs. He held that their probative value outweighed their prejudicial effect, and that they were relevant to show the circumstances of the crime. R. 2709-2711. The trial court further cited *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010), *State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Burkhardt*, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007) to support its position that autopsy photographs of victim are admissible in the sentencing phase of a capital murder trial for use by the doctor who performed the autopsy for the purpose of illustrating the nature of the injuries. R. 2705-2706.

There can be no finding of *Strickland* deficiency or prejudice because admission of the photos was proper. "The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *Id.* "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct. App. 2008) (internal quotation marks omitted). *See also State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (quoting *Nichols v. State*, 267 Ala. 217, 100 So.2d 750, 756 (1958) ("The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.")).

In *State v. Torres* the Supreme Court of South Carolina held that "[i]n the sentencing phase of a capital murder trial, the scope of the probative value is much broader than the guilt phase. *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (citing *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986). In addition, the Court held "that autopsy photographs may be

presented to the jury in an effort to show the circumstances of the crime and character of the defendant.” *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (citing *Rosemond*, *supra*; *Burkhart*, *supra*). Here, in compliance with *Torres*, the State introduced the photographs during examination of Dr. Wren illustrating the number of injuries, location of the injuries, and manner in which the injuries were committed. *See id.*, (“If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.”) (quoting *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353(1996)); *see also State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008) (“Admitting photographs which serve to corroborate testimony is not an abuse of discretion.”); *State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution to corroborate testimony concerning condition of victim’s body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim’s mouth);

Applicant is also unable to show ineffective assistance for failure to raise the issue of Reggie Frye’s testimony. During trial, the Defense called Applicant’s father to the stand. During cross-examination, the State questioned Applicant’s father about whether he knew Reggie Frye and had had a conversation with him regarding the fact that he had involuntarily locked up Applicant’s gun in order to prevent Applicant from gaining access to it. Applicant’s father denied knowing [REDACTED] and claimed he did not recall having any such conversation with him. R. 3048-3052. Later, during the punishment phase of Applicant’s trial, the Defense recalled Applicant’s father and asked the same questions. During the State cross-examination, Applicant’s father admitting to knowing Mr. Frye, but again denied recalling any conversation about locking up Applicant’s gun. (R. 3115-3117). The State then sought to offer testimony from

Mr. Frye on the basis of the father's inconsistent statement. The State cited to *State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009) to support its position. R. 3117-3119. Over the Defense's objection, the trial court permitted [REDACTED] to testify as to his conversation. R. 3119-3120. [REDACTED] testified to a conversation he had had with Applicant's father in which the father admitted that he had seized Applicant's gun because he was afraid that Applicant was going to hurt himself or someone else. He testified further that the father also acknowledged that Applicant had broken into the gun case prior to the murder and retrieved the murder weapon. R. 3127.

As to Applicant's allegations of hearsay, under the rules of evidence, a prior inconsistent statement may be admitted when the proper foundation has been laid:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

SCRE 613(b).

Furthermore, In *State v. Stokes*, the South Carolina Supreme Court affirmed under similar circumstances. There the court held:

Thus, it is the opportunity to cross-examine that is constitutionally protected. In the instant case, appellant had that opportunity. It is undisputed [witness] appeared at trial, was available for cross-examination, and could have been recalled after the statement was admitted.

Stokes, 381 S.C. at 402, 673 S.E.2d at 440.

During Applicant's trial, [REDACTED] was cross-examined by Defense counsel. R. 3128-3131. In addition, [REDACTED]'s testimony fell under the hearsay exception set forth under SCRE 613(b). In regards to relevancy, the State offered and the trial court accepted premeditation as sufficient reason to introduce the evidence. R. 3118). The statement supported that Applicant