

THE SOUTH CAROLINA COURT OF APPEALS

RECEIVED

Johannie M. Brisbon # 21658, v. State of South Carolina,  
Petitioner, Respondent

MAR 17 2014

SC Court of Appeals

CASE NO. 2009-CP-32-1603  
Appellate Case NO. 2013-002427

NOW COMES BEFORE THE STATE OF SOUTH CAROLINA COURT OF APPEALS TO PLEAS FOR MERCY AND PRAY THIS HONORABLE STATE OF SOUTH CAROLINA COURT OF APPEALS WOULD BE LENIENT UNTO AND TOWARD THE PETITIONER IN THE BELOW MATTER. THE PETITIONER HAS DONE ALL HE COULD TO TRY TO ADJUDICATE THIS MATTER. THIS MATTER HAS BEEN IN A DIRECT APPEAL, A POST CONVICTION RELIEF APPLICATION, AND NOW IN A STATE WRIT OF HABEAS CORPUS PETITION WITH THE SAME ISSUES. THIS STATE WRIT OF HABEAS CORPUS HAS BEEN IN BEFORE THE HONORABLE ADMINISTRATIVE JUDGE AND THE PETITIONER DID NOT EVEN GET A CHANCE TO TRY TO EXPLAIN TO THE HONORABLE ADMINISTRATIVE JUDGE SOMETHING ABOUT THE FUNCTIONS OF THE STATE WRIT OF HABEAS CORPUS WERE ABOUT THE "RIGHTS TO LIBERTY" IN MY CASE AND NOTWITHSTANDING WITH THE CRIMINAL ACTS. IT IS NO WAY THE HONORABLE ADMINISTRATIVE JUDGE COULD NOT HAD READ THIS WRIT OF HABEAS CORPUS AND DID NOT SEE THESE "RIGHTS TO LIBERTY" VIOLATIONS. THE PETITIONER REALLY BELIEVES THE ASSISTANT ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA DID NOT PUT THIS STATE WRIT OF HABEAS CORPUS PETITION WITH A PARTIAL OF THE COURT TRIAL TRANSCRIPT AND WITH A PARTIAL OF THE POST CONVICTION RELIEF APPLICATION COURT TRIAL TRANSCRIPT TO SHOW THESE "RIGHTS TO LIBERTY" VIOLATIONS BEFORE THE HONORABLE ADMINISTRATIVE JUDGE FOR HIM TO READ; CAUSES, THE ADMINISTRATIVE JUDGE'S DISMISSED THIS STATE WRIT OF HABEAS CORPUS WITHIN A TENDAYS PERIOD. THIS WRIT OF HABEAS CORPUS PETITION HAS BEEN IN THE COURT SYSTEM EVER SINCE APRIL, 2009, AND WAS RE-FILED BY THE ASSISTANT ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, IN OCTOBER 11, 2013, AND OCTOBER 21, 2013; THE PETITION 2009-CP-32-1603, WAS DISMISSED WITH PREJUDICE, AFTER THIS PETITION HAS BEEN SETTING IN THE LEXINGTON COUNTY CLERK OF OFFICE AND IN THE ATTORNEY GENERAL OFFICE FOR JUST ABOUT AROUND AN ABOUT FOUR (4) YEARS, THIS IS ALSO A "RIGHTS TO LIBERTY" VIOLATION. THE PETITIONER IS ASKING THE STATE OF SOUTH CAROLINA COURT OF APPEALS FOR A CERTIFICATE OF APPEALABILITY; CAUSES, THIS "RIGHTS TO LIBERTY" IS GOES TO BE A CONTINUE VIOLATEDN ...

CAUSES, THESE ESSENTIAL ELEMENTS IN THE SOUTH CAROLINA CODE ANN. § 16-3-10, OF MURDER REQUIRES "WITH MALICE AFORETHOUGHT" AND MANY MORE IN THIS SERIOUS CRIME IN WHICH THE STATE OF SOUTH CAROLINA SOLICITOR HAVE NOT PROVEN BEYOND A REASONABLE DOUBT. THE STATE'S SOLICITOR IS CLAIMING THE MURDER TOOK PLACE OR WAS AT THIS SHED OR LAKE HOUSE IN THIS CEMETERY AREA IN LEXINGTON COUNTY WHERE THE PETITIONER WORKED AT, AND CLAIMING OR OR USING; CAUSES, THE PETITIONER WAS THE LASTS PERSON TO SEE HER ALIVE OR CAUSES, HE LEFT HER AT THE PUBLIC BUSINESS PLACE OR RESTAURANT; HE MURDERED HER. WHEN ALL THE FACTS IN THE RECORDS SHOWS SOMEONE ELSE DID SEE THE PETITIONER AND HIS GIRLFRIEND RIDING OR TRAVING TOWARD THE PUBLIC BUSINESS PLACE OR RESTAURANT ABOUT 9:45p.m OR 10:45p.m. THIS SAME NIGHT, THEY KNEW THESE COUPLE, A 'RIGHT TO LIBERTY', ALL OF THE EVIDENCE COLLECTED FROM THE CEMETERY AREA WERE NEGATIVE FOR THE MURDER'S SCENE. THE 'RIGHTS TO LIBERTY', THE STATES' SOLICITOR WAS USING AN AXE FOUND AT THE SHED OR LAKE HOUSE AS THE ACTUAL WEAPON, YOU KNOW HOW BIG AN AXE IS. THIS INVESTIGATION TOOK SEVERAL MONTHS AND THIS SAME AXE WAS BEING USED WITH TWO MEN AT THIS CEMETERY AREA, WHILE THE PETITIONER WAS LOCKUP UNDER OR DURING HIS INVESTIGATION, THERE WERE TWO OTHER MEN WORKING HERE, TOO. THE 'RIGHT TO LIBERTY', THE DAUGHTER DID TESTIFY HER MOTHER DID NOT TAKE HER POCKETBOOK WITH HER OR AN EXTRA BAG OF CLOTHES FOR TO CHANGE, EITHER, AND HER DAUGHTER SAID AT THE TRIAL HER MOTHER WAS NOT WEARING THE SAME CLOTHES, SHE WAS WEARING THE NIGHT SHE LEFT WITH THE PETITIONER, EITHER. SHE WAS WITH SOMEONE ELSE, THE 'RIGHT TO LIBERTY'. THE PETITIONER HAD GIVEN HER THIS THIS MONEY TO MAKE SURE SHE GET BACK HOME. THIS TWENTY DOLLARS WOULD BE ENOUGH TO CATCH A TAXICAB BACK HOME. CAUSES, THE PETITIONER KNEW SHE DID NOT HAVE HER POCKET BOOK OR PURSE WITH HER, AFORETHOUGHT OF CARE. THE PETITIONER AND HIS GIRLFRIEND HAVE BEEN SEEING EACH OTHER FOR ABOUT FIFTEEN YEARS THE PETITIONER HAVE CHILDREN WITH HER, TOO, THE 'RIGHT TO LIBERTY'. THE STATE'S SOLICITOR IS IN A RUSH TO GET A CONVICTION INSTEAD OF SEEING JUSTICE SERVED, CONVICTED AN INNOCENT PERSON.

THE SOUTH CAROLINA COURT OF APPEALS

Johnnie M. Brisbon, #216581 v. State of South Carolina,  
Petitioner, Respondent.

Cases no. 2009-CP-32-1603  
2013-002427

PROOF OF SERVICE BY MAIL

I am an inmate and Petitioner in the ABOVE-CAPTIONED ACTION. A REGULAR COMMUNICATION BY MAIL EXISTS THROUGHOUT THE STATE OF SOUTH CAROLINA AND THIS IS A PROPER CIRCUMSTANCE OF SERVICE BY MAIL. I HAS THIS DAY SERVED A TRUE COPY OF THE PETITION TO THE FOLLOWING PARTY BY DEPOSITING THE SAME IN THE UNITED STATES MAIL SYSTEM AT THE BROAD RIVER CORRECTIONAL INSTITUTION POSTAGE PREPAID.

TO: THE ATTORNEY GENERAL OFFICE.

ASSISTANT ATTORNEY GENERAL  
MARY S. WILLIAMS  
Post Office Box 11549  
COLUMBIA, S.C. 29211

Sincerely,

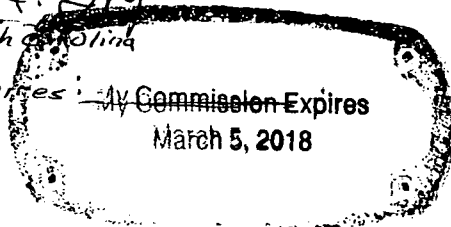
Johnnie M. Brisbon  
Johnnie M. Brisbon.

SWORN AFFIRMED AND SUBSCRIBED BEFORE ME

THIS 11th DAY OF MARCH, 2014.

Susan H. Jure  
Notary Public of South Carolina

my Commission Expires: March 5, 2018



Johnnie M. Brisbon, # 216581  
Murray Unit, A-wing, Room # 266  
Broad River Correctional Institution  
4460 Broad River Road  
Columbia, S.C. 29210

Re: BRISBON, Case No. 2013-002427

MARCH 10, 2014

SOUTH CAROLINA COURT OF APPEALS  
JENNY A. KITCHING, CLERK  
POST OFFICE BOX 11629  
COLUMBIA, S.C. 29211

Dear Clerk Kitching:

Please find enclosed within the original Brisbon,  
Case No. 2013-002427, petition to be filed in your office.

Thanks you much, Clerk Kitching.

Sincerely,

Johnnie M. Brisbon  
Johnnie M. Brisbon.

cc: msu/gak

Jwb.

RECEIVED

MAR 17 2014

SC Court of Appeals



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

April 7, 2008

Mr. Johnny M. Brisbon #216581  
Broad River Correctional Institution  
4460 Broad River Road  
Columbia, SC 29210

Dear Mr. Brisbon:

Enclosed please find a copy of the order of the South Carolina Supreme Court denying your petition for writ of certiorari. This means that the lower court's decision in your case stands and you have exhausted your state remedies. Note the time limits for filing future actions based on the date of the denial of this PCR appeal action via the federal habeas statute of limitations.

Should you have any questions concerning this matter, please contact me.

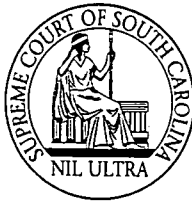
Sincerely,

Wanda H. Carter  
Deputy Chief Appellate Defender

WHC/mwl

Enclosure

11  
DEG



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 7, 2008

## REMITTITUR

The Honorable Beth Carrigg  
205 East Main Street, Suite 146  
Lexington, SC 29072-3599

Re: Brisbon, Johnny M. v. The State – 1996-CP-32-02956

Dear Ms. Carrigg:

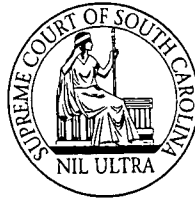
The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

  
CLERK

DES/jj

cc: Deputy Chief Attorney Wanda H. Carter  
Assistant Attorney General Daniel E. Grigg



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 19, 2008

Deputy Chief Attorney Wanda H. Carter  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: Brisbon, Johnny M. v. The State

Dear Counsel:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

“Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.

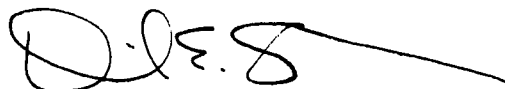
For the Court

Justice James E. Moore, not participating

March 19, 2008.”

The remittitur will be sent to the lower court as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,



CLERK

DES/jj

cc: Assistant Attorney General Daniel E. Grigg

APR 03 2011

**ORIGINAL**

Note:

Clerk of Court, please files the original in your office and send one copy clocked stamped to the Attorney General Office at Post Office Box 11549; Columbia, S.C. 29211, for Robert Stevenson, warden of Broad River Correctional Institution and return the other copy back to me, that I has provided with the envelope - - -

Clerk, I really appreciate any assisting at all in this matter, Thanks!!!

*Johanne A. Carrigg*

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

2009 APR -6 AM 10: 57

FILED

2009CP3201603

2009CP3201603

ORIGINAL

Johnnie M. Brisbon, #216581  
B.R.C.I., Murray 275  
4460 Broad River Road  
Columbia, S.C. 29210

March 30, 2009

2009 APR -6 AM 10:57

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

FILED

Clerk of Court,  
Lexington County  
05 139-E. Main Street, Room 107  
Lexington, S.C. 29072-3494

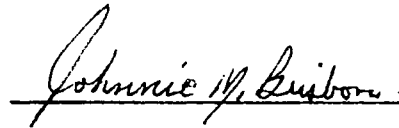
Re: The Filing of State Habeas Corpus

Dear Clerk of Court,

Please files enclosed within the original State Habeas  
Corpus to be filed in your office....

I thank you in advance.

Respectfully Submitted,



Johnnie M. Brisbon

CC: File

Find.

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

FILED

JOHNNIE M. BRISBON, #216581  
Applicant, 2009 APR -6 P 12:19

Case No. \_\_\_\_\_

vs.

SETH A. CARENS  
CLERK OF COURT  
LEXINGTON

2009CP3201603

STATE HABEAS CORPUS

STATE OF SOUTH CAROLINA, et al.,  
Respondent.

To: The Residing Judge of Lexington County in Lexington, South Carolina.

The undersigned pro se applicant hereby seeks a State Writ of Habeas Corpus, pursuant to South Carolina Code of Laws, section 17-17-10 through 80, (1976), et seq., based on the following particulars:

1. The applicant is a citizen of the United States and a resident of of the State of South Carolina, domiciled in Richland County, South Carolina at Broad River Correctional Institution, 4460 Broad River Road, Columbia, S.C. 29210.

2. The applicant is serving a life sentence for murder after imposition of the same in the General Sessions Court of Lexington County on the September 1994 term.

3. The applicant is presently unlawfully and unconstitutionally confined because the state's forensic blood evidence and the state's DNA experts both testified that the blood does not specially identify neither the applicant nor his girlfriend, on any of those items that was collected from the lake or shed house, in Lexington County, where the applicant worked at.

4. The applicant is challenging the Attorney General to prove applicant's guilt beyond a reasonable doubt. The applicant is challenging the state's forensic expert testimony in the trial transcript with the P.C.R. hearing transcript for supporting arguments, both are saying the same things: there is no evidence substantial, circumstance of physical, that can actually say the applicant or his girlfriend's blood was on any of those items seized from the shed or lake house.

Wherefore, the Applicant respectfully request the following relief:

a) that the Court will order the Attorney General and their agencies, which has the custody of the applicant, to immediately release the above applicant, if this Constitutional violation is true according to the State Writ of Habeas Corpus with the attached "Allegations and Supporting Grounds", in which argument is incorporated as is set forth verbatim<sup>1</sup> herein; and that the Court will issue this order unconstitutionally releasing the applicant from the custody and confinement of Respondent;

b) and if it is found that the States's forensic blood tests and the applicant's PCR forensic expert are saying the same things; that there is no circumstance, substantial, or physical evidence that can actually say that the applicant's or his girlfriend's blood was found on any of those items that were seized from the shed of lake house, where the applicant worked at, and that if the juries would hear these facts and factors, the outcome of the applicant's case would have been different, however, the applicant is using<sup>2</sup> this Honorable Court for a jury trial to hear these facts, of this case.

<sup>1</sup> or, <sup>2</sup> asking<sup>2</sup> Verbatim

c) and that the Honorable Court will grant the applicant any further and different relief it deems fair, just and equitable....

d) and that the Honorable Court accept the jurisdiction; causes, the lower and the high Courts have overlooked the incompetency of the forensic testings, the applicant was denied and deprived the effective assistance of counsel guaranteed by the sixth and fourteenth amendments to the United States Constitution and the South Carolina law, causes, Counsel requested and knew the forensics prior to trial, and failed to retain their own expert to assist counsel, which resulted in admission of this type of evidence for the first time in a South Carolina court without sufficient guarantee that the underlying science was reliable...

e) and that the pro se applicant is pleading for mercy and asking the Honorable Court the relax the rules, I am a lay person in the law of South Carolina and I am not a lawyer, the applicant does not ask the court to inquire into the criminal act for which the applicant has been convicted for, but into the "Rights of Liberty" notwithstanding the act, and Johnny M. Brisbon 0216501, is in "custody, "in violation of the Constitution, treaties, and laws of the United States.... And This Court is the only <sup>Court that</sup> can give some kind of release...

f) If there are any tangible facts or evidence of Johnny M. Brisbon's Constitutional Rights being violated, Brisbon is asking this Honorable Court for an immediately release from the Respondent.

1-to

### Statement of Case

The applicant, Johnny M. Brisbon was convicted of murder via a jury trial held during the September 1994 term of the Lexington County General Sessions Court before the Honorable M. H. Westbrook, the applicant was sentenced to life imprisonment, and the applicant appealed. The applicant's conviction and sentence were affirmed Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996). On December 31, 1996, the applicant filed a PCR application with the Lexington County Office to the Clerk of Court; however, subsequently, the Respondent filed a return, and a hearing was held on January 27, 2006; at the Lexington County Courthouse before the Honorable C.M. Davis, and on May 2, 2006, Judge Davis issued an order of dismissal in the case. The applicant appealed and his State Writ of Habeas Corpus follows.

### State's Trial Transcript for Supporting Argument of Reasonable Doubt and Presumption of Innocence

The Genetic forensic expert qualifying as expert in the DNA field (Tr.p. 227, ll. 17-24).

Q. Were you able to do the R.F.L.P. D.N.A. testing on the items submitted in this particular case.

A. No sir, we were not able to obtain enough DNA that was suitable for analysis for a R.F.L.P. based test, see (PCRTr.p. 490-491, ll. 15-20 and 4-9).

A. Well, we<sup>2</sup> need more DNA, and it also needs to be not degraded, PCR will work with DNA that has degraded to a certain point, whereas R.F.L.P. based testing does not work very well on DNA that is degraded because of the state of decomposition from a body

or from a particular sample.

Q. you did the R.F.L.P., but it was not sufficient based on the sample from the victim, is that correct?

A. That is correct (Tr.p. 237-38, ll. 9-24, 2-7; p. 239, ll. 2-5).

Q. Now were you able to obtain a standard DNA sample from all of those items that were submitted to you as standard from the victim?

A. No, sir, we typically would not use a section of skin, we had bone if we had bone for the extraction because the bone would be our first choice.

Q. Did you get an adequate, sufficient sample to do the PCR testing?

A. Yes, sir. see (PCR Tr.p. 488-89, ll. 9-25, 1-17; p. 492-93, ll. 1-11, 2-5).

A. The fact that with one of the sample, that being the specimen from the ax, we were dealing with a very small amount of material, so there wasn't a lot of DNA to recover. The second reason is the problem with degradation and that being similar to what we saw with the specimen from the victim in this case where there was a high degree of degradation because of the decomposition that has begun (PCR Tr.p. 490-91, ll. 13-25, 1-9).

A. That means that ten percent of the people in that relevant population that you look at would have that type, it doesn't look at, its not enough information to specifically identify one individual from everyone else, but rather it gives us a group of people that we narrow it down to who have that particular type (Tr.p. 241, ll. 7-12, 19-21; p. 242-243, ll. 20-25, 1-6; p. 248, ll. 7-21; p. 252, ll. 7-24; p. 265, ll. 17-21.; see, PCR Tr.p. 493-94, ll. 8-19; p. 499-502, ll. 1-7).

1-11, means, lines.

### Cross Examinations

Q. Now this tests you did in this case aren't what we call genetic fingerprinting?

A. No, ma'am that's a -- somewhat of a, I guess, colloquialism, but it an entirely different type of test, see (PCR Tr.p. 492-93, ll. 1-7, 2-5, 8-19; p. 529, ll. 16-28).

Q. Alright, and in that kind of test you can reach the conclusion that there's an one in a million chance that somebody else had this DNA?

A. Very commonly (Tr.p. 258, ll. 2-18; on redirect, p. 265, ll. 17-21; PCR Tr.p. 501, ll. 2-7).

### Post Conviction Relief Transcript

The genetic forensic expert qualifying as an expert in the DNA field (Tr.p. 488-89, ll. 9-25, 1-17).

Q. From the documents you've read, is there any indication that a DNA expert was consulted by the defense?

A. No, not from my gathering of what was said.

A. I assume because they didn't have enough sample size, yes... One of the shortcoming of R.F.L.P. was that you needed a large sample size, to put it in context, you needed a blood stain about the size of a quarter to get enough DNA to do the analysis.

Q. Back in the 1990's, during this time frame, was PCR universally accepted in the scientific community of the courts?

A. Not everyone accepted it.

Q. Are you aware of any opinion Dr. Mullis, the inventor of PCR technology, may have expressed through trade journals, Profession publications, and in testimony as to whether or not PCR was ready for forensic use in the time frame of 1994 through '96?

A. At least in '95 he's on record of stating that he

didn't think it was ready for forensic use (PCR Tr.p. 492-93, ll. 1-7, 2-5, 8-19).

Q. This is the man that invented the process saying that the technology used in this case was not ready for forensic use, is that correct?

A. Correct. (PCR Tr.p. 488-89, ll. 9-25, 1-17; p. 490-91, ll. 13-25, 1-9; p. 492-93, ll. 1-11, 23-25, 1-19; p. 513-17, ll. 7-10, 11-25; p. 503-04; p. 520-21; ll. 24-25, 1-6).

Q. As a matter of fact, they could not identify the victim's blood or being on the ax, could they?

A. Could not, if the latter was correct, then the person would have been excluded as the contributor of the blood on the ax.

Q. So instead of it being merely 12,000 people's blood in the lake house as they described it or on the ax or the couch, if indeed it was the same blood, instead of 12,000 people, the population that more accurately describes it may have been in the millions?

A. True.

Q. What else did the DNA results not indicate?

A. DNA results -- well, they do not indicate the race of the person; the sex of the person; the ethnicity of the person as different in race; where the person resides; or when the blood got there, whether it be on the ax or on the cushions of the couch.

Q. So, first of all, tell me if I'm understanding this correctly. There's no way to tell how long the blood's been there?

A. Correct. (PCR Tr.p. 490-91, ll. 13-25, 1-19; p. 476, ll. 21-25, 1; p. 526-27; ll. 11-25, 1-19; p. 528-29, ll. 19-25, 1-5; p. 512, ll. 5-10).

Q. There's no way of telling whether the blood come from a black man or a white man or a hispanic?

A. Or a woman, yes.

Q. There was no way to tell from the blood that was

found in there whether or not it even came from the victim?

A. True. (PCR Tr.p. 504; p. 510-11, ll. 22-25, 1-8; p. 520-22; p. 530-31, ll. 1-3, 8-9, 16-18, 25, 1; p. 532, 526-27, ll. 19-25, 1-15; p. 498, ll. 13-16).

### Ineffective Assistance of Counsel

The defense Counsel did testify in the PCR hearing that she did not see the evidence, she saw the report of the evidence, and the juries did not see the evidence, they too only got a report of what the evidence said. Causes, the defense Counsel did not do an independent investigation and failure of hiring an expert to assist her in the applicant's defense. The defense Counsel was ineffective for failing to do a thorough investigation of these forensic and DNA testings, this is where she should have kept her attention at, however, after the defense Counsel had done her independent examination of the facts and circumstances, the pleading and the laws involved. The defense Counsel's unprofessional errors and decisions or judgment of not to hire a genetic expert to help and assist her in the operation for the defense in this case. She did deprive and deny the applicant of a fair trial and prejudiced the defense of the case. The defense Counsel's unprofessional errors, judgement, and decisions of not hiring an expert and not investigating the forensic and DNA tests to which would be found wanting in all her strategic choices about which lines to reply on at the trial. Causes, the defense Counsel had failed to fulfill the duties of investigating the forensic and DNA testing or hiring a genetic expert to help and assist her in the preparation of a defense which did deny and deprive the applicant of fair trial and did prejudice the defense. The defense Counsel's unprofessional errors, judgement and decisions resulted in an actual and substantial disadvantage to the course of her defense, the defense Counsel's deficient

performance where the evidence of deficiency may be more accessible to the applicant than the prosecution, this information about forensic and DNA testing would be found wanting; Causes, the adversary system requires deference to defense Counsel's informed decisions. Causes of the defense Counsel's unprofessional errors, judgement, and decisions do justify a reversal of this judgment, the applicant was sentenced to the remainder of his life in prisonment for murder, he did not do. Causes of the defense Counsel's unprofessional errors deny and deprived the applicant of a fair trial and prejudiced his defense, there is a reasonable probability but for the defense Counsel's unprofessional errors the results of the proceedings would have been different.

The defense Counsel admitted in the PCR hearing that she did talk to another attorney about the DNA and forensic tests; causes, the attorney had just recently tried a DNA case, and she testified that they did talk about what DNA was about, and the attorney did suggest to her about using an expert, and in fact, gave her the name of a woman in North Carolina to use. Causes, the defense Counsel was informed and suggested to her of using a genetic expert to assist and help her with preparing her defense in this case, for her decisions and deficient performance; do deny and deprive the applicant of a fair trial and prejudiced his defense. The defense Counsel only hope was to find information to discredit the State's forensic and DNA tests; causes of the defense Counsel still failing to fulfill the duty to investigate the genetic expert forensic tests and hiring a genetic expert to

help and assist her in the preparation of the applicant's defense, did deny and deprive the applicant of a fair trial and did prejudice the defense, there is a reasonable probability but for defense Counsel's unprofessional errors the outcome of the proceedings would have been different. Even the applicant's genetic expert testified at the PCR hearing and said most lawyers have failed in a trial case of forensic and DNA tests, causes they did not use them as expert witnesses, and he thought that many attorneys simply did not know about people like him existed, and there is a need for experts like himself to assist and help lawyers in preparing their defense, she thought she could handle the DNA and forensic tests, it came out in the defense Counsel's own testimony, she admitted she did not know anything about the forensic and DNA testing methods, causes, defense Counsel's unprofessional errors failing to call and hire a forensic and DNA expert in order to contradict the State's forensic and DNA evidence, do deny and deprive the applicant of a fair trial and do prejudice the defense. The PCR Counsel and the applicant's expert genetic testified and admitted at the PCR hearing in their closing argument that the defense Counsel may have been ineffective assistance by not calling an expert to assist her in her defense at the time of the applicant's case, however, both Counsel and the applicant's genetic expert saying the same things, "we are not sure that we would have had the experience to have called an expert, either, and had we not done so, we would have been ineffective assistance, also..." Causes of defense Counsel's deficient performance resulted in an actual and

substantial disadvantage to the course of the defense Counsel's defense, did deny and deprive the applicant of a fair trial and did prejudice the defense, there is a reasonable probability but for defense Counsel's unprofessional errors the results of the proceedings would have been different. The defense Counsel had been suggested, informed, and given a good reason to believe by pursuing a certain investigation would be fruitful to help or assist in weakening the State's forensic testing, causes of the defense Counsel's deficient performance prejudiced the defense, the defense Counsel's errors were so serious that it denied and deprived the applicant of a fair trial, to wit, had the defense Counsel would have done a reasonable research or investigation on or about the forensic testing, she would have discovered that the States' forensic testing was not accurate as the DNA testing, causes, it could not specifically identify one individual from anyone else. It can only exclude an individual and give a group of people from where the samples could have come from. The defense Counsel never actually saw the forensic dot blot testing so that the proper interpretation might be brought to the Court. The defense Counsel's deficient performance prejudiced the defense so as to deny and deprive the applicant of a fair trial, and this is a presumption of innocence, there is a reasonable probability but for defense Counsel's unprofessional errors the outcome of the proceedings would have been different. If the defense Counsel would have called or hired a genetic expert to assist and help her prepare a defense for the applicant's behalf at the time of the trial and showed the jury, the State forensic

blood evidence was inconsistent, contradicted and forensic blood evidence only can show grouping blood evidence as opposed to any specific or solid match to his or his girlfriends blood on any of those items seized, and causes, it can only exclude an individual and give a grouping of people from where the sample could have come from, and causes, the forensic blood evidence could not speak on race, gender or ethnicity of the donor's blood, and causes, the forensic blood evidence cannot specifically identify one individual from anyone else. Causes, the defense Counsel failed to obtain an expert in the field of genetic or DNA technology at the time of the applicant's trial and failure to call or hire an expert to testify to the contradicting of the State's forensic blood evidence to that effect at the time of the applicant's trial, and if the applicant's genetic expert would have explained more clearly the above contradictions before the juries in the applicant's defense the results of the proceedings would have been different. The defense Counsel's deficient performance prejudiced the defense, to wit, the defense Counsel's errors were so serious that it denied and deprived the applicant of fair trial, and the defense Counsel made errors so serious that the defense Counsel was not functioning as the "Counsel" guaranteed to the applicant by the Sixth and Fourteenth Amendments.

The applicant have demonstrated in the above that the defense Counsel's representation fell below an objective standard of reasonableness, and a reasonable probability that but for the defense Counsel's unprofessional errors, the results of the

proceedings would have been different, according to Strickland, 466 U.S. 668 (1984). Causes of the above sitting forth do, constitutes a denial of fundamental fairness shocking to the universal sense of justice. Causes of the defense Counsel, these specified errors resulted in the required prejudice. The defense Counsel's errors justify, for a reversal, for a new trial or vacated remanded. Catoe, 359 S.C. 120, 577 S.E.2d 782 (2004).

Closing Arguments of Contradiction and Inconsistency  
of the Forensic Testings

Ultimately, though, the defense Counsel stated in the PCR hearing that she did not need an expert when realized that the forensic blood evidence emphasized serology and blood grouping as opposed to DNA results that were not definite and exact, however, the defense Counsel also testified at the PCR hearing that she was in no way qualified to evaluate the films, dot blots, or the forensic blood evidence, that how does she expect the juries to make a righteous and just decisions about the forensic expert's testimony on and about blood evidence that is contradicted and inconsistent with the murder charged in the indictment. If the defense Counsel does not understand how did she expect the jury to know or understand what the forensic expert's testimony would be about whose blood it matched or did not match; the State's genetic expert testified that the PCR, polymerase chain reaction, testing was performed on several samples submitted to them, and this form of testing is not as accurate as DNA testing, causes, the forensic test can not specifically identify one individual

↳ than.

from anyone else, the forensic test can only exclude an individual and/or gives a group of people from which the samples could have come from, causes, the defense Counsel failed to make sure all the juries could understand what the State's genetic expert's testimony, about the forensic testing, by not hiring a genetic expert to help explain more clearly the contradictions and inconsistencies in the forensic test, did deny and deprive the applicant of a fair trial and did prejudice the defense. In the transcript the State's genetic expert testified before the jury on direct examination about the RFLP test was not sufficiently based on the sample from the applicant's girlfriend, and he needed more DNA and it also needs to be not degraded; he tries to explain about PCR test will work with DNA - that has degraded to a certain point, and that is one of the advantages of this test, whereas the RFLP based testing does not work very well on DNA that is degraded causes of the State of decomposition from the victim's body or from a particular sample, to wit, he was dealing with a very small amount of material, so there was not a lot of DNA to recover, well - second of all, the second reason is the problem with the degradation and that being similar to what he saw with the specimen from the victim's body with this case where there was a high degree of degradation causes of the decomposition that had begun. It is one type of PCR based test and because of its sensitivity it is the first test which he used when he was dealing with a very limited specimen, to wit, the primary reason was because of the specimen obtained from the victim's body with this case, which he was comparing with those

items, this specimen which the genetic expert had received from the victim's body in this case was a specimen of bone and tissue or skin, and this was in a very decomposed state, and it had degraded very far, and causes of that, the genetic expert was not able to obtain enough DNA evidence that was suitable for an analysis for a RFLP based test, and this RFLP based testing, in that the RFLP requires DNA that is slightly larger in its size and not quite as degraded, the forensic test was not enough information to specifically identify the applicant's girlfriend or his blood from everyone else, but rather the forensic test gives the genetic expert a group of people that the expert can narrow it down to who have this particular type of blood and it was consistent with over twelve thousand people in the Lexington and Richland counties, however, when you break down this 'commoning blood' further from groups to different subgroups and the given percentage of the people - who have this subgroup as opposed to this commoning subgroup; it seemed to us these results were closer to that type of testimony the expert could give than the exact applicant's blood type is and in this person the odds against it was one to five trillion, this leaves the State with a reasonable doubt, and the State must prove all essential elements in the murder charged in this indictment beyond a reasonable doubt, the subgroup shows above very clearly that the applicant's coworkers both used the same ax daily as needed and they also used the same sofa or couch, this is a workshop - lake house, and the State did not prove that the two workers did not use the ax, sofa, or couch, either, however, the applicant testified before

the juries about how the sofa or couch chair, and many other things that had been painted all over upon them, how some kids had broken into the shed or lake house many times since he has been there and the applicant had let the jury know that this shed or lake house was not secured, either; they have had a few problem with the kids or people breaking into the lake house at night, and these kids or people would steal anything, and he had named a few things that were stolen: hedge cutter and a chain saw and how they would mess up, stuff in the lake house or shed, and that those spray paint cans were already there in the lake-shed house with the rest of the tools the ax which is a regular tool; and the applicant also testified before the jury and let them know that he had left his girlfriend at a public or business place at her own words that she had seen or saw someone she thought she knew; and he had given her twenty dollars, and he left her there.

The State must prove beyond a reasonable doubt that the killing was done "with malice aforethought." The State have not proved the with "malice aforethought" that the applicant killed or murdered his girlfriend in all the essential elements beyond a reasonable doubt, and the State have not showed that any other circumstances that would show directly that intent to kill existed by the applicant, and/or that there is not any evidence of the applicant lying in wait against his girlfriend existed were proved beyond a reasonable doubt. In the above setting forth does constitute a denial of fundamental fairness shocking to the universal sense of justice.

The PCR Counsel gave the defense Counsel the greatest of respect as an attorney, and to say she have been ineffective assistance by not calling an expert in the defense at the time of this trial. The PCR Counsel think-in no way impinges upon the defense Counsel's excellent work. There are a very few criminal attorneys that the PCR Counsel hold in the higher esteem, this being said; that if any other Counsel would have had been in her shoes in the '90's, whenever their case was in trial in the '90's, the PCR Counsel is not sure that another Counsel, even his self, would have had the experience to have called an expert either; and had he or they not done so, he or they would have been ineffective assistance, also.

The defense Counsel deficient performance of not getting an expert to assist or help her with the defense at the time of trial, the error was so serious that it did deny and deprive the applicant of a fair trial and did prejudiced the defense. Even during the PCR hearing the applicant genetic expert testified before the Court that at the time of this trial there were questions as to whether PCR, polymearse chain reaction, tests was universally accepted in the scientific community as reliable, and that even the inventor of the PCR doubted whether this technology was ready for forensic uses, and as a result; this should have been brought and revealed to the juries by the defense Counsel, or her via expert testimony, however, causes of the defense Counsel failure to obtain the actual forensic evidence against the applicant and have the forensic testings examined by her genetic expert; causes, the applicants genetic expert witness at the PCR

hearing stated that the State forensic blood testing could not specifically identify the applicant or his girlfriend as being on the ax, sofa, or couch which that the genetic population, i.e. the 9% conclusion should have been challenged because the forensic blood evidence testings could not speak on race, gender, or ethnicity of the donor's blood, also the dot blots evidence, the scientific protocol, the photographs of the PCR/DNA tests, the laboratory tests, and the test dot blots should have been reviewed by defense Counsel, to wit, clearly - this is a weak circumstantial blood evidence case, no confession, no eyewitness, and the applicant claims was - he's an innocent man of this murder charge: the only evidence which is also very weak; the forensic blood evidence only shows grouping blood evidence as opposed to any specific or a solid match of the applicant or his girlfriend's blood on those item's seized, and these weaknesses in the State's case and especially the weakness in the State's forensic blood evidence tests are reasonable doubt is what distinguished the applicant's case from any other case where everyday it seems on the news or in the newspaper about where cases of DNA solves the crime and it frees an innocent man who was convicted as guilty and went to prison, and technology as I see in this petition, did do this today; one thing that's consistent about the applicant is that he has consistently said that he did not murder his girlfriend, and he has consistently said he's an innocent man, and even the applicant's genetic expert testified at the PCR hearing that given to the improvements of the genetic testings today; that the State

contest the tissue samples, the State contest the ax and the ax's blade, and the State can re-test the sofa-couch cushions, and the State must find out one way or the other, whether or not his girlfriend was murdered at this cemetery by the applicant beyond a reasonable doubt; and in the other occasion that there is also an equally good chance it can be tested and proved that the applicant is an innocent man; the State's pathologist witness testified before the juries, to wit, the most important issue about the applicant's girlfriend body being moved, there were not any evidence to show or prove that his girlfriend had been transported or moved to the area of Lee County by the applicant beyond a reasonable doubt; and also, the State's pathologists witness testified before the juries, to wit, the most important issue about this ax as not being the weapon that was accurate and/or actual of making these wounds; in other words, it was a possibility the weapon could have been a knife, pieces of metal, ax hammer with sharp claws on the back, or the spelunking type of hammer; basically, the State's pathologists testified - was more about the knife making the wounds than the ax that the Solicitor used in the trial as the weapon which the detectives removed from the applicant workshop, lake house, area in Lexington County, the State did not prove beyond a reasonable doubt, that this ax is the actual weapon, in this above setting forth do, constitutes a denial of fundamental fairness shocking to the universal sense of justice.

The applicant's girlfriend was found in Lee County in which Lee County dismissed the murder charge against the applicant

causes of "probable cause", and then Lexington County claimed or pickup the case saying they would convict the applicant in their County; claiming the murder took place or was at this shed or lake house in this cemetery area in Lexington County where the applicant worked at, to wit, the State is forgetting that their own pathologist had testified that there is no evidence to show and/or prove that his girlfriends body had been moved or transported to the Lee County area by the applicant beyond a reasonable doubt.

Causes the defense Counsel did err in not calling or hiring an expert witness to examine the forensic testing at the time of this trial, to wit, the defense Counsel was in error for failing to produce an expert witness where the defense Counsel was insufficiently, attempted an attack on the forensic blood evidence testings and to discredit the forensic blood grouping testings respectively at the time of this trial, the defense Counsel admits she was in no way qualified to evaluate the forensic blood testing evidence, and she was not hiring an genetic expert to assist or help her in preparing a defense for the applicant's case at the time of the trial; the State did not prove that the forensic blood evidence was the actual blood of his girlfriend or his beyond a reasonable doubt according to the essential elements in the murder charge in the indictment. The real issue is that to be effective assistance what the defense Counsel would have had to have done is to obtain those forensic blood testings, the dot blots, in the same quality that the State possessed and have a genetic expert look at those tests and

determine whether or not there was a problem with them, causes and apparently, there was - because it certainly was not a genetic fingerprint that the testings of the applicant's blood or his girlfriend, beyond a reasonable doubt, to wit, the State's own genetic expert testified before the juries that the testings he did in the applicant's case are not what they call genetic fingerprinting, it is entirely different type of testings, the defense Counsel failed to obtain an expert in the filed of genetic or DNA technology at that time and failure to hire or call an expert to testify to that effect at that time during his trial, the defense Counsel's deficient performance of not getting an expert to assist and help her with the defense at the time of the applicant's trial, the error was so serious it denied and deprived the applicant of a fair trial and did prejudiced the defense, causes of the defense Counsel's errors justify a reversal of this judgement, the applicant was sentenced to the remainder of his life for a murder that he is actually innocent of, the above setting forth do, constitutes a denial of fundamental fairness shocking to the universal sense of justice.

#### Closing Arguments of Reasonable Doubt

#### And Presumption of Innocence

The State of South Carolina Attorney General had persuaded the PCR Court Judge that the Post Conviction Relief hearing is not the only relief available pursuant or an appropriate remedy for the granting of a new trial; Causes, the PCR Counsel had proven that the defense Counsel was ineffective in the

applicant's case at the time of his trial; the PCR Counsel argued that his focus was not to try to retry the applicant's case, but to lay the groundwork and use the appropriate remedies for a new trial.. The PCR Counsel presented an expert genetic fingerprint that showed all of the things that were wrong with the State's forensic blood testings how contradicted and inconsistent the applicant's forensic tests were, and the forensic tests could have been more clearer and shall have changed had the State's forensic tests been provided to the defense Counsel at the time of the applicant's trial for a comparing review and examination by a DNA expert, the outcome of the proceedings would have been different, and the State did not prove this case beyond a reasonable doubt, to wit, applicant did not think it would be fair to the defense Counsel to try and use today's technology to determine and decide whether something could have been done back then, but it is the duty under the State's burden of proof to uses today's technology to decide and determine, causes, the burden of proof is on the State to prove and show every essential element of the murder charged in the indictment against the applicant beyond a reasonable doubt, according to Jackson, 443 U.S. 307 (1979); Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004),

due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof... defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense..."

Where there is no sub-substantial, circumstantial, or physical evidence, these essential elements for murder, Code §

16-3-10, must be weighed on the indictment or charge to see if the applicant is guilty or not guilty of the murder charged that's in the indictment... These factors should be considered in the weighing the reliability of the weak circumstantial evidence, upon mere suspicion and conjecture, and a conviction should be on common sense or based upon reason, so the presumption of innocence alone is sufficient to acquit the applicant... The State of South Carolina Attorney General is trying to get the applicant to prove his won' innocence of the murder charge, where the law says under the United States of America's Constitution and the State of South Carolina's Constitution, to wit, every person who comes into the courtroom system is presumed to be innocent; the law presumes, the applicant to be innocent of a crime: Thus the defendant, although accused, begins the trial with a "clean slate"... with no evidence against him/her and the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit the applicant. The Court should always remember that an applicant is never to be convicted on mere suspicion or conjecture, the test is one of reasonable doubt; a reasonable doubt is a doubt based upon reason and common sense, the burden is always on the State to prove guilt beyond a reasonable doubt, and this burden never shifts to the defendant, to wit, the law never imposes upon a defendant in any criminal case the burden or duty of calling any witnesses or producing any evidence, if he/she wishes.

Causes, the applicant had pleaded not guilty of the murder

charged in the indictment; the State must prove every element essential in the indictment beyond any reasonable doubt against the applicant, from which the applicant's guilt may be fairly and logically deduced... where there is no circumstantial, substantial, or physical evidence, to wit, these elements of murder must be weighed on all essential elements in the indictment of murder, to see if the applicant is guilty or not guilty of the murder S.C. Code Ann. § 16-3-10; the State Attorney General is stooping very low by making the applicant prove his own innocence when the Court have already instructed him of his innocence, and the Attorney General knows if the applicant's lawyer obtained the actual forensic evidence against the applicant then, the Attorney General would as a matter of fact, causes, the forensic, exhibits, or evidence are in the custody of the Clerk, the PCR Counsel really think if the applicant or a lawyer would take those exhibits or forensic evidence blood tests out of there, to wit, there could be a great concern in terms of possible tainting with the forensic testings, misappropriation of the forensic blood evidence, the dot blot tests, or exhibits, and/or a chain of custody problems, which from the PCR Counsel's defense standpoint might probably create more problems within which regard to be overcome and may even preclude this possibility of getting a new trial, or opening this possibility that the lawyer or applicant tainted with the forensic blood evidence and exhibits tests; this is why the State Attorney General must prove all the essential elements of the murder beyond a reasonable doubt, causes, the State Attorney General had

collected and connected these exhibits or forensic blood tests against the applicant, so the Attorney General must prove the applicant's guilt with those exhibits, dot blots, or forensic blood evidence tests beyond a reasonable doubt, and - however, this burden of proof is on the Attorney General now to prove and show the Court every essential element beyond a reasonable doubt; Applicant is challenging the Court to order the Attorney General to prove his guilt beyond a reasonable doubt, by the law of the lands; the Attorney General have not upheld the State's burden of proof against the applicant neither the showing of the State's burden of proof of any circumstantial, substantial or physical evidence, that was connecting, showing, tying, or placing the applicant to this murder charge indictment against him, the due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof... defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense", according to, Jackson, 443 U.S. 307 (1979)<sup>1</sup>, causes, the above setting forth do, constitutes a denial of fundamental fairness shocking to the universal sense of justice... The Courts have generally and universally held that it is ineffective assistance of Counsel and awarded a new trial...

<sup>L</sup>now.

<sup>2</sup>  
Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004).

The Applicant's Presumption of Innocence

The State have not proven "with malice aforethought" done against the applicant's girlfriend by the applicant that was proven beyond a reasonable doubt; there is not with malice aforethought proving...

The State have not proved a combination of any previous evil intent to kill existed against the applicant's girlfriend by the applicant that was proven beyond a reasonable doubt; there is no combination of any previous evil intent, probable cause existed proving...

The State have not proved or shown any act producing the fatal result against the applicant's girlfriend by the applicant that was proven beyond a reasonable doubt, there is no act producing this fatal result, proving...

The State have not proven any other circumstances which will show directly that an intent to kill existed against the applicant's girlfriend by the applicant that was proven beyond a reasonable doubt; there is no other circumstance that will show directly that an intent to kill existed proving...

The State have not proven any evidence of lying in wait against the applicant's girlfriend by the applicant that was proven beyond a reasonable doubt, there is no evidence of lying in wait, proving...

These essential elements are in the South Carolina Code Ann., § 16-3-10, of murder, and many more in which the State Solicitor have not proven beyond a reasonable doubt...

The applicant's presumption to be innocent, causes, the

applicant before the juries and Court that he left his girlfriend at a business or public place at her own words. She saw someone she knew... Had this forensic blood evidence been challenged in the applicant's trial the outcome of this case most probably would have been different.

The defense Counsel erred in failing to call a DNA forensic expert in order to contradict the State's forensic blood evidence is a Constitutional violation according to, Strickland v. Washington, 466 U.S. 668 (1984), and the Sixth and Fourteenth Amendments to the United States Constitution Article 1, § 14, of the South Carolina Constitution, in the above setting forth do, constitutes a denial of fundamental fairness shocking to the universal sense of justice.

<sup>1</sup> CATOE, 359 S.C. 120, 597 S.E.2d 782 (2004).

Conclusion

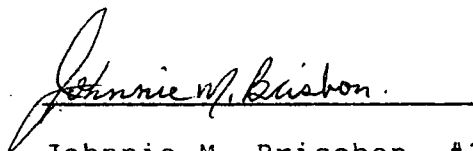
Based on the foregoing argument, the applicant's State Habeas Corpus should be granted for a new trial, and the State allow a full briefing on this issue, and the applicant an immediately release from the custody of SCDC and DPPPS agencies...

Sworn to before me  
this \_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
Notary Public For South Carolina:

My Commission Expires: \_\_\_\_\_

Respectfully Submitted,



Johnnie M. Brisobon, #216581

B.R.C.I., Murray 275

4460 Broad River Road

Columbia, S.C 29210

State of South Carolina )  
County of Lexington )

VERIFICATION

I, Johnnie M. Brisbon, #216581, being duly sworn upon mine 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; I declare under penalty of perjury that the allegations and facts therein set forth are true.

Johnnie M. Brisbon  
Applicant

Sworn or affirmed to and subscribed before me

this 30th day of March 2009.

Susan J. Johnson

Notary Public For South Carolina  
My Commission Expires March 5, 2018

My Commission Expires: \_\_\_\_\_

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

I, Johnnie M. Brisbon, #216581, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following facts are true:

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

Johnnie M. Brisbon  
Applicant

Sworn to and subscribed before me

this 30th day of March, 2009.

Susan J. Johnson

Notary Public For South Carolina  
My Commission Expires March 5, 2018

My Commission Expires: \_\_\_\_\_

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JOHNNIE M. BRISBON, #216581  
Applicant,

FILED  
2009CP3201603

2009 APR -6 12:49

vs.

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

PROOF OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,  
Respondent

I am an inmate in the above captioned action.

A regular communication by mail exist through the State of South Carolina and this is a proper circumstance of service by mail.

I have, on this day, served a true copy of this State Habeas Corpus, Trial Transcript of the forensic expert, and the State Pathologist Expert parts of testimonies, and the PCR Hearing Transcript of the Applicant's Forensic Expert testimony with the Defense Counsel in the above matters, on the following party by depositing the same in the United States Mail System at Broad River correctional Institution, postage prepaid to:

The Attorney General Office  
Henry D. McMaster  
Post Office Box 11549  
Columbia, S.C. 29211-1549

Respectfully Submitted,

s/ Johnnie M. Brisbon

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 30th DAY OF March

2009  
Susan D. Johnson

NOTARY PUBLIC

STATE OF SOUTH CAROLINA My Commission Expires  
March 5, 2018  
MY COMMISSION EXPIRES

1 genetics lectures, genetics lab, medical genetics, and DNA  
2 profiling.

3 Q Are you also editor and publisher of North Carolina  
4 Medical Genetics newsletter?

5 A Yes, I was.

6 Q And a visiting professor at Roosevelt University in  
7 Chicago?

8 A Yes.

9 Q And Davidson College in Davidson, North Carolina?

10 A Yes.

11 Q And your administrative experience?

12 A I was assistant vice chancellor for four years back  
13 in the '70s at UNCC.

14 Q And your consulting activities?

15 A I've consulted in a variety of areas: For the Sickle  
16 Cell Association; I've done consulting work with CNC,  
17 which is the hospital in Charlotte; and since 1993 I've  
18 been doing consulting in the forensic courts on DNA  
19 issues.

20 Q Have you ever been qualified as an expert witness in  
21 the field of genetics and DNA in the courts?

22 A Yes, sir, I have.

23 Q How many times?

24 A A little over 300 times.

25 Q I have a CV. Can you identify this document?

1 MR. SALLEY: Your Honor, a copy of this has been  
2 provided to the respondent.

3 THE WITNESS: This is a copy of my curriculum  
4 vitae, yes.

5 MR. SALLEY: We'd ask that be marked as  
6 Applicant's Exhibit 1.

7 MS. TODD: No objection.

8 THE COURT: All right.

9 (WHEREUPON, Applicant's Exhibit No. 1 was marked  
10 for identification and received into evidence.)

11 MR. SALLEY: Your Honor, I move Dr. Ostrowski be  
12 qualified as an expert in genetics and DNA technology.

13 THE COURT: Any objection?

14 MS. TODD: No objection.

15 THE COURT: All right. Motion granted.

16 BY MR. SALLEY:

17 Q Do you know Ms. Fullwood?

18 A Yes, I've assisted her over the years.

19 Q And what is your experience?

20 A She's one of the finest attorneys I've ever had the  
21 pleasure of working with.

22 Q From the documents you've read, is there any  
23 indication that a DNA expert was consulted by the defense?

24 A No, not from my gathering of what was said.

25 Q Do you have an opinion as to why that was not done?

PCR, TR.

\ 1 A I would assume that, and I think it came out in  
2 Ms. Fullwood's testimony, it was early in the science and  
3 I think many attorneys simply didn't know that people like  
4 myself existed, that there was a need for people like  
5 myself.

6 Q As a matter of fact, from your experience, in many of  
7 the cases the State was utilizing technicians as experts;  
8 is that correct?

\ 9 A Yes, sir.

10 Q That's not the case now, is it?

11 A No, SLED has brought on several Ph.D. level people  
12 recently.

13 Q So back during the time that this case was tried,  
14 back in '94, people really did not understand DNA at all,  
15 did they?

16 A Well, I wouldn't say at all, but they certainly  
17 didn't have degrees in the area.

18 Q What are the two areas of genetic expertise that a  
19 DNA expert could be expected to provide in the Brisbon  
20 case?

21 A In the Brisbon case as is typical in all forensic  
22 cases in the use of DNA, molecular genetics, which is the  
23 actual laboratory work, the test tube, lab coat folks, and  
24 population genetics, which is a mathematical science which  
25 crunches numbers and asks the question how many people

1 might also match the evidence.

2 Q For example, when we were discussing a minute ago  
3 that there were 12,000 people, blacks in Lexington and  
4 Richland County that match the DNA that was found at  
5 Celestial Gardens, that would fall under the category of  
6 population genetics?

7 A Yes, sir.

8 Q Is that correct?

9 A Yes.

10 Q When we talk about dot blots and PCR, that would fall  
11 under the area of molecular genetics; am I correct?

12 A That's correct.

13 Q Now, could you give the Court an overview of the  
14 technology that existed in 1996 or 1994?

15 A Well, again, as stated by Ms. Fullwood, RFLP was the  
16 technology at that time in forensic courts and was  
17 utilized extensively. One of the shortcomings of RFLP was  
18 that you needed a large sample size. To put it in  
19 context, you needed a blood stain about the size of a  
20 quarter to get enough DNA to do the analysis.

21 Q And you reviewed the record in this case?

22 A Yes, sir.

23 Q And they did not use RFLP in this case?

24 A And I assume because they didn't have enough sample  
25 size, yes.

PCR, TR.

1 Q Now, tell us what PCR is.

2 A The PCR technology was invented as already stated by  
3 Dr. Cary Mullis in the '80s for which he received the  
4 Nobel prize, and what that technology allows the scientist  
5 to do is to take specific genes and amplify them, make  
6 Xerox copies if you will, so if you have a very limited  
7 amount of DNA which could not be tested, you first amplify  
8 the DNA with the PCR technology giving yourself enough  
9 sample to then test the DNA.

10 Q Well, now, back in '95 didn't Dr. Ellis opine that  
11 PCR technology was not at the stage yet that it was to be  
12 used for forensic purposes?

13 MS. TODD: Objection to leading.

14 THE COURT: What was your objection?

15 MS. TODD: Leading.

16 THE COURT: All right. Do it without leading.

17 MR. SALLEY: I will try to speed things up, your  
18 Honor. I apologize. I'll try to use direct steps with  
19 the witness.

20 BY MR. SALLEY:

21 Q You review trade journals as part of your profession,  
22 do you not?

23 A Yes, sir.

24 Q And you mentioned Dr. Ellis a moment ago.

25 A Uh-huh.

1 Q Are you aware of any opinion Dr. Ellis, the inventor  
2 of PCR technology, may have expressed through trade  
3 journals, professional publications, and in testimony as  
4 to whether or not PCR was ready for forensic use in the  
5 time frame of 1994 through '96?

6 A At least in '95 he's on record of stating that he  
7 didn't think it was ready for forensic use.

8 Q And this is the man that invented the process saying  
9 that the technology used in this case was not ready for  
10 forensic use; is that correct?

11 A Correct.

12 Q Now, how does PCR work?

13 A Again, it works in the way that -- let's just take a  
14 number. Let's say there are 60,000 genes per cell in each  
15 of us. In this case two genes were looked at, one called  
16 DQ alpha and one called D1S80. So the DNA's extracted,  
17 put into a test tube and into what is called a thermal  
18 coupler that controls temperature for the reaction. And  
19 these two genes are amplified, the DQ alpha and the D1S80,  
20 and only those two genes, and literally millions of copies  
21 are made of those two genes and then you can do  
22 technologies that visualizes those two genes.

23 Q How important was the PCR, polymerase chain reaction,  
24 to the process?

25 A Oh, without PCR you don't get DQ alpha and the D1S80

PCR, IR.

1 results. There would be no DNA results.

2 Q Back in the 1990s, during this time frame, was PCR  
3 universally accepted in the scientific community or the  
4 courts?

5 A Not everyone accepted it.

6 Q Including the inventor?

7 A Including the inventor.

8 Q In fact, did you testify in any hearings prior to  
9 this where the Court chose not to let the DNA evidence in  
10 because it was based on PCR technology?

11 A Yes, I did.

12 Q What was that case?

13 A Missouri versus Link, L-I-N-K.

14 Q What was there any indication that PCR technology was  
15 challenged in your view of the record in the Brisbon  
16 trial?

17 A It didn't seem as such.

18 Q So it was not challenged?

19 A I would say it was not, yes.

20 Q What are scientific protocols?

21 A Scientific protocols are literally the recipes to how  
22 to do a particular technology. In this particular case,  
23 the DQ alpha results come out on a strip, a strip about  
24 six inches long by about a half an inch wide, and these  
25 strips are purchased from a commercial company, and that

1 company provides basically the textbook on how to do the  
2 technique, and therefore that's called a protocol.

3 Q In fact, I believe that you wrote an article called  
4 PCR, DQ, and Polymarkers: A New Generation of Forensic  
5 DNA Profiling?

6 A I did.

7 Q And it was published in Trial Brief?

8 A Trial Brief, yes.

9 Q Winter 1994-95?

10 A Yes, sir.

11 Q And you have an illustration in that article that you  
12 think would be illustrative to the courts?

13 A I think it would help in the discussion of this, yes.

14 Q Would you identify this article?

15 A Yes. Yes, that's the article.

16 MR. SALLEY: Move to mark this as Applicant's  
17 Exhibit 2.

18 MS. TODD: No objection.

19 THE COURT: All right.

20 (WHEREUPON, Applicant Exhibit No. 2 was marked  
21 for identification and received into evidence.)

22 MR. SALLEY: The graph, to quickly refer your  
23 Honor, is on the second page.

24 BY MR. SALLEY:

25 Q Now, could you tell the judge what that graph is and

PCR, JR.

1 good science requires that you actually see the evidence  
2 and say was it a typo or was that, in fact, what he had  
3 seen on it.

4 Q And for the Court, would you explain the significance  
5 of the genotype excluded?

6 A It takes just one non-match of just one of these  
7 genes to exclude someone. And if, in fact, as I recall  
8 the genotype on the ax and on the couch was given as one  
9 point one, comma, one point two; that would be the  
10 genotype. Mr. DeGulielmo's report, in fact, said one  
11 point one, comma, two, and those are two totally  
12 genotypes. In fact, if the latter was correct, then the  
13 person would have been excluded as the contributor of the  
14 blood on the ax.

15 Q As a matter of fact, they could not identify the  
16 victim's blood as being on the ax, could they?

17 A Could not. Well, they're working from bones that  
18 were found and I'm not sure I can speak to the issue of  
19 the bones and reliability of the bones.

20 Q Right. But what I'm saying is, is it your  
21 understanding from the testimony that there was at least  
22 nine percent of the black population was included in the  
23 group of people that could have been present?

24 A You're now moving from the molecular aspects of this  
25 to the population genetics aspects of it.

1 Q Speaking to that, was the population genetics  
2 sufficiently challenged in your opinion?

3 A It was not.

4 Q Would you explain that?

5 A Well, to start from the beginning, long before this  
6 evidence and these genes were used in this trial,  
7 population geneticists went out and tested people  
8 randomly, hopefully randomly, and asked the question, how  
9 often does this particular genotype exist in the black  
10 population, in the white population, Hispanic population,  
11 Asian population, et cetera, so there are things called  
12 databases for each of the major ethnic/racial groups in  
13 this country.

14 From my reading of the testimony, Mr. DeGulielmo  
15 simply spoke of the percentages in the black population.  
16 It was never brought out that this DNA evidence does not  
17 speak to the race of the donor in the blood. It can  
18 simply say it occurs in a certain percentage in different  
19 populations.

20 Q So instead of dealing with nine percent of the black  
21 population in Richland/Lexington Counties, it could have  
22 been just 14 percent of the general population?

23 A Yes, that's true. And not only of Richland County or  
24 Lexington County but also of the state of South Carolina  
25 and the United States for that matter because the DNA

1 results also do not say where the person lives or resides..

2 Q So instead of it being merely 12,000 people's blood  
3 in the lake house as they described it or on the ax or on  
4 the couch, if indeed it was the same blood, instead of  
5 12,000 people, the population that more accurately  
6 describes it may have been in the millions?

7 A True.

8 Q What else did the DNA results not indicate?

9 A DNA results -- well, they do not indicate the race of  
10 the person; the sex of the person; the ethnicity of the  
11 person as different in race; where the person resides; or  
12 when the blood got there, whether it be on the ax or on  
13 the cushions of the couch.

14 Q So, first of all, tell me if I'm understanding this  
15 correctly. There's no way to tell how long the blood's  
16 been there?

17 A Correct.

18 Q The blood could have been there for a month or ten  
19 years?

20 A Correct.

21 Q There's no way of telling whether the blood came from  
22 a black man or a white man or a Hispanic?

23 A Or a woman, yes.

24 Q Or a woman?

25 A Yes.

1 Q I was getting to that next. There's no way to tell  
2 whether it came from a man or a woman?

3 A True.

4 Q There was no way to tell from the blood that was  
5 found in there whether or not it even came from the  
6 victim?

7 A True.

8 Q And yet in review of the record, this was the only  
9 nexus to tie the defendant and the victim together in  
10 Lexington County?.

11 A Apparently so.

12 Q Was there anything else that the DNA expert would  
13 have asked for relative to DNA evidence that's apparently  
14 not in question?

15 A Would have also asked for chain of custody, the  
16 laboratory bench notes.

17 The laboratory bench notes are records that the  
18 technician in the laboratory keeps as they're doing the  
19 work, if something went wrong or something unexpected came  
20 up. And since this technology is absolutely so sensitive,  
21 you always need to see what's called the unexpected  
22 results log.

23 It's very easy to contaminate these simply by  
24 touching the strips with the bare hand or having the  
25 strips touch a bench that has not been thoroughly cleaned.

PCR, Tk.

1 type situation, they're making an allegation of  
2 ineffective assistance of counsel.

3 THE COURT: I understand that.

4 MS. TODD: And if the Court were to find they  
5 had proven both deficiency and prejudice, then the result  
6 would be a new trial.

7 I don't know that PCR is the appropriate remedy  
8 or the appropriate forum for re-testing things using more  
9 sophisticated technology. I don't think that it would be  
10 fair to Ms. Fullwood to use today's technology to  
11 determine whether something could have been done back  
12 then.

13 THE COURT: Well, I understand that, but I'm  
14 just asking a question. I'm not indicating any propensity  
15 to do anything. I just want to know what my options are.

16 MS. TODD: The State would submit that the items  
17 in evidence have been there all along and were available  
18 to the applicant. There are also most probably relatives  
19 and that possibly there could have been some reverse DNA  
20 testing done on, and the applicant has not done that, and  
21 this case has been out there for going on ten years now.  
22 To be fair, it was filed the end of '96, so it's more like  
23 nine years.

24 THE COURT: Okay. All right. That's the  
25 questions that I had. So I will be glad to hear you in

1 argument.

2 MR. SALLEY: Your Honor, I've got the greatest  
3 amount of respect for Beth Fullwood as an attorney, and to  
4 say she may have been ineffective by not calling an expert  
5 in this case I think in no way impinges upon the excellent  
6 work, consistently excellent work she does in the Public  
7 Defender's office. Of the members of the Lexington County  
8 Bar, there are very few criminal defense attorneys that I  
9 hold in higher esteem.

10 That being said, that had I been in her shoes in  
11 1996 -- 1994, I'm sorry, 1994, whenever this case was  
12 tried in '94, I'm not sure that I would have had the  
13 experience to have called an expert either, and had I not  
14 done so, I would have been ineffective.

15 Every day it seems on TV you see cold case files  
16 where DNA solves the crime and it frees an innocent man  
17 who was convicted as guilty and went to jail, and  
18 technology, as we've heard from the stand, can do that  
19 today.

20 One thing that's consistent about Johnny Brisbon  
21 is that he has consistently said that he did not murder  
22 the victim in this case. He has consistently said he's an  
23 innocent man.

24 Dr. Ostrowski said that given the improvements  
25 of genetic testing today, that we can test tissue samples,

PCR, TR.

1 we can test the ax, the ax blade, and we can test the  
2 cushions and we can find one way or the other whether or  
3 not Ms. Bertha Grooms was murdered at that cemetery by  
4 Johnny Brisbon, or in the other occasion that there's also  
5 an equally good chance it can be tested and prove that  
6 Mr. Brisbon is an innocent man.

7 THE COURT: Well, now, Ms. Todd argued that you  
8 could have asked for examination of that evidence in  
9 preparation for this hearing.

10 MR. SALLEY: Until very, very recently, I was  
11 not informed until about two weeks ago that that evidence  
12 still was held by the Court.

13 MS. TODD: I disagree with that, your Honor.

14 MR. SALLEY: The second thing is, your Honor, as  
15 PCR attorney, my focus is not to retry the case but lay  
16 the groundwork for a new trial, and I think that is -- I  
17 mean I think that is the appropriate remedy. I think that  
18 in terms of what is the right thing to be done is to give  
19 Mr. Brisbon a new trial.

20 In this case, Ms. Fullwood did not see the  
21 evidence, she saw the report of the evidence. And the  
22 jury didn't see the evidence, they only got a report of  
23 what the evidence said. And as far as I can tell in  
24 similar cases involving failure to obtain an expert  
25 witness, that the courts have generally universally held

1 that it's ineffective assistance of counsel and awarded a  
2 new trial.

3 I know with the lady up in Saluda County that I  
4 just got appointed on involves a burglary, and the defense  
5 counsel failed to get an expert to see or talk about cross  
6 racial identification procedures, and Judge Keesley  
7 granted a new trial in that case.

8 That murder case down in McCormick, Judge  
9 Westbrook ordered a new trial for failure of defense  
10 counsel to obtain an expert to examine whether or not a  
11 confession was voluntarily given. And so I think that in  
12 ruling for a new trial in this case, the Court is  
13 following the precedent that has been set in this circuit.

14 THE COURT: Well, I see, and maybe you and Ms.  
15 Todd can speak to this, but I see news media accounts from  
16 time to time in other states where DNA testing has been  
17 done after the fact. Do you know what procedural  
18 mechanism is used to get that reopened? Is it with PCR,  
19 habeas corpus, is it some motion on after-discovered  
20 evidence? Do you know what mechanisms are used?

21 MR. SALLEY: I think the mechanism that's used  
22 is PCR.

23 THE COURT: So a judge has to order a new trial  
24 before testing can be --

25 MR. SALLEY: Can be conducted.

1 prove at this stage of the proceeding what the results of  
 2 the new genetic testing are going to be. As a matter of  
 3 fact, because the exhibits are in the custody of the  
 4 Clerk, I think if we were to take those exhibits out there  
 5 would be a concern in terms of possible tainting of the  
 6 evidence, misappropriation of evidence, chain of custody  
 7 problems, that from a defense standpoint would probably  
 8 create more problems in that regard to be overcome and may  
 9 even preclude the possibility of getting a new trial,  
 10 opening the possibility that we tainted the evidence,  
 11 could have changed it, plus there's also the issue of we  
 12 don't have any tissue samples, so I think we would need  
 13 tissue samples in order to complete that testing. I  
 14 assume the State has a tissue sample because they did the  
 15 test in the first place.

16 Beg the Court's indulgence.

17 In addition, your Honor, the attorney's job is  
 18 to look at all the evidence and not take someone's word  
 19 for it. That is precisely what happened in this case.

20 THE COURT: All right.

21 MS. TODD: Your Honor, I believe Mr. Salley is  
 22 not correctly representing how a PCR action works. The  
 23 applicant has the burden of proof. The State doesn't have  
 24 a burden of proof at a post-conviction relief action.

25 We're not trying to make him prove our case.

1 He's trying to make us prove his case.

2 I put in my letter that I wrote to him and Judge  
3 Keesley in November that if they wanted to have the  
4 exhibits tested or they wanted to see if any further  
5 testing was possible, to let me know as soon as possible.  
6 I said I was not certain of the exact procedure but I  
7 believed that the items would need to be resubmitted to  
8 SLED for them to make a determination pursuant to Judge  
9 Keesley's order as to whether testing could be done and  
10 preserve enough of the sample for the possibility that  
11 there would be a need for a new trial.

12 THE COURT: All right. Well --

13 MS. TODD: Your Honor, I am more than willing to  
14 take your initial question to my office as to whether our  
15 office would be willing to have an order regarding testing  
16 rather than a new trial.

17 THE COURT: Well, that's fine, but Mr. Salley  
18 objected to that.

19 MR. SALLEY: I think the only relief the Court  
20 could give, your Honor, is to have a new trial. There's a  
21 lot of PCR applicants I have sit in that chair over there  
22 that think the Court is going to do away with their  
23 sentence and reduce their sentence and things like that,  
24 and the first thing I ask those people when I put them on  
25 the stand is, Do you understand that the only thing this

PCR, TR.

1 Court can give you is a new trial? It's going to be a new  
2 trial on the original charges. And a lot of them when  
3 they hear that is, whoa, I don't want any of that, and  
4 because of the nature of PCR, I think a new trial is the  
5 only relief the Court can order.

6 THE COURT: All right. I understand your  
7 position and you very well may be right about that. I  
8 guess I just question where you've made a real strong  
9 showing of prejudice. I know you've shown that after the  
10 fact now we know that there's other tests that could have  
11 been obviously now, but what -- when he testified that the  
12 gentlemen who invented this technology opined in 1995 that  
13 it shouldn't have been used as forensic evidence, that was  
14 the year after trial, so how would she have known that or  
15 how would she be ineffective for not knowing that?

16 MR. SALLEY: That's really not the issue, your  
17 Honor. The real issue is that to be effective what she  
18 would have had to have done is obtained that DNA evidence,  
19 the dot blots, in the same quality that the State  
20 possessed and have a DNA expert look at those to determine  
21 whether or not there was a problem with them. Because --  
22 and apparently there was because it certainly was not a  
23 genetic fingerprint case.

24 THE COURT: Where is the showing that there was  
25 something wrong with it?

1 MR. SALLEY: Dr. Ostrowski testified to all the  
2 things that were wrong or could have been changed had they  
3 been provided, had they been reviewed by a DNA expert.

4 THE COURT: But there was no showing that they  
5 were wrong, though.

6 MR. SALLEY: We can't get them.

7 THE COURT: The DNA test would show that.

8 MR. SALLEY: We can't get the DNA tests. They  
9 have been destroyed. The State's destroyed that evidence.

10 THE COURT: I'm talking about a new DNA test.  
11 It can show absolutely if it was right or wrong.

12 MR. SALLEY: It could, your Honor. But that's  
13 not --

14 THE COURT: If the evidence is there it would,  
15 wouldn't it?

16 MR. SALLEY: Yes, your Honor, but I think that  
17 would have to be done pursuant to a new trial. I don't  
18 think the mechanism exists in PCR to do that.

19 THE COURT: Well, I don't believe that to be the  
20 law, that there's not some mechanism for getting a new DNA  
21 test ordered without ordering a new trial. I may be  
22 wrong, but if you can find some authority on that I wish  
23 you'd find it and write a little brief on that and send it  
24 to me and Ms. Todd, because I don't think that's the law.

25 MR. SALLEY: I think the only relief available

PCR, TR.

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

I, CAROL M. THUEME, RPR, Official Court Reporter for the 11th 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 Common Pleas for Lexington County, South Carolina, on the 27th day of January, 2006.

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

November 16, 2006

*Carol M. Thueme*

CAROL M. THUEME, RPR, Court Reporter

My Commission Expires: 06-04-2007

ORIGINAL

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF LEXINGTON )  
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 Johnny M. Brisbon, SCDC # 216581, )  
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 Applicant, )  
 )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS

96-CP-32-2956

BETH A. CARRIGG  
 CLERK OF COURT  
 LEXINGTON SCDC

2006 MAY -5 A 9:41

FILED

ORDER DENYING POST-CONVICTION RELIEF

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 31, 1996. The Respondent made its Return on October 20, 2003. An evidentiary hearing into the matter was convened on January 27, 2006, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Lourie A. Salley, III, Esquire. The Respondent was represented by Sabrina C. Todd of the South Carolina Attorney General's Office.

At the hearing, Ronald S. Ostrowski, Ph.D testified on behalf of the Applicant. Also testifying was the Applicant's trial counsel, Elizabeth Fullwood, Esquire. In addition to the pleadings, this Court also had before it a copy of the trial transcript, the records of the Lexington County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, a discovery order of the Honorable William P. Keesley, and the Respondent's motion to alter or amend Judge Keesley's discovery order.

The records before this Court indicate the Applicant is presently confined in the South

*CWD*

State Trial's Transcript

93-GS-32-1558

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 SERVICES AS WELL FOR PRIVATE CUSTOMERS WHO WANT TO HAVE  
2 TESTING DONE FOR A VARIETY OF REASONS.

3 IN ADDITION TO THAT I HAVE A FORENSIC LABORATORY THERE  
4 WHICH HANDLES CASES INVOLVED IN CRIMINAL PROCEEDINGS LIKE  
5 THIS ONE AS WELL AS IN CASES OF DISPUTED PARENTAGE WHERE  
6 THERE ARE DECEASED INDIVIDUALS INVOLVED AND WE MAY NEED TO  
7 HAVE A BODY EXHUMED OR OBTAIN OTHER TYPES OF SPECIMENS WHICH  
8 ARE MORE DIFFICULT TO WORK WITH.

9 THE THIRD TYPE OF TESTING WHICH WE'RE INVOLVED WITH IS A  
10 BONE MARROW TISSUE TYPING PROGRAM FOR BONE MARROW TRANSPLANTS  
11 AFFILIATED WITH THE DIFFERENT REGISTRIES BOTH IN THE UNITED  
12 STATES AND OTHER COUNTRIES.

13 Q YA'LL DO TESTING BOTH NATIONWIDE AND SUBMITTED FROM  
14 OTHER COUNTRIES?

15 A YES, SIR.

16 Q WELL, FORENSIC HOW LONG HAVE YA'LL BEEN INTO FORENSIC  
17 D.N.A. TESTING?

18 A THE FORENSIC D.N.A. TESTING BEGAN WHEN I WENT TO GENETIC  
19 DESIGN AND WELL SOME CONSULTING IN LATE 1989, EARLY 1990.

20 Q AND THOSE FORENSIC CASES HAVE BEEN SUBMITTED FROM  
21 VARIOUS JURISDICTIONS; NOT JUST LIMITED NECESSARILY TO THE  
22 SOUTHEAST. IS THAT CORRECT?

23 A THAT'S CORRECT. WE DO QUITE A BIT OF WORK ON THE WEST  
24 COAST AND QUITE A BIT OF WORK IN THE SOUTHEAST AS WELL.  
25 THOSE ARE PROBABLY THE TWO LARGEST REGIONS OF OUR WORK.

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 Q HAVE YOU TESTIFIED IN COURTS OF RECORD IN THIS  
2 JURISDICTION AND OTHER JURISDICTIONS AS AN EXPERT IN FORENSIC  
3 D.N.A. TESTING AND PROCEDURES?

4 A YES, SIR, I HAVE.

5 Q APPROXIMATELY HOW MANY DIFFERENT JURISDICTIONS?

6 A THE LAST TIME I CHECKED THERE WERE I BELIEVE ABOUT 17  
7 STATES AS WELL AS FEDERAL AND MILITARY COURTS.

8 Q FEDERAL AND MILITARY?

9 A YES, SIR.

10 Q 17 STATE COURTS AND FEDERAL MILITARY COURTS: ARMY,  
11 MARINES.

12 A MARINES AND NAVY.

13 Q MARINES AND NAVY? AND HAVE YOU ALWAYS BEEN ACCEPTED AS  
14 AN EXPERT IN THE FIELD OF FORENSIC D.N.A. TESTING WHEN YOU  
15 WERE OFFERED IN THESE JURISDICTIONS?

16 A YES, SIR.

17 Q HAVE YOU EVER FAILED TO BE QUALIFIED AS AN EXPERT IN  
18 THIS FIELD?

19 A NO, SIR.

20 MR. MCMAHON: YOUR HONOR, I WOULD OFFER -- I WOULD OFFER  
21 THE GENTLEMAN AS AN EXPERT IN THE FIELD OF D.N.A. TESTING.

22 MS. FULLWOOD: NO OBJECTION.

23 THE COURT: ALRIGHT. WITHOUT OBJECTION HE IS QUALIFIED  
24 AS AN EXPERT IN THE AREA OF D.N.A. TESTING.

25 Q I ALWAYS GET TO THIS POINT ONCE I FIND OUT WHAT MY

ST, Tr.

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 PROCESS THAT OCCURS IN EVERY ONE OF OUR BODIES EVERY DAY, AND  
2 THAT IS OUR BODY IS COMPRISED OF CELLS, THE BASIC UNIT OF  
3 LIFE. THOSE CELLS ONLY LIVE A FINITE PERIOD OF TIME.  
4 BECAUSE OF THAT WHEN A CELL IS READY TO DIE, THAT CELL WILL  
5 DIVIDE AND WILL FORM TWO NEW DAUGHTER CELLS, AND THAT'S HOW  
6 THE ORGANISM CONTINUES TO PROMULGATE ITSELF. EACH CELL ONLY  
7 HAS ONE COPY OF ITS D.N.A. SO IF THE CELL IS GOING TO DIVIDE  
8 AND FORM TWO NEW CELLS IT HAS TO COPY THAT D.N.A. SO THAT  
9 EACH OF ITS DAUGHTER CELLS WILL HAVE ONE COPY OF THE D.N.A.  
10 THERE ARE A GROUP OF ENZYMES REFERRED TO AS POLYMERASES  
11 (PHONETIC) WHICH AID IN THIS FUNCTION. IT IS THEIR JOB TO  
12 SPECIFICALLY COPY THE D.N.A., BUT WHAT HAS BEEN DONE IS THE  
13 P.C.R. HAS INVOLVED THE USE OF THOSE ENZYMES IN A LABORATORY  
14 SETTING TO MIMIC THAT PROCESS, AND TO TAKE VERY, VERY SMALL  
15 AMOUNTS OF D.N.A. AND TO COPY IT EXACTLY BY DEFINING THAT  
16 SEQUENCE AND ALLOWING US TO HAVE ENOUGH D.N.A. TO ANALYZE IN  
17 ANY PARTICULAR TEST.

18 NOW THIS TYPE OF TESTING IS USED IN VIRTUALLY EVERY  
19 ASPECT OF BIOMEDICAL TESTING YOU CAN IMAGINE. P.C.R. IS USED  
20 ROUTINELY IN NUMBERS OF HOSPITALS AND PRIVATE COMPANIES EVERY  
21 DAY FOR CYSTIC FIBROSIS DETECTION. IT'S USED IN A NUMBER OF  
22 OTHER MEDIC ABNORMALITIES WHICH ARE DETECTED BOTH IN GENETIC  
23 SCREENING AND PRENATAL DIAGNOSIS. IT ALSO IS USED IN ALMOST  
24 ALL ASPECTS OF BIOMEDICAL RESEARCH IN LOOKING FOR NEW  
25 DIFFERENT -- NEW TESTS AND DIFFERENT TESTS FOR DETECTING

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 DIFFERENT TYPES OF GENETIC DISEASES.

2 Q P.C.R. IS NOT ONLY USED IN FORENSICS.

3 A THAT'S CORRECT.

4 Q IT'S USED IN ALL THESE OTHER AREAS ALSO ON A DAILY BASIS  
5 OF WIDELY USED D.N.A. TESTING. RIGHT?

6 A THAT IS CORRECT. IT IS USED BY OUR COMPANY AS WELL IN  
7 OUR BONE MARROW TISSUE TYPING PROGRAM FOR DETERMINING MATCHES  
8 FOR BONE MARROW TRANSPLANTS.

9 Q NOW I KNOW WE HAVEN'T TALKED ABOUT ALL THE ITEMS OF  
10 EVIDENCE THAT HAVE BEEN SUBMITTED TO YOU IN THIS PARTICULAR  
11 CASE YET, BUT SINCE WE HAVE THIS POINT, WERE YOU ABLE TO DO  
12 THE R.F.L.P. D.N.A. TESTING ON THE ITEMS SUBMITTED IN THIS  
13 PARTICULAR CASE?

14 A NO, SIR.

15 Q AND WHY WAS THAT?

16 A WELL, THE PRIMARY REASON WAS BECAUSE OF THE SPECIMEN  
17 OBTAINED FROM THE VICTIM IN THE CASE WHICH WE WERE COMPARING  
18 TO THOSE ITEMS.

19 Q EXPLAIN WHAT YOU MEAN BY THE SPECIMEN FROM THE VICTIM.

20 A THE SPECIMEN WHICH WE RECEIVED FROM THE VICTIM IN THIS  
21 CASE WAS A SPECIMEN OF BONE AND TISSUE OR SKIN, AND IT WAS IN  
22 A VERY DECOMPOSED STATE. IT HAD DEGRADED VERY FAR, AND  
23 BECAUSE OF THAT, WE WERE NOT ABLE TO OBTAIN ENOUGH D.N.A.  
24 THAT WAS SUITABLE FOR ANALYSIS FOR AN R.L.F.P. BASED TEST.

25 Q DO YOU NEED A GREATER AMOUNT, QUANTITY OF D.N.A. TO DO

ST. TR.

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 THE R.L.F.P. TESTING AS OPPOSED TO DOING P.C.R. TESTING?

2 A WELL, WE NEED MORE D.N.A. AND IT ALSO NEEDS TO BE NOT  
3 DEGRADED. P.C.R. WILL WORK WITH D.N.A. THAT HAS DEGRADED TO  
4 A CERTAIN POINT, AND THAT'S ONE OF THE ADVANTAGES OF THE  
5 TEST, WHEREAS, R.L.F.P. BASED TESTING DOES NOT WORK VERY WELL  
6 ON D.N.A. THAT IS DEGRADED BECAUSE OF THE STATE OF  
7 DECOMPOSITION FROM A BODY OR FROM A PARTICULAR SAMPLE.

8 Q SO IN THIS PARTICULAR CASE YOU DID A P.C.R. TESTING.

9 A CORRECT.

10 Q YOU ATTEMPTED TO DO THE R.L.F.P.?

11 A YES, SIR.

12 Q AND WERE NOT ABLE TO DO IT.

13 A THAT'S CORRECT.

14 Q BECAUSE OF THE SAMPLE SUBMITTED FROM THE VICTIM AND THE  
15 CONDITION OF THOSE SAMPLES. IS THAT CORRECT?

16 A THAT'S CORRECT.

17 Q NOW WHAT ITEMS WERE SUBMITTED TO YOU FOR EXAMINATION IN  
18 THIS PARTICULAR CASE?

19 A I NEED TO GET MY NOTES.

20 Q YOU WANT TO RETAKE THE STAND? RETAKE THE STAND FOR ME  
21 MOMENTARILY AND LET ME ASK YOU THAT.

22 THE COURT: LET'S TAKE JUST A SECOND AND LET THE JURY  
23 STAND AND STRETCH FOR A MINUTE. DO NOT DISCUSS ANYTHING BUT  
24 WE'LL LET YOU HAVE A SECOND FOR YOU TO STRETCH IF YOU WANT  
25 TO. YOU'VE BEEN VERY, VERY PATIENT.

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 Q NOW THE -- JUST TO BACK UP MOMENTARILY NOW THAT THERE  
2 WAS A SHORT BREAK. YOU DID THE R.F.L.P. BUT IT WAS NOT  
3 SUFFICIENT BASED ON THE SAMPLE FROM THE VICTIM. IS THAT  
4 CORRECT?

5 A THAT IS CORRECT.

6 Q WHAT ITEM OR ITEMS WERE SUBMITTED TO YOU FOR EXAMINATION  
7 IN THIS PARTICULAR CASE?

8 A THERE WERE BASICALLY THREE ITEMS. THE FIRST ITEM WAS A  
9 COMPOSITION OF THREE ITEMS ITSELF. ITEMS NUMBERS 18, 19 AND  
10 20 WHICH WERE SKIN AND SECTIONS OF FEMUR FROM THE VICTIM.

11 Q HOW MANY SECTIONS OF THE FEMUR FROM THE VICTIM?

12 A THERE WERE TWO, A FEMORAL HEAD ITEM #18 AND ONE PORTION  
13 OF FEMUR ITEM 20.

14 Q NOW THOSE NUMBERS YOU'RE USING NOW ARE THOSE THE NUMBER  
15 THAT THEY WERE SUBMITTED TO YOU UNDER?

16 A THAT'S CORRECT.

17 Q ALRIGHT. SO YOU HAD THREE WHAT I WOULD CALL SAMPLES OR  
18 STANDARDS FROM THE VICTIM SUBMITTED FOR YOUR EXAMINATION. IS  
19 THAT CORRECT?

20 A CORRECT.

21 Q AND IN ADDITION TO THOSE STANDARDS FROM THE VICTIM, DID  
22 YOU HAVE UNKNOWN OR ITEMS OF EVIDENCE SUBMITTED FOR YOUR  
23 EXAMINATION?

24 A YES, WE DID.

25 Q AND WHAT WERE THOSE ITEMS?

ST. TR.

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 A THERE WAS ITEM #10 WHICH WAS A CUTTING FROM A COUCH  
2 CUSHION AND ITEMS NUMBERS 12.1 AND 12.3 WHICH WERE SWABBINGS  
3 TAKEN FROM AN AXE.

4 Q WAS IT INDICATED WHAT AREAS OF THE AXE THESE SWABBINGS  
5 WERE TAKEN FROM?

6 A YES, SIR.

7 Q AND WHAT AREAS?

8 A 12.1 IS A BLOOD SWAB COLLECTED FROM THE BLADE OF THE  
9 AXE. 12.3 IS A BLOOD SWAB REMOVED FROM THE HANDLE OF THE  
10 AXE.

11 Q WHO SUBMITTED THESE ITEMS TO YOU?

12 A THEY WERE SUBMITTED BY IRA JEFFCOAT FROM SLED.

13 Q NOW GOING TO THOSE OTHER NUMBERS, THE ITEM 10 AND 12.1  
14 AND 12.3---

15 A YES, SIR.

16 Q ---AND REMOVED THREE SMALLER ITEMS FROM STATE'S EXHIBIT  
17 #22. ITEM TEN IS THAT THE ITEM THEN THAT WAS SUBMITTED TO  
18 YOU FOR EXAMINATION?

19 A YES, SIR, IT IS.

20 Q AND 12.1 IS THAT THE ITEM INDICATED BLADE OF AXE  
21 SUBMITTED TO YOU FOR EXAMINATION?

22 A YES, SIR, IT IS.

23 Q AND ITEM 12.3 IS THAT THE ITEM INDICATED HANDLE OF AXE  
24 SUBMITTED TO YOU FOR EXAMINATION?

25 A YES, SIR, IT IS.

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 Q AND THE OTHER NUMBERS YOU USED PREVIOUSLY, MIKE, I  
2 BELIEVE THOSE WERE 18, 19 AND 20.

3 A YES, SIR.

4 Q THOSE BEING THE FEMORAL HEAD, THE FEMUR, THE SKIN FROM  
5 THE VICTIM SUBMITTED AS STANDARDS.

6 A THAT'S CORRECT.

7 Q NOW WERE YOU ABLE TO OBTAIN A STANDARD D.N.A. SAMPLE  
8 FROM ALL OF THOSE ITEMS THAT WERE SUBMITTED TO YOU AS  
9 STANDARDS FROM THE VICTIM?

10 A NO, SIR, WE TYPICALLY WOULD NOT USE A SECTION OF SKIN.  
11 WE HAD BONE IF WE HAD BONE FOR THE EXTRACTION BECAUSE THE  
12 BONE WOULD BE OUR FIRST CHOICE.

13 Q WERE YOU ABLE TO EXTRACT A STANDARD OF D.N.A. SAMPLE  
14 FROM BOTH ITEMS OF BONE THAT WERE SUBMITTED TO YOU BY AGENT  
15 JEFFCOAT?

16 A THERE WERE EXTRACTIONS MADE FROM THAT BONE TWO DIFFERENT  
17 TIMES DURING THE PROCESS AND MATERIAL WAS TAKEN FROM BOTH  
18 SECTIONS OF THAT BONE AT THAT TIME.

19 Q DID YOU GET AN ADEQUATE, SUFFICIENT SAMPLE TO DO THE  
20 P.C.R. TESTING?

21 A YES, SIR.

22 Q NOW WERE YOU ABLE TO EXTRACT -- IF I'M USING THE  
23 APPROPRIATE TERMS; IF I'M NOT, YOU CAN CERTAINLY FEEL FREE TO  
24 CORRECT ME, BUT WERE YOU ABLE TO EXTRACT D.N.A. FROM THE  
25 UNKNOWN ITEMS OF EVIDENCE FROM THESE ITEMS THE CUTTINGS FROM

567K.

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 THE COUCH CUSHION?

2 A YES, SIR.

3 Q AND WERE YOU ABLE TO EXTRACT D.N.A. FROM THE SAMPLES  
4 SUBMITTED MARKED FROM THE HEAD OF THE AXE AND THE BLADE OF  
5 THE AXE?

6 A YES, SIR.

7 Q AND WAS THAT -- THOSE SAMPLES SUFFICIENT SAMPLES IN  
8 QUALITY AND QUANTITY TO DO THE P.C.R. TESTING?

9 A YES, SIR, THEY WERE.

10 Q NOW AT THAT POINT YOU COMPARED THE TWO. IS THAT  
11 CORRECT?

12 A THAT IS CORRECT.

13 Q PERHAPS I WANTED TO GET TO THIS POINT ON THE P.C.R.  
14 WHERE WE'RE ACTUALLY TALKIN' ABOUT THE TEST YOU CONDUCTED ON  
15 THIS, BUT I BELIEVE YOU HAVE SOME OTHER SLIDES AVAILABLE THAT  
16 WILL EXPLAIN THE P.C.R. TEST.

17 A YES, SIR.

18 Q ALRIGHT. WOULD YOU SHOW US THOSE SLIDES NOW, AND WE'LL  
19 GO BACK WITH YOUR RESULTS ON THAT P.C.R. TEST.

20 A THERE ARE A NUMBER OF REASONS THAT WE WOULD USE P.C.R.  
21 IN ANY GIVEN ANALYSIS, AND I'LL SHOW YOU A COUPLE OF THOSE.  
22 TWO THAT ARE RELEVANT IN A CASE OF THIS NATURE ARE THE FIRST  
23 TWO. THE FACT THAT WITH ONE OF THE SAMPLES, THAT BEING THE  
24 SPECIMEN FROM THE AXE, WE WERE DEALING WITH A VERY SMALL  
25 AMOUNT OF MATERIAL. SO THERE WASN'T A LOT OF D.N.A. TO

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 RECOVER.

2 AND SECOND OF ALL, THE SECOND REASON IS THE PROBLEM WITH  
3 DEGRADATION AND THAT BEING SIMILAR TO WHAT WE SAW WITH THE  
4 SPECIMEN FROM THE VICTIM IN THIS CASE WHERE THERE WAS A HIGH  
5 DEGREE OF DEGRADATION BECAUSE OF THE DECOMPOSITION THAT HAD  
6 BEGUN.

7 WITHOUT GOING INTO TOO MUCH DETAIL REGARDING THE P.C.R.  
8 PROCESS, BASICALLY IT INVOLVES THE USE OF WHAT WE CALL  
9 THERMAL CYCLER. IT IS A MACHINE WHICH CONTROLS THE  
10 TEMPERATURES VERY CAREFULLY AND UTILIZES THAT TO TAKE  
11 ADVANTAGE OF THE ENZYME. IT'S CALLED A CYCLER BECAUSE IT  
12 GOES THROUGH A PARTICULAR STEP-WISE PROCESS, AND I'M SHOWING  
13 YOU THIS TO GIVE YOU AN IDEA OF THE BASIC STEPS. THERE ARE  
14 THREE OF THEM WHERE WE DENATURE THE D.N.A.; THEN THE  
15 ANNEALING STAGE AND THE ELONGATION STAGE. THEN WE REPEAT  
16 THAT CYCLE A SPECIFIC NUMBER OF TIMES. THE H.L.A. D.Q. ALPHA  
17 WHICH IS THE PARTICULAR TEST THAT WE'RE TALKING ABOUT IN THIS  
18 CASE, THE CYCLE IS AS FOLLOWS: 94 DEGREES TO DENATURE THE  
19 D.N.A.; 60 DEGREES IS THE ANNEALING TEMPERATURE, AND 72  
20 DEGREES THE ELONGATION TEMPERATURE. THAT OCCURS THROUGH A  
21 SERIES OF 32 DIFFERENT CYCLES TO AMPLIFY OR COPY THE D.N.A.  
22 WHICH IS PRESENT IN THE SAMPLES.

23 Q NOW AT THIS POINT YOU HAVE A TERM UP THERE, WE'VE GONE  
24 FROM P.C.R. TO H.L.A.D.Q. ALPHA.

25 A CORRECT.

57 JR.

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 HERE YOU CAN COMPARE THE TWO. IS THAT RIGHT?

2 A YES, SIR.

3 Q WAS THERE A SUFFICIENT AMOUNT BOTH ON THE KNOWN AND  
4 THE -- I CALL IT THE UNKNOWN, BUT THE ITEMS FROM THE LAKE  
5 HOUSE AS I REFER TO THEM AS FOR YOU TO COMPARE THOSE TWO?

6 A YES, SIR, THERE WAS.

7 Q NOW WHEN YOU COMPARE THOSE TWO, WHAT DOES THE TEST  
8 RESULTS TELL US THAT IT IS OR IS NOT A PARTICULAR INDIVIDUAL  
9 OR DO WE END UP WITH A GROUP OF INDIVIDUALS?

10 A AS I MENTIONED, THESE DIFFERENT TYPES OCCUR WITH A GIVEN  
11 FREQUENCY RANGING FROM TWO TO ABOUT 18 PERCENT OF THE  
12 POPULATION. ANY GIVEN TYPE YOU SEE OCCURS WITH THAT  
13 PARTICULAR FREQUENCY AND DEFINES A PARTICULAR GROUP OF PEOPLE  
14 WHO WOULD SHARE THAT SAME TYPE. FOR EXAMPLE IF YOU LOOKED AT  
15 A PARTICULAR SPECIMEN THAT OCCURRED IN 10 PERCENT OR TYPE TEN  
16 PERCENT OF THE POPULATION, THAT MEANS THAT TEN PERCENT OF THE  
17 PEOPLE IN THAT RELEVANT POPULATION THAT YOU LOOK AT WOULD  
18 HAVE THAT TYPE. IT DOESN'T LOOK AT -- IT'S NOT ENOUGH  
19 INFORMATION TO SPECIFICALLY IDENTIFY ONE INDIVIDUAL FROM  
20 EVERYONE ELSE, BUT RATHER IT GIVES US A GROUP OF PEOPLE THAT  
21 WE NARROW IT DOWN TO WHO HAVE THAT PARTICULAR TYPE.

22 Q AND CERTAINLY YOU CAN EXCLUDE AN INDIVIDUAL.

23 A THAT'S CORRECT.

24 Q YOU CAN DEFINITELY EXCLUDE AN INDIVIDUAL IF THE LAKE  
25 HOUSE DOESN'T MATCH THE BONE, IT WOULD EXCLUDE THAT

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 INDIVIDUAL FROM THE GROUP. IS THAT CORRECT?

2 A THAT IS CORRECT.

3 Q ALRIGHT. NOW IN THIS PARTICULAR CASE, FURTHER, HAVE YOU  
4 PREPARED AND ASSISTED IN THE PREPARATION OF A CHART SHOWING  
5 THE RESULTS OF THE D.N.A. TESTING?

6 A YES, SIR, WE DID.

7 Q WOULD THIS ASSIST YOU IN YOUR TESTIMONY BEFORE THE JURY?

8 A YES, SIR.

9 MR. MCMAHON: YOUR HONOR, I WOULD OFFER THIS INTO  
10 EVIDENCE.

11 MS. FULLWOOD: NO OBJECTION. (STATE'S EXHIBIT #23  
12 RECEIVED IN EVIDENCE.)

13 Q NOW I'M REFERRING TO STATE'S EXHIBIT #23. NOW THE TOP  
14 SAMPLES FROM THE LAKE HOUSE, WHAT DOES THIS REPRESENT, THE  
15 TOP PART OF THE CHART, WHAT DOES IT REPRESENT?

16 A WHAT WE'RE LOOKING AT IS A SCHEMATIC DIAGRAM FOR THE  
17 RESULTS OF THE TWO SPECIMENS OR KNOWN SPECIMENS AND THAT  
18 WOULD BE ITEMS 12.1, 12.3 SAMPLES FROM THE AXE AND ITEM #10  
19 THE CUTTING FROM THE COUCH.

20 Q THAT'S THESE ITEMS HERE.

21 A THAT'S CORRECT.

22 Q NOW I NOTICE YOU'VE JUST GOT ONE AXE ITEM ON THERE. WHY  
23 IS THAT?

24 A THAT IS CORRECT. BECAUSE IN THE ORIGINAL INFORMATION  
25 PROVIDED BY SLED AND DISCUSSED WITH THEM, THERE WAS A

SP:TK

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 A THAT'S CORRECT.

2 Q NOW THE D.N.A. SAMPLES FROM THE COUCH AND THE AXE, WHAT  
3 WERE THEY?

4 A THEY WERE ALSO 1.1, 1.2.

5 Q BOTH FROM THE COUCH WAS 1.1, 1.2 AND THE AXE 1.1, 1.2.

6 A THAT'S CORRECT.

7 Q NOW GIVEN THAT CAN YOU EXCLUDE THEM A PARTICULAR  
8 PERCENTAGE OF THE POPULATION THAT COULD NOT HAVE BEEN THE  
9 DONOR OF THE BLOOD ON THE AXE AND THE BLOOD ON THE CUSHION  
10 AND THE D.N.A. EXTRACTED FROM THE LAKE HOUSE?

11 A YES, SIR.

12 Q WHAT PERCENTAGE OF THE POPULATION CAN BE EXCLUDED AS A  
13 RESULT OF YOUR TESTING?

14 A WELL, THE H.L.A.D.Q. ALPHA TYPE 1.1., 1.2 OCCURS  
15 CONSERVATIVELY IN 9 PERCENT OF THE NORTH AMERICAN BLACK  
16 POPULATION TELLING US THAT 91 PERCENT OF THAT POPULATION CAN  
17 BE EXCLUDED AS NOT HAVING THAT TYPE.

18 Q AND WHEN YOU SAY CONSERVATIVELY IN 9 PERCENT, WHAT DO  
19 YOU MEAN BY THE USE OF THE TERM CONSERVATIVELY?

20 A WELL, WHAT I MEAN IS WE LOOK FOR ANY PARTICULAR  
21 COMPARISON AT THE RACIAL GROUP WHICH IS CONSISTENT WITH THE  
22 RACIAL GROUP OF THE PERSON WE'RE SUPPOSED TO BE COMPARING TO.

23 Q THE VICTIM IN THIS CASE.

24 A IN THIS CASE THE VICTIM, CORRECT.

25 Q OK.

MIKE DEGULIELMO - DIRECT BY MR. MCMAHON

1 A WE HAD INFORMATION THAT THE VICTIM WAS BLACK. BECAUSE  
2 OF THAT WE LOOK AT A DATA BASE OF NORTH AMERICAN BLACK  
3 INDIVIDUALS TO MAKE THAT COMPARISON. THERE ARE ALSO DATA  
4 BASES THAT ARE NORTH AMERICAN CAUCASIAN OR AMERICAN HISPANIC  
5 INDIVIDUALS AND IN THOSE TWO DATA BASES THE NUMBERS WERE LESS  
6 CONSERVATIVE THAN THEY WERE WITH THE BLACK DATA BASE.

7 Q OK. SO 91 PERCENT OF THE NORTH AMERICAN BLACK  
8 POPULATION WOULD BE EXCLUDED---

9 A THAT'S CORRECT.

10 Q ---FROM THE DONOR OF THIS BLOOD ON THE CUSHION AND THE  
11 BLOOD ON THE AXE HEAD AND HANDLE.

12 A YES, SIR.

13 Q IS THAT RIGHT? WOULD THE VICTIM BE EXCLUDED?

14 A NO, SIR.

15 Q SHE WOULD BE IN THAT CLASS OF 9 PERCENT. IS THAT  
16 CORRECT?

17 A THAT'S CORRECT.

18 Q AS THE DONOR OF THE BLOOD ON THE AXE HANDLE, HEAD AND  
19 THE BLOOD ON THE CUSHION FROM THE COUCH.

20 A THAT'S CORRECT.

21 Q NOW WHEN YOU SAY CONSERVATIVE, WHEN YOU USE THAT TERM  
22 CONSERVATIVE, IS THAT THE LARGEST CLASS IN WHICH THE DATA  
23 BASES ARE AVAILABLE FOR YOU?

24 A THAT IS CORRECT.

25 Q IS THAT CORRECT? IT COULD BE LESS, A SMALLER CLASS BUT

ST. TR.

MIKE DEGULIELMO - CROSS BY MS. FULLWOOD

1 Q OK. 'CAUSE I HAVE A LITTLE TROUBLE WITH THE  
2 PRONUNCIATION TOO. NOW THE TESTS YOU DID IN THIS CASE AREN'T  
3 WHAT WE CALL GENETIC FINGERPRINTING, ARE THEY?

4 A NO, MA'AM. THAT'S A -- SOMEWHAT OF A, I GUESS, A  
5 COLLOQUIALISM, BUT IT'S AN ENTIRELY DIFFERENT TYPE OF TEST.

6 Q THAT'S A R.F.L.P. TEST, ISN'T IT?

7 A YES, MA'AM.

8 Q ALRIGHT. AND IN THAT KIND OF TEST YOU CAN REACH THE  
9 CONCLUSION THAT THERE'S A ONE IN A MILLION CHANCE THAT  
10 SOMEBODY ELSE HAD THIS D.N.A.

11 A VERY COMMONLY.

12 Q MORE OR LESS THAT'S THE END RESULT OF THAT KIND OF TEST.  
13 RIGHT?

14 A YES, MA'AM.

15 Q BUT THAT'S NOT THE KIND OF TEST YOU DID HERE.

16 A NO.

17 Q IT'S NOT CLOSE, IS IT?

18 A IT'S AN ENTIRELY DIFFERENT TYPE OF TEST.

19 Q OK. NOW YOU TESTIFIED ABOUT SUBMITTING TWO REPORTS IN  
20 THIS CASE.

21 A CORRECT.

22 Q AND THE FIRST ONE YOU SUBMITTED IN NOVEMBER OF 1992. IS  
23 THAT RIGHT?

24 A YES, MA'AM.

25 Q AND YOUR SECOND REPORT IS DATED YESTERDAY, ISN'T IT?

MIKE DEGULIELMO - CROSS BY MS. FULLWOOD

1 A I BELIEVE IT'S DATED MONDAY.

2 Q IS IT MONDAY? OK. SO MONDAY OF THIS WEEK.

3 A CORRECT.

4 Q AND TODAY'S WEDNESDAY.

5 A CORRECT.

6 Q OK. NOW YOU'RE NOT TRYING TO SAY THAT YOUR SECRETARY  
7 MADE SOME KIND OF MISTAKE HERE. RIGHT?

8 A NO, MA'AM.

9 Q YOU'RE SAYING THAT YOU MADE THE MISTAKE. RIGHT?

10 A THAT'S CORRECT.

11 Q SO THE RESULTS OF THESE KIND OF TESTS CAN ALWAYS BE  
12 FLAWED BY AN ERROR IN THE TESTER. RIGHT?

13 A WELL, THE RESULT ITSELF IS NOT FLAWED SO MUCH AS THE  
14 FACT THAT WHEN I PHYSICALLY WROTE THE REPORT, I WRITE ALL MY  
15 REPORTS OUT AND HAVE THEM TYPED. I WROTE THE WRONG NUMBER  
16 DOWN ON THE FORM ON A SHEET TO BE TYPED.

17 Q AND AS A RESULT OF THAT YOUR FIRST REPORT WASN'T RIGHT,  
18 WAS IT?

19 A THAT'S CORRECT.

20 Q OK. YOU TALKED A LITTLE BIT ABOUT THE POPULATION  
21 STATISTICS AND GROUPS TO INCLUDE AND GROUPS TO EXCLUDE. NOW  
22 CAN YOU TELL ME FROM WHAT SOURCES YOU DERIVED YOUR DATA BASES  
23 FROM?

24 A SURE. THERE ARE -- WITH H.L.A.D.Q. ALPHA THERE IS DATA  
25 FROM ANY OF A VARIETY OF SOURCES. WE HAVE DATA THAT WE

ST. 72.

MIKE DEGULIELMO - CROSS BY MS. FULLWOOD

1 A 10,745.46.

2 Q WHAT NUMBER AGAIN NOW?

3 A 10,745.46.

4 Q OK. WE'LL JUST ROUND IT OUT TO 10,745?

5 A OK.

6 Q OK. SO THE RESULTS IN YOUR TEST SHOWED GENETIC TRAITS  
7 THAT YOU COULD EXPECT TO SEE IN 10,745 BLACK PEOPLE IN  
8 RICHLAND COUNTY.

9 A YES, MA'AM.

10 Q OK. NO FURTHER QUESTIONS.

11 REDIRECT EXAMINATION

12 BY MR. MCMAHON

13 Q HOW MANY IS THE TOTAL ON BOTH OF THOSE IN RICHLAND AND  
14 LEXINGTON?

15 A RICHLAND IS 119,394.

16 Q NO, NO. THE TOTAL OF THE 9 PERCENT OF RICHLAND AND  
17 LEXINGTON COMBINED.

18 A 12,411.

19 Q SO IF 12,411 WERE IN THIS LAKE HOUSE AND BLEEDING AND---  
20 MS. FULLWOOD: OBJECTION.

21 Q ---THE D.N.A. WOULD MATCH---

22 THE COURT: WHAT'S THE OBJECTION?

23 MS. FULLWOOD: IT'S LEADING.

24 THE COURT: SUSTAINED. JUST RE -- I THINK THE WAY HE  
25 POSITED THE QUESTION IS APPROPRIATE UNDER THE CIRCUMSTANCES.

MIKE DEGULIELMO - REDIRECT BY MR. MCMAHON

1 GO AHEAD.

2 Q HOW MANY AGAIN, MIKE?

3 A 12,411.

4 Q SO IF 12,411. THAT'S 9 PERCENT OF RICHLAND AND  
5 LEXINGTON COUNTY POPULATION WAS IN THIS LAKE HOUSE---

6 MS. FULLWOOD: OBJECTION. OBJECTION. THAT CALLS FOR  
7 SPECULATION, JUDGE. THAT'S ABSURD.

8 MR. MCMAHON: HE'S AN EXPERT WITNESS, YOUR HONOR. I CAN  
9 CERTAINLY ASK HIM QUESTIONS.

10 THE COURT: WAIT. WAIT. LET ME. MCMAHON. GO AHEAD,  
11 MR. MCMAHON. ARE YOU FINISHED?

12 MR. MCMAHON: MAY I FINISH THE QUESTION?

13 THE COURT: NO, GO AHEAD AND FINISH YOUR ARGUMENT.  
14 WELL, LET ME -- YOU GONNA HAVE TO COME UP HERE. SORRY.  
15 (THERE WAS A BENCH CONFERENCE OUT OF THE HEARING OF THE JURY  
16 AND OFF THE RECORD.) GO AHEAD, MR. MCMAHON.

17 Q I FORGOT THE NUMBER. 12 THOUSAND HOWEVER MANY.  
18 RICHLAND AND LEXINGTON COUNTY. 12 THOUSAND HOWEVER MANY  
19 BLACK AMERICANS WERE IN THIS LAKE HOUSE AND BLEEDING THEIR  
20 D.N.A. WOULD MATCH. IS THAT CORRECT?

21 A YES, SIR.

22 THE COURT: OK.

23 Q I DON'T HAVE ANY MORE QUESTIONS.

24 THE COURT: ANY RECROSS?

25 MS. FULLWOOD: NO, SIR.

PCR, TR.  
ST, TR.

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✓ CERTIFICATE

I, THE UNDERSIGNED, SMOKEY PERRY, OFFICIAL AND CERTIFIED COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT AND NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT TO THE BEST OF MY ABILITY AND SKILL.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

*Smoky Perry*

1-20-95

12



Johnnie W. <sup>#</sup>Prisbon, 216581  
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