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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

BROOKE JEWELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000898

APPENDIX

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

COURT OF GENERAL SESSIONS

00-GS-10-6747

STATE OF SC,)

vs.)

BROOKE A. JEWELL,)

DEFENDANT.)

TRANSCRIPT OF RECORD

COPY

November 7, 2001

North Charleston, SC

B E F O R E:

THE HONORABLE DANIEL F. PIEPER, JUDGE.

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KAREN CROFT, RPR
Official Court Reporter

1 Wednesday, November 7, 2001

2 **THE COURT:** If you will each state your full
3 name for the record and tell me what case this is,
4 indictment?

5 **MS. WILSON:** Your Honor, this is State vs.
6 Brooke Alexander Jewell. It is indictment 2000-GS-10-6747
7 and 6748. Those are charges of burglary in the first
8 degree and criminal sexual conduct in the first degree.

9 We are here today for I guess what would be best
10 termed a status of counsel hearing. Mr. Massalon can
11 better set out for you why they felt like a hearing was
12 necessary and then we can just go from there, I suppose.

13 **THE COURT:** All right. Yes, sir?

14 **MR. MASSALON:** Thank you, Your Honor. For the
15 record, my name is John Massalon and I'm here representing
16 Andy Savage, who is in the room, of Savage & Savage.
17 Mr. Savage represents Mr. Jewell who is the defendant in
18 the indictment numbers that the solicitor just read.
19 Mr. Jewell's case is set for a plea and sentencing next
20 week before Judge Cottingham.

21 We wanted to bring this matter to your
22 attention, as the solicitor said, for a status hearing
23 because of the following information. About a little over
24 a week ago, Mr. Savage learned that Mr. Jewell had been in
25 communication with a woman who is now a former employee of

1 Mr. Savage's firm. At that time she worked as a secretary
2 for Mr. Savage. And the communications focussed on a
3 providency form that Mr. Savage had sent to Mr. Jewell in
4 anticipation of his plea and sentencing. And that's just
5 a document that summarized the likely questions that
6 Mr. Jewell would get at the plea and sentencing, questions
7 about his competency, the charges against him, his
8 right --

9 THE COURT: I have seen it, plea colloquy.

10 MR. MASSALON: Very similar to that.

11 THE COURT: I have seen it.

12 MR. MASSALON: Mr. Jewell was apparently
13 concerned because others at the detention center had not
14 gotten these forms from their attorneys and been asked to
15 acknowledge they had gotten them. That concern led him to
16 ask Ms. Anderson some questions about it. They discussed
17 some of the issues surrounding the providency form and
18 Mr. Jewell's case --

19 THE COURT: Why did it concern Mr. Jewell? I
20 think all defense attorneys should use a form similar to
21 that and I have advocated as much.

22 MR. MASSALON: Yes, sir. I think the basis of
23 his concern -- and I don't have any concern about it. I
24 agree with you. But I think his concern was that others
25 at the detention center, other inmates were not getting

1 this information from their lawyers.

2 THE COURT: Well, I guess Mr. Jewell had a
3 better attorney than them.

4 MR. MASSALON: I think that he probably does --
5 I think he definitely does. But I think that concerned
6 him. And he questioned, frankly, Mr. Savage's motives in
7 sending it to him and was concerned that other inmates
8 weren't getting it from their attorneys.

9 So as I understand it, he started questioning
10 Ms. Anderson about that. She talked with him a number of
11 times when he would call from the detention center about
12 that issue, about his case, about his guilty plea.

13 We understand also that Mr. Jewell wrote at
14 least one letter to Ms. Anderson, a former employee, at
15 her home and that's really how this issue came to light.
16 When Ms. Anderson got that letter at her home, she -- it
17 came to Mr. Savage's attention. She felt that someone in
18 the office had given it out. Mr. Jewell, you'll have an
19 opportunity to hear him say it, says that he got her
20 address from Ms. Anderson directly.

21 We have not gotten a copy of the letter.
22 Ms. Anderson has not given it to us. We haven't seen it.
23 We don't know what it says other than what Mr. Jewell says
24 it says. And we no longer have access to that
25 information.

1 What brings us here, Your Honor, is that
2 Mr. Savage contacted me to determine if this situation had
3 created a conflict which would prevent him from
4 representing Mr. Jewell throughout the conclusion of this
5 case. Mr. Savage and I met with Mr. Jewell last week at
6 the detention center and learned from him the information
7 that I have just summarized for you. We explained the
8 interests of the conflict of interest rules to him, asked
9 him if he was satisfied with his attorney, if he wanted
10 Mr. Savage to continue to represent him through the plea?
11 And he indicated at that time that he did want Mr. Savage
12 to continue.

13 However, I am aware, as I'm sure you are, of
14 cases that urge attorneys when a conflict or potential
15 conflict comes up in these situations to bring it to the
16 Court's attention. We told Mr. Jewell that it was
17 possible that we would have to bring this to the Court's
18 attention and he embraced that idea. He thought it was a
19 good one and actually asked that we set this hearing up
20 for that purpose.

21 **THE COURT:** Well, is there anything to indicate
22 through his communications with the former employee that
23 he's dissatisfied with the services of his attorney?

24 **MR. MASSALON:** Well, he can probably answer that
25 better than I, Your Honor. But my understanding is that

1 when he got the providency form, he was concerned about
2 why he had gotten it, whether Mr. Savage was looking out
3 for his own, being Mr. Savage's own interests.

4 THE COURT: Mr. Jewell, I need to ask you some
5 questions. Don't tell me anything about the facts of your
6 case, okay? I'm just asking you, again, questions. Do
7 you understand that?

8 MR. JEWELL: Sure.

9 THE COURT: From what I understand, this sample
10 form was sent to you just reviewing with you the types of
11 questions that you could expect during a guilty plea
12 proceeding. Now, for whatever reasons, you have called
13 into question the actions of your attorney. Whether that
14 be for some reason that I'm not aware of or whether it be
15 because you are unfamiliar with that process, I don't
16 know. But is there some reason that you are questioning
17 the actions of your counsel at the time whether it be
18 through just that act alone or through your communications
19 with a former employee?

20 MR. JEWELL: Your Honor, my concern is not based
21 primarily on the providency form itself but based more
22 upon what his former employee was telling me over --
23 during phone conversations.

24 THE COURT: Is this something his former
25 employee told you that calls into question Mr. Savage's

1 ability to represent you in this matter?

2 MR. JEWELL: She made it appear that way. I
3 don't doubt --

4 THE COURT: Give me the nature of that now,
5 nature of that conversation. Do you have that letter?

6 MR. JEWELL: I have -- I wrote a letter after
7 the fact because they wanted to know what it said. So I
8 tried to remember as best as I could what I wrote in the
9 letter. So this is --

10 THE COURT: It is nothing about your case --
11 Have you reviewed this, Mr. Massalon?

12 MR. MASSALON: I have not.

13 THE COURT: You are urging me to elicit
14 information from him. I assume this has been reviewed
15 before anything is told to me. I don't want to jeopardize
16 any criminal case.

17 Don't tell me anything about the facts of your
18 case. Do you understand that?

19 MR. JEWELL: Your Honor, I don't doubt --

20 THE COURT: Do you understand what I said?

21 MR. JEWELL: Yes, sir.

22 THE COURT: Let Mr. Massalon review the letter
23 first.

24 MR. MASSALON: Your Honor, what I might suggest
25 after looking at this, it is nothing that I'm concerned

1 about you knowing. But in the context of his criminal
2 case, it may be better if you question Mr. Jewell about
3 these matters possibly outside of our presence, if the
4 solicitor and I could be excused from the courtroom and
5 the court reporter take it down.

6 THE COURT: Is there something in the record
7 that suggests that's appropriate?

8 MR. MASSALON: Why don't you do this, if I may.
9 May I confer with Mr. Savage a moment and see if he's got
10 any concerns about this in the context of the criminal
11 case? I don't in the context of what we are doing here.

12 THE COURT: Go ahead.

13 MR. MASSALON: Give me just a moment.

14 MR. JEWELL: Your Honor --

15 THE COURT: Hold on.

16 MR. MASSALON: Your Honor, what I might suggest,
17 may I pass this up to you and let you review it and you
18 can have a better idea what we are talking about?

19 THE COURT: Yes.

20 Now, let me just ask you, Mr. Jewell --

21 If you prefer for me to take this up with him, I
22 will. But I think that I would do that with some
23 trepidation. I think I can ask general questions.

24 MR. MASSALON: All right.

25 THE COURT: I'm asking you, Mr. Jewell, is there

1 something that has called into question your belief that
2 Mr. Savage can adequately represent you or that some
3 conflict exists through your communications with this
4 former employee, I suppose?

5 MR. JEWELL: Your Honor, I personally believe in
6 Mr. Savage and that he is representing me one hundred
7 percent. However, I just wanted for this to be on record
8 as to what his former employee was telling me.

9 THE COURT: Is there something that his former
10 employee told you that calls into question his
11 representation of you or that creates a possible conflict?
12 I'm not asking you legally, I'm asking you were you told
13 something that is making you wonder something in your
14 mind? That's what I'm trying to find out. I'll decide
15 the legal consequences.

16 MR. JEWELL: There are some things that
17 Ms. Anderson -- I'm sorry.

18 THE COURT: Yes, sir?

19 MR. JEWELL: I kept a journal of everything
20 Ms. Anderson was telling me over the telephone --

21 THE COURT: Well, before you get into that, I'm
22 asking you, first, are you seeking to -- are you seeking
23 new representation?

24 MR. JEWELL: No, sir.

25 THE COURT: All right. Now, are you wanting

1 some input about whether or not you have his total
2 concentration on your case or something? Is that what you
3 are questioning?

4 MR. JEWELL: No, sir.

5 THE COURT: I'm trying to understand what your
6 concern is without getting into it all yet.

7 MR. JEWELL: My concern is that I'm in a very
8 awkward position because of what his former employee told
9 me.

10 THE COURT: Start with the form. Do you have
11 some concern about that form?

12 MR. JEWELL: Yes.

13 THE COURT: What is your concern about that
14 form?

15 MR. JEWELL: She told me --

16 THE COURT: I'm familiar with that form --

17 MR. MASSALON: I have got a blank copy.

18 Is that the one I have seen before, Mr. Savage?

19 MR. SAVAGE: Yes, sir.

20 THE COURT: I have encouraged lawyers this is a
21 smart thing to do. You should never come to court
22 unprepared.

23 So you are saying there is something in here
24 that you are concerned about?

25 MR. JEWELL: She told me several times, do not

1 ever sign the providency form.

2 THE COURT: And what does that -- why does that
3 concern you?

4 MR. JEWELL: Because of the other things that
5 she had told me. She told me that Andy is not looking out
6 for my best interests.

7 THE COURT: Well, first of all, in regard to
8 this form, it could be done either of two ways. If a
9 client doesn't want to sign the form, it can still be made
10 part of the record that the attorney went over the form
11 with the client and they could make that part of the
12 record. And one way or the other, you are going to answer
13 these questions whether it be in the form or before the
14 judge. You do understand that, that probably all these
15 questions will be answered at your guilty plea proceeding?
16 Do you understand that?

17 MR. JEWELL: Yes, Your Honor.

18 THE COURT: All right. So it is just because a
19 former employee said that -- I read between the lines that
20 this form could come back to haunt you is why you
21 shouldn't sign the form?

22 MR. JEWELL: She was telling me I should not
23 sign the form because of the questions relating to my
24 satisfaction with Mr. Savage's representation.

25 THE COURT: All right. Well, then, as I asked

1 you earlier, are you satisfied with his representation?

2 MR. JEWELL: I am. However, my family is
3 sending a private investigator from North Carolina down
4 here to speak with Ms. Anderson to get her side of the
5 story.

6 THE COURT: I am not trying to belittle it in
7 any way, but you may just be -- you have to do what you
8 think is right. It is your case. You are the one facing
9 time. But if this all stems out of this form, you know, I
10 think you are wasting your money.?

11 MR. JEWELL: It doesn't all stem from this form.

12 THE COURT: All right. So she's told you other
13 things about his representation, is that what you are
14 telling me?

15 MR. JEWELL: Yes, Your Honor.

16 THE COURT: For example, without going into your
17 case, give me a category. He hasn't spoken with a
18 particular witness or something like that?

19 MR. JEWELL: First, Your Honor, yesterday Judge
20 Rawl told me that this would be a private hearing. And
21 out of the sake of Mr. Savage and my sake I would rather
22 say those things to you in private.

23 THE COURT: We can do it in chambers. All
24 right. Let's set up in chambers. I will do this in
25 chambers just to protect from any inadvertent disclosure

1 of attorney-client privileges.

2 MS. WILSON: With the court reporter?

3 THE COURT: Yes.

4 MS. WILSON: How about with us?

5 THE COURT: Yes. When you say private, I mean
6 with counsel present.

7 MR. JEWELL: Sure.

8 THE COURT: I am not doing anything without the
9 attorneys present.

10 (WHEREUPON, the following was held in chambers
11 with all attorneys present.)

12 THE COURT: Yes, sir?

13 MS. WILSON: Could we put on the record who is
14 present?

15 THE COURT: Yes. In camera hearing to protect
16 against any possible disclosure of attorney-client
17 confidences or anything that might jeopardize the criminal
18 case. Present is the State through the solicitor's
19 office, Scarlett Wilson, and Mr. Jewell's attorney in this
20 matter, John Massalon. Mr. Savage remained in the
21 courtroom.

22 MS. WILSON: I want to make sure we are straight
23 on this. Mr. Massalon, you are not representing
24 Mr. Jewell --

25 MR. MASSALON: I am not representing Mr. Jewell.

1 I am representing Mr. Savage.

2 THE COURT: I'm sorry, you are representing
3 Mr. Savage.

4 So Mr. Jewell, you are presenting these to me
5 without your attorney, Mr. Savage, present. Do you want
6 Mr. Savage in here? He can be in here.

7 MR. JEWELL: That doesn't bother me.

8 THE COURT: Have Mr. Savage come here since he
9 represents Mr. Jewell. I want to make sure there is no
10 unintentional disclosure of anything pertaining to
11 attorney-client privileges or something that might
12 jeopardize the criminal case. There is no need for
13 anything off the record. Just go ahead and tell me.

14 MR. JEWELL: The Christopher Moore trial, I
15 was -- when I heard the verdict, I was as sick about it as
16 Ms. Wilson probably was. I got up on the stand and I told
17 the truth.

18 THE COURT: Yes.

19 MR. JEWELL: And I was very disappointed at the
20 verdict.

21 THE COURT: Well, what does that have to do with
22 Mr. Savage? None of us can control what a jury does in a
23 case.

24 MR. JEWELL: I understand.

25 THE COURT: One week a jury might return guilty,

1 one week they might return not guilty. None of us have
2 any control over their mental observations or how they are
3 going to perceive a case. But has that in some way called
4 into question his representation in this case?

5 MR. JEWELL: Absolutely not.

6 THE COURT: We are here to decide whether or not
7 Mr. Savage has a conflict of interest in this case or if
8 there is something special you are trying to bring to the
9 Court about your attorney's representation insofar as
10 whether or not he should proceed with the case. Now, let
11 me make it clear for the record, you are not requesting
12 that he be removed from the case?

13 MR. JEWELL: I'm not requesting that.

14 THE COURT: Now, what is it that you want to
15 tell me?

16 MR. JEWELL: All I want to tell you is I wanted
17 to be on record what this Ms. Anderson told me.

18 THE COURT: Okay. What is it that she told you?

19 MR. JEWELL: Over several weeks' time she became
20 very convincing to me over the telephone. I would call to
21 the office to check in on things. She began to really act
22 as if she really cared about me and my case and what was
23 going on. And over a period of time she convinced me --
24 or attempted to convince me that Mr. Savage was not
25 looking out for my best interests.

1 THE COURT: And why? What did she tell you?

2 MR. JEWELL: After a while she started -- after
3 a while I began to keep a journal of everything she said.

4 THE COURT: Then you understand she is a former
5 employee?

6 MR. JEWELL: Yes.

7 THE COURT: Okay.

8 MR. JEWELL: Yes. She said specifically, He is
9 screwing you every chance he gets.

10 THE COURT: And she convinced you of that being
11 true?

12 MR. JEWELL: No.

13 THE COURT: Okay. So --

14 MR. JEWELL: I'm not saying it's true. I want
15 it to be on the record so that I'm protected.

16 THE COURT: I don't know how it would protect
17 you since you desire for him to continue representing you.
18 Unless you plan on challenging something -- if you get
19 convicted or plead guilty, unless you plan on challenging
20 his representation after the fact.

21 MR. JEWELL: Well --

22 THE COURT: And that's why I'm asking you, are
23 you satisfied with his representation?

24 MR. JEWELL: I am not as of now. Because as I
25 told you before, my family is sending a private

1 investigator to speak with her, Ms. Anderson.

2 THE COURT: And you are supposed to appear next
3 week in court for --

4 MR. JEWELL: Yes.

5 THE COURT: Has the plea already been tendered
6 and you are sentencing or just pleading and sentencing?

7 MS. WILSON: Plea and sentencing.

8 THE COURT: Yes, sir. And you are going forward
9 with that next week?

10 MR. JEWELL: As of now, yes.

11 THE COURT: And if he doesn't go forward with
12 it, you are calling it for trial?

13 MS. WILSON: Yes, sir.

14 THE COURT: All right. One way or another you
15 are going to court next week it sounds like.

16 MR. JEWELL: Okay.

17 THE COURT: Go ahead. I'm not sure I'm giving
18 you time to tell me. But if there is not a conflict, I am
19 going to rule as such. Especially if you are willing to
20 proceed notwithstanding anything you are telling me today.
21 So go ahead and tell me.

22 MR. JEWELL: She told me that he wants me to
23 sign the questions relating to satisfaction with his
24 services in order to protect himself.

25 THE COURT: All right. And you are now

1 questioning that? You understand that when the judge
2 accepts your plea he is going to ask you, are you
3 satisfied with the services of your attorney?

4 MR. JEWELL: I understand that.

5 THE COURT: Do you intend to tell the judge yes
6 or tell the judge no? You can't tell the judge, Judge,
7 yes, as far as I know. The judge might not accept your
8 plea.

9 MR. JEWELL: As of now it is a yes.

10 THE COURT: Okay. So you are satisfied --

11 MR. JEWELL: Yes, I believe in Mr. Savage, okay?
12 But --

13 THE COURT: But you just feel this employee has
14 told you -- former employee these things?

15 MR. JEWELL: Why would she tell me all these
16 things?

17 THE COURT: I don't know, might be it is because
18 she is a former employee. I am not going to question --

19 MR. JEWELL: Suppose she quit.

20 THE COURT: I am not going to question her
21 veracity or her status.

22 MR. JEWELL: I was told she quit.

23 THE COURT: I don't know what happened, whether
24 she was fired or she quit or what. Go ahead. So that
25 doesn't trouble you at this time?

1 MR. JEWELL: Sure it troubles me. I'm worried.

2 THE COURT: You are worried that he asked you to
3 sign that form?

4 MR. JEWELL: No, I'm worried --

5 THE COURT: That she said this?

6 MR. JEWELL: I'm worried that what if what she
7 said is true?

8 THE COURT: Well, let me just ask you generally,
9 he's gone over with you your legal strategies, correct?

10 MR. JEWELL: Yes.

11 THE COURT: He's gone over with you possible
12 defenses, correct?

13 MR. JEWELL: Yes.

14 THE COURT: If it is incorrect, tell me. I'm
15 just saying that as a question. He's gone over with you
16 possible witnesses; is that correct?

17 MR. JEWELL: Yes.

18 THE COURT: Have you given him any witness
19 information that you know about that he hasn't pursued?

20 MR. JEWELL: No.

21 THE COURT: Is there someone you want him to
22 talk to that he hasn't talked to?

23 MR. JEWELL: No.

24 THE COURT: Is there any legal theory in the
25 case that you don't understand that he hasn't fully

1 explained to you?

2 MR. JEWELL: No.

3 THE COURT: Is there some theory that you are
4 advancing that he has not pursued?

5 MR. JEWELL: No.

6 THE COURT: All right. So is there anything --

7 MR. JEWELL: They suggested this hearing, not
8 me.

9 THE COURT: I understand that. But if I'm to
10 get to the bottom of this, I have to know what's in your
11 mind. And I can only do it by asking.

12 MR. MASSALON: If I may clarify one thing about
13 the providency form. And Mr. Jewell and Mr. Savage and I
14 discussed this when we met last week. But Mr. Savage sent
15 him that form and asked him basically to acknowledge that
16 he got it and that he had read it. He really wasn't
17 asking Mr. Jewell, as I understand it, to answer the
18 questions and send him the letter back. What he wanted to
19 make sure was that Mr. Jewell acknowledged that he had
20 read through it, read each question and knew what to
21 expect at the hearing. So I wanted to clarify that he
22 wasn't looking for answers, just giving Mr. Jewell
23 information.

24 THE COURT: I understand.

25 MR. JEWELL: Your Honor, I'm not particularly

1 concerned about the providency form. I'm just concerned
2 about what she told me over various --

3 THE COURT: Is there anything else she told you?

4 MR. JEWELL: Yes.

5 THE COURT: Go ahead.

6 MR. JEWELL: He is scared he'll get sued by me.

7 THE COURT: And why would you think that would
8 be true?

9 MR. JEWELL: For ineffective counsel or -- I
10 don't know. I don't know what to believe.

11 THE COURT: Well, is there a reason you want to
12 believe her over your attorney?

13 MR. JEWELL: Absolutely not.

14 THE COURT: Okay.

15 MR. JEWELL: I want to believe Mr. Savage.

16 THE COURT: All right.

17 MR. JEWELL: Okay. What he's doing is not
18 right. He knows what he is doing is wrong and he's trying
19 to protect himself. She also told me that she was keeping
20 a journal of everything that was said about me in my case
21 and that she had taken this journal home. She told me she
22 had made copies of these documents.

23 THE COURT: Where is she now working?

24 MR. SAVAGE: Judge, she is not who she said she
25 was. When we found that out, we terminated her.

1 **THE COURT:** You don't know where she is working?

2 **MR. SAVAGE:** She claims to be working for a law
3 firm in the north area but we don't know that's true. She
4 is not who she says she is. She's done a similar --

5 **THE COURT:** What is her name?

6 **MR. MASSALON:** The name she used with Mr. Savage
7 was Elaine Anderson. But Mr. Savage had -- when this came
8 to light, he got Jim Peacher who does some private
9 investigation work to check into her background. And
10 apparently she has used a number of names, according to
11 Mr. Peacher's investigation, and also I think gave a false
12 social security number. And so --

13 **MR. SAVAGE:** Actually has accused Mr. Jewell of
14 being part of this conspiracy now.

15 **MR. MASSALON:** Against her.

16 **THE COURT:** Okay.

17 **MR. JEWELL:** And, Your Honor, if that is in fact
18 true, if she ever tries to sue Mr. Savage or whatever, I'm
19 behind him 100 percent. Because she gave me her address
20 to write to her.

21 **THE COURT:** Have you spoken with her since she's
22 left the law firm?

23 **MR. JEWELL:** No.

24 **THE COURT:** Okay. Anything else?

25 **MR. JEWELL:** She was reading over the phone to

1 me one day that she was instructed to tell me that if I do
2 not sign the providency form that I would not have a
3 lawyer. That's what she said over the phone. She told me
4 I would not have any protection if I signed the providency
5 and I would not be able to do anything later. I didn't
6 even know what she was talking about.

7 THE COURT: But she alarmed you?

8 MR. JEWELL: Yes.

9 THE COURT: Even though you didn't know what she
10 was talking about, she alarmed you?

11 MR. JEWELL: Yes.

12 THE COURT: You know, if it were me, if I had
13 those concerns, I wouldn't have consulted with a former
14 legal assistant or a private investigator. I would have
15 asked my family to talk to another lawyer and see what
16 routine procedure is. And you probably could have
17 resolved a hundred percent of this in a 20-minute
18 consultation with another attorney.

19 MR. JEWELL: But, Your Honor, we have paid a
20 tremendous amount of money to Mr. Savage.

21 THE COURT: No. What I said was your family is
22 about to retain a private investigator. A lot of these
23 concerns could have possibly been addressed by having them
24 go speak in a private consultation with another attorney
25 and not incur all the substantial fees -- that's up to

1 you. I'm not telling you what to do because you are
2 saying you don't have a problem with his representation.
3 So I just throw that out to you for whatever it is worth.

4 MR. JEWELL: I wanted it to be on record what
5 she said.

6 THE COURT: It is on record. Now, this stuff --
7 this stuff may not help you later being on the record.
8 But it is on the record. It may actually be used against
9 you in a PCR proceeding. Do you understand that?

10 MR. JEWELL: (The witness nodded.)

11 THE COURT: Pardon?

12 MR. JEWELL: Yes. I said -- she also said be
13 careful several times. I asked, Well, how do you know
14 he's screwing me? And she said, I know. And she would
15 often whisper things very low to where I could barely hear
16 her over the phone.

17 THE COURT: And what did she say?

18 MR. JEWELL: I couldn't hear her. But it was
19 like she was trying to secretly tell me what was going
20 on --

21 THE COURT: Okay.

22 MR. JEWELL: -- in my case. And then she told
23 me that she was -- that she tried to come see me the other
24 day at the jail. And I didn't understand why, so I
25 questioned that. And then she told me that we needed to

1 talk but that she had a cell phone. And I couldn't call
2 her from the jail on a cell phone. At that point she gave
3 me her address. And I wrote a simple letter just asking,
4 you know, what does she have? What is --

5 THE COURT: And you have not heard anything from
6 her?

7 MR. JEWELL: No.

8 THE COURT: Anything else?

9 MR. JEWELL: She told me, I asked her what kind
10 of documents or how many documents she has? And she
11 specifically said, It is quality, not quantity.

12 THE COURT: At any point did she give you
13 anything specific?

14 MR. JEWELL: No.

15 THE COURT: All right. Anything else?

16 MR. JEWELL: I do have a couple more questions.
17 I believe Ms. Wilson said earlier that perhaps I could ask
18 you those questions in private?

19 THE COURT: I don't know anything about that.
20 I'm not in the habit of answering questions.

21 MR. JEWELL: That you guys could step out.

22 MS. WILSON: I think it depends on what kind of
23 questions --

24 THE COURT: What kind of questions? I don't
25 answer legal questions. I'm not the one on the hot seat.

1 What kind of questions are you talking about?

2 MR. JEWELL: I will hold off on that.

3 THE COURT: Tell me the nature of the questions
4 and I will tell you --

5 MR. JEWELL: They were legal questions.

6 THE COURT: Legal questions about your case?

7 MR. JEWELL: Yes.

8 THE COURT: No, I can't answer those questions.
9 But I did ask you questions about whether or not you feel
10 that he's pursued all the various matters that you have
11 discussed with him and you said that he has.

12 MR. JEWELL: Yes, he has.

13 MS. WILSON: What I was referring to in court
14 was if this colloquy got into a discussion of some of the
15 advice that Mr. Savage had given or some sort of strategy
16 that was necessary to be revealed for purposes of this
17 hearing, that the State could step out.

18 THE COURT: Oh.

19 MS. WILSON: And that's what I meant when I said
20 that on the record.

21 THE COURT: She is saying that she would step
22 out, not that I would just be here with you.

23 MR. SAVAGE: Did you want to ask about my advice
24 to you on NGRA?

25 MR. JEWELL: No.

1 MR. SAVAGE: Do you want to ask about whether
2 the Court has the authority to lower your charge as
3 opposed to the prosecutor?

4 MR. JEWELL: No.

5 THE COURT: Do you understand that?

6 MR. SAVAGE: Those were the only two issues.

7 THE COURT: Were you going to ask me questions
8 like that?

9 MR. JEWELL: Yes.

10 THE COURT: And now you are satisfied that you
11 understand the answers to these questions?

12 MR. JEWELL: Yes.

13 MR. SAVAGE: There was an issue about a mental
14 illness defense which was a substantial issue with his
15 family and with Brooke that was very difficult to resolve.
16 I think it was my understanding that everyone but his
17 father agrees to the interpretation of the South Carolina
18 law on that.

19 THE COURT: I asked you, has Mr. Savage gone
20 over with you all the available defenses?

21 MR. JEWELL: He has.

22 THE COURT: And you are satisfied that he's
23 pursued everything in the case in regard to those
24 offenses?

25 MR. JEWELL: (The witness nodded.)

1 **THE COURT:** And are there any that you -- any
2 avenues that you are asking him to follow that he has not
3 done?

4 **MR. JEWELL:** No.

5 **THE COURT:** So you already told me there are no
6 witnesses he hasn't talked to. He's discussed the law
7 with you. There's nothing you don't understand after your
8 conversations. You are not requesting new counsel. You
9 are not requesting Mr. Savage be relieved. You are not
10 dissatisfied with his services. I can't say that a
11 conflict exists with his representation merely because his
12 former employee has left and made these allegations,
13 especially when you are not asking me to act on those.

14 **MR. JEWELL:** Sure.

15 **THE COURT:** If you have some concern because of
16 those allegations, you are free to ask the Court to have
17 him relieved. But you don't want that; is that correct?

18 **MR. JEWELL:** That's correct.

19 **THE COURT:** So nothing that's been presented to
20 me on its face would warrant this Court finding a conflict
21 of interest that I could see.

22 Does the State see any conflict of interest
23 that's been presented?

24 **MS. WILSON:** I didn't originally. My only
25 concern and one of the reasons I thought it was a good

1 idea to do this is because I think it's a good idea to get
2 what was allegedly said out and then have it clear for the
3 record that Mr. Jewell still wishes to go forward with
4 Mr. Savage. But --

5 MR. SAVAGE: There is an issue that I'm aware of
6 that Brooke didn't tell you.

7 THE COURT: What is it?

8 MR. SAVAGE: Brooke thought I had prevented him,
9 for whatever reason, from being a witness in a case in
10 which he was a government witness against Christopher
11 Moore and apparently was given information by that
12 employee that I had come out, secretly met with the
13 solicitor to block his testimony.

14 THE COURT: You did testify in that case?

15 MR. JEWELL: Yes.

16 MR. SAVAGE: But that was one of the issues I
17 believe that was raised.

18 THE COURT: You are saying someone told you that
19 he is trying to stop you from testifying?

20 MR. JEWELL: No, I just had that concern because
21 of what she had been telling me, that he was screwing --
22 allegedly screwing me over every chance he could get. So
23 when --

24 THE COURT: But indeed you did testify?

25 MR. JEWELL: Yes, I testified later. I just had

1 written that on my journal that day.

2 THE COURT: I understand.

3 MR. JEWELL: And I hadn't been picked up to come
4 to court yet, so that's why I was concerned at that time.

5 THE COURT: All right. Anything further?

6 MR. JEWELL: No, Your Honor.

7 THE COURT: I mean, I stand by what I said.
8 Again, you -- I have asked you a few times if you are
9 requesting that he be relieved to which you responded in
10 the negative. You are not seeking new counsel. You are
11 not seeking any action of the Court. You are not
12 dissatisfied with his services. I don't believe a
13 conflict of interest has been presented under the law of
14 this state that would warrant this Court taking any
15 action. Unless there is something further you are
16 requesting, then I presume y'all can go forward with
17 Mr. Savage representing you.

18 MS. WILSON: I just want to put on the record
19 also that we have --

20 THE COURT: Please understand, when this is
21 called, that won't be the time to then say I want a new
22 attorney. This is being hashed out now, okay?

23 MR. JEWELL: (The witness nodded.)

24 MS. WILSON: And we are -- I have put Mr. Savage
25 on notice that we intend to call this case next week. As

1 it stands now we are not first up. And I have certainly
2 anticipated a plea. But if the plea falls through, we are
3 going to do everything we can to go forward depending on
4 what --

5 THE COURT: Do you understand that, Mr. Jewell?

6 MR. JEWELL: Yes.

7 MS. WILSON: -- what the court looks like.

8 MR. MASSALON: Just to interject one thing. The
9 only remaining concern I guess I have is Mr. Jewell's --
10 pertaining to Mr. Jewell's comments about the private
11 investigator that's coming in from North Carolina and
12 plans to talk with Ms. Anderson. And Ms. Wilson touched
13 on it a little bit. But --

14 THE COURT: I'm not going to delay the case, do
15 you understand that, for your private investigator?

16 MR. JEWELL: Sure.

17 THE COURT: You understand that?

18 MR. JEWELL: Yes.

19 THE COURT: And you still want to go forward
20 with Mr. Savage --

21 MR. JEWELL: I'm not asking --

22 THE COURT: -- knowing that your trial or plea
23 will not be delayed?

24 MR. JEWELL: Yes.

25 THE COURT: You are not asking for that?

1 MR. JEWELL: I'm not asking for that.

2 THE COURT: All right. Anything further from
3 anyone? Anything further you wanted to state about her
4 comments to you, Mr. Jewell, that you felt a need to have
5 on the record? I will order that this proceeding be
6 sealed until after a trial or guilty plea at which point
7 it can be unsealed. As I told you, if something does come
8 down the road and you challenge your conviction or plea in
9 any way, some of your responses here today might be used
10 in that proceeding. Because at this point you are saying
11 you are very satisfied with his services. Okay? Do you
12 understand?

13 MR. JEWELL: Yes.

14 THE COURT: Anything you want to say?

15 MR. MASSALON: Your Honor, I probably am going
16 to order a transcript of this. But I will do that with
17 the understanding that it is sealed --

18 THE COURT: Well, I mean, the parties involved
19 can get a transcript sealed. As to everyone else --

20 THE COURT REPORTER: Yes, sir.

21 MR. MASSALON: Yes, sir.

22 THE COURT: And if you get one, you have to keep
23 it sealed except for your use only.

24 MR. MASSALON: Yes, sir.

25 THE COURT: And you are welcome -- you can do

1 that, you can make a direct request if you so desire.

2 But anything further you need to say?

3 ~~MR. JEWELL:~~ Your Honor, I didn't want to make a
4 big issue of this at all --

5 **THE COURT:** That's okay. We are not making a
6 big issue. I have heard everything and I wanted to hear
7 everything. If there was a conflict, I would have told
8 Mr. Savage you need to get out of the case. And I don't
9 see a conflict.

10 All you have really presented to me -- and I
11 understand your fear, your fear is because you are facing
12 a substantial period of time and a substantial crime. And
13 any time anyone tells you that, of course, you are going
14 to be worried about it.

15 But as far as what I can gather, I have asked
16 you for all the details. She hasn't ever given you
17 anything specific. She has never told you anything
18 specifically that he has done other than maybe this
19 allegation he tried to stop you from testifying which you
20 did testify. So to me there's no issue about that. You
21 did testify.

22 And, you know, the thing about the providency
23 form, I think that's good practice. And you cannot plead
24 without a judge asking you if you are satisfied with his
25 services. You pointed on that particular section of the

1 form that she told you not to sign. If you weren't
2 satisfied with the services of your attorney, I wouldn't
3 take your plea anyway. I would just tell you, you know,
4 I'm not accepting it. Anything else?

5 MR. JEWELL: That's all.

6 THE COURT: I don't find any conflict of
7 interest. Mr. Savage can carry on with his
8 representation. Good luck to you in your case.

9 MR. MASSALON: Thank you, Judge.

10 MR. SAVAGE: Thank you.

11 MS. WILSON: Thank you, Your Honor.

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CERTIFICATE OF REPORTER

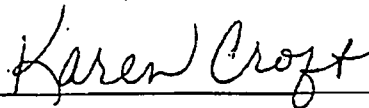
STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

I, Karen Croft, Registered Professional Reporter and Official Court Reporter for the Ninth 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 Charleston County, South Carolina, on the 7th day of November, 2001.

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

December 27, 2001



Karen Croft, RPR
Official Court Reporter
My Commission Expires: 11-16-03

1 STATE OF SOUTH CAROLINA IN THE COURT OF
2 COUNTY OF CHARLESTON GENERAL SESSIONS
3 00-GS-10-6747
4 00-GS-10-6748
5 The State of)
6 South Carolina)
7 vs.) TRANSCRIPT OF RECORD
8 Brooke Alexander) November 15, 2001
9 Jewell,) Charleston, SC
10 Defendant)

11 B E F O R E:

12 THE HONORABLE JUDGE EDWARD B. COTTINGHAM

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

14 Ms. Scarlett Wilson, Assistant Solicitor
15 Attorney representing the State

16 Mr. Andrew J. Savage, III, Esquire Esquire
17 Attorney representing the Defendant

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25 MICHELE R. DARLING
 Circuit Court Reporter

1	<u>I N D E X</u>				
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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
C-1	Pre-plea report	96	

1 (The following was reported on November 15,
2 2001.)

3 THE COURT: All right. Solicitor, what's the
4 next case?

5 MS. WILSON: Brooke Jewell. They have to
6 bring him over, Your Honor.

7 THE COURT: All right.

8 (Brief pause.)

9 MS. WILSON: Your Honor, the State calls
10 State versus Brooke Alexander Jewell. They are
11 indictments 2000-GS-10-6747 for burglary in the
12 first degree, and 2000-GS-10-6748 for criminal
13 sexual conduct in the first degree.

14 Do we need -- do you want these or do you
15 want -- here are the indictments.

16 (Brief pause.)

17 THE COURT: All right. What's before me,
18 please?

19 MS. WILSON: Your Honor, as I said, this is
20 State versus Brooke Jewell. He faces two charges,
21 one for burglary in the first degree and one for
22 criminal sexual conduct in the first degree.

23 THE COURT: As a threshold matter now, has he
24 been examined by the department--

25 MR. SAVAGE: Judge, we have consulted with a

1 half dozen health care professionals. Competence
2 has never been an issue. Is not on issue.

3 THE COURT: Well, I read that under the
4 material that you kindly presented to me, a copy
5 of which was given to the State, some psychologist
6 who's obviously not qualified to testify in that
7 regard, indicated that there might be a guilty but
8 mentally ill; that's absolutely not an issue in
9 this case?

10 MR. SAVAGE: That was a consideration, but
11 it's not an issue today.

12 THE COURT: Not an issue today.

13 MR. SAVAGE: Judge, we have an M.D.
14 psychiatrist. We have a Ph.D. psychologist. We
15 have a M.D. psychiatrist second, and we have a
16 Ph.D. psychologist. We've got two Ph.D.'s and two
17 M.D. psychiatrists, all who will be consistent in
18 their testimony that competence is not an issue,
19 that in their opinion, NGRI is not an issue.

20 THE COURT: All right, sir. I just want to
21 make sure that that issue would not arise, of
22 course, on a post conviction relief matter in any
23 way.

24 All right, sir. Having the record clear as
25 to that issue, now, Mr. Savage, do you represent

1 this defendant?

2 MR. SAVAGE: I do, Your Honor.

3 THE COURT: Has he been advised of the
4 charges contained in these two indictments, the
5 punishment applicable thereto and his right to be
6 tried by trial by jury?

7 MR. SAVAGE: He has, Your Honor.

8 THE COURT: Does he understand that within my
9 discretion upon acceptance of the guilty plea upon
10 the charge of burglary first degree, I could in my
11 discretion sentence him up to life imprisonment?

12 MR. SAVAGE: He does, Your Honor.

13 THE COURT: And upon my acceptance of his
14 plea to criminal sexual conduct in the first
15 degree, in my discretion he could receive up to 25
16 years; does he understand that?

17 MR. SAVAGE: It would be 30 years, Your

18 HONOR.

19 MR. WILSON: 30 years.

20 THE COURT: 30 years rather.

21 Does he understand that with regards to

22 burglary first degree, the statute made and

23 provided by the Legislature of this State says

24 there is a minimum of 15 years?

25 MR. SAVAGE: He's aware of that, Your Honor.

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1 THE COURT: All right, sir. In your opinion
2 now, does Mr. Jewell understand these charges?

3 MR. SAVAGE: He does, Your Honor.

4 THE COURT: He does. In your opinion, as his
5 attorney, does he freely, knowingly and
6 intelligently waive his constitutional rights to
7 trial by jury?

8 MR. SAVAGE: Yes, he does, Your Honor.

9 THE COURT: The right to confront the
10 witnesses against him?

11 MR. SAVAGE: Yes, he does.

12 THE COURT: The right to testify in his own
13 behalf?

14 MR. SAVAGE: Yes, he does.

15 THE COURT: Does he understand his
16 presumption of innocence?

17 MR. SAVAGE: He does.

18 THE COURT: Does he understand he does not
19 have to take the stand, and if he does not, I
20 would charge the jury that his silence could not
21 be and must not be used against him in any way?

22 MR. SAVAGE: He's aware of that, Your Honor.

23 THE COURT: How does Mr. Jewell indicate he
24 desires to plea to the charge of burglary?

25 MR. SAVAGE: Your Honor, he tell us me he

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1 desires to plead guilty to the charge of burglary
2 in the first degree.

3 THE COURT: And how does this defendant
4 Jewell plead to the charge of criminal sexual
5 conduct in the first degree?

6 MR. SAVAGE: Guilty.

7 THE COURT: How old is he, for the record?

8 MR. SAVAGE: Your Honor, on [REDACTED] he
9 turned 28 years of age.

10 THE COURT: And how much education does he
11 have?

12 MR. SAVAGE: He has a complete college
13 education, has a college degree.

14 THE COURT: Who's the -- let me address this
15 statement to the victim's advocate or to the
16 Solicitor.

17 Who is the victim in this case?

18 MS. WILSON: Your Honor, the victim's name is

19 J [REDACTED] S [REDACTED]

20 THE COURT: Has she been advised that this
21 plea would be taken today?

22 MS. WILSON: Yes, sir, I have discussed that
23 fully with her and she has apparently decided not
24 to be here. She was aware of when the plea was to
25 take place.

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1 THE COURT: There is no question about that
2 now; she's absolutely entitled to be here.

3 MS. WILSON: No question.

4 THE COURT: You, as Solicitor, who has that
5 responsibility, and the victim's advocate, are
6 comfortable with this Court proceeding without her
7 presence?

8 MS. WILSON: Yes, sir.

9 THE COURT: All right, sir. Mr. Whitfield
10 (sic) tell me -- what kind of -- how much -- what
11 is his educational background?

12 MR. SAVAGE: College graduate, Your Honor.

13 THE COURT: What type of work has he done
14 recently?

15 MR. SAVAGE: His most recent occupation has
16 been in sales.

17 THE COURT: Okay. Mr. Whitfield (sic), you
18 have heard your attorney state that you have been
19 advised of the charges contained in these two
20 indictments, to wit, burglary in the first degree,
21 criminal sexual conduct in the first degree, is
22 that your understanding?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Do you understand that within my
25 discretion you could receive life imprisonment for

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1 burglary first degree?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Do you understand that under any
4 scenario you would receive at least 15 years. Do
5 you understand that?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Do you understand with regards to
8 criminal sexual conduct within my discretion you
9 could receive up to 30 years?

10 THE DEFENDANT: Yes.

11 THE COURT: Madam Solicitor, is there any
12 plea negotiations in this case?

13 MS. WILSON: None, Your Honor.

14 THE COURT: Do you agree with that, Mr.
15 Savage?

16 MR. SAVAGE: Yes, sir.

17 THE COURT: You understand that there are no
18 negotiations before me?

19 THE DEFENDANT: I understand.

20 THE COURT: Within my discretion I could
21 sentence you to life imprisonment on one charge,
22 30 years on the other.

23 Under any circumstances, according to the
24 statutory laws made and provided, you would
25 receive a minimum of 15 years under any

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1 circumstances under the burglary first degree; do
2 you understand that?

3 THE DEFENDANT: I understand.

4 THE COURT: Do you have any questions about
5 that whatsoever?

6 THE DEFENDANT: No.

7 THE COURT: Do you -- have you fully
8 discussed with your lawyer these charges and the
9 possible punishment?

10 THE DEFENDANT: Yes, Your Honor, I have.

11 THE COURT: Mr. Savage is recognized as one
12 of the outstanding attorneys in this state and in
13 this area. Are you satisfied with his services?

14 THE DEFENDANT: Yes, I am.

15 THE COURT: Has he done everything you've
16 asked him to do?

17 THE DEFENDANT: I certainly hope so.

18 THE COURT: Well, called all the witness that
19 you wanted.

20 THE DEFENDANT: I believe he has, yes.

21 THE COURT: He indicates to me that there is
22 no issue with regards to your competency; do you
23 agree with that?

24 THE DEFENDANT: I agree.

25 THE COURT: I would let the record reflect.

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1 that as I discuss this with you, it is clear to me
2 that you are fully competent to understand the
3 nature of these proceedings, the consequences of
4 your plea, and the possible punishment. Do you
5 agree with all of this?

6 THE DEFENDANT: Yes, I do.

7 THE COURT: All right, sir.

8 Now, this indictment with regards to burglary
9 in the first degree, alleges, and the State must
10 prove beyond a reasonable doubt that you--

11 MR. SAVAGE: Judge, may I address that for
12 just a second?

13 THE COURT: Yes, sir.

14 MR. SAVAGE: On that particular indictment it
15 alleges that he went into this dwelling with a
16 weapon; that is not correct. A weapon was used,
17 but the weapon was in the dwelling. It was not
18 carried into the dwelling.

19 Mr. Jewell is concerned that you may think --
20 I told him the elements wouldn't matter--

21 THE COURT: Do you agree with that?

22 MS. WILSON: Yes, sir, he armed himself once
23 inside the apartment.

24 MR. SAVAGE: Inside.

25 THE COURT: Well, that's not an element of

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1 burglary first degree anyway.

2 The elements of burglary in the first degree
3 is that you entered the dwelling of another in the
4 nighttime without consent and with the intention
5 to commit a crime therein; do you understand that?

6 MS. WILSON: Your Honor, in this case he did
7 not enter the dwelling in the nighttime, but he
8 entered, he armed himself and he committed a
9 violent crime once in inside. That would be the
10 theory that we would be going forward on.

11 THE COURT: That is still an element for
12 burglary first degree.

13 MR. SAVAGE: Yes, sir?

14 THE COURT: You agree, Mr. Savage, that the
15 elements of first degree are there?

16 MR. SAVAGE: No question about it. And I
17 believe that Mr. Jewell acknowledges that, Your
18 Honor.

19 THE COURT: You agree with that, Mr. Jewell?

20 THE DEFENDANT: Yes.

21 THE COURT: All right. This indictment says
22 that you committed burglary in the first degree on
23 July the 12th, 2000 in that you entered the
24 dwelling of another without consent and therein
25 committed a violent crime. Do you agree that you

1 did that?

2 THE DEFENDANT: I did.

3 THE COURT: All right, sir. The next
4 indictment with regards to criminal sexual conduct
5 in the first degree alleges that on that same date
6 and time, while in the commission of the offense
7 of burglary in the first degree, did commit a
8 sexual battery against the named victim here,
9 against her consent and will involving criminal
10 sexual conduct in the first degree. Did you do
11 that?

12 THE DEFENDANT: Unfortunately so.

13 THE COURT: Unfortunately what?

14 THE DEFENDANT: Unfortunately I did.

15 THE COURT: And you are admitting that freely
16 and voluntarily?

17 (Defendant nodding in the affirmative.)

18 THE COURT: Swear, this witness.

19 (WHEREUPON, the defendant was duly sworn by
20 the Clerk.)

21 THE COURT: All right, Mr. Jewell, I want
22 this record to reflect and want you to understand
23 now that you are under oath not only as to the
24 previous answers given to me, but to those that
25 will be given subsequently. Do you understand?

1 THE DEFENDANT: Yes.

2 THE COURT: Do you, under your oath, assert
3 to me that the previous answers given to my
4 inquiry were true and correct?

5 THE DEFENDANT: Yes?

6 THE COURT: You are admitting to me that you
7 understand the nature of the charges, the possible
8 punishment?

9 THE DEFENDANT: Yes, sir?

10 THE COURT: Understanding that there is no
11 issue here with regards to your competency or
12 sanity, you agree with that?

13 THE DEFENDANT: I agree....

14 THE COURT: You are satisfied with the
15 services of your distinguished attorney?

16 THE DEFENDANT: Yes.

17 THE COURT: You are telling me that you are
18 pleading guilty freely and voluntarily to the
19 offense of burglary in the first degree and to
20 criminal sexual conduct in the first degree?

21 THE DEFENDANT: Yes?

22 THE COURT: Understanding the possible
23 punishment, knowing that as a minimum you would
24 receive 15 years?

25 THE DEFENDANT: Yes.

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1 THE COURT: As a minimum. All right, sir.

2 MS. WILSON: Your Honor, just for the record,

3 I'm not sure if I heard you correctly, but I

4 wanted to make sure that the elements of criminal

5 sexual conduct in the first degree were set out in

6 that he committed a sexual battery against the

7 victim without her consent and that he used

8 aggravated force in doing so. And also that she

9 was the victim of a burglary at the time of the

10 sexual conduct.

11 THE COURT: Yes. The victim was the owner of

12 that apartment.

13 You agree with that?

14 THE DEFENDANT: Yes.

15 THE COURT: And you entered into criminal

16 sexual conduct, sometimes called rape, against her

17 consent and will with force and violence; is that

18 right?

19 THE DEFENDANT: Yes.

20 THE COURT: We will get into the specific

21 factors in this matter and at that time I will ask

22 him to agree or disagree with those assertions.

23 MS. WILSON: Thank you, Your Honor.

24 THE COURT: And do you understand that with

25 regards to these issues, you are presumed innocent

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1 and the State would have to prove you guilty
2 beyond a reasonable doubt; do you understand
3 that?

4 THE DEFENDANT: Yes.

5 THE COURT: Mr. Jewell, you are an
6 unintelligent individual and I'm sure that you know
7 something of our judicial process. But so that
8 this record will reflect, let me go over it with
9 you.

10 You, as all other defendants, are presumed
11 innocent. You don't have to prove a thing. The
12 State of South Carolina must prove you guilty
13 beyond a reasonable doubt; do you understand that?

14 (Defendant nodding in the affirmative.)

15 THE COURT: If we were to go to trial, we
16 would select 12 jurors with no friends to reward,
17 no enemies to punish. 12 jurors who upon their
18 oath would say that they would base their
19 verdict on the law and the evidence in this
20 courtroom.

21 The State of South Carolina would call
22 certain witnesses hoping to prove these various
23 allegations against you beyond a reasonable doubt.

24 You then would be afforded an opportunity to
25 call such witnesses and to present such defenses.

1 as you might have. Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: In addition to that, you would
4 have the opportunity to get on this witness stand,
5 say anything that you thought appropriate.

6 In addition to that, if you elected to stand
7 on your presumption of innocence and not testify,
8 I would charge the jury that your silence could
9 not be used against you in any way whatsoever. Do
10 you understand that?

11 THE DEFENDANT: Yes.

12 THE COURT: The jury would be instructed by
13 me that you are presumed innocent and they would
14 have to find you guilty, if at all, as to both
15 indictments or either of them beyond a reasonable
16 doubt.

17 They would be instructed that they would have
18 to consider each indictment separately.

19 As to each indictment, their verdict could be
20 guilty or not guilty. It could be guilty of one
21 and not guilty of the other. Do you understand
22 that?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: If I accept your plea of guilty
25 to burglary in the first degree and to criminal

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1 sexual conduct in the first degree, which we used
2 to call rape, you are saying to me, I understand
3 these rights, I understand my rights to trial by
4 jury; I wish to give up these rights and plead
5 guilty. Is that what I hear you say?

6 (Defendant nodding in the affirmative.)

7 THE COURT: Understanding now your rights to
8 trial by jury, do you want a jury trial or do you
9 wish to plead guilty?

10 THE DEFENDANT: I wish to plead guilty, Your
11 Honor.

12 THE COURT: And are you guilty of both
13 charges?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Anybody threatened you to get you
16 to plead guilty?

17 THE DEFENDANT: No.

18 THE COURT: Anybody forced you to in any
19 way?

20 THE DEFENDANT: No, sir.

21 THE COURT: Has anybody promised you
22 anything? If there's any promises out there, I
23 want to know about it at this time, because I
24 don't know of any.

25 THE DEFENDANT: No, Your Honor.

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1 THE COURT: Has there been any promises made
2 to Him?

3 MS. WILSON: No, sir.

4 THE COURT: Mr. Savage?

5 MR. SAVAGE: No, sir.

6 THE COURT: All right, sir.

7 Mr. Jewell, are you today under the influence
8 of intoxicating liquors or drugs of any kind?

9 THE DEFENDANT: Not today, Your Honor.

10 THE COURT: What day have you been under?

11 THE DEFENDANT: The day of the crime.

12 THE COURT: I'll deal with that. How long
13 have you been incarcerated?

14 THE DEFENDANT: Sixteen months.

15 THE COURT: Sixteen months. In the last few
16 months have you had any alcohol or drugs?

17 THE DEFENDANT: Absolutely not.

18 THE COURT: Your mind is clear.

19 Mr. Jewell, do you have any complaints that
20 anybody did to you or for you or against you,
21 including the law enforcement officers of this
22 city, county and State? Anybody mistreated you in
23 any way?

24 THE DEFENDANT: I was disturbed that I was
25 not read my rights.

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1 Also Detective Bunkum, which I understand is
2 no longer with the sheriff's department, he said
3 at least one thing in my statement -- he wrote my
4 statement.

5 THE COURT: I'll give you an opportunity to
6 explain that.

7 What is he talking about with regards to his
8 allegation that his rights wasn't read to him?

9 MR. SAVAGE: Judge, there was some dispute as
10 to whether his Miranda warnings were properly
11 given at the time.

12 THE COURT: Does he understand that if I
13 accept this plea of guilty, he is giving up any
14 position that he may have had with reference to
15 his allegations about failure to give Miranda
16 warnings?

17 MR. SAVAGE: That and a number of other issue
18 he's aware of that once he enters a guilty plea,
19 he surrenders those rights to contest those
20 issues.

21 THE COURT: I just want it abundantly clear
22 now, that you will not be hereafter able to assert
23 that position or any other positions, including
24 any defenses, specifically since you raised the
25 issue, I'm telling you, that you will not

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1 hereafter in any proceeding be in a position to
2 say that you weren't given your Miranda rights.

3 Because I tell you now if you wish to assert
4 that position, I will stand you aside and we will
5 put you to trial. Do you understand that?

6 THE DEFENDANT: I understand.

7 THE COURT: Let it be clear, Mr. Jewell, that
8 at any time in these proceedings up to and
9 including -- up to the time of sentencing, if you
10 wish to withdraw your plea, I will gladly give you
11 that opportunity. Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you have any questions about
14 it?

15 THE DEFENDANT: No, Your Honor.

16 THE COURT: As we proceed in these
17 proceedings and in my questioning, I tell you and
18 ask that you, if you have any concerns or any
19 problems or don't understand any questions, I
20 invite you to bring that issue before me.

21 You would not offend me in any way. I would
22 appreciate the fact to clarify any questions that
23 you have. Do you understand that?

24 THE DEFENDANT: Yes.

25 THE COURT: As of now do you have any

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1 questions about anything I have said to you?

2 THE DEFENDANT: No.

3 THE COURT: All right, sir. Now, Mr. Jewell,
4 are you pleading guilty of your own free will and
5 accord?

6 THE DEFENDANT: Yes.

7 THE COURT: Did you on that night in July
8 burglarize the apartment of the victim in this
9 case?

10 THE DEFENDANT: In the afternoon, sir.

11 THE COURT: Afternoon?

12 THE DEFENDANT: Yes, I did.

13 THE COURT: And in that occasion, did you
14 rape that unfortunate victim?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: All right, sir.

17 I conclude that his plea is freely and
18 voluntarily made. He asserts under oath that he's
19 had the advice and counsel of a distinguished
20 attorney with whose services he says he's
21 satisfied.

22 I'm satisfied beyond a reasonable doubt that
23 this plea is freely, intelligently and knowingly
24 made.

25 I further find beyond a reasonable doubt that

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1 he knowingly and intelligently waives his
2 constitutional rights to a trial by jury.

3 It is appropriate that the plea as to
4 burglary in the first degree and criminal sexual
5 conduct in the first degree be and it is accepted.

6 MS. WILSON: Thank you, Your Honor.

7 THE COURT: All right. Now, would you give
8 me the factual scenario?

9 MS. WILSON: Yes, sir, I will. Your Honor,
10 as you have seen in the materials that the defense
11 attorney handed up, these are rather aggravated
12 facts, and I will go through them with you.

13 As you have heard, this occurred on July 12th
14 of last year, 2000. At that time, Your Honor, the
15 victim was living at an apartment complex in Mount
16 Pleasant and she was sunbathing at the pool at
17 that complex.

18 She did not know Brooke Jewell. She did not
19 know that he had been to the pool before or to the
20 apartment complex before, and she did not know
21 that he watched her and knew where she lived.

22 On the 12th, the victim, who as I said was
23 sunbathing, was in and out of her apartment to get
24 water and things like that.

25 THE COURT: Did he live at that apartment?

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1 MS. WILSON: He did not.

2 THE COURT: What business did he have over
3 there on that occasion?

4 MS. WILSON: None that I know of.

5 He was evidently at the pool that day where
6 she was. She would go in and out of her apartment
7 and she left the door unlocked.

8 Later on in that afternoon, Mr. Jewell went
9 into that apartment. He

10 THE COURT: How did he know it was her
11 apartment, he saw her?

12 MS. WILSON: Evidently he could see her,
13 that's what we can surmise from his statements,
14 and based on the statements of other witnesses,
15 that he knew which apartment she was going into
16 and out of, and either could tell from that that
17 she left it unlocked or took his chances on her
18 leaving it unlocked.

19 But there is no question that he did not have
20 to break anything to get inside.

21 THE COURT: Let me interrupt you.

22 How did you know it was her apartment, Mr.
23 Jewell?

24 THE DEFENDANT: I had seen her -- I had
25 passed her before on my way to the pool on a

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1 previous occasion. I just saw her going into her
2 apartment.

3 I went to the pool and minded my own business
4 and left that day.

5 THE COURT: What business did you have at
6 that pool? You didn't live there. Why were you
7 at that pool?

8 THE DEFENDANT: I had permission to be at
9 that pool.

10 THE COURT: All right, sir. By who?

11 THE DEFENDANT: By a couple different people.

12 THE COURT: All right, sir.

13 Proceed.

14 MS. WILSON: Your Honor, Mr. Jewell went into
15 the apartment and basically lay in wait. He armed
16 himself with a knife, not tableware, but with a
17 sharp steak-type knife.

18 I believe the victim described it as like a

19 Hinkle knife.

20 THE COURT: Was that a knife that he found in
21 the apartment?

22 MS. WILSON: Yes, sir.

23 He closed the blinds, he unplugged the
24 telephone, and he waited on her. She returned
25 sometime that afternoon, and when she did, she

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1 went into her bedroom and was attacked by the
2 defendant.

3 He pulled off her bathing suit bottoms. He
4 performed oral sex on her. He then performed
5 vaginal intercourse on her, holding her at knife
6 point during the whole event.

7 Then he forced her to perform oral sex on
8 him.

9 During this event, the victim tells me that
10 he asked her if it was the first time she had been
11 raped, and if she liked it.

12 After he did these things to her, Your Honor,
13 before he fled, he took electrical cords from her
14 room and tied, hog tied her basically, her hands
15 and her feet.

16 She -- after she thought he was gone, she
17 attempted to get up and to go for help. He was
18 still in the apartment. He came back, threatened
19 her with the knife, and told her that, you know,
20 she needed to stay back there or else he would
21 kill her.

22 Eventually, Your Honor, within a week, the
23 defendant was apprehended. Someone at the
24 apartment complex did know Mr. Jewell and had seen
25 him at the pool earlier that day.

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1 The description that was given over the news,
2 coupled with a drawing, a sketch that was given,
3 clues this other witness in that she had seen
4 Brooke Jewell there that day, and that eventually
5 led to his arrest, where he gave a statement, it's
6 our position, after his Miranda warnings.

7 His first statement basically blamed the
8 victim in that he said she consented, they got in
9 a fight and that they had had this long sexual
10 relationship.

11 But eventually he told the truth regarding
12 the rape.

13 A sexual assault kit was done on the victim.
14 A search warrant, I believe it was, was executed
15 on the defendant, and he -- or at least he gave
16 samples of his blood, saliva, and things of that
17 nature, and a DNA match confirmed that he was, in
18 fact, the assailant in this case.

19 THE COURT: He later withdrew his assertion
20 that it was consensual?

21 MS. WILSON: Yes, sir. That same day. He
22 was interviewed first, he claimed consent, then
23 later he told the full truth, complete with arming
24 himself with the knife, tying her up, going into
25 the apartment without her consent.

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1 THE COURT: For the record, now, what
2 specific aggravating circumstances do you rely on
3 With reference to burglary first degree?

4 MS. WILSON: Your Honor, specifically he
5 entered the apartment, and when he did so, when he
6 entered the dwelling, he armed himself with a
7 knife.

8 In addition to that, while he was in the
9 apartment, he committed a violent crime.

10 And based on those two things, it rises to
11 burglary first.

12 THE COURT: Where did you get the knife, Mr.
13 Jewell?

14 THE DEFENDANT: From her kitchen, Your Honor.

15 THE COURT: Okay. What type of cord or rope
16 did you use to tie her hands or feet?

17 THE DEFENDANT: During the incident itself I
18 saw a cord on the floor and I decided to tie her
19 up with it at that time.

20 THE COURT: Tie her feet or hands or both?

21 THE DEFENDANT: Both.

22 THE COURT: Did he restrain her in any other
23 way, such as a mask or anything?

24 MS. WILSON: No, sir.

25 THE COURT: How long was it before she was

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1 able to get loose from these restraints?

2 MS. WILSON: Your Honor, I don't believe it
3 was that long. Within several minutes after he
4 finally left the apartment.

5 THE COURT: How long did this horrible
6 scenario last?

7 MS. WILSON: Your Honor, it was my
8 understanding it went, it lasted over several
9 minutes, probably 15 minutes, something like that.
10 It wasn't hours and hours, but it certainly
11 seemed like that to the victim.

12 THE COURT: Mr. Jewel, you have heard a
13 recitation of the allegations that the State of
14 South Carolina have indicated they can prove
15 beyond a reasonable doubt.

16 Now, how did you get into her apartment, sir?

17 THE DEFENDANT: I turned the handle and
18 walked in. It was unlocked.

19 THE COURT: Okay. You -- had you ever talked
20 to the victim before in any way whatsoever?

21 THE DEFENDANT: Just once in passing she said
22 hi. I said hi. I never had any evil thoughts
23 until that day, the day of the crime.

24 THE COURT: You observed her going in and out
25 and that's how you knew her apartment?

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1 THE DEFENDANT: Yes.

2 THE COURT: What time of day or night did you
3 go in, sir?

4 THE DEFENDANT: Approximately 2:30 -- or two
5 o'clock.

6 THE COURT: How long did you wait on her to
7 come?

8 THE DEFENDANT: Five minutes at most.

9 THE COURT: What made you think she was
10 getting ready to come to her apartment at that
11 time?

12 THE DEFENDANT: I didn't know.

13 THE COURT: You hid in which room of her
14 apartment?

15 THE DEFENDANT: In her bedroom.

16 THE COURT: Under the bed or where?

17 THE DEFENDANT: No, just right there at the
18 entrance way to her bedroom.

19 THE COURT: And you had the knife in your
20 hand at that time?

21 THE DEFENDANT: Yes.

22 THE COURT: And you had retrieved the knife
23 from where?

24 THE DEFENDANT: From her kitchen.

25 THE COURT: And how did you -- what first

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1 happened as she walked in? Did you grab her from
2 behind or the front, or what? Where were you when
3 she walked in the bedroom?

4 THE DEFENDANT: I was in her bedroom. She
5 walked into the bedroom and screamed and I kind of
6 pushed her over on to the bed.

7 THE COURT: You today are not alleging in any
8 way that this incident was consensual?

9 THE DEFENDANT: It was not consensual.

10 THE COURT: Okay.

11 THE DEFENDANT: The only disagreement I have,
12 that I can think of, is I don't recall messing
13 with any blinds or unplugging a telephone. She
14 said that.

15 I did the other things, I'll admit to that.

16 THE COURT: Well, whether or not the
17 telephone was plugged or unplugged is not an
18 element of the crime for which you're charged so
19 let's find that.

20 MR. SAVAGE: Mr. Jewell is aware of that,
21 Your Honor. We've discussed that on many
22 occasions.

23 THE COURT: Solicitor, is the victim -- and I
24 understand did not wish to be here.

25 MS. WILSON: That's correct. I met with her

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1 yesterday -- I'm sorry, I met with her the day
2 before yesterday, and I have talked with her
3 several times in the past several months.

4 THE COURT: All right. Is there anything
5 else from the State at this time?

6 MS. WILSON: Not at this time, Your Honor. I
7 feel sure I will want to address the Court after
8 mitigation is presented.

9 THE COURT: That will be fine.

10 Mr. Savage, I'll be glad to hear from you or
11 to hear from anybody that you desire to call, sir.

12 MS. WILSON: Beg the Court's indulgence.

13 THE COURT: Yes.

14 (Brief pause.)

15 MR. SAVAGE: Judge, Brooke Jewell, the
16 information that was provided to the Court earlier
17 this week, I think, gives you his social, his
18 family, his academic background.

19 And I will cover that briefly by saying to
20 you that at age 28, other than this incident that
21 the Court is addressing today, he's enjoyed an
22 excellent reputation for peace, tranquility, good
23 behavior, community service, religious attendance,
24 and has been a devoted son to his parents and to
25 his sisters.

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1 Mr. Jewell was represented by other counsel
2 when he was initially arrested. And probably
3 within two weeks of his arrest I was retained by
4 his sister, Sherry Brown.
5 And when I went to see him at the jail, I saw
6 somebody who was strange in observation. His eyes
7 were bulging. His affect was abnormal. His
8 discussions with me were free flowing, and he
9 seemed to comprehend and understand without
10 difficulty. He just looked strange to me.
11 It troubled me. It made me more troubled
12 when I started doing his family history and his
13 social, his academic history.
14 He is a bright kid. He grew up in a home
15 where his parents had divorced early on, but not
16 unlike many other people in our community.
17 He has two older siblings, Mandy, who is in
18 the court room today and Sherry who is not here.
19 But he was an ideal child, lived with both
20 his Momma and his Daddy at different times in this
21 life. Excelled in high school. Was popular. Was
22 athletic.
23 He attended a junior college in North
24 Carolina on a scholarship. He was a resident
25 advisor, selected among many, many students for

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1 that position. Did an excellent job there.

2 Was selected to travel to Europe to study
3 overseas, one of very few people at Bravard
4 College that did that.

5 He went on to The College of Charleston where
6 he excelled academically. Well respected among
7 his peers. He became a soccer coach for
8 youngsters in Mount Pleasant on his own.
9 Community service because he excelled in soccer
10 himself.

11 Graduated. Was a well-thought-of employee
12 through a number of different employers.

13 And sometime towards a year and a half out
14 from his graduation, two and a half years out from
15 his graduation, he started having some emotional
16 difficulties.

17 He was involved in a troubled love
18 relationship. He became depressed, and he went to
19 see his family physician who prescribed some
20 medication for him in an effort to alleviate his
21 depression.

22 The medication for the next two or three
23 months had the opposite affect and that medication
24 was addressed and it was changed again.

25 In June, some three weeks prior to this

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1 incident, he, on his own, went to a psychiatrist,
2 because he was troubled about his thoughts, his
3 feelings, his aggravated state. His difficulty in
4 concentrating at work. His relationship with his
5 family, his friends, and his then lover.

6 It is a bizarre situation. The prosecutor
7 asked and Your Honor asked how did he get there
8 that day?

9 From his soccer coaching days there was a
10 child who lived at that apartment complex. The
11 mother of that child is the one that identified
12 him when she saw his photograph on the news.

13 He also had two of his peers, women his age,
14 who had invited him over there on a number of
15 occasions.

16 This clearly was not his apartment. He had
17 no entitlement to be there, but he had been given,
18 and we have verified independently, that he had
19 been given permission to come visit there, to use
20 the facilities, and had been there on a number of
21 occasions.

22 There is no explanation. I have no
23 explanation. And I mean, we investigated this
24 case upside down, inside out going back to his
25 birthday, for what happened that day.

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1 His dad and his mom suggested the use of an
2 SSRI, Paxil, may have been involved in this. And
3 as a result of that, we went and retained the
4 services of seven different health care
5 professionals. Doctor Morton who, Your Honor, I
6 believe you know him from The Medical University
7 in pharmacology.

8 He is the leading expert in the country. He
9 first put us on that track.

10 A forensic psychologist, Pat Gerald.

11 Doctor Jenkins, a psychiatrist.

12 Doctor Randy Waid, who I'm sure you're
13 familiar with.

14 Doctor Booth.

15 And the national -- the guy in the United
16 States, Peter Breggin is here.

17 What I would ask the Court to do is you're
18 going to hear from his friends and his family, and
19 I will tell you now momma's going to say he was a
20 good son, daddy's going to say he was a good son,
21 sister's going to say he's a wonderful brother.

22 Friends and peers are going to say he was a
23 terrific guy, we never saw any indication of
24 this.

25 I know you've heard that before, and I don't

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1 mean to diminish the importance of the their
2 testimony to you, but what's important that I want
3 the Court to hear is from the scientific community
4 on the impact that these medications had on him at
5 that time, and the failure of the medical
6 community to recognize that he was one of those
7 one percenters or two percenters, when they take
8 these SSRI's, that they have an adverse reaction.

9 Doctor Jenkins, are you here?

10 Doctor Jenkins practices, Your Honor, at

11 North Trident. Doctor Jenkins came along about

12 mid-course in this examination because I was

13 troubled by it, quite frankly. I didn't -- wanted

14 to be convinced, but I wasn't convinced.

15 I've known Doctor Jenkins for a substantial

16 period of time. Doctor Jenkins is associated with

17 a psychologist by the name of William Burke. Bill

18 Burke. You may have had him testify.

19 He is the expert for sexual offenses.

20 Doctor Jenkins is associated with Doctor

21 Burke, and that is how Doctor Jenkins became

22 involved.

23 And I wanted a good psychiatric workup, not a

24 psychological workup, but a medical disciplined

25 workup, which Doctor Jenkins did at that time.

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1 And then as a result of that, we went
2 further.

3 By the time Doctor Jenkins had seen Brooke,
4 we had gone through Doctor Morton, the
5 pharmacologist, we had gone through Doctor Pat
6 Gerald, and we had gone through Doctor William
7 Burke. Doctor Jenkins then became involved.

8 DOCTOR JENKINS: That's right. And it was
9 December, so some time had passed that since he
10 had been in jail before I had my initial
11 evaluation with Mr. Jewell.

12 And at that time I did standard psychiatrist
13 evaluation, mental status exam. He was alert and
14 oriented. He was cooperative with the
15 evaluation.

16 He clearly endorsed symptoms of mood swings.
17 He had periods of depression that alternated with
18 periods of irritability.

19 And had endorsed these symptoms for some
20 time, several years, as a matter of fact.

21 Also, he had periods where he had paranoid
22 thinking. He had some racing thoughts, which is
23 an aspect of the mood instability disorders,
24 thoughts going real fast, can't shut them down.

25 These things led me to further questioning in

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1 so far as his previous treatment with the
2 medications.

3 And he revealed to me that when his family
4 doctor had started him on Celexa, which is an
5 anti-depression medicine which works very well for
6 depression, he had started feeling worse.

7 As Mr. Savage had reported a little bit
8 earlier, he was kind of in a fog, confused. His
9 thoughts were going faster, and he was feeling
10 more irritable, more aggressive.

11 And the reason for this is an energizing
12 antidepressant like Celexa has that affect on
13 someone who's got a mood swing disorder.

14 For depression it's very good, it brings
15 someone out of depression.

16 But if you have a mood swing disorder where
17 you have periods of depression, periods of
18 irritability, it sort of winds you up, makes you
19 worse, your thoughts are going faster. Judgment
20 is poor, impulsivity is worse.

21 This is in the family of the manic depressive
22 illness in the most severe form. He has the more
23 subtle form, I believe, where if not for the
24 presence of an energizing antidepressant, he's not
25 going to have dramatic mood swings and dramatic

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1 impairment of judgement.

2 But under the influence of an antidepressant,
3 that winding up affect, he actually gets worse.

4 So that's why he eventually went to see a
5 psychiatrist, because he could tell that he was
6 not getting better with the medicine that the
7 family doctor gave him.

8 And frequently that's the case, family
9 doctors don't do a family history. They hear
10 about depression so they start somebody on an
11 antidepressant.

12 And as a psychiatrist, it's very often that I
13 see somebody who is doing poorly on an
14 antidepressant, that we then have to switch them
15 over to a mood stabilizing medicine that's going
16 to actually address all of the different symptoms
17 that he's experiencing.

18 So when he went to see the psychiatrist, he
19 was agitated, confused, still very depressed. She
20 at that time didn't recognize, because this is a
21 more subtle thing, like I said, it's not a full
22 blown manic depressive syndrome, it's missed quite
23 frequently.

24 People get started on two, three, four
25 antidepressants and do poorly, and then ultimately

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1 a professional figures out that this is not a
2 straight forward depression, this is actually a
3 mood swing disorder.

4 So the psychiatrist that he saw put him on
5 another antidepressant, that was Paxil, and he
6 continued to do poorly over the three weeks that
7 he was on that medication.

8 Thoughts speeded up. Racing. He began to
9 experience suicidal ideation. Hopelessness. He
10 was more impulsive, enraged.

11 He would be driving in his car and he would
12 be thinking about driving his car into a tree and
13 killing himself.

14 The way he describes his thought processes at
15 that time, I would go so far as to say that he had
16 an element of what I call delusional
17 hopelessness.

18 He was not thinking about the consequences of
19 his actions in so far as driving the car into the
20 tree, thinking that that was a pretty reasonable
21 option for him.

22 THE COURT: Let me interrupt you. Assuming
23 that he had this feeling of hopelessness and
24 assuming that he had that mood swing, why would
25 that have induced him to rape somebody? You say

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1 he wanted to commit suicide, why didn't he kill
2 himself rather than go rape a woman?

3 DOCTOR JENKINS: That was an option that he
4 had. And I'm going to explain--

5 THE COURT: I apologize for interrupting, but
6 I needed to know that. Go ahead.

7 DOCTOR JENKINS: I'll be glad to address
8 that. It was around this same time that he wound
9 up at the pool and observed the victim in this
10 crime.

11 I need to also say that hypersexuality and
12 obsessive thought processes are an aspect of this
13 disorder.

14 People are obsessive about spending. They're
15 obsessive about having sex or wanting to have
16 sex.

17 They're impulsive. And frequently, when
18 they're wound up, they can become aggressive.

19 They may appreciate the difference between
20 right and wrong, but they can't control themselves
21 from trying to kill themselves or sometimes doing
22 something like speeding in their car and getting
23 speeding tickets, which he has a history of that
24 as well.

25 And, you know, unfortunately, you know, in

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1 the state that he was in, in the mental state that
2 he was in, he could appreciate the difference
3 between right and wrong with regards to these
4 crimes that he committed, but he could not conform
5 his behavior to the right behavior because of his
6 mental state, is what my thoughts are about that.

7 And so he was clearly in the know that this
8 is, you know, wrong, I shouldn't be doing this,
9 but his state of mind was such with the thoughts
10 racing, the hypersexuality, the impulsivity, the
11 suicidal ideation, the aggressive sexual ideation
12 about this victim, that that was what he came up
13 with, which was, you know, a bad thing, you know,
14 we'll all agree about that.

15 I believe his state of mind had a lot to do
16 with his actions. That in his previous history we
17 don't have any evidence that he's ever done these
18 kinds of illegal things and been arrested.
19 The speeding tickets are the only things that
20 I'm aware of, as far as legal problems.

21 The fact that he was off the Paxil by the
22 time I saw him, he was much better. He wasn't the
23 way that Andy Savage describes him, you know, with
24 the initial incarceration.

25 At that time he still had periods of

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1 depression that alternated with periods of
2 irritability, some mood fluctuation, still having
3 the racing thoughts, sleeplessness at times,
4 sometimes a little paranoia.

5 But he didn't have this full-blown syndrome
6 that he had under the influence of the
7 antidepressant.

8 And I see this frequently in patients. As I
9 said before, you know, well-meaning professionals
10 don't pick up that there is a subtle mood swing
11 disorder going on here, because they hear
12 depression, treat with an antidepressant, and then
13 it has this winding up affect with the underlying
14 mood instability.

15 MR. SAVAGE: Judge, this was in December when
16 Doctor Jenkins came involved. Doctor Booth, who
17 works with Doctor Jenkins--

18 Is Doctor Booth here?

19 I can't say I was a true believer when I
20 first heard this. So I talked to Doctor Jenkins
21 and I talked to Doctor Burke, and I talked to
22 Doctor Booth.

23 And I said, this is a hard sell. I need
24 something more substantive than a self report of
25 how Brooke was thinking at the time.

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1 Doctor Jenkins then suggested that we do a
2 blind study... And we went down the road pretty far
3 on that where we would re-initiate the medication
4 that Brooke was receiving from that other
5 psychiatrist in June of the previous year.

6 And then we developed some ethical issues, if
7 he's incarcerated and you don't have total control
8 of him and he acts out with another inmate, then
9 what kind of problems would have.

10 THE COURT: You're not suggesting to me now
11 that because of this Paxil he couldn't conform his
12 conduct, are you?

13 MR. SAVAGE: No, sir, and I'll explain that.
14 What I understand the medical -- and you're going
15 to hear from four; the position is that he could
16 distinguish right from wrong, and Brooke has told
17 me that on a number of occasions.

18 I understand his position that he didn't view
19 the seriousness of it where you and I would say,
20 oh my God, look what I just did. Because of what
21 Brooke's mental health was, he didn't give it that
22 acute reaction.

23 It was, well, my life's going down the tubes
24 anyway, I shouldn't have done it, but--

25 DOCTOR JENKINS: It's like when a manic

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1 person runs up their credit card debt or takes a
2 taxi to Atlanta and, you know, they really, you
3 know, they're not appreciating that this is going
4 to be a problem that I'm getting myself into.

5 THE COURT: They know what they're doing is
6 wrong, they're just not too concerned about the
7 consequences?

8 DOCTOR JENKINS: That's right. That's right.

9 MR. SAVAGE: Because of that mental problem.

10 Doctor Booth has seen--

11 Where is Doctor Booth?

12 Come on up.

13 Doctor Booth has seen Brooke on a--

14 THE COURT: Doctor, thank you for your
15 presentation.

16 DOCTOR JENKINS: Thank you.

17 THE COURT: I apologize for having interrupted

18 you.

19 DOCTOR JENKINS: That's fine. Thank you,

20 sir.

21 MR. SAVAGE: Doctor Booth is a psychologist.

22 I thought we needed somebody to see Brooke on a
23 regular basis instead of getting the doctor to see
24 him here and there.

25 And Doctor Booth has had continuity with him

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1 from early -- very early this year, through about
2 a month ago, maybe three weeks ago.

3 DOCTOR BOOTH: Yes, Your Honor--

4 THE COURT: Thank you, Doctor Booth, for
5 being here.

6 DOCTOR BOOTH: Yes. And I'm not going to
7 read this entire statement, but what I have here
8 is a summary that I provided to Mr. Savage about
9 the time that I spent with Brooke while he was
10 incarcerated.

11 THE COURT: I believe that was provided to
12 me.

13 MR. SAVAGE: Yes, sir, you do have that.

14 DOCTOR BOOTH: Yes, sir.

15 THE COURT: I've had the opportunity to
16 review that and I thank you for that.

17 DOCTOR BOOTH: The thing that I'd like to
18 point out is this, that during the entire seven
19 month period that I saw Brooke, not on any
20 occasion did he attempt to deny what he had done.

21 And on several occasions I witnessed him
22 experience extreme remorse, often saying that he
23 would love to be able to apologize to the victim,
24 if he could only write her or tell her how sorry
25 he was for what he had done, and that sort of

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1 thing.

2 He was always cooperative with me, easily
3 engaged, and basically there for whatever purpose
4 I needed to have him there for.

5 In other words, he wanted to be better and
6 wanted to do better.

7 THE COURT: Thank you, doctor.

8 DOCTOR BOOTH: Yes, sir.

9 THE COURT: Doctor Waid.

10 Your Honor, you may be familiar with Doctor
11 Waid, he's testified many, many times in this
12 courtroom.

13 THE COURT: Yes, sir. Doctor Waid, I'm
14 delighted to have you again.

15 DOCTOR WAID: Good to see you again.

16 THE COURT: Good to see you.

17 DOCTOR WAID: Your Honor, I came in late, in
18 August, had the opportunity to review all the work
19 that had been conducted.

20 I do a lot of review of sexual predators for
21 the State and the sexual predator law and I do do
22 a lot of criminal defenses as they relate to
23 mental illness defenses.

24 I first met with the parents and established
25 the first fact that I think everybody establishes,

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1 the makeup of this young man, developmentally,
2 upbringing, adolescence.

3 The past history of criminal activities just
4 doesn't match up generally what the expectations
5 we have of individuals who commit these types of
6 violent and hideous crimes.

7 THE COURT: That's disturbed me, as I read
8 the record here, presented by Mr. Savage. But go
9 ahead.

10 DOCTOR WAID: And no matter what we say, the
11 majority of people who come before you, sir, and
12 have for this kind of violent crime and do this
13 kind of violent crime, certainly have antecedents
14 in their life and we can certainly identify those
15 and use those in empirical ways to predict who's
16 going to commit again and try to help the Court
17 understand these situations.

18 That was puzzling to me, obviously. This is
19 not the makeup of somebody like that. I saw no
20 evidence of personality disorder and previous
21 criminal activity.

22 And literally, as the story goes, in December
23 of 1999, he indeed does go to a family physician,
24 really for more stress and gastrointestinal kind
25 of symptoms, and it's not unusual at all that a

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1 family physician would prescribe an
2 antidepressant.

3 THE COURT: That would have been Doctor
4 Thompson.

5 DOCTOR WAID: I believe it is, yes, sir.

6 And this is very typical. They actually
7 prescribe more antidepressants than psychiatrists
8 do in our country.

9 Ultimately, when it gets more complex, you'll
10 find it gets involved.

11 We did see, actually right away from a variety
12 of agents, not just Paxil, that he had a
13 disturbing response to it, that it was driving
14 him, making him more agitated, more manic like,
15 and mania is a definite problem, having -- anybody
16 who treats it. I've had manic people we have had
17 to pick up downtown and so forth, they do
18 behaviors essentially out of the context of their
19 usual behavior.

20 But he was already argumentative. He was
21 getting in trouble with his friends. He was
22 breaking up with his girlfriend. And ultimately
23 it got so bad that he did seek psychiatric care.

24 Ultimately there was a try of another
25 antidepressant.

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1 I don't blame Paxil. I think the whole group
2 of them were going to be a problem for this young
3 man for the ample reasons that Doctor Jenkins
4 pointed out that he was going to be driven by an
5 antidepressant.

6 On the day and what my job ultimately
7 became was to assess around a criminal defense as
8 it relates to mental illness statutes in this
9 State.

10 And as I worked with this young man and
11 worked with the family, I did do a microanalysis
12 of the day, because no matter what the mental
13 illness is, you still need to see how the person
14 was thinking each moment leading up to at the
15 moment of the crime, and I did that.

16 What is evident on the day is he very well
17 could have committed suicide. That was an

18 option. He almost did it in Beaufort.

19 He returns back under a very depressed and
20 driven state, was going to go to work, headed to
21 526, decides not to, and he knew of this pool, he
22 had been at this pool before, and he did have
23 permission, and he wanted to kind of cool out.

24 Ultimately, a set of behaviors occurs from
25 that phenomena.

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1 In my review of the behaviors, I cannot say
2 that it warrants the level of distortion defect
3 where he wouldn't know the kind of moral, legal
4 right from wrong and the stringent criteria of
5 McNaughten.

6 And I have indicated that to his attorney.

7 I believe his behaviors were of such that it
8 doesn't warrant that type of defense, but it's
9 obvious that they were terribly out of context for
10 this man's usual way of behaving throughout his
11 life all the way to this period in his life.

12 So ultimately I broke that down and looked at
13 his behaviors at the time of the incident and even
14 two or three days.

15 In about two or three days, he still wasn't
16 right before I think he even came to his own
17 realization of the harmfulness of his behavior and
18 the wrongfulness of his behavior, but at the time
19 he knew and he wasn't so psychotic that he didn't
20 know they were legally and morally wrong.

21 So I helped in my evaluation to say it
22 doesn't warrant the concern of the McNaughten
23 Rule.

24 However, I did at that time, and I know the
25 literature very well, have concerns, as you

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1 pointed out, about the other statute, which is
2 essentially in our State, conformity, can you
3 confirm your behavior?

4 It was not my opinion totally on my
5 microanalysis of his behavior. I had some doubt
6 one way or another. I think it was a very
7 difficult call, but at that time I was talking to
8 Mr. Savage regarding Doctor Breggin and an
9 opportunity for another person to come in and
10 continue the work that really did have to relate
11 to the conformity issue.

12 My point here today in his behalf is to tell
13 you honestly that I think these are mitigating
14 aspects, that this young man's MO was so different
15 from this crime, that it is such a serious event
16 in his life that it warrants somewhat compelling
17 understanding from it.

18 He obviously has admitted it to me, he knows
19 it was wrong. He's remorseful. Obviously his
20 life is absolutely detrimentally affected by this
21 event in his life.

22 But I am convinced at an expert level and a
23 professional level that he was, one, driven by the
24 antidepressant, and induced into a manic state.

25 Manic states are hostile, aggressive and

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1 wherever they can find the object to act on, they
2 will.

3 I've had manic patients come at me in team
4 meetings at the VA and so forth. They're
5 indiscriminate. And sexually can be
6 indiscriminate.

7 And so the behavior did match.

8 And I do have concerns about conformity, but
9 I certainly have concerns, and to let the
10 courtroom know, that in my opinion, this use of
11 antidepressants did mitigate, did cause the mania,
12 which certainly is involved in why it created such
13 a hideous crime and why it was so out of character
14 for this man who had already been on this world 24
15 years.

16 And so I think it is a puzzle.

17 Ultimately I then deferred, because Doctor
18 Breggin, a psychiatrist, was going to come in and
19 even look more closely at this, and Doctor Breggin
20 himself has a great deal of research in the area
21 of how there are negative affects from using these
22 medications.

23 Obviously a lot of people are helped, but any
24 of us who have been in the field can tell you
25 these are not benign agents, and often they induce

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1 people to do things that are atypical for their
2 behavior and can even induce psychosis and even
3 more serious, malignant disorders.

4 And so where I'm coming from is I honestly
5 believe without being on antidepressants, leading
6 up, that this crime doesn't happen.

7 THE COURT: Doctor, that was an excellent
8 presentation and I appreciate the input that you
9 have given.

10 DOCTOR WAID: Thank you.

11 MR. SAVAGE: Doctor Peter Breggin.

12 Judge, you have Doctor Breggin's background,
13 he is the national authority on this very issue of
14 how these medications, particularly the SSRI--

15 THE COURT: Glad to have you with us, doctor.

16 DOCTOR BREGGIN: Your Honor, I looked at all
17 of the records that were available in the case,
18 every stitch of them, I think, and I interviewed
19 the family, the mom and dad, sister, some friends
20 as well, and I just have a volume of material, and
21 it confirms everything you have heard from the
22 previous experts about his lack of any violent or
23 criminal behavior, about his basic character, so I
24 won't go into that any further other than to say
25 that I have spent hours and hours looking at all

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1 that and have come to the same conclusions.

2 What I would like to do, since you have heard
3 such good testimony already, is just give some of
4 the scientific background so it's just not a
5 clinician speaking, but point to some of the books
6 and articles and to some of the findings from the
7 FDA.

8 And I thought the most direct way to get
9 going was to just put this up. This is attached,
10 you have seen this already, Your Honor, it's--

11 Could we put that up?

12 THE COURT: That was in the material provided
13 to me.

14 MR. SAVAGE: Yes, sir.

15 DOCTOR BREGGIN: Right. And I would like to
16 explain it to you, because now with the previous
17 testimony, you will have some better sense of what
18 we're talking about.

19 Wherever would be a good placement.

20 First let me explain to you what this is
21 about. When a drug is approved by The Food and
22 Drug Administration, it goes through a series of
23 multiple kinds of testing.

24 One form of testing are short term controlled
25 clinical trials. They last, for a drug like

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1 Paxil, on the average of four to six weeks.

2 They're very short term, but they're very

3 scientific.

4 Paxil is compared to a placebo, that is a

5 sugar pill, in the same depressed patients, and

6 usually to an older antidepressant in the same

7 depressed patients.

8 So if something happens more often on Paxil,

9 it isn't because of the depression, because all of

10 the patients are depressed, it's because of the

11 Paxil.

12 The FDA then goes through this very lengthy

13 negotiation with the drug company in which the

14 drug company attempts to make as little as

15 possible about the bad affects, and the FDA tries

16 to encourage them to own up, and out of that comes

17 a negotiated product, which is the label. The

18 official label of the drug. And that's really

19 what the whole process is about.

20 When that label is approved, it doesn't mean

21 the drug is completely safe.

22 In fact, one of the conferences I went to

23 sponsored by the FDA, they gave out big posters,

24 when we approve a drug, it's not safe, it's just

25 safe enough to be approved.

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1 Because no potent drugs are, quote, safe,
2 they all have side affects. And it's a matter
3 that they've approved it because the risks aren't
4 so bad or so common that they outweigh the
5 benefits completely.

6 And sometimes misjudgments are made and drugs
7 are withdrawn from the market, and sometimes the
8 labels are changed along the way.

9 What I did was to go through the official
10 Paxil label, as approved by the FDA, to show the
11 kinds of problems that are admitted by the drug
12 company and affirmed by the FDA.

13 Looking at the entire body of patients whom
14 they gave the drug, which was over seven -- over
15 six thousand of whom were depressed, in patients
16 who were bipolar, that is with a history of mania,
17 as well as depression, they got a two point two
18 percent rate of mania and hypomania.

19 So that if we had a room of a hundred people
20 here and they were all part of their general
21 testing, more than two of the people in this room
22 would get essentially crazy.

23 They would develop an agitation, an anxiety.
24 Their judgement would be impaired. They'd do
25 things that were potentially outrageous and

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1 criminal.

2 That's a large number when you think about
3 what a hundred people, what two point two percent
4 means.

5 Now, in the patients who were just depressed,
6 the rate was low. It was still one percent.

7 That's in the whole bunch of people that they
8 tested.

9 Now, the following numbers are from the
10 smaller group, from the controlled clinical trials
11 where they could develop careful percentages,
12 they found, compared to placebo, that there were
13 increases, and compared to other antidepressants,
14 insomnia, 13 percent of the patients, nervousness,
15 five percent. Anxiety, five percent. Agitation,
16 one percent. Drugged feeling, two percent.

17 Confusion, one percent.

18 They found, under a different category, that
19 doesn't list percentages. And this category is
20 drawn from the whole body of patients. They found
21 under the frequent category, frequent in FDA terms
22 is one percent. They found central nervous system
23 stimulation. They found emotional ability, which
24 is instability. They found impaired
25 concentration. They found amnesia, which is one

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1 of the few things he did not have; he had a very
2 clear memory.

3 And they found worsening of depression,
4 interestingly enough.

5 Under infrequent, just very briefly,
6 infrequent in FDA terms means between one in a
7 hundred or one in a thousand. So up to one in a
8 thousand.

9 They find really serious reactions.
10 Paranoia. Psychosis. Hostility, and a variety of
11 other things. And libido increased. They found
12 that as well.

13 The overall picture here, just looking at the
14 official label for the drug, tells you that a
15 significant number of people taking this drug
16 under careful drug company controlled studies, are
17 going to develop mania and also get worse

18 depression and have, in smaller percentages,
19 hostility or paranoia.

20 Now, once you go into clinical practice,
21 however, you're in a situation where it's going to
22 be higher rates.

23 Everyone at the FDA acknowledges this; many
24 publications would not.

25 So in actual practice, he had a worse chance,

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1 because during these trials, patients are seen
2 every week.

3 They're seen by top investigators,
4 experienced doctors. When they see something
5 wrong, they can stop the medication.

6 In this case, in clinical practice, you have
7 somebody who hasn't gone through the whole
8 rigmarole for the FDA testing that they'd put him
9 through if he was in a FDA study.

10 He's not being seen once a week. The doctors
11 don't know quite as much about what's going on, as
12 do these.

13 So we can assume even higher rates in
14 clinical practice, that's generally acknowledged.

15 Having established that mania occurs on these
16 drugs and is known to occur and is in the label, I
17 want to confirm that what the other experts have
18 said is state of the art consensus opinion, that
19 it is not an unusual opinion.

20 And in order to do that, I'm relying on the
21 diagnostic and statistical manual of The American
22 Psychiatric Association. In this case, the fourth
23 addition, which is 1994.

24 Now, what this is is the Psychiatric
25 Association brings together committees of people

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1 to do an analysis of various diagnoses, to define
2 what is depression, to define what is mania,
3 define what is an anxiety disorder.

4 And it is a committee of experts. So when
5 they come up with a conclusion, it's kind of a
6 consensus of experts. Very important.

7 One of the things that's really striking
8 about the diagnostic manual is that at least five
9 or six times it says that antidepressants can
10 cause mania.

11 Here, I'll read you one statement: "Symptoms
12 like those seen in a manic episode may be due to
13 the direct affects of the antidepressant
14 medication."

15 There are about six of these kinds of
16 statements. Just one other. "Symptoms like those
17 seen in a manic episode may also be precipitated
18 by antidepressant treatment, such as medication."

19 So here in the consensus document, repeated
20 observations that mania can be caused by
21 antidepressants.

22 The other point that is made clearly in this
23 document is that sexual aggressive behavior is a
24 characteristic of mania.

25 So much so that in the actual little box

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1 listing criteria, sexual issues are twice
2 mentioned. Once saying that you can have
3 increased goal directed activities, and by that
4 they mean almost obsessive activities in the arena
5 of buying foolish business investments, sexual
6 indiscretions. Clearly beyond indiscretion.

7 And then goes on to talk about just sexually
8 increased behavior. It talks about assaultive
9 behavior, suicidal behavior, antisocial
10 behaviors.

11 It talks about people ending up in hospitals
12 in the criminal justice system as a result of
13 mania.

14 And, again, this is out of one of the more
15 conservative books that one could use in the
16 profession, because it's a consensus book, the
17 diagnostic manual.

18 This is the same manual, Your Honor, that
19 every psychiatrist must use for the insurance
20 companies, that every research project must use if
21 it's using depression.

22 It's the same manual that is used to define
23 depression when the FDA studies are done.

24 So this is the basic, basic book.

25 In terms of the science, I could have brought

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1 in cartons of articles confirming that this class
2 of drugs, the SSRI drugs, which by the way include
3 Prozac, it includes Paxil, Zoloft, and Celexa.
4 This class of drugs can cause mental disturbances.

5 One of these drugs is Zoloft. And I was
6 hired by the FDA, I'm an expert -- not the FDA,
7 excuse me. The FAA. The Federal Aviation people,
8 because they wanted me to talk about the dangers
9 of this class of drugs, why people shouldn't get
10 them as pilots.

11 Right now if you're a pilot, you can't fly on
12 Paxil. And there was a pilot who wanted to fly on
13 one of these drugs and they brought me in to go
14 through this kind of material.

15 So I have cartons of material on this, and I
16 brought along four or five articles.

17 THE COURT: The makers of Paxil don't want to
18 see you, do they?

19 DOCTOR BREGGIN: Often not, Your Honor.

20 But the four or five articles basically are
21 in two groups, one showing that the SSRI's cause
22 mania, and the other showing that they cause
23 compulsive suicidality.

24 In fact, the first classic article on
25 compulsive suicidality from the SSRI came out in

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1 the best known journal, The American Journal Of
2 Psychiatry, back in 1990.

3 And on the day that he's going from
4 compulsive suicidality to compulsive aggressivity
5 and compulsive sexuality, is very consistent with
6 the ups and downs of these drugs.

7 One detail that wasn't mentioned that he told
8 me with great embarrassment just in our last
9 interview was that after he committed this
10 horrendous act he was still overwrought sexually
11 and he actually masturbated in the shower that
12 same day.

13 Bizarre behavior, which he was deeply
14 embarrassed to tell me about, and which fits
15 completely.

16 With his--

17 THE COURT: As I understand it, though, and I
18 want to make it clear about this, he had the
19 capacity to conform his conduct to the rules of
20 law.

21 It may be that he didn't care about the
22 consequences, but there is no question about he
23 had the capacity; do you agree with that, Mr.
24 Savage?

25 MR. SAVAGE: Yes, sir.

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1 THE COURT: I don't want that issue--

2 MR. SAVAGE: We're right on the fine line on
3 this.

4 THE COURT: I understand. But I don't want
5 that issue to come up on a post conviction relief,
6 that he was guilty but mentally ill or not guilty
7 by reason of insanity.

8 MR. SAVAGE: Doctor Breggin and Mr. Jewell
9 and I met for two hours yesterday at the jail. We
10 thoroughly discussed this. We discussed it in
11 minute detail, and as I understand it, this
12 medication by the scientific community and medical
13 community triggered an event, but it did not
14 trigger it to the extent that he could not
15 distinguish right from wrong, legally or morally.

16 And that while he didn't appreciate the
17 seriousness of the act, he did it anyway.

18 THE COURT: That's what I'm developing from
19 these distinguished doctors here, and I appreciate
20 their presence, it gives me a lot of -- but I want
21 to make sure that there's no contention--

22 MR. SAVAGE: We also discussed a plea of
23 guilty but mentally ill. And my advice to Mr.
24 Jewell was that that wouldn't benefit him. Given
25 the state of The Department of Corrections, he

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1 would have been treated as an inmate not as a
2 patient under that plea.

3 And I explained to him the case involving the
4 school in Greenwood where the jury found him
5 guilty but mentally and he still received the
6 death penalty.

7 Those issues have been discussed for many,
8 many months with Mr. Jewell.

9 THE COURT: Well, all of these doctors are
10 saying, as I understand it, that under the
11 McNaughten Test, he understood right from wrong.

12 And I understand what you're saying, but he
13 had the capacity to conform his conduct, though.
14 I understand, that because of his condition,
15 apparently caused by Paxil, he didn't understand
16 perhaps the enormity of what it was or the
17 consequences of it.

18 THE DEFENDANT: Correct.

19 THE COURT: That's what I hear. Is that
20 right, doctor?

21 DOCTOR BREGGIN: That's what I'm saying, Your
22 Honor.

23 THE COURT: All right, sir. That's fine.
24 Proceed. And I apologize for interrupting you,
25 but I want this record to abundantly reflect that

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1 there is no contention of guilty but mentally ill
2 or not guilty by reason of insanity. You may
3 proceed now.

4 THE DEFENDANT: Your Honor, I agree with them
5 completely. I was not aware of the consequences.
6 I knew what I was doing was wrong, but not to the
7 extent of what I was doing.

8 THE COURT: All right, sir. I can accept
9 that assertion. Thank you for that.

10 Yes, sir.

11 DOCTOR BREGGIN: I'm near the end. I'd
12 like--

13 THE COURT: No, sir, doctor, you go ahead.
14 You're aiding the Court, and I appreciate it..

15 DOCTOR BREGGIN: Okay. May I, Your Honor,
16 tell you about five other cases, just to show you
17 the similarity of them that have been in Court
18 that I have looked at in great detail so that you
19 get a sense that this is not uncommon or unreal?

20 I honestly will get calls, maybe more than
21 one or two a week, every week, of people having
22 done something destructive or harmful on these
23 drugs.

24 And I have been to Court maybe 12 times about
25 it, or eight, nine, ten, 12 times about it over

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1 the past several years.

2 One case was in southwest Virginia. A man
3 who had no history of violence who was a deacon in
4 the church and studying to be a minister and
5 married, had a stepdaughter who abruptly, with no
6 explanation, charged into his own home with a
7 shotgun, drove his wife out of the home and took
8 the stepdaughter into the bedroom and then into
9 the bathroom and was holed up into the bathroom
10 when he finally gave himself up.

11 In this case it was never clear what
12 particular abuses may have occurred.

13 On the basis of my testifying that an SSRI
14 had precipitated this abrupt change, the
15 prosecution offered a lesser charge.

16 In another case that just evolved this week
17 finally, I testified a few months ago in the case
18 of a young man in Avington, Virginia, who had
19 found that his wife was being unfaithful, had
20 abruptly decided, on these same drugs, that he was
21 going to force her to give a confession; he was
22 going to take her to a private place and force her
23 under gunpoint to give a confession that she had
24 done this so he could broadcast it to the
25 community. He had fantasies of being on the

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1 radio.

2 And when she said, well, can I stop and have
3 a cigarette first, right in front of the deputy
4 sheriff's house, he said sure, and she leaped out
5 of the house (sic), went into the deputy sheriff's
6 house, and he followed them with guns blazing,
7 wounded the deputy sheriff, wounded her,
8 fortunately slightly, and himself was very
9 severely wounded.

10 Again, no previous history of violence,
11 nothing at all. Out of the blue. And the Judge,
12 last week, citing my testimony, gave him a lesser
13 sentence, he said, than he would ordinarily had
14 given.

15 One of the more bizarre cases that is rather
16 famous, because it actually resulted in a not
17 guilty by reason of insanity due to Prozac and to
18 a second drug; he was taking two drugs, a man in
19 Connecticut robbed his wife's bank while wearing
20 only for his disguise a mustache and driving his
21 vintage blue Camaro, which was so well known in
22 the community that everybody knew who had done it.

23 In fact, he had stood in front of the bank
24 before he had robbed it, discussing his car so
25 that one of the witnesses could even identify the

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1 hubcaps of the car.

2 On another occasion he robbed his local drug
3 store and waited in line wearing only his wife's
4 prescription sunglasses for a disguise. He was,
5 of course, easily identified.

6 In the final episode, he walked through a
7 police cordoned, because he looked so weird
8 walking into a bank, that they called the police,
9 and he'd looked so weird getting his lunch, that
10 the luncheonette had called the police.

11 He walked through policemen and drove off in
12 a hail of bullets. And fortunately, no one was
13 injured.

14 In that case my testimony was corroborated by
15 a Harvard professor and the Judge gave a not
16 guilty by reason of insanity due to the drugs.

17 Two more briefly. In Florida a 12-year-old
18 girl who had never handled the gun, but had been
19 harassed by some boys, got a gun and fired,
20 point-blank, on Prozac in this case, point-blank
21 at the boy. Fortunately the gun did not go off.

22 I testified in Court and she got a lesser
23 charge.

24 Finally, a case that I had nothing to do
25 with, to show you that it's not just my

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1 activities, Your Honor, it's many other experts.

2 In Wyoming recently, the manufacturer of
3 Paxil was sued in a product liability case in
4 regard to a man who murdered his own mother and
5 his daughter and their child.

6 He murdered three generations of people on
7 Paxil, and the drug company was sued and the -- in
8 Wyoming, it was only a few months ago, and the
9 jury awarded over six million dollars to the
10 victims on the grounds that this had been induced
11 by Paxil.

12 THE COURT: Why haven't the appropriate
13 authorities taken this drug off the market?

14 DOCTOR BREGGIN: Well, Your Honor, I don't
15 have a good answer. I don't have a good answer.

16 Clearly many, many people feel help by the
17 drugs. Clearly many, many people, many, many
18 doctors feel the drugs are useful.

19 I think the real issue here is the lack of
20 warnings being given to physicians. Too many
21 physicians haven't heard as much as -- well, I
22 would say 95 percent of American physicians have
23 not heard as much as you have heard today about
24 these drugs.

25 And if you will go through the label, you

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1 have got to be an expert to dig this material out
2 of the label.

3 So I think we're really looking at a lack of
4 information and it's just to take time for it to
5 get clearer and clearer to the public.

6 But I don't have a good explanation for why
7 things aren't appropriately handled.

8 Do you have any -- Well, one last case. I'm
9 involved in a case now of a man, Your Honor, who
10 after a few Paxil drowned his two children and
11 himself in a tub.

12 He was an engineer. He had no history of
13 violence. He was depressed. He took a few
14 Paxil.

15 I'm involved now in the case of product
16 liability against the corporation on that basis.
17 So this is real.

18 THE COURT: Thank you so much, doctor.

19 MR. SAVAGE: Judge, I want to be sure, before
20 Doctor Breggin leaves, on the issue of not guilty
21 by reason of insanity, I believe that he's been
22 very clear with me, I want to be sure that we're
23 clear with the Court on that issue.

24 THE COURT: Yeah, well, I'm comfortable with
25 the fact that--

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1 MR. SAVAGE: His written report--

2 THE COURT: --he knew right from wrong and
3 that he had the capacity to conform.

4 I understand what the doctor has said, it is
5 very helpful to me in my decisions.

6 DOCTOR BREGGIN: I had interviewed him on the
7 phone originally, Your Honor, and in the middle of
8 my report, I think I originally mentioned, sort of
9 in the middle somewhere, that he might not know
10 right from wrong, and I didn't put it in my
11 conclusion. I didn't put it at all in the
12 conclusion.

13 And then once I interviewed him in detail, it
14 was absolutely, unequivocally clear that he had
15 some sense of what he was illegal and morally
16 wrong, so I'm clear on that.

17 THE COURT: Well, I thank you for clarifying
18 that. That's very helpful to this record.

19 MR. SAVAGE: Thank you, Judge.

20 THE COURT: All right. Thank you, doctor.
21 Very informative.

22 MR. SAVAGE: Judge, that just sets up the
23 scientific explanation, what we think is the
24 explanation. There may be some disagreement about
25 that.

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1 And I've told you about how remorseful he's
2 been. Doctor Booth told you that.

3 What I didn't tell you is is part of that
4 remorse and trying to make up for his acknowledged
5 wrongdoing. He tried to cooperate in at least two
6 rather serious cases that were in this Court. I
7 believe he testified in one and perhaps provided
8 information at some risk to himself.

9 Judge, his parents, Jerry Jewell, and his
10 momma, Joan Schneider are somewhere close by. His
11 sister Mandy.

12 If you would stand up.

13 And her fiance are here.

14 And then he has a number of friends and peers
15 from this community who essentially all would say,
16 what happened? We don't have an explanation for
17 this.

18 His dad wants to speak. His mom may want to
19 speak. His sister is going to take a pass, I
20 think.

21 Is that right, Mandy?

22 THE COURT: Yes, sir, I'll be glad--

23 MR. SAVAGE: And in your report you have a
24 lot of this information from the family.

25 THE COURT: Yes. I spent last evening, some

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1 hours, reading this report. And throughout the
2 report, based on his prior history and no
3 involvement with any law, I was quite frankly,
4 surprised about his conduct.

5 The doctor's testimony have enlightened me
6 some with regard to this issue.

7 Yes, sir.

8 MR. JERRY JEWELL: Your Honor, imagine, if
9 you will, you've got a son that you have had for
10 26 years, you were there when he was born, saw him
11 born, you raised him, everything was going
12 perfectly well up until three months before this
13 incident occurred.

14 Everything was fine. Wonderful. I was very,
15 very proud of my son. He had the right kind of
16 attitude. He had the right kind of attitude all
17 of his life.

18 I remember when he was six years old, we were
19 out in the boat pulling his mother and a guest
20 skiing, and the guest's wife asked Brooke, Brooke
21 do you know how to ski?

22 And he said, yes, I do.

23 And she said, you mean you ski?

24 And he said, no, ma'am, I know how, but I
25 just haven't done it yet.

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1 That's the kind of attitude that he's had all
 2 of his life. It's a great attitude. Never had
 3 any problems out of him. He was always caring.
 4 He was considerate. He worked with people. All
 5 kinds the way from little kids to old people.

6 Everybody respected him. And he respected
 7 them. I never saw any lack of respect on his part
 8 for anyone in my life.

9 Imagine the horror. Imagine the horror of
 10 knowing that your son is on a drug and that it's
 11 affecting his mental capacity and you know it and
 12 you can't get him off it because the doctors have
 13 kept him on it.

14 And then imagine the horror of getting --
 15 someone coming to your house, like his mother came
 16 to my house at 11 o'clock at night, to tell me
 17 that he had been arrested for rape.

18 I mean, it's unbelievable. Unbelievable.
 19 But I want to point out that he has a lot of good
 20 examples of great things that he's done in those
 21 26 years before he was incarcerated. Almost 27
 22 years.

23 THE COURT: I've read the record, and I was
 24 impressed with that.

25 MR. JERRY JEWELL: And it's my feeling that

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1 here for a good purpose and we need that.

2 THE COURT: I understand. Do we have that
3 capability?

4 You may come around and use this microphone,
5 if you care to.

6 MS. JOAN SCHNEIDER: Can I use this, please?

7 THE COURT: Yes, ma'am, because--

8 MS. JOAN SCHNEIDER: I just want to make
9 sure--

10 Can you all hear me?

11 THE COURT: Do you need a glass of water?

12 Get some water, please.

13 MS. JOAN SCHNEIDER: I'm here on behalf of my
14 son, Brooke. I feel like I know-- I know them--
15 him longer than anyone here, because I gave birth
16 to him 28 years ago.

17 He is standing here in front of us in
18 shackles. This is not his normal attire. This is
19 his attire? (demonstrating)

20 Very environmentally. Very lively. Very
21 honest, loving, giving, generous person.

22 Genetically if you could re-group and remake this
23 man, you would want him exactly like he is.

24 There has to be no change. We have never had
25 the word never in our vocabulary. It's the

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1 strongest word I have learned through the years.

2 There is no -- there should be no word never.

3 In this circumstance -- in this circumstance

4 I never had the word never -- well, I had it in my

5 vocabulary, and then I knew that it could -- it's

6 not a good word to use.

7 MR. SAVAGE: You need to address the Court

8 and not the audience.

9 MS. JEAN SCHNEIDER: Oh, I'm sorry.

10 THE COURT: That's okay, I can hear you. If

11 you care to address out there, that's okay; okay?

12 MS. JEAN SCHNEIDER: Since he was small, he

13 was very capable, very energetic, very enduring

14 and very organizing of every possible item that --

15 or agenda he could do.

16 He will be a great leader. He truly will be

17 a great leader. This has broken his path. His

18 path was not chosen this way. He did not chose it

19 this way. It was chosen for him through chemicals

20 that he went to get help for, and it was chosen --

21 it was not chosen, it was strictly given to him --

22 it had the opposite affect on him.

23 He has been a patient. He has been

24 commendable in his life in the detention center,

25 which we expected.

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1 He has never been a fighter. He has never
2 been in trouble. He's never been in shackles
3 before.
4 He's not the person that he sounds like to be
5 in the news media. And when the call came that
6 night to tell us that he had been arrested for
7 rape, no way. Never. Not my son. Not Brooke.
8 This just isn't in his life strategy.
9 Your Honor, when he was small, this is a
10 little poem that he wrote for me, thanking me for
11 being a mom, thanking for cooking for him,
12 thanking for ironing his clothes.
13 He has continued to be like that his whole
14 life. He is not a predator. He is not a burglar.
15 He is not a sexual deviant person.
16 Until July 12th and six months prior to that
17 date, he was an outstanding citizen and still is
18 an outstanding son.
19 He will always be the person that he wants to
20 be inside. He doesn't need any chemicals that
21 will re-alter himself and his attitude.
22 We together went on a mission trip to
23 Bolivia. We built a Methodist church by handmade
24 adobe bricks. He had found firsthand the
25 humbleness it takes to be in the real world today.

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1 He found that material things do not mean a
2 thing. It's what's inside, and you have to work
3 on it, you have to do what God gave you to work
4 with.

5 He has always done that. This is not his
6 style.

7 This is a picture of he and Strom Thurmond.
8 He took, at New York University, a five hundred
9 fortune business course there, in New York,
10 studied to further his degree, went to the
11 Pentagon, and who happened to be there but Strom
12 Thurmond.

13 He's very proud of this picture. Very proud
14 of South Carolina.

15 He's a very ingenuous person. He's a kind,
16 loving man. And the shackles he wears today don't
17 change my feelings for him at all.

18 He does not want to be a South Carolina penal
19 system number. He wants to be a normal person.
20 He can be, someday, with your help.

21 It's very -- it's been very -- it's been a
22 very long year. It's something that we have not
23 occurred ever in our family.

24 And the word never will truly be the biggest
25 word that ever was, because in his case, it should

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1 have never happened. But it did. Thank you.

2 THE COURT: Thank you so much.

3 THE DEFENDANT: Your Honor, it is a tragic
4 series of events that has led us here today. If I
5 could somehow draw back from the situation to
6 afford myself an objective prospective, I might
7 scarcely believe that the human condition could
8 become so base and miserable as that in which we
9 are mired.

10 But my subject prospective compels an
11 ineluctable presence, and I am so utterly
12 disgusted at what happened over 16 months ago.

13 The remorse that engulfs my very core of
14 being is based not only in the specifics of the
15 offense, but also the affects it has had on all
16 who have been drawn into these affairs.

17 While I must bear a form of responsibility
18 for what has happened, it is but one form, and yet
19 there are other forms of responsibilities to be
20 borne here as well.

21 The action that took place, this pitiful
22 sordid offense against a fellow human being, is so
23 unlike anything I have ever done in all my life.

24 Anyone who has ever known me would not
25 believe I am capable of committing any act of

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1 violence.

2 This, all this, this crime, these proceedings
3 the impending consequences; and most of all, Your
4 Honor, the suffering of the victim, this is not
5 me, nor has it ever been.

6 I had lived 26 years with absolutely no
7 violence whatsoever. I have never even been in a
8 school yard fight. I have never had any reason to
9 be in trouble with the law.

10 I contend that none of this horror would ever
11 have transpired if I had not been prescribed a
12 series of increasingly debilitating and
13 mind-altering drugs whose affect on my brain
14 pushed me over the edge from my normal state of
15 mind and into the abyss of manic hostility.

16 I was involuntarily forced into a chemical
17 hell. And the demons in that hell unfortunately
18 and tragically were lose upon an innocent victim.
19 Rather upon two victims, myself included.

20 I recoil from the horror of it. I agonize at
21 the pain of it. I would give anything to be able
22 to take it back, to turn back the clock and know
23 in advance what devastation these medications
24 would wreak.

25 Much has been ruined because of this. But

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1 should the ruination be so utterly complete that
2 my life be swept away onto the wreckage pile?

3 Your Honor, I took the medications exactly as
4 I was told by the doctors. And because of this, I
5 was pushed to the point of lacking my normal self
6 control. My gatekeeper was no longer working.

7 Rather wouldn't it be more appropriate, in
8 light of all of the medical evidence, to allow me
9 the chance to make things right and to prove to
10 the world that I am not the monster these charges
11 would make me out to be.

12 Your Honor, this is my plea, I can say no
13 more. I ask the Court for mercy and understanding
14 and for the help to overcome all of this, for it
15 is something that necessarily must be overcome.

16 I pray that a similar set of circumstances
17 may never again visit anyone and that the forces
18 that ultimately ~~will~~ be brought into the light of
19 intense scrutiny by the legal and medical
20 professions.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. SAVAGE: Judge, we have a number of
24 friends.

25 If you would just stand up so the Judge can

1 recognize that you are here in support of your
2 friend, Brooke Jewell. Thank you.

3 THE COURT: I thank all of you for being
4 here.

5 MR. SAVAGE: Judge, so the record's clear,
6 Brooke and I have met probably on 75 occasions at
7 the county detention center with and without
8 experts, with and without investigators.

9 He has written me, I guess, a hundred and 40
10 letters. We have, in depth, discussed the
11 potential defenses. We have exhaustively
12 researched all of the witness that he has directed
13 me to.

14 We have discussed the situation that arose
15 earlier, regarding the Miranda rights. I told
16 Brooke, and it is my opinion to him, even if he
17 was successful, which is doubtful, that the

18 independent corroboration of his complicity in
19 this crime is overwhelming, that is by eye witness
20 accounts, victim eye witness accounts, third party
21 eye witness accounts, his admissions, his DNA
22 results.

23 But that was never an issue, because Brooke
24 has always told me what he was charged with he did
25 and he apologized for it.

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1 We have exhaustively researched every angle
2 of this case.

3 We haven't always agreed; have we?

4 THE DEFENDANT: We've worked out everything.

5 MR. SAVAGE: And I say that in a positive
6 way, because Brooke has challenged and wanted to
7 examine everything, but when it came right down to
8 it, it was his decision, not my decision, it was
9 his decision that he wanted to proceed today with
10 a guilty plea and to waive any of the potential
11 defenses that he had.

12 And he wanted the Court to specifically know
13 that he has accepted responsibility.

14 He is not hiding behind Paxil, but he has
15 used that as an explanation for what he believes
16 in his mind he wouldn't otherwise have done.

17 He appreciates the wrongfulness of the act--

18 THE DEFENDANT: Your Honor, I would not have
19 done this crime if I had not been under the
20 influence of those medications.

21 THE COURT: Well, your record suggests that.
22 I was puzzled into the wee hours of this morning
23 as I read all the exhaustive materials furnished
24 by Mr. Savage.

25 It's not the usual thing that I see. And

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1 I've been on the bench for 18 years now. And it's
2 been puzzling me throughout.

3 I thank you for your comments.

4 Is there anything further from the
5 Solicitor's Office?

6 MS. WILSON: Your Honor, I just have a few
7 comments. There is no question that Mr. Jewell
8 has had a problem.

9 But I don't think we can ignore the fact that
10 before he began medication he started having some
11 sort of difficulty, and, in fact, that's what led
12 him to taking the medication.

13 And I am concerned with some of what's been
14 presented in that the information that I have
15 received by one of the people who was closest to
16 him at this time was that Mr. Jewell was not,
17 taking this medication properly.

18 And when I say that, I don't mean that he was
19 abusing it in the sense that, you know, trying to
20 OD or anything like that, but the information that
21 I have gotten is that if he felt good he didn't
22 take it. If he felt bad, he did take it. If he
23 felt really bad he might take one or two.

24 And you just can't do that with this type of
25 drug, obviously.

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1 Some of the things that the doctors look at
2 when they were making their determinations and
3 their presentation had to do with the fact that
4 this wasn't a very smart crime.

5 And you've been on the bench a long time and
6 I have been doing this for a little while, and I
7 think we have both seen throughout our careers
8 that people do stupid things all the time.

9 And sometimes people want to get caught. So
10 I hope the Court will not weigh too heavily the
11 fact that the defendant was easily caught, because
12 that simply happens all the time.

13 He did take steps to try to get away with
14 this crime. And he did initially deny it, in that
15 he claimed that the victim consented to the sexual
16 relations.

17 Your Honor, it's the State's position in this
18 case that the facts speak for themselves. They're
19 horrendous facts.

20 The defendant, I'm certain, is grieving.

21 I'm sure he's in pain, and I know his family
22 and friends are as well.

23 But it pales in comparison to what this
24 victim is going through. It really does.

25 In the State's view, Your Honor, a 15 year

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1 sentence does not take into account the rape at
2 all. Not at all.

3 And we would ask for you to give a sentence
4 that's fair, a sentence that addresses Mr. Jewell,
5 the mitigation that was presented, but also
6 represents and addresses the horrendous facts and
7 the pain and years of distress that the victim
8 will go through.

9 THE COURT: As a threshold matter, let me
10 express my appreciation to the defendant's mother
11 and father and to those friends who are here in
12 support of him.

13 Your presence here indicates and the remarks
14 indicate that this is an unusual situation.

15 Mr. Savage has kindly provided me vast
16 material, which I spent hours reading. I can't
17 understand why he did it.

18 The distinguished testimony of these doctors
19 helps me to understand it to some degree.

20 It's necessary that I say upon this record
21 certain things that I am sorry I have to say,
22 because of his friends and of his parents.

23 But this is a horrible crime. My experience
24 on the bench is that someone who has been
25 burglarized never gets over it. They're home is

1 their castle and their place of sanctity, and it
2 never again provides that safe haven that we all
3 enjoy when we go home.

4 And that unfortunate victim will live with
5 this horrible consequence the rest of her life.

6 If I go home to Bennetsville, South Carolina
7 this evening and I would find that my wife or my
8 daughter was raped, and that though it occurred on
9 Paxil, it wouldn't make me feel any better that
10 this horrible crime was perpetrated against
11 another human being.

12 Now, Mr. Jewell, you raped that young girl.
13 You sodomized her. You tied her up. You waited
14 in wait for her. You planned it.

15 Just about as bad a set of circumstances
16 under a burglary and rape that I can imagine that
17 I've ever seen.

18 I would have, under the quote, facts of this
19 case, have no hesitancy in giving you the absolute
20 maximum provided by law.

21 On the other hand, I know that you have
22 candidly and openly pled guilty. In doing so you
23 have helped this Court and this unfortunate victim
24 so that she doesn't have to live the agony of
25 testifying as to what occurred on this terrible

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1 night.

2 I give you credit for helping that victim to
3 that extent.

4 I am persuaded that the Paxil may have been a
5 contributing factor to this unusual behavior on
6 your behalf.

7 I regard that as not an excuse, but perhaps
8 as some mitigating circumstances. Nothing else in
9 your record explains this horrible behavior.

10 Given the fact that you did not force this
11 young victim to relive these horrible

12 circumstances and giving credit to what these

13 distinguished doctors have said, coupled with the

14 remarks of Mr. Savage, I have concluded that I'm

15 not going to give you the maximum provided by law,

16 for those facts and circumstances clearly indicate

17 that I could, and justifiably so.

18 I am not going to give you the

19 minimum, because that sends the wrong message to

20 the good people of Charleston County and these

21 young ladies who live by themselves in these

22 apartments.

23 We've got to send a message too that this

24 sort of conduct is not acceptable and if somebody

25 has this medical difficulty that you assert, they

1 need to go get help for it, because we just cannot
2 fathom, in a society such as we have, such sort of
3 conduct that a young lady, in her own home, raped
4 in broad daylight. Unfathomable.

5 With regards to the offense of criminal
6 sexual conduct in the first degree, it is the
7 judgment and sentence of this Court that you be
8 confined for a period of 21 years. And I give you
9 credit for time served.

10 With regard to the offense of burglary,
11 having a minimum of 15 years, the law permits me
12 in my discretion to make that sentence concurrent.

13 Given the fact that you have a prior
14 unblemished record, coupled with the fact that
15 there are some mitigating circumstances, that 15
16 year sentence is concurrent to the 21 years
17 previously imposed.

18 That will be the judgment of the Court, and I
19 thank you.

20 MR. SAVAGE: Thank you, Judge.

21 MS. WILSON: Thank you, Your Honor.

22 THE COURT: This Court is now in recess.

23 (Brief pause.)

24 THE COURT: Have the defendant come back
25 around.

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1 All right. Let's get back on the record.

2 Okay. Mr. Defendant, I have previously

3 imposed the sentence upon you, the record will

4 reflect, and I advise you, sir, that you have the

5 right to appeal upon such grounds as you and your

6 distinguished attorney deem appropriate, okay?

7 THE DEFENDANT: Thank you.

8 THE COURT: All right. Thank you.

9 MS. WILSON: Thank you, Your Honor.

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12 (Court's Exhibit Number 1, pre-plea report,
13 marked for identification.)

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18 (End of proceedings.)
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4 I, the undersigned, Michele Rene Darling,
5 Circuit Court Reporter for the Ninth Judicial
6 Circuit of the State of South Carolina, do hereby
7 certify that the foregoing is a true, accurate and
8 complete Transcript of Record of all the
9 proceedings had and evidence introduced in the
10 trial of the captioned case, relative to appeal,
11 in the Criminal Court for Charleston County, South
12 Carolina on the 15th day of November, 2001.

13 I do further certify that I am neither of
14 kin, counsel nor interest to any party hereunto.
15
16
17

18 July 29, 2002
19 Michele R. Darling
20
21 Michele R. Darling
22 Circuit Court Reporter
23
24
25

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Brooke Jewell, #279898)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2011-CP-10-4234

APPLICATION FOR

POST-CONVICTION RELIEF

2011 JUN 15 PM 4:28
CLERK OF COURT**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution; 4460 Broad River Road, Columbia, SC 29210
2. Name and location of Court which imposed sentence Charleston County Court of General Sessions; 100 Broad Street, Charleston, SC 29401
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2000-GS-10-6747: First degree burglary
 - (b) 2000-GS-10-6748: Criminal sexual conduct in the first degree
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 2000-GS-10-6747: 15 years imprisonment
 - (b) 2000-GS-10-6748: 21 years imprisonment

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty X
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) After-discovered evidence warrants a new sentencing proceeding

- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Memorandum of Law in Support of Application for Post-Conviction Relief
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Application for Post-Conviction Relief
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Charleston County Court of Common Pleas; 100 Broad Street, Charleston, SC
- 29401
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. Dismissed
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

i. October 29, 2009

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

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

(a) The evidence is after-discovered pursuant to S.C. Code Ann. Section 17-27-45(C)

(b) _____

(c) _____

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

(a) your arraignment and plea? Yes

(b) your trial, if any? _____

- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Andrew Savage, III; Savage & Savage, PA, P.O. Box 1002, Charleston, SC 29402
- ii. Tricia A. Blanchette; Law Office of Tricia A. Blanchette, LLC, P.O. Box 12725, Columbia, SC 29211
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Plea and Sentencing
- ii. Application for Post-Conviction Relief
- iii. _____
19. State clearly the relief you seek in filing this application:
Vacate sentences and remand for a new sentencing proceeding
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA

County of Charleston

)
)
)

VERIFICATION

I, Jeremy A. Thompson, attorney for the Applicant, 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.

SWORN to and subscribed before me this 13th
day of June, 2011.

[Signature] (L.S.)
Notary Public

My Commission Expires: 1/3/17



STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
Brooke Jewell, #279898.	)	2011-CP-10-4234
	)	
Applicant.	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	
State of South Carolina.	)	
	)	
Respondent.	)	
	)	

In response to the post-conviction relief application filed June 15, 2011, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the October 2000 term of the Charleston County Grand Jury for burglary - 1st degree (00-GS-10-6747) and criminal sexual conduct first degree (00-GS-10-6748). Andrew Savage, Esquire, represented the Applicant. On November 15, 2001, the Applicant pled guilty as indicted. The Honorable Edward Cottingham sentenced him to confinement for fifteen (15) years for burglary – 1st degree and twenty-one (21) years for CSC – 1st degree. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. William J. LaLima, Esquire, represented Applicant on appeal. Following an Anders brief, the South Carolina Court of Appeals dismissed Applicant's appeal. State v. Jewell, Op. No. 2005-UP-296 (S.C. Ct. App. filed April 25, 2005). The Applicant then filed a petition for writ of

certiorari with the Supreme Court of South Carolina. He then filed a Motion to Dismiss, in which he indicated that he wished to voluntarily dismiss the Petition for Writ of Certiorari. The motion was granted by Order dated April 21, 2006. The Remittitur was issued on April 25, 2006.

The Applicant subsequently filed his first application for post-conviction relief on May 24, 2006, in which he raised the following grounds for relief:

1. Ineffective assistance of counsel in that:
 - a. counsel did not prepare for trial and failed to advise Applicant that evidence seized might be successfully suppressed at a trial by jury on the basis of Fourth Amendment claims;
 - b. counsel did not prepare for trial and failed to advise Applicant that statements made to authorities might be successfully suppressed at a trial by jury on the basis of Fifth Amendment claims;
 - c. counsel did not prepare for trial due to conflicts of interest which prejudiced the criminal defense.
2. Involuntary guilty plea in that:
 - a. counsel failed to advise Applicant that evidence seized might be successfully suppressed if Applicant exercised his right to a jury trial;
 - b. counsel did not prepare for trial and failed to advise Applicant that statements made to authorities might be successfully suppressed at a jury trial on the basis of Fifth Amendment claims;
 - c. counsel did not prepare for trial due to conflicts of interest.
3. Ineffective assistance of appellate counsel in that:
 - a. counsel failed to investigate and claim relevant issues for direct appeal of conviction and sentence.

The State made its Return on July 27, 2006. After hiring a private investigator and working with counsel in preparation for the case, Applicant elected to withdraw his PCR application with prejudice. The Honorable Deadra L. Jefferson, Tricia Blanchette, Esquire, and the Applicant each signed a Consent Order of Dismissal with Prejudice, which was filed on October 29, 2009.

Incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department

of Corrections, the guilty plea transcript, the direct appeal records, the Final Anders Brief of Appellant, the Court of Appeals' Opinion dismissing the appeal, the Petition for Writ of Certiorari, the Motion to Dismiss, the South Carolina Supreme Court's Order granting the motion to dismiss and dismissing the petition, the Remittitur dated April 25, 2006, the first PCR application, the State's Return thereto, and the Consent Order of Dismissal with Prejudice.

II.

In his current and second application, the Applicant asserts the following grounds for relief:

- I. Newly discovered evidence in that Applicant had his blood tested on June 17, 2010 and the results demonstrate that Applicant is a "poor metabolizer" of prescription drugs, which means he is "at increased risk of drug-induced side effects due to diminished drug elimination."

III.

First, Respondent submits that the current PCR application must be summarily dismissed because it is successive to the Applicant's prior application. The Uniform Post Conviction Procedure Act provides that:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (2003). Successive applications are disfavored and the burden is on the Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Respondent submits that Applicant has failed to establish sufficient reason why he could not have raised this allegation in his previous application; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice, 305 S.C. 448. Respondent requests that the Court summarily dismiss the application as successive.

IV.

Respondent submits that this application for post-conviction relief should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10, et. seq. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant pled guilty on November 15, 2001. The Remittitur from the direct appeal was issued on April 25, 2006. Therefore, he was required to file an application before April 25, 2007. This application was filed on June 15, 2011, which was more than four (4) years after the statutory filing period expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law." Therefore, this Court should summarily dismiss the application for post-conviction relief for failure to file within the time mandated by statute.

V.

The Applicant alleges that newly discovered evidence exists in that Applicant had his blood tested on June 17, 2010 and the results demonstrate that Applicant is a "poor metabolizer" of prescription drugs, which means he is "at increased risk of drug-induced side effects due to diminished drug elimination." An applicant requesting a new trial based on after-discovered evidence must show that the evidence:

(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). The Applicant has not shown that the alleged evidence would change the result if a new trial was had or that it is material to the issue of guilt or innocence. With the exercise of due diligence, the Applicant also could have had his blood tested prior to the plea hearing or prior to the filing of his first PCR application. This test was administered nearly ten (10) years after the date of the offenses. The Court should summarily dismiss this allegation.

VI.

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

VII.

WHEREFORE, Respondent moves to summarily dismiss the application based on successiveness, filing after the statute of limitations had expired, and failure to establish a claim for newly discovered evidence.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR RESPONDENT

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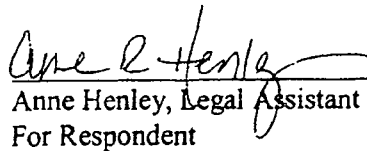
Oct. 24, 2011.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
	)	2011-CP-10-4234
	)	
BROOKE JEWELL. #279898	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** and the **Proposed Conditional Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Brooke Jewell, #279898
Broad River Correctional Institution
4460 Broad River Rd
Columbia, SC 29210

DATED this 24th day of October, 2011


 Anne Henley, Legal Assistant
 For Respondent

EXHIBITS

For The Court:

No. 1 For Identification

19:6

1 MS. RATIGAN: Your Honor, the case is Brooke
2 Jewell versus the State.

3 THE COURT: Is it a motion to dismiss on the
4 statute of limitations?

5 MS. RATIGAN: Yes, Your Honor, may it please the
6 Court.

7 The State has filed a return and motion to
8 dismiss this matter. The full procedural history is
9 laid out in that return.

10 But just very briefly Mr. Jewell pled guilty to
11 burglary first, CSC first back in November of 2001. He
12 received concurrent sentences of 15 years on the
13 burglary first, and 21 years on the CSC first.

14 He had an appeal that was dismissed by the Court
15 of Appeals after an Anders brief. And then he
16 voluntarily dismissed his petition for writ of
17 certiorari.

18 Mr. Jewell filed a PCR application in 2006. He
19 voluntarily withdrew that application. That was
20 memorialized in a consent order signed by Judge
21 Jefferson in October of 2009.

22 Mr. Jewell then filed a second PCR application
23 in June of 2011. We filed our return and motion to
24 dismiss based on the expiration of the statute of
25 limitation, and the presumption against successive PCR

1 applications. And therefore, we ask the matter be
2 dismissed with prejudice at this time.

3 It is my understanding Mr. Thompson has an
4 argument about after-discovered evidence, which I can
5 then address for the Court after he makes an argument.

6 THE COURT: Certainly. And I have reviewed the
7 file and the full transcript. So I'm happy to hear
8 from you.

9 MR. THOMPSON: May it please the Court, Your
10 Honor. Let me begin by asking, do you have the -- this
11 was attached to this GenALex before it was attached to
12 the memorandum of law.

13 Do you have a copy of that?

14 THE COURT: I do not know that I have seen that.
15 Counsel, if you have an extra copy, I'm happy for you
16 to approach and I will take a look at it.

17 MR. THOMPSON: And I'm going to hand up some
18 cases as well.

19 THE COURT: Sure.

20 MR. THOMPSON: And Everything that I'm going to
21 hand up I have already provided to opposing counsel.

22 THE COURT: Okay.

23 MR. THOMPSON: Essentially, Your Honor, as you
24 know from reading over the transcripts, Mr. Jewell
25 alleged, or at least presented a good deal of evidence

1 in mitigation evidence at the plea and during the
2 sentencing that his actions, this CSC first and
3 kidnapping, were I guess shall we say caused by Paxil,
4 that he was on Paxil at the time of the offense and
5 that his behavior at that point in time was due to the
6 adverse side effects he was suffering from Paxil.

7 THE COURT: Right. And I believe the transcript
8 of the guilty plea, three of four different doctors or
9 therapists testified from what I recall, correct?

10 MR. THOMPSON: Yes, that's correct.

11 And it is our position, Your Honor, that the
12 evidence that was presented at the sentencing is
13 primarily related -- it's primarily therapists,
14 primarily psychologists and psychiatrists who were
15 testifying, or not testifying but was informing Judge
16 Cottingham that they had met with Mr. Jewell, evaluated
17 Mr. Jewell and it was their opinion that Paxil may have
18 at least to some degree contributed to the offense.

19 Now, we are not going to do the full-blown
20 hearing today. This is just on the statute of
21 limitation. It is our position, Your Honor that the
22 tests, the GenALEx test which the date of the report on
23 that is June 17th, 2010, that that test shows something
24 more significant than what we prepared at the
25 sentencing proceeding.

1 That that test shows hard science, hard proof
2 that he was suffering from the worst side effects from
3 Paxil. And in trying to get an explanation, I'm not an
4 expert on this, but from talking to people about it,
5 basically my understanding -- and I'm going to also
6 hand up --

7 THE COURT: Well, basically it found him to be a
8 poor metabolize, correct?

9 MR. THOMPSON: Yes. Yes. A poor metabolizer of
10 the drug. I'm going to hand up --

11 THE COURT: Okay.

12 MR. THOMPSON: That is a document I pulled off
13 of GenALex's website which kind of describes -- and I
14 know the report has it in there as well -- but
15 describes what a poor metabolizer is, and how they are
16 specifically affect by adverse drug effects.

17 And basically our position is that this new test
18 proves essentially what the experts at the sentencing
19 hearing could only speculate to; that he was a poor
20 metabolizer of Paxil, that this chromosome that he --
21 that he is a poor metabolizer of 2(D)6 is directly
22 affected by Paxil. Paxil directly affects that
23 chromosome.

24 And that, like I said, this is evidence that is
25 in greater -- I guess holds greater scientific weight

1 than did the psychiatry and psychology evidence that
2 was presented at the sentencing.

3 THE COURT: Let me ask you this question and
4 then I want you to continue.

5 It doesn't really prove that that's what
6 happened. But it proves that if that particular side
7 effect was something that he was experiencing, that
8 perhaps his ability to eliminate the drug was
9 compromised, correct?

10 MR. THOMPSON: Yes.

11 THE COURT: So there are a couple of steps you
12 have to go through before you can say it proved what
13 the doctors hypothesized at the hearing, correct?

14 MR. THOMPSON: Yes. But it may be represented
15 by an overstated our position, but at least --

16 THE COURT: That's your job. I think it's my
17 job to ask you questions about it. So you are doing a
18 great job. Thank you.

19 MR. THOMPSON: Thank you. But I think again
20 that it is of greater scientific -- I guess hard
21 science is the way I have been terming it, it's hard
22 science evidence that he was actually suffering from
23 Paxil's adverse side effect as opposed to just
24 speculation.

25 Now, granted it was from psychologists and

1 psychiatrists, but speculation. No one can prove it.
2 And that is what we assert that this test shows, is
3 that it can actually -- again, a couple of steps along
4 the way get to a point where we can show that he was
5 actually suffering from these side effects. That it is
6 extremely likely that he was suffering from these side
7 effect at the time of the offense.

8 Now, we are alleging under 17-27-20 I believe
9 it's (a)(4), that this new evidence is after-discovered
10 evidence not previously presented and heard that
11 requires vacation in particular of the sentence in the
12 interest of justice.

13 It is our position that this new evidence would
14 have given Judge Cottingham a -- or at least now shows
15 again that the mitigation evidence was definite. That
16 it's not just speculation, it was definite and that
17 that would have made a difference at the sentencing
18 procedure.

19 THE COURT: Well, could have been construed as
20 such. Correct?

21 MR. THOMPSON: Yes.

22 And that under section 17-27-45, which is the
23 statute of limitations provision for the PCR statute.
24 And specifically under subsection (c) it says, if the
25 applicant contends that there is material evidence and

1 material -- that there is evidence of material fact not
2 previously presented and heard, that it's got to be
3 filed within -- the PCR application has to be filed
4 within one year after the date of actual discovery of
5 the facts by the applicant, or after the date when the
6 facts could have been ascertained by the exercise of
7 reasonable diligence.

8 In particular, Your Honor, I do have -- and I
9 can present testimony on the argument that he has filed
10 within one year of his reasonable diligence that he
11 could have discovered this evidence any time sooner
12 than he did.

13 But essentially, Your Honor, under the actual
14 discovery portion of the statute, and the statute of
15 limitations, is that within one year of actually
16 discovering the evidence you have to file your PCR
17 application.

18 This PCR application was filed June 15, 2011.
19 The report dated June 17, 2010. Close by two days, but
20 it's there. We are within one year of the actually
21 discovery.

22 And that's the report, not exactly when he
23 discovered them, Mr. Jewell discovered them. But at
24 least within one year of the report date we are within
25 that one year.

1 And I handed up, Your Honor, Tilley versus State
2 and Coats versus State. Tilley versus State is 334
3 S.C. 24, 511 S.E.2d 689. Coats is 352 S.C. 500, 575
4 S.E.2d 557.

5 Tilley is a 1997 decision. Coats is a 2003
6 decision. Tilley is primarily a successive application
7 decision. Tilley had filed four application. He filed
8 three PCR applications, then discovered that he was not
9 parole eligible and filed a PCR application within one
10 year or -- yeah, within one year of discovering that.

11 In that case the Supreme Court -- the Supreme
12 Court specifically held, we find respondent's claim
13 concerning parole eligibility are not successive. He
14 learned that he was ineligible for parole on October
15 26, 1995 and within a month he filed the current PCR
16 application.

17 He could not have raised this claim in a
18 previous PCR application because he did not know about
19 the claim until October 26th, 1995.

20 And so in terms of successiveness, if you didn't
21 know about the facts you get one year from the date you
22 discover them to file your PCR. We are within one year
23 on that.

24 THE COURT: Let me ask you a couple of questions
25 just for my edification. And it may be more pertinent

1 potential evidentiary hearing. I just want to make
2 sure that I'm clear.

3 I'm seeing this report dated June 17, 2010
4 discussing poor metabolizers, altered metabolizers, et
5 cetera.

6 The collection date of 6/1/2010, is that the
7 collection date of the specimen that GenAEx evaluated
8 to determine what type of metabolizer Mr. Jewell is?

9 MR. THOMPSON: Yes.

10 THE COURT: Okay. And correct me if I'm wrong,
11 but he pled guilty on November 15, 2001; is that
12 correct?

13 MR. THOMPSON: Yes.

14 THE COURT: Okay. Why was this collection not
15 done until 6/1/2010?

16 MR. THOMPSON: Because Mr. Jewell did everything
17 -- and that goes to the reasonable -- reasonable --
18 within a reasonably discovering date in terms of the
19 17-27-45 (c).

20 Mr. Jewell did everything possible he could to
21 discover that this test existed. And that's what I can
22 present testimony on through Mr. Jewell.

23 But essentially, Your Honor, it is our position
24 that Mr. Jewell, Mr. Jewell engaged in a PCR and a
25 lawsuit against GlaxoSmithKline, the makers of Paxil,

1 in the years following this plea.

2 And that he, throughout the course of all that
3 time, was trying to find this text, was trying to find
4 something that could do what we believe this test does.

5 THE COURT: Was he represented by counsel in the
6 product liability action?

7 MR. THOMPSON: Yes, by Josh Kendrick. And he
8 was represented ultimately in the PCR by Tricia
9 Blanchette.

10 THE COURT: Let me ask you this next question.
11 The penalty for burglary, as I understand it at the
12 time, was 15 to life, correct?

13 MR. THOMPSON: Yes.

14 THE COURT: And what was the criminal sexual
15 conduct first penalty?

16 MR. THOMPSON: Up to 30 I believe.

17 THE COURT: Right. And he got 15, the minimum I
18 think. And Judge Cottingham structured the sentence as
19 15 years for the burglary, 21 years for the CSC first
20 and ran them concurrent?

21 MR. THOMPSON: Yes.

22 THE COURT: He understands he could have run
23 those consecutively had he so chosen, correct?

24 MR. THOMPSON: Yes.

25 THE COURT: Okay. I mean, that's neither here

1 nor there as to the statute of limitations and
2 successive petition argument. Whenever I was on the
3 other side in your seat where you are sitting, I was
4 always careful to advise my clients in PCR cases that
5 you might actually get a worse situation than you had
6 before.

7 MR. THOMPSON: Yes.

8 THE COURT: And I just throw that out there for
9 the what it's worth category.

10 All right. Anything else you want to let me
11 know before I hear in reply from the attorney general?

12 MR. THOMPSON: The only other thing I wanted to
13 mention, Your Honor, is with regard to Coats, Coats is
14 an actual statute of limitations issues, not
15 successiveness.

16 And it also says, and it's in the very last
17 paragraph, petitioner files a PCR application raising
18 that claim within -- and it's another parole
19 eligibility case -- within one year after the date of
20 actually discovery of the fact that he was patrol
21 ineligible.

22 So under both successiveness and statute of
23 limitations, our Supreme Court has held that actual
24 discovery is the date that you go by. And that we are
25 within one year of the date of the test. And that's

1 when he discovered it, and he submitted it timely.

2 THE COURT: Okay. Thank you, sir.

3 Yes, ma'am.

4 MS. RATIGAN: Thank you, Your Honor. Just very
5 briefly. It appears that Mr. Jewell is trying to argue
6 the existence of after-discovered evidence in order to
7 circumvent that statute of limitations.

8 We would argue, however, that this does not
9 qualify as after-discovered evidence under the Hayden v
10 State test. That case is cited on page 5 of the motion
11 to dismiss.

12 Hayden sets forth the elements an applicant must
13 prove to show that it is after-discovered evidence. It
14 says you need to prove all five of those elements. He
15 cannot prove at least two.

16 First of all, he could not by the exercise of
17 due diligence have been discovered before the trial.
18 We submit Mr. Jewell cannot maintain that claim today.
19 It is very clear from the transcripts he knew at the
20 time he pled guilty in 2001 that the use of Paxil was
21 an issue in this case; therefore, he could have had a
22 test or tried to discover this prior to trial if he
23 knew Paxil was already an issue.

24 Second of all, Hayden states it needs to be
25 material to the issue of guilt or innocence. This

1 evidence is not material to the issue of guilt or
2 innocence. By Mr. Thompson's own admission, this was
3 something that would have been used for sentencing;
4 therefore, we would argue under *Hayden v State* this not
5 proper after-discovered evidence and therefore it
6 should not be used to circumvent the statute of
7 limitations.

8 I would also note, Your Honor, that he did file
9 a PCR application back in 2006. He retained counsel,
10 according to the consent order. He also retained an
11 investigator in this case. However, after he filed
12 that application in '06 he voluntarily withdrew it in
13 October of 2009.

14 He did not have this blood work done, it
15 appears, for about another eight months after that. We
16 would argue that he hired an attorney, he hired an
17 investigator. This is something that at a minimum
18 could have been gone into at his first PCR hearing.

19 We believe he hasn't met his burden of proving
20 that he is entitled to an evidentiary hearing on the
21 merits of the case.

22 THE COURT: Anything further?

23 MR. THOMPSON: If Your Honor is inclined to --
24 and I don't want to presuppose your ruling -- but if
25 Your Honor is inclined to agree with that argument, I

1 would like to present testimony of my client's efforts
2 in terms of trying to discover this science before now.

3 Because it is our position that he did
4 everything possible to discover it through his first
5 PCR, through his lawsuit against GlaxoSmithKline. And
6 that under no circumstances would he have waited any
7 longer to do this test had he known about it. That he
8 did it immediately.

9 THE COURT: Let me ask you this question. As to
10 requirement four of the Hayden v State analysis, in the
11 context of the guilty plea that your client gave and
12 made, and I have reviewed the entire transcript, I
13 reviewed the pretrial status proceeding that Judge
14 Pieper had, there is no question in my mind that his
15 guilty plea was knowing, intelligent and voluntary
16 supported by an excellent attorney who put up the
17 doctors to testify there and the therapist.

18 How is this test then material to his guilt or
19 innocence? I understand that it was presented in
20 mitigation for sentencing purposes, but I don't think
21 there is a question any longer of his guilt.

22 MR. THOMPSON: No, Your Honor, we are not
23 contesting his guilt. But the -- and I will quote from
24 the return. An applicant requesting a new trial based
25 on after-discovered evidence must show that the

1 evidence -- and then it goes through the test.

2 We are not requesting a new trial. We are
3 requesting a new sentencing. We -- and that is what
4 the statute provides for. 17-27-20 says, conviction or
5 sentence.

6 I'm not aware of any case ever ruling on the
7 sentencing aspect of it. But 17-27-20 and 45 (c) are
8 both clear that it's conviction or sentence. It does
9 not have to be related to guilt or innocence, it has to
10 be this is material evidence that goes toward the
11 sentence that was imposed.

12 And that that's what the statute envisions.
13 And, yes, Hayden applies to a motion for a new trial
14 based on after-discovered evidence, but that's not what
15 we are asking. And I believe that the Hayden test
16 would be changed to must be material to the issue of
17 sentencing.

18 THE COURT: Is there any law on that? I have
19 not seen a case on that in South Carolina.

20 MR. THOMPSON: I haven't seen one.

21 MS. RATIGAN: I'm not aware of any, Your Honor.

22 THE COURT: Here's what I'm going to do. As to
23 anything except the issue of whether he could have,
24 through the exercise of due diligence discovered this
25 test and the result of the test before the trial, or

1 any other possible ground that has been raised that
2 isn't supported by the June 17, 2010 test, the motion
3 to dismiss is granted as to the statute of limitations.

4 As to the specific testing and the result of
5 this test, I think it's more appropriate to resolve the
6 could be discovered, or possibly could have discovered
7 question at the summary judgment stage or after a full
8 blown evidentiary hearing.

9 I'm going to deny the motion solely on that
10 very, very slim ground. I think you are entitled to
11 show why he could not, or argues that he could not have
12 discovered it.

13 I think the State is allowed to show, you know,
14 how long this test has been out here, and whether he
15 could have or should have discovered it for purposes of
16 whether or not it is indeed after-discovered evidence
17 that could be considered in terms of the mitigation.

18 So does that make sense what we are dealing
19 with?

20 MS. RATIGAN: Yes, Your Honor. Would you like
21 me to do a proposed order just to make sure we are all
22 kind of --

23 THE COURT: A brief proposed order would be
24 helpful.

25 That being said, the result you're asking for

1 essentially is a new sentencing.

2 MR. THOMPSON: Yes.

3 THE COURT: And you got a mandatory minimum
4 here.

5 MR. THOMPSON: And we understand.

6 THE COURT: You need to warn your client that
7 sometimes you want to be careful what you ask for. So
8 I say that with an abundance of having no idea who you
9 would be in front of if you did indeed get a new
10 sentencing, but. I throw that out there.

11 MR. THOMPSON: Will do, Your Honor.

12 THE COURT: Okay. That will be the ruling of
13 the Court.

14 Anything else you all need to put on the record
15 with the respect to the hearing today?

16 MR. THOMPSON: I don't believe so.

17 MS. RATIGAN: No, Your Honor.

18 THE COURT: You all both did an excellent job.
19 Counsel, is this my copy to keep or do you need
20 this back?

21 MR. THOMPSON: That's your copy.

22 THE COURT: All right. I'm going to put it with
23 the file. I guess we will get your hearing set with
24 our next term of PCR's, or whenever you all can arrange
25 to have it done.

1 And I will make all of this -- I think we should
2 mark this as a Courts Exhibit. Anybody have an
3 objection to that?

4 MS. RATIGAN: No, Your Honor.

5 MR. THOMPSON: No.

6 (Court's Exhibit No. 1 is marked for
7 identification.)

8 THE COURT: Okay. Counsel, if you will submit a
9 proposed order. Copy counsel for the petitioner on it
10 and I will wait a couple days and get that order done.

11 MS. RATIGAN: Thank you, Your Honor.

12 MR. THOMPSON: Thank you, Your Honor.

13 THE COURT: Thank you. Good luck to you.

14 (Whereupon, the proceedings in this matter
15 before the Court were adjourned.)

16 * * * * *

C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER,
Official Court Reporter for the Ninth Judicial
Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate, and
PARTIAL transcript of record, and of all the
proceedings had and evidence introduced in the above
captioned case, relative to appeal, in the Circuit
Court for South Carolina, on the indicated date.

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

-----*Anne Bouley Meyer*-----

Anne Bouley Meyer, RPR
Circuit Court Reporter

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1	I N D E X				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	ELENA PELETSKAYA	8	11	12	--
4	DAVID KURTZ	13	15	33	--
5	ANDREW SAVAGE	35	45	46	--
6	BROOKE JEWELL	47	--	--	--
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1	E X H I B I T S			
2	NO.	DESCRIPTION	ID.	EV.
3	Applicant's 1	Report	10	10
4	Applicant's 2	Dr. Kurtz's CV	14	14
5	Applicant's 3	Graph	24	24
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1 (December 6, 2013.)

2 THE COURT: All right. Are you Brooke
3 Jewell?

4 THE APPLICANT: Yes, sir.

5 THE COURT: You're here on an application for
6 post-conviction relief on undiscovered evidence, arguing
7 the results of a 2010 blood test showed that he is a poor
8 metabolizer of prescription drugs that entitles him to a
9 new sentencing hearing. I have no idea what the
10 relevance of that is or what that means, but I guess
11 that's what I'm here for.

12 Are we ready?

13 MR. THOMPSON: Yes, Your Honor.

14 THE COURT: Let's go. What do you want to
15 tell me about it?

16 MR. THOMPSON: May it please the Court: Your
17 Honor, our sole allegation of this hearing is after
18 discovered evidence requiring a new sentencing proceeding
19 pursuant to South Carolina code section 17-27-20(a)4 and
20 that this proceeding is timely pursuant to section
21 17-27-45(c).

22 To give you a bit of a brief procedural and
23 factual background, Your Honor, the incident in this case
24 happened in 2000. My client, Mr. Jewell, was prescribed
25 in particular interest in this case Paxil,

1 antidepressant. He was a college graduate, had no prior
2 history of any criminal conduct, was working a job, had
3 no issues whatsoever, and on the day of the incident, he
4 entered the apartment of the victim in this case, waited
5 for her to come into her apartment where he accosted her
6 and engaged in forceable sexual conduct with her and then
7 left the scene.

8 He was subsequently charged with burglary in
9 the first degree and criminal sexual conduct in the first
10 degree for those actions. He retained Mr. Andy Savage,
11 who is here today, to represent him on these charges, and
12 in the -- basically in the lead-up to the guilty plea,
13 the main issue was to what -- basically to what degree
14 could they determine that Paxil had been a contributing
15 factor to the offense.

16 And, in fact, Mr. Savage had four experts
17 presented at the sentencing proceeding. I believe it was
18 three psychologists or psychiatrists and then one expert
19 on Paxil, a national expert on Paxil. Mr. Jewell was
20 sentenced to 21 years imprisonment and 15 years
21 imprisonment with the sentences to be served
22 concurrently. Following that proceeding, Mr. Jewell
23 searched for more and more evidence to try and indicate
24 that Paxil was indeed the major contributing factor, if
25 not the contributing factor, to this incident.

1 He found out about a DNA test that could be
2 done through a company by the name of Genelex that could
3 test his drug sensitivity. That is primarily what we are
4 here today on, after he had that test, this
5 post-conviction relief application within one year of
6 receiving that test result, basically, the test result is
7 that he is a poor metabolizer of drugs.

8 I have an expert here today, Dr. Kurtz, from
9 the Medical University of South Carolina who is going to
10 testify as to basically what him being a poor metabolizer
11 means, and what that -- how that affects -- the side
12 affects of the drugs and stuff like that, and
13 essentially, Your Honor, we are asking you to grant
14 Mr. Jewell a new sentencing proceeding based on this
15 after discovered evidence.

16 It's our contention that had the evidence
17 been presented at the sentencing proceeding, this is
18 different than psychiatry and psychology information.
19 This is pharmacology information. I don't mean any
20 disrespect to psychologists and psychiatrists. This is
21 more hard science, in my opinion, kind of evidence that
22 is more than just, We think this is what happened. This
23 is a more definite kind of science, in our opinion.

24 So we would be asking Your Honor to grant him
25 a new sentencing as a result of this proceeding.

1 THE COURT: All right. He got 21 years?

2 MR. THOMPSON: Yes, Your Honor.

3 THE COURT: You could 30 for criminal sexual
4 conduct, right?

5 MR. THOMPSON: And life for burglary.

6 THE COURT: You understand that? If you get
7 a new sentencing hearing, you could get more than what
8 you have now?

9 THE APPLICANT: Yes, Your Honor.

10 THE COURT: You understand there is nothing
11 to prohibit another judge from coming back and saying,
12 You know what? I disagree with Judge Cottingham. I
13 thought he was kind of soft on the guy, and he could give
14 you a lot more time than 15 years and 21.

15 Do you understand that?

16 THE APPLICANT: I do.

17 THE COURT: And you still want to go forward?

18 THE APPLICANT: Yes, sir.

19 THE COURT: Okay. Call your witness.

20 MS. WILSON: Your Honor, if I may clarify one
21 thing on the record for you, it's my understanding that a
22 remedy for newly discovered evidence is a new trial.

23 THE COURT: Well, he pled guilty. I assume
24 he wants just to plead guilty again.

25 MR. THOMPSON: We want a new sentencing. We

1 don't want to overturn the actual conviction.

2 THE COURT: Okay. It went to trial? He pled
3 guilty, so you don't want to set aside his plea, you just
4 want to --

5 MR. THOMPSON: Section 27-28-4 states that
6 there exists evidence of material facts not previously
7 heard, presented and heard, that requires vacation of the
8 conviction or sentence in the interest of justice.

9 We believe Your Honor has the authority to
10 grant just a new sentencing proceeding because it
11 requires that the sentence be vacated, not the
12 conviction.

13 THE COURT: Okay. Call your witness.

14 MR. THOMPSON: We would call Dr. Elena
15 Peletskaya.

16 ELENA PELETSKAYA,
17 having been first duly sworn,
18 was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. THOMPSON:

21 Q. Dr. Peletskaya, who are you employed with?

22 A. I'm employed with a company named Genelex.

23 Q. And what is your position at Genelex?

24 A. I am a senior scientist.

25 Q. And what do you do at Genelex?

1 A. I perform technical supervision of the laboratory
2 procedures and develop new access, supervise the lab.

3 Q. And in connection with that, I guess, in
4 connection, what does Genelex do generally, what kind of
5 services do they offer?

6 A. Genelex does genetic testing, primary drug
7 sensitivity testing. We test several different genes or
8 genotypes that have clinically relevant variants in genes
9 that could contribute to sensitivity to different drugs,
10 especially if there were multiple drugs involved.

11 MS. WILSON: Excuse me. Could the witness
12 speak up a little bit.

13 BY MR. THOMPSON:

14 Q. Did you say you're the director of the laboratory?

15 A. No. I'm with the director. I'm a technical
16 supervisor.

17 Q. And in that position, do you -- would you oversee
18 the reports that are issued by Genelex when testing is
19 done?

20 A. Yes, I do.

21 Q. Can I approach the witness, Your Honor?

22 THE COURT: Uh-huh. Go ahead. You don't
23 have to ask permission.

24 BY MR. THOMPSON:

25 Q. Do you recognize that document?

1 A. I do.

2 Q. And don't talk about the specific information on
3 the document, just what is this document?

4 A. This is a standard report that Genelex issues
5 after drug sensitivity is given to a doctor and the
6 patient.

7 Q. And is this the kind of document that is kept in
8 the regular course of business at Genelex?

9 A. Yes.

10 Q. And produced?

11 A. Yes.

12 MR. THOMPSON: Your Honor, I would like to
13 admit this as Applicant's 1.

14 THE COURT: Fine.

15 MS. WILSON: No objection.

16 (Applicant's Exhibit No. 1 was marked for
17 identification and admitted into evidence.)

18 BY MR. THOMPSON:

19 Q. Who was the patient on this test?

20 A. Brooke A. Jewell.

21 Q. And what are the results of the test?

22 A. The results of test are --

23 MS. WILSON: Objection, Your Honor. She is
24 just the technical supervisor. Can we get some
25 questioning about if she actually performed the test to

1 be able to say what the results are, analyze them?

2 MR. THOMPSON: I'm not asking her to analyze
3 them, I'm just asking her to say what the report says.

4 THE COURT: Well, typically we call that
5 hearsay. What are you going to ask her about it?

6 MR. THOMPSON: The document is in evidence.

7 THE COURT: The document is in evidence.
8 What -- you admitted you didn't object to that a few
9 minutes ago, so what are you objecting to specifically?

10 MS. WILSON: Her being able to explain the
11 test results.

12 THE COURT: Well, you didn't ask her to
13 explain. You said what are the results, so --

14 MS. WILSON: Withdrawn.

15 THE COURT: We can read it, or I can read it.
16 Go ahead.

17 BY MR. THOMPSON:

18 Q. What are the results of that?

19 A. The report says that it's a DST-CYT 2D6 *4 *4 poor
20 metabolizer. Basically, it's a type of one of the
21 variants we test for, and that is what kind of genotype
22 and what kind of hemotype is listed here.

23 MR. THOMPSON: No further questions of this
24 witness, Your Honor.

25 THE COURT: She gets to ask.

1 MS. WILSON: Thank you.

2 CROSS-EXAMINATION

3 BY MS. WILSON:

4 Q. Did you perform the test on Mr. Jewell's sample?

5 A. No.

6 Q. Did you know what type of sample was provided to
7 Genelex from Mr. Jewell?

8 A. Yes. I've seen the report. It's a cheek swab,
9 basically. It's a little cotton swab that goes in the
10 mouth.

11 Q. And how often after your office received the
12 sample from Mr. Jewell was it tested?

13 A. I cannot say that from the information on this
14 report, and I need to go from the records to find out.
15 Normal procedure is after we receive the sample, it's
16 three to five days. At the moment when it was up to ten
17 days when the results were released.

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

20 THE COURT: Do you have anything else you
21 want to ask her?

22 MR. THOMPSON: Just briefly, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. THOMPSON:

25 Q. At the top right-hand side of the page, it says

1 collection date 6/1/10, receipt date 6/3/10, and report
2 date 6/7&8/10 date?

3 A. Yes, sir.

4 Q. What is the difference between the collection date
5 and the receipt date?

6 A. Collection date is when the cheek swab was
7 actually taken from the patient, either authorized
8 collector or the patient himself, and the receipt date is
9 when it came in the mail to Genelex.

10 Q. And the report date is the date of the report?

11 A. The report is -- report is when it was actually
12 released to the patient, or the doctor, whichever the
13 case may be.

14 MR. THOMPSON: Beg the Court's indulgence.
15 No further questions, Your Honor.

16 DAVID KURTZ,
17 having been first duly sworn,
18 was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. THOMPSON:

21 Q. Dr. Kurtz, where are you employed?

22 A. I'm a professor of pharmacology at the Medical
23 University of South Carolina in Charleston.

24 Q. If you would, just describe your education and
25 background for what you do, how you came to get to that

1 position.

2 A. I was an undergraduate in Princeton University,
3 graduated in 1973 with a degree in biochemistry, a PhD
4 from Columbia University in New York in 1978, worked at
5 laboratory called Cold Stream Harbor Laboratory in Long
6 Island until 1986 when I took a job here in the
7 department of pharmacology and became a full professor
8 in, I think it was, 2001. I don't remember anymore, to
9 tell you the truth, and my expertise is in molecular
10 biology as well as teaching extensive courses in
11 pharmacology to the medical students, dental students,
12 and graduate students.

13 Q. And at my request, did you prepare a curriculum
14 vitae?

15 A. Yeah, I did.

16 Q. Can you identify that?

17 A. That's my CV.

18 MR. THOMPSON: Your Honor, would like to
19 admit this as Applicant's 2.

20 MS. WILSON: No objection.

21 THE COURT: Admitted.

22 (Applicant's Exhibit No. 2 was marked for
23 identification and admitted into evidence.)

24 BY MR. THOMPSON:

25 Q. Now, you mentioned you studied molecular biology.

1 What does the study of molecular biology entail?

2 A. Usually studying how your genes are converted into
3 proteins, how your genetic makeup affects that, how you
4 can measure those genes, and I recently have done what is
5 called pharmacogenetics, which is specifically how your
6 genetic makeup affects your reaction to various drugs.
7 It's a very expanding, rapidly expanding field.

8 Q. And despite the fact that it is a rapidly
9 expanding field, is the science of molecular biology and
10 pharmaco --

11 A. Pharmacogenetics, is what they call it.

12 Q. Are those, I guess, in the scientific community
13 generally accepted?

14 A. Absolutely, absolutely.

15 Q. And, I believe, in your CV, you have written a
16 number of papers on these issues; is that correct?

17 A. Yes.

18 MR. THOMPSON: Your Honor, at this time I
19 would like to qualify Dr. Kurtz as an expert in molecular
20 biology and pharmacogenetics.

21 MS. WILSON: Just a few questions for the
22 witness, Your Honor.

23 THE COURT: Sure. Go ahead.

24 CROSS-EXAMINATION

25 BY MS. WILSON:

1 Q. Dr. Kurtz, we have your curriculum vitae and it
2 was put into evidence, and I just have a question about a
3 gap in the time on your CV. I might just be misreading
4 it.

5 A. That is left out. It should say associate
6 professor, 1987 to 2000.

7 Q. So that was just an error?

8 A. Yes. That's a typo. Thanks for pointing it out.
9 I'll change it.

10 Q. And have you ever been qualified as a witness to
11 testify in court about molecular biology?

12 A. I testified down in Beaufort, it must have been 17
13 years ago, in the mid-'90's. I'm sorry. I couldn't even
14 tell you the case, the attorney. It had to do with a
15 forensic PCR and whether it was valid, and I never found
16 the outcome of that case. I could probably find it
17 somewhere.

18 Q. So is that you testified one time, you've been
19 qualified one time?

20 A. Yes.

21 Q. And were you called by the plaintiff or the
22 defendant?

23 A. By the defendant.

24 Q. And your background in molecular biology, does
25 that allow you to keep up with the DNA sensitivity

1 testing updates, publications, that type of thing?

2 A. I have to give lectures on that every year to both
3 the graduate students and the dental students, so I'm
4 forced -- not forced, like it's a bad thing. I like to
5 keep up with the newer techniques and their frank
6 increase in accuracy over the last several years.

7 Q. And today you're here to testify about the
8 DNA drug testing done for Mr. Jewell; is that correct?

9 A. That's correct.

10 Q. And have you ever done DNA drug testing?

11 A. Not specifically drug testing. I certainly have
12 done genetic profiles from DNA samples.

13 Q. And have you ever worked in a lab where it was
14 done?

15 A. Oh, you mean the type of analysis that was done at
16 Genelex?

17 Q. Yes. Have you ever worked in a lab that did DNA
18 drug sensitivity testing?

19 A. Yes, very indirectly in the sense that I was
20 involved in a lab that studied the metabolism of drugs
21 and the rate of metabolism of the drug.

22 Q. Are you familiar with the lab results of the state
23 where Mr. Jewell's testing was done? I believe it was
24 Washington state.

25 A. Yes, I believe Seattle, yes. They're a very

1 reputable company, Genelex.

2 Q. And have you published any works or in peer
3 reviewed journals about DNA, drug sensitivity testing?

4 A. Indirectly, if you look at the paper Chee at all,
5 this is a study of the genetics of susceptibility to
6 cancer in response to cigarette smoking.

7 Q. Tell me which one that is.

8 A. Second from the end under peer reviewed. It's on
9 page one.

10 Q. Okay.

11 A. Six.

12 Q. Chee, A.C.?

13 A. Yes, Angela Chee.

14 MS. WILSON: No further questions.

15 THE COURT: What is your position on his
16 being an expert?

17 MS. WILSON: No objection to that.

18 THE COURT: All right.

19 DIRECT EXAMINATION (Cont'd)

20 BY MR. THOMPSON:

21 Q. Dr. Kurtz, the attorney for the State asked you if
22 you worked in a lab. Do you actually have to prepare the
23 test results to be able to testify about what they mean?

24 I'm sorry. Is that a no?

25 A. No, you don't. If the test result is accurate,

1 which it is, you can understand what would be the likely
2 effect of having this particular -- I don't want to call
3 it a mutation, but you can think of it as a mutation on
4 the way Mr. Jewell is going to metabolize drugs, meaning
5 how rapidly they're broken down.

6 Q. And getting to the report, you have reviewed the
7 Genelex report in this case?

8 A. Yes.

9 Q. What does it mean that Mr. Jewell is a poor
10 metabolizer?

11 A. He has a mutation in the gene for an enzyme called
12 cytochrome 2D6, which is the main enzyme in the liver
13 which metabolizes Paroxetine, or Paxil. His particular
14 mutation, which he has two copies of, means that he has
15 no 2D6 activity whatsoever.

16 Q. And what does that mean, that he has no 2D6
17 activity? When Paxil enters his bloodstream, what
18 happens?

19 A. It's broken down by a much slower pathway that
20 isn't understood, probably involving another enzyme
21 called CYP-384, though that hasn't been tested
22 rigorously, but because he is 2D6 deficient, the Paxil,
23 he's going to have both a higher peak level, that is, the
24 peak level that reaches the bloodstream about six or
25 seven hours after administration, and the overall -- how

1 long it's going to stay in the body is going to be
2 considerably higher than a person who is what's called an
3 extensive metabolizer, meaning the majority of the
4 population. About 10 percent of Caucasians actually have
5 this specific mutation in 2D6 called *4.

6 Q. And is every drug metabolized with the 2D6 enzyme?

7 A. No. There are over 50 cytochrome P450s. 2D6 is
8 important for the metabolism of many antidepressants,
9 many drugs prescribed for high blood pressure. It is
10 responsible for the metabolism of codeine to the active
11 form, so because it's so important, and because there are
12 other -- they're called mutations. They're actually
13 called -- polymorphism is the term that's used.

14 90 percent of the population has the normal level
15 of 2D6. They're going to metabolize drugs at a given
16 rate. The other 10 percent have different mutations
17 where they have only 10 percent of the activity that a
18 normal person would have of this enzyme, or in
19 Mr. Jewell's case, no enzyme activity, and because it's
20 so important and because likely the side effects are
21 going to be greatly exacerbated on someone who is *4,
22 routine testing is now done on 2D6, so -- I say now, I
23 mean in the last couple of years, physicians and
24 hospitals will actually recommend -- before they
25 prescribe an antidepressant that is known to be

1 metabolized by this enzyme or certain high blood pressure
2 medications or some anticancer drugs, they routinely test
3 for the possible polymorphisms in 2D6, because you can
4 say with certainty that -- you can't say how much higher
5 the drug level in his bloodstream is going to be, but you
6 can confidently say it's going to be higher.

7 Q. And in connection with this case, did you prepare
8 a report where you did kind of a graphical display of
9 that?

10 A. Yes, yes.

11 Q. And can you identify that document?

12 A. Yes.

13 Q. What is that?

14 A. This is a mini report that I made for you showing
15 the normal -- how a drug would normally be metabolized
16 where it reaches a peak volume, peak concentration in the
17 bloodstream X number of hours after concentration, and
18 that number of hours can vary tremendously from drug to
19 drug and then it's going to eventually be eliminated,
20 usually through the kidneys into the urine, again with a
21 very specific rate, okay?

22 And in the bottom, it shows that if someone is
23 deficient in a major metabolic enzyme, then that person
24 for sure is going to have a higher peak level and a
25 higher area-under-the-curve. Area-under-the-curve means

1 the total amount of drug that stays in the body following
2 that dose.

3 Now, acute side effects that happen almost
4 immediately are usually due to too high of a peak
5 concentration, not always, but usually. More long-term
6 chronic side effects are often due to increased area
7 under the curve, okay, and so we can say with certainty
8 that Mr. Jewell will have a higher peak but we can't say
9 how much higher because we don't know what other enzymes
10 are metabolized in Paxil.

11 Q. And what is the difference between an acute and a
12 chronic side effect?

13 A. An acute side effect is one that is going to
14 manifest very quickly after taking the drug and often
15 much short -- not always, but of shorter duration.
16 Long-term side effects may not manifest themselves for
17 several weeks or months, okay, because the drug is -- I
18 want to say slowly building up in the system. It's just
19 staying in the system much longer.

20 Q. And so I guess -- would you describe -- suicidal
21 tendencies, would that be more acute or chronic?

22 A. The literature seems to show that it's chronic,
23 okay? There are anecdotal reports of someone taking
24 antidepressants who then express suicidal thoughts that
25 day or the next day. It seems more to occur after a

1 period of weeks. I should mention, and we discussed
2 this, the side effects. There are certain side effects
3 of a drug that will happen to almost everyone who takes
4 it, okay, but then there are side effects that can be
5 exceedingly rare and are very idiosyncratic and have to
6 do with that individual.

7 And often what happens is, when a drug goes
8 through clinical testing and clinical trials, at the
9 most, they're testing it on a few thousand individuals,
10 okay, and so if it's a rare side effect, you might never
11 ever see that during a clinical trial. Sometimes you
12 only see a very real side effect after the drug has been
13 in widespread clinical use where it's been used on
14 hundreds of thousands or millions of people.

15 Q. And is there any support in the literature that
16 you reviewed that suggests that violence is a potential
17 side effect of Paxil?

18 A. Yes. There were two peer-reviewed articles
19 showing that there is a -- ranking the increase in -- I
20 wish I could remember what he called it -- violent
21 activities in response to giving both antidepressants,
22 and I believe this paper tested several others, and as I
23 recall, on the table, Paroxetine was the second highest
24 with perhaps a tenfold increase.

25 Then the second paper showed through a series of

1 individual case analysis of a very convincing tie-in for
2 the very rare case that Paxil would seem to lead directly
3 to violence in patients who had never shown it before.

4 Q. And would you consider the violent side effect to
5 be a chronic side effect or an acute side effect?

6 A. Almost certainly could be chronic side effect.
7 The acute side effects of Paxil tend to almost be just
8 the opposite, lethargy, at least initially. There are
9 some reports of constant feeling of restlessness which
10 appears to be a combination of both acute and chronic
11 side effects.. In the cases of reported violence, it
12 tended to be several weeks or months after the start of
13 treatment with Paxil.

14 MR. THOMPSON: I would like to admit his
15 report as Applicant's 3.

16 MS. WILSON: No objection.

17 (Applicant's Exhibit No. 3 was marked for
18 identification and admitted into evidence.)

19 BY MR. THOMPSON:

20 Q. So the hypothetical graph you did at the bottom as
21 compared to the top --

22 A. The top just shows a normal person, so that the
23 top one is supposed to represent the *1 patient at the
24 bottom.

25 Q. So at the bottom, that is a normal graph, and then

1 the *4, which is what Mr. Jewell would be hypothetically.
2 Is this after taking one dose of Paxil?

3 A. Yes.

4 Q. And what was the dosage amount you used to make
5 that calculation?

6 A. This was based on the 20 milligram dose.

7 Q. And would taking Paxil over the course of, say, 20
8 milligrams a day or twice a day for three weeks, what
9 would that do to your brain?

10 A. Well, what it would do -- and I wish I would have
11 included this. You would get a series of these curves,
12 each overlapping on each other, that would essentially go
13 higher and higher in this case because he's never
14 completely getting rid of the first dose before he takes
15 the next one, and so you get like you're going up the
16 stairs, for lack of a better way to put it.

17 Q. And the higher and higher you get up the stairs,
18 the more and more likely that you're going to be
19 suffering from identified side effects?

20 A. Any side effect.

21 Q. Now, you can't tell us specifically which side
22 effects?

23 A. No.

24 Q. Is that -- that's not something that your science
25 can do?

1 A. No.

2 Q. What would you -- let me rephrase that. Would a
3 psychiatrist or psychologist, if they said hypothetically
4 that Mr. Jewell was suffering from what they believed to
5 be the violent side effect of Paxil, would your
6 conclusion support that finding?

7 A. Yeah.

8 Q. Now, the specific research about 2D6 and Paxil and
9 how they interrelate, how much was of that was known in
10 2000?

11 A. It was known among the scientific community. I
12 don't think it was that well-known to the general public,
13 and certainly routine testing was not done.

14 Q. You testified earlier it's only within in the last
15 couple years that -- who would have been recommending
16 that this testing be done for Paxil as prescribed?

17 A. Well, now it's a psychiatrist or, if it's admitted
18 in a hospital, it would be the hospital administration
19 that would do the test. You can think of it as the basic
20 science had been done and pretty well understood, even as
21 early as the late 1980s. Routine testing really wasn't
22 available at the time because the techniques didn't
23 exist, okay?

24 Secondly, there wasn't like there is now
25 recognition of how important your genetic makeup is --

1 let me rephrase it.

2 It was always understood how important your
3 genetic makeup is and how you metabolize, break down
4 drugs, and in terms of being able to identify specific
5 mutations with specific drugs, that only started to
6 become routine in the late 80's and 90's as more and more
7 of the population was analyzed, okay?

8 So you can think of it -- it was well-known in the
9 scientific literature through -- let's say by the
10 mid-'90s, but it certainly wasn't known or used by the
11 general public until, I would say, the mid-2000s, at
12 least in the case of 2D6.

13 Q. And would Mr. Jewell be prescribed Paxil now?

14 A. I doubt it. I mean, what -- the first wave, when
15 this was recognized as a very important side effect for
16 just about any of the antidepressants that are
17 prescribed, what psychiatrists will do is either lower
18 the dose tremendously, if he were 2D6 *4, or use another
19 one that is metabolized by a different pathway, like
20 Citrulline or a couple of the others where 2D6 isn't
21 involved, and so his genotype would not be a problem.

22 I can show you graphs of recommendations by the
23 drug companies where if you have these various mutations
24 in 2D6 you either start with the vanishingly small dose
25 or not at all, and then depending on what mutations you

1 have, you need a higher and higher dose, so that is now
2 well-known and well understood.

3 Q. But that was not the case in 2000?

4 A. No, absolutely not.

5 MR. THOMPSON: Beg the Court's indulgence.

6 No further questions of this witness, Your
7 Honor.

8 CROSS-EXAMINATION (Cont'd)

9 BY MS. WILSON:

10 Q. Is it your testimony today that DNA sensitivity
11 testing is a widely accepted area of testing?

12 A. Oh, yeah.

13 Q. And it's offered at testing labs across the
14 country?

15 A. Yes.

16 Q. And was your -- the analysis that you did for
17 Mr. Jewell, was that solely based on the test results you
18 received from Genelex?

19 A. Yes.

20 Q. And it's your guesstimate that this test became
21 widely available a few years ago?

22 A. I've looked to see what companies offer 2D6
23 testing, and there are now several, and in reading the
24 literature and in actually speaking with a psychiatrist,
25 they did not used to routinely do it because they didn't

1 realize it was important, or -- how can I put it? They
2 realized it was important, but they thought they could
3 handle the problem by changing the dose rather than doing
4 the test beforehand, okay?

5 I should say that the one area where routine
6 testing has been done for quite a while was in the test
7 for another enzyme called 2C9, which is needed for
8 metabolizing blood thinners because that can be
9 life-threatening, so that's a well-known test, and that
10 was far more routinely done as long ago as the early
11 2000s, but something like 2D6, no, it was not routinely
12 tested for.

13 Q. And can you give a guesstimate of when people
14 started realizing --

15 A. I would say 2008, 2009, in that area.

16 Q. And so --

17 A. And, also, I should emphasize that there are
18 two -- sometimes it's the patient, him or herself, who
19 wants to know. Sometimes it's the physician who wants to
20 know before the drug is ever prescribed, and it's the
21 latter that has only recently come into --

22 Q. Okay. And you say Mr. Jewell as a poor
23 metabolizer has higher peak peaks and chronic side
24 effects?

25 A. The peak would be more -- could give you acute

1 side effects and contribute to side effects, so the fact
2 is he is going to have a higher peak concentration, and I
3 wanted to emphasize, we can't say if his peak is 1.5
4 times normal, quite normal, or three times. It's
5 impossible to tell without doing exact testing. We can
6 confidently said both his peak and the so-called
7 area-under-the-curve is going to be higher, okay?

8 Q. So your testimony is that his peak is just higher
9 than normal?

10 A. Yeah, and area-under-the-curve, how long -- the
11 total amount of time the drug stays in the body.

12 Q. Okay. And you mentioned several peer-reviewed
13 articles about violence being some type of side effect of
14 Paxil?

15 A. Yes.

16 Q. And were any of those peer-reviewed articles
17 specifically about the drug Paxil?

18 A. Yes. There was one that was -- as I recall, SSRIs
19 in general, but using Paxil as the specific example, and
20 the other one tested the -- it was retrospective test in
21 reports of violence -- now, this is self-reporting, or
22 reports by the family -- of a whole bunch of other drugs
23 besides the antidepressants. So Paxil was only just one
24 of them.

25 Q. And you testified today that you're not sure if

1 Mr. Jewell suffered from violence as a chronic side
2 effect?

3 A. It's impossible to say that one way or the other.
4 I believe that the reference is in the second page of
5 that.

6 Q. Okay.

7 A. I thought the other reference was too but it
8 isn't. Sorry.

9 Q. Thank you for pointing that out to me. So is your
10 conclusion here today that because Mr. Jewell, his peaks
11 are slightly higher than average and the way he
12 metabolizes the drug is different, he has an increased
13 likelihood of having certain side effects?

14 A. He's going to have an increased likelihood of any
15 side effect. It's impossible to say which ones.

16 Q. Thank you.

17 MS. WILSON: I don't have any more questions.

18 THE COURT: I want to follow up on this. So
19 this 2D6 issue that he has, that means that he is going
20 to have an increased risk of having a side effect, all
21 right?

22 THE WITNESS: Perhaps a whole spectrum of
23 side effects.

24 THE COURT: Okay. And the rare side effect
25 of causing violence would be included in that.

1 THE WITNESS: Exactly, included in that.

2 THE COURT: But is there anything about 2D6
3 abnormalities that suggest, or, in his case in
4 particular, that says he had a rare violent effect on
5 this date? Is there any way for you to say this?

6 THE WITNESS: There is no way anyone can say
7 that with certainty.

8 THE COURT: So he could just fall into the
9 any side effect category, and it would be -- which is, I
10 gather, uncommon or common, that you're going to have a
11 side effect?

12 THE WITNESS: There is virtually no drug that
13 doesn't have a side effect.

14 THE COURT: Okay.

15 THE WITNESS: And I'm sure that those side
16 effects, which tend to be rather minor, are certainly not
17 life-threatening to himself or anyone else, are going to
18 be worse in Mr. Jewell than in the general population.

19 When you start seeing these very rare side
20 effects, then it becomes impossible to predict whether
21 his particular genetic makeup is going to affect that
22 particular side effect, and that's true of any drug in
23 any genetic makeup.

24 THE COURT: I made a note, so I just wanted
25 to make sure I understood this, that, in fact, the more

1 common side effect of Paxil is that you have the opposite
2 reaction of --

3 THE WITNESS: Very short, short term, yes.

4 THE COURT: So, in other words he -- if he
5 was going to have a side effect, it would more likely be
6 that it would not be of violence.

7 THE WITNESS: I don't know that you could say
8 that, again, because we're distinguishing between the
9 acute and the chronic, and once a drug starts to build up
10 in the system, then it really becomes impossible to say
11 with any degree of certainty one way or the other.

12 THE COURT: Okay. So all you can say for
13 certain today is: One, he has an abnormality with 2D6,
14 all right, and that that means he's going to have an
15 increased chance of having a side effect.

16 THE WITNESS: Correct.

17 THE COURT: As to what that side effect would
18 be, you can't opine.

19 THE WITNESS: Correct.

20 THE COURT: Anybody want to ask him based on
21 anything I asked, or do you have anything else you want
22 to ask him?

23 MR. THOMPSON: Just briefly, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. THOMPSON:

1 Q. The attorney for the State asked you if your
2 results were based on -- or your opinion was based on the
3 results of Genelex. Do you have any reason to doubt the
4 results from Genelex?

5 A. No. That type of testing is very, very routine
6 these days.

7 Q. And in terms of the level of those, you can't say
8 with any specificity that the amount, I guess, of how
9 high up he's going, but if he's on the drug for three
10 weeks and taking it regularly, or even irregularly for
11 three weeks, how high up the graph do you think he's
12 going to get?

13 A. He's going to get pretty high up, and that's the
14 problem with the drug that's prescribed daily in someone
15 like Mr. Jewell who has this polymorphism, because he's
16 not getting rid of the first dose by the time he takes
17 the second dose and by the time he takes the third dose,
18 and so there's that stairs analogy, slowly climbing up
19 the stairs.

20 So the amount of total drug that remains in his
21 system can become -- it can become life-threatening,
22 which is exactly why they're doing this testing now.
23 Quite honestly, it's for the protection of the physician
24 and the hospital that they request the testing because if
25 they prescribe a drug that has the very serious side

1 effect to a patient and they didn't test that patient,
2 even though those tests were available, they could get
3 sued, and, in fact, are routinely sued for that.

4 Q. And, again, you cannot testify that there was a
5 specific side effect --

6 A. No.

7 Q. That there was a specific side effect, that there
8 was a specific direct causation between Paxil and a
9 specific side effect, but your conclusions would support
10 a psychiatrist's opinion --

11 A. Yes.

12 Q. -- that this act of violence was caused by Paxil?

13 A. Yes.

14 Q. And that it would be more likely than an act of
15 violence was caused by Paxil because of his 2D6
16 deficiency?

17 A. Correct.

18 MR. THOMPSON: Beg the Court's indulgence.
19 No further questions.

20 MS. WILSON: Nothing from the State.

21 MR. THOMPSON: The Applicant would call Andy
22 Savage.

23 ANDREW SAVAGE,

24 having been first duly sworn,

25 was examined and testified as follows:

1 DIRECT EXAMINATION

2 BY MR. THOMPSON:

3 Q. Mr. Savage, how are you doing this afternoon?

4 A. Good, thank you.

5 Q. Where do you practice?

6 A. Right here, in Charleston.

7 Q. And how much of your practice is devoted to
8 criminal law?

9 A. 99 percent is.

10 Q. And how long have you been practicing?

11 A. 1975. I was licensed in 1975.

12 Q. And since that point, how much of your practice
13 has been devoted to criminal matters?14 A. Better than 90. I was a prosecutor for six years,
15 and then in the beginning, there wasn't the specialty of
16 criminal law at that time, so I did one domestic case,
17 never went back, and some PR cases.

18 Q. Do you recall your representation of Mr. Jewell?

19 A. Yes, I do. Very unusual case.

20 Q. How did you come to represent Mr. Jewell?

21 A. His arrest came a few days after the incident. It
22 was a highly publicized case. I was aware of his case,
23 and I was contacted either by his parents or his sister.24 Brooke had been a student at the College of
25 Charleston, very good student. I did not know him. His

1 parents lived near -- in the upstate, and his sister, I
2 believe, lived in Charlotte. Somebody in the family
3 contacted me.

4 Q. And you said this was an unusual case. What made
5 it unusual?

6 A. It was very perplexing because the person who I
7 knew, through meeting him and speaking to his family,
8 doing the research we did in terms of employment and
9 education, all this background, was totally inconsistent
10 with the conduct he was charged with. There was no
11 rational explanation for his behavior.

12 Q. And did you try to search for an explanation for
13 his behavior?

14 A. Yeah. Brooke is a pretty intelligent guy. He did
15 very well in school. He was very successful in his
16 part-time jobs. He was very successful in the job he
17 occupied at the time of his conduct.

18 He was engaged socially in the community in a very
19 positive way, had a very caring and compassionate family.
20 He had a girlfriend at the time who was caring,
21 compassionate, very attractive, not just physically, but
22 the person of his girlfriend was very attractive. I
23 learned pretty early on that his girlfriend, ironically,
24 suggested that he undergo some counselling with a
25 psychiatrist. I believe her name was Dustin. I'm not

1 sure of that. She practiced on King Street or right off
2 King Street.

3 One of the first things I wanted to do was to find
4 out more about any problems he might have had emotionally
5 or psychologically that could add to the explanation for
6 his behavior, admitted behavior, I might say. Brooke
7 never had any defense in terms of misleading anybody in
8 terms of who he was and what he had done. Brooke and his
9 family, which was a very concerned family, wanted to seek
10 out an explanation, just like he did, just like we did,
11 for his behavior.

12 So the appropriate starting point was why did he
13 go to a psychiatrist? What the background on that?
14 Well, she wasn't exactly helpful. In fact, she was very
15 difficult to deal with. We learned that he had been on
16 an SSRI for a limited period of time, basically
17 unsupervised, and what I mean by that is, by that time in
18 the literature it was known, at least it was expressed,
19 that there was some difficulties with psychological
20 issues resulting from either the startup or the sudden
21 dropping of SSRIs, and clearly the literature at that
22 time required psychiatrists at that time to monitor
23 dosage reaction, observations to prevent any bizarre
24 behavior, and I know there was some testimony earlier
25 about the effect of SSRIs.

1 I'm talking about now from a medical perspective,
2 not necessarily a legal defense. The legal defense was
3 considered at one time. It was basically rejected on my
4 advice. I didn't think that what we knew about SSRIs --
5 at the time, if you remember, there was a case around
6 that time period of time, I think Chapman, a young boy,
7 12 years of age may have killed his grandparents, maybe
8 it was a Paxil defense, but, you know, the law was pretty
9 clear, I thought, at the time, discussed it with Brooke
10 that an NGRI was not in the cards.

11 Q. In your preparation for -- let me rephrase it. So
12 Paxil was not a legal defense. I guess you could not
13 claim insanity?

14 A. As his attorney, that was my advice to him. I
15 don't think -- we never pushed it, so we never had a
16 hearing on it, but my advice was what we have developed
17 at that time was strong mitigation. Again, you have
18 bizarre behavior by somebody who has basically a perfect
19 record at that point, and I thought that it presented a
20 very good case in mitigation, and that's what we did.

21 Q. And in that case in mitigation, what did you
22 present to the Court in terms of evidence regarding
23 Paxil's effect on Mr. Jewell?

24 A. I have some notes, and I'll be glad to share them
25 with you. These are summaries. His file -- I think he

1 withdrew this before, and I was advised -- not these
2 assistant Attorney Generals, who are excellent, but I was
3 advised by somebody else in the Attorney General's office
4 that my file was not necessary for keeping. Of course,
5 I'm going back from computer files.

6 Brooke, the incident happened July of 2000. One
7 of the very first people I obtained was William Alexander
8 Morton, Jr. He was a PhD in pharmacology at MUSC, same
9 place your previous expert was employed. I met with him
10 at MUSC on August 4th, so within three weeks of the
11 incident date, less than three weeks of the arrest date,
12 and the reason for that was to look for an explanation.
13 By that time I knew that he was an SSRI patient and that
14 he had terrible supervision from a psychiatrist, so I was
15 trying to -- immediately trying to figure out what role
16 that might have played.

17 And I then met with Brooke at the detention center
18 on the 21st of August, and we reviewed that. I also
19 reviewed it with his family, and it was clear that we
20 should pursue that for -- at the same time, because this
21 was a sexually related offense, we retained Dr. Pat
22 Gerald, a psychologist, to sort of get a background on
23 any psychological issues independent of Dr. Dustin that
24 may have given an indication of sexual aberrance that
25 could possibly explain -- this was a very methodical

1 crime.

2 As I recall, the morning of the incident,
3 Mr. Jewell was employed. He was going to work. He had
4 some mental issues at that time, was halfway to Beaufort
5 or maybe further, turned around, went to this particular
6 apartment complex that he had been to before for
7 legitimate social purposes.

8 The victim was identified as being at the swimming
9 pool. He knew where she lived. He somehow made entry to
10 her apartment, waited for her to return, utilized a
11 kitchen utensil, a knife of some type, bound her, engaged
12 in various sexual instances. It was a very methodical,
13 planned out, at least in his mind -- it wasn't a crime of
14 opportunity.

15 All right? So that immediately troubled me with
16 the NGRI defense, but, still, there was something bizarre
17 about it, there really was. He told me early on about
18 some sexual issues of increase of volume of ejaculate at
19 about that time when he was taking these SSRIs, so we
20 really wanted to get a medical analysis of what was going
21 on.

22 So Dr. Gerald, since deceased, was retained on the
23 25th of July. We also retained Bill Burke. You may be
24 familiar with him. That wasn't done until September,
25 after I got Dr. Gerald's initial report. Dr. Jenkins,

1 who is a psychiatrist associated with Dr. Burke, was not
2 retained until December of that year. I consulted with a
3 family therapist who lived in New York by the name of
4 Wendy Cooper Samuel. She had a lot of interaction with
5 his family members and was able to facilitate the legal
6 defense or mitigation with the family. She was very
7 helpful.

8 Brooke did not like her, for whatever history
9 there was there I didn't go into, so we didn't use her
10 anymore, but she continued from the family's perspective
11 of being a facilitator.

12 Jack Booth was another psychologist that we had
13 him evaluated, Brooke, as we got into the spring of 2001,
14 and I wanted to get a variety of medical health care
15 specialists to see whether there was a similar diagnosis
16 and whether there was a pattern that would change as he
17 left the SSRI world.

18 Randy Waid, who I think everybody in South
19 Carolina knows, was then hired in July, so one year
20 following the incident, Randy came in and looked at
21 everybody else's evaluations, and he made his own
22 evaluation. And then shortly thereafter, actually
23 through the assistance of his family, we found a national
24 expert physician by the name of Peter Bracken. I think I
25 mentioned Dr. Dustin was not cooperative, but in any

1 event, several of those testified at his hearing with
2 Judge Cottingham, and very effectively he basically got
3 six years for the criminal sexual conduct.

4 Q. And it sounds like you talked to about eight or
5 nine different experts about this case?

6 A. Yeah, and I think there are others that may be
7 phone consultations and that sort of thing.

8 Q. Including Dr. Morton with MUSC, the pharmacology
9 department?

10 A. True. I think either the first or second person I
11 spoke with.

12 Q. Did anybody that you spoke to tell you about any
13 DNA drug sensitivity testing that could be performed?

14 A. No.

15 Q. Was that something that came up?

16 A. No.

17 Q. Did Dr. Morton specifically tell you anything
18 about that?

19 A. Actually, it was something we sought out at that
20 time. We wanted to know if there was a way to analyze
21 how SSRI medications could have affected him.

22 Q. And were you able to find anything?

23 A. No. If that had existed at that time, certainly,
24 I mean, with the number of experts we had, particular
25 experts in that limited field, Dr. Bracken, for instance,

1 we would have known about it, and we would have used it.

2 Q. And that was my next question. Were you present
3 for Dr. Kurtz's testimony earlier?

4 A. Yes. Did I listen to it all? No. But was I
5 present? Yes. If the judge was speaking, I would have
6 listened.

7 Q. If -- from what you did hear from Dr. Kurtz, would
8 you have presented that sort of testimony?

9 A. Absolutely, no question. We exhausted at that
10 time the available medical information, expert
11 information. His sister was extremely generous in terms
12 of providing the resources necessary. Obviously, we
13 would have done that.

14 Q. Do you feel that would have assisted in your
15 presentation at the sentencing to have a more, I guess --
16 testimony about a more, I guess, direct correlation
17 opposed to psychiatrists and psychologists?

18 A. Yeah, though we did a pretty effective job. I
19 think Brooke and his family will tell you that. That
20 sentencing, I mean, you look at the outcome and you have
21 to consider he got the minimum on burglary, right? The
22 State wouldn't back off the burglary first, so he got the
23 minimum sentence on that, and he got basically six years
24 added on, and Cottingham is not known as, you know, the
25 best person to go in front of if you're a defendant.

1 So, yeah, I was -- you know, it's 21 years. It's
2 a God awful sentence, but it was God awful testimony too,
3 but would I have used that? Absolutely, and would that
4 have made a difference? I can't speculate on that.

5 Q. But you certainly would have included it in your
6 presentation.

7 A. It would not have changed my mind on the plea
8 versus trial, but we would have, if it had been
9 available, would have certainly employed that as part of
10 the mitigation.

11 MR. THOMPSON: Beg the Court's indulgence.

12 No further questions of this witness.

13 CROSS-EXAMINATION

14 BY MS. WILSON:

15 Q. Good afternoon, Mr. Savage.

16 A. How are you?

17 Q. I just have a couple brief questions for you.

18 Of the experts that you were able to retain on
19 Mr. Jewell's behalf, was one of them a pharmacologist?

20 A. Yes.

21 Q. And do you think that -- you agree and you
22 testified that you did present evidence about how
23 Mr. Jewell metabolized these drugs and side effects and
24 things of that nature. You did present that to the Court
25 during his sentencing?

1 A. I was personally -- not as a lawyer. I was
2 personally convinced the SSRI medication that he was
3 taking that it didn't cause the action that he
4 participated in that certainly had an effect on it, and
5 we did everything we could to communicate that to the
6 Court.

7 Q. Okay. And do you think that this would have
8 affected the issue of guilt or innocence, had he
9 proceeded to trial, or would have been relevant to that?

10 A. I guess it's speculation now for what I would have
11 thought back then if I had more information, but that's
12 why I brought out about the specifics of the activity
13 because it was a very planned process that he engaged in
14 in terms of the misconduct. Why he did that is beyond
15 me. It was beyond him. He can't explain it. His family
16 can't explain it.

17 No psychologist was able to explain it. Nobody we
18 talked to could explain it, given his background, his
19 history, his employment, his academic success at the
20 College of Charleston. There was no explanation for this
21 wild man who appeared one day and who left that same day.

22 MS. WILSON: No further questions. Thank
23 you.

24 THE COURT: Do you have anything else you
25 want to ask?

1 REDIRECT EXAMINATION

2 BY MR. THOMPSON:

3 Q. Just one quick question, and I think you testified
4 about this earlier, but you just said the wild man that
5 entered and left that day. Was that anything that you
6 ever experienced firsthand meeting with Mr. Jewell?

7 A. I can't remember the exact date. I probably have
8 it somewhere where I met him very shortly after his
9 arrest. As I said earlier, who presented himself that
10 day was not the same person that was described in the
11 arrest warrants, and ever since that day, you know, I
12 don't know what his SCDC history is, but I would bet that
13 it hasn't -- there is no violent misconduct. It just --
14 that's not who we knew.

15 MR. THOMPSON: No further questions of this
16 witness, Your Honor.

17 THE COURT: You may step down.

18 MS. WILSON: Thank you.

19 THE COURT: By the way, it was Pittman and it
20 was Zoloft. The kid?

21 THE WITNESS: Okay. And he had lawyers who
22 were more interested in lawsuits.

23 THE COURT: Any more witnesses?

24 MR. THOMPSON: We would call the applicant,
25 Your Honor.

1 BROOKE JEWELL,
2 having been first duly sworn,
3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. THOMPSON:

6 Q. Mr. Jewell, how are you doing this afternoon?

7 A. Good. Thank you.

8 Q. Where did you go to school?

9 A. College of Charleston. I grew up in North
10 Carolina but went to the College of Charleston.

11 Q. Did you graduate from the College of Charleston?

12 A. Yes, sir.

13 Q. And when did you graduate from College of
14 Charleston?

15 A. I graduated on Mother's Day of 1997.

16 Q. So that was about three years prior to this
17 incident?

18 A. Yes.

19 Q. And where were you employed prior to this
20 incident?

21 A. Prior to the incident or during? I was working at
22 Vision Products, an office furniture company, in North
23 Charleston at the time.

24 Q. Now, at the time of this incident, and, I guess,
25 in the weeks and months leading up to it, where were you

1 living? Was that in North Charleston?

2 A. No, I was living with my girlfriend, actually, in
3 downtown Charleston.

4 Q. And when did you start taking, in particular,
5 Paxil?

6 A. I started on Paxil approximately three weeks
7 before the incident.

8 Q. And what was the dosage you were prescribed for
9 Paxil?

10 A. I believe I started out at 20 milligrams, but it
11 may have been increased, it seems like, but it's been so
12 long I can't remember.

13 Q. And how did those -- why were you put on Paxil, to
14 the best of your knowledge?

15 A. In my opinion, my girlfriend convinced me that I
16 was not peppy enough in our relationship, so she sent me
17 to my general practitioner, which is when I originally
18 got placed on antidepressants. And then those first two
19 were not working, so I went to a psychiatrist and she
20 prescribed the Paxil three weeks before the incident.

21 Q. And that was the psychiatrist that Mr. Savage was
22 referencing earlier?

23 A. Yes, Dr. Dustin.

24 Q. And kind of describe your feelings. How did
25 taking those drugs make you feel? How did taking Paxil

1 make you feel?

2 A. Up until the day of the offense, there was no
3 real -- there was definitely no improvement of my
4 feelings, my emotions, what I was going through. The day
5 of the offense, this crazy feeling came on so quickly,
6 which I have never experienced before, either prior to or
7 since. But the day of the offense, I became suicidal
8 shortly before the events and just extremely agitated,
9 lots of emotion, pacing back and forth. It was just like
10 my mind was speeding, if you will.

11 Q. And these feelings, did they, I guess, overcome
12 you?

13 A. Most definitely.

14 Q. And it's in the plea transcript what happened. I
15 don't want you to go into much detail, but did you commit
16 the incident? Did you commit the offenses at that point?

17 A. Yes, I did.

18 Q. Under that feeling that had come over you.

19 A. Yes.

20 Q. Did you subsequently stop taking Paxil?

21 A. After I was arrested, I went to the county
22 detention center, and my family and my lawyers met with
23 me, Andy Savage, as he mentioned. There was an odd
24 affect, as he called it. Something wasn't right. Even
25 though he had never met me, he noticed something

1 peculiar. My family, my sister and my father, noticed.
2 They could just see it. I wasn't myself, so they
3 recommended and suggested that maybe I come off the
4 Paxil.

5 So the medical team at the county detention
6 center, they withdrew me slowly. They weaned me off of
7 it in a matter of, I believe, five or ten days, and at
8 that point, I began improving and returning to myself.

9 Q. And did you at that point realize what had
10 occurred?

11 A. Yes. I had realized what had occurred. It really
12 started hitting me a couple days after the offense.

13 Q. And in terms of the, I guess, your defense with
14 Mr. Savage representing, did y'all begin looking for
15 experts that could help explain your behavior that day?

16 A. Yes, we did.

17 Q. And what were you hoping you would find? What
18 were you hoping somebody would be able to say?

19 A. All I ever wanted was for the truth to come out as
20 to what happened. Why? I mean, I had always been honest
21 as to, you know, I did this, but we couldn't figure out
22 exactly why, and it took some time to start finding more
23 and more information on the violence associated with
24 these SSRI type medications.

25 But, yes, definitely from the get-go we were

1 researching. My family members were on the Internet. We
2 stayed in touch with the attorney, and he stayed in touch
3 with the various medical experts, and there just wasn't
4 that much at the time, in 2000, 2001.

5 The FDA warnings, the black box warning, did not
6 come out until, I think, 2005, long after I was in
7 prison.

8 Q. And when you say the black box warning, what does
9 that mean?

10 A. The black box is the FDA's strictest warning on
11 any medication. They only place this black box warning
12 on labels of drugs that are -- that can potentially be
13 very dangerous.

14 Q. Now, ultimately, to your understanding, you were
15 unable to find an expert who could -- let me rephrase
16 that.

17 Were you hoping that you would have an expert at
18 your plea who could testify similarly to what Dr. Kurtz
19 testified to earlier?

20 A. Well, I think we all wanted something, but we had
21 no idea that this type of test was going to become
22 available. I mean, metabolism, DNA metabolism, who would
23 have thought of it unless you're a scientist? We were
24 looking for something of the sort, but we never dreamed
25 about this type of test.

1 Q. And even after your plea, did you continue -- did
2 you and your family continue researching Paxil?

3 A. Yes. In the last ten years that I've been in
4 SCDC, I've had family members, friends -- they'll send me
5 articles printed from the Internet, newspaper articles,
6 anything they can find that might help my case.

7 Q. And I want to try to get into some, I guess,
8 specific timelines here. Did you take further legal
9 action with regard to your case? And specifically there
10 were a couple of actions that you filed. Did you sue
11 GlaxoSmithKline?

12 A. I did.

13 Q. And what was the basis for that lawsuit?

14 A. The basis was product liability, I believe; fraud,
15 medical negligence, acts like that.

16 Q. And what were you seeking to prove basically with
17 that lawsuit?

18 A. I was seeking to prove through that lawsuit that
19 Paxil was, in fact, a major contributor of my actions,
20 that the drug company has known for many, many years that
21 their drug can cause violence acts, suicides and various
22 violence.

23 Q. And were you able to find any expert testimony --
24 let me rephrase that.

25 Who represented you on that lawsuit?

1 A. Mr. Joshua Kendrick. I actually had three law
2 firms that represented me at one time: The Hood Firm
3 here in Charleston, Joshua Kendrick in Columbia, and
4 Wesley Locklair out of Myrtle Beach.

5 Q. And what was the ultimate result of that lawsuit?

6 A. The ultimate result was we lasted three-and-a-half
7 years in federal court and we had passed summary judgment
8 showing that we had merit in the case; however, we were
9 outgunned. We were outmanned. We were up against the
10 second largest drug company in the world. It was told to
11 me they spent well over \$1 million fighting my case where
12 we had spent maybe 50,000, but that's all we had.

13 Q. And did you ultimately drop the lawsuit?

14 MS. WILSON: Objection, Your Honor. What is
15 relevant to this line of questioning?

16 MR. THOMPSON: I'm trying to show that -- I'm
17 trying to get to the point. I'm trying to show that they
18 further researched this issue into this lawsuit, and they
19 dropped the lawsuit because they couldn't find it.

20 MS. WILSON: Is this regarding newly
21 discovered evidence of Mr. Savage's investigation or --
22 I'm not understanding why the civil lawsuit in federal
23 court is relevant.

24 MR. THOMPSON: Well, if you were conceding
25 that this is timely, if Andy Savage could not have found

1 this evidence --

2 MS. WILSON: I'm not conceding that.

3 MR. THOMPSON: Well, then I think is
4 relevant.

5 THE COURT: Y'all talk to the Court, by the
6 way. I'll let you go. Go ahead.

7 BY MR. THOMPSON:

8 Q. Did you ultimately dismiss the lawsuit?

9 A. Yes.

10 Q. And in connection with the lawsuit, did you search
11 for additional information to try and prove that Paxil
12 could cause this incident, that was a major contributor?

13 A. Of course.

14 Q. And did you consult with additional experts during
15 the process of this case?

16 A. Yes.

17 Q. And were you able to find anybody there who was
18 able to give you the kind of information regarding the
19 DNA drug sensitivity testing?

20 A. I'm sorry. Could you repeat that.

21 Q. Was there anybody that y'all consulted with, that
22 your attorney consulted with to the best of your
23 knowledge, that was able to provide the kind of evidence
24 that Dr. Kurtz was able to testify to today?

25 A. No. We still at that point had never come across

1 this type of testing.

2 Q. And you had three different attorneys representing
3 you at that point?

4 A. I'm not sure at that point.

5 Q. Three different attorneys looked into the case.

6 A. Yes.

7 Q. And did you subsequently file for post-conviction
8 relief?

9 A. Yes.

10 Q. And who represented you in that proceeding?

11 A. Tricia Blanchette out of Columbia.

12 Q. And what happened to that?

13 A. I was advised by counsel eventually after some
14 time to dismiss that case.

15 Q. And during the process of that case, were you
16 continuing to search for the kind of evidence that
17 Dr. Kurtz testified to here today?

18 A. Yes.

19 Q. And were you able to find it then?

20 A. No.

21 Q. If you had been able to find someone like Dr.
22 Kurtz to testify on your behalf, would you have dropped
23 that first PCR?

24 A. Absolutely not.

25 Q. When, to the best of your recollection, did you

1 find out about the Genelex lab doing this test?

2 A. It's been now approximately three years.

3 Q. And how did you find out?

4 A. There is an inmate who runs a nonprofit
5 organization which notifies the public, warns the public
6 over the dangers and the violence associated with these
7 SSRI drugs. This inmate sent me a copy of the test and
8 notified me that he had just taken the test, and he
9 offered me a copy and the contact information for
10 Genelex.

11 Q. And what did you do to get your -- what did you
12 have to do? Were you trying to get your blood tested or
13 your DNA tested?

14 A. Yes. I immediately contacted my mother. I called
15 her to set up financial arrangements, to pay for the
16 test, and also in SCDC you have to file a form, one of
17 various forms, to request that such a test be taken.

18 And the form that I had to file is called, I
19 believe, an elective outside health care request, and I
20 immediately obtained a copy of that form and submitted it
21 to the proper SCDC officials.

22 Q. Did you recognize that document?

23 A. Yes.

24 Q. What is that?

25 A. The form I just spoke of, the elective outside

1 health care request.

2 MR. THOMPSON: I would like to offer that as
3 Applicant's 4.

4 MS. WILSON: No objection, Your Honor.

5 BY MR. THOMPSON:

6 Q. And how soon, to the best of your recollection,
7 after you got that information from that inmate did you
8 begin this process?

9 A. Immediately.

10 Q. That day?

11 A. Yeah. I am sure I called my mother that same day
12 and spoke with her about the test and that we needed to
13 proceed.

14 Q. And to the best of your recollection, was there
15 any delay on getting the test done? Was there anything
16 you did to delay the process? Did you wait days to
17 submit the form?

18 A. Not at all. I filed this request form along with
19 a general staff form to Ms. Ruthie Purvis, who is the
20 medical record keeper at Broad River Correctional, and I
21 believe it took approximately 30 days, which is normal
22 for her to respond. She called me from work. She called
23 me to medical one day and she asked me what it was for,
24 and I just told her DNA medical testing.

25 She signed it and a witness signed it, and then I

1 was able to move to the second section, which was to send
2 it to Genelex itself.

3 Q. And the date of the report is, I believe,
4 Applicant's 1. That is June 17th, 2010. Do you recall
5 how soon after that report was issued that you received
6 that document?

7 A. I remember I was waiting very impatiently for it
8 and hoping for the good results, but it seemed like it
9 was maybe two weeks.

10 Q. After you submitted your swab?

11 A. Right, right. There was a nurse -- there was a
12 private practitioner nurse that Genelex had hired in the
13 Columbia area. She called Broad River medical, got
14 permission to come in. There was also a Broad River
15 nurse, so there were two nurses there.

16 The hired nurse swabbed both of my inner cheeks
17 with two separate swabs and inserted them into zip-lock
18 type material and Fed Exed it to Genelex.

19 Q. And I meant to ask you this earlier. You
20 testified to some degree, but you and your family members
21 throughout the course of this process after your plea had
22 been looking for evidence like this; is that right?

23 A. Yes.

24 Q. And you -- and the first time you found out about
25 the drug sensitivity training was through this inmate in

1 Pennsylvania?

2 A. Yes.

3 Q. And I apologize. I said in Pennsylvania. Was the
4 inmate housed in Pennsylvania?

5 A. Yes.

6 Q. I think I have gone over everything regarding your
7 efforts to find this evidence. What I want to ask you
8 about now is -- and the judge asked you these questions
9 earlier. I just want to make sure it's clear for the
10 record. I understand that you are not asking to overturn
11 the entire plea, are you?

12 A. No, just the sentence.

13 Q. Just the sentence. And you understand that if you
14 go back on just the resentencing that your convictions
15 for first degree burglary and criminal sexual conduct
16 will still stand. Do you understand that?

17 A. Yes.

18 Q. And you understand that first degree burglary you
19 received, it carries a mandatory minimum sentence of 15
20 years. That cannot be suspended. Do you understand
21 that?

22 A. Yes.

23 Q. And that you're doing a 21-year sentence; is that
24 right?

25 A. Yes.

1 Q. And if the judge grants the relief you're
2 requesting, your sentence could only be lowered by a
3 maximum of six years in prison. Do you understand that?

4 A. Yes.

5 Q. And that it is possible for you to be sentenced
6 higher than the original sentence that you received, all
7 the way up to life in prison. Do you understand that?

8 A. Yes.

9 Q. Knowing that, do you still want to go forward with
10 this action here today?

11 A. Yes.

12 Q. I believe I have covered everything, but normally
13 I say this is your one and only shot at PCR. The first
14 one you had a hearing on, but if there is anything I've
15 left out, I would ask that you let the Court know
16 anything that is relevant to your case. Do you think I
17 left anything out?

18 A. I can't think of anything.

19 MR. THOMPSON: No further questions.

20 THE COURT: Cross?

21 MS. WILSON: Nothing from the State, Your
22 Honor.

23 THE COURT: You can step down. Next witness?

24 MR. THOMPSON: Beg the Court's indulgence one
25 moment, Your Honor.

1 No further witnesses, Your Honor.

2 THE COURT: Anything from the State?

3 MS. WILSON: No witnesses from the State,
4 Your Honor.

5 THE COURT: All right. What do you want to
6 tell me? You want to make a closing?

7 MR. THOMPSON: Your Honor, just very briefly,
8 in my opinion, there are two critical aspects of this
9 case that Your Honor is called to decide upon. First, I
10 guess, being the threshold question of whether or not
11 this application is timely.

12 There was a prior hearing in this matter, I
13 don't know that we ever really discussed it, but there
14 was a prior hearing -- July? And Your Honor should have
15 the order in your packet. Judge McDonald --

16 THE COURT: Didn't she rule that you got the
17 hearing?

18 MR. THOMPSON: She ruled that we got a
19 hearing and the timeliness of the petition would be taken
20 up at this hearing, and whether or not it specifically --
21 whether or not Mr. Savage would have had access to this
22 evidence at the -- I guess, in terms of his preparation
23 for this case, and I think the evidence is clear that he
24 did not.

25 In terms of whether or not this is after

1 discovered evidence from the conviction, it certainly is.
2 Mr. Savage testified he had retained about eight or nine
3 experts, including someone with the MUSC school of
4 pharmacology, and nobody was able to provide the kind of
5 information, the kind of testimony that Dr. Kurtz
6 testified to earlier, and that fits with what Dr. Kurtz
7 testified to, going to the overall timeliness, not just
8 Mr. Savage's representation, but he testified, Dr. Kurtz
9 testified, that this science wasn't widely accepted and
10 widely utilized by health care professionals until the
11 last couple years, and the last couple years is about
12 when Mr. Jewell found out about this information from the
13 inmate in Pennsylvania.

14 There is no -- he had a prior PCR, but,
15 again, given the efforts that were undertaken by Mr.
16 Jewell both in the first PCR and his lawsuit against
17 GlaxoSmithKline and in his continual research trying to
18 find this -- trying to find this evidence, we submit that
19 this evidence could not have been discovered until it was
20 discovered by Mr. Jewell and that our PCR is timely
21 because it was filed within one year of the date of the
22 report.

23 The PCR was filed on June 15th, 2011. The
24 report date is June 17th, 2010. That is within one year.

25 Additionally, Your Honor, and I would just

1 hand up -- I to some degree made this argument at the
2 last proceeding as well, I would reiterate it here, that
3 in a couple of cases I will hand up -- and, for the
4 record, those are Coats v. State, 352 S.C. 500, 575
5 S.E.2d 557, a 2003 decision of the South Carolina Supreme
6 Court; and Tilley v. State, 334 S.C. 24, 511 S.E.2d 689,
7 it's a 1999 decision by the South Carolina Supreme Court.
8 Both of those cases analyze after discovered evidence
9 claims, including claims where the -- in particular,
10 Tilley had four PCRs, and I believe this was Coats's
11 first PCR, but it was after discovered evidence as well,
12 and in both of those cases the Supreme Court found the
13 application was timely because it was filed within one
14 year of the date of the actual discovery of the evidence.

15 We submit that fits in with the statute as
16 well. Section 17-25-45(c) provided a one-year statute of
17 limitations that says it must be filed under this chapter
18 within one year after the date of actual discovery of the
19 facts by the applicant and after the date when the facts
20 could have been ascertained by reasonable diligence. No
21 matter what standards you use, I plead if it's actual
22 discovery, certainly we're within one year. If it's
23 within reasonable discovery, we still submit we're within
24 one year.

25 Turning to the merits of the case, Your

1 Honor, we submit that this evidence is actual discovered
2 evidence that materially affects the sentence that was
3 imposed in this case. A review of the record, in my
4 opinion, shows that the testimony -- and I keep using the
5 word testimony. No one actually testified at the
6 sentencing proceeding.

7 The presentation of witnesses, experts, by
8 Mr. Savage shows that they had psychologists and
9 psychiatrists who came to testify, not anybody who could
10 actually testify regarding Mr. Jewell's physiological
11 makeup, the impact of this drug would have had on his
12 physiology, and someone that could do the kind of
13 calculations that Dr. Kurtz testified to; in particular,
14 the escalating effect that this drug would have had on
15 him and the likelihood that any side effect -- that
16 Mr. Jewell would have been suffering from any side
17 effect.

18 There is evidence that Dr. Kurtz testified to
19 that a side effect of Paxil is violence, that it is more
20 likely that Mr. Jewell was suffering from that side
21 effect, or any side effect, for that matter --

22 THE COURT: I don't think you can say that he
23 was more likely suffering from that side effect. It was
24 likely that he was suffering from a side effect, and
25 that's the testimony that I heard, that based on this

1 genetic predisposition that he has that he's not
2 metabolizing Paxil like everybody else does.

3 It's building up in his body. He's likely to
4 have a side effect. Most common side effect is, in fact,
5 the opposite of violence, but he couldn't say one way or
6 the other whether or not it was likely that day he was
7 suffering from the violent reaction, only that he was
8 suffering from a reaction.

9 MR. THOMPSON: That's correct, and he also
10 testified --

11 THE COURT: Or side effect, I guess, is
12 probably the phrase he was using.

13 MR. THOMPSON: He also testified that if
14 psychiatrists and psychologists came forward and said
15 that they believed that Mr. Jewell was suffering from the
16 side effect of violence from Paxil that his conclusions
17 would support that finding.

18 And that, to me, is the critical aspect of
19 this case, is that the psychiatrists and psychologists
20 were presented at the sentencing, but unfortunately their
21 information could only go so far. He couldn't provide
22 the physiological backup, the hard science evidence that
23 Mr. Jewell was suffering, would be far more likely to be
24 suffering from any side effect of the drug, including the
25 side effect of violence.

1 Mr. Savage -- and we are not alleging in this
2 post-conviction relief action that Mr. Savage was
3 ineffective. Quite the opposite. We believe he did
4 everything he possibly could have done to represent
5 Mr. Jewell to the fullest at that guilty plea proceeding.
6 He just couldn't find this evidence, but he testified
7 here earlier today that he would have presented this
8 evidence as part of his mitigation.

9 He didn't feel it was cumulative. He thought
10 it would have been relevant to the case and to Judge
11 Cottingham's decision, and so it is our contention that
12 this evidence is material. It definitely goes to the
13 aspect of sentencing, and we believe it further shows
14 that Mr. Jewell, which was his contention at the
15 sentencing, that Paxil was the major contributor to the
16 incident.

17 There's a different kind of evidence than
18 what we presented, and we believe they should be given a
19 new sentencing.

20 THE COURT: Wasn't it clear there was a lot
21 of evidence presented to Judge Cottingham that day that
22 there was a strong belief that Paxil somehow contributed
23 to this?

24 MR. THOMPSON: Yes, there was. But --

25 THE COURT: So Judge Cottingham had

1 information not totally a whole lot different at that
2 time.

3 MR. THOMPSON: But we submit it's
4 qualitatively different. You had the opinion of a
5 psychiatrist and psychologists who say -- and at that
6 point in time they didn't have all that information about
7 Paxil that Dr. Kurtz has today. And they said they
8 believed that they thought Paxil was a contributing
9 factor, that he was suffering from that side effect at
10 that point in time, but this type of evidence, especially
11 when they're viewed in conjunction, in our opinion,
12 definitely shows that this was -- that Paxil was the
13 major contributing factor to this incident, that this is
14 a different kind of evidence than a psychiatrist or
15 psychologist's opinion testifying as to what they think
16 was going on in Mr. Jewell's head.

17 There is a physiological -- he would have
18 been suffering -- he was far more likely to be suffering
19 from side effects of Paxil because of his poor
20 metabolizing rate.

21 THE COURT: I don't think there is any
22 question about that, but whether or not you can say that
23 that causal link was a violent side effect, well, he
24 couldn't say that. He could only say that it was a side
25 effect, that he was very likely suffering from side

1 effects of it, so Judge Cottingham was listening to
2 essentially that argument that day from a number of
3 people saying, Look, Judge, we really do believe that
4 this young man was affected by Paxil that day.

5 And it wasn't like Judge Cottingham was
6 sitting in judgment of whether or not it did or did not.
7 It was mitigation on his sentencing, so he considered all
8 the things that you're asking the Court to consider
9 today, and if you're granted relief, I can't really see
10 what the difference would be to a subsequent sentencing
11 Court.

12 You would still have the argument, look,
13 Paxil played a strong factor in this man's actions that
14 day, we believe, but there is no evidence that is going
15 to be able to say, in fact, that it had a direct link.
16 They just believed that more likely it was not that it
17 played a factor in it.

18 What is the difference between that and what
19 Judge Cottingham already had before him that day?

20 MR. THOMPSON: Because this is physiological
21 evidence. This is not evidence that is an opinion about
22 looking into someone's mind, this is a opinion about this
23 is how his body would have processed it. This is not --
24 we think there is this really rare side effect of Paxil,
25 of violence, that we believe is out there. We believe

1 that this is evidence that this is somebody who cannot
2 metabolize the drug at all.

3 This is somebody who takes a drug that to
4 metabolize has to go down different pathways to be
5 metabolized, and the more he adds to it, the worse and
6 worse and worse his condition gets. And when he's taking
7 it three weeks prior to the incident, then it just become
8 more and more likely that what he encountered that day
9 was, in fact, the Paxil. That's what we believe makes it
10 more likely than what was presented at the sentencing,
11 that the Paxil was the factor, and I believe -- and
12 Mr. Savage testified he would have presented this at the
13 sentencing, that if Mr. Savage had felt, You know what,
14 we had enough, that was it, we had enough, and I don't
15 think this would have made a difference, I wouldn't have
16 used it.

17 He didn't testify to that. He said, We would
18 have used it because this is what we were looking for.

19 THE COURT: All right. I see where -- I get
20 what you're trying to say, but what I'm trying to get is,
21 even if you make the argument, which I don't think you
22 can make based on the testimony that I heard, and that is
23 that there is a causal effect, unless you got a strong
24 association effect, not a causal effect, so if you had a
25 causal effect, then maybe you should be arguing for a new

1 trial on the grounds of criminal responsibility, but
2 you're not asking for that.

3 You're asking for a new sentence, and Judge
4 Cottingham gave him a sentence of 21 years, which, you
5 know, knowing Judge Cottingham, I'm telling you, I think
6 he took it into consideration because Judge Cottingham --
7 probably normally, and a lot of judges would have given
8 him 30 years and he might have gotten a lot closer to
9 life than 15 on the burglary on something that Andy
10 Savage's testimony said it was planned out, it was
11 methodical, it wasn't a crime -- it was not just a crime
12 of opportunity; in other words, it was premeditated.

13 So that was what Judge Cottingham had before
14 him, because I was just looking at the transcript of what
15 the factual presentation was to him. He was laying in
16 wait. All right? It wasn't a spontaneous thing. He was
17 watching this woman sunbathe. He planned this thing out,
18 obviously, with some forethought, and went in and raped
19 her.

20 It looks like about three different sexual
21 acts, so Judge Cottingham, from what I gather, probably
22 gave him, or gave this Paxil argument, some
23 consideration. So one of the things that you got to show
24 me is he might have got a better deal if he goes and
25 makes this argument. I don't know how you're going to

1 show you're going to get anything closer to 15, which is
2 the minimum you're going to get at any rate.

3 MR. THOMPSON: Because this evidence makes it
4 more likely that a reviewing judge would have -- or Judge
5 Cottingham in this case would have imposed a lesser
6 sentence because it makes it more likely than not just --
7 I think Paxil had something to do with this. This is
8 more, okay? We are dealing with severe physiological
9 side effects from somebody who cannot process this drug,
10 that this is evidence that was not presented to Judge
11 Cottingham that he did not have available at his
12 disposal, and that I understand that Judge Cottingham is
13 genuinely considered to be a harsh sentencing judge but
14 that if he's got even more evidence that Paxil, more hard
15 science evidence that Paxil was the direct contributor to
16 this offense that he would have gone further.

17 I don't know that he would have gone all the
18 way down to 15, but he might have gone down to 18. He
19 might have gone down to 17; he might have gone down to
20 20. If he would have gone down at all, even by six
21 months, Mr. Jewell's entitled to relief, and that is our
22 contention.

23 I'm not saying that Judge Cottingham
24 definitely 100 percent would have gone down to 15, but I
25 think it is reasonably likely he would have gone lower if

1 he had somebody who could have come in and testified.

2 He's had his blood tested. I've handled
3 these results. He's a poor metabolizer. He virtually
4 doesn't metabolize this drug at all, and when this
5 incident occurred, it was likely that -- especially when
6 you take into consideration in conjunction buffering the
7 testimony -- the evidence that was presented by the
8 experts that were presented at sentencing, it makes it
9 far more likely that Mr. Jewell was suffering from this
10 side effect at this time.

11 It's not just we think he was. This is a
12 side effect we don't -- you know, Paxil, there is a
13 little bit of science out there that Paxil has this side
14 effect. You have peer reviewed studies of violence being
15 caused by Paxil. You have this physiological evidence,
16 and that is different than what was presented at the
17 sentencing. Had Judge Cottingham had that at his
18 disposal, we believe and we submit to the Court that it's
19 reasonably likely his sentence would be have been
20 lowered.

21 It might not have been 15, but it was
22 reasonably likely it would have been 20 and below.

23 THE COURT: Okay. Anything else?

24 MR. THOMPSON: Nothing further, Your Honor.

25 THE COURT: You want to make an argument?

1 MS. WILSON: Very briefly, Your Honor. With
2 regard to Mr. Jewell's newly discovered evidence claim,
3 the State submits this is not newly discovered evidence.
4 Newly discovered evidence standard is outlined in Hagy
5 vs. State, and it says the defendant must show all of
6 these elements in order to be successful in the newly
7 discovered evidence claim.

8 First they must show that such evidence would
9 probably change or result in any trials had, and
10 Mr. Jewell has not presented evidence of that today.
11 Specifically, Judge Cottingham says in the transcript
12 that he is persuaded that Paxil may have been a
13 contributing factor to the Applicant's unusual behavior
14 and the Court indicated that it could not -- he could not
15 sentence -- Judge Cottingham indicated he could not
16 sentence the Applicant to the minimum in light of the
17 violent nature of the offense.

18 The second element is that it has been
19 discovered since trial.

20 The third element is that it could not, by
21 exercising due diligence, been discovered before trial.

22 The fourth element is that it's material to
23 the issue of guilt or innocence, and Mr. Savage testified
24 today that it would have went to mitigation, and so
25 that's not to guilt or innocence, and further, in light

1 of the results of the test, Mr. Jewell doesn't indicate
2 that he's not -- that he is innocent, but instead he just
3 wants this issue to go to his mitigation.

4 Fifth element is that this testimony is not
5 clearly cumulative or impeaching, and this testimony was
6 clearly presented at trial.

7 We have Dr. Waid who testified that from a
8 variety of agents, not just Paxil, the Applicant has a
9 deserving response to it and that it is driving him and
10 making him more agitated. We also have testimony from
11 Dr. Waid saying that SSRI drugs are not benign agents,
12 may also induce people to do things that are atypical for
13 their behavior.

14 We have testimony from Dr. Bracken who
15 testified that at the time of the incident Mr. Jewell's
16 actions were very consistent with the ups and downs of
17 the drug Paxil, and, also, it's obvious from the
18 testimony that Mr. Jewell presented that these experts
19 thought he had a negative reaction to the way he
20 metabolized his Paxil, and this testimony that was given
21 during mitigation was actually stronger than the test
22 results we hear from Mr. Kurtz because he specifically
23 addressed Paxil with Mr. Jewell, and we also had the
24 evidence presented by Dr. Kurtz. He says that exact same
25 thing.

1 He said his conclusion was that Mr. Jewell
2 breaks down the drugs at a higher peak, and he also said
3 he couldn't say if Mr. Jewell suffered or was more likely
4 to suffer from violence as a side effect or if that was
5 just a side effect. He said that as a result of this 2D6
6 there was an increase of all side effects.

7 Further, this new DNA testing did not meet
8 the requirement of evidence that was not previously
9 presented or heard, so we just request that you deny this
10 request for a new sentencing based on newly discovered
11 evidence.

12 THE COURT: All right.

13 MR. THOMPSON: Can I respond to one thing,
14 Your Honor?

15 THE COURT: Sure.

16 MR. THOMPSON: With all due respect, I submit
17 the attorney for the State is arguing the wrong standard
18 for review. We're not arguing for a new trial. The
19 standard she is quoting is for a new trial. As to
20 whether or not this is after discovered evidence for a
21 trial, not for a sentencing proceeding, we submit that
22 the standard, when you're analyzing whether or not a
23 sentencing proceeding should be given, is not whether or
24 not this is material to guilt or innocence, but whether
25 or not it's material to the sentence that was imposed and

1 the reasons for the sentence imposed, and that it's not,
2 you know -- not that it's more likely than not that a new
3 trial would be given, but that a lower sentence would be
4 imposed, so we would just ask Your Honor to use the
5 correct standard in reviewing whether or not this is
6 after discovered evidence affecting the sentence. We're
7 not challenging the conviction.

8 THE COURT: All right. Well, I'm going to go
9 back and look at this transcript a little bit more
10 closely because I just had a chance to glance through
11 portions of it. I'll let y'all know what I decide.

12 - - -

13 (Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 6th of December 2012.

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

July 6, 2013

Circuit Court Reporter

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8/5/12

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

2011-CP-10-4234

Brooke Jewell,
S.C.D.C. No. 279898,

Applicant,

ORDER

v.

State of South Carolina,

Respondent.

FILED
2012 JUL 31 AM 11:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY 1

This PCR application was filed June 15, 2011. Respondent made its return and motion to dismiss on October 24, 2011. A hearing was held on July 23, 2012 at which time Applicant was present and represented by Jeremy Thompson, Esquire. Respondent was represented by Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General.

I.

On November 15, 2001, Applicant pled guilty to first-degree burglary (2000-GS-10-6747) and first-degree criminal sexual conduct (CSC) (2000-GS-10-6748). He was represented by Andrew J. Savage, III, Esquire. The Honorable Edward B. Cottingham levied concurrent sentences of fifteen years for first-degree burglary and twenty-one years for first-degree CSC.

Applicant filed a notice of appeal, which was perfected as an Anders brief. The South Carolina Court of Appeals dismissed the appeal on April 25, 2005. While Applicant filed a petition for writ of certiorari at the South Carolina Supreme Court, that petition was voluntarily dismissed on April 21, 2006.

Applicant filed a PCR application on May 4, 2006 (2006-CP-10-2011). He was represented by Tricia A. Blanchette, Esquire. Applicant voluntarily withdrew his PCR

application and the Honorable Deadra L. Jefferson signed a consent order on October 29, 2009.

II.

In his current PCR application, Applicant argues he is entitled to a new sentencing hearing because of after-discovered evidence. Applicant argues the results of a 2010 blood test show he is a "poor metabolizer" of prescription drugs and this is after-discovered evidence that entitles him to a new sentencing hearing.

III.

This Court has reviewed the Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, and the pleadings.

A. After-Discovered Evidence

Applicant argues there is after-discovered evidence that allows him to justify the circumvention of the statute of limitations. For an applicant to be granted a new trial based on after-discovered evidence, he must show the evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citation omitted). This Court finds there must be a subsequent hearing in order to allow Applicant to argue the 2010 drug sensitivity test is truly after-discovered evidence. This Court notes the only issue that will go forward at this subsequent hearing is whether the results of this test could have been discovered by plea counsel.

B. State's Motion to Dismiss

As to any and all other issues, this Court finds the State's motion to dismiss is well taken.

As Applicant pled guilty on November 15, 2001, and his appeal ended on April 21, 2006, this PCR application filed on June 15, 2011, is clearly untimely. See S.C. Code Ann. § 17-27-45(a) (2003). Further, this PCR application is successive to the first application filed in 2006 (and voluntarily dismissed by Applicant). Successive PCR applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). If Applicant could have raised these allegations in a previous application, then Applicant may not raise those grounds in successive applications. Id. As such, any issues other than those related to the alleged after-discovered evidence are dismissed with prejudice.

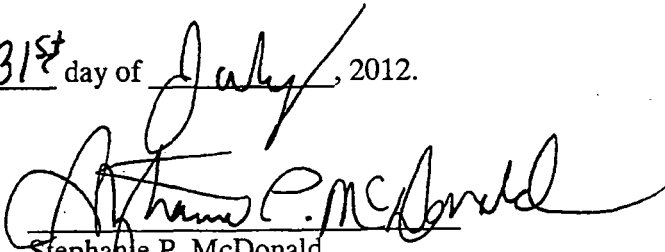
IV. CONCLUSION

Based on the records, pleadings, arguments of counsel, and evidence presented, this Court finds the State's motion to dismiss is granted in part and denied in part.

IT IS THEREFORE ORDERED THAT:

1. The State's motion to dismiss is **DENIED** as to the issue of whether the 2010 drug sensitivity test qualifies as after-discovered evidence. The issue of the timing and due diligence related to this testing may be raised at a subsequent hearing.
2. The State's motion to dismiss is **GRANTED** as to all other issues.

AND IT IS SO ORDERED this 31st day of July, 2012.


 Stephanie P. McDonald
 Presiding Judge
 Ninth Judicial Circuit

July 31, South Carolina.

246 County of Charleston BerkeleyCase # 2011 -CP- 10 - 4234Jewell, Brooke

Applicant / Petitioner

vs.

State of South Carolina,
Respondent.RECEIVED
7/27/12

ORDER

FILED
2012 JUL 24 PM 12:40
JULIE J. ARMSTRONG
CLERK OF COURT

This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

1. The application for post-conviction relief is hereby: denied granted under advisement; a formal order will be filed (see below - No.6)

2. Motion(s) was/were heard in this case and the court orders:

The motion to dismiss and/or for summary judgment is hereby granted denied under advisement based upon the statute of limitations and/or the successive nature of the application or other reason as follows:Motion to dismiss is denied as to the blood testing issue only. Counsel will address the timeliness issue in the proposed Order.

3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:

Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed with prejudice without prejudice.

5. Other: _____

6. The court further orders:

The Attorney General Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within 30 days.Both sides are directed to submit proposed orders to the court and to serve the orders on each other within _____ days.The court does not request proposed orders.

IT IS SO ORDERED.

Date: 7/23/2012
Charleston, S.C.Thomas L. McDonald
Presiding JudgeCourt Reporter Anne MeyerAttorney for Applicant Jeremy ThompsonAttorney for Respondent Karen C. Ratigan

CC
AG
AT
SD
GSSTATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Brooke Jewell, #279898,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2011-CP-10-4234

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4/13

ORDER OF DISMISSAL

FILED
2013 MAR 27 AM 7:50
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 15, 2011. The Respondent made its Return and Motion to Dismiss on October 24, 2011. A hearing was held on July 23, 2012 at which the Applicant was present and represented by Jeremy Thompson, Esquire. Respondent was represented by Karen C. Ratigan, Esquire, of the South Carolina Office of the Attorney General. By order dated July 31, 2012, the Honorable Stephanie P. McDonald denied the Respondent's motion to dismiss as to the issue of newly discovered evidence and granted the Respondent's motion to dismiss as to all other allegations.

An evidentiary hearing into the newly discovered evidence allegation was convened on December 6, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Jeremy Thompson, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

Testifying at the evidentiary hearing were the Applicant, Andrew Savage, Dr. David T. Kurtz, and Elana Peletskaya. This Court had before it the guilty plea transcript, the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina

2000-GS-10-6747
2000-GS-10-6748

R

Department of Corrections, the PCR application, Respondent's Return thereto, the Applicant's appellate documents, and the Applicant's exhibits.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the October 2000 term of the Charleston County Grand Jury for burglary- first degree (00-GS-10-6747) and criminal sexual conduct- first degree (00-GS-10-6748). Andrew Savage, Esquire, represented the Applicant. The Applicant pled guilty as indicted. On November 15, 2001, the Honorable Edward Cottingham sentenced the Applicant to confinement for 15 years for burglary and 21 years for criminal sexual conduct. The sentences were to run concurrently.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. William J. LaLima, Esquire, represented the Applicant on appeal. Following the following of an Anders brief, the South Court of Appeals dismissed the Applicant's appeal. State v. Jewell, Op. No. 2005-UP-296 (S.C. Ct. App. filed April 25, 2005). The Applicant then filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Applicant subsequently filed a Motion to Dismiss, in which he indicated that he wished to voluntarily dismiss the Petition for Writ of Certiorari. The motion was granted by Order dated April 21, 2006.

The Applicant subsequently filed his first application for post-conviction relief on May 24, 2006, in which he raised the following grounds for relief:

1. Ineffective assistance of counsel.
 - a. Counsel did not prepare for trial and failed to advise Applicant that evidence seized might be successfully suppressed at a trial by jury on the basis of Fourth Amendment claims.



- b. Counsel did not prepare for trial and failed to advise Applicant that statements made to authorities might be successfully suppressed at a trial by jury on the basis of Fifth Amendment claims.
- c. Counsel did not prepare for trial due to conflicts of interest which prejudiced the criminal defense.
2. Involuntary guilty plea.
3. Ineffective assistance of appellate counsel in that.
 - a. Counsel failed to investigate and claim relevant issues for direct appeal of conviction and sentence.

The State made its Return on July 27, 2006. After hiring a private investigator and working with counsel in preparation for the case, Applicant elected to withdraw his PCR application with prejudice. The Honorable Deadra L. Jefferson, Tricia Blanchette, Esquire, and the Applicant each signed a Consent Order of Dismissal with Prejudice, which was filed on October 29, 2009.

ALLEGATIONS

In his current and second application for post-conviction relief, the Applicant asserts the following grounds for relief:

1. Newly discovered evidence in that Applicant had his blood tested on June 17, 2010 and the results demonstrate that Applicant is a "poor metabolizer" of prescription drugs, which means he is "at increased risk of drug-induced side effects due to diminished drug elimination."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80

(2003).

Summary of the Testimony

First to testify at the evidentiary hearing was Elana Peletskaya. Peletskaya testified she is a senior scientist at Genelex and supervises the performance of the drug sensitivity testing. She testified that Genelex does genetic testing of drug sensitivity. Peletskaya testified the report issued in this case was a standard report issued by Genelex and the reports are kept in the regular course of business. She testified further she did not perform the test on the cheek sample provided by the Applicant.

The Applicant then called Dr. David T. Kurtz to testify. Dr. Kurtz testified he is a professor of pharmacy at the Medical University of South Carolina. He testified his work includes molecular biology research and teaching pharmacology. He testified he has been called as an expert witness once before in Beaufort for the defense. Dr. Kurtz testified he has never done DNA drug sensitivity testing, but he has worked indirectly in a lab where the testing was done. He testified further he was familiar with the lab requirements for the State where the Applicant's testing was done and he keeps up with drug sensitivity testing procedures and methods. The Court qualified Dr. Kurtz as an expert witness in pharmacology.

Dr. Kurtz testified he reviewed the Applicant's report from Genelex and his opinion is solely based on the test results from Genelex. He testified the applicant has a gene mutation that affects how his liver metabolizes drugs. He testified this mutation results in a much slower break down of prescription drugs in the Applicant's body. He testified prescription drugs peak at a higher level in the Applicant's bloodstream and stay in his body longer. He testified the test cannot determine how high above normal the Applicant peaks. Dr. Kurtz testified that in low metabolizers, acute side effects manifest quickly and chronic side effects manifest more slowly.

He testified that oftentimes low metabolizers never get rid of the first dose of a medication before they take the second dose.

Dr. Kurtz testified further it was his conclusion that because the Applicant breaks down drugs more slowly he has an increased likelihood of experiencing all side effects. He testified that he is aware of two peer articles that state violence is a chronic side effect of Paxil. He testified that while violence is a chronic side effect of Paxil, the drug sensitivity testing does not indicate which acute and chronic side effects the Applicant is more likely to experience. Dr. Kurtz testified he could not say for certain that the Applicant did or did not suffer from violence as a chronic side effect simply because he is a low metabolizer of Paxil.

Dr. Kurtz also testified that DNA drug sensitivity testing is a widely accepted area of DNA testing and is offered by testing labs across the country. He testified 2D6 testing became widely available around 2008 or 2009. He testified it wasn't until recently that labs were able to identify specific mutations of drugs. Dr. Kurtz testified that in 2000, while DNA drug sensitivity testing was known in the scientific community, it was not routine and widely known to the public. He testified further that routine testing was not available because techniques for testing did not exist.

Also testifying was Andrew Savage, Esquire. Counsel testified he has practiced mostly criminal law since 1975. He testified he recalls his representation of the Applicant and was hired shortly after the Applicant was arrested. He testified he immediately began searching for an explanation for the Applicant conduct. He testified he first wanted to find out about any emotional or psychological problems the Applicant was having. Counsel testified he learned that the Applicant was on SSRI drugs unsupervised. Counsel testified he was aware of the problems associated with SSRI drugs. He testified he considered not guilty by reason of insanity as a legal

defense, but concluded that use of Paxil was not a legal defense and he advised his client of such.

Counsel testified his focus then shifted to the development of a strong case for mitigation. He testified he presented evidence relating to the Applicant's Paxil use to the Court in mitigation after the Applicant's plea. He testified on July 25, 2000 he retained Dr. Pat Gerald, a psychologist to determine if the Applicant suffered from any sexual aberrance. He testified in September 2000 he retained Dr. Bill Burke and in December 2000, he retained Dr. Jenkins. Counsel testified he also spoke to Wendy Cooper Samuel and Dr. Jack Booth. Counsel testified he retained Randy Wade in July 2001 to review the evaluations of all the other experts he retained. Counsel testified he retained Dr. Peter Breggin, a national expert on how SSRI medications affect users, and has phone consultations with many other experts.

Counsel testified he hired several experts who testified at the Applicant's guilty plea proceeding. Counsel testified their testimony was effective because the Applicant was given the minimum sentence for burglary. He testified that when consulting various experts, no one mentioned DNA sensitivity testing. He testified had the testing been available at the time, he would have presented the test during the guilty plea. However, counsel testified it would not have changed his advice to the Applicant about pleading guilty. Lastly, counsel testified he could not speculate on whether the DNA drug sensitivity testing would have made a difference during sentencing.

Last to testify was the Applicant Brooke Jewell. The Applicant testified he started taking Paxil three weeks prior to the crime. He testified he started taking 20 milligrams and could not recall if his dosage was increased. He testified his girlfriend convinced him that he was not energetic enough, so he went to a psychiatrist and was prescribed Paxil. He testified that after he was prescribed Paxil he did not notice any improvement. The Applicant testified that he

committed the crime and has been looking for an expert to explain why for some time. He testified that three years ago he found out that Genelex did DNA drug sensitivity testing.

Newly Discovered Evidence

The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(c). In order for an Applicant to obtain a new trial on the basis of newly discovered evidence, the party requesting the new trial must show that the evidence (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and, (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

This Court finds the Applicant's second application for post-conviction relief alleging newly discovered evidence was timely filed in accordance with S.C. Code Ann. §17-27-45(c). However, this Court finds that in light of the extensive mitigation evidence presented by counsel during the sentencing portion of the plea proceeding, it is unlikely the results of the DNA drug sensitivity testing would have resulted in a different sentence for the Applicant.

The record reflects counsel presented evidence of the Applicant's educational background and his reputation in the community (Plea T. 8:12-13, 33:19-35:11). Counsel

presented evidence to the court of his emotional and mental health background. (Plea T. 35:11-36:5). Counsel also presented testimony from several medical professionals who discussed the impact that SSRI medications like Paxil had on the Applicant. Present to testify as mitigation were Dr. Jenkins, a psychiatrist, Dr. Booth, a psychologist, Dr. Waid, and Dr. Breggin, a national authority on SSRI medications. (Plea T. 46-69). Along with his testimony, Dr. Breggin presented case law from other jurisdictions where the defendant's SSRI medication use precipitated an abrupt change in their behavior. (Plea T. 70-73).

The record also reflects the plea court took into consideration all mitigating circumstances presented by counsel during the plea. The plea judge states on the record "I am persuaded that the Paxil may have been a contributing factor to this unusual behavior on your behalf. I regard that as not an excuse, but perhaps as some mitigating circumstances. Nothing else in your record explains this horrible behavior". (Plea T. 94:7-9). This Court finds the plea court took all mitigating circumstances presented by the defense into consideration when sentencing the Applicant including the adverse effect the Applicant's Paxil use may have had on his behavior. This Court also finds the positive effect of the mitigation evidence presented by counsel is reflected in the Applicant being sentenced to the minimum sentence for burglary-first degree.

This Court also finds the DNA drug sensitivity test results as interpreted by Dr. Kurtz during the PCR are merely cumulative to the testimony presented by several experts who testified for the defense during the plea proceedings. The Applicant's DNA drug sensitivity test results indicated that he is a "poor metabolizer" and is at an "increased risk of drug-induced side effects". After analyzing the results of the Applicant's DNA drug sensitivity testing, Dr. Kurtz concluded that because the Applicant breaks down drugs more slowly he has an increased

likelihood of experiencing the side effects of prescription drugs. Dr. Kurtz also concluded the Applicant's DNA drug sensitivity test results do not indicate which acute and chronic side effects the Applicant is more likely to experience.

This Court finds that during the Applicant's plea proceeding several medical professionals testified the Applicant had negative reactions to the Paxil he was prescribed during the time of the incident. Dr. Waid testified that "from a variety of agents, not just Paxil, [the Applicant] has a disturbing response to it, that it was driving him, making him more agitated". (Plea T. 51:11-14). Dr. Waid also testified that SSRI drugs "are not benign agents, and often induce people to do things that are atypical of their behavior, and can even induce psychosis and even more serious, malignant disorders." (Plea T. 55:23-56:3). Dr. Breggin testified that the Applicant's activities at the time of the incident were very consistent with the ups and downs of SSRI drugs. He testified "on the day that he's going from compulsive suicidality to compulsive aggressivity and compulsive sexuality, is very consistent with the ups and downs of the drugs." (Plea T.66:3-6). This Court finds that the Applicant has failed to carry his burden of proving the results of a DNA drug sensitivity test are newly discovered evidence warranting resentencing. This Court also finds that there is no evidence or material fact, not previously presented and heard, that requires vacation of the Applicant's sentence.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

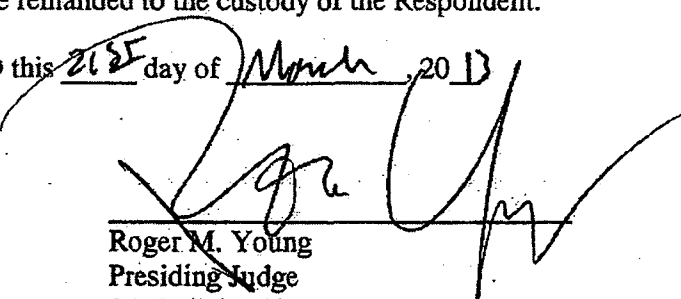
Based on all the foregoing, this Court finds and concludes the Applicant has not met his burden of proving that the results of the DNA drug sensitivity testing would have resulted in a different sentence for the Applicant in light of the extensive mitigation evidence presented by counsel during the sentencing portion of the plea proceeding. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 21st day of March, 2013



Roger M. Young
Presiding Judge
9th Judicial Circuit

Charles, South Carolina.