

 ORIGINAL

VOLUME THREE OF THREE

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Edward W. Miller, Circuit Court Judge

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THE STATE,

S.C. Supreme Court

RESPONDENT,

V.

JERRY BUCK INMAN,

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CARLA FIELD - EXAMINATION BY THE COURT

25

1 Q. ALL RIGHT. AND UNTIL -- WELL, LET ME ASK YOU, ARE
2 YOU FAMILIAR WITH ANY OF THE ATTORNEYS THAT ARE IN THIS
3 ROOM TODAY?

4 A. THROUGH THE NEWS COVERAGE, OF COURSE, YOU KNOW.

5 Q. WOULD YOU RECOGNIZE ANY OF THEIR VOICES?

6 A. PROBABLY NOT VOICES. PROBABLY FACES, BUT NOT VOICES.

7 Q. OKAY. THANK YOU.

8 MR. BANNISTER: I DON'T HAVE ANY FURTHER QUESTIONS,
9 JUDGE.

10 THE COURT: MR. ARIAIL, ANYTHING YOU WANT TO ASK?
11 YOU DON'T HAVE A DOG IN THIS FIGHT FROM WHAT YOU SAID, BUT
12 I'LL LET YOU ASK A QUESTION.

13 MR. ARIAIL: THANK YOU. I DON'T HAVE ANY.

14 THE COURT: ALL RIGHT. MR. LIGHTSEY, ANYTHING --
15 WOULD YOU LIKE TO ASK ---

16 MR. LIGHTSEY: NO, THANK YOU. NO, YOUR HONOR. THANK
17 YOU.

18 THE COURT: MS. FIELD, LET ME ASK YOU THIS. YOU
19 RECEIVED A TELEPHONE CALL, A RELAYED MESSAGE TO STOP THE
20 LIVE FEED, IS THAT RIGHT.

21 A. YES, UH-HUH (AFFIRMATIVE).

22 THE COURT: AND WHAT DID YOU DO AS A RESULT OF THAT?

23 A. I SWITCHED OUR SIGNAL OVER TO A GRAPHIC THAT COMES
24 OUT OF OUR CONTROL ROOM. THERE IS A SILENT GRAPHIC IMAGE
25 OF OUR LOGO.

CARLA FIELD - REDIRECT EXAMINATION BY MR. BANNISTER

26

1 THE COURT: OKAY. SO WHEN YOU SAY YOU STOPPED THE
2 LIVE FEED IT WAS BOTH THE VISUAL AND THE AUDIO?

3 A. YES, ABSOLUTELY.

4 THE COURT: DO YOU KNOW WHAT TIME THAT WAS?

5 A. I'M SORRY, I CAN'T SAY SPECIFICALLY WHAT TIME IT WAS.
6 IT WAS WHENEVER YOU SPOKE TO OUR RECORDER IN THE
7 COURTROOM, AND I WAS TOLD THAT I NEEDED TO STOP IT.

8 THE COURT: OKAY. AND WHERE DID YOU PICK UP OR DO
9 YOU KNOW HOW YOU PICKED UP THE AUDIO THAT CAME THAT YOU
10 HEARD AS MUFFLED? DO YOU KNOW -- WAS IT THROUGH THE
11 COURT'S SYSTEM OR THROUGH ---

12 A. I THINK IT WAS THROUGH OUR CAMERA.

13 THE COURT: THROUGH YOUR CAMERA? SO -- AND YOU DO
14 HAVE MICROPHONES ATTACHED TO THE CAMERA, CORRECT?

15 A. YES.

16 THE COURT: OKAY. DO YOU KNOW WHO THE CAMERA-MAN WAS
17 THAT DAY? I DON'T SEE HIM HERE TODAY.

18 A. I'M NOT SURE WHO IT WAS. I'M SORRY.

19 THE COURT: BUT YOU CAN FIND OUT?

20 A. OH, YES. ABSOLUTELY.

21 THE COURT: OKAY. ALL RIGHT. ANYTHING ELSE?

22 MR. BANNISTER: JUST BRIEFLY.

23 REDIRECT EXAMINATION BY MR. BANNISTER:

24 Q. ARE THERE OTHER MICROPHONES THAT YOUR BROADCASTERS
25 USE ON-SITE? I MEAN, THEY HAVE THOSE PORTABLE ONES, DO

CARLA FIELD - REDIRECT EXAMINATION BY MR. BANNISTER

27

1 THEY NOT, THAT YOU CAN HOOK TO YOUR BELT OR THEY HAVE THE
2 LITTLE MICROPHONES THAT ATTACH?

3 A. I REALLY CAN'T SPEAK TO WHAT EQUIPMENT WAS IN THE
4 COURTROOM. I KNOW THAT THERE WAS A CAMERA WITH A
5 MICROPHONE. THAT'S MY ASSUMPTION. BUT I DON'T -- I DON'T
6 EVEN KNOW THAT FOR SURE.

7 Q. OKAY. SO YOU REALLY CAN'T SAY WHETHER OR NOT THE
8 INFORMATION OR THE VOICES YOU HEARD WERE COMING FROM THE
9 CAMERA ITSELF OR OTHER MICROPHONES ---

10 A. WELL, WE ONLY HAD ONE SIGNAL THAT WAS BEING FED TO
11 THE NEWS ROOM. AND THAT WOULD BE BOTH AUDIO AND VIDEO.
12 AND I'M ASSUMING IT'S ENTIRELY FROM OUR CAMERA.

13 Q. ALL RIGHT. AND THAT'S WHAT I WANT TO MAKE SURE, IF
14 THERE ARE OTHER WAYS FOR YOU TO GET AUDIO THAN THE CAMERA.
15 ARE YOU -- ARE YOU SAYING THE ONLY AUDIO WE EVER GET IS
16 FROM THE CAMERA?

17 A. AT THAT POINT THE ONLY AUDIO WE WOULD HAVE BEEN
18 RECEIVING WOULD HAVE COME THROUGH OUR CAMERA.

19 Q. ALL RIGHT. AND HOW DO YOU KNOW THAT?

20 A. WE DIDN'T -- WE WEREN'T USING THE OTHER SOURCE. IT'S
21 A SINGLE SOURCE THAT WAS FEEDING TO OUR NEWS ROOM.

22 Q. ALL RIGHT. AND HOW DO YOU KNOW THAT IT WASN'T ONE OF
23 THE LITTLE PORTABLE MICROPHONES THAT ---

24 A. I GUESS YOU'D HAVE TO VERIFY THAT WITH SOMEBODY ELSE
25 THAT WAS IN THE FIELD. BUT I DON'T HAVE ANY REASON TO

CARLA FIELD - EXAMINATION BY THE COURT

28

1 BELIEVE THAT WE WOULD DO SOMETHING THAT UNUSUAL.

2 Q. OKAY. AND I'M TRYING TO GET AT HOW YOU CAN BE
3 CERTAIN IT WASN'T.

4 A. OH, I'M NOT. I'M NOT CERTAIN THAT IT WASN'T. I HAVE
5 NO REASON TO BELIEVE IT WAS ANYTHING OTHER THAN A NORMAL
6 CAMERA FEED.

7 Q. OKAY. BUT YOU DON'T KNOW?

8 A. NO.

9 THE COURT: AND ONE OTHER QUESTION, MS. FIELD. DO
10 YOU KNOW, WAS IT YOUR CAMERA THAT THE -- BECAUSE MY
11 REQUIREMENT AT THAT HEARING THAT THERE ONLY BE ONE CAMERA
12 IN THE COURTROOM?

13 A. WE WERE THE POOL CAMERA FOR THAT DAY.

14 THE COURT: OKAY. ALL RIGHT. AND SO YOU COULD
15 PROVIDE TO MR. LIGHTSEY THE -- WHOEVER THE CAMERA PERSON
16 WAS? HE WAS A GENTLEMAN ---

17 A. YES.

18 THE COURT: --- PROBABLY IN HIS MID THIRTIES.

19 A. YES. WE CAN DEFINITELY DETERMINE THAT.

20 THE COURT: ALL RIGHT.

21 MR. BANNISTER: AND ONE LAST FOLLOW-UP.

22 REDIRECT EXAMINATION BY MR. BANNISTER:

23 Q. THERE WERE APPARENTLY A NUMBER OF PEOPLE THAT WERE
24 THERE PRIOR TO AUGUST THE 19TH THAT WERE THERE TO WIRE THE
25 COURTROOM. DO YOU KNOW WHO THAT MIGHT HAVE BEEN OR ---

CARLA FIELD - EXAMINATION BY THE COURT

29

1 A. I'D HAVE TO FIND THAT OUT FROM THE STATION.

2 Q. OKAY.

3 THE COURT: OKAY. THANK YOU, MA'AM. YOU CAN STEP
4 DOWN. THANK YOU VERY MUCH. ALL RIGHT. MR. BANNISTER,
5 YOU'VE REFERENCED THE QUATTLEBAUM CASE IN YOUR MOTION. IS
6 THAT YOUR AUTHORITY IN THIS ---

7 MR. BANNISTER: WELL, PARTLY. I MEAN, I THINK THAT'S
8 A STEP OR TWO AWAY FROM WHERE WE ARE NOW. AND I DO NOT
9 BELIEVE THAT THE SOLICITOR'S OFFICE HAD ANYTHING TO DO
10 WITH THE SURREPTITIOUS ---

11 THE COURT: OKAY.

12 MR. BANNISTER: --- BROADCAST.

13 THE COURT: SO NO QUESTION THERE IS NOT INTENTIONAL
14 PROSECUTORIAL MISCONDUCT?

15 MR. BANNISTER: IF THERE IS, I DON'T KNOW ABOUT IT.
16 AND THAT'S WHAT I'M SAYING IS, I MEAN, WE NEED TO -- I
17 HAVEN'T SEEN ANY OF THE AFFIDAVITS THAT HAVE BEEN HANDED
18 TO YOU FROM THE SOLICITOR'S OFFICE. SO, YOU KNOW,
19 OBVIOUSLY I NEED TO REVIEW THOSE.

20 BUT REGARDLESS OF HOW INFORMATION GOT TO THE
21 SOLICITOR'S OFFICE, I THINK WE NEED TO KNOW WHAT
22 INFORMATION GOT TO THE SOLICITOR'S OFFICE. I MEAN, WE
23 KNOW THAT THERE WAS -- IT WAS OBVIOUSLY A BETTER SOUND
24 THAN OUR LAST WITNESS WAS AWARE OF BECAUSE WE KNOW FROM
25 WHAT THE SOLICITOR SAID ABOUT MARSHA PICKETT TEXTING HIM

1 AND SAYING, HEY, WE CAN HEAR YOU TALKING ABOUT THIS
2 PARTICULAR PERSON. IF I'M MISSTATING THAT, YOU TELL ME.

3 MR. ARIAIL: YOU'RE MISSTATING IT. SHE DID NOT TEXT.
4 SHE CALLED.

5 MR. BANNISTER: OKAY.

6 MR. ARIAIL: IN THE COURTROOM. I VIOLATED THE CHIEF
7 JUSTICE'S ORDER, AND I ANSWERED IT.

8 THE COURT: WE WERE IN RECESS.

9 MR. ARIAIL: YES.

10 MR. BANNISTER: RIGHT. AND WE WEREN'T SUPPOSED TO BE
11 BEING RECORDED.

12 THE COURT: OKAY. ALL RIGHT.

13 MR. BANNISTER: SO I'M ASKING FOR -- I WANT SOMEBODY
14 TO -- I'D LIKE FOR THE COURT TO APPOINT SOMEBODY TO
15 INVESTIGATE THIS OTHER THAN US OR THE SOLICITOR'S OFFICE
16 FOR TWO REASONS. ONE, SO WE CAN KNOW HOW TO HANDLE THE
17 BROADCAST MEDIA GOING FORWARD. AND, TWO, 'CAUSE OBVIOUSLY
18 WE DON'T KNOW HOW THE PROBLEM OCCURRED. IT'S GOING TO BE
19 ---

20 THE COURT: WELL, I KNOW HOW TO HANDLE THE BROADCAST
21 MEDIA GOING FORWARD.

22 MR. BANNISTER: WELL, I DON'T WANT THEM THERE, JUDGE.
23 I MEAN, I'M NOT SAYING ---

24 THE COURT: WELL, YOU'VE BEEN CLEAR WITH THAT SINCE
25 SEPTEMBER OF 2007.

1 MR. BANNISTER: WELL, NO, I THINK THIS IS A LITTLE
2 BIT OF A DISTINCTION. IT'S JUST A DIFFERENCE BETWEEN
3 HAVING THE WHOLE THING PRESENTED LIVE AND IN PROGRESS
4 GAVEL TO GAVEL. YOU KNOW, I'M NOT SAYING KEEP THE NEWS
5 OUT OF THE COURTROOM, BUT I THINK THE TVs AND THE
6 RECORDERS NEED TO GO. WE'VE GOT A WHOLE OTHER -- I MEAN,
7 THE INFORMATION THAT HAS GOTTEN OUT OF THE COURT NEVER
8 SHOULD HAVE.

9 THE COURT: OKAY. WHAT INFORMATION IS THAT?

10 MR. BANNISTER: WELL, ---

11 THE COURT: THAT'S WHAT WE NEED TO KNOW.

12 MR. BANNISTER: THAT'S RIGHT. AND THAT'S WHAT I'M
13 SAYING TO YOUR HONOR IS EITHER I'VE GOT TO SPEND THE TIME
14 TO FIND THAT OUT OR WE'VE GOT TO HAVE SOME HELP.

15 THE COURT: WELL, -- ALL RIGHT.

16 MR. BANNISTER: AND I THINK IT WOULD BE MUCH CLEARER
17 IF IT WERE NOT MY OFFICE DOING IT, IF IT WAS STATE LAW
18 ENFORCEMENT, SLED.

19 THE COURT: ALL RIGHT. WELL, LET ME JUST -- MY
20 RECOLLECTION OF WHAT HAPPENED, AND I'VE BEEN -- TRIED TO
21 BE VERY SOLICITOUS OF THE MEDIA THROUGHOUT THIS ENTIRE
22 PROCEEDING. IT'S OBVIOUSLY VERY -- IT'S GOT A LOT OF
23 APPEAL TO THE MEDIA AND THE PUBLIC. IT'S A HIGH PROFILE
24 CASE.

25 AND AFTER MR. BENDER WAS HERE, I HANDED THIS ORDER

1 OUT, I THINK THE COURT HAS BEEN EXTREMELY CLEAR ABOUT THE
2 CONDUCT WE REQUIRE. I THINK YOUR STATEMENT EARLY ON IN
3 THIS HEARING WAS CORRECT, THAT THERE IS A DISCONNECT
4 BETWEEN THE MEDIA'S UNDERSTANDING OF WHAT THEY'RE SUPPOSED
5 TO DO AS LAID OUT IN THE ORDER. AND WE'RE GOING TO CLEAR
6 THAT UP TODAY.

7 BUT THE DYNAMICS OF THIS WHOLE CASE HAVE CHANGED WITH
8 THE ENTRY OF MR. INMAN'S GUILTY PLEA. I AM THE FACT-
9 FINDER NOW. I DID NOT LISTEN TO THE FEED. AND I HAVE NOT
10 HEARD ANY INFORMATION THAT WAS DISSEMINATED FROM THE FEED
11 OTHER THAN WHAT'S PRESENTED RIGHT HERE. WE DON'T HAVE TO
12 WORRY ABOUT A JURY BEING CONTAMINATED BY MEDIA EXPOSURE.

13 THE ONLY THING THAT CONCERNS ME FROM THIS VIOLATION
14 OF THE COURT ORDER THEN IS WHETHER OR NOT AN
15 ATTORNEY/CLIENT PRIVILEGE HAS BEEN VIOLATED. AND THE ONLY
16 PEOPLE THAT IT WOULD -- WHO COULD HEAR THAT PRIVILEGED
17 INFORMATION AND HAVE AN IMPACT ON THE OUTCOME OF THIS CASE
18 WOULD BE THE SOLICITOR'S OFFICE.

19 AND I HAVE INSTRUCTED THEM, AND AS OFFICERS OF THE
20 COURT I KNOW THEY WILL OBEY THAT INSTRUCTION, NOT TO TALK
21 TO ANYBODY WHO MAY HAVE HEARD ANYTHING OFF OF THE MEDIA
22 FEEDS.

23 WE -- SO THE POINT IS IS THAT THE REAL ISSUE HERE IS
24 THE CONDUCT -- WELL, ONE OF THE ISSUES, I GUESS THERE ARE
25 TWO, IS WHETHER OR NOT THERE HAS BEEN SOME SORT OF

1 VIOLATION OF THE ATTORNEY/CLIENT PRIVILEGE.

2 AND I WOULD DISAGREE WITH THE SOLICITOR. AND I'LL
3 RULE IN THIS CASE, AND MAYBE I'LL GET CORRECTED DOWN THE
4 ROAD, THAT COMMUNICATION BETWEEN AN ATTORNEY AND THEIR
5 CLIENT IN THE COURTROOM IS PROTECTED AS LONG AS IT'S NOT
6 DISSEMINATED IN SOME FASHION BY SPEAKING TOO LOUDLY OR
7 ANYTHING LIKE THAT. IF THEY -- IF AN ATTORNEY AND THEIR
8 CLIENT WANT TO HAVE A PRIVATE CONVERSATION IN THE
9 COURTROOM, THE FACT THAT IT'S IN AN OPEN COURTROOM DOES
10 NOT REMOVE THE PRIVILEGE.

11 IF I WERE TO RULE THAT IT DID, THEN I GUESS WRITTEN
12 COMMUNICATIONS BETWEEN ATTORNEY AND CLIENTS IN THE
13 COURTROOM WOULD THEN BE SUBJECT TO DISCLOSURE. AND I
14 THINK THAT'S -- I CERTAINLY WOULDN'T RULE THAT. AND I
15 THINK THAT WOULD BE CLEARLY PRIVILEGED INFORMATION.

16 SO I'M NOT GOING TO REVIEW THESE DOCUMENTS. I'M
17 GOING TO -- I MAY ASK -- I'LL ASK AN INDEPENDENT PERSON TO
18 REVIEW THE DOCUMENTS TO MAKE SURE THAT THERE IS NO -- THAT
19 INFORMATION CAME OUT, I DON'T KNOW WHAT IT WOULD BE, IN
20 YOUR COMMUNICATION WITH YOUR CLIENT. AND WE'LL PROTECT
21 THAT AND INFORM YOU IF WE FIND THAT. THEN THAT WILL
22 CHANGE THE WHOLE DYNAMIC OF WHAT'S GOING ON TODAY.

23 BUT I'M NOT GOING TO GO ON A FISHING EXPEDITION TO
24 TRY AND TURN SOMETHING UP THAT'S NOT GOING TO BE -- COME
25 TO LIGHT ANYWAY. THE SOLICITOR'S NOT GOING TO HEAR ABOUT

1 IT. AND I'M NOT GOING TO HEAR ABOUT IT. AND SO WE DON'T
2 HAVE TO WORRY ABOUT A POTENTIAL JURY POOL OUT THERE.

3 MR. BANNISTER: MAY I, YOUR HONOR?

4 THE COURT: UM-HUM (AFFIRMATIVE).

5 MR. BANNISTER: JUST BRIEFLY. IT'S -- I AGREE WITH
6 YOU THAT WE DON'T HAVE TO WORRY ABOUT A JURY, BUT TO THE
7 EXTENT THAT IT'S MY JOB TO PROTECT THE DEFENDANT AND
8 PRIVILEGED COMMUNICATION, ANYTHING THAT WAS MADE AVAILABLE
9 TO THE SOLICITOR'S OFFICE PRESENTS A SERIES OF POTENTIAL
10 PROBLEMS FOR US WITH REGARDS TO THE DEFENSE. I MEAN,
11 WE ---

12 THE COURT: WELL, YOUR OBLIGATION IS TO SHOW ME WHERE
13 THE PREJUDICE IS.

14 MR. BANNISTER: WELL, AND I GUESS AT LEAST FROM A
15 STARTING POINT I UNDERSTAND THAT THE COURT HAS ORDERED
16 THAT MR. ARIAIL AND THE PEOPLE INVOLVED IN THIS CASE ARE
17 SUPPOSED TO BE OFF LIMITS WITH ANYBODY THAT HEARD
18 ANYTHING, BUT WHO ARE THOSE PEOPLE? HOW'S THAT GOING TO
19 BE, I MEAN, HOW ARE THEY GOING TO PRACTICALLY WORK THAT?
20 I MEAN, IF HIS -- AND MARSHA PICKETT ---

21 THE COURT: LET ME INTERRUPT YOU FOR A SECOND.

22 MR. BANNISTER: OKAY.

23 THE COURT: I APOLOGIZE FOR DOING THAT. AND LET ME
24 TELL YOU WHAT MY MEMORY WAS IN THE COURTROOM. HE WAS A
25 VERY PLEASANT CAMERA-MAN, VERY PLEASANT -- ALL THE PEOPLE

1 HAVE BEEN VERY PLEASANT, ASKED ME IF HE COULD, I BELIEVE
2 THE MICROPHONE WAS UP ON THE BENCH, HIS CAMERA/MICROPHONE.
3 AND THAT IS WHY, I GUESS, MS. PICKETT HEARD MY LAW CLERK
4 TALKING TO ONE OF THE BAILIFFS WHO CAME OVER WHO -- CAN'T
5 REMEMBER HIS NAME, APPARENTLY WAS BORN IN GREENVILLE AND
6 WANTED TO TALK TO MY LAW CLERK WHO WAS FROM GREENVILLE.
7 AND THAT'S WHEN MS. PICKETT CALLED.

8 SO IT WAS VERY EARLY IN THAT LONG RECESS. AND I
9 THINK IT WAS PROBABLY BEFORE LUNCH. AND HE ASKED ME IF HE
10 COULD MOVE THE MICROPHONE. AND I BELIEVE HE MOVED THE
11 MICROPHONE TO THE PODIUM WHICH WAS NEAR THE SOLICITOR'S
12 TABLE WHERE YOU GAVE YOUR COMMENTS OR THE SOLICITOR GAVE
13 HIS COMMENTS AND READ THE STIPULATED FACTS IN THE CASE,
14 WHICH WOULD EXPLAIN WHY ALL THE OTHER VOICES WERE MUFFLED.
15 BUT THAT IS MY RECOLLECTION OF WHAT WENT ON.

16 AND WHEN I CAME OUT AND TOLD THEM TO SHUT IT DOWN, I
17 NOW BELIEVE BASED ON MS. FIELD'S TESTIMONY UNDER OATH THAT
18 THEY SHUT IT DOWN. UP TO THAT POINT IT WAS A CLEAR
19 VIOLATION. SO -- AND WE'LL HAVE TO DEAL WITH THAT IN SOME
20 FASHION. AND WE'LL DO THAT SHORTLY.

21 MR. BANNISTER: YOUR HONOR, ---

22 THE COURT: BUT I'VE NOW LAID OUT WHAT I REMEMBER
23 ABOUT IT. SO I'M SORRY TO HAVE INTERRUPTED YOU. GO
24 AHEAD.

25 MR. BANNISTER: THAT'S OKAY. I WAS -- THE CONCERN WE

1 HAD WAS, OBVIOUSLY, THERE WAS A MICROPHONE AT OUR TABLE.

2 THE COURT: THAT WAS A COURT'S MICROPHONE.

3 MR. BANNISTER: AND DO WE KNOW FOR CERTAIN THAT THE
4 MEDIA HAS NOT TAPPED INTO THOSE MICROPHONES?

5 THE COURT: WELL, WE'RE GOING TO FIND OUT.

6 MR. BANNISTER: WELL, THAT'S -- I THINK WE NEED ---

7 THE COURT: OKAY. MS. FIELD IS GOING TO TELL MR.
8 LIGHTSEY, MR. LIGHTSEY'S GOING TO TELL ME. AND I'LL ASK
9 Y'ALL TO DO THAT BY TOMORROW. IS THAT POSSIBLE?

10 MR. LIGHTSEY: (AFFIRMATIVE NOD).

11 THE COURT: THEY INDICATE -- YES, SIR, MR. LIGHTSEY?

12 MR. LIGHTSEY: YES, SIR.

13 THE COURT: HE INDICATES THAT THEY CAN. IF THEY
14 HAVE, THEN WE'LL -- THAT'LL BE ANOTHER ISSUE WE'LL HAVE TO
15 ADDRESS. I'M NOT SURE HOW IT CHANGES THINGS, BUT WE'LL
16 DEAL WITH THAT. THAT'S A BRIDGE WE HAVEN'T COME TO. AND
17 I'M NOT GOING TO CROSS IT UNLESS OUR ROAD GOES IN THAT
18 DIRECTION.

19 BUT THE BURDEN, ACCORDING TO QUATTLEBAUM, IS UPON YOU
20 TO SHOW THAT THERE IS PREJUDICE TO YOU. AND THE PREJUDICE
21 TO YOU WOULD BE THAT THE STATE WOULD LEARN SOMETHING ABOUT
22 YOUR CONDUCT OF YOUR DEFENSE TO YOUR DETRIMENT OR THAT I
23 WOULD BE -- HEAR SOMETHING AS A FACT-FINDER AND BE
24 PREJUDICED. AND I DON'T BELIEVE THAT THAT'S GOING TO
25 OCCUR. AND I HAVE TAKEN EVERY STEP I CAN THINK OF AT THIS

1 POINT TO MAKE SURE THAT IT DOES NOT.

2 MR. BANNISTER: WELL, AND THE PROBLEM WITH THE LOGIC
3 OF THAT, YOUR HONOR, IS THAT IN THE QUATTLEBAUM CASE THEY
4 HAD A VIDEO WHICH MADE IT VERY EASY TO SAY, OKAY, THIS IS
5 WHAT WAS SAID AND THIS IS WHAT WAS HEARD. THERE WAS AN
6 INVESTIGATION INTO WHO HEARD WHAT. BUT THE INFORMATION
7 THAT WE NEED AS A DEFENSE IN ORDER TO BE ABLE TO SHOW A
8 PREJUDICE IS IN THE SOLICITOR'S HANDS.

9 THE COURT: IT'S IN HIS OFFICE.

10 MR. BANNISTER: IT'S IN HIS OFFICE, THE PEOPLE WHO
11 HEARD ---

12 THE COURT: AND I HAVE THAT, OKAY?

13 MR. BANNISTER: WELL, I ---

14 THE COURT: I'M NOT GOING TO LOOK AT IT.

15 MR. BANNISTER: --- HAVEN'T SEEN THAT.

16 THE COURT: AND I'M NOT GOING TO SHOW IT TO YOU
17 UNLESS THERE IS SOME -- UNLESS THERE IS -- I'M GOING TO
18 ASK SOME INDEPENDENT PERSON, AND I'LL THINK ABOUT IT AND
19 CONTACT YOU ALL, AND MAKE SURE THAT YOU TWO ARE HAPPY WITH
20 WHO I PICK. IT MAY BE ANOTHER JUDGE, BUT PROBABLY NOT
21 BECAUSE THEY MAY END UP BEING A WITNESS.

22 BUT WE'LL PICK SOMEBODY WHO WE CAN BE SATISFIED WITH
23 TO REVIEW THIS INFORMATION THAT WILL NOT VIOLATE SOME
24 PRIVACY AND WHO CAN TELL US WHETHER OR NOT THERE'S
25 INFORMATION CONTAINED IN THERE THAT WOULD BE RELEVANT.

1 I GUESS I COULD ASK SLED TO DO THAT, COULDN'T I? I
2 THINK SO. WOULD THAT BE SATISFACTORY WITH YOU?

3 MR. BANNISTER: I'D LIKE TO SEE SLED CONDUCT
4 INTERVIEWS OF THE INDIVIDUALS. THEN I'D BE SATISFIED.

5 THE COURT: WELL, MR. BANNISTER, I'M NOT GOING TO GO
6 ---

7 MR. BANNISTER: IT'S A LITTLE DIFFERENT COMING FROM
8 YOUR BOSS. YOUR BOSS SAYS, HEY, DID YOU HEAR ANYTHING?
9 NOT SUPPOSED TO.

10 THE COURT: YOU'RE RIGHT. IT MIGHT BE A LITTLE MORE
11 INTIMIDATING TO HEAR FROM MR. ARIAIL THAN IT WOULD BE TO
12 HEAR FROM ...

13 MR. BANNISTER: JUDGE, IN COMMENTING ON THE FACT THAT
14 YOU WILL BE THE FACT-FINDER, AM I TO TAKE FROM THAT THAT
15 MY MOTION TO RECONSIDER YOUR NOVEMBER 15TH, 2007 ORDER
16 REQUESTING A JURY TRIAL AFTER A GUILTY PLEA IS DENIED?

17 THE COURT: YES, SIR, YOU MAY ASSUME THAT'S CORRECT.

18 MR. BANNISTER: THANK YOU, YOUR HONOR. THEN WE DON'T
19 HAVE ANYTHING FURTHER ON THIS ISSUE, YOUR HONOR.

20 THE COURT: OKAY. MR. ARIAIL?

21 MR. ARIAIL: THE ONLY THING I, IN RESPONSE TO SLED
22 INTERVIEWING ALL MY EMPLOYEES, WHICH IF YOU WANT TO DO
23 THAT, THAT'S FINE. BUT THE CRUX IS DID I HEAR ANYTHING?
24 DID STROM HEAR ANYTHING? OR DID ANYBODY WORKING ON THIS
25 CASE HEAR ANYTHING? THE ANSWER'S NO.

1 AND SO, I MEAN, YOU CAN SEND SLED TO INTERVIEW ME,
2 AND I'LL TELL THEM THE SAME THING I PUT IN THAT AFFIDAVIT.
3 BUT I JUST THINK ASKING SOMEBODY ON MY STAFF IF THEY HEARD
4 ANYTHING, I HAVE NO OBJECTION TO IT. AND WE'LL MAKE THEM
5 ALL AVAILABLE.

6 BUT I THINK TO GET TO THE -- WHETHER OR NOT THERE'S
7 BEEN ANY PREJUDICE WE'VE GOT TO HAVE HEARD SOMETHING THAT
8 CERTAINLY GIVES US AN INDICATION OF WHERE THEY'RE GOING
9 AND WHAT THEY'RE DOING THAT WE DIDN'T KNOW ABOUT OR THAT
10 YOU'VE HEARD SOMETHING LIKE YOU SAID. SO, I MEAN, WE
11 HAVEN'T HEARD ANYTHING. AND I DON'T KNOW WHERE WE'RE
12 GOING WITH IT. BUT WE'LL COOPERATE IN ---

13 THE COURT: WELL, I'M NOT GOING TO ORDER THAT.

14 MR. ARIAIL: --- ANY MANNER YOU TELL ME TO.

15 THE COURT: NO, I'M NOT GOING TO ORDER THAT. I'M
16 GOING TO -- I WILL FIND SOMEONE, AND IT MAY BE A SLED
17 OFFICER, AN AGENT WITH SLED TO REVIEW THE DOCUMENTS THAT
18 YOU'VE GIVEN ME THAT HAVE BEEN HANDED UP BY EVERY MEMBER
19 OF YOUR STAFF. IF THERE IS SOMETHING IN THERE THAT NEEDS
20 FURTHER REVIEW, THEN WE CAN PURSUE IT AT THAT TIME. WE
21 WILL NOTIFY YOU IMMEDIATELY IF THAT COMES UP.

22 WITH RESPECT TO YOUR MOTION TO BAR MEDIA FROM ALL
23 PROCEEDINGS, MR. BANNISTER, I'M NOT GOING TO DO THAT.

24 MR. BANNISTER: JUDGE, ---

25 THE COURT: I'LL BE HAPPY TO HEAR FROM YOU ON THAT.

1 MR. BANNISTER: JUST THE BROADCAST MEDIA OR JUST THE
2 CAMERAS IN THE COURTROOM AND THE AUDIO. I MEAN, IT'S
3 CREATING A SEPARATE RECORD APART FROM THE COURT REPORTER.
4 AND THAT'S JUST, I MEAN, I THINK THAT'S JUST A PROBLEM.

5 THE COURT: OKAY.

6 MR. BANNISTER: IT HAS BEEN, AND IT WAS TODAY.

7 THE COURT: ALL RIGHT. WELL, MY READING -- AND, MR.
8 LIGHTSEY, YOU MIGHT OUGHT TO COME FRONT AND CENTER IF YOU
9 -- MY READING OF 605 DOES NOT PROHIBIT A -- THE RECORDING
10 OF AN ENTIRE TRIAL WHILE THE COURT IS IN SESSION, OKAY.
11 WOULD YOU AGREE WITH THAT, MR. LIGHTSEY?

12 MR. LIGHTSEY: YES, SIR.

13 THE COURT: ALL RIGHT. MY READING OF THE RULE ALSO
14 INDICATES THAT IT IS IN THE COURT'S DISCRETION HOW TO
15 HANDLE THE MEDIA. AND I GUESS, I DON'T KNOW, YOU'RE HERE
16 ON BEHALF OF ONE MEMBER OF THE MEDIA. WHAT IS MR.
17 BENDER'S POSITION?

18 MR. LIGHTSEY: HE PROBABLY WAS HERE BEFORE YOU FOR
19 THE SOUTH CAROLINA PRESS ASSOCIATION. HE'S THEIR GENERAL
20 COUNSEL.

21 THE COURT: OKAY. WELL, I DON'T KNOW HOW TO GET THE
22 WORD OUT TO EVERYBODY OTHER THAN THE WAY I'VE DONE IT. WE
23 HAVE PREPARED AN ORDER. MR. BENDER SAID IT WAS THE BEST
24 ORDER HE HAD SEEN. I'M NOT TRYING TO PAT MYSELF ON THE
25 BACK. HE WAS VERY WELL SATISFIED WITH IT. IT FOLLOWS THE

1 RULE. IT IS CLEAR.

2 AND I HAVE TO ADMIT, I WAS EXTREMELY UPSET WHEN THIS
3 ALL STARTED. I AM NOT GOING TO BAR THE MEDIA OR THE
4 BROADCAST MEDIA, BUT I AM GOING TO -- I AM GOING TO BAR A
5 LIVE FEED. I'M NOT GOING THROUGH THAT AGAIN. I HANDED
6 THEM THE ORDER. IT CLEARLY STATES WHAT CAN BE RECORDED
7 AND BROADCAST. THEY VIOLATED IT. AND SO I AM NOT GOING
8 TO ALLOW LIVE FEEDS.

9 AND I WOULD ASK YOU, MR. LIGHTSEY, I DON'T KNOW HOW
10 YOU WILL PROCEED FROM HERE, BUT I WOULD ASK YOU TO EXPLAIN
11 TO YOUR CLIENT, AND I HOPE IT WOULD BE DISSEMINATED, AND I
12 HOPE EVERYONE'S LISTENING, THAT THEY READ THE ORDER AND
13 THE RULE EVERY TIME THEY COME INTO COURT. THERE IS A GOOD
14 REASON FOR THE RULE. THERE'S A GOOD REASON FOR THE ORDER.
15 AND WE ARE GOING THROUGH THIS MECHANIZATION TODAY BECAUSE
16 THERE WAS A VIOLATION OF THE ORDER.

17 I'VE ALWAYS TRUSTED THE MEDIA TO DO -- TO BEHAVE
18 THEMSELVES PROPERLY. I'M AFRAID THEY JUST GOT A LITTLE,
19 AS MR. BANNISTER SAID, DISCONNECTED FROM THEIR ROLE. AND
20 THIS IS A BIG, VERY WELL-KNOWN CASE, WHICH MIGHT CAUSE
21 PEOPLE TO, IN THEIR EXCITEMENT, LOSE SIGHT OF WHAT THEIR
22 RESPONSIBILITIES ARE.

23 SO, MR. LIGHTSEY, COULD I ASK YOU TO EXPLAIN TO YOUR
24 CLIENT, GO OVER THE ORDER WITH THEM? HAVE I GIVEN YOU A
25 COPY OF IT?

1 MR. LIGHTSEY: I'VE GOTTEN A COPY, YOUR HONOR. AND
2 THE ORDER'S FINE. I CERTAINLY DON'T HAVE ANY CONCERNS
3 WITH THE TERMS OF THE ORDER AS AN ADVOCATE OF THE PRESS.
4 WE ALSO HAVE DONE LEGAL WORK FOR SOME OF THE OTHER TV
5 STATIONS. AND WE'LL CONSULT WITH THEM ABOUT THAT AS WELL.

6 I THINK, JUST TO CLEAR THE RECORD, I THINK REALLY
7 FROM MY UNDERSTANDING OF WHAT HAPPENED, WHAT WE'RE DEALING
8 WITH WAS AN INADVERTENT VIOLATION OF THE RULE. THEY WERE
9 SET UP TO START THE LIVE FEED AT TEN. THAT'S WHEN THEY
10 THOUGHT THE HEARING WAS GOING TO BEGIN.

11 AND IT STARTED THEN. AND THEY JUST DIDN'T REALIZE
12 THEY NEEDED TO TURN IT OFF. IT CERTAINLY WAS NOT A
13 DELIBERATE CONTEMPT OF THE ORDER OR WILFUL VIOLATION OF
14 THE ORDER.

15 WE WILL GET ALL OF THE FACTS IN AN AFFIDAVIT FOR THE
16 COURT ---

17 THE COURT: OKAY.

18 MR. LIGHTSEY: --- AND SUBMIT THAT TO YOU TOMORROW.

19 THE COURT: ALL RIGHT. AND THE ONLY OTHER THING I
20 WOULD SAY IS THAT THE -- I GUESS DON'T -- IT WOULDN'T BE
21 THE PRESS MEDIA OR STILL CAMERAS WERE TAKING PICTURES
22 DURING A RECESS. AND THAT IS PROHIBITED AS WELL. SO I
23 DON'T -- DON'T KNOW IF YOU HAVE ANY CONTACT ---

24 MR. LIGHTSEY: WE'LL PASS THAT ON.

25 THE COURT: --- WITH THOSE FOLKS OR NOT.

1 MR. LIGHTSEY: WE CAN PASS THAT ON AS WELL.

2 THE COURT: BECAUSE WE -- AND AS YOU -- I KNOW YOU
3 AGREE, EVERYONE IN HERE AGREES, THAT WE ARE GOING TO
4 PROTECT THE INTEGRITY OF THIS COURT SYSTEM AND
5 PARTICULARLY THIS CASE. AND IF -- WE'LL TAKE WHATEVER
6 STEPS WE HAVE TO DO THAT. OKAY. ANYTHING ELSE?

7 MR. BANNISTER: NO, YOUR HONOR.

8 THE COURT: ALL RIGHT. DO YOU -- ANYTHING WE CAN DO
9 TO HELP YOU IN YOUR -- PROCEED IN YOUR PREPARATION?

10 MR. BANNISTER: NOTHING I HAVEN'T ALREADY ASKED FOR,
11 YOUR HONOR.

12 THE COURT: ALL RIGHT. VERY GOOD. ALL RIGHT. WE'LL
13 BE ADJOURNED.

14 MR. ARIAIL: WELL, JUST ONE ---

15 THE COURT: WELL, WAIT A MINUTE.

16 MR. ARIAIL: I'M FILING TWO MORE RESPONSES, EXCUSE
17 ME, ONE MORE RESPONSE TO HIS MOTION TO RECONSIDER ORDER
18 DATED NOVEMBER 15TH REGARDING JURY TRIAL SENTENCING AFTER
19 ENTER OF A GUILTY PLEA.

20 THE COURT: I DENIED THAT.

21 MR. ARIAIL: ALL RIGHT. AND HERE'S OUR RESPONSE WITH
22 A CERTIFICATE OF SERVICE.

23 THE COURT: OKAY. ALL RIGHT. THANK YOU VERY MUCH.

24 (HEARING ENDED AT 3:45 PM)

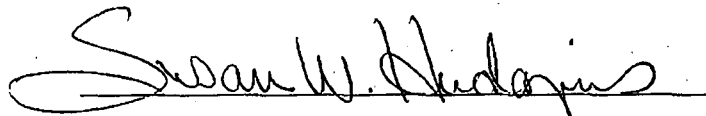
25 (END OF REQUESTED TRANSCRIPT OF RECORD)

1 CERTIFICATE OF REPORTER

2 I, THE UNDERSIGNED, SUSAN W. HUDGINS, OFFICIAL COURT
3 REPORTER FOR THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE
4 OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS
5 A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL
6 THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE
7 TRIAL/HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL,
8 IN THE CIRCUIT COURT FOR PICKENS COUNTY, SOUTH CAROLINA,
9 ON THE 27TH DAY OF AUGUST 2008.

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

12 SEPTEMBER 15, 2009

13
14
15 

16 CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

) COURT OF GENERAL SESSIONS
) 2006-GS-39-2222-2225
)
)
)

ORIGINAL

STATE OF SOUTH CAROLINA

PLAINTIFF)

vs.

) TRANSCRIPT OF RECORD
)
)

JERRY BUCK INMAN

DEFENDANT)

April 14, 2009
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, Judge.

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

ROBERT M. ARIAIL, ESQ.
BETTY C. STROM, ESQ.
LEIGH PAOLETTI, ESQ.
Attorneys for the Plaintiff

JAMES W. BANNISTER, ESQ.
EVERETT P. GODFREY, JR., ESQ
SYMMES W. CULBERTSON, ESQ.
Attorneys for the Defendant

APRIL HERRON
Official Court Reporter

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Certificate of Reporter 16

1 THE COURT: All right, Mr. Godfrey, you're the moving
2 party. All right, Mr. Godfrey.

3 MR. GODFREY: May it please the Court. I guess first
4 of all, Judge, I say I'm surprised to be here. I thought
5 I had ended all this back in September. I filed a return
6 to petition for attendance of out of state witness that
7 was filed by the State requesting Dr. Marti Loring be
8 subpoenaed as out of state witness as a necessary and
9 material witness. Obviously the State hasn't used
10 necessary and material as that is part of the South
11 Carolina statute and part of the Georgia statute. A
12 material witness is defined as a person who can give
13 testimony that no one else or at least very few can give
14 according to Black's Law Dictionary.

15 During the course of the hearings back in September,
16 it was indicated by the Court that there were many people,
17 many qualified people, who could step in and be a social
18 historian in this particular case. Reason I guess we're
19 at this point, Dr. Marti Loring, when she was on the
20 stand, heard Solicitor Ariail when he was addressing the
21 Court indicate that she was not licensed and she did not
22 qualify as a witness. And he went ahead and advised the
23 Court what the penalties were, civil and criminal
24 penalties. Dr. Loring became very upset thinking that she
25 might be prosecuted. And, in fact, there were other

1 statements that were made during the course of that
2 hearing which indicated that there is a possibility that
3 she could have been prosecuted.

4 Transcript -- partial transcript, page 115 lines 11
5 through 13, you indicated that -- that you were not going
6 to grant a mistrial, I'm going to continue the case. I
7 would instruct counsel to seek another social historian so
8 that Dr. Loring will never have to deal with this case
9 again. And then before the close of the hearing, the
10 Court advised Mr. Bannister to inquire to determine
11 whether or not Dr. Loring could continue to participate.
12 And that if not there were many qualified people who could
13 perform the same job that she had done so far.

14 Subsequent to the September hearing, Mr. Bannister
15 did in fact meet with or talk with Dr. Marti Loring. And
16 she was still very concerned about the potential legal
17 problems. And because of that, Judge, she was released
18 from the defense team. She is no longer a defense expert.
19 And it's my understanding, although I don't know who it
20 is, but it's my understanding that another social
21 historian has been retained by the defense. I have an
22 affidavit in this package from Dr. Loring indicating that
23 she is not going to be testifying. I have an affidavit
24 from Mr. Bannister, and of course he's present here in the
25 courtroom, advising that he is not going to call her as a

1 witness.

2 Judge, I don't believe the State has the right to
3 subpoena Dr. Marti Loring because she was formally a
4 defense expert. I think it's a violation of legal
5 standards that we practice under and discovery rules that
6 we practice under. And, in fact, if she was subpoenaed as
7 a witness, I can't even imagine what Solicitor Ariail's
8 questions would be of Dr. Loring. I can't even imagine
9 what his first question would be. Judge, this lady felt
10 intimidated and she felt threatened based on the comments
11 that she heard in the courtroom. She asserted the Fifth
12 Amendment privilege, which Solicitor Ariail granted
13 immunity in this district.

14 THE COURT: Yeah, let's talk about that. Just what
15 crime did she commit? There was no crime. And I'm not
16 through dealing with Dr. Loring. She had no legal basis
17 not to testify.

18 MR. GODFREY: Well, Judge, once Solicitor Ariail
19 granted immunity in this district, he clearly did not
20 grant--

21 THE COURT: No, not even without his immunity. There
22 was no crime. Supreme Court's made it clear that you do
23 not have to be licensed in a state to testify as an expert
24 witness. They've done it with physicians, they've done it
25 with engineers, they've done it by way of Administrative

1 Order. There's no question that she was -- and she was
2 not -- she was here as a social historian, she was not
3 here practicing clinical -- her profession. She doesn't
4 have to have a license to testify. So there is no law
5 that she broke. That's the first -- that's the baseline
6 here. And on top of that then, if she was worried that
7 she was, she was granted immunity. Although that's a
8 separate issue.

9 MR. GODFREY: She felt threatened. And at the time I
10 don't believe there was any common agreement in the
11 courtroom that no law had been broken. If I recall
12 correctly, the law clerk for you looked for about a day or
13 half day trying to find a case that involved the engineer.
14 Mr. Bannister in the very beginning of this indicated that
15 you ought to look at the -- that everybody should look at
16 the statute itself where it appeared to be an exception.

17 Well, Judge, I would call your attention to Lanzetta
18 vs. New Jersey which would be 306 U.S. 451, it's a 1939
19 case at page 453. No one may be required, at peril of
20 life, liberty or property, to speculate as to the meaning
21 of penal statutes. All are entitled to be informed as to
22 what the State commands and/or forbids. The applicable
23 rule is stated in Connally vs. General Construction, 269
24 U.S. 385, That the terms of penal statute creating a new
25 offense must be sufficiently explicit to inform those who

1 are subject to it, what conduct on their part will render
2 them liable to its penalties. It's a well recognized
3 requirement consonant alike with ordinary notions of fair
4 play and the settled rules of law. And a statute which
5 either forbids or requires the doing of an act in terms so
6 vague that men of common intelligence must necessarily
7 guess at its meaning and differ as to its application
8 violates the essential of due process.

9 Solicitor Ariail made the argument to the Court
10 during his voir dire that she did not qualify because she
11 was in violation of the law.

12 THE COURT: Well he was wrong.

13 MR. GODFREY: Nobody made that specific pronouncement
14 at the September hearing. It's nowhere in the transcript.

15 THE COURT: I think it came out at some point. 'Yes,
16 overnight, everybody looked at it. And it's very clear
17 based on the cases and all that but that's a separate
18 issue that I'm going to deal with her contempt for her
19 failure to testify. Something I haven't dealt with yet.
20 And I said that in the transcript as well. So that's a
21 separate issue. I don't know, is there anything else that
22 you need to tell us about the subpoena?

23 MR. GODFREY: Judge, she is not a material witness,
24 she's not going to be called by the defense. And based
25 upon the Rules of Discovery and case law, the State has no

1 right to call her.

2 THE COURT: All right.

3 Mr. Ariail.

4 MR. ARIAIL: Your Honor, I think it begs the question
5 to say she's not a material witness. She is a material
6 witness. She testified -- she's on the record that she
7 had knowledge of mitigation evidence and that it was
8 relevant in the sentencing phase and she wanted to tell
9 the truth about this defendant. She's got relevant
10 information. And until and as such time as her presence
11 is not needed, she is material.

12 THE COURT: Well what about Mr. Bannister's affidavit
13 that he's not going to call her?

14 MR. ARIAIL: Does not render her not material.

15 THE COURT: Well we don't know what other experts he
16 may have hired, who may have material evidence, who he's
17 not going to call.

18 MR. ARIAIL: That is correct. And also, I don't know
19 that he's going to call somebody that would not fill the
20 role that she was originally hired to fill. And if--

21 THE COURT: Well it may be that Mr. Bannister has
22 made a strategic decision that he doesn't need a social
23 historian.

24 MR. ARIAIL: Could be. And when that develops, it
25 may render the need for her being a material witness and

1 to be present, it may render unnecessary. But until that
2 happens, I believe that both the Court -- well primarily
3 the Court ought to have, in the fact finding role that you
4 are in, this witness available to you in the event that
5 she is needed and the Court deems her to be needed. And
6 that's why I took the action.

7 THE COURT: Well, okay.

8 Mr. Bannister, anything you want to -- your turn,
9 Bannister.

10 MR. BANNISTER: No, not unless the Court has some
11 specific inquiry from me.

12 THE COURT: All right.

13 MR. BANNISTER: What has been asserted so far is
14 correct.

15 THE COURT: Okay.

16 MR. GODFREY: May it please the Court, I was advised
17 by Dr. Marti Loring that she was under subpoena to appear
18 in a case in Alabama. I have copies of the subpoena here
19 that shows that she is--

20 THE COURT: Well, that's, you know, the real fight
21 for her is in Georgia.

22 Now, I mean, you going to call her as a witness,
23 Mr. Ariail? I don't think you can do that. She is, as an
24 expert, belongs to the defense. She has received
25 confidences from the defendant and I presume from the

1 attorneys that you're not privy to unless they want to
2 reveal them in court. Is there some law which says that
3 you would have a right to do that?

4 MR. ARIAIL: Well first, you're right, her fight is
5 in Georgia, it's not here. I don't even think you have
6 jurisdiction to hear this. Jurisdiction for hearing any
7 protest she has under the statute is in Georgia. But
8 secondly, she is not -- her testimony is not simply
9 limited now to what she learned in terms of being an
10 expert for the defendant. She is now -- there's another
11 issue that the defense has raised that it's our
12 understanding that they're going to present additional,
13 supplementing the record with regard to the mistrial
14 motion. She may very well be relevant to that. As to
15 what discussions, what information was imparted to her, a
16 lot of things would be relevant to that particular issue.
17 Not just what the mitigation aspect.

18 But let's assume that we get to the end of the case
19 and there is no mitigation expert. That a strategic
20 decision has been made that there's not going to be a
21 mitigation expert. Because there's nothing in this record
22 that indicates there's going to be another mitigation
23 expert. Mr. Bannister's affidavit doesn't say that. So
24 assuming that is a possibility, the safe course that we
25 feel is necessary to take is to make sure that a witness

1 who has relevant information regarding mitigation, who is
2 hired and paid by the State to perform that service, if
3 they don't present another one or there's some problem
4 with the other one, that she's available for the Court.
5 Doesn't necessary be called by the State, be called by the
6 Court.

7 If you'll notice the pleadings, I didn't style the
8 pleadings such as the State intended to call her at all.
9 I think she's material and necessary for the benefit of
10 the Court and the defendant and the whole issue of due
11 process. So that's why we filed the motion. I think
12 she's still material for that until and unless some
13 competent replacement is presented and testified.

14 THE COURT: All right.

15 MR. GODFREY: Transcript, at one point the Court
16 indicated, I'm not going to grant you a mistrial, I'm
17 going to continue the case. I would instruct counsel to
18 seek another social historian so that Dr. Loring will
19 never have to deal with this case again.

20 And then right before the hearing was ended, Court
21 indicated I want to give you, that being Bannister, the
22 opportunity -- well I wouldn't rule that Dr. Loring is
23 completely out of the case, she can -- well you can look
24 into that but I don't know how long it's going to take.
25 But if you determine or she determines that she doesn't

1 want to participate any longer, I'll give you an
2 opportunity to show how you've been prejudice by not
3 having her in particular, if that's what you want to do.
4 I want you to have that opportunity. I'm sure they're
5 many, many qualified, highly qualified persons that can
6 perform the same job that Dr. Loring has done so far.

7 Dr. Loring, after her conversation with
8 Mr. Bannister, wanted to be off this case. She has not
9 done anything on it. She has not looked at it. She
10 hasn't had any conversations with the defense team since
11 sometime in late September, early October.

12 THE COURT: Well how do you know that?

13 MR. GODFREY: She told me.

14 THE COURT: All right.

15 MR. GODFREY: And, you know, at the time that the
16 Court made the ruling, there was no exception or objection
17 from the Solicitor's Office or from the State. And I
18 don't believe that Bob's petition should go forward. I
19 believe the Court, pursuant to the statute, has to certify
20 it before it can be sent to Georgia. And I don't see any
21 basis for certification.

22 THE COURT: Anything, Bannister?

23 MR. BANNISTER: No, I don't have anything on this
24 issue, Your Honor. But since our future conduct and what
25 we intend to do has come up, I do want to go ahead and

1 let's stop talking about hypothetical and talk about
2 what's going to ultimately be the real situation come the
3 20th.

4 MR. ARIAIL: Your Honor, before we get into that,
5 just because I don't think you anticipated this, I
6 didn't -- Mr. Inman is not here. And I think regardless
7 of whether they can waive his presence or not, I think
8 we're getting into some critical issues that I think he
9 needs to at least in writing be informed of his right to
10 be here.

11 THE COURT: Well I don't know where he's going. I
12 don't think he has to be here for this issue, this is --
13 well what issues -- what issues do you intend to get into?

14 MR. BANNISTER: Nothing. I was just going to -- well
15 first, let me say that I at least obtained his oral
16 statement through my investigator that he would waive his
17 appearance at this hearing.

18 THE COURT: All right.

19 MR. BANNISTER: And I think it's incumbent upon me at
20 this point to let the Court know I have requested funding,
21 received funding for another mitigation expert.

22 THE COURT: Yeah, I've signed that order.

23 MR. BANNISTER: Yeah. I have another expert.
24 Whether or not she will be sufficient or whether or not
25 she can do what Dr. Loring remains to be seen. But what I

1 do know standing here today, having talked with her
2 yesterday, is that there is no way that she is going to be
3 prepared to go forward on the 20th. And so I felt like it
4 was incumbent upon me to let the Court know that.

5 THE COURT: Well, this case was continued in
6 September, around the 14th. That's seven months. So I
7 suspect -- and this date has been set by agreement of
8 everybody. And we're going forward on Monday. I am not
9 going to withdraw my certification of this subpoena. It
10 may be that she becomes -- she's going to have to fight
11 that fight in Georgia.

12 Anything else we can talk about logistically or
13 anything now about Monday?

14 MR. BANNISTER: I may have one or two witnesses that
15 I need to call out of turn because of scheduling
16 conflicts. I would anticipate that we're going to be
17 looking at a lengthy argument. So I just want to make
18 everybody aware that become Monday I may need to put
19 somebody up pretty quick.

20 THE COURT: Okay. We'll do whatever we got to do.

21 MR. BANNISTER: You're asking, I'm telling.

22 THE COURT: Well I appreciate that.

23 MR. BANNISTER: We've got one witness who because of
24 work obligations she just can't be here on Tuesday. But
25 we could work her probably in Monday or Wednesday morning.

1 That's my plan.

2 THE COURT: All right, anything else that we can do
3 to ease the flow?

4 There was no response.

5 Okay good, see y'all on Monday.

6 (WHEREUPON, the proceedings were concluded.)
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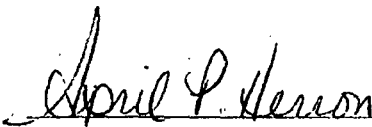
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 14th day of April, 2009.

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

November 16, 2009



APRIL P. HERRON, Court Reporter

WITNESSES

Kenneth H. Kirby

Central Police Department

5/26/2006

ARREST WARRANT NUMBER

DIRECT PRESENTMENT

ACTION OF GRAND JURY

CRIME BILL

Date NOV 08 2006

Rebecca Long
Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-39-2222

RMA

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2006

THE STATE

VS.

JERRY BUCK INMAN

Indictment for

0079

BURGLARY FIRST DEGREE

VIOLATION § 16-11-0311

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

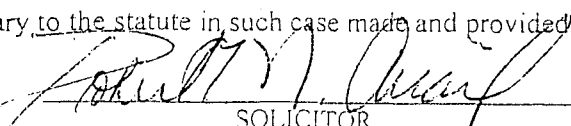
INDICTMENT FOR
BURGLARY FIRST DEGREE

At a Court of General Sessions, convened on November 8, 2006 the Grand Jurors of Pickens

County present upon their oath:

That JERRY BUCK INMAN did in Pickens County, on or about the 26th day of May 2006, willfully and unlawfully enter the dwelling of TIFFANY SOUERS located at 118-CC Sumter Lane Central, South Carolina, without consent and with the intent to commit a crime therein and the entering did occur during the nighttime. This is in violation of §16-11-311 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

Kenneth H. Kirby

Clemson Police Department

8/26/2006

ARREST WARRANT NUMBER

H017956

ACTION OF GRAND JURY

TRUE BILL

AUG 19 2006

Date

Hayes B. Harris
Representative of Grand Jury

VERDICT

Representative of Petit Jury

Date:

DOCKET NO. 2006-GS-39-02223

RMA

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

AUGUST TERM 2008

THE STATE

vs.

JERRY BUCK INMAN

AMENDED INDICTMENT FOR

0160

CRIMINAL SEXUAL CONDUCT FIRST DEGREE

VIOLATION § 16-03-0652

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

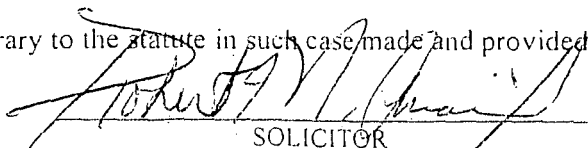
AMENDED INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT FIRST DEGREE

At a Court of General Sessions, convened on AUGUST 19, 2008 the Grand Jurors of Pickens

County present upon their oath:

That JERRY BUCK INMAN did in Pickens County, on or about the 26th day of May, 2006, engage in sexual battery, with TIFFANY SOURERS, and used aggravated force to accomplish this sexual battery. This is in violation of South Carolina Code of Laws Section 16-3-0652 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

Kenneth H. Kirby

Central Police Department

5/26/2006

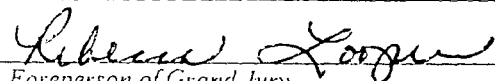
ARREST WARRANT NUMBER

H017955

ACTION OF GRAND JURY

TRUE BILL

Date NOV 08 2006


Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-39-2224
RMA

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2006

THE STATE

vs.

JERRY BUCK INMAN

Indictment for

0095

KIDNAPPING

VIOLATION § 16-03-0910

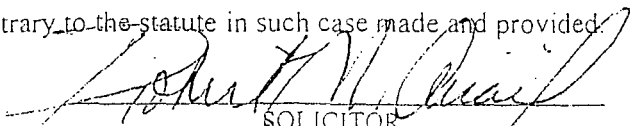
STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

INDICTMENT FOR
KIDNAPPING

At a Court of General Sessions, convened on November 8, 2006 the Grand Jurors of Pickens
County present upon their oath:

That JERRY BUCK INMAN did in Pickens County, on or about the 26th day of May 2006, unlawfully seize,
abduct, confine, inveigle, decoy or carry away TIFFANY SOUERS, without the authority of law. This is in
violation of §16-3-910 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

Kenneth H. Kirby

Central Police Department

5/26/2006

ARREST WARRANT NUMBER

H017954

ACTION OF GRAND JURY

TRUE BILL
NOV 08 2006
DATA

Rebecca Longen
Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-39-2225
RMA

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2006

THE STATE

vs.

JERRY BUCK INMAN

Indictment for

0116

MURDER

VIOLATION § 16-03-0010, 0020

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

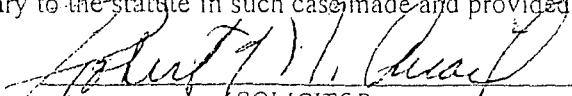
INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on November 8, 2006 the Grand Jurors of Pickens

County present upon their oath:

That JERRY BUCK INMAN did in Pickens County, on or about the 26th day of May 2006, unlawfully and with malice aforethought kill TIFFANY SOUERS by means of strangulation, and that TIFFANY SOUERS died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	C. A. NO.: 2006-GS-39-2222
State of South Carolina,	)	2006-GS-39-2223
	)	2006-GS-39-2224
Plaintiff,	)	2006-GS-39-2225
	)	
v.	)	
	)	SENTENCING ORDER
Jerry Buck Inman,	)	
	)	
Defendant.	)	

CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA
 APR 22 2009 10:07 AM

The Pickens County Grand Jury indicted the Defendant on November 8, 2006 on charges of Murder, Burglary in the First Degree, Criminal Sexual Conduct in the First Degree, and Kidnapping. Pursuant to S.C. Code § 16-3-26(A), the State timely notified the Defendant that it intended to seek the death penalty for the murder charge on August 22, 2006. I was assigned this case by Order of the Chief Justice of the South Carolina Supreme Court dated March 13, 2007. On August 19, 2008, this court conducted a competency hearing pursuant to S.C. Code § 44-23-410 and State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), and found the Defendant competent to stand trial. This case was scheduled for a jury trial to commence on September 8, 2008. On August 19, 2008, the Defendant pled guilty to Murder, Burglary in the First Degree, Criminal Sexual Conduct in the First Degree, and Kidnapping. On September 8 - 11, 2008, this Court commenced a non-jury sentencing proceeding as a result of the guilty plea. On September 11, 2008, the Sentencing proceeding was adjourned and continued as a result of the defense witness, Dr. Marty Loring, claiming protection under the Fifth Amendment of the United States Constitution and refusing to testify after comments made by the Solicitor which the witness construed as intimidating. The hearing was resumed on April 20, 2009 and the presentation of all legal issues and testimony were concluded on April 22, 2009.

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Law

S.C. Code § 16-3-20 provides, in part, that a person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. For purposes of this statute, "life imprisonment" means until death of the offender without the possibility of parole. No person sentenced to life imprisonment pursuant to this statute is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment.

When the State seeks the death penalty, upon conviction or adjudication of a defendant of murder, the court is required to conduct a separate sentencing proceeding. In such a proceeding, if a statutory aggravating circumstance is found beyond a reasonable doubt, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. In cases like the present case, where the defendant, in the guilt phase, waives his right to a trial by jury and pleads guilty, the sentencing proceeding must also be conducted without benefit of a jury, and the sentencing decision is to be made by a judge.

In the sentencing proceeding, the judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. The law requires the judge to consider mitigating and extenuating circumstances authorized or allowed by law, as well as certain enumerated statutory aggravating and mitigating circumstances which may be supported by the evidence, pursuant to S.C. Code § 16-3-20(C). The judge is required to examine the evidence and determine the existence of the statutory aggravating circumstance or circumstances. Unless at least one of

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CLERK OF COURT
JAMES COUNTY
POLICE

the statutory aggravating circumstances enumerated in this section is found beyond a reasonable doubt, the death penalty must not be imposed.

Finding and consideration of aggravating circumstances

Pursuant to S.C. Code § 16-3-20, I have carefully considered the evidence presented at the sentencing proceeding and make the following findings concerning the existence of statutory aggravating circumstances:

I find the State has proven beyond a reasonable doubt that the Defendant committed the murder for which he is charged while in the commission of the crimes of kidnapping, burglary in the first degree, and criminal sexual conduct in the first degree.

The circumstances surrounding the murder of Tiffany Souers are savage, brutal, and unconscionable. I find that the State has proven beyond a reasonable doubt that Tiffany Souers' home was broken into in the night time by the Defendant (Burglary in the First Degree, 2006-GS-39-2222), that she was held against her will (Kidnapping, 2006-GS-39-2224), that she was the victim of forcible rape (Criminal Sexual Conduct in the First Degree, 2006-GS-39-2223), and that she was subsequently choked by the Defendant until she died (Murder, 2006-GS-39-2225). Having proven the charge of murder, accompanied by three statutory aggravating circumstances, the State is entitled to seek the death penalty for the Defendant.

Finding and consideration of mitigating circumstances

Pursuant to S.C. Code § 16-3-20, I have carefully considered the evidence presented at the sentencing proceeding and make the following findings concerning the existence of statutory mitigating circumstances:

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CLERK OF COURT
ROCKERS COUNTY
TOLUNA

(1) The Defendant does have a significant history of prior criminal convictions involving the use of violence against another person and is therefore unable to avail himself of this mitigating factor.

(2) The murder was committed while the Defendant was under the influence of mental or emotional disturbance. It is apparent that the Defendant has and continues to suffer from several mental and emotional disturbances.

The Defendant makes no attempt to claim he was not criminally responsible for the murder of Tiffany Souers. However, there is clear evidence that the defendant suffers from numerous and long-standing mental health disorders. The Defendant's witness, Dr. David Price was qualified as an expert in the fields of Forensic Psychology, Clinical Psychology, and Neuro-Psychology. Dr. Price testified that the Defendant had been diagnosed with three Axis I Disorders: 1) Mood Disorders, consisting of Depression, Bi-Polar, Major Depression in the recurrent form, and Major Depression with Psychosis; 2) Dissociative Identity Disorder; and 3) Sexual Paraphilia. The Defendant also suffers from the Axis II disorder of Personality Disorder with Schizophrenia. Some of the effects of these diseases on the Defendant, according to this expert's testimony, were impulsivity, irritability, aggressiveness, agitation, and poor thinking, a profound impairment of ability to function in daily life, bad decisions, flat affect, slow speech, introvert behavior, not forthcoming about himself, and an inability to engage in normal heterosexual relationships. Dr. Price also describes the Defendant as a serial rapist. The Defendant has attempted to commit suicide on seven separate occasions, including cutting his wrist on two occasions, cutting his jugular vein, starvation, cutting his antecubital vein, and swallowing two six inch strands of barbed wire. Dr. Price is a nationally recognized expert on mental health malingering and

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CLERK OF COURT
ICKENS COUNTY
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he opines that the Defendant is not a malingerer. The Defendant was sexually abused as a young child, and Dr. Price testified that the circumstance of this offence and several other of Mr. Inman's offences mimic the sexual abuse which he suffered as a child. Mr. Inman tries to minimize his mental illness and refuses to acknowledge the physical and sexual abuse he suffered at the hands of his parents. Mr. Inman's ability to conform his conduct to the requirements of the law is substantially impaired. On cross examination, Dr. Price testified that Mr. Inman has the ability to make choices to conform to the requirements of the law as evidenced by some of his conduct relating to other victims of his offenses who testified at this hearing. Again, I stress that the Defendant does not claim his disorders excused him from criminal responsibility for his actions, but may have contributed to them for purposes of sentencing only.

CLERK OF COURT
JACKSON COUNTY
TOLINA
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(3) There is no evidence the victim was a participant in the defendant's conduct or consented to the act.

(4) There is no evidence of the participation of an accomplice in this murder, and the defendant's participation was not relatively minor.

(5) There was no evidence presented that the defendant acted under duress or under the domination of another person.

(6) As stated above, the capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was impaired at the time of the crime due to mental and emotional disturbances, but it did not rise to the level of excusing criminal responsibility.

(7) The Defendant was 35 years old at the time of the crime. His mental acuity is average.

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(8) There is no evidence the Defendant was provoked by the victim into committing the murder.

(9) As stated above, the Defendant was over the age of eighteen at the time of the crime.

(10) The Defendant showed no signs of mental retardation at the time of the crime. "Mental retardation" means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

Finding and consideration of non-statutory mitigating circumstances

Turning to non-statutory mitigation, I have carefully considered all the evidence. The Defendant, through excellent and well prepared counsel, presented compelling mitigation evidence.

There is evidence in the record that the Defendant has suffered a great amount of trauma in his life. He was exposed to violence and sexual abuse at an early age. He was exposed to violence at an early age by witnessing the sexual abuse of his sister, and experiencing physical and sexual abuse from both his biological father and from his older step-brother. He was sexualized at a young age, and has had a history of deviant sexual activity. He has a substance abuse problem that has an apparent genetic component and is also exacerbated by his underlying mental disorders. The defendant's mental disorders are documented above.

The Defendant admitted his guilt to the crime early in the criminal investigation. He made numerous confessions to law enforcement beginning on the day of his arrest, June 26, 2006, in which he confessed to murdering Tiffany Souers.

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CLERK OF COURT
JOHNS COUNTY
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2009 APR 22 PM 6:58

The Defendant pled guilty and has acknowledged the brutality of his conduct and also acknowledges that he cannot be rehabilitated. As Dr. Price has described Mr. Inman: he grew up in prison; he is a person with a bad genetic loading of inherited mental disorders whose formative environment did him no favors; he was described as a lost soul who will remain lost. The Court views Mr. Inman as a tortured soul, whose inner demons will never leave him.

I have considerable sympathy for Mr. Inman and the lamentable circumstances of his early life; a person with no opportunity to escape his tragic circumstances. However, while his background lends itself to an understanding of who he has become, it does not excuse his longstanding pattern of violence and his sexually predatory conduct.

As stated above, the State proved beyond a reasonable doubt the existence of more than one aggravating circumstance accompanying the commission of the murder of Tiffany Souers. This crime was horrific and was perpetrated upon one of society's most valuable citizens -- a young woman, full of life, energy and vitality, love for her family, with a passion for life and for people, whose own life was marked by her good deeds and generosity to others.

Jerry Buck Inman is a self-described "animal", who has acknowledged that he cannot be rehabilitated. The concept of a fair sentence includes consideration of many factors, such as the seriousness of the crime, the culpability of the offender, characteristics of the offender, need for protection of society, need for punishment and accountability. Determining the proper sentence in a case in which the death penalty is sought is especially painful and agonizing. The death penalty is the ultimate sentence which is to be imposed only in the worst cases and only after serious, deliberate and careful consideration.

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CLERK OF COURT
JOHNS COUNTY
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6:58

Regrettably, Jerry Buck Inman falls within a small group of deviant predators who exhibit in their conduct a callous disregard for society and the rights and safety of others. While this has been one of the hardest decisions of my life, I am firmly convinced that the murder and rape of Tiffany Souers and the characteristics of Jerry Buck Inman warrant the penalty of death.

I have carefully considered all relevant facts and circumstances, including the existence of statutory aggravating circumstances, as well as statutory and non-statutory mitigating circumstances. My verdict is not the result of prejudice, passion or any other arbitrary circumstance.

It is therefore the judgment and sentence of this court that the Defendant Jerry Buck Inman be remanded to the South Carolina Department of Corrections, henceforth to be kept in close and safe confinement until the 27th day of July, 2009, upon which day between the hours of six o'clock p.m. and six o'clock a.m. on July 28, 2009, or upon an order of execution issued by the South Carolina Supreme Court, the Defendant Jerry Buck Inman shall suffer death by electrocution or by lethal injection in the manner provided by law.

May God have mercy on your soul.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

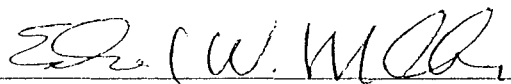
1. That for Indictment 2006-GS-39-2225, Murder of Tiffany Souers, you, Jerry Buck Inman, are sentenced to death; and,
2. That for Indictment 2006-GS-39-2222, Burglary in the First Degree, you, Jerry Buck Inman, are committed to the Department of Corrections for a period of thirty years; to run consecutive to the sentence imposed above; and,
3. That for Indictment 2006-GS-39-2223, Criminal Sexual Conduct in the First Degree, you, Jerry Buck Inman, are committed to the Department of Corrections for a period of thirty years; to run consecutive to the sentence imposed above.

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CLERK OF COURT
JOHNS COUNTY
SOUTH CAROLINA
2009 APR 20 PM 6:58

4. That for Indictment 2006-GS-39-2224, Kidnapping, pursuant to S.C. Code § 16-3-910 and because you have been sentenced for Murder, this Court may not impose a sentence for the crime of kidnapping.

IT IS SO ORDERED.



Edward W. Miller
Circuit Court Judge
13th Judicial Circuit

April 22, 2009
Pickens, South Carolina

2009 APR 22 P 6:58

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

IN THE SUPERIOR COURT OF DeKalb COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

CASE NO.

09CV1000

VS.

DR. MARTI LORING

RULE NISI

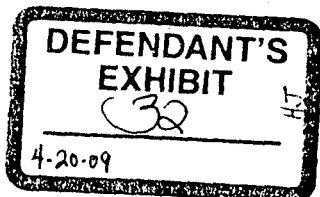
The Court having considered the foregoing Motion to Compel the Attendance of an out of state witness from the State of South Carolina, the Court hereby orders Dr. Marti Loring to appear on the 16th day of April 2009th at 3:00 P.M. clock in Courtroom 6B to show why she should not be ordered to return to Pickens County, South Carolina to testify in the trial of Jerry Inman. Failure to appear at the above date and time in this court could result in a bench warrant being issued for the arrest of Dr. Marti Loring.

SO ORDERED, this 15th day of April, 2009. at 2:20 p.m.

JUDGE

DEKALB SUPERIOR COURT

W. D. Cherry
 Senior Appellate Court Judge
 Presiding by Designation



7001 APR 16 A 10:12

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

IN RE: DR. MARTI LORING

CASE NO.

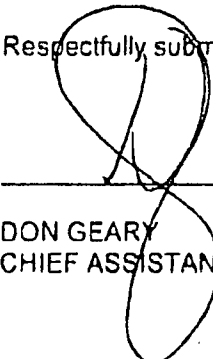
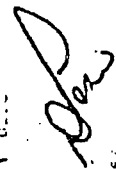
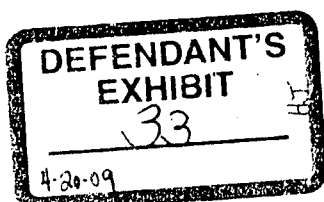
09CV1000

MOTION TO COMPEL ATTENDANCE
OF OUT-OF-STATE WITNESS

Comes now Don Geary, Chief Assistant District Attorney, and shows the Court the following:

On April 15, 2009, the State of South Carolina, through the Solicitor for the 13th Judicial Circuit, Pickens County, delivered to the undersigned the proper paperwork (see attached) to secure the attendance of Dr. Marti Loring, a DeKalb County resident, at the trial of State v. Jerry Inman, in Pickens County, South Carolina, on April 20, 2009. The State respectfully moves this court to sign the attached order for said Dr. Marti Loring to attend said trial.

Respectfully submitted,


DON GEARY
CHIEF ASSISTANT D.A.

2009 APR 16 A 10:13
APR 16 2009

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

IN RE:

DR. MARTI LORING,

SOUTH CAROLINA CASE NO

2006-GS-39-2222

DEKALB COUNTY CASE NO

09CV1000

MOTION TO SECURE ATTENDANCE
OF AN OUT OF STATE WITNESS**ORDER DIRECTING A WITNESS INTO CUSTODY TO DETERMINE
MATERIAL WITNESS STATUS IN THE STATE OF SOUTH CAROLINA**

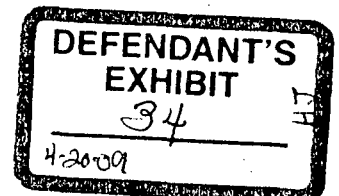
The above matter having been heard by this Court on the 16th day of April, 2009.

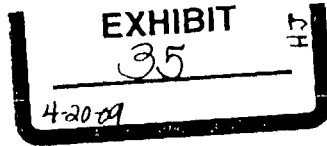
It appearing to the satisfaction of this Court that the named witness, Dr. Marti Loring, is purposefully avoiding service and attendance in this Court, and that Dr. Marti Loring, who has been determined to be and material witness by Judge Edward Miller, Thirteenth Judicial Circuit, Pickens County, South Carolina, and that Dr. Marti Loring may flee if served with a Rule Nisi, it is hereby;

ORDERED, that the above named witness, be taken into custody and held by the Sheriff until she can be brought before this Court concerning her status as a material witness in the Pickens County, South Carolina, criminal case. This Court shall be notified as soon as possible that the witness is in custody.

IT IS SO ORDERED this 16th day of April, 2009.

Linda Warren Hunter
Linda Warren Hunter, Judge
DeKalb County Superior Court





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1 STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
 2 COUNTY OF GREENVILLE)
 3
 4 THE STATE) TRANSCRIPT OF RECORD
) 2001-GS-23-3214
 5 -vs-) 2001-GS-23-3216
) 2001-GS-23-3217
 6 MICHAEL JAMES LANEY,) 2001-GS-23-3218
) 2001-GS-23-3219
 7 Defendant.) APRIL 12, 2007
 Greenville, South Carolina
 8
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11 B E F O R E:

12 THE HONORABLE G. EDWARD WELMAKER, JUDGE.
 13
 14

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

16 ROBERT M. ARIAIL, SOLICITOR
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 Circuit Court Reporter
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		EXHIBITS		
	NO.	DESCRIPTION	ID.	EV.
	CT-1	DR. CAROLINE EVERINGTON C.V.	88	
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1 Q. Both for the AAMR and for the DSM-IV?

2 A. For this edition, yes.

3 Q. Okay. Now, you have in front of you that red book,
4 which is the same as what I have here, and that is the AAMR
5 2002, 10th Edition on mental retardation, is it not?

6 A. Right.

7 Q. Would you turn for me to page 48 of that book?

8 Are you there?

9 Do you see there is a summary section on the bottom?

10 A. Yes.

11 Q. Can you read for the court just the first I think it's
12 going to be three sentences of that summary?

13 A. Okay. "In summary, mental retardation is not something
14 that you have, like blue eyes or a bad heart. Nor is it
15 something that you are, like being short or thin."

16 Q. Excuse me, I'm going to ask you to slow down now when
17 you read these.

18 What does the next one say?

19 A. "It is not a medical disorder, although it may be coded
20 in a medical classification of diseases; nor is it a mental
21 disorder, although it may be coded in a classification of
22 psychiatric disorders. Mental retardation" --

23 Q. That's all. You could go on, but that's all I wanted
24 to say on that point --

25 A. Okay.

1 A. -- or disorders.

2 Q. -- Dr. Everington, I am going to turn yourself now --

3 MR. TESSIER: And I'll cover the court the
4 opportunity, if you think we need a break or anything, but
5 I'm going to turn now to Michael Laney, in particular.

6 THE COURT: All right. Let's take a short break,
7 about ten minute break, and then we will reassemble.

8 You may step down, doctor. Don't discuss your
9 testimony.

10 (Whereupon, proceedings were recessed)

11 (Whereupon, proceedings were reconvened)

12 THE COURT: You may proceed.

13 MR. TESSIER: Thank you, Your Honor.

14 BY MR. TESSIER:

15 Q. Dr. Everington, I now wanted to turn your attention to
16 Michael Laney, in particular.

17 Were you asked to assess Michael for mental retardation
18 in this case?

19 A. Yes, I was asked for an opinion on mental retardation
20 in this case.

21 Q. And that was sometime back in February when you were
22 first contacted?

23 A. Yes.

24 Q. What did you do to conduct your work on assessing
25 Michael for mental retardation?

1 A. I met with him on two occasions, for a total of seven
2 hours, and I gave him academic assessments and language
3 assessments, because those are assessments that can be given
4 directly to the individual. And then I did interview him on
5 his -- on impression of his adaptive skills, so that's what
6 I did with him.

7 Q. Now, just to make sure I understand, are there
8 licensing requirements for any of the testing that you did
9 with Michael?

10 A. I gave educational measures --

11 Q. Okay.

12 A. -- which I'm fully qualified to give. I teach other
13 people how to give these measures.

14 Q. Okay. Did you give any other kinds of tests, other
15 than what you would categorize as educational measures?

16 A. No, I did not give an IQ test.

17 Q. Okay. What about the SIB-R test?

18 A. That's an educational measure as well. It's a measure
19 of adaptive behavior, but we use that in the schools as well
20 for a basis for instruction and adaptive behavior measures.
21 So it is used in the identification of mental retardation,
22 but it's also used for planning and other kinds of things.

23 Q. Okay. In addition to working directly with Michael and
24 giving these exams or tests, I call them exams or testings,
25 did you also look at or have the opportunity to look at old

1 MR. ARIAIL: Judge, I need copies of her notes and
2 all before we leave.

3 THE COURT: Right. If you could, get those as
4 soon as you could.

5 (Whereupon, proceedings were recessed).

6 (Whereupon, proceedings were reconvened)

7 THE COURT: All right, solicitor, are you ready to
8 proceed with your cross-examination of the witness?

9 MR. ARIAIL: I am, Your Honor.

10 THE COURT: All right, sir. You may proceed.

11 CONT'D CROSS EXAMINATION BY MR. ARIAIL:

12 Q. Ms. Everington, over the lunch break I had asked that
13 you review that stack of records and determine if there is
14 anything that had not been provided that you had reviewed?

15 A. I did review those records and there was nothing in
16 there that I had not been provided previously.

17 Q. Okay. Are you a licensed psychologist?

18 A. No, I'm not. I stated that in the direct. No, I'm not
19 a licensed psychologist.

20 Q. Are you familiar with the provisions of South Carolina
21 law that regulate licensed psychologists?

22 A. No, I'm not.

23 Q. Well, I'm going to read you a couple of things, and
24 then I'm going to ask you about this.

25 MR. ARIAIL: And I direct the court's attention to

1 Code Section 40-55-50, which defines psychologists within
2 the meaning of this chapter. Acts constituting the practice
3 as psychology.

4 BY MR. ARIAIL:

5 Q. And it defines in Subsection 1 assessment of
6 individual, family, or group behavioral, emotional and/or
7 intellectual functioning for the purposes of one, or more,
8 of the following: Diagnosing mental disorders as being
9 within the scope of the practice of psychology.

10 The law, 40-55-55, provides that it is unlawful for a
11 person to engage in the practice of psychology in this state
12 without obtaining a license from the Board of Psychology.

13 Now, if you are not a licensed psychologist, are you
14 exempt under the provisions of law from performing those
15 functions that are prohibited by persons not licensed in the
16 State of South Carolina?

17 A. I am providing an opinion on mental retardation. And
18 as a mental retardation professional, I am qualified to
19 provide an opinion to examine records, to look at
20 educational measures, and to provide an opinion on mental
21 retardation.

22 MR. ARIAIL: Your Honor, I'm going to urge the
23 court to review this Statute, because I believe what we
24 have, regardless of her characterization, I believe that
25 this conduct of hers in testifying in regard to -- it

1 prohibits -- the statutes specifically prohibits the
2 administration of testing, the interpretation of testing,
3 and the testifying in regard to testing that she's
4 administered.

5 This Section also provides that this person -- if
6 anyone so violates this section, that it is a felony within
7 the State, punishable by a sentence of up to ten years in
8 prison and a fine of \$50,000.

9 And before I go any further with this witness, you
10 having qualified her as an expert, I think we have got a
11 legal issue that she is not a licensed psychologist within
12 that Section, and to go forward any further I believe would
13 be in violation of that law.

14 Now, if somehow she is exempt from that, or not
15 performing what I think this law prohibits, then we need to
16 discuss that, but it's our position that the Statute is
17 clear in Subsection 1, that what she's done in the course of
18 this testimony is prohibited by the Statute.

19 THE COURT: All right. Is what you are asking,
20 Mr. Ariail, is that she be allowed an opportunity to review
21 the Statute as to whether or not she wishes to testify or to
22 distinguish whether it's a mental disorder that she's
23 talking about or --

24 MR. ARIAIL: Well, I think -- the Statute says in
25 Subsection 1 (a), it says assessment of individual, family,

1 or group behavioral, emotional, and/or intellectual
2 functioning for the purpose of one, or more, of the
3 following: Diagnosing mental disorders.

4 She has clearly diagnosed this defendant as having
5 a mental disorder; mental retardation.

6 THE COURT: Does this section define mental
7 disorders? I think I heard her testimony to the degree that
8 mental retardation and mental illness were different.

9 MR. ARIAIL: Well, it also prohibits identifying
10 psychological or neuropsychological aspects, or other
11 dysfunctions, diseases, or disabilities. Evaluating mental
12 or emotional status, including intelligence and aptitude.
13 Identifying personality characteristics.

14 I think the Statute is so broad, that it is clear
15 that only a psychologist or a licensed psychologist,
16 psychiatrist, or someone exempt under the Statute would be
17 qualified to do this.

18 Aside from the penal aspects of it, I think the
19 Statute by its very nature prohibits her from being a
20 court's expert.

21 THE COURT: Mr. Mauldin, Mr. Tessier, I'll be glad
22 to hear from you on that.

23 MR. TESSIER: Your Honor, I haven't looked at the
24 Statute. I can certainly do so.

25 He has not said anything that sounds remotely

qualifications, she has specific experience in training forensic psychologists in the assessment and evaluation of mental retardation in individuals.

After examination about her qualifications, the Court accepted Dr. Everington as an expert in the fields of special education and mental retardation. Dr. Everington testified that, in her opinion, to a reasonable degree of certainty, the Defendant is mentally retarded and was mentally retarded at the time of the crimes in question.

During cross-examination, the Solicitor inexplicably and without any justification tried to intimidate and threaten Dr. Everington by claiming that he "believed" she would be committing a felony if she were to proceed any further in her testimony. This thinly veiled threat by the Solicitor was clearly designed for no purpose other than to intimidate Dr. Everington and to deprive the Defendant of due process of law by substantially interfering with Dr. Everington's free and unhampered choice to testify concerning her opinion that Michael Laney is mentally retarded.

Because of the substantial violation by the Solicitor, the Defendant has no choice but to demand that remedial action be taken by the Court, as indicated in more detail below.

Argument

I. THE COURT CORRECTLY ACCEPTED DR. EVERINGTON AS AN EXPERT WITNESS IN THE FIELDS OF SPECIAL EDUCATION AND MENTAL RETARDATION, AND THERE CAN BE NO GENUINE DOUBT THAT DR. EVERINGTON IS AN EXPERT IN THOSE FIELDS

In addition to Dr. Everington's direct testimony concerning her qualifications, one of the exhibits presented for the Court's consideration at the hearing on Thursday was a Curriculum Vitae for Dr. Everington that sets forth, in detail, many of Dr. Everington's educational degrees,

work experience, professional organizations, publications, and other experiences that amply qualify her as a preeminent expert in the field of mental retardation. Further, the Court is aware (and it is obviously public record) that some of Dr. Everington's work on mental retardation is specifically cited in the U.S. Supreme Court case of *Atkins v. Virginia*, 536 U.S. 304 (2002), the very case that is the focal point of the hearing that was conducted last Thursday.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). To be competent to testify as an expert, a witness "must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Id.* There is no requirement that an expert be limited to any class of persons acting professionally. *Id.*, 326 S.C. 248, 253, 487 S.E.2d 596, 598. In *Gooding*, for example, our Supreme Court recognized that an emergency medical technician who had substantial experience with intubation of patients and had instructed physicians on the proper technique for intubation and extubation, was qualified to serve as an expert witness in intubation, even though he was not a medical doctor. Other examples include *O'Tuel v. Villani*, 318 S.C. 24, 455 S.E.2d 698 (Ct. App. 1995) (despite no medical training, expert in learning disabilities and mental deficiencies competent to testify concerning proximate cause of learning disabilities in child who had suffered a hypoxic event during delivery); *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978) (chiropractor competent to testify as a medical expert to extent of his knowledge and experience); and *Howle v. PYA/Monarch, Inc.* 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) (nonmedical psychologist qualified to render opinion on presence of acute anxiety neurosis with depression as a result of an automobile accident).

In this case, there was no meaningful challenge by the Solicitor to Dr. Everington's qualifications in the two fields of special education and mental retardation, and the Court accepted Dr. Everington as an expert in each of these fields:

THE COURT: All right. I'll accept her as a -- for purposes of this hearing as an expert in the field of mental retardation and special education.

Transcript Excerpt, p. 1 lines 3 through 5 (For ease of reference, all transcript excerpts cited herein are attached hereto collectively as Exhibit A).

II. THE SOLICITOR COMMITTED PROSECUTORIAL MISCONDUCT IN IMPROPERLY THREATENING A DEFENSE WITNESS FOR THE PURPOSE OF INTIMIDATION, THUS DENYING THE DEFENDANT DUE PROCESS

As set out in the introduction, the Solicitor attacked Dr. Everington at the hearing, impermissibly threatening and attempting to intimidate her with a claim that her testimony itself was a felony under South Carolina law:

MR. ARIAIL: Your Honor, I'm going to urge the court to review this Statute [i.e., S.C. Code Ann. §40-55-50], because I believe what we have, regardless of her characterization, I believe that this conduct of hers in testifying in regard to - it prohibits -- the statutes specifically prohibits the administration of testing, the interpretation of testing, and the testifying in regard to testing that she's administered. This Section also provides that this person - if anyone so violates this section, that it is a felony within the State, punishable by a sentence of up to ten years in prison and a fine of \$50,000. And before I go any further with this witness, you having qualified her as an expert, I think we have got a legal issue that she is not a licensed psychologist within that Section, and to go forward any further I believe would be in violation of that law. Now, if somehow she is exempt from that, or not performing what I think this law prohibits, then we need to discuss that, but it's our position that the Statute is clear in Subsection 1, that what she's done in the course of this testimony is prohibited by the Statute.

Transcript Excerpt, p. 2 line 21 through p. 3 line 17 (Exhibit A) (emphasis added).

Thus, the Solicitor made clear that he believed that Dr. Everington's testimony was a felony under South Carolina law, and that "to go forward" with that testimony would be in

violation of that law. This from the chief prosecutor for Greenville County, South Carolina.

Interestingly, the Solicitor did proceed to go forward despite his "belief" that a felony was about to be committed. If the Solicitor truly believed a felony was about to be committed as he professed he did, then the dictates of Rule 3.8 of the Rules of Professional Conduct (concerning special responsibilities of a prosecutor) required him to, among other things, "make reasonable efforts to assure that the accused [i.e., the witness that he just accused] has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." In this case, the Solicitor made no such efforts. The Solicitor did not make any attempt to provide the witness with any *Miranda* warnings, nor did he make any other attempt to ensure that she understood that she might have the right to an attorney before being questioned by the lead prosecutor for Greenville County.

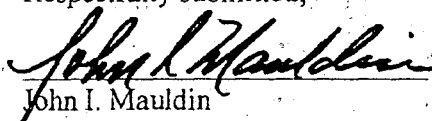
Under the Rules of Professional Conduct, it is absolutely clear that a prosecutor has the responsibility of a minister of justice and not simply that of an advocate. Comment [1], Rule 3.8. It is well established that a prosecutor may not "lob baseless threats or charges at a potential defense witness in an effort to prevent the witness from testifying. *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) (citing *State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997) (improper intimidation of witness may violate defendant's due process right to present defense witnesses freely if the intimidation amounts to substantial government interference with witness's free and unhampered choice to testify)).

The Defendant has been prejudiced by the Solicitor's conduct. At this all-important (quite literally, life or death) hearing on whether or not the Defendant is mentally retarded, the Solicitor chose, rather than to question a witness on the merits of the issue, to attack her personally and accuse her of committing a felony. This is not the conduct of a minister of justice.

This conduct was designed to place doubt in the Court's mind about the strength of the testimony of a critical witness whose actual qualifications were unimpeachable by the Solicitor.

Because the conduct of the Solicitor here violated the Defendant's due process, the Defendant respectfully requests that the death notice be quashed in this case, resulting in a sentence of life without parole. As an alternative, without waiving his rights to the foregoing relief, the defendant requests that the Thirteenth Solicitor's Office be recused from the prosecution of this case and that some alternative arrangement be made for the continued prosecution of this Defendant. As a third alternative and as an absolute minimum, and without waiving his rights to any of the foregoing more appropriate relief, the Defendant must have assurance from the Court, on the record, that the Solicitor's accusation and conduct has not in any way changed the Court's acceptance of Dr. Everington as an expert witness in the fields of special education and mental retardation and that the Court place no credence on the accusations made by the Solicitor, with explicit instructions to the Solicitor that he formally and immediately withdraw his accusations against Dr. Everington and be admonished that any further accusation along this line will result in an immediate mistrial.

Respectfully submitted,



John I. Mauldin
Troy A. Tessier
Attorneys for the Defendant

April 16, 2007
Greenville, South Carolina

1 * * * * *

2 MR. TESSIER: We renew our motion, Your Honor.

3 THE COURT: All right. I'll accept her as a --
4 for purposes of this hearing as an expert in the field of
5 mental retardation and special education.

6 You may continue your questions.

7 * * * * *

8

9 * * * * *

10 BY MR. ARIAIL:

11 Q. Ms. Everington, over the lunch break I had asked that
12 you review that stack of records and determine if there is
13 anything that had not been provided that you had reviewed?

14 A. I did review those records and there was nothing in
15 there that I had not been provided previously.

16 Q. Okay. Are you a licensed psychologist?

17 A. No, I'm not. I stated that in the direct. No, I'm not
18 a licensed psychologist.

19 Q. Are you familiar with the provisions of South Carolina
20 law that regulate licensed psychologists?

21 A. No, I'm not.

22 Q. Well, I'm going to read you a couple of things, and
23 then I'm going to ask you about this.

24 MR. ARIAIL: And I direct the court's attention to
25 Code Section 40-55-50, which defines psychologists within

Exhibit A-1

1 the meaning of this chapter. Acts constituting the practice
2 as psychology.

3 BY MR. ARIAIL:

4 Q. And it defines in Subsection 1 assessment of
5 individual, family, or group behavioral, emotional and/or
6 intellectual functioning for the purposes of one, or more,
7 of the following: Diagnosing mental disorders as being
8 within the scope of the practice of psychology.

9 The law, 40-55-55, provides that it is unlawful for a
10 person to engage in the practice of psychology in this state
11 without obtaining a license from the Board of Psychology.

12 Now, if you are not a licensed psychologist, are you
13 exempt under the provisions of law from performing those
14 functions that are prohibited by persons not licensed in the
15 State of South Carolina?

16 A. I am providing an opinion on mental retardation. And
17 as a mental retardation professional, I am qualified to
18 provide an opinion to examine records, to look at
19 educational measures, and to provide an opinion on mental
20 retardation.

21 MR. ARIAIL: Your Honor, I'm going to urge the
22 court to review this Statute, because I believe what we
23 have, regardless of her characterization, I believe that
24 this conduct of hers in testifying in regard to -- it
25 prohibits -- the statutes specifically prohibits the

1 administration of testing, the interpretation of testing,
2 and the testifying in regard to testing that she's
3 administered.

4 This Section also provides that this person -- if
5 anyone so violates this section, that it is a felony within
6 the State, punishable by a sentence of up to ten years in
7 prison and a fine of \$50,000.

8 And before I go any further with this witness, you
9 having qualified her as an expert, I think we have got a
10 legal issue that she is not a licensed psychologist within
11 that Section, and to go forward any further I believe would
12 be in violation of that law.

13 Now, if somehow she is exempt from that, or not
14 performing what I think this law prohibits, then we need to
15 discuss that, but it's our position that the Statute is
16 clear in Subsection 1, that what she's done in the course of
17 this testimony is prohibited by the Statute.

18 THE COURT: All right. Is what you are asking,
19 Mr. Ariail, is that she be allowed an opportunity to review
20 the Statute as to whether or not she wishes to testify or to
21 distinguish whether it's a mental disorder that she's
22 talking about or --

23 MR. ARIAIL: Well, I think -- the Statute says in
24 Subsection 1 (a), it says assessment of individual, family,
25 or group behavioral, emotional, and/or intellectual

1 functioning for the purpose of one, or more, of the
2 following: Diagnosing mental disorders.

3 She has clearly diagnosed this defendant as having
4 a mental disorder: mental retardation.

5 THE COURT: Does this section define mental
6 disorders? I think I heard her testimony to the degree that
7 mental retardation and mental illness were different.

8 MR. ARIAIL: Well, it also prohibits identifying
9 psychological or neuropsychological aspects, or other
10 dysfunctions, diseases, or disabilities. Evaluating mental
11 or emotional status, including intelligence and aptitude.
12 Identifying personality characteristics.

13 I think the Statute is so broad, that it is clear
14 that only a psychologist or a licensed psychologist,
15 psychiatrist, or someone exempt under the Statute would be
16 qualified to do this.

17 Aside from the penal aspects of it, I think the
18 Statute by its very nature prohibits her from being a
19 court's expert.

20 THE COURT: Mr. Mauldin, Mr. Tessier, I'll be glad
21 to hear from you on that.

22 MR. TESSIER: Your Honor, I haven't looked at the
23 Statute. I can certainly do so.

24 He has not said anything that sounds remotely
25 close to something that Dr. Everington would have done as is

1 in any way in violation of the statute. She's not diagnosed
2 a mental disorder. It is not a mental disorder.

3 She's acting as an expert witness testifying in
4 her field of expertise about whether or not an individual
5 has mental retardation. She has administered educational
6 testing, for which she is fully qualified to administer.
7 There is no licensing requirement that she hasn't met with
8 regard to any tests that she gave.

9 He mentioned some basically IQ testing. She
10 didn't give any IQ testings. She looked at some IQ tests
11 results from the past.

12 So if you want to take a break. Your Honor, we are
13 happy to go and look at this Statute. I'm sure he's not got
14 an opinion from the Attorney General of the State of South
15 Carolina that's going to tell us that what she's doing right
16 here is unlawful, but if he wants to go and take a several
17 week break and we will analyze this issue, we can do that.

18 It sounds to me like a person who can't figure out
19 how to cross-examine the witness and he's got to go
20 somewhere else with it.

21 MR. ARIAIL: I'd like to add just if you read that
22 second Section under 1, all the A through H, it says for
23 purposes of this Section assessment refers to, but is not
24 limited to one, or more, of the following practices, insofar
25 as they involve the application of psychological principles.

A-5

1 methods, or procedures: Observation, description, testing,
2 appraisal, evaluations, screening, tests interpretation,
3 interviewing, diagnosing of mental disorders, etcetera,
4 etcetera, etcetera.

5 And I think that's exactly what she has done.

6 MR. TESSIER: And if I can just add, Your Honor, I
7 think in the educational system out there today there are
8 educational tests being performed, even as we speak, and
9 these people are not being thrown in jail for testing the
10 children figuring out at what grade level they are at, for
11 example. I'm just -- this is just coming to me off the top
12 of my head. I haven't reviewed this Statute, but I suspect
13 it's absolutely inapplicable to this situation.

14 THE COURT: All right. I'll allow -- I'll allow
15 the cross examination to continue for the purposes of
16 expediting the hearing and we will address that issue, once
17 we have had an opportunity to study the Statute in more
18 detail.

19 MR. ARIAIL: All right.

20 * * * * *

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22 * * * * *

23 THE COURT: All right. The purpose for the
24 hearing having been accomplished, I'll weigh all the
25 evidence that's been presented to me and I'll certainly

A-6

1 issue a decision as soon as I can.

2 MR. MAULDIN: Okay.

3 THE COURT: Thank you very much.

4 Is there a -- if there is any -- I'll be here in
5 the morning. If there is any housekeeping matters we need
6 to take care, I'll be available, so just let me know, okay?

7 MR. ARIAIL: I think we have time next week.

8 THE COURT: All right. Thank you very much.

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A-7

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF GENERAL SESSIONS

2001-GS-23-3214

2001-GS-23-3219, etc.

The State)

v.)

Michael Laney,
Defendant.)

STATE'S MEMORANDUM IN
OPPOSITION TO THE DEFENDANT'S
MOTION TO QUASH THE DEATH NOTICE

2007 APR 24 AM 11:40
FILED
CLERK OF COURT

On Thursday, April 12, 2007, the Court held a hearing, pursuant to Franklin v. Maynard,¹ to determine whether the Defendant could prove by a preponderance of the evidence whether he is mentally retarded. During the hearing, the Defendant called Dr. Caroline Everington, a special education professor at Winthrop University, to give an opinion that the Defendant is mentally retarded.

On cross examination, the Solicitor elicited from Everington that she is not a licensed psychologist or psychiatrist in South Carolina.² He then raised a concern with the Court about Everington's testimony.

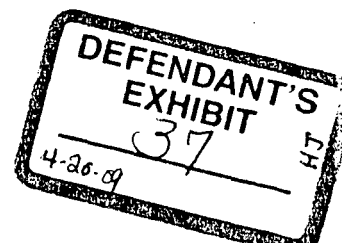
And before I go any further with this witness, you having qualified her as an expert, I think we have got a legal issue that she is not a licensed psychologist within that Section (S.C. CODE ANN. § 40-55-50), and to go forward any further I believe would be in violation of the law. Now if somehow she is exempt from that, or not performing what I think the law prohibits, then we need to discuss that, but it's our position that the Statute is clear in Subsection 1, that what she's done in the course of this testimony is prohibited by Statute.³

Based on this inquiry, the Defendant alleges that the Solicitor committed prosecutorial misconduct, and the Court should quash the State's Death Notice.

¹ 356 S.C. 276, 588 S.E.2d 604 (2003).

² Defendant's Motion to Quash Death Notice, at Ex. A-1.

³ Defendant's Motion to Quash Death Notice, at Ex. A-3.



ARGUMENT

The Solicitor did not engage in prosecutorial misconduct when he raised the issue of § 40-55-50's applicability with the Court during Dr. Everington's cross examination, and, therefore, the Court should not quash the State's Death Notice.

At the outset, it should be noted that the very premise on which the Defendant bases his motion is flawed. The Defendant claims that the Solicitor "improperly threaten(ed) a defense witness for the purpose of intimidation."⁴ Yet, the portion of the transcript the Defendant submitted with his motion reveals that the Solicitor raised his concerns with the Court, not Dr. Everington.⁵

Furthermore, the Solicitor stated that he believed that his cross examination of Dr. Everington should stop until the Court was satisfied that her testimony was not in violation of the law. "[T]o go forward any further I believe would be in violation of that law."⁶ However, the Solicitor continued with his cross examination only after the Court encouraged him to do so. "All right. I'll allow - I'll allow the cross examination to continue for the purposes of expediting the hearing and we will address that issue once we have had an opportunity to study the Statute in more detail."⁷

Even if the Solicitor *had* charged Dr. Everington with a crime, the Solicitor would not have committed prosecutorial misconduct. If a prosecutor has probable cause to believe a witness is committing a crime when she testifies, that prosecutor may not only

⁴ Defendant's Motion to Quash Death Notice, at 4.

⁵ See *infra* note 3.

⁶ See *Infra* note 3.

⁷ Defendant's Motion to Quash Death Notice, at Ex. A-6.

raise the issue with the Court, but charge the witness with a crime.³ In this case, the Solicitor had probable cause to believe Dr. Everington had violated § 40-55-50(A) both in her activities with the Defendant and his family prior to the hearing and in giving her opinion during the hearing.

S.C. CODE ANN. § 40-55-50 prohibits a person who is not a licensed psychologist from "appl(ying) the principles, methods, or procedures of psychology in the conduct of any of the following activities:

- (1) Assessment of individual, family, or group behavioral, emotional, and/or intellectual functioning for the purpose of one or more of the following:
 - a. diagnosing mental disorders;
 - b. identifying psychological or neuropsychological aspects of other dysfunctions, diseases, or disabilities; (and)
 - c. evaluating mental or emotional status including intelligence and aptitude."

Webster's Dictionary defines "psychology" as "the science of mind and behavior" and "the mental or behavioral characteristics of an individual or group."⁹

Dr. Everington applied psychological principles both when she assessed the Defendant to determine whether he was mentally retarded and when she opined in court that the Defendant was mentally retarded. First, she violated § 40-55-50(A)(1)(a) when she diagnosed the Defendant as being mentally retarded, which arguably is a mental disorder. Second, she violated § 40-55-50(A)(1)(b) when she identified psychological aspects of mental retardation which she claims the Defendant possesses, namely

³ *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998) (stating that the prosecutor did not engage in misconduct when he charged the witness with misprision of a felony, accessory after the fact, and obstruction of justice after she testified in a pre-trial hearing but before she testified at trial. The court reasoned that because the prosecutor had probable cause to believe the witness had engaged in misconduct, indicting the witness on these charges was appropriate.).

⁹ WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 689 (1967).

limitations on adaptive behavior. Third, she violated § 40-55-50(A)(1)(c) when she evaluated the Defendant's mental status related to intelligence and aptitude, when she reviewed his IQ test scores, attempted to explain the divergence in these scores while testifying, and testified that these scores made him eligible for a mental retardation diagnosis.

The Defendant relies primarily on State v. Needs¹⁰ and State v. Williams¹¹ as authority for the proposition that the Solicitor committed prosecutorial misconduct when he raised the applicability of § 40-55-50 during Dr. Everington's testimony. Both cases are clearly distinguishable from this case.

In Needs, the prosecutor charged a witness with several crimes after she had testified in a pre-trial hearing but before the trial began. The Solicitor has not charged Dr. Everington with any crimes: he merely raised the issue with the Court. Furthermore, should the Solicitor investigate the matter more fully and decide to charge Dr. Everington with a crime, he would not commit prosecutorial misconduct, because like the prosecutor in Needs, he would have probable cause to believe she committed a crime.

In Williams, the prosecutor indicated to a witness' lawyer that if the witness talked with the defendant's lawyer pre-trial, it could jeopardize that witness' plea agreement. Raising the applicability of § 40-55-50 to Dr. Everington's activities and testimony does not remotely compare to a prosecutor's attempts to deny a defendant's lawyer access to a witness who may have exculpatory evidence.

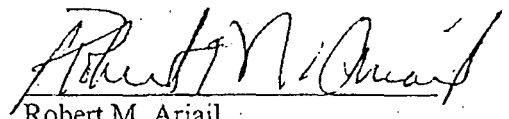
¹⁰ 333 S.C. 134, 508 S.E.2d 857 (1998)

¹¹ 326 S.C. 130, 485 S.E.2d 99 (1997).

CONCLUSION

The Solicitor did not commit prosecutorial misconduct when he cross-examined Dr. Everington, and the Defendant's Motion to Quash the Death Notice should be denied.

Respectfully submitted,


Robert M. Ariail
Solicitor, Thirteenth Judicial Circuit

Dated: April 24, 2007
Greenville, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
)
COUNTY OF GREENVILLE)
)
STATE OF SOUTH CAROLINA,)
)
)
vs.)
)
)
MICHAEL J. LANEY)
)
)
Defendant.)

**DEFENDANT'S REPLY MEMORANDUM
IN SUPPORT OF HIS MOTION TO QUASH
THE DEATH NOTICE BASED ON
PROSECUTORIAL MISCONDUCT**

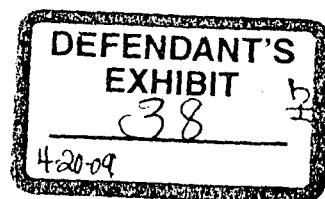
FILED
2011 MAY 21

This memorandum is provided in reply to the State's Memorandum in Opposition to the Defendant's Motion to Quash the Death Notice in this case based on prosecutorial misconduct.

I. The Solicitor Directly Attacked the Defense Witness in a Blatant Attempt at Intimidation.

In the memorandum provided by the Solicitor, an attempt is made to avoid a finding or prosecutorial misconduct by insinuating that the conduct of the Solicitor in accusing the defense witness of a felony was somehow not directed at the witness, but rather was directed merely to the Court's attention. This is not true. Had the Solicitor been interested in the legality of Dr. Everington providing testimony on mental retardation (which is, of course, her field of expertise and has been so for decades), the Solicitor could have elected to raise his questions in a sidebar or in some other manner outside the presence of the witness and certainly outside the courtroom where television cameras were rolling. He chose not to do this.

In fact, after a lengthy lunch break during which the Solicitor had ample opportunity to raise his “concerns” with the Court outside Dr. Everington’s presence, the Solicitor intentionally directed his first questions about the statute to Dr. Everington,



obviously hoping to score the maximum intimidation effect with the defense witness by doing so in such a public manner. The transcript is clear on how the Solicitor attacked

Dr. Everington after the break:

Q. Ms. Everington, over the lunch break I had asked that you review that stack of records and determine if there is anything that had not been provided that you had reviewed?

A. I did review those records and there was nothing in there that I had not been provided previously.

Q. Okay. Are you a licensed psychologist?

A. No, I'm not. I stated that in the direct. No, I'm not a licensed psychologist.

Q. Are you familiar with the provisions of South Carolina law that regulate licensed psychologists?

A. No, I'm not.

Q. Well, I'm going to read you a couple of things, and then I'm going to ask you about this.

MR. ARIAIL: And I direct the court's attention to Code Section 40-55-50, which defines psychologists within the meaning of this chapter. Acts constituting the practice as psychology.

BY MR. ARIAIL:

Q. And it defines in Subsection 1 assessment of individual, family, or group behavioral, emotional and/or intellectual functioning for the purposes of one, or more, of the following: Diagnosing mental disorders as being within the scope of the practice of psychology. The law, 40-55-55, provides that it is unlawful for a person to engage in the practice of psychology in this state without obtaining a license from the Board of Psychology. Now, if you are not a licensed psychologist, are you exempt under the provisions of law from performing those functions that are prohibited by persons not licensed in the State of South Carolina?

A. I am providing an opinion on mental retardation. And as a mental retardation professional, I am qualified to provide an opinion to examine records, to look at educational measures, and to provide an opinion on mental retardation.

MR. ARIAIL: Your Honor, I'm going to urge the court to review this Statute, because I believe what we have, regardless of her characterization, I believe that this conduct of hers in testifying in regard to -- it prohibits -- the statutes specifically prohibits the administration of testing, the interpretation of testing, and the testifying in regard to testing that she's administered. This Section also provides that this person -- if anyone so violates this section, that it is a felony within the State, punishable by a sentence of up to ten years in prison and a fine of \$50,000....

Transcript Excerpt, pp. 105-107. (Exhibit A).

There can be no doubt what effect was sought by the Solicitor by this direct attack on Dr. Everington. This was a deliberate and calculated effort to intimidate a defense witness in the hopes of preventing her testimony on behalf of the defendant. After being challenged on this misconduct, the Solicitor now attempts to deflect the Court's attention by insisting, disingenuously, that he was merely "raising concerns" with the Court and not the witness. The behavior of the Solicitor must not go without sanction. In this instance, the requested remedies are set forth in the defendant's initial brief.

II. By Stating that He Had Probable Cause to Charge the Witness, The Solicitor Admits, at a Minimum, He Violated the Ethical Rules.

In the Solicitor's memorandum, he indicates, "In this case, the Solicitor had probable cause to believe Dr. Everington had violated §40-55-50(A)...." This is precisely the point made in the Defendant's initial memorandum. Either the Solicitor believed a crime had been committed or he did not. If the Solicitor believed a crime was committed (as he now admits he did), then Rule 3.8 of the Rules of Professional Conduct required him to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel" and also required him not to "seek to obtain from an unrepresented accused a waiver of important pretrial rights...." Here, the Solicitor is the only person who claims Dr. Everington violated the law, and insists he believes she did. Yet the Solicitor chose not to advise Dr. Everington of her rights, and proceeded to question her in detail about the "crime" he claims she committed, never once taking any steps to assure that Dr. Everington be afforded the opportunity to obtain counsel on her behalf.

There can be no question that the issue of whether or not Dr. Everington violated a licensing statute has no bearing on her qualifications as an expert witness in this case. Support for the proposition that the Court is to determine whether or not a witness is qualified to testify is set out in detail in the initial brief by the defendant. Whether or not a witness is licensed to practice in a particular field is not determinative. The fact that the Solicitor has raised this issue at all in the case against Michael Laney could only be designed for the purpose of intimidating a critical and eminently qualified witness for the defense in violation of the defendant's due process rights. Dr. Everington would not be so intimidated.

III. Dr. Everington has Not Violated S.C. Code Ann. §40-55-50.

Dr. Everington is a mental retardation specialist, with a Ph.D. in Special Education and years of experience in the field. Among other things, she teaches forensic psychologists how to assess mental retardation. Her work on mental retardation was cited in the case of *Atkins v. Virginia*, 536 U.S. 304 (2002). She is a member of the American Psychological Association ("APA") and the American Psychology & Law Association and a member of the American Association for Intellectual & Developmental Disability (formerly the AAMR). She is a board certified forensic examiner and a certified elementary and special education teacher. She is an invited member for Division 33 of the APA, the committee of the APA looking to establish guidelines for assessment on mental retardation in capital cases. She is one of the creators of the CAST-MR, currently the only competency assessment specifically for persons with mental retardation. Her qualifications are extensive. She is, without question, a preeminent expert in the field of

mental retardation.

Dr. Everington has been recognized and testified as an expert witness in the fields of special education and mental retardation in at least six states other than South Carolina – Ohio, Kentucky, Florida, Illinois, North Carolina, and Louisiana – and each of these states has a statute criminalizing the unlicensed practice of psychology¹. Never before has anyone claimed Dr. Everington has been in violation of the law by serving as an expert witness and providing expert testimony concerning mental retardation. In fact, Dr. Everington has even served as a court-appointed expert witness on several occasions. Hard to believe a court would appoint an expert to violate the law.

The Solicitor claims three violations of the South Carolina statute in this case. First, the Solicitor claims that Dr. Everington “violated §40-55-50(A)(1)(a) when she diagnosed the Defendant as being mentally retarded, which arguably is a mental disorder.” This is wrong. First of all, the Solicitor apparently wants to criminalize conduct that is “arguably” in violation of a statute, which of course directly contradicts the due process clause of the Constitution. More importantly, mental retardation is a developmental disability, not a mental disorder. This comes straight from the AAMR classification of mental retardation, as quoted by Dr. Everington during her testimony:

Q. Okay. Now, you have in front of you that red book, which is the same as what I have here, and that is the AAMR 2002, 10th Edition on mental retardation, is it not?

A. Right.

Q. Would you turn for me to page 48 of that book? Are you there? Do you see there is a summary section on the bottom?

A. Yes.

Q. Can you read for the court just the first I think it's going to be three sentences

¹ Ohio Rev. Code Ann. §4732.01; Ky. Rev. Stat. Ann. §319.010; Florida Stat. Ann. §490.003; 225; Illinois Comp. Stat. 15/2; N.C. Gen. Stat. §90-270. 2; La. Rev. Stat. Ann. §37:2352.

of that summary?

A. Okay. "In summary, mental retardation is not something that you have, like blue eyes or a bad heart. Nor is it something that you are, like being short or thin."

Q. Excuse me, I'm going to ask you to slow down now when you read these. What does the next one say?

A. "It is not a medical disorder, although it may be coded in a medical classification of diseases; nor is it a mental disorder, although it may be coded in a classification of psychiatric disorders."

Transcript Excerpt, p. 28 (emphasis added) (Exhibit A).

Dr. Everington and AAMR are not the only ones in agreement that mental retardation is not a mental disorder. The American Psychological Association and the American Psychiatric Association agree as well. In their amicus brief filed with the Supreme Court of the United States in *McCarver v. North Carolina*, No. 00-8727 in 20012, these two associations expressly and repeatedly take the position that "mental retardation is a developmental disability" and they both utilize definitions from the AAMR Manual (the 1992 version of the 2002 AAMR Manual provided to the Court as an exhibit in this case) and from the DSM-IV-TR in support of their conclusion.

There can be no question that Dr. Everington has not in any way attempted to diagnose or treat a mental disorder in this case, for mental retardation is universally recognized -- by psychologists and psychiatrists and mental retardation specialists -- as a developmental disability, not a mental disorder.

Next, the Solicitor claims Dr. Everington "violated §40-55-50(A)(1)(b) when she identified psychological aspects of mental retardation which she claims the Defendant possesses, namely limitations on adaptive behavior" and that Dr. Everington "violated

² A copy of this Amicus Brief is attached hereto as Exhibit B. This brief can be found at www.psych.org/edu/other_res/lib_archives/archives/amicus/00-8727.pdf. Counsel did not have time to confirm with

§40-55-50(A)(1)(c) when she evaluated the Defendant's mental status related to intelligence and aptitude....” Again, this is fanciful. Primarily, the flaw in the Solicitor's arguments rests with the definition of the word “assessment” as used in the statute. The statute broadly (and quite vaguely) defines “assessment” to include one or more of certain practices insofar as they involve the application of psychological principles, methods, or procedures: observation, testing, etc... for any of the purposes identified in this item. Dr. Everington utilized educational principles, methods, and procedures in her work, and evaluated Michael Laney for mental retardation – not any mental disorder -- utilizing only those assessments she is fully qualified and certified to use:

Q. What did you do to conduct your work on assessing Michael for mental retardation?

A. I met with him on two occasions, for a total of seven hours, and I gave him academic assessments and language assessments, because those are assessments that can be given directly to the individual. And then I did interview him on his -- on impression of his adaptive skills, so that's what I did with him.

Q. Now, just to make sure I understand, are there licensing requirements for any of the testing that you did with Michael?

A. I gave educational measures --

Q. Okay.

A. -- which I'm fully qualified to give. I teach other people how to give these measures.

Q. Okay. Did you give any other kinds of tests, other than what you would categorize as educational measures?

A. No, I did not give an IQ test.

Q. Okay. What about the SIB-R test?

A. That's an educational measure as well. It's a measure of adaptive behavior, but we use that in the schools as well for a basis for instruction and adaptive behavior measures. So it is used in the identification of mental retardation, but it's also used for planning and other kinds of things.

Transcript, pp. 57-58 (Exhibit A).

counsel on that amicus brief that it is the as-filed version of same.

Dr. Everington did not "apply psychological principles" for the purposes of (a) diagnosing mental disorders; (b) identifying psychological or neuropsychological aspects of other dysfunctions, diseases, or disabilities; (c) evaluating mental or emotional status including intelligence and aptitude; (d) identifying personality characteristics; (e) identifying psychological factors influencing well-being; (f) selecting, placing, or referring into treatments, programs, or settings; (g) evaluating the effectiveness of treatments, programs, or settings; or (h) preventing mental disorders or maladaptive behavior related to other dysfunction, disease, or disability. In short, Dr. Everington has not "practiced psychology" as defined by this South Carolina statute. She has not attempted to treat anyone or undertake a psychologist-patient relationship with anyone. She has not held herself out in any way as a psychologist, and in fact volunteered at the beginning of her testimony that she was neither a psychiatrist nor a psychologist.

Instead, Dr. Everington simply applied her specialized knowledge and expertise in the fields of special education and mental retardation in order to provide testimony to help the finder of fact in this case determine whether or not Michael Laney is mentally retarded. This was done completely from her applications of the educational principles and methods accepted in her field. There has been no violation of the statute.

IV. To the Extent It is Argued Dr. Everington Violated S.C. Code Ann. §40-55-50, the Statute Would be Unconstitutionally Void for Vagueness.

The only person who seems to think Dr. Everington has violated the statute at issue is the Solicitor. The defense adamantly disagrees with this claim. As discussed in the defendant's earlier memorandum, the entire issue of whether or not Dr. Everington

violated a criminal statute has no bearing on the issues before the Court in this case. Dr. Everington is qualified to provide expert testimony on special education and mental retardation and has done so. The Court recognized Dr. Everington as an expert witness and was justified in doing so. This determination has not been revisited and is within the discretion of the trial court. The entire spectacle that has been created by the Solicitor has no place in the context of the criminal proceedings against Michael Laney, and that is why the defense has sought an appropriate remedy for the Solicitor's conduct here.

Having said that, to the extent the Solicitor wishes to take the position that the statute's language encompasses Dr. Everington's conduct in testifying (a position which the defense strongly disagrees with), the defendant suggests this statute would be unconstitutional. In fact, even the Solicitor admits the statute can be read in an incredibly broad manner: "I think the Statute is so broad, that it is clear that only a psychologist or a licensed psychologist, psychiatrist, or someone exempt under the Statute would be qualified to do this." Transcript, p. 108 (Exhibit A). He then notes in his current brief that Dr. Everington violated the statute because mental retardation is "arguably" a mental disorder, suggesting that South Carolina should criminalize conduct that any solicitor might "argue" is violative of any statute's language, regardless of how broadly worded.

Fortunately, the United States Constitution provides certain standards concerning what due process requires in the context of interpreting criminal statutes. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory

enforcement.” *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). In *Morales*, a statute prohibited a “street gang member” from “loitering” in “any public place.” The Court struck down this statute as void for vagueness because it was difficult to ascertain what conduct it prohibited, and it left too much discretion in prosecuting authorities to make that determination.

“It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.” *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). In *Giaccio*, a statute permitted the jury in a criminal case to determine whether the defendant should pay the costs of case, even if the defendant was acquitted, without any standards to guide the jury’s determination. The trial judge instructed the jury that they should impose costs on the defendant if they found he engaged in conduct that was “reprehensible in some respect,” though not unlawful. The Court struck down this statute as void for vagueness. “It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as ‘misconduct,’ or ‘reprehensible conduct.’” 382 U.S. at 404.

Finally, further guidance may be found in *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939): “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” In *Lanzetta*, a statute prohibited anyone from being “a member of any gang consisting of two or more persons.” The Court struck this down, as there was no way to determine how to define “gang consisting of two or more persons.”

While the defense does not believe this analysis is necessary in the context of this case, given that Dr. Everington did not violate the statute at issue on its own terms, to the extent the Solicitor seeks to stretch the already broad language of the statute so that it covers Dr. Everington's conduct, then due process must be applied and would invalidate any such interpretation. In fairness to the defendant in this case, we believe the Court should provide such a ruling now.

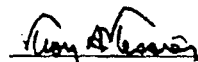
Dr. Everington did nothing more than provide testimony in her field of expertise in this case – mental retardation. She did not “practice psychology” in doing so, but merely applied the education, training, and experience she possesses in her fields of special education and mental retardation to the situation and then testified concerning the opinions she drew from that experience, education, and training. Interestingly, to the extent the Solicitor contended (as he originally did) that it was Dr. Everington's testimony itself that was in violation of the statute³, the South Carolina legislature did not in any way prohibit the giving of testimony as part of the definition of the practice of psychology in the statute at issue. This despite the fact that the legislature expressly included the giving of testimony within its definition of the practice of medicine in a similar statute concerning the licensing of physicians in this state. S.C. Code Ann. §40-47-20(36)(h). Thus, where the legislature has intended to proscribe the giving of testimony, it has expressly done so within the text of the statute. It did not do so in the statute governing the practice of psychology.

³ “[I]t's our position that the Statute is clear in Subsection 1, that what she's done in the course of this testimony is prohibited by the Statute.” Transcript, p. 107).

Conclusion

As indicated in the two memoranda provided by the defendant on this issue, it is the defendant's position that the Solicitor deliberately and in a very calculated manner attempted to intimidate a critical defense witness in this case. The law in South Carolina clearly provides that intentional misconduct on the part of the prosecutor raises an irrebuttable presumption of prejudice to the defendant. Accordingly, the defendant seeks the relief requested, as set forth in his initial motion on this issue.

Respectfully submitted,



John J. Mauldin

Troy A. Tessier

Attorneys for the Defendant

May 21, 2007

Greenville, South Carolina

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EXHIBIT A

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENVILLE) IN THE COURT OF GENERAL SESSIONS

3
4 THE STATE) TRANSCRIPT OF RECORD
5 -vs-) 2001-GS-23-3214
6 MICHAEL JAMES LANEY,) 2001-GS-23-3216
7 Defendant.) 2001-GS-23-3217
8) 2001-GS-23-3218
9) 2001-GS-23-3219
10) APRIL 12, 2007
11) Greenville, South Carolina

12 B E F O R E:

13 THE HONORABLE G. EDWARD WELMAKER, JUDGE.

14
15 A P P E A R A N C E S:

16 ROBERT M. ARIAIL, SOLICITOR
17 BETTY C. STROM, DEPUTY SOLICITOR
18 Attorneys for the State

19 JOHN I. MAULDIN, PUBLIC DEFENDER
20 TROY A. TESSIER, ESQUIRE
21 Attorneys for the Defendant

22 Michael R. Watts
23 Circuit Court Reporter

24
25

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	NO.	DESCRIPTION	ID.	EV.
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3	CT-1	DR. CAROLINE EVERINGTON C.V.	88	
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1 Q. Both for the AAMR and for the DSM-IV?

2 A. For this edition, yes.

3 Q. Okay. Now, you have in front of you that red book,
4 which is the same as what I have here, and that is the AAMR
5 2002, 10th Edition on mental retardation, is it not?

6 A. Right.

7 Q. Would you turn for me to page 48 of that book?

8 Are you there?

9 Do you see there is a summary section on the bottom?

10 A. Yes.

11 Q. Can you read for the court just the first I think it's
12 going to be three sentences of that summary?

13 A. Okay. "In summary, mental retardation is not something
14 that you have, like blue eyes or a bad heart. Nor is it
15 something that you are, like being short or thin."

16 Q. Excuse me, I'm going to ask you to slow down now when
17 you read these.

18 What does the next one say?

19 A. "It is not a medical disorder, although it may be coded
20 in a medical classification of diseases; nor is it a mental
21 disorder, although it may be coded in a classification of
22 psychiatric disorders. Mental retardation" --

23 Q. That's all. You could go on, but that's all I wanted
24 to say on that point --

25 A. Okay.

1 A. -- or disorders.

2 Q. -- Dr. Everington, I am going to turn yourself now --

3 MR. TESSIER: And I'll cover the court the
4 opportunity, if you think we need a break or anything, but
5 I'm going to turn now to Michael Laney, in particular.

6 THE COURT: All right. Let's take a short break,
7 about ten minute break, and then we will reassemble.

8 You may step down, doctor. Don't discuss your
9 testimony.

10 (Whereupon, proceedings were recessed)

11 (Whereupon, proceedings were reconvened)

12 THE COURT: You may proceed.

13 MR. TESSIER: Thank you, Your Honor.

14 BY MR. TESSIER:

15 Q. Dr. Everington, I now wanted to turn your attention to
16 Michael Laney, in particular.

17 Were you asked to assess Michael for mental retardation
18 in this case?

19 A. Yes, I was asked for an opinion on mental retardation
20 in this case.

21 Q. And that was sometime back in February when you were
22 first contacted?

23 A. Yes.

24 Q. What did you do to conduct your work on assessing
25 Michael for mental retardation?

1 A. I met with him on two occasions, for a total of seven
2 hours, and I gave him academic assessments and language
3 assessments, because those are assessments that can be given
4 directly to the individual. And then I did interview him on
5 his -- on impression of his adaptive skills, so that's what
6 I did with him.

7 Q. Now, just to make sure I understand, are there
8 licensing requirements for any of the testing that you did
9 with Michael?

10 A. I gave educational measures --

11 Q. Okay..

12 A. -- which I'm fully qualified to give. I teach other
13 people how to give these measures.

14 Q. Okay. Did you give any other kinds of tests, other
15 than what you would categorize as educational measures?

16 A. No, I did not give an IQ test.

17 Q. Okay. What about the SIB-R test?

18 A. That's an educational measure as well. It's a measure
19 of adaptive behavior, but we use that in the schools as well
20 for a basis for instruction and adaptive behavior measures.
21 So it is used in the identification of mental retardation,
22 but it's also used for planning and other kinds of things.

23 Q. Okay. In addition to working directly with Michael and
24 giving these exams or tests, I call them exams or testings,
25 did you also look at or have the opportunity to look at old

1 MR. ARIAIL: Judge, I need copies of her notes and
2 all before we leave.

3 THE COURT: Right. If you could, get those as
4 soon as you could.

5 (Whereupon, proceedings were recessed).

6 (Whereupon, proceedings were reconvened)

7 THE COURT: All right, solicitor, are you ready to
8 proceed with your cross-examination of the witness?

9 MR. ARIAIL: I am, Your Honor.

10 THE COURT: All right, sir. You may proceed.

11 CONT'D CROSS EXAMINATION BY MR. ARIAIL:

12 Q. Ms. Everington, over the lunch break I had asked that
13 you review that stack of records and determine if there is
14 anything that had not been provided that you had reviewed?

15 A. I did review those records and there was nothing in
16 there that I had not been provided previously.

17 Q. Okay. Are you a licensed psychologist?

18 A. No, I'm not. I stated that in the direct. No, I'm not
19 a licensed psychologist.

20 Q. Are you familiar with the provisions of South Carolina
21 law that regulate licensed psychologists?

22 A. No, I'm not.

23 Q. Well, I'm going to read you a couple of things, and
24 then I'm going to ask you about this.

25 MR. ARIAIL: And I direct the court's attention to

1 Code Section 40-55-50, which defines psychologists within
2 the meaning of this chapter. Acts constituting the practice
3 as psychology.

4 BY MR. ARIAIL:

5 Q. And it defines in Subsection 1 assessment of
6 individual, family, or group behavioral, emotional and/or
7 intellectual functioning for the purposes of one, or more,
8 of the following: Diagnosing mental disorders as being
9 within the scope of the practice of psychology.

10 The law, 40-55-55, provides that it is unlawful for a
11 person to engage in the practice of psychology in this state
12 without obtaining a license from the Board of Psychology.

13 Now, if you are not a licensed psychologist, are you
14 exempt under the provisions of law from performing those
15 functions that are prohibited by persons not licensed in the
16 State of South Carolina?

17 A. I am providing an opinion on mental retardation. And
18 as a mental retardation professional, I am qualified to
19 provide an opinion to examine records, to look at
20 educational measures, and to provide an opinion on mental
21 retardation.

22 MR. ARIAIL: Your Honor, I'm going to urge the
23 court to review this Statute, because I believe what we
24 have, regardless of her characterization, I believe that
25 this conduct of hers in testifying in regard to -- it

1 prohibits -- the statutes specifically prohibits the
2 administration of testing, the interpretation of testing,
3 and the testifying in regard to testing that she's
4 administered.

5 This Section also provides that this person -- if
6 anyone so violates this section, that it is a felony within
7 the State, punishable by a sentence of up to ten years in
8 prison and a fine of \$50,000.

9 And before I go any further with this witness, you
10 having qualified her as an expert, I think we have got a
11 legal issue that she is not a licensed psychologist within
12 that Section, and to go forward any further I believe would
13 be in violation of that law.

14 Now, if somehow she is exempt from that, or not
15 performing what I think this law prohibits, then we need to
16 discuss that, but it's our position that the Statute is
17 clear in Subsection 1, that what she's done in the course of
18 this testimony is prohibited by the Statute.

19 THE COURT: All right. Is what you are asking,
20 Mr. Ariail, is that she be allowed an opportunity to review
21 the Statute as to whether or not she wishes to testify or to
22 distinguish whether it's a mental disorder that she's
23 talking about or --

24 MR. ARIAIL: Well, I think -- the Statute says in
25 Subsection 1 (a), it says assessment of individual, family,

1 or group behavioral, emotional, and/or intellectual
2 functioning for the purpose of one, or more, of the
3 following: Diagnosing mental disorders.

4 She has clearly diagnosed this defendant as having
5 a mental disorder; mental retardation.

6 THE COURT: Does this section define mental
7 disorders? I think I heard her testimony to the degree that
8 mental retardation and mental illness were different.

9 MR. ARIAIL: Well, it also prohibits identifying
10 psychological or neuropsychological aspects, or other
11 dysfunctions, diseases, or disabilities. Evaluating mental
12 or emotional status, including intelligence and aptitude.
13 Identifying personality characteristics.

14 I think the Statute is so broad, that it is clear
15 that only a psychologist or a licensed psychologist,
16 psychiatrist, or someone exempt under the Statute would be
17 qualified to do this.

18 Aside from the penal aspects of it, I think the
19 Statute by its very nature prohibits her from being a
20 court's expert.

21 THE COURT: Mr. Mauldin, Mr. Tessier, I'll be glad
22 to hear from you on that.

23 MR. TESSIER: Your Honor, I haven't looked at the
24 Statute. I can certainly do so.

25 He has not said anything that sounds remotely

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EXHIBIT B

No. 00-8727

IN THE
Supreme Court of the United States

ERNEST PAUL McCARVER,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF OF AMERICAN PSYCHOLOGICAL
ASSOCIATION, AMERICAN PSYCHIATRIC
ASSOCIATION, AND THE AMERICAN ACADEMY OF
PSYCHIATRY AND LAW AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*¹

The American Psychological Association is a voluntary, nonprofit, scientific and professional organization that was founded in 1892. With more than 155,000 members and affiliates, it is the major association of psychologists in the United States. Among the Association's major purposes is to increase and disseminate knowledge regarding human behavior, and to foster the application of psychological learning to important human concerns. The Association's Division of Mental Retardation and Developmental Disabilities endeavors to advance the treatment of mental retardation and developmental disabilities, based on scientific inquiry and high standards of practice. The Association has filed briefs for this Court's consideration in similar cases, including *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Ford v. Wainwright*, 477 U.S. 399 (1986); and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

The American Psychiatric Association, with more than 40,000 members, is the Nation's largest organization of physicians specializing in psychiatry. It has participated in numerous cases in the Court. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Estelle v. Smith*, 451 U.S. 454 (1981).

The American Academy of Psychiatry and the Law, with approximately 2,500 members worldwide, is an organization of psychiatrists dedicated to excellence in practice, teaching, and research in forensic psychiatry.

¹ Petitioner and respondent have filed with the Court blanket consents to the filing of amicus briefs in support of either party. No party authored this brief in whole or in part and no one, other than Amici, their members, or their counsel contributed to the preparation or submission of this brief.

Issues at the heart of this case – namely, mental retardation and its diagnosis – have been the subject of significant research by psychologists and psychiatrists. Thus, Amici submit this brief to present relevant scientific knowledge that provides a context for the Court's review of whether the Constitution prohibits the execution of individuals with mental retardation.

SUMMARY OF ARGUMENT

Due to their disability, individuals with mental retardation cannot attain the very high level of personal culpability or blameworthiness that they must have to be punishable by death. Mental retardation is a developmental disability defined by significant impairments in intellectual functioning – impairments that also significantly limit the individual's ability to cope with everyday tasks required to care for one's self and interact in society (called "adaptive functioning"). Although many individuals with mental retardation can achieve comparative independence when they receive appropriate training, support, and services, the fact remains that such persons are *substantially* less capable of both abstract reasoning and practical or adaptive functioning than non-retarded adults. These very real and serious impairments are reflected in diminished capacities to understand basic facts, foresee the moral consequences of actions, learn from one's mistakes, and grasp the feelings, thoughts, and reactions of other people.

A comparison with children is useful here. Adults with mental retardation are, of course, *not* children. Nonetheless, with respect to personal culpability, adults with mental retardation and children share the critical characteristics of diminished capacity to understand the moral and factual consequences of their actions, to control their impulses, and to make independent decisions without undue influence by others.

Accordingly, a categorical prohibition against execution of members of both groups is warranted. Just as that categorical prohibition is not rendered inappropriate by the wide variation in the intellectual and practical abilities of children up to the age of 15, it is also not inappropriate merely because mental retardation varies in severity and in the practical abilities it affects. Indeed, unlike 15-year-olds, *all* individuals with mental retardation exhibit *substantially* more limited intellectual and practical functioning than the typical adult.

A blanket prohibition against the execution of individuals with mental retardation is workable, because mental retardation can be identified using time-tested instruments and protocols with proven validity and reliability. Incorrect diagnoses are forestalled because mental retardation may be diagnosed only if three necessary criteria are all present: significant limitations in intellectual functioning, significant limitations in practical or "adaptive" functioning, and onset before adulthood. Qualified professionals who conduct a complete mental retardation examination of an individual will be able to make an objective determination whether the individual has mental retardation, in the sense that independent professionals undertaking separate assessments should reach the same conclusion.

To achieve objectivity, however, certain safeguards must be followed. The assessment must be performed by qualified professionals with experience relating to mental retardation and to administration of IQ and adaptive functioning tests. The evaluation must also be complete, *i.e.*, it must include a thorough assessment of each of the three necessary criteria indicating mental retardation. Compliance with these safeguards should curtail unnecessary legal wrangling, conflicting "diagnoses," and both false positive and false negative determinations concerning whether the individual has

mental retardation. Proper clinical procedures are essential where, as here, life or death is at issue.

ARGUMENT

I. Due To Their Disability, Individuals With Mental Retardation Cannot Attain The Very High Level Of Blameworthiness Required For Capital Punishment.

Individuals with mental retardation are incapable of attaining the very high level of moral culpability or blameworthiness that is required before an individual may be singled out to be punished by death. "Under the Eighth Amendment, the death penalty has been treated differently from all other punishments." *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring in judgment). The decision to impose the death penalty must "be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *see also Thompson*, 487 U.S. at 834 (plurality) (same). Therefore, the decision to punish a crime with death "requires a nexus between the punishment imposed and the defendant's blameworthiness." *Thompson*, 487 U.S. at 853 (O'Connor, J., concurring in judgment) (quoting *Enmund v. Florida*, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting)); *see also Stanford v. Kentucky*, 492 U.S. 361, 382 (1989) (O'Connor, J., concurring in judgment).

Mental retardation significantly diminishes an offender's blameworthiness. Mental retardation is universally defined as (1) significant limitations in general intellectual functioning, (2) which exist concurrently with significant limitations in adaptive functioning, (3) the onset of which begins before adulthood. *See* Editorial Board, *Definition of Mental Retardation* [hereinafter *Definition*], in *Manual of Diagnosis*

and *Professional Practice in Mental Retardation* 13, 13 (John W. Jacobson & James A. Mulick eds., American Psychological Association 1996) [hereinafter *APA Manual*]; American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992) [hereinafter *AAMR Manual*]; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. text revision 2000) [hereinafter *DSM-IV-TR*]. These three defining criteria – all of which must be present before an individual may be classified as having mental retardation, see *Definition*, at 14; see also *AAMR Manual*, at 5; *DSM-IV-TR*, at 41 – are interrelated in a way that diminishes blameworthiness.

As the definition of mental retardation makes clear, it is not marked simply by limitations in intellectual functioning or by limitations in adaptive functioning. Rather, “[t]he limitations in adaptive skills are . . . closely related to the intellectual limitation.” *AAMR Manual*, at 6; see also *id.* at 14-15 (“the intellectual limitations must have an impact on coping or adaptive skills to meet the definition”); *Definition*, at 22. Thus, people with mental retardation have intellectual limitations that result in real and serious impairments in “how effectively individuals cope with common life demands.” *DSM-IV-TR*, at 42; see also *Definition*, at 20 (mental retardation is characterized by “poor generalization skills and motivational deficits [as well as] deficits in major problem-solving processes and practical knowledge or skills”).² Further, mental retardation is a developmental disability, which means

² Specifically, diagnosis of mental retardation requires serious limitations in at least two of these adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. See *AAMR Manual*, at 5; *Definition*, at 30-31; *DSM-IV-TR*, at 41.

that these serious intellectual and adaptive limitations manifest themselves before the individual achieves the ability to function as an adult. See *AAMR Manual*, at 16-18; *Definition*, at 36-37; *DSM-IV-TR*, at 47.

Of course, people with mental retardation display a range of intellectual and adaptive abilities. Individuals with mental retardation may possess relative strengths in some skills areas, especially compared to their limitations in others (e.g., an adult who cannot learn to read might have some limited math skills). See, e.g., *AAMR Manual*, at 6-7. With supports and services tailored to their individual needs, persons with mental retardation can also generally continue to improve in their functioning over time. See, e.g., *id.* at 7. Indeed, with the appropriate support, supervision, and assistance, some individuals with mental retardation can learn to live independently and/or hold menial jobs. See, e.g., *DSM-IV-TR*, at 43.³

³ Because individuals with mental retardation have varying skills and thus varying needs for support, the American Association on Mental Retardation uses a subclassification system that reflects the level and kind of

Despite these individual variations, the very definition of mental retardation means that all persons with this disability suffer from very substantial impairments in their intellectual

support needed. See *AAMR Manual*, at 26, 34. Alternatively, people with mental retardation are sometimes subclassified as having either "mild," "moderate," "severe," or "profound" mental retardation, depending on the degree of their intellectual and adaptive functioning. See *Definition*, at 14-19; *DSM-IV-TR*, at 43-44. Note that the term "mild" mental retardation can be misleading, for even the highest functioning individuals with mental retardation must have substantial cognitive and behavioral disabilities before they can be diagnosed with retardation. See *Definition*, at 13 (mental retardation requires *significant* limitations in intellectual and adaptive functioning); *AAMR Manual*, at 5 (same); *DSM-IV-TR*, at 41 (same).

and adaptive abilities compared to non-retarded individuals. Although there is no precise census of the number of people with mental retardation, studies invariably put the number at less than 3% of the general population, usually in the 1% to 3% range. See, e.g., D.D. Smith & Ruth Luckasson, *Introduction to Special Education: Teaching in an Age of Challenge* 146 (2d ed. 1995).

This small group represents those whose intellectual limitations substantially restrict their development and adaptive functioning. These limitations are reflected in diminished capacities to understand and process facts and information;⁴ to learn from mistakes and from experience generally;⁵ to generalize and to engage in logical if-then reasoning;⁶ to control impulses;⁷ to communicate;⁸ to understand the moral

⁴ See John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in *The Criminal Justice System and Mental Retardation* 55, 53-59 (Ronald W. Conley et al. eds., 1992); Diane Courselle et al., *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 Wyo. L. Rev. 1, 24 (2001); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 431 (1985).

⁵ See McGee & Menolascino, *supra*, at 58; Kenneth L. Appelbaum & Paul S. Appelbaum, *Criminal-Justice-Related Competencies in Defendants with Mental Retardation*, J. of Psychiatry & L. 483, 488 (Winter 1994).

⁶ See McGee & Menolascino, *supra*, at 58, 60; Appelbaum & Appelbaum, *supra*, at 488.

⁷ See McGee & Menolascino, *supra*, at 58; Appelbaum & Appelbaum, *supra*, at 489; Ellis & Luckasson, *supra*, at 429.

⁸ See Appelbaum & Appelbaum, *supra*, at 487; Ellis & Luckasson, *supra*, at 428; see also Solomon M. Fulero & Caroline Everington, *Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation*, 19 L. & Human Behavior 533, 535 (1995).

implications of actions and to engage in moral reasoning;⁹ and to recognize and understand the feelings, thoughts, and reactions of other people.¹⁰ Moreover, people with mental retardation are often especially eager to please others, a characteristic obviously susceptible to manipulation.¹¹

⁹ See Margaret C. Flynn et al., *The Mentally Handicapped Adult's Concepts of Good and Bad Acts*, 29 J. Mental Deficiency Research 55, 61-62 (1985); McGee & Menolascino, *supra*, at 59-60; Appelbaum & Appelbaum, *supra*, at 489; Yael Isreali, *The Moral Development of Mentally Retarded Children: Review of the Literature*, 14 J. of Moral Educ. 33 (1985); Ellis & Luckasson, *supra*, at 429-30.

¹⁰ See Tom Gumpel, *Social Competence and Social Skills Training for Persons with Mental Retardation*, 29 Educ. & Training in Mental Retardation & Developmental Disabilities 194 (1994); McGee & Menolascino, *supra*, 59-60; Appelbaum & Appelbaum, at 489.

¹¹ See Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 Mental Retardation 212, 212-13 (1999); Fulero &

These serious limitations necessarily diminish the personal culpability or blameworthiness of individuals with mental retardation. This is not to say that such individuals are never competent to stand trial or that they should not be held responsible for their actions. But the death penalty is imposed only on a small subset of all persons convicted of crimes, and its imposition must reflect the greater personal blameworthiness of those who are executed compared to those who are not so punished. *See supra* at 4. Every individual with mental retardation has impaired cognitive and practical functioning that reduces his or her personal blameworthiness relative to others who commit similar crimes.

A comparison with children is instructive. The Eighth Amendment bars execution of individuals who were under the age of 16 at the time they committed their crimes. *See Thompson*, 487 U.S. at 838 (plurality); *id.* at 857-58 (O'Connor, J., concurring in judgment where legislature has not specifically authorized such executions). Of course, adults with mental retardation are different in many important respects from children; accordingly, the two groups should and do have different legal rights and responsibilities. *See, e.g., Penry*, 492 U.S. at 339-40 (opinion of O'Connor, J.).

Everington, *supra*, at 535; Ellis & Luckasson, *supra*, at 431-32.

Nonetheless, with respect to the potential blameworthiness that can attach to their actions, children and persons with mental retardation share the same critical characteristic: diminished intellectual and practical capacities compared to non-retarded adults. The constitutional bar and national consensus against execution of juvenile offenders reflects the fact that "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Thompson*, 487 U.S. at 835 (plurality). The very same considerations apply to a person with mental retardation. *See, e.g., Penry*, 492 U.S. at 322 (opinion of Court) ("Because Penry was mentally retarded, [he was] less able than a normal adult to control his impulses or to evaluate the consequences of his conduct . . ."). *See also supra* at 7-8 (describing impairments typical of individuals with mental retardation).

The bar against execution of juvenile offenders also illustrates the principle that disproportionality between the death penalty and an individual's personal culpability can sometimes be found for an entire class of persons, rather than case by case. Juveniles range widely in their intellectual and practical abilities, both between and within age groups. Yet, no one may be executed for a crime committed below the age of 16 due to the diminished blameworthiness that attaches to persons in that class.

Indeed, a particular 15-year-old may possess very strong reasoning skills commensurate with most adults. In contrast, by definition *every* individual with mental retardation has much more limited reasoning skills. And while an adult with mental retardation may have more years' life experience than a juvenile, that additional experience has little bearing on blameworthiness due to the limited ability of persons with

mental retardation to use information from one situation to help guide behavior in another. Perhaps most importantly, a case-by-case determination of the blameworthiness of individuals with mental retardation is especially inappropriate because mental retardation – unlike youth – may be treated by sentencers as an aggravating rather than a mitigating factor, resulting in imposition of the death penalty based on the very condition that makes the individual less blameworthy than a non-retarded offender. *See Penry*, 492 U.S. at 323.¹²

¹² Psychological research also indicates that capital sentencing juries are frequently incapable of understanding sentencing instructions, which diminishes the likelihood that case-by-case capital sentencing will properly

reflect the reduced blameworthiness of individuals with mental retardation. See Richard L. Wiener et al., *The Role of Declarative and Procedural Knowledge in Capital Murder Sentencing*, 28 J. Applied Soc. Psychology 124 (1998); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 L. & Human Behavior 575 (1997); Richard L. Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. Applied Psychology 455 (1995).

Comparison with juveniles is also useful for the light it sheds on the problem of line-drawing. In *Thompson*, all members of the Court agreed that the Constitution bars execution of juveniles below *some* age. See 487 U.S. at 828-29 (plurality); *id.* at 848 (O'Connor, J., concurring in judgment); *id.* at 872 (Scalia, J., dissenting). Yet, because development from childhood to adulthood is a continuous process, it presents the question of where on the developmental spectrum to draw the line between constitutionally permissible and impermissible executions. See *id.* at 838 (plurality) (declining to decide whether death penalty may be imposed on juveniles 16 or older when they commit a crime); *id.* at 854 (O'Connor, J., concurring in judgment) (recognizing line-drawing problem); *id.* at 872 (Scalia, J., dissenting) ("there is no clear line here").

Mental retardation does not present a similar line-drawing problem. As explained above, professionals in the area of mental disabilities have developed criteria of mental retardation that apply only to those whose developmental limitations in intellectual functioning are also reflected in substantial limitations in adaptive functioning, *i.e.*, the ability to cope with and solve the practical and social problems faced by independent adults. Although individuals with "borderline intellectual functioning" may have IQ scores almost as low as (or even equal to) some individuals with mental retardation, these two groups are clearly differentiated, because only among persons with mental retardation is the deficit in intellectual functioning also associated with a substantial impairment of adaptive functioning. See, *e.g.*, *DSM-IV-TR*, at 41-42, 48, 740.

Thus, individuals with mental retardation form a well-demarcated group that is defined by precisely those characteristics that are relevant to their diminished blameworthiness: developmentally rooted deficits in both intellectual and adaptive functioning that are substantially

below the level of other adults. Accordingly, individuals with mental retardation necessarily lack the very high level of blameworthiness that is required before a person can be punished by death.

II. Objective Diagnosis Of Mental Retardation Can Be Made By Qualified Practitioners Using Proven Measurement Instruments.

A determination that persons with mental retardation may not be executed raises questions concerning whether and how such persons can be reliably identified. The clinical knowledge of psychologists, psychiatrists, and other professionals relating to the diagnosis of mental retardation is highly relevant to these issues. As we explain below, mental retardation is a disability that can be identified using well established, valid, and reliable tests and procedures (Part A). In order to avoid incorrect diagnoses, however, it is essential that the evaluation be performed by professionals who are qualified in the area of mental retardation and who perform a complete mental retardation evaluation (Part B).

A. Mental Retardation Can Be Identified Through the Use of Time-Tested and Scientifically Grounded Assessment Instruments and Protocols.

Psychologists and other mental retardation professionals have developed tests and other evaluative tools that allow the identification of individuals with mental retardation. Two qualified mental retardation professionals separately administering these diagnostic tests should reach the same conclusion concerning whether an individual has mental retardation. As a result, a blanket rule against execution of persons with mental retardation should *not* result in new "battles of experts" concerning whether a defendant, in fact, has mental retardation. We elaborate this point below with reference to the three definitional criteria of mental retardation: significant limitations in intellectual functioning, significant limitations in adaptive functioning, and onset before adulthood.

1. *Intellectual Functioning.* The first criterion of mental retardation is the existence of significant limitations in general intellectual functioning. *See Definition*, at 13; *AAMR Manual*, at 5; *DSM-IV-TR*, at 41. In this context, "significant limitations" means two or more standard deviations below the mean. *See Definition*, at 13; *AAMR Manual*, at 35; *DSM-IV-TR*, at 41.¹³

¹³ Standard deviation is a statistical measure of the variability in the distribution of events. Only about 2.3% of individuals should have true IQ scores two or more standard deviations below the mean. *See AAMR Manual*, at 37.

Tests that measure cognitive functioning have been used since the beginning of the twentieth century to classify individuals' cognitive abilities and to diagnose mental retardation and similar disabilities. See Donald K. Routh, *Intellectual Development, in APA Manual*, at 85, 87-88. Today, standardized IQ tests are the presumptive instruments of measurement among professionals that diagnose and treat mental retardation. *AAMR Manual*, at 36.¹⁴ Individually

¹⁴ Standardized IQ tests cannot be used in some situations, such as when persons are observed in cultural settings different from their home countries. See *id.* at 35. In such situations, "the general guideline for consideration of intellectual functioning performance as determined by clinical judgment is that it must be below the level attained by approximately 97 percent of persons of comparable age and cultural backgrounds." *Id.* at 35-36.

administered IQ tests are widely recognized as *valid* and *reliable* means of assessing intellectual functioning for the purpose of diagnosing mental retardation. *See id.* at 35 (IQ tests are “only way to address the intellectual aspect of mental retardation in a normative way”).¹⁵ Clinicians confirm the

¹⁵ “Validity” and “reliability” have technical meanings in connection with standardized tests. “Validity refers to the degree to which evidence and theory support the interpretations of test scores entailed by proposed uses of tests,” American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 9 (1999) – colloquially, that the test measures what it is being used to measure. “Reliability refers to the consistency of [test] measurements when the testing

results of IQ tests by evaluating the individual's functioning in everyday settings and roles. *See id.* at 36.

On the scales used by many IQ tests, two standard deviations below the mean corresponds to a true score of 70. *See, e.g., Definition*, at 14 (table); *DSM-IV-TR*, at 41. However, "there is a measurement error of approximately 5 points in assessing IQ." *DSM-IV-TR*, at 41. Hence, an individual who scores 75 on a standardized IQ test may in fact suffer from the intellectual limitations that constitute the first necessary criterion for a diagnosis of mental retardation. *See id.* Accordingly, all authorities agree that an individual with an IQ of 75 may be diagnosed with mental retardation – *but only if significant limitations in adaptive functioning also exist.* *See Definition*, at 15; *AAMR Manual*, at 14-15; *DSM-IV-TR*, at 41-42. This is one reason why adaptive limitations have been embraced by mental retardation professionals as an integral part of the definition of mental retardation.

2. *Adaptive Functioning.* The second necessary criterion of mental retardation is the existence of significant limitations in adaptive functioning. *See Definition*, at 13; *AAMR Manual*,

procedure is repeated on a population of individuals or groups." *Id.* at 25. As explained below in the main text, standard IQ tests have standard errors of about 5 points, which is a reflection of their comparative reliability.

at 5; *DSM-IV-TR*, at 41. “[A]daptive behavior refers to what people do to take care of themselves and to relate to others in daily living rather than the abstract potential implied by intelligence.” *AAMR Manual*, at 38; *see also DSM-IV-TR*, at 42 (“*Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting”).

As explained above, mental retardation is a developmental disability that affects such everyday functioning in addition to the conceptual intelligence measured by IQ tests. Thus, although an IQ score between 70 and 75 is not a dispositive indication of mental retardation, comprehensive evaluation of adaptive functioning skills by a qualified mental retardation professional should be sufficient to resolve any question concerning whether the subject has mental retardation. *See, e.g., AAMR Manual*, at 15. An adaptive functioning evaluation is therefore critical for a sound diagnosis of mental retardation. *See, e.g., Definition*, at 14.

Professionals involved in the diagnosis and treatment of mental retardation agree that adaptive functioning is composed of a wide array of discrete skills that can be placed into categories or “domains,” each of which is amenable to evaluation and testing. These skills determine whether and how effectively an individual can do everything from meeting new people, to dressing, to managing a personal banking account. Professionals have identified ten domains of adaptive skills that are assessed for the purposes of diagnosis. They are communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. *See DSM-IV-TR*, at 41; *AAMR Manual*, at 39-41; *Definition*, at 30-31. The adaptive

functioning criterion for identifying mental retardation is satisfied when the individual has substantial limitations in at least two of these domains. See *DSM-IV-TR*, at 41; *AAMR Manual*, at 39-41; *Definition*, at 30.

Clinicians have at their disposal objective rating scales and assessment methods for the comprehensive evaluation of adaptive functioning skills. Such instruments were largely developed for the express purpose of testing adaptive functioning as it relates to mental retardation, and the tests accordingly have a high degree of validity in connection with this use. See *AAMR Manual*, at 41 ("there is a relatively close correspondence between the structure of many of the [testing] scales and the implicit meanings within those definitions [of mental retardation]"). In addition to validity, the reliability of particular adaptive functioning tests has been determined through extensive and intensive analyses. See John W. Jacobson & James A. Mulick, *Psychometrics*, in *APA Manual*, at 75, 80-82.

As with intellectual functioning, the threshold for significant limitations in adaptive functioning is a domain score that is two or more standard deviations below the mean, see *Definition*, at 13, referenced to the subject's chronological age; see *AAMR Manual*, at 6; *Definition*, at 28; see also *DSM-IV-TR*, at 42. To verify the accuracy of results obtained from these instruments, the clinician usually must also interview one or more knowledgeable persons who are well-acquainted with the subject's typical, unprompted adaptive behavior. See *Definition*, at 35; *AAMR Manual*, at 45.

3. *Onset Prior to Adulthood*. The third necessary criterion of mental retardation is onset prior to adulthood. See

Definition, at 13; *AAMR Manual*, at 5, 16; *DSM-IV-TR*, at 41.¹⁶

For present purposes, this criterion is important because it provides additional certainty concerning a diagnosis of mental retardation. A complete evaluation of an individual for mental retardation requires consideration of materials such as school records and reports from persons who have long familiarity with the client in order to confirm that present limitations in intellectual and adaptive functioning became manifest before adulthood. See Diane Courselle et al., *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 Wyo. L. Rev. 1, 20, 27 (2001). Unlike many other disabilities or diseases, mental retardation cannot appear for the first time in adults.¹⁷ Thus, false positive diagnoses of mental retardation

¹⁶ This age may range from 18 to 22. See *AAMR Manual*, at 6 (18 years); *DSM-IV-TR*, at 39 (18 years); *Definition*, at 13 (22 years). The existence of this range reflects the fact that "the cutoff age for the end of the developmental period and the beginning of adulthood may be relative to the social, cultural, and ethnic milieu. . . . The critical consideration would be whether the individual was functioning as an adult in . . . society prior to the onset" of the disability. *Definition*, at 36 (quoting *AAMR Manual*, at 17). Thus, a person who initially presents symptoms of mental retardation between the ages of 18 and 22 may receive "an appropriate alternative classification" that is distinct from mental retardation if that person previously achieved adult levels of functioning. *Definition*, at 36-37.

¹⁷ An adult who develops intellectual and adaptive limitations similar to mental retardation (e.g., due to a head injury or disease) typically suffers from some form of dementia. Dementia represents "a decline from a previously higher level of functioning," *DSM-IV-TR*, at 148, whereas mental retardation is a developmental disability that prevents the attainment of higher levels of functioning in the first place. Dementia may differ from mental retardation in significant ways, including severity of intellectual and/or adaptive impairment. Therefore, whether and under what circumstances the death penalty may be imposed on persons with dementia raises questions distinct from those at issue in this case.

due to malingering (*i.e.*, the opportunistic feigning of symptoms) are essentially unknown. *See id.* at 27.¹⁸

B. Diagnosis of Mental Retardation Requires a Complete Evaluation by Qualified Professionals.

¹⁸ Indeed, to the extent feigning is an issue relating to diagnoses of mental retardation, it arises because individuals with retardation try to *cover up* their disability due to the lifelong stigma that often attaches to it. *See id.* This is one reason why it is essential for qualified mental retardation professionals to perform a comprehensive mental retardation evaluation if there is any reason to believe mental retardation is present. *See generally infra* Section II.B.

The foregoing discussion explains how diagnoses of mental retardation can be made using valid and reliable tests and protocols. The corollary of this point is that the diagnosis must be made by *qualified mental retardation professionals* who conduct a *complete mental retardation evaluation* adequately covering all three necessary criteria for diagnosis (intellectual limitations, adaptive limitations, and time of onset).

The first essential prerequisite to a reliable clinical identification of mental retardation is that the evaluation be performed by *qualified professionals*. See, e.g., *Definition*, at 38; Ellis & Luckasson, *supra*, at 485-87. Not every psychologist or psychiatrist is qualified to perform a mental retardation evaluation; indeed, many such professionals focus on mental illness or other issues and have no expertise relating to retardation. See Ellis & Luckasson, *supra*, at 485-87. Professionals without this expertise may fail to recognize mental retardation, especially "mild" retardation where an individual's IQ is around 70 and he or she has comparatively high adaptive functioning in some but not all domains.

Qualified professionals must also administer the specific IQ and adaptive functioning tests used in the mental retardation evaluation. See, e.g., *AAMR Manual*, at 44. The American Psychological Association and other major professional organizations interested in the integrity of measurement methodologies have published standards that require test publishers to specify the qualifications a person must have in order to administer any given test of intelligence. See American Educational Research Association, American Psychological Association & National Council on Measurement

in Education, *Standards for Educational and Psychological Testing* 69, 114 (1999); see also *AAMR Manual*, at 36.¹⁹

The second essential prerequisite to a reliable clinical identification of mental retardation is that the evaluation be complete, i.e., that it adequately cover all three necessary criteria for mental retardation. As explained above, mental

¹⁹ Experience in the identification of mental retardation and administration of IQ and adaptive functioning measurement devices is also necessary to deal with many other issues, such as evaluation of individuals from linguistic or cultural backgrounds requiring special tests or other devices, see *AAMR Manual*, at 44; *DSM-IV-TR*, at 42, 46, or individuals with sensory or physical limitations that interfere with performance on standard tests, see *AAMR Manual*, at 47. An inexperienced evaluator could incorrectly conclude that persons with these special needs have mental retardation when in fact they do not.

retardation exists only when all three criteria are met: significant limitations in intellectual functioning, *and* significant limitations in adaptive functioning, *and* onset before adulthood. Perhaps the most common shortcoming in purported evaluations for mental retardation is exclusive reliance on IQ tests (or, in some cases, IQ tests combined with some consideration of the individual's case history). Without assessment of *adaptive functioning*, however, such an "evaluation" is inherently unreliable. *See Definition*, at 14 ("Classification requires that all three criteria must be met. Psychological diagnosis based exclusively on intellectual functioning and age of onset criteria is clinically inappropriate"). This is true in all cases, but especially when an individual scores between 70 and 75 on IQ tests. Because of the standard error in those tests, such scores are ambiguous with respect to mental retardation in the absence of adaptive functioning assessments. *See supra* at 14-15.

Finally, minimal assessment of each of the three criteria is not sufficient; the assessment of each criterion must also be *adequate*. Assessment of intellectual functioning, for example, must be performed on an *individual* rather than a group basis to obtain accurate results. *See AAMR Manual*, at 25. With respect to adaptive functioning, mental retardation may exist when an individual has significant limitations in at least two of ten enumerated skill areas or "domains." *See, e.g., id.* at 5; *DSM-IV-TR*, at 41. Accordingly, testing or evaluation of only some but not all domains is an insufficient basis on which to base a conclusion that an individual does *not* have mental retardation.

The importance of a complete mental retardation evaluation is illustrated by the present case. Mr. McCarver has been examined by a number of mental health professionals, but prior to Dr. Baroff, none of these clinicians appears to have evaluated Mr. McCarver for the purpose of determining

whether he has mental retardation, as opposed to mental illness. More specifically, none of the earlier examiners appears to have assessed Mr. McCarver's adaptive functioning. Yet, under the universally accepted diagnostic criteria discussed above, mental retardation can neither be confirmed nor ruled out for an individual who scores between 70 and 75 on an individual IQ test, unless the individual's adaptive functioning is also assessed. Accordingly, the opinions of the various clinicians in this case appear to reflect the different purposes and scopes of their respective examinations of Mr. McCarver, rather than conflicting diagnoses reached after complete *mental retardation* assessments.

Qualified mental retardation professionals who independently carry out complete mental retardation evaluations of an individual should reach the same conclusion about whether that individual has mental retardation. Reaching the correct result is critical where an improperly administered evaluation can literally mean the difference between life and death.

CONCLUSION

For the foregoing reasons, the death penalty should not be imposed on individuals with mental retardation.

Respectfully submitted,

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28

Counsel of RecordCounsel for the American Psychological Association*

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Washington, D.C. 20036
(202) 775-0184

*Counsel for the American Psychiatric Association
and the American Academy of Psychiatry and the Law*

June 8, 2001

Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8282
Telefax: 864-467-8582



Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185

Solicitor
Robert M. Ariail

August 13, 2007

RECEIVED
8/13/07
4:30 PM

Dr. Caroline Everington
106 Withers Building
Winthrop University
Rock Hill, SC 29733

Re: State v. Michael Laney

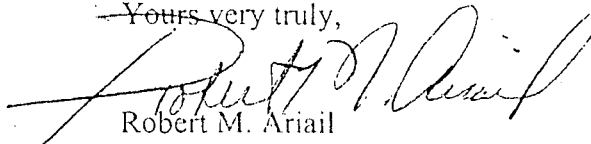
Dear Dr. Everington

I would like to meet with you during the week of August 27th, 2007. The purpose of this meeting will be to discuss several areas of your testimony rendered during a prior proceeding in the above reference matter. Some of the areas I would like to discuss are:

1. The specifics of the cases in which you have previously consulted or testified including; who hired and paid you, the amount of your fee, your opinions whether you testified or not, the charges, and the State and jurisdiction of the case.
2. The manner and method of the scoring of tests by you in Mr. Laney's case.
3. The people you interviewed and the other sources of your information.

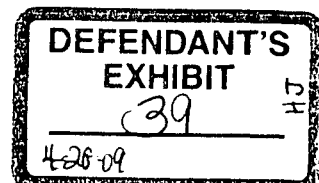
If you are unable to meet at anytime during this week, please provide me an alternate date and time that is convenient for you. I am willing to meet after hours if that is more convenient for you.

Yours very truly,


Robert M. Ariail
Solicitor, Thirteenth Judicial Circuit

RMA:mp

cc: John Mauldin, Attorney for Defendant

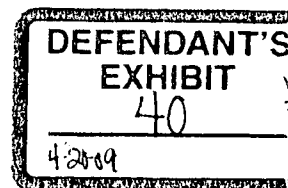


STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	
	)	
STATE OF SOUTH CAROLINA,	)	RENEWAL OF
	)	DEFENDANT'S MOTION TO QUASH
	)	THE DEATH NOTICE BASED ON
vs.	)	PROSECUTORIAL MISCONDUCT
	)	
MICHAEL J. LANEY	)	
	)	
<u>Defendant.</u>	)	

By Motion filed and served on April 16, 2007, the defendant requested specific relief resulting from the Prosecutorial Misconduct of the Solicitor during a hearing before this Court relating to the testimony of an expert witness called by the Defendant. That Motion is pending.

The Defendant now renews that request and in further support of his Motion would show unto the Court:

- 1) On August 13, 2007, a copy of a letter sent by the Solicitor to the defense witness was delivered to counsel for the defendant (Exhibit A);
- 2) The State can point to no legal right that allows it to speak with this expert witness in advance of trial or to obtain the information requested of this expert witness in advance of trial;
- 3) That this letter, given the previous conduct of the Solicitor, represents still another attempt by the state to intimidate, threaten, and harass the witness for the defense in the obvious hope of convincing the witness not to testify on behalf of the defendant at trial;
- 4) That given the conduct of the State that is the subject of the pending



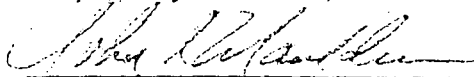
motion and given the circumstances of the pending unresolved motion, it is improper for the State to make any contact with this defense expert witness, as such conduct by the state denies the defendant due process of law.

As indicated in support of his prior motion, the Rules of Professional Conduct make it absolutely clear that a prosecutor has the responsibility of a minister of justice and not simply that of an advocate. Comment [1], Rule 3.8. It is well established that a prosecutor may not "lob baseless threats or charges at a potential defense witness in an effort to prevent the witness from testifying. *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) (citing *State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997) (improper intimidation of witness may violate defendant's due process right to present defense witnesses freely if the intimidation amounts to substantial government interference with witness's free and unhampered choice to testify)).

The motion relating to the Solicitor's conduct in improperly threatening and intimidating the defense expert witness is still pending. No ruling has been made. It would be absolutely inappropriate for the Solicitor to have any further opportunity to intimidate and threaten the witness again in any unsupervised context.

Accordingly, in addition to the relief requested in the pending motion concerning prosecutorial misconduct, the defendant respectfully requests that the Court order that the Solicitor's office refrain from any further contact with the defense expert witness prior to trial in this case.

Respectfully submitted,



John I. Mauldin

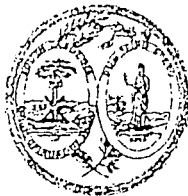
Troy A. Tessier

Attorneys for the Defendant

August 27, 2007
Greenville, South Carolina

South Carolina
Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8282
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Greenville County Courthouse
305 E. North Street, Suite 325
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Solicitor

Robert M. Ariail

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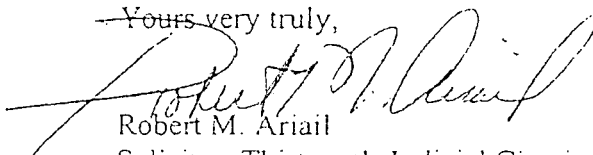
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1. The specifics of the cases in which you have previously consulted or testified including; who hired and paid you, the amount of your fee, your opinions whether you testified or not, the charges, and the State and jurisdiction of the case.
2. The manner and method of the scoring of tests by you in Mr. Laney's case.
3. The people you interviewed and the other sources of your information.

If you are unable to meet at anytime during this week, please provide me an alternate date and time that is convenient for you. I am willing to meet after hours if that is more convenient for you.

Yours very truly,


Robert M. Ariail
Solicitor, Thirteenth Judicial Circuit

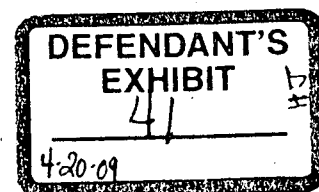
RMA:mp

cc: John Mauldin, Attorney for Defendant

Exhibit A

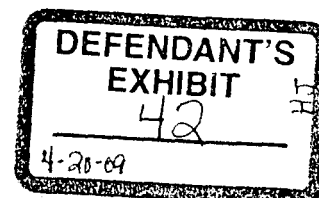
THE RESOLUTION OF THE MICHAEL LANEY CASE

1. Need to have a conference with Judge Welmaker regarding our strategy and the fact that we expect a consecutive life sentence on each murder.
2. There MUST be a Blair b/c the issue that the defendant is possibly incompetent has been raised before the court and the court MUST make a determination of competency before proceeding any further.
3. At the competency hearing, burden of proof is on the defendant to prove by a preponderance of the evidence that the defendant does not have a rational understanding of the proceedings and/or cannot assist his counsel.
4. Donna Schwartz Watts presumably will testify. Will she say anything different than what she said at the initial Blair hearing at the first trial. In other words, will she not talk about deterioration.
5. We have to have Price evaluate the defendant so as to render testimony as to competency.
6. We will put up Price for evidence of competency.
7. We will get the matter of mental retardation settled in that we will have Domino and Schwartz Watts both testify that he is not mentally retarded.
8. We will have a copy of Pam Crawford's earlier testimony from the 2001 Blair hearing in the event that Schwartz Watts says there is no difference b/t then and now.
9. ~~Have judge rule that with regards to mental retardation, he considered the testimony of Dr. Everington in making his decision but further finds that under section 40-55-50, Dr. Everington is violating that statute when she renders a diagnosis of mental retardation. (THIS ONE HAS SOME CONCERN BY MAULDIN)~~ No!
↓
10. A finding by the court that there was no prosecutorial misconduct. (BOB MAYBE DOES NOT WANT THIS) —NO— JUST draw motions
11. A come to Jesus meeting with Mauldin, ~~and~~ and Tessier.
12. Meet with victims' families and explain situation.
13. ask Mauldin if there is any other evidence of incompetency other than Donna Schwartz Watts, b/c I don't want to be an issue on PCR that he had it and did not present it.
- 14.



THE RESOLUTION OF THE MICHAEL LANEY CASE

1. Need to have a conference with Judge Welmaker regarding our strategy and the fact that we expect a consecutive life sentence on each murder.
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8. We will have a copy of Pam Crawford's earlier testimony from the 2001 Blair hearing in the event that Schwartz Watts says there is no difference b/t then and now.
9. Defense withdraws both motions for prosecutorial misconduct.
10. ask Mauldin if there is any other evidence of incompetency other than Donna Schwartz Watts, b/c I don't want to be an issue on PCR that he had it and did not present it.
- 11.



1 STATE OF SOUTH CAROLINA)

2 COUNTY OF GREENVILLE)

) IN THE COURT OF GENERAL SESSIONS

3
4 THE STATE)

) TRANSCRIPT OF RECORD

5 -vs-)

) 2001-GS-23-3214

) 2001-GS-23-3216

) 2001-GS-23-3217

6 MICHAEL JAMES LANEY,)

) 2001-GS-23-3218

) 2001-GS-23-3219

7 Defendant.)

) AUGUST 30, 2007

) Greenville, South Carolina

8
9
10
11 B E F O R E:

12 THE HONORABLE G. EDWARD WELMAKER, JUDGE.

13
14
15 A P P E A R A N C E S:

16 ROBERT M. ARIAIL, SOLICITOR

17 BETTY C. STROM, DEPUTY SOLICITOR

Attorneys for the State

18 JOHN I. MAULDIN, PUBLIC DEFENDER

19 TROY A. TESSIER, ESQUIRE

Attorneys for the Defendant

20
21 Michael R. Watts

Circuit Court Reporter

22
23
24
25
DEFENDANT'S
EXHIBIT

43

4-20-09

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WITNESSES

PAGE

DR. DONNA SCHWARTZ-WATTS (DW)

DIRECT EXAMINATION BY MR. MAULDIN

6

(NO CROSS EXAMINATION)

DR. DAVID PRICE (SW)

DIRECT EXAMINATION BY MR. ARIAIL

13

CROSS EXAMINATION BY MR. MAULDIN

32

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
S-1	DR. SCHWARTZ-WATTS EVALUATION		32
S-2	CURRICULUM VITAE OF DR. DAVID PRICE		32
CT-1	FORENSIC EVALUATION REPORT	32	

1 (PROCEEDINGS, August 30, 2007)

2 THE COURT: All right. This hearing is set
3 pursuant to the Statute 43-23-430 of the South Carolina
4 Codes. It's here to determine the defendant's competency to
5 stand trial under the guidelines that are set forth under
6 Statute 44-23-410 and State v. Blair.

7 Are there any preliminary matters we need to take
8 care of before we begin the hearing?

9 MR. MAULDIN: Your Honor, the only matter.
10 Originally it was set for 2:30. We moved it back. Our
11 witness is not present. She's on the road, on the way, and
12 should be here any time, so we have agreed to take the
13 witnesses out of order for the purposes of going ahead with
14 the testimony.

15 THE COURT: All right, sir.

16 MR. MAULDIN: That's the only thing I can think of
17 preliminarily.

18 MS. STROM: That's correct, Your Honor. And as
19 part of the presentation of the evidence here today, counsel
20 for the defense and for the State have stipulated to the
21 contents of the report of Dr. Domino. And I confirmed that
22 yesterday. There would be no need for Dr. Domino to be
23 present here and testify, that we stipulate to the contents
24 of her report.

25 I have shown that report again to Mr. Mauldin this

1 morning. He obviously has a copy, and I submit a clean copy
2 to the court for consideration.

3 THE COURT: Without objection, Dr. Domino's report
4 will be submitted in lieu of testimony.

5 Are we ready for the first witness?

6 MR. MAULDIN: Yes, sir.

7 MR. ARIAIL: Yes, sir.

8 Call Dr. David Price.

9 DR. DAVID PRICE, having been first duly sworn,
10 testified as follows:

11 THE CLERK: Thank you. Please be seated.

12 MR. ARIAIL: Your Honor, Dr. Schwartz-Watts is
13 here. If we want to reverse track and --

14 THE COURT: In the order of testimony, I will be
15 glad to let her --

16 MR. MAULDIN: If I may make a suggestion if she
17 testifies after Dr. Price?

18 MR. ARIAIL: Let's talk about that.

19 MR. MAULDIN: Your Honor, could we have just --
20 let's take a few moments break and then we can put the
21 witnesses up in order.

22 THE COURT: All right, sir.

23 MR. MAULDIN: Does that suit you?

24 THE COURT: That would be fine. We will be at
25 ease for a few minutes.

1 (Whereupon, proceedings were recessed)

2 (Whereupon, proceedings were reconvened)

3 THE COURT: Are you ready to proceed now?

4 MR. MAULDIN: Yes, sir, Your Honor.

5 THE COURT: All right. You may call your first
6 witness.

7 MR. MAULDIN: I call Donna Schwartz-Watts to the
8 stand, Your Honor.

9 DR. DONNA SCHWARTZ-WATTS, having been first duly
10 sworn, testified as follows:

11 THE CLERK: Please state your full name for the
12 record.

13 THE WITNESS: Sure. My name is Donna Marie
14 Schwartz-Watts, S-C-H-W-A-R-T-Z-W-A-T-T-S.

15 MR. MAULDIN: May it please the court?

16 THE COURT: Yes, sir.

17 DIRECT EXAMINATION BY MR. MAULDIN:

18 Q. Dr. Schwartz-Watts, with whom are you employed?

19 A. I still work for the University of South Carolina
20 School of Medicine.

21 Q. All right. And what is your title of that employment?

22 A. I think I have been promoted since the last time we
23 talked. I'm a professor of clinical psychiatry there now,
24 and still director of forensic psychiatric services.

25 Q. Okay. Are you a medical doctor?

1 A. Yes.

2 Q. And what type of medical doctor are you?

3 A. A forensic psychiatrist.

4 Q. Would you describe to the court forensic psychiatry,
5 please?

6 A. Sure. It's a subspecialty medicine, just like
7 cardiology is a subspecialty of internal medicine. And what
8 that subspecialty focuses on is the interface between
9 psychiatry and the law. So anywhere where a mental health
10 issue may arise in a legal situation would be an area where
11 a forensic psychiatrist is consulted.

12 Q. What are your primary duties at the University of South
13 Carolina?

14 A. I have a number.

15 First, and foremost, I'm a teacher. We have to teach
16 there, and so I train the forensic psychiatric residents.
17 They spend six months with me during their year of training.

18 I also teach child psychiatry residents, and they
19 rotate to me year long.

20 I also train general residents in psychiatry. I
21 lecture them, and also on occasion will have medical
22 students work with us.

23 Secondly, I do research, and I have to present in
24 various and national meetings and write papers and that sort
25 of thing.

1 And then thirdly I have a number of contracts I have to
2 do. The department bills for my services, so I have a
3 contract with the Department of Corrections. I work at the
4 Department of Juvenile Justice at times. I am often a --
5 presently I'm working with the Department of Mental Health
6 conducting some evaluations for them, because they are short
7 of doctors. And then I also have a practice through the
8 university, where I'm retained by various legal officials to
9 do forensic work.

10 Q. Referring to your teaching responsibilities, part of
11 that responsibility is to teach in the area of forensic
12 psychiatry, the students, the medical students, is that
13 correct?

14 A. Yes, and the residents.

15 Q. You referred also to your practice of contracting with
16 various -- upon various requests regarding forensic
17 psychiatry. I'm assuming that would include the type of
18 arrangement that you and I have with regard to your
19 involvement in this matter?

20 A. Yes, I have big contracts with institutions, but, yes,
21 and then another part of that practice is many, many
22 contracts with various attorneys, judges, prosecutors, civil
23 attorneys, Family Court attorneys, that sort of thing.

24 Q. Are you board certified in general and forensic
25 psychiatry?

1 A. Yes, and I'm also now re-certified. A few years ago --
2 every 10 years now we have to be re-certified in both
3 specialties, and I'm re-certified in both areas.

4 Q. Have you been qualified in South Carolina Supreme
5 Court, District Court, Common Pleas and General Sessions in
6 the courts of the State of South Carolina?

7 A. Yes.

8 Q. As an expert in forensic psychiatry?

9 A. Yes.

10 MR. MAULDIN: Your Honor, we offer Dr.
11 Schwartz-Watts as an expert in the area of forensic
12 psychiatry.

13 THE COURT: Any objection or any voir dire
14 requested?

15 MS. STROM: None.

16 THE COURT: All right. She would be qualified as
17 an expert in the field of forensic psychiatry.

18 BY MR. MAULDIN:

19 Q. Dr. Schwartz-Watts, I'm going to ask you if I contacted
20 you regarding participation in the matter of the State
21 versus Michael James Laney?

22 A. Yes.

23 Q. Were you, in fact, also involved in what we will
24 describe as Laney 1; that is, back in 2000 and 2001, were
25 you also involved in my representation of Michael Laney?

1 A. Yes.

2 Q. Did you find yourself testifying on occasion during
3 that time frame?

4 A. Yes.

5 Q. Regarding the participation in 2000 and 2001, did you
6 present trial testimony, not only at the actual trial of the
7 case, but at a pretrial hearing involving the competency of
8 Michael Laney to stand trial in 2001?

9 A. Yes.

10 Q. I have, previous to this point, given you a copy of
11 that prior testimony and you have had an opportunity to look
12 that over?

13 A. Yes.

14 Q. You -- in your current role with regard to Michael, I
15 once again contracted with you during this year, 2007, to
16 participate with me in his defense, is that right?

17 A. Yes.

18 Q. And I believe I requested that you prepare a
19 preliminary report finding back in April of this year, is
20 that right?

21 A. Yes.

22 Q. And you did so?

23 A. Yes.

24 Q. Is it your -- to your knowledge, did I provide the
25 prosecutor with a copy of that report?

1 A. I hope so. I think so.

2 Q. And you have had an opportunity in preparation for
3 today's testimony to review your report that you did for me
4 in April?

5 A. Yes.

6 Q. In your evaluation and ongoing participation in this
7 case, did you bring to my attention your concerns about
8 whether or not Michael might be competent to be re-sentenced
9 in this matter?

10 A. Yes.

11 Q. Did you express your opinion that you didn't feel very
12 satisfied that he was competent?

13 A. That's correct.

14 Q. Is that fair to say?

15 A. Yes.

16 Q. And is it your understanding that I, subsequent to that
17 advice, did bring that matter to the court's attention
18 concerning our -- the competency issue?

19 A. I would guess so, yes.

20 Q. You have had the opportunity to review your report,
21 your testimony, the records that you reviewed, your notes
22 regarding interviews with Michael, and I want to ask you if
23 at this time you have an opinion as to whether he lacks the
24 competency to be re-sentenced in this matter?

25 A. Yes.

1 Q. All right. And what is that opinion?

2 A. It's my opinion that he's not.

3 Q. Thank you.

4 Answer any questions the prosecutor might have for you,
5 please, ma'am.

6 MS. STROM: Court's indulgence?

7 THE COURT: Yes, ma'am.

8 (Off the record)

9 (Back on the record)

10 MS. STROM: We have no questions.

11 THE COURT: All right. Thank you, ma'am. You may
12 step down.

13 THE WITNESS: Thank you.

14 MR. MAULDIN: Your Honor, that is the witness for
15 the defendant in this matter under the Blair case, Your
16 Honor.

17 THE COURT: All right, sir.

18 Anything from the State.

19 MR. ARIAIL: Yes, Your Honor.

20 The State calls Dr. David Price.

21 DR. DAVID PRICE, having been first duly sworn,
22 testified as follows:

23 THE CLERK: Please state your full name for the
24 record.

25 THE WITNESS: David Richard Price.

1 THE CLERK: Thank you.

2 THE COURT: Yes, sir, you may proceed.

3 MR. ARIAIL: Thank you, Your Honor.

4 DIRECT EXAMINATION BY MR. ARIAIL:

5 Q. Would you state your name for the record, please?

6 A. David Richard Price.

7 Q. And Dr. Price, what is your profession?

8 A. I'm a licensed clinical psychologist by the State, but
9 I also practice forensic psychology and neuropsychology.

10 Q. All right. And you practice here in Greenville?

11 A. I do.

12 Q. And how long have you practiced here in Greenville?

13 A. I have practiced in Greenville since 1982.

14 Q. And you are -- when you say clinical psychology, does
15 that involve the seeing and consulting and treating of
16 patients?

17 A. It does.

18 Q. And forensic, is that -- forensic psychology, is that
19 the similar definition that Dr. Schwartz-Watts gave in
20 regard to clinical -- I mean in forensic psychiatry?

21 A. Yes, sir, it is.

22 Q. Tell us -- elaborate a little bit how that works in the
23 psychology field.

24 A. Forensic psychology is essentially applying the
25 knowledge and database, the mental health field, to legal

1 questions. It could be questions of disability; worker's
2 comp injury; fitness for duty evaluations, whether someone
3 is competent to return to work and not be a danger to
4 themselves and others; criminal matters, such as this one -
5 competency, mitigation, aggravation; probate, competency to
6 execute a health care decision or to make a will.

7 It pretty much covers the gamut of the legal type
8 questions.

9 Q. And you have been involved in that area of psychology
10 for how long?

11 A. I have been involved in that area of psychology since
12 1993, but I restricted my practice to just forensic issues
13 in 1990.

14 Q. All right. Give me your educational background and
15 then we will talk a little bit about training since then.

16 A. I have had a -- I received a Bachelors Degree in
17 Psychology from Clemson University, and a Masters in Doctor
18 of Philosophy from Auburn University in Clinical Psychology.

19 I interned at the University of Pittsburgh Internship
20 Consortium, and I was licensed by the state in 1982, I
21 believe it was, to practice clinical psychology.

22 Q. In regard to consultation for purposes of court
23 testimony, how many cases have you during your career been
24 involved in?

25 A. It would be hard to estimate, but it would be well in

1 excess of a thousand.

2 Q. And in terms of criminal cases, have you also been
3 involved in testifying in regard to forensic psychology
4 issues in criminal cases?

5 A. Yes, sir, I have.

6 Q. In this state and other states?

7 A. I have been qualified in this state and other states
8 and have participated in such cases, basically nationally.
9 I have a national practice.

10 Q. And currently are you consulting on cases involving
11 forensic psychology in the criminal justice field in this
12 country? And, if you would, specify where those are
13 located.

14 A. Well, I have a number of active cases. I have several
15 murder cases that are at the federal level in Illinois,
16 Missouri, Indiana.

17 I just completed testifying in a competency issue in a
18 murder case for the public defender of Indiana.

19 I have other criminal cases.

20 I have consulted with Mr. Mauldin's office, with his
21 associates, on criminal cases, and I believe one of those is
22 still open.

23 I have a number of -- I have a number of civil and
24 criminal cases that are active, and it's hard to remember
25 exactly which ones are where, but I have a number of them.

1 Q. And during the course of a year, how many times would
2 you say that you have testified in either a court of this
3 state or a court -- or federal courts, or some other states?

4 A. I think an average would be about a dozen times a year.

5 Q. And you have been previously qualified as an expert
6 witness in the field of clinical psychology and forensic
7 psychology within the courts of South Carolina?

8 A. And neuropsychology.

9 Q. And neuropsychology. All right.

10 MR. ARIAIL: Your Honor, we would submit him as an
11 expert in the field of forensic psychology for purposes of
12 rendering testimony regarding the competence of the
13 defendant.

14 THE COURT: Any objection or any voir dire
15 requested?

16 MR. MAULDIN: None, Your Honor.

17 THE COURT: Without objection, he would be
18 qualified as an expert in the field of forensic psychology.

19 BY MR. ARIAIL:

20 Q. Pursuant to my request did you become involved in this
21 case, and specifically that being the case of the State
22 versus Michael James Laney?

23 A. I did.

24 Q. And when was your first involvement?

25 A. My first involvement was prior to the first trial in

1 2000, 2001.

2 Q. And so your involvement, it begins where this case
3 began in trial, I think it was the year 2001?

4 A. Yes, sir.

5 Q. And has it continued sporadically throughout the
6 intervening years, becoming involved again recently when
7 this case approached trial?

8 A. Yes, sir, it has.

9 Q. What was your involvement back in 2001, prior to the
10 first trial and during the first trial? What did you do?

11 A. In the first trial you were concerned about mental
12 health issues for Mr. Laney and asked me to consult with you
13 on those and to be available at the sentencing hearing in
14 case you needed some consultation regarding the
15 cross-examination of other witnesses, or perhaps even
16 testimony.

17 So my first step in this case was I reviewed your
18 complete file at your office. I also attended the
19 sentencing phase of the trial and heard that testimony and
20 observed the courtroom proceeding, and then have reviewed
21 essentially every mental health document that's been
22 produced since then.

23 Q. And have you reviewed, in specific, the testimony of
24 Dr. Donna Schwartz-Watts at the first trial and the
25 testimony of Dr. Pam Crawford at the first trial?

1 A. I have reviewed that. I also heard it live.

2 Q. You heard it live and reviewed it since then?

3 A. Yes, sir.

4 Q. Have you also reviewed as a part of my request the
5 records and testimony of Dr. Everington at the mental
6 retardation hearing?

7 A. Yes, sir, I did.

8 Q. And have you reviewed the report of the Department of
9 Mental Health recently issued in August of this year?

10 A. Yes, sir, I have.

11 Q. What other records specifically can you refer to that
12 that you have reviewed in regard to Mr. Laney? Are those
13 the records there that you have?

14 A. Yes, sir, there are a number of records, and certainly
15 many of these records were reports from investigators, DNA
16 analysis, and things like that.

17 I also had an opportunity to -- and I can't recall
18 their name specifically, but I had an opportunity to
19 interview a number of the residents of the neighborhoods
20 where the crimes took place that had familiarity with Mr.
21 Laney, as he was doing yard work, or offering to do yard
22 work.

23 I have reviewed basically all the reports that have
24 been produced in this case, such as the one by Dr. Crawford
25 and Dr. Brawley. The neurological evaluation by the

1 Department of Mental Health, the evaluation by the
2 Department of Mental Health, the test instruments. And
3 then, again, all the previous mental health testimony that's
4 been rendered in this case. And some of his North Carolina
5 records that were available.

6 Q. Did you also have occasion to review those records that
7 are referred to in the Department of Mental Health report?

8 A. I did.

9 Q. Have you had occasion at my request to interview any
10 witnesses or persons connected with the South Carolina
11 Department of Corrections recently?

12 A. Yes, sir, I did. I was able to interview and talk at
13 length with the social worker with death row, Ms. Caroline
14 Binds; one of correctional officers, Lieutenant Williams;
15 one of the correctional officers, Sergeant Jefferson; and
16 then the librarian that would give Mr. Laney his books, an
17 inmate McClure.

18 Q. When were those interviews conducted?

19 A. Yesterday.

20 Q. And as -- also today have you had an opportunity to
21 interview and talk with the defendant himself, Michael
22 Laney?

23 A. I spent approximately two hours this morning with Mr.
24 Laney and talked with him at length.

25 Q. Is that the first opportunity that you have had to talk

1 face to face with him?

2 A. Yes, sir, it is.

3 Q. And in yesterday's interview, the amount of time, how
4 much did you spend in that pursuit of information?

5 A. I spent approximately two and a half hours at Leiber
6 Correctional facility. Two hours -- I met with the social
7 worker and the officers in a group. Two hours with them.
8 Then approximately 30 minutes with Mr. McClure.

9 Q. Okay. And as a result of that background that you have
10 referred to - the review of the records, hearing the
11 testimony of the first trial, reviewing trial testimony from
12 subsequent proceedings, interviewing those witnesses at the
13 Department of Corrections, reviewing the records in the
14 present case, and also interviewing Mr. Laney this morning -
15 have you been able to form an opinion as to whether or not
16 Mr. Laney is competent to stand trial?

17 A. I don't think there is any question that he's competent
18 to stand trial. He is certainly competent.

19 Q. In the course of this process, did you also look at as
20 a side issue the matter of mental retardation of Mr. Laney?

21 A. Yes, sir, I did.

22 Q. And were you able to render or have you formed an
23 opinion as to whether or not Mr. Laney suffers from mental
24 retardation?

25 A. I have seen nothing in the records to support a

1 diagnosis of mental retardation from Mr. Laney previously.

2 I also never considered his IQ of 86 to be an outlier,
3 as it's been described in previous testimony.

4 Quite simply, when you get into legal cases, whether
5 it's civil or criminal, people can fain lower intellect.
6 They can't fain being brighter. They can't fake higher
7 scores. That's probably the best predictor of his
8 intellectual level, but I have also had access to other
9 information. Like today, when I was interviewing him, he
10 shared with me a number of documents. He had a big envelope
11 where he had been taking copious notes related to the legal
12 in the Department of Correctional setting. The organization
13 of the notes and the sentence structure and the language and
14 the coherence were inconsistent with any diagnosis of mental
15 retardation.

16 People with borderline intellectual functioning, which
17 has been a diagnosis that's been rendered for him, that's an
18 IQ in the seventies, Your Honor, they achieve academic
19 skills to the 6th grade level. Approximately the 6th grade
20 level. His sentence structure and reading comprehension
21 would be in excess of that, as would probably his
22 mathematical skills, and I'll explain why I have that
23 opinion.

24 His mathematical skills, he has to keep track of the
25 money he has to spend at the canteen in the Department of

1 Corrections. To order things from the canteen, he has to
2 organize a list. He has to organize the cost of that list,
3 and he has to make sure he has -- it's sort of like a debit
4 account. He has to make sure he has that money available to
5 pay for that, because if he orders -- if he orders those
6 items and he does not have the money in his account to pay
7 for those, then he's going to be punished. He's going to
8 have some type restrictions put on him, whether it's
9 lockdown or not being able to use the canteen. So he's
10 indicating some mathematical ability there to keep an
11 ongoing running account of how much money he has.

12 Reading comprehension, although it's not visible now,
13 when I saw him today, he had a mesh bag full of -- three
14 manila envelopes, his lunch, and seven volumes of the
15 transcript from his earlier trial.

16 And in discussing with him his earlier trial, he can
17 refer to those books as volumes to specific places where
18 he's read that and has made copious notes along the margins,
19 indicating where he's taken exception to that or it was not
20 used in the way he thought it should have been used in his
21 defense. He told me he's read those transcripts several
22 times. To be able to read those and understand those
23 certainly would be at a reading level above the 6th grade
24 level.

25 Q. All right.

1 A. He also within his notes -- I mean, it's very
2 interesting looking at his notes. He also has in his notes,
3 he has forms available to fill out to file motions and to
4 have the proper way to file a motion. He has -- in his
5 notes he has --

6 Q. These are court motions?

7 A. Court motions, yes, sir.

8 Q. Okay.

9 A. Within his notes he has notes to himself about how to
10 stage questions in the court proceedings; how the questions
11 should be phrased, they shouldn't lead.

12 He has notes to himself that you must object in order
13 to appeal. Things of that nature. Copious notes. Things
14 of that nature.

15 Q. During your interview with him this morning, were there
16 any difficulties in communicating with him? Was he -- or
17 did he talk freely with you?

18 A. You know, he talked very freely with me. And actually
19 I was a little surprised, given other ways that I have heard
20 him described how pleasant and cooperative and rational he
21 was with me.

22 Q. All right. As to the issue of his competence and his
23 ability to assist in his own defense and to assist his
24 attorneys, tell us what particular aspects of your notes --
25 not notes, but your reading of material and interviewing him

1 form the basis of that opinion, that he is, in fact,
2 competent?

3 A. Well, let me make one note in answering that to sort of
4 set a foundation for that. I found him today to be exactly
5 the way the correctional officers described him over the
6 past five years, or whatever. He was in contact in reality.
7 He was rational. He could discuss his case. He could ask
8 questions. He could respond to questions. There was no
9 like word salad. I mean, he was very organized. He was
10 very on target. He expressed definite opinions. And
11 whether you agree with those opinions or not, he was able to
12 substantiate what he felt were facts that would support
13 those opinions related to his case.

14 In talking with him about his case, he specifically
15 told me, and no disrespect, Mr. Mauldin, that he doesn't
16 like you. And the issue is separation regarding the
17 strategy of his case. Mr. Laney feels his case should focus
18 on his innocence and not on saving his life. And he
19 recognizes that Mr. Mauldin's goal is to get him life
20 imprisonment versus death, to save his life. That's a
21 difference in trial strategy.

22 He told me he's talked to other attorneys, and
23 specifically talked about having a phone conversation with
24 one attorney that said he thought he get could him life.
25 And Mr. Laney said, "and I told him I have got enough

1 records here in my cell to give me life. That's not helping
2 me any."

3 He has probably a better recall of facts of his case,
4 because he only has to focus on one case than either you or
5 Mr. Mauldin, because that's what he does all day, is focus
6 on his case.

7 He told me that he felt he could entirely cooperate
8 with an attorney, if the attorney was one that accepted his
9 strategy, which is the focus of his innocence.

10 He -- he has knowledge of the charges that were pressed
11 against him. He remembers in detail the experts and what
12 they opined at his initial trial, whether it be Dr.
13 Cunningham from Texas, or Dr. Watts from Columbia, Dr.
14 Crawford. He remembers all of that.

15 He remembers who the previous judge was and how he felt
16 the judge conducted the courtroom.

17 He remembered his prior attorney, Mr. Ghent, who was
18 co-counsel at that time with Mr. Mauldin.

19 He remembered the points that were made. He -- when
20 asking him about -- he knew today he would -- I didn't tell
21 him this, but he knew today he was having a competency
22 hearing. He knew what competency was.

23 When I asked him "did you think -- "do you think you
24 are competent or incompetent?" He says "well, I may be a
25 little incompetent." And I say "why might you be a little

1 incompetent?" And his response was he's not had adequate
2 time to prepare his case to prove his innocence. Not
3 whether he has the mentality to be competent. It's just
4 that he hasn't had the time to prepare. And one of his
5 complaints about preparing is that he hadn't had access to
6 the law books that he would like to have at the Department
7 of Corrections. They haven't been as fulfilling with that.

8 Speaking of the Department of Corrections in his
9 reading, he has a dictionary that he uses when he doesn't
10 understand words. Most of the time at the Department of
11 Corrections he's either reading encyclopedias or law books
12 or his records. That's how he spends his time.

13 When I asked the -- the inmate was Mr. McClure is an
14 inmate on death row. And, of course, his opinion is that
15 everybody on death row is incompetent, and so he told me he
16 was immediately going to tell Mr. Laney that he had talked
17 to me, but he did make the observation that Mr. Laney knows
18 what he wants. He wants encyclopedias. When he gives him
19 encyclopedias, when he gets it back, it's obvious it's been
20 read. It's been well worn. There might be pages folded to
21 keep place of where you want to return to read. There might
22 be things underlined or notes made in it.

23 His notes are coherent. The majority of them are about
24 his case. Some are about complaints with the Department of
25 Corrections.

1 There is concern that I heard at some point that he
2 doesn't like to leave his cell. He does not leave his cell
3 because he has a psychiatric disorder. He does not like to
4 leave his cell, A, because when he used to leave it -- and,
5 one of the officers told me when he used to take recreation,
6 he would go out out in the area there and play chess, which
7 was an issue in his first hearing, he has the mentality to
8 play chess. He doesn't go now because he's afraid that the
9 correctional officers will go in and interfere with his
10 legal documents, and feel like they did that before when he
11 left.

12 His other -- the other reason he doesn't like to leave
13 his cell and take recreation is he doesn't like the black
14 inmates. I gather he has some fear of the black inmates.
15 He feels more protected, both of his belongings and of his
16 personal safety, within his cell.

17 Q. Did he exhibit other self-protective aspects in your
18 interview, or --

19 A. Yes, sir, I felt he was very self-protective. He wants
20 to maintain that he was innocent of his crime, and he talks
21 about his case within that context, which I think is very
22 self-protective. I mean, he doesn't say anything
23 incriminating.

24 Q. Okay. None of your conversations with him -- in those
25 conversations, he did not indicate to you knowledge of the

1 crime or anything incriminating regarding his involvement in
2 it?

3 A. He had knowledge of the crime --

4 MR. MAULDIN: Your Honor --

5 THE COURT: Wait, wait, wait.

6 MR. MAULDIN: I'm going to object to the form of
7 that question, and, furthermore, the substance for which
8 he's eliciting.

9 THE COURT: I -- I'll sustain the objection.

10 MR. ARIAIL: Well, let me ask --

11 THE COURT: Or if you would just rephrase the
12 question.

13 BY MR. ARIAIL:

14 Q. The self-protective aspect of it, you were making
15 reference to his not discussing his crime and his
16 involvement in it?

17 A. That's correct.

18 Q. And that's what he did during your interview?

19 A. That's correct.

20 Q. All right. Any other aspects of self-protective
21 behavior that you noted?

22 A. Well, he would -- well, in his conversation with me, he
23 would try to explain some of the issues in his case that he
24 felt got him convicted, such as the car in North Carolina,
25 or the -- that had stolen goods in it, that type of thing.

1 And he was telling me that he had borrowed the car. The
2 woman had loaned him the car. He had not --

3 MR. MAULDIN: One moment, Dr. Price.

4 I'm going to enter an objection to the discussion
5 regarding factual matters relating to the incident. I
6 simply think it's -- this doctor has gone well into
7 supporting his view that Mr. Laney is competent to be
8 sentenced. He doesn't need all this recitation about what
9 he's told him about what he was convicted of. I object.

10 THE COURT: I sustain the objection.

11 BY MR. ARIAIL:

12 Q. All right. Back to -- back to his competence to stand
13 trial.

14 Other areas that you observed that you felt support
15 that, particularly let's talk about hygiene.

16 A. Well, the issue about his hygiene, when you look at
17 rendering diagnoses for Mr. Laney -- and I know
18 schizophrenia has been talked about in the past -- one of
19 the things you look at is their every-day functioning. The
20 correctional officers told me that he keeps his cell clean.
21 He doesn't miss a chance to take a shower. He cuts his own
22 hair. He shaves. He maintains his personal hygiene, within
23 the restrictions provided by the Department of Corrections.

24 Of course -- yeah, he has very good hygiene and his
25 attire is regulated for him.

1 Q. And you also consulted with the social worker. What
2 interaction had she had with Mr. Laney as it would -- as she
3 related to you that would bear on his competence?

4 A. He has had three contacts with the department -- with
5 mental health within the Department of Corrections, all of
6 them early on. And they really were pretty much part of the
7 evaluation process of the Department of Mental Health when a
8 new inmate comes in. He was seen by a psychiatrist that
9 gave him a diagnosis of poly-substance dependence and
10 borderline intellectual functioning. That's been the --
11 those have been the diagnoses have been maintained by the
12 Department of Corrections.

13 He's not been under any treatment, whether therapy,
14 counseling, or medication, since he's been a resident of the
15 Department of Corrections, nor have they felt that he needed
16 any treatment. He's never been referred for treatment.

17 Q. He never exhibited any behavior that would require
18 that?

19 A. The guards told me that he's never exhibited any type
20 irrational behavior that would have them concerned about him
21 and prompted a referral for mental health, nor has he asked
22 for one.

23 Q. And a social worker at the institution would see him on
24 a regular basis?

25 A. She's on death row on a regular basis and knows of him,

1 but she's not seen him on a regular basis because they don't
2 feel like he needs any treatment.

3 Q. Okay. Any other aspects of your interview or review of
4 the notes that support your opinion that he is competent to
5 stand trial at this time?

6 A. When I saw him today, he was very lucid. He was in
7 good contact with reality. He, you know, knows dates; knows
8 why he's here; knows where he's at; knows what the charges
9 are against him; knows what the outcome could be.

10 I did not see anything that would suggest even remotely
11 that he be incompetent.

12 MR. ARIAIL: Just a second.

13 (Off the record)

14 (Back on the record)

15 BY MR. ARIAIL:

16 Q. Mr. Price, I'm going to hand you up a psychiatric
17 evaluation prepared by Dr. Donna Schwartz-Watts and ask you
18 if you reviewed that?

19 A. Yes, sir.

20 Q. Okay.

21 MR. ARIAIL: Your Honor, we would like to offer
22 this as an exhibit.

23 (Psychiatric Evaluation marked as State's Exhibit
24 No. 1 for identification)

25 MR. MAULDIN: No objection.

1 THE COURT: Without objection, it's offered into
2 evidence.

3 We showed Dr. Domino's report as Court's Exhibit
4 No. 1.

5 This would be State's Exhibit No. 1.

6 (Forensic Evaluation Report marked as Court's
7 Exhibit No. 1 for identification).

8 MR. ARIAIL: Your Honor, I would also like to
9 offer his CV as an exhibit for the court.

10 MR. MAULDIN: Well, no objection under the
11 circumstances, Your Honor.

12 THE COURT: Okay.

13 (Curriculum Vitae marked and received into
14 evidence as State's Exhibit No. 2)

15 THE COURT: Without objection, that would be
16 State's Exhibit 2.

17 MR. ARIAIL: That's all I have.

18 Answer any questions Mr. Mauldin would have.

19 CROSS EXAMINATION BY MR. MAULDIN:

20 Q. Just a couple of very narrow questions, Mr. Price, if I
21 might.

22 A. Yes, sir.

23 Q. You describe in your testimony your involvement in this
24 case in the initial trial and sentencing back in 2001?

25 A. Yes, sir.

1 Q. I want to put my question in context for you. The
2 South Carolina Supreme Court remanded the sentencing portion
3 of Michael's case in the spring of last year, about a year
4 and four or five months ago, so I want to begin at that
5 point. Not back in 2001, but in March or April, or
6 thereabouts, of 2006.

7 A. Yes, sir.

8 Q. I want you to give the court an estimate of
9 approximately how many hours -- and if you need to check
10 your records there, how many hours you have spent in the
11 evaluation of this case since the spring of 2006.

12 A. I would -- I would estimate between 50 and 60. That
13 would include the issues about mental retardation in the
14 spring.

15 Q. And you have met with Michael one time?

16 A. That's correct.

17 Q. And that was this morning in this courthouse for two
18 hours?

19 A. That's correct.

20 Q. And that is the only opportunity that you have had to
21 actually interact with Mr. Laney?

22 A. Well, I obviously had observed him before, but that's
23 the first time I have actually sat face to face with him and
24 been able to question him and talk with him, yes, sir.

25 MR. MAULDIN: Nothing further.

1 THE COURT: Any redirect?

2 MR. ARIAIL: None, Your Honor.

3 THE COURT: Thank you, sir. You may step down.

4 Any objection to this witness being excused?

5 MR. ARIAIL: None.

6 MR. MAULDIN: No, Your Honor.

7 THE COURT: Thank you, sir. You may be excused.

8 MR. ARIAIL: The State has nothing further.

9 THE COURT: All right. Anything in reply?

10 MR. MAULDIN: Your Honor, if I -- to make sure my
11 records are correct, you have received as a Court's Exhibit
12 the report from the state hospital dated August the 21st,
13 2007? That's what you have as a Court's Exhibit?

14 THE COURT: That's correct. That's Dr. Domino's
15 report.

16 MR. MAULDIN: Yes, sir.

17 THE COURT: I got that as Court Exhibit No. 1.

18 MR. MAULDIN: And you have Dr. Schwartz-Watts
19 three-page psychiatric report, dated April of 2007?

20 THE COURT: I have that.

21 MR. MAULDIN: All right.

22 Nothing further, Your Honor.

23 THE COURT: All right. Let's take just a short
24 break. I need to review some of these documents. We will
25 be right back. We will take just a short break.

1 (Whereupon, proceedings were recessed)

2 (Whereupon, proceedings were reconvened)

3 THE COURT: All right. I'll be more than glad to
4 hear from either or both of the attorneys, if there is any
5 statements they wish to make, on this issue of competency.

6 Anything from the State or from -- certainly, Mr.
7 Mauldin, if you want to?

8 MR. ARIAIL: Nothing from the State, Your Honor.

9 MR. MAULDIN: Your Honor, just one moment.

10 We would rely upon the testimony of Dr.
11 Schwartz-Watts, who has been involved in this case for
12 years.

13 We also make note of the fact that the State, in
14 fact, put in Dr. Schwartz-Watts' report to you, and that
15 report -- the text of that report certainly would support
16 the position that the defendant takes with regard to the
17 competency issue, Your Honor. Thank you.

18 THE COURT: All right. Thank you, Mr. Mauldin.

19 Well, obviously I have had an opportunity to
20 review the exhibits and the testimony of the experts who
21 have offered their testimony.

22 I have also had an opportunity to make
23 observations of the defendant, not only in today's hearing,
24 but on other hearings during the course of the pretrial
25 motions that we have heard.

1 Obviously this is a matter that the competency has
2 been raised by the defendant. And the defendant, under the
3 law, has the burden of proof by the preponderance of
4 evidence to show the incompetency.

5 And for him to meet the requirements of
6 incompetency, of course, the defendant would have to be
7 shown that he does not have sufficient present ability to
8 consult with his attorney, a reasonable degree of rational
9 understanding, nor to have a rational or factual
10 understanding of the proceedings against him, our law.

11 Dr. Schwartz-Watts' report obviously mentions
12 delusional beliefs and disorganized thinking.

13 The other experts find to the contrary, or either
14 those are not established.

15 The questions that obviously must be asked is
16 whether or not a defendant understands the charges in this
17 case, not -- which are against him, but to which he has been
18 found guilty, and the penalties that he now faces, the
19 severity of those penalties that he now faces; whether he
20 can assist his legal counsel; whether he understands the
21 role of the various courtroom officers.

22 Certainly there is evidence in the record that he
23 does understand the proceedings and the charges and
24 penalties, the duties of the solicitor and the duties of his
25 attorneys, the judge, and other courthouse personnel. And

1 he certainly knows how to control his behavior in the
2 courtroom, the seriousness of the charges.

3 Obviously the law is not such that it's whether or
4 not the defendant cooperates with his counsel, but whether
5 or not he has sufficient capacity to cooperate with his
6 counsel. That's what must be looked at.

7 Under the Statute that we are here on, Section
8 44-23-430, the court finds that the defendant is fit to
9 stand trial; that the criminal proceedings should be
10 presumed, and will resume, to begin next Tuesday, September
11 the 4th, 2007.

12 I find that there is a showing of competency for
13 him to understand the nature of the proceedings still
14 pending against him in sentencing. Therefore, the case will
15 proceed.

16 Is there any other matters that we need to take
17 care of today?

18 MR. ARIAIL: Yes, Your Honor.

19 At this time the State would like to file with the
20 court its notice of intent to withdraw to seek the death
21 penalty in this case and have the defendant sentenced in
22 accordance with his prior convictions for murder.

23 The victims in this case, the victims families
24 have been consulted on numerous occasions as we have
25 proceeded through the process that's led up to this point

1 and have concluded, along with me, that even if the
2 proceedings were to go forward, that the likelihood is that
3 the family would continue to be drawn into a controversy,
4 even to the day of the defendant's execution, if that ever
5 occurred, over the various issues of mental -- or the
6 various mental issues that have been raised.

7 The fact that he's found competent today, as you
8 are aware, doesn't mean that he would be continue to remain
9 competent. That issue would continue to be litigated. I
10 have explained all that to the family. It's their wish that
11 we withdraw the notice to seek the death penalty at this
12 time and to request the court to impose two consecutive life
13 sentences without the possibility of parole upon the
14 defendant.

15 THE COURT: All right. Anything from the defense?

16 MR. MAULDIN: Your Honor, the -- preliminarily I
17 might -- that there are couple of motions that we filed, one
18 dated April the 16th; one dated August the 27th, which was a
19 renewal of the previous motion. Both involved motions to
20 quash the death notice.

21 It is my legal opinion that if the death notice is
22 withdrawn, then those motions become moot. So I am asking
23 that the court allow me to withdraw motions, dated April the
24 16th and August the 27th, relating to quashing the death
25 notice.

1 We -- in followup to Mr. Ariail's representations
2 to the court that there have been long and difficult
3 discussions, and we do believe that the appropriate approach
4 at this point would be the sentencing. That's all that the
5 court still has before it on this case.

6 The case is very complicated. It has become a
7 very complicated case under the Atkins decision, and also
8 now that the competency questions, and it likely would go
9 for years, for -- literally for years. And so we do believe
10 that the withdrawal of the notice changes the complexion of
11 this case entirely, and the -- my client, having been
12 convicted, and that conviction -- those convictions having
13 been affirmed, we would think that the only matter for the
14 court to determine is the appropriate sentence for a
15 noncapital conviction murder.

16 So prior to that sentencing, of course, I would
17 like to make a few comments, but I have nothing further as
18 to the procedural matters at this time.

19 THE COURT: Is there any reason that the
20 sentencing can't proceed at this time?

21 MR. ARIAIL: No, Your Honor.

22 THE DEFENDANT: I would like to --

23 MR. MAULDIN: No, Your Honor.

24 Hang on. Hang on.

25 No, Your Honor.

1 THE COURT: All right. Do you need any time to
2 talk with your client?

3 MR. MAULDIN: I would be glad to speak to him for
4 just a moment, Your Honor, if the court wishes?

5 THE COURT: It's up to you.

6 MR. MAULDIN: I'll be glad to step out to speak to
7 him, Your Honor.

8 THE COURT: We will just stand at ease.

9 MR. MAULDIN: Just for a moment, Your Honor.

10 THE COURT: Yes, sir. We will not leave the
11 bench.

12 (Off the record)

13 (Back on the record)

14 THE COURT: Are you ready to proceed, Mr. Mauldin?

15 MR. MAULDIN: Yes, Your Honor.

16 THE COURT: All right. Have the defendant come
17 forward, please.

18 MR. MAULDIN: Come on around.

19 THE COURT: Anything else the State wishes to
20 offer?

21 MR. ARIAIL: No, Your Honor.

22 THE COURT: Mr. Mauldin, I'll be glad to hear from
23 you at this time, sir.

24 MR. MAULDIN: Your Honor, I would say the
25 following. This court is aware, and need not be reminded,

1 and is fully aware of your authority and your power and your
2 discretion regarding the range of sentencing in this case.
3 There exists before you two counts of murder that have been
4 affirmed by the South Carolina Supreme Court, and now we
5 stand before the court for sentencing on those cases.

6 This situation is filled with sadness. There is
7 sadness all around, for everyone, in a case like this.
8 There is -- one thing that is clearly and for certain is
9 that nothing that we do in this courtroom this afternoon is
10 going to have any effect on what happened in September of
11 2000. Nothing we can do to change that. What happens in
12 the courtroom today is not going to end the pain and
13 suffering that these families, all the families, all the
14 families involved in this case. The two families of these
15 fine women are going to struggle with what happened for the
16 rest of their lives, and there is nothing that this court or
17 what happens in this courtroom will have much of an effect
18 on that, quite frankly.

19 I guess being in the role that I play in a case of
20 this nature, I have got to say that hopefully what we do in
21 court will have at least some finality to the courthouse
22 role in the suffering that people have to deal with and the
23 healing that has to follow, or at least hopefully can begin
24 at this stage. The sentencing at least will allow all the
25 people involved to at least begin to move forward in their

1 own individual lives.

2 And this particular situation, of course, the
3 public is forever safe. We have -- you know, Michael will
4 likely live the rest of his tortured life in prison. It's a
5 difficult situation. I have been involved in this case and
6 representing Michael for a long time.

7 And I will say, for the record, that I appreciate
8 the State's willingness and Mr. Ariail, in particular, his
9 willingness to at least keep a door open to try to figure
10 out if we could come up with a resolution to this that would
11 leave everyone at least with some semblance of dignity and
12 the healing process can begin.

13 I think we have a responsibility to search for
14 resolutions that will -- while we know they will not
15 eliminate the pain for the parties involved, but somehow
16 reduce that and allow people to move forward in their lives.
17 I think that's what we have done here. It's been difficult
18 and I appreciate the State's role in that.

19 I appreciate Mr. Tessier's assistance in working
20 with me with Michael.

21 I know that Michael has had some difficult times,
22 and, you know, we certainly hope that some of those things
23 will begin to work themselves out.

24 So with that, Your Honor, we have nothing further.

25 If Michael wishes to say something, certainly you

1 have an opportunity, but that's all we have to say, Your
2 Honor.

3 THE COURT: Okay. Thank you.

4 Mr. Laney, is there anything that you would like
5 to tell me before sentence is imposed?

6 THE DEFENDANT: Yeah. I looked at them
7 transcripts and the way the first trial happened and I'm not
8 agreeing to anything. As far as an attorney being --
9 power-of-attorney type of situation that I'm in, and I plan
10 to appeal. And, you know, basically all I can say is I
11 ain't had time to prepare for this. I have been blocked by
12 inmates, by police coming in and taking stuff from -- I'm
13 trying to learn. I got -- I got health problems. It's
14 been that people just can't seem to get the right issues
15 raised. He ain't thinking at things right. It's an
16 organization, I know, but I feel like I needed more time,
17 which apparently I ain't going to get enough time and it's
18 going to give me some people time.

19 And I also feel like that it's a tactic, you know,
20 been used against me to keep me from further being able to
21 learn what I need to actually express myself in a way
22 that -- to keep from being taken advantage of further,
23 especially, you know, being in the State of South Carolina
24 and their prison system, you know, and how it works.

25 So, you know -- and I have got some stuff over.

1 there now that I have been writing notes about, copies, or
2 whatever that guy said, that I plan to try to send to a
3 judge, whoever, to try to -- you know what I'm saying?

4 THE COURT: Yes, sir.

5 All right. Well, thank you very much for those
6 comments.

7 Mr. Tessier, I left you out. I'll be certainly
8 glad that -- you worked awfully hard on this case. I'll
9 certainly be glad to hear from you, if there is anything.

10 MR. TESSIER: Nothing from me, Your Honor. Thank
11 you.

12 THE COURT: Well, it's obvious from the record
13 that Mr. Laney has had a rocky road in life's journey, Mr.
14 Mauldin. There has been substantial drug abuse. Clearly
15 the intellectual functioning of Mr. Laney is not normal, but
16 I think equally clear that he's committed and been found
17 guilty of brutal crimes against these ladies. And I just
18 can't imagine the shock and hurt and agony felt by family
19 members of these two victims.

20 As much as they impact these victims, the acts
21 that have been committed by Mr. Laney also have impacted all
22 of us living in a civilized society in the State of South
23 Carolina, which is, in reality, just the normal citizens of
24 our state have also felt the evil of these heinous crimes
25 that have been committed. And under our law, while it's

1 imperfect, the crimes must be punished so there can be
2 justice for everyone. And hopefully the sentences imposed
3 will properly fulfill that honorable desire and goal that we
4 have to administer justice.

5 In Case Number 2001-GS-23-3214, the sentence of
6 the court is that the defendant be committed to the State
7 Department of Corrections for a term of life without any
8 eligibility for parole.

9 Case Number 2001-GS-23-3219, the sentence of the
10 court is that the defendant be committed to the State
11 Department of Corrections for life without parole.

12 This sentence is to be consecutive to that
13 previously imposed under Indictment 3214.

14 Thank you very much.

15 MS. STROM: Thank you, Your Honor.

16 MR. ARIAIL: Thank you, Your Honor.

17 MS. STROM: Judge, do you need to tell him he has
18 ten dates to appeal?

19 THE COURT: Yeah.

20 Mr. Laney, let me just remind you of one thing,
21 that you had mentioned that you did have an appeal that you
22 were wanting on the other case.

23 Let me remind you also that you have a right to
24 appeal this proceeding that we have had today, the
25 sentencing, within ten days. And if you can't afford a

1 lawyer, one would be appointed for you.

2 Do you understand that, that you can appeal what
3 just happened today?

4 THE DEFENDANT: No, I didn't know that.

5 THE COURT: Well, do you understand now that you
6 can?

7 THE DEFENDANT: Can I get the information while
8 I'm here?

9 THE COURT: We will make sure the information that
10 I'm giving you now is that you have a right to appeal the
11 sentencing procedure within ten days.

12 THE DEFENDANT: Sentencing procedure?

13 THE COURT: What we have done today, you have a
14 right to appeal that within ten days. And if you need a
15 lawyer, one could be appointed for you.

16 THE DEFENDANT: Yeah. Yeah.

17 THE COURT: Okay. I just wanted you to be aware
18 of that.

19 Do you understand that right?

20 THE DEFENDANT: This life-without-parole thing is
21 a question that I got. I mean, I was -- I seen somewhere
22 where it says the Constitution or something -- not
23 constitutional about the Constitution -- or Constitutional
24 about the Constitution that I could raise any issue.

25 THE COURT: Well --

1 THE DEFENDANT: -- in life.

2 THE COURT: You certainly would have a --

3 THE DEFENDANT: Anything as far as a life
4 imprisonment.

5 THE COURT: Well, you can appeal. You can appeal
6 this matter within ten days. I just wanted you to be aware
7 that you had that right, if you wish to exercise it.

8 THE DEFENDANT: Oh, yeah, yes, sir.

9 THE COURT: Thank you very much.

10 (END OF REQUESTED TRANSCRIPT OF RECORD)

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CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for GREENVILLE County, South Carolina, on the 30th day of AUGUST, 2007.

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

SEPTEMBER 28, 2007

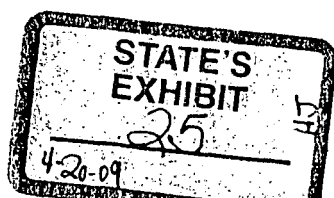


Michael R. Watts
Circuit Court Reporter

1. Postpone Laney evaluation at Dept. of Mental Health for several weeks. (Judge Welmaker to sign consent order.)
2. Public Defender to withdraw all motions, memoranda and statements relating to fairness of proceedings.
3. Solicitor to withdraw death notice.
4. Judge Welmaker to find Laney retarded based on evidence already in the record.
5. Judge Welmaker to sentence Laney to life without parole.
6. Laney to be evaluated by Dept. of Mental Health to affirm competency. (Evaluation for retardation unnecessary.) Public Defender to withdraw motion (including all support) relating to competency.

Notes from
Coul Mueller

We met w/
family by
did & was
to do this @
4:15 time.
BS

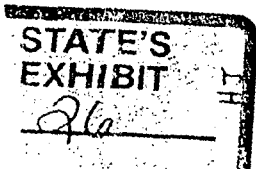


STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
THE STATE	)	
	)	
VS.	)	ORDER
	)	
MICHAEL JAMES LANEY,	)	
	)	
DEFENDANT.	)	

This matter came before me pursuant to a motion filed by the State of South Carolina for a hearing concerning the issue of mental retardation on the part of the Defendant, Michael James Laney. The matter arises as a result of the ruling by the United States Supreme Court in Atkins v. Virginia, 536 US 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In that case, the Supreme Court held that the execution of a mentally retarded person is cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution. The individual states were given the opportunity of developing procedures to reflect these constitutional restrictions in capital cases.

Consequently, the South Carolina Supreme Court addressed the issue the following year in the case of Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). There, our Court set forth the outline to be followed in cases involving mentally retardation issues by stating that "...the trial judge shall make the determination in a pre-trial hearing, if so requested by the Defendant or the prosecution, after hearing evidence, including expert testimony, from both the Defendant and the State." The Court asserted that Defendant would have the burden of proof as to the mental retardation by the preponderance of the evidence. As a result, the State requested such a hearing, which was held on April 12, 2007.

Each side put forth an expert witness for purposes of the hearing. The defense called Dr. Caroline Everington, a professor of Special Education and Associate Dean in the College of Education at Winthrop University. Dr. Everington testified extensively about mental retardation, and the procedures by which a determination is made. Based upon the definition of mental retardation set forth under statutory law, she testified as to the three major parts of the definition which included intellectual functioning, adaptive behavior, and the nature of mental retardation being a developmental disorder, i.e., evidenced in an individual before age 18. In addition to setting forth the criteria of each prong in detail, Dr. Everington testified as to her particular findings for Michael James Laney on each aspect. She determined that Defendant was in fact mentally retarded both at the present time and at the time of the commission of the offenses.

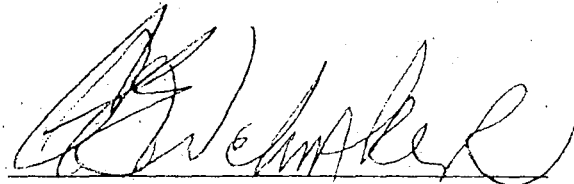


Certified Copy
Paul B. Wicks
 Clerk of Court C.P. & G.S.
 Greenville County
 Dated

Through cross-examination, the State brought out several factors in the analysis by Dr. Everington which would reflect the absence of mental retardation in Defendant. In addition, the State called as a witness Dr. Pamela Crawford, an expert in the field of psychiatry and forensic psychiatry. Dr. Crawford had examined Defendant during the time before his first trial. Instead of mentally retarded, her diagnosis for Defendant is borderline intellectual functioning. She set forth her reasons from each aspect, along with her observations and prior interactions with Defendant. Both experts were thoroughly cross-examined by the opposing side.

Not every piece of evidence available relating to the mentally retardation issue was likely presented for this pre-trial hearing before the Court. From the opinions of the experts, which have been considered by the Court, Defendant has not met his evidentiary burden by the greater weight. The Court therefore rules that a finding of mental retardation at this time is not warranted by a preponderance of the evidence.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'G. Edward Welmaker', written over a horizontal line.

G. EDWARD WELMAKER
CIRCUIT COURT JUDGE
THIRTEENTH JUDICIAL CIRCUIT

August 20, 2007
Pickens, South Carolina

WITH

→ WE WOULD LIKE IT REDEFINED
THE CONCEPT OF "HAND OF ONE" "HAND OF MANY"
IN CONCERT WITH THE TWO SEPARATE CHARGES
OF MURDER.

10. HOW COULD YOU EVER FIND ONE GUILTY AND
ONE INNOCENT?

FOREMAN

Doug K. Stemen

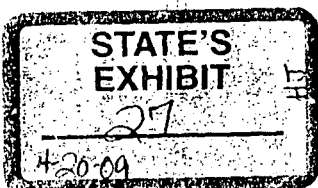
2:11 JUNE 23 06

→ WHATEVER TESTIMONY RELATED TO WHERE
JIM COCKMAN'S BODY WAS PLACED IN THE
SUV AT HWY 11/14 INTERSECTION

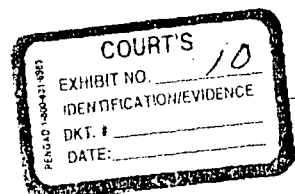
FOREMAN

Doug K. Stemen

2:13 JUNE 23 06



Certified Copy
Paul B. Winkelman
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 4-16-09



Puggett)

6/2/06

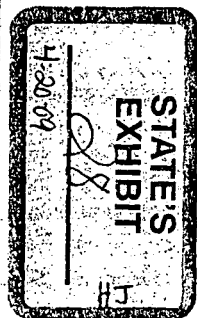
Foreman

J K Stemen

Regarding Jennifer Holloway Testimony

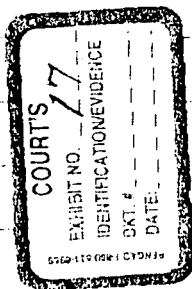
A. we would like any testimony about

1. Her being ordered to tape MR. Cockman
2. Her statements ^{from} ~~and/or~~ Expert witnesses who report that David E told her to do better job of wrapping
3. Her statements from expert witnesses that she taped up to or over MR. Cockman's nose



B. we would like any testimony that relates Jennifer Holloway's experience of being abused by David Edens.

C. we would like any testimony about Jennifer Holloway's past criminal record.



D. Testimony of Dr. Watts related her diagnosis (DSM) in comparison to local Doctor at the "Jail House". In the context of "Did you agree with previous diagnosis")

Page (2) con'd

E. We need any testimony from
DR LORINC and DR Watts with
regards to Jennifer Holloway
taping MR. Cockman.

6/27/06

Foreman

8:23pm

D J K Stemon

Verified Copy

Paul B. Widenarium
Clerk of Court C.P. & G.S.
Greenville County, SC

Dated 4-16-09

Solicitor, Thirteenth Judicial Circuit



Telephone: 864-467-8282
Telefax: 864-467-8582

Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, South Carolina 29601-2185

Solicitor
Robert M. Ariail

July 19, 2006

Ms. Susan McLaughlin
103 Paddock Drive
Greer, SC 29650

Dear Ms. McLaughlin:

Please accept my sincere appreciation for the dedicated service you rendered on jury duty in the trial and sentencing of David Wendell Edens and Jennifer Annette Holloway. Although the issues were difficult, it was clear that you were serious about your deliberations. The State always seeks conscientious jurors to resolve the issues which are involved in each case, but more importantly their service insures a strong, but fair criminal system for the benefit of the entire community.

I enclose herewith an anonymous questionnaire which I would appreciate you completing and returning to us. This will assist in my continuing effort to improve our trial preparation and Courtroom presentation in these cases. Even though the responses we receive to the questionnaire are extremely helpful, we have found that it is even more valuable for us to meet with jurors socially and further discuss their observations of the trial process. Therefore, we would like to invite you to be our guests for dinner. The tentative date is August 8, 2006 at 6:30 at a location to be determined. If you would be able to come, please advise us by contacting my assistant, Marcia Pickett, at 467-8282. Based upon the responses received, I will advise you of a firm date and location.

Even though your sentencing deliberations did not result in a unanimous agreement, we would like to encourage each of you to join us even though you may feel you were voting against our request. This is not to challenge anyone's decision, but rather to understand how we could improve our court presentation.

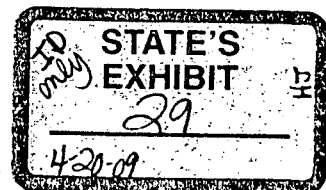
As you are aware from Judge Hayes' instructions, there is no obligation upon you to accept or respond to this questionnaire or invitation.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Bob Ariail".

Robert M. Ariail
Solicitor, Thirteenth Judicial Circuit

RMA:mp
Enclosure





Mark Sanford
Governor

Adrienne Riggins Youmans
Director

South Carolina
Department of Labor, Licensing and Regulation

Division of Legal Services
Office of General Counsel

April 16, 2009



110 Centerview Drive
Post Office Box 11329
Columbia, SC 29211-1329
Phone: (803) 896-4470
FAX: (803) 896-4471
www.llr.state.sc.us

Everette P. Godfrey, Jr.
Godfrey Law Firm, LLC
10 East Avenue
Greenville, SC 29601

Re: License requirements for expert testimony

Dear Mr. Godfrey:

The South Carolina Department of Labor, Licensing and Regulation provides administrative and investigative services to more than forty professional and occupational licensing programs. S.C. Code 40-1-50(A). The Department investigates allegations of unlicensed practice under the authority of S.C. Code 40-1-80(A). Where appropriate, the Department institutes criminal or civil proceedings for unlicensed practice under the authority of S.C. Code 40-1-200 and 210.

The South Carolina Department of Labor, Licensing and Regulation does not pursue either criminal or civil sanctions against individuals who testify as experts in the courts of this state, even when those individuals are not licensed in South Carolina. On two occasions the South Carolina Supreme Court considered statutes that appeared to require state licensure as a condition to giving expert testimony in the courts of this state. In each case, the Court ruled that the statute could not be used to prevent out-of-state experts from testifying in South Carolina Courts. Baggerly v. CSX Transportation, Inc., 370 S.C. 362, 635 S.E.2d 97 (2006); Re: Act No. 385 of 2006 [No Number in original], Supreme Court of South Carolina, August 24, 2006.

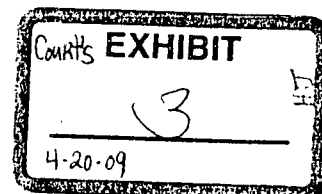
These decisions appear to be based upon the doctrine of separation of powers and to hold that the decision of the court to allow or disallow a particular expert witness cannot be limited by legislation. Because the Department of Labor, Licensing and Regulation cannot distinguish the legislative action in the Social Work Practice Act from that in the Engineering and Medical Practice Acts, the Department does not seek to prevent an out-of-state social worker from giving expert testimony, if qualified by the rules of the court, despite not being licensed in South Carolina.

With kindest regards, I am

Very truly yours,

Sharon A. Dantzler
Deputy General Counsel

SAD:osm



CLERK OF COURT
 STATE OF SOUTH CAROLINA PICKENS COUNTY THE COURT OF GENERAL SESSIONS
 SOUTH CAROLINA THIRTEENTH JUDICIAL CIRCUIT

COUNTY OF PICKENS

2007 AUG 17 P 4:40 Case No.: 2006-GS-39-2222-2225

State of South Carolina,

Plaintiff,

v.

Jerry Buck Inman,

Defendant.

**Motion To
 Determine Mode of Trial**

To: Solicitor, Thirteenth Judicial Circuit

MOTION

The Defendant, by and through the undersigned attorneys, moves the Court for an Order to determine the mode of trial. The Defendant seeks to enter a guilty plea to all indictments. By way of this Motion, the Defendant demands a jury trial to determine his sentence.

The Defendant does not wish to contest his guilt and has informed undersigned counsel of his strong desire to acknowledge his guilt. The Defendant does not want to put the victim's family through the spectacle of a courtroom proceeding regarding his guilt. The Defendant seeks to alleviate the cruel impact the attendant media attention would have on everyone involved. The Defendant wishes to enter his guilty plea as quickly as possible.

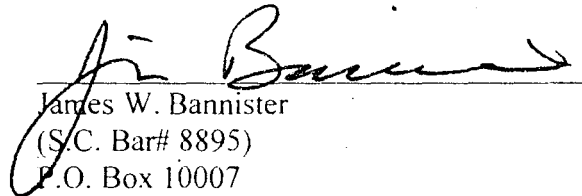
This Motion is made pursuant to the 6th Amendment Right to a Jury Trial as interpreted by *Ring v. Arizona*, 536 U.S. 584 (2002) and in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), the 8th Amendment's Cruel and Unusual Punishment Clause as interpreted by *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Skipper v. South Carolina*,

476 U.S. 1 (1986), *Payne v. Tennessee*, 501 U.S. 808 (1991), the 14th Amendment Due Process Clause, the 14th Amendment Equal Protection Clause, the 6th Amendment Confrontation Clause, the 6th Amendment Compulsory Process Clause, *Simmons v. United States*, 390 U.S. 377 (1968), *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985), and *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001).

WHEREFORE the Defendant seeks an Order of the Court to determine the mode of trial for proceeding with Defendant's guilty plea and demand for jury trial sentencing.

Respectfully submitted,

BANNISTER & WYATT, LLC



James W. Bannister

(S.C. Bar# 8895)

P.O. Box 10007

Greenville, SC 29603

Ph: (864) 298-0084

Fax: (864) 298-0146

ATTORNEY FOR THE DEFENDANT

August 17, 2007

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
)
 COUNTY OF PICKENS) THIRTEENTH JUDICIAL CIRCUIT

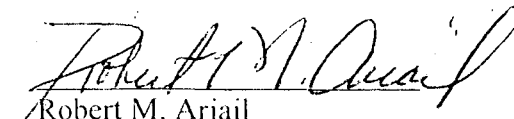
THE STATE)
)
 VS.) STATE'S RESPONSE TO DEFENDANT'S
) MOTION TO DETERMINE MODE OF
 JERRY BUCK INMAN,) TRIAL
)
 DEFENDANT)
) 2006-GS-39-2222-2225

Comes now the State of South Carolina, by and through its attorney, Robert M. Ariail, Solicitor for the Thirteenth Judicial Circuit and responds to the defendant's motion as follows:

The defendant has filed a motion requesting that Court determine the mode of the trial. In its motion, the defendant states that he wishes to plead guilty to the charges and yet be sentenced by a jury. This very practice has been reversed by the South Carolina Supreme Court in State v. Truesdale, 296 SE2d 528 (1982), Shaw v. State, 277 SE2d 140 (1981) and State v. Patterson, 295 SE2d 264 (1982). The Court held that empanelling a jury for the sole purpose of sentencing a defendant once he has pled guilty is improper. If a defendant were allowed to plead guilty and then be sentenced by a jury, that would be a conditional guilty plea, which are prohibited by our law.

Furthermore, the defendant cites Ring v. Arizona, 536 U.S. 584 (2002) as authority for this practice. However, State v. Wood, 607 SE2d 57 (2004), State v. Crisp, 608 SE2d 429 (2005) and State v. Downs, 604 SE2d 377 (2004) all hold that the sentencing procedure outlined in 16-3-20 of the South Carolina Code of Laws does not violate Ring. Specifically in our statute, it sets forth that if the defendant pleads guilty, the judge shall conduct the sentencing proceeding. See Section 16-3-20 (B) South Carolina Code of Laws, as amended.

Respectfully submitted this 11 day of September, 2007.


 Robert M. Ariail
 Solicitor, 13th Judicial Circuit

2007 SEP 11 P 3 24

CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

SOUTH)

THIRTEENTH JUDICIAL CIRCUIT

COUNTY OF PICKENS)

2009 APR 20

Case No: 2006-GS-39-2222-2225

State of South Carolina,)

Plaintiff,)

v.)

Jerry Buck Inman,)

Defendant.)

**RENEWED MOTION FOR RECUSAL
OF THIRTEENTH CIRCUIT SOLICITOR'S
OFFICE**

TO: THIRTEENTH CIRCUIT SOLICITOR

The Defendant, by and through the undersigned counsel, moves this Court at a time convenient to be heard for an Order recusing the Thirteenth Circuit Solicitor's Office from the prosecution from the above named Defendant. On September 11, 2008, after the Solicitor drove the Defendant's expert witness from the stand with threats of criminal prosecution, the Defendant moved for a mistrial and for recusal of the Thirteenth Circuit Solicitor's Office. At that time, the Defendant placed on the record its belief that allegations of misconduct which formed the basis of the Motion for Mistrial placed the Solicitor's Office in a position of an unavoidable conflict. Specifically, the Defendant placed on the record its belief that the Defendant's allegations of prosecutorial misconduct placed the Solicitor's Office in the position of having to defend allegations that were necessarily tied to individual intent and purpose.

The Defendant was made aware through correspondence with the Court that the Thirteenth Circuit Solicitor's Office may have caused an unlawful arrest warrant to be issued against the Defendant's former expert witness, Dr. Marti Loring. It is this type of conduct that the Defendant hoped to avoid with its Motion for recusal. Now that the Defendant's worst fears have been realized, the Defendant renews its Motion for Mistrial. The Defendant incorporates

herein as if set for verbatim its Renewed Motion For Mistrial and imposition of sentence of Life Without Parole filed contemporaneously herewith. Furthermore, the Defendant incorporates herein its Motion to Determine the Role of the Solicitor and Prosecution team. The Defendant specifically cites to the case of State v. Lee, 203 SC 536, 28 SE2d. 402 (1943) which holds that a prosecutor may either be a prosecutor on a case in question or a witness, but should not be both. See also, State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981) ("The role of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.") (C.J. Lewis dissent).

WHEREFORE, the Defendant seeks an Order of the Court recusing the Thirteenth Circuit Solicitor's Office from the trial of the above referenced case.

Respectfully submitted,

BANNISTER & WYATT, L.L.C.



James W. Bannister

(Fed. 6902)

(S.C. Bar# 8895)

P.O. Box 10007

Greenville, SC 29603

Ph: (864) 298-0084

Fax: (864) 298-0146

ATTORNEY FOR THE DEFENDANT

April 19, 2009

COUNTY OF PICKENS

THIRTEENTH JUDICIAL CIRCUIT

THE STATE

VS.

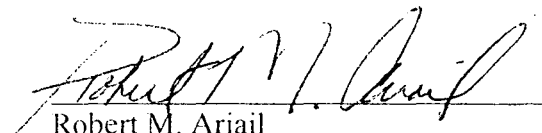
RESPONSE TO RENEWED MOTION
FOR RECUSAL OF THIRTEENTH
CIRCUIT SOLICITOR'S OFFICE

JERRY BUCK INMAN,

2006-GS-39-2222, 2006-GS-39-2223,
2006-GS-39-2224, 2006-GS-39-2225

DEFENDANT

The State of South Carolina by and through its undersigned attorney, Robert M. Ariail, Solicitor for the Thirteenth Judicial Circuit, hereby responds to and moves for the dismissal of the Defendant's Motion for Recusal of Thirteenth Circuit Solicitor's Office dated April 17, 2009 on the basis of the affidavit of Mr. Don Geary attached hereto setting forth the circumstances surrounding the service of papers on Dr. Marti Loring relating to an out of state subpoena.



Robert M. Ariail

Solicitor, Thirteenth Judicial Circuit

Dated: April 19th, 2009

2009 APR 20 P 1:17

0159 300001
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA
 CLERK OF COURT
 PICKENS COUNTY
 COUNTY OF PICKENS
 SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
 THIRTEENTH JUDICIAL CIRCUIT

2008 SEP -9 P 2: 02

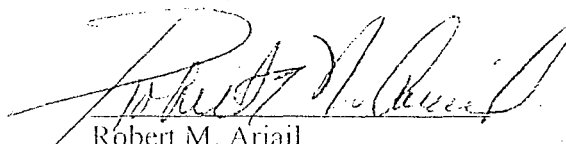
THE STATE	)	STATE'S RESPONSE TO DEFENDANT'S
	)	MOTION TO RECONSIDER ORDER
VS.	)	DATED NOVEMBER 15, 2007 re:
	)	JURY TRIAL SENTENCING AFTER
JERRY BUCK INMAN,	)	ENTRY OF GUILTY PLEA
	)	
DEFENDANT	)	2006-GS-39-2222, 2006-GS-39-2223
	)	2006-GS-39-2224, 2006-GS-39-2225

Comes now the State of South Carolina, by and through its attorney, Robert M. Ariail, Solicitor for the Thirteenth Judicial Circuit and responds to the defendant's motion as follows:

1. The defendant is making asking the court to reconsider its decision of November 15, 2007 in which the Court held that the defendant could not enter a guilty plea and then be sentenced by a jury.
2. The current state of the law in South Carolina is that a defendant who pleads guilty, is required to be sentenced by the trial judge. See 16-3-20 of the South Carolina Code of Laws, State v. Crisp, 608 SE 2d 429 (2005), State v. Downs 604 SE 2d 377 (2004), State v. Patterson, 295 SE 2d 264 (1982), and State v. Truesdale, 296 SE 2d 528 (1982).
3. The State incorporates its response and memorandum to the defendant's earlier motion and any arguments made at the hearing on the defendant's earlier motion.
4. Furthermore, the defendant, at the time of his guilty plea, waived his right to have a jury sentencing. That was very clear from the questions asked by the court and answered by the defendant.

Therefore, the defendant's motion should be denied.

Respectfully submitted this 27th day of August, 2008.


 Robert M. Ariail,
 Solicitor, 13th Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	Case No.: 2006-GS-39-2222-2225
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	MOTION TO SUSPEND PROCEEDINGS
v.	)	
	)	
Jerry Buck Inman,	)	
	)	
Defendant.	)	



TO: THIRTEENTH CIRCUIT SOLICITOR'S OFFICE

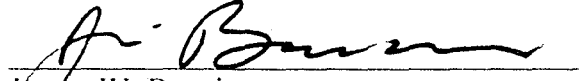
The Defendant, by and through the undersigned attorneys, moves the Court at a time convenient to be heard for an Order of the Court suspending the proceedings in the above referenced case. Counsel for the defendant received correspondence from the Court relating to an incident that occurred at some time between 6:00 p.m. – 10:00 p.m. on April 16, 2009. Upon information and belief the Thirteenth Circuit Solicitor's Office caused an unlawful arrest warrant to be issued against Dr. Marti Loring. The procurement of the unlawful arrest, the participation by the Thirteenth Circuit Solicitor's Office and the purposes behind this conduct are relevant to the Defendant's Motion for Mistrial and allegations of prosecutorial misconduct. Furthermore, this evidence is additional evidence supporting the Defendant's Motion pursuant to the double jeopardy clause of the 5th Amendment for imposition of a sentence of Life Without Parole.

Currently, the hearing on the Defendant's Motion for a Mistrial is scheduled for April 20, 2009. These proceedings need to be suspended to permit the Defendant to obtain a satisfactory investigation of the issues mentioned herein.

WHEREFORE, the Defendant seeks an Order of the Court granting its Motion to suspend proceedings.

Respectfully submitted,

BANNISTER & WYATT, L.L.C.

A handwritten signature in black ink, appearing to read "J. Bannister", is written over a horizontal line.

James W. Bannister

(Fed. 6902)

(S.C. Bar# 8895)

P.O. Box 10007

Greenville, SC 29603

Ph: (864) 298-0084

Fax: (864) 298-0146

ATTORNEY FOR THE DEFENDANT

April 19, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	Case No.: 2006-GS-39-2222-2225
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	MOTION TO DETERMINE ROLE
v.	)	OF SOLICITOR ARIAIL AND
	)	PROSECUTION TEAM
Jerry Buck Inman,	)	
	)	
Defendant.	)	

2009 APR 20 P 1:19

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

The Defendant, by and through undersigned counsel, moves the Court at a time convenient to be heard for a determination of the role of the Solicitor and members of the prosecution team. Specifically, the Defendant seeks an order of the Court determining whether the Solicitor and his prosecution team are lawyers or witnesses.

As the Court is aware, the Defendant has previously moved for a mistrial and for the imposition of the sentence of Life Without Parole. The motions, memoranda and arguments are incorporated herein as if set forth verbatim. A cursory review of the Defendant's position on its Motion for mistrial and imposition of Life Without Parole sentence makes it clear that one of the central factual issues in determination of the defendant's motion is the intent of the Solicitor and his prosecution team. "In determining the issue of what a person knew or what a person intended at a particular time, the Court should consider any statements made or acts done or omitted by that person and all other facts and circumstances received in evidence which may aid the determination of the person's knowledge or intent." 1A. *Fed. Jury Practice and Instruction* 5th §17.07 – Proof of Knowledge and Intent (2000). It is the Defendant's position that Solicitor Ariail, Deputy Solicitor Betty Strom and potentially other members of the prosecution team are material witnesses to what Solicitor Ariail "intended at a particular time." Obviously, the

particular time relates to objections on the record by Solicitor Ariail in State v. Laney in which he accused the Defense witness's expert, Dr. Everington, of violating criminal statutes and the time period relating to the same objections in the case *sub judice* to Dr. Loring's testimony.

There appear to be two options. First, the Solicitor and the prosecution team may continue to serve in the role and capacity as lawyers, but not witnesses. Second, the Solicitor and his prosecution team may serve as witnesses, but not lawyers. "Although a prosecuting attorney is competent to testify, his testifying is not approved by the Courts except where it is made necessary by the circumstances of the case, and, if he knows before the trial that he will be a necessary witness, he should withdraw and have other counsel prosecute the case." State v. Lee, 203 S.C. 536, 28 S.E.2d 402.¹

It would be a violation of both the South Carolina Rules of Professional Conduct and the Defendant's Constitutional guarantees to cross examination secured by the Sixth Amendment to allow the Solicitor and his prosecution team to serve as both lawyers and witnesses. See Sate v. Capps, 276 S.C. 59, 65, 275 S.E.2d 872, 875 (1981) ("The role of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.") (C.J. Lewis dissent citing Code of Professional Responsibility). Furthermore, it would be a clear violation of the Defendant's Sixth Amendment right to confront and cross-examine witnesses and his Fourteenth Amendment right to due process of law to allow the Solicitor and his prosecution team to offer evidence as "officers of the Court." The Solicitor and his prosecution team have already offered evidence to the Court as "officers of the Court" on issues related to the surreptitious broadcasting of the Defendant's attorney/client privileged and attorney work product privileged communications. The

¹ To the extent necessary, the Defendant hereby places the Solicitor and his prosecution team on notice that they are material witnesses.

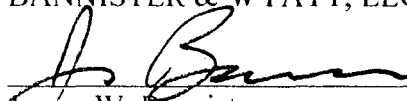
Defendant's motion, memoranda and arguments regarding the same are incorporated herein as if set forth verbatim.

Finally, the Defendant's Eighth Amendment Right to present any and all mitigating evidence is at issue because the Motion for Mistrial, if successful, results in the imposition of Life Without Parole pursuant to the Double Jeopardy Clause of the 5th Amendment. As a result, the Solicitor and his prosecution team represent mitigating evidence.

WHEREFORE, the Defendant seeks an order of the Court setting forth the role of Solicitor Ariail and his prosecution team as witnesses or lawyers, but not both.

Respectfully submitted,

BANNISTER & WYATT, LLC



James W. Bannister

(Fed. 6902)

(S.C. Bar# 8895)

P.O. Box 10007

Greenville, SC 29603

Ph: (864) 298-0084

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ATTORNEY FOR THE DEFENDANT

April 19, 2009

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) THIRTEENTH JUDICIAL CIRCUIT

COUNTY OF PICKENS) P 1: 13

Case No.: 2006-GS-39-2222-2225

State of South Carolina,)

Plaintiff,)

v.)

Jerry Buck Inman,)

Defendant.)

**RENEWED MOTION FOR MISTRIAL,
 MOTION TO IMPOSE LIFE WITHOUT PAROLE,
 AND MEMORANDUM IN SUPPORT THEREOF.**

TO: ROBERT M. ARIAIL, SOLICITOR, 13TH JUDICIAL CIRCUIT

MOTION

The Defendant, by and through the undersigned attorneys, moves the Court, at a time convenient to be heard, for an Order declaring a mistrial and imposing a sentence of Life Without Parole. This motion is made pursuant to the 6th Amendment Right to Compulsory Process, the 14th Amendment Due Process Clause and the 5th Amendment Double Jeopardy Clause. This motion incorporates herein arguments made on the record during the trial of this case, September 8, 2008- September 10, 2008, and all evidence to be introduced during the resumption of the trial on or about April 20th, 2009.

MEMORANDUM IN SUPPORT

On September 10, 2008, the Defendant moved the Court to grant its Motion for Mistrial based on a violation of the Defendant's 6th Amendment Right to Compulsory Process and his 14th Amendment Right to Due Process of law. Specifically, the motion was based on the Solicitor's unlawful intimidation of the Defendant's witness which drove the witness from the stand. The Defendant submits the following Memorandum in Support of its renewed Motion for Mistrial and Motion to Impose Life Without Parole.

I. Violation of Due Process – Intimidation of a Witness

Substantial government interference with a defense witness' free and unhampered choice to testify violates a defendant's 6th and 14th Amendment rights. The Defendant must prove substantial interference by a preponderance of the evidence.

A. Black Letter Law

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973).

The right of a defendant to present witnesses in his own behalf in order to establish a defense is a fundamental element of due process of law. *Webb v. Texas*, 409 U.S. 95 (1972).

“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. 14, 19 (1967).

“‘[S]ubstantial government interference with a defense witness' free and unhampered choice to testify violates due process' rights of the defendant.” *United States v. Henricksen*, 564 F.2d 197 (5th Cir. 1977).

1. 6th Amendment Compulsory Process Clause

“This right is found specifically in the Sixth Amendment right to compulsory process. A recent commentator has traced the development of the compulsory process clause finding that at the time of its adoption it stood for the principle that ‘a defendant should have a meaningful opportunity, at least on a par with that of the prosecution to present a case in his favor through witnesses.’” *U.S. v. Morrison*, 535 F.2d 223, 226-227 (3rd Cir. 1976); *see also Pyle v. Kansas*, 317 U.S. 213 (1942) (establishing that suppression of evidence favorable to the defendant by the prosecution constitutes a denial of due process).

2. 14th Amendment Due Process

This 6th Amendment Right is made applicable to the States and incorporated into the Due Process guarantees under the 14th Amendment. “The *Webb v. Texas* decision holds that the use of coercive measures which effectively drive a key defense witness from the stand deprives a defendant of due process of law under the Fourteenth Amendment of the U.S. Constitution.” *Missouri v. Brown*, 543 SW2d 56, 59 (Mo. App. 1976).

B. Burden of Proof – Preponderance of the Evidence

“Frequently, when a claim affecting the defendant's constitutional rights arises in a criminal case, the proponent must carry his or her burden of proof by a preponderance of the evidence.” *U.S. v. Lord*, 711 F.2d 887 (9th Cir. 1983) (applying preponderance of the evidence standard to claims of witness intimidation).

C. No Showing of Prejudice Required-Mistrial Per Se

The Defendant asserts that no showing of prejudice is required and that intimidation of a witness requires a mistrial per se. In *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979) the Court addressed whether a defendant must show prejudice: “On the basis of *Webb*, both the third and the sixth circuits have stated that they would not require a finding of prejudice in order to reverse a conviction because of this type of due process violation. We agree with their analysis of *Webb* and hold that this type of due process violation is harmful per se. (citing *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973)). *See also, State v. Hafner*, 362 A.2d 925, 936 (Conn. 1975), *cert. denied* 423

U.S. 851 (holding that "serious prosecutorial misconduct, regardless of the prosecutor's intentions, may so pollute a criminal prosecution as to require a new trial, even without regard to prejudice to the defendant").

South Carolina, however, currently requires a showing of prejudice in the context of witness intimidation. *State v. Williams*, 326 S.C. 130, 135 S.E.2d 99, 102 (1997) (conducting harmless error analysis). Even so, South Carolina still recognizes that "[d]eliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice." *State v. Quattlebaum*, 338 S.C. 441, 447, 527 S.E.2d 105, 109 (2000). As discussed below, the case *sub judice* clearly and unequivocally involves deliberate prosecutorial misconduct.

D. Misconduct Cases-A Survey of Precedent

Cases have held that various types of governmental interference with a defense witness can deprive the defendant of his right to Due Process. *See e.g., Webb v. Texas*, 409 U.S. 95, (1972) (defense witness intimidated by remarks of trial judge); *United States v. Henricksen*, 564 F.2d 197 (5th Cir. 1977) (defense witness intimidated by terms of plea bargain); *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) (defense witness intimidated by remarks of assistant United States attorney); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973) (defense witness intimidated by remarks of secret service agent involved in the case); *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982) (U.S. Attorney telephoned defendant's girlfriend's attorney to advise him to remind his client if she testified at trial she could be reindicted on dropped charges); *See also United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973); *United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973); *Bray v. Peyton*, 429 F.2d 500 (4th Cir. 1970); *Commonwealth v. Jennings*, 311 A.2d 720 (Pa. 1973).

The categories of cases that follow are set forth in an ascending level of egregiousness. They all, however, resulted in a finding of a Due Process violation requiring reversal and a new trial.

1. Statute Prohibiting Co-Defendants From Testifying

In *Washington v. Texas*, 388 U.S. 14, 19 (1967), the Supreme Court held that a defendant was denied his Sixth Amendment right to have compulsory process for obtaining witnesses by statutes providing that principals, accomplices, or accessories in the same crime cannot be introduced as witnesses for each other. The Court held that this statute denied the defendant the right to place on the stand any witness who was physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material to the defense. The statute was ruled unconstitutional and the conviction was overturned.

2. Sending Word Through Defense Witness's Attorney

In *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), the Assistant United States Attorney sent the witness messages through the witness's counsel that her testimony would be

used as evidence against her and further warned of the possibility of federal perjury charges being filed against her if she testified. According to the Third Circuit, the good faith of the United States Attorney was not relevant in an inquiry into whether the defendant was denied his constitutional right to present witnesses in his defense.

In *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982), the U. S. Attorney made a phone call to the witness's attorney suggesting that she would be well-advised to remember the Fifth Amendment. This conduct violated the defendant's due process right to present his defense witnesses freely. The government's "suggestion" was held to have destroyed the choice of the witness to testify freely. The government conceded the error in its brief and tried to argue that any error was harmless. The case was reversed.

3. Law Enforcement Personnel Conveying Message/Intimidation

In *United States v. Hammond*, 598 F.2d 1008, 1012-13 (5th Cir. 1979) the Court recited the following factual scenario:

One of these witnesses, Mr. Parsons, had already testified and been cross-examined when the court called a recess. During this recess, FBI agent Peisner approached Parsons. Peisner told Parsons that he knew about the "situation in Colorado." Parsons had been indicted in a state matter in Colorado and had agreed to go there to work with the FBI in an assistance capacity. Peisner told Parsons that if he "continued on," he would have "nothing but trouble" in Colorado. The next morning both Parsons and the other defense witness, who had not yet given any testimony, were subpoenaed to appear before a grand jury for further investigation.

* * *

In this case, it was certainly reasonable for defense witness Parsons to interpret agent Peisner's comments as threats to retaliate if Parsons continued to testify. Because of these comments, Parsons did refuse to testify. Accordingly, we find that agent Peisner's comments constituted a "substantial governmental interference" with defense witness Parson's "free and unhampered choice to testify." We therefore conclude that this governmental interference deprived the defendant of his due process right to present his witnesses. Because we hold that this due process violation requires reversal, we do not reach the question of whether, under the circumstances of this case, the government's issuance of the subpoenas also violated the defendant's due process rights.

Finally, in *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973) (per curiam), a codefendant was granted a directed verdict. The defendant then called the codefendant to testify in the defendant's case-in-chief. The trial judge warned the codefendant that his testimony could lead to a prosecution for misprision of a felony and allowed the codefendant to seek out counsel. In the meantime, a secret service agent acting at the behest of the prosecutor told the codefendant he *would* be prosecuted for misprision of a felony if he testified. The codefendant then refused to testify. *Id.* at 335. The Court concluded the agent's actions "substantially interfered with any free and unhampered determination the witness might have made as to whether to testify and if

so as to the content of such testimony.” *Id.* at 336. The court reversed the defendant's conviction, finding a due process violation. *Id.*

4. Prosecutor Meeting With Witness Outside Courtroom

In *N.Y. v. Shapiro*, 409 N.E.2d 897 (Ct. App. 1980) the defense witnesses were confronted by the prosecutor outside the courtroom and given the ominous injunction that they be consistent above all else. They sought assurance that any misstatements or inconsistencies they may have uttered during the course of their prior testimony would not suddenly become prosecutable after their appearance on defendant's behalf. The District Attorney refused to extend immunity. The Court found that this refusal served no purpose other than to irretrievably bind the witnesses to their previous sworn versions, accurate or not. By doing so, the District Attorney impermissibly affected the witnesses' meaningful exercise of their Fifth Amendment rights and insured their unavailability as witnesses for the defendant. The prosecutor's conduct was held to be clearly erroneous and the convictions were reversed.

In *United States v. Henricksen*, 564 F.2d 197 (5th Cir.1977) (per curiam), before trial, a codefendant, whose testimony would have tended to exonerate the defendant, plea bargained with the government. As part of the plea, the codefendant agreed not to testify in any way regarding the defendant. A violation of this provision would void the plea agreement and subject the codefendant to prosecution on all counts of the indictment. *Id.* at 198. The court noted that “[s]ubstantial government interference with a defense witness' free and unhampered choice to testify violates due process” and reversed the conviction. *Id.*

In *United States v. Morrison*, 535 F.2d 223, 225 (3d Cir. 1976), the government had decided not to prosecute the defendant's girlfriend. On the day of the trial, she assured defense counsel that she would testify. In the next few days, the prosecutor sent out three messages warning her, among other things, that “if she testified, that testimony would be used as evidence against her.” *Id.* The prosecutor also sent her an illegal subpoena and had her brought to his office to impress upon her the force of the law. At that encounter, he again warned her of the dangers of testifying. The Court found this to be a violation of the defendant's Due Process rights and reversed the conviction.

5. Judge to Advise Witness

In *Webb v. Texas*, 409 U.S. 95 (1972), the trial judge singled out the sole defense witness and gave him an admonition on the dangers of perjury. The trial judge went on to advise the witness of his right to refuse to testify. The trial judge further explained that he expected the witness, who had a prior criminal record and was then serving a prison sentence, to lie and to assure him that if he lied he would be prosecuted and probably convicted for perjury. The Supreme Court held that these threatening remarks effectively drove the witness off the stand, thus depriving the defendant of his right to Due Process.

6. Prosecutor Driving Witness From the Stand in Good Faith

In *California v. Warren*, 207 Cal. Rptr. 912, 974 (Ca. App. Ct. 1984), the court summarized intimidation that had occurred. “This case graphically illustrates the almost inherently coercive effect of a prosecutor’s advising a defense witness of the privilege against self-incrimination. The only respect in which a prosecutor may arguably be better situated than others to provide such advice is that his office actually makes the decision to prosecute. But it is this very power that infects a prosecutorial admonition of the right of a defense witness not to testify with a perilous potential for improper intimidation; and this is so regardless of the propriety in fact of the prosecutor’s motives. Accordingly, we hold that, in this situation, a trial judge should recommend that the witness seek advice from separate counsel or, if appropriate, appoint counsel to render such advice. Often, the Public Defender or regularly appointed private counsel is readily available to undertake such an assignment so that the trial would not be unnecessarily delayed by such a procedure.” *Id.* (internal citations omitted).

In a similar case, good faith of the prosecutor made no difference. “Even if the prosecutor’s motives were impeccable ... the implication of what he said was calculated to transform [the witness] from a willing witness to one who would refuse to testify, and that in fact was the result.” *California v. Bryant*, 203 Cal. Rptr. 733, 736 (Ct. App. 1984) (citing *United States v. Smith*, 478 F.2d 976, 979 (D.C. Cir. 1973); *Bellizzi v. Superior Court*, 524 P.2d 148 (1974). “Moreover, if the prosecutor’s only purpose was to ensure that the court advise Harris of his rights, the matter could have been discussed with the court out of the presence of the witness so admonitions could be presented to the witness, by the court, ‘without any threats or implication of retaliation.’” *Warren*, 207 Cal. Rptr. at 974.

In *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973), the court held that the actions of the prosecutor, in gratuitously admonishing a witness of the possibility that he might be prosecuted for misprision of felony if he testified, constituted prejudicial error, even though evidence of defendant’s guilt was overwhelming. The court also held that the government’s later statement that the witness would not be prosecuted was not sufficient to overcome the prejudice. The court held that the action of the prosecutor involved in that case substantially interfered with any free and uninhibited determination the witness might have made as to whether to testify and, if so, the content of that testimony.

In *Campbell v. Maryland*, 376 A2d 866 (Md. App. 1977), the Court dealt with a situation where the threat was made in the presence of the witnesses counsel. “That the threat here was conveyed through and in the presence of counsel is a difference without distinction.” *Id.* at 869.

In *U.S. v. Smith*, 478 F.2d 976, 979 (D.C. Ct. App. 1973) good faith, once again, had no impact. “We think the prosecutor’s warning was plainly a threat that resulted in depriving the defendants of Twitty’s testimony. The government argues in its brief that Twitty had a right to be advised that he might incriminate himself and be subject to prosecution if he elected to testify, and the government suggests that the prosecutor was only protecting Twitty’s rights when he warned him. Even if the prosecutor’s motives were impeccable, however, the implication of what

he said was calculated to transform Twitty from a willing witness to one who would refuse to testify, and that in fact was the result. We therefore conclude that the prosecutor's remarks were prejudicial. As the Supreme Court of Michigan observed in *People v. Pena*, 175 N.W.2d 767, 768 (Mich. 1970), '[a] prosecutor may impeach a witness in court but he may not intimidate him in or out of court.' See also *Bray v. Peyton*, 429 F.2d 500 (4th Cir. 1970); *People v. Butler*, 186 N.W.2d 786 (Mich. Ct. App. 1971). If the prosecutor thought the witness should be advised of his rights then he should have suggested that the court explain them to Twitty. The matter would then have been presented to Twitty by the court without any threats or implication of retaliation. The treatment of the witness Twitty requires the reversal of Smith's conviction." *Id.*

In re Martin, 744 P.2d 374, 393 (Ca. 1987) eliminated any need for a defendant to show improper motives. "In order to establish a violation of his constitutional compulsory-process right, a defendant must demonstrate misconduct. To do so, he is not required to show that the governmental agent involved acted in bad faith or with improper motives. *United States v. Morrison*, 535 F.2d 223, 227 (3d Cir. 1976); see *People v. Bryant*, 203 Cal.Rptr. 733 (Ca. App. 1984); *United States v. Smith*, 478 F.2d 976, 979 (D.C. Cir. 1973); *Bray v. Peyton*, 429 F.2d 500, 501 (4th Cir. 1970)."

In *State v. Allen*, 800 S.W.2d 82, 85-86 (Mo. Ct. App. 1990) the court recited the following facts: "At trial, appellant called his brother Tommy Allen as a witness on his behalf. Tommy Allen testified that he and his brothers Chris and Dennis had burned appellant's car. He testified that appellant took no part in the burning and was at the Lake of the Ozarks at the time the car was burned. He also testified that he informed appellant about the burning of the car on the Saturday following the burning. This testimony was exculpatory for appellant in the sense that it tended to negate appellant's guilty knowledge. The prosecutor, on cross-examination, rather than interrogate Tommy Allen about the substance of his direct examination testimony, instead employed a line of 'inquiry' relating to whether Tommy Allen knew that it is a crime to destroy evidence and whether he had been given the *Miranda* warnings prior to testifying. After repeated questions along this line, Tommy Allen refused to testify and subsequently invoked his privilege against self-incrimination. The prosecutor moved to have Tommy Allen's direct examination testimony stricken, and the trial court granted the motion.

PROSECUTOR: Mr. Allen, you realize that it's a crime in the State of Missouri to burn physical evidence?

A: No, I don't.

PROSECUTOR: Do you know that now?

A: No.

PROSECUTOR: Do you know that the statement you are making here today could be used against you in any court of law?

A: Yes, I do.

PROSECUTOR: Do you realize you have the right to an attorney?

A: Yes.

PROSECUTOR: You realize anything you say here today can be used against you?

A: Yes, I do.

PROSECUTOR: Would you like an attorney?

A: No.

PROSECUTOR: You would not?

A: I guess. I don't know.

PROSECUTOR: Because I don't want you to get up here and admit a crime. You know you have

the right to an attorney; do you realize that?

A: Yes.

PROSECUTOR: Would you like an attorney?

A: Yes.

PROSECUTOR: Your Honor, I don't think I am going to ask him any more questions.

We find this authority compelling. We hold that the prosecutor's warnings effectively drove Tommy Allen off the witness stand, thereby preventing appellant from presenting a witness crucial to his defense. The prosecutor's professed concerns about attempting to safeguard the constitutional rights of Tommy Allen are not well taken. The method employed by the prosecutor in this case, ostensibly to protect the rights of the witness, has been properly condemned by the court in *State v. Brown*, 543 S.W.2d 56 (Mo. Ct. App. 1976). *Id.*

7. Prosecutor Driving Witness From the Stand in Bad Faith

In *Commonwealth v. Jennings*, 311 A 2d 720, 721-722 (Pa. 1973), the court dealt with a situation that showed bad faith.

The discourse between the district attorney and the court led Vecchione to state on the stand that he was 'intimidated' and 'scared of' the prosecutor. The court advised Vecchione to confer with an attorney during a recess period. After a noon conference with a member of the public defender's office, Vecchione went home and did not return to court. Out of consideration for Vecchione's plight, the appellant expressly declined the court's offer to issue a bench warrant to procure Vecchione's return.

The events which occurred at trial surrounding the circumstances and significance of the criminal complaint against Vecchione led the trial judge to express some rather harsh words for the assistant district attorney: 'Frankly I have never had this experience before, either. I don't think I have ever seen a more blatant abuse of the criminal process than what occurred here this morning. I am really shocked Threatening with an arrest. In my many years as a Judge and seven years as a prosecutor myself, and-I have never had an experience like this . . . I want to turn this tactic I am going to have the notes transcribed. I will refer it to the proper authority This is outrageous;'

The appellant argues that the actions of the prosecutor constituted a denial of the appellant's Fourteenth Amendment rights to due process and a fair trial. We agree."

In *Pennsylvania v. Jennings*, 311 A 2d 720, 722 (1973), the Court reached a similar conclusion. "While the facts in Webb differ from those herein insofar as the objectionable warnings were very strenuous admonitions against perjury given by the trial judge himself, the rationale applies equally to the instant case. One need only note the outrage of the trial judge and the self-expressed fear of the young witness to reach the conclusion that the constitutionally-forbidden duress was present here. As *Brady* makes clear, it does not matter that the prosecutor's intentions were good, or that the testimony of the witness would only have mitigated the defendant's guilt; it only matters that the Assistant District Attorney's improper conduct intimidated the witness and resulted in his refusal to testify. As the trial judge noted, it is the

court's function to advise a witness of his rights against self-incrimination when it feels the witness is about to give such testimony. However, when the prosecutor gives the warning while brandishing the complaint, the witness will likely conclude, as the witness in the instant case obviously did, that he will be prosecuted because he gave evidence which undermined the Commonwealth's case. As the *Webb* decision states, the accused is entitled to protection from the state's abuse of its prosecutorial machinery which tends to 'effectively (drive the) witness off the stand.'" *Id.*

8. Prosecutor Arresting Witness On the Stand

In *Bray v. Peyton*, 429 F.2d 500 (4th Cir.), the Fourth Circuit held that the prosecution committed misconduct by arresting a defense witness during trial, finding it "difficult to imagine" that the incident would not have had an intimidating effect not only on the person arrested but on other defense witnesses as well. *Id.* at 501.

II. Undisputed Facts Relevant to Deliberate Prosecutorial Misconduct

A. Facts Relevant to Solicitor Ariail's Knowledge of Law On Intimidation of a Witness and Ethical Misconduct

On April 12, 2007, the Solicitor for the 13th Circuit, participated in the capital trial of Michael Laney, Indictment No.: 2001-GS-23-3214, 16, 17, 18 and 19 (referred to herein as "the *Laney* case"). One of the issues in that case was whether the defendant, Laney, was mentally retarded such that he was ineligible for the death penalty. (Ex. A. 4/12/07 *Laney* Tr. p. 57.) The defense attorneys, John Mauldin and Troy Tessier, called Dr. Everington to the stand as an expert on this issue. *Id.* Once the witness was tendered to the Solicitor for cross-examination, the Solicitor's second question to Dr. Everington was as follows: "Are you a licensed psychologist?" *Id.* at p. 105 ln. 17. His next question to Dr. Everington was: "Are you familiar with the provisions of South Carolina law that regulate licensed psychologists?" (*Id.* at p. 105 ln. 20-21.) The Solicitor then began to read Dr. Everington S.C. Code § 40-55-50. (*Id.* at p. 106 ln. 5-9.) The Solicitor went on to inform Dr. Everington that it was "unlawful for a person to engage in the practice of psychology in this state without obtaining a license from the Board of Psychology." (*Id.* at ln. 10-12.) Shortly thereafter, the Solicitor "urged" the *Laney* trial judge to take a look at S.C. Code § 40-55-50 (*Id.* at p. 106 ln. 22) and specifically pointed out to the trial judge that this code section carried criminal penalties. (*Id.* at p. 107 ln. 5-8.) The Solicitor concluded by stating that: "we have got a legal issue that she is not a licensed psychologist within that Section, and to go forward any further I believe would be in violation of that law." (*Id.* at p. 107 ln. 9-13.) Ultimately, the Court recessed prior to making a determination regarding the legal status of Dr. Everington's testimony.

On April 16, 2007, the *Laney* defense team filed "Defendant's Motion to Quash the Death Notice Based on Prosecutorial Misconduct." (Ex. B.) The Motion alleged, among other things, that the Solicitor had committed prosecutorial misconduct by "setting up" Dr. Everington

with his questions for potential criminal sanctions, for intimidating Dr. Everington in violation of Laney's Due Process rights, and for violating prosecutorial standards of ethical conduct. *Id.* The Motion to Quash cited specifically to *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998), *State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997), and Rule 3.8 of the Rules of Professional Conduct.

On April 24, 2007, the Solicitor filed the "State's Memorandum In Opposition to the Defendant's Motion to Quash the Death Notice." (Ex. C.) In responding to the allegation of prosecutorial misconduct, the Solicitor tried to distinguish *State v. Needs* and *State v. Williams*. Of particular note, the Solicitor's Memorandum failed to cite to any case-law or ethical cannon other than the two cases cited by the *Laney* defense.

On May 21, 2007, the *Laney* defense team filed "Defendant's Reply Memorandum in Support of His Motion to Quash the Death Notice Based on Prosecutorial Misconduct." (Ex. D.) The memorandum addressed the ethics of "setting up" Dr. Everington for potential criminal sanctions, reiterated her impeccable credentials, and renewed the assertion of a Due Process violation. *Id.* No further response was filed by the Solicitor.

On August 13, 2007, the Solicitor sent Dr. Everington a letter requesting that Dr. Everington meet with Solicitor Ariail to discuss the testimony he had already asserted was illegal. (Ex. E.)

On August 27, 2007, the *Laney* defense team filed a "Renewal of Defendant's Motion to Quash the Death Notice Based on Prosecutorial Misconduct." This renewed motion attached Solicitor Ariail's August 13, 2007, letter that he sent to Dr. Everington and alleged that it represented another attempt to intimidate, threaten and harass the witness. (Ex. N.) The motion, once again cited to Rule 3.8 of the Rules of Professional Conduct.

B. Facts Relevant To Solicitor Ariail's Knowledge That His Conduct Was Improper

The Defendant has witnesses who will testify to the following: On August 28, 2007, prior to the hearing on the Defendant's Motion to Quash Death Notice for Prosecutorial Misconduct in the *Laney* case, Solicitor Ariail requested a meeting with John Mauldin. At that meeting or shortly thereafter, the Solicitor offered to withdraw the death notice. After the meeting, the Solicitor requested in a written memorandum that John Mauldin agree to a finding that Dr. Everington "was violating the statute" and that there had been "no prosecutorial misconduct." (Ex. F First *Laney* Plea Memo.) This proposal was rejected by Mr. Mauldin. *See id.* (hand written notes saying "No-Just withdraw the motion").

The Solicitor then made a second proposal that required that the defendant's Motion to Quash the Death Notice Based on Prosecutorial Misconduct be withdrawn. This request was memorialized in writing by the Solicitor and submitted to John Mauldin in a second document.

(Ex. G Second *Laney* Plea Memo.) Mr. Mauldin accepted this proposal. On August 30, 2007, at the final hearing in the *Laney* case, the deal was consummated. (Ex. H *Laney* Sentencing Tr. p. 38.) The withdrawal of the defendant's Motion was placed on the record after the Solicitor withdrew the Death Notice. *Id.*

C. Facts Relevant to Solicitor Ariail's Knowledge That Dr. Loring Was Not Licensed as a Clinical Social Worker in South Carolina

On June 26, 2006, the Solicitor was involved in the capital case of *State v. Edens and Holloway*, Indictment No. 2005-GS-23-3879 and 2005 GS-23-3880. (referenced collectively herein as the *Edens and Holloway* trial.) Dr. Loring was called as an expert witness by the *Holloway* defense team. (Ex. J. *Holloway* Tr. p. 2.) Again Dr. Loring testified that she was licensed in Georgia as a clinical social worker. (*Id.* at p. 5 ln.1-8.) Again, Dr. Loring was qualified in the fields of "social history analysis and assessment and trauma and abuse." (*Id.* at p. 5 ln. 12-14.) Once again, when asked by the trial judge if there was any voir dire, the Solicitor responded: "No voir dire." (*Id.* at p.5 ln.20.)

On November 26, 2007, the Solicitor was involved in the capital case of *State v. Motts*, Indictment No.2006-GS-23-5622 (referenced herein as the *Motts* trial.) In that case, the defense attorney, Chris Scalzo, called Dr. Marti Loring as an expert witness. (Ex. I. *Motts* Tr. p.1660.) During the qualification by Chris Scalzo, Dr. Loring testified that she was a clinical social worker and sociologist. (*Id.* at p. 1660 ln.21.) She testified that her role is "trying to get to know the inside head and then the outside, their behaviors, looking at their history, and records about the person to understand how they come to behave the way they do." (*Id.* at p. 1661 ln.2-9.) She was qualified in the fields of "social history analysis and assessment, as well as trauma and abuse analysis." (*Id.* at p. 1664 ln.7-10.) Of particular importance, Dr. Loring specifically testified that she was licensed in Georgia as a clinical social worker. (*Id.* at p. 1663 ln. 6-11.) When the *Motts* trial judge inquired if Solicitor Ariail had any voir dire, the Solicitor responded: "We have no questions or objection at this time." (*Id.* at p. 1664 ln. 12-13.) Ultimately, the jury returned a death verdict in this case. *State v. Motts*, Indictment No. 2006-GS-23-5622.

D. Facts Relevant to Solicitor Ariail's Personal Hostility Toward Dr. Loring

Witnesses for the Defendant will testify to the following. In the *Laney* case, the jury was very interested in Dr. Loring's testimony. When they began to deliberate the sentence to be imposed, they requested testimony from Dr. Loring be read to them as part of their deliberations. This was the only request for evidence made by the jury during their deliberations. The jury was unable to reach a unanimous verdict, splitting roughly 6/6, and the trial judge imposed a Life Without Parole sentence. Upon finding out that the sentence would be Life Without Parole, the Solicitor became visibly upset.

Within 4-6 weeks of the conclusion of the *Edens and Holloway* case, the Solicitor sent invitations to the *Edens and Holloway* jurors inviting them to come to a dinner at the Solicitor's

expense. The dinner was held at Stax Peppermill. During the meal, the Solicitor made it clear in his remarks and attitude that he wanted answers as to why certain jurors had not voted for death.

The case *sub judice* came to trial on September 8, 2008. On September 9th, the undersigned attorneys made the Court and the Solicitor aware that Dr. Loring would be testifying for the Defendant. On September 9th, the Solicitor moved the Court to force the Defendant to turn over all the materials that had been used by Dr. Loring to form her opinion. The Solicitor stated that Dr. Loring's testimony was a "rambling recitation of rank hearsay" and he needed some way to limit her testimony. (Ex. K. *Inman* Sentencing Tr. p. 251.)

The Defendant called Dr. Loring to the stand on September 10th. The Court was asked to qualify Dr. Loring as an expert "in the field of trauma, abuse, forensic and therapeutic interviewing, and as a social historian in capital sentencing." (Ex. K *Inman* Tr. p. 327 ln. 1-3.) When the witness was tendered to the Solicitor, he asked Dr. Loring the same set up questions as he had asked Dr. Everington. *Id.* at p. 327-328. Next, he informed the court that her testimony involved criminal conduct. *Id.* at p. 328. This juncture in the proceedings was the first moment that the Solicitor made the Court or Defense counsel aware of his belief that Dr. Loring was violating the law. *Id.* Solicitor Ariail stated: "[W]hether or not I present an indictment against her is a totally separate issue." (*Id.* at p. 331 ln. 1-2.) Throughout the argument, the Solicitor maintained that Dr. Loring was in violation of a criminal statute. *Id.* at p. 328-331.

III. Prosecutorial Misconduct – Application of Law to Facts

In *State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997) the South Carolina Supreme Court set forth the applicable analysis for a Due Process violation involving a defense witness. Specifically, the Court stated:

Improper intimidation of a witness may violate a defendant's due process right to present his defense witnesses freely if the intimidation amounts to "substantial government interference with a defense witness' free and unhampered choice to testify."

Id. at 135, at 102 (quoting *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir.1991)).

According to our Supreme Court, substantial interference occurs when the prosecution lobs "baseless threats or charges" at a witness. *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1999). "Veiled threats" also constitute improper intimidation. *Williams*, 326 S.C. at 135, 485 S.E.2d at 102 ("Generally, courts have found unconstitutional intimidation where the government has advised a potential defense witness that it would not be in his 'best interest' to talk to the defendant or his attorney.")

"Where substantial interference is found, the next issue is whether the error can be deemed harmless." *Id.* at 135 at 102. "Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice." *State v. Quattlebaum*, 338 S.C. 441, 448, 527 S.E.2d 105, 109 (2000).

The record in this case shows that we are dealing with deliberate prosecutorial misconduct.

A. Prosecutorial Misconduct – Deliberate Misconduct

Even if “deliberate misconduct” requires proof that a Solicitor acted with specific intent, the record established in this case meets that requisite intent.

1. Intentional/Willful Prosecutorial Misconduct

In the criminal context, the terms willful and intentional capture the meaning of specific intent. *United States v. Bishop*, 412 U.S. 346, 360 (1973). The terms “[w]illful and intentional are synonymous.” *State v. Bryant*, 316 S.C. 216, 219, 447 S.E.2d 852, 854 (1994). Therefore, “[a]n act is done ‘willfully’ if done voluntarily, intentionally, and with the specific intent to do something the law forbids. In other words, a criminal act is willful if the actor **knows the conduct is unlawful and acts with bad purpose either to disobey or to disregard the law.**” *United States v. Bishop*, 412 U.S. 346, 360 (1973) (emphasis added).

2. Solicitor Ariail Knows His Conduct Was Unlawful.

“The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, [the Court] should consider any statements made or acts done or omitted by that person and all other facts and circumstances received in evidence which may aid the determination of that person’s knowledge or intent.” 1A *Fed. Jury Practice and Instructions* 5th § 17.07 - Proof of Knowledge and Intent (2000).

In this case, the fact that Solicitor Ariail was aware that his conduct was unlawful is a matter of record with the court and is memorialized in his own documents.

a. On the Record - Ariail’s Notice of Misconduct

As previously stated, it is uncontested that on April 12, 2007, the Solicitor for the 13th Circuit, participated in the *Laney* trial. It is uncontested that Solicitor Ariail’s questions to Dr. Everington were as follows: “Are you a licensed psychologist?” (Ex. A. at p. 105 ln. 17.) His next question to Dr. Everington was: “Are you familiar with the provisions of South Carolina law that regulate licensed psychologists?” (*Id.* at p. 105 ln. 20-21.) The Solicitor then read to Dr. Everington S.C. Code § 40-55-50, (*id.* at p. 106 ln. 5-9), and informed her that it was “unlawful for a person to engage in the practice of psychology in this state without obtaining a license from the Board of Psychology.” (*Id.* at ln. 10-12.) The Solicitor took the same position in the *Laney* trial that he has taken in this case. “We have got a legal issue that she is not a licensed psychologist within that Section, and to go forward any further I believe would be in

violation of that law.” (*Id.* at p. 107 ln. 9-13.) This strategy in the *Laney* trial triggered the chain of events that definitively put the Solicitor on notice.

i. Notice of Law Governing Conduct

On April 16, 2007, the *Laney* defense team filed “Defendant’s Motion to Quash the Death Notice Based on Prosecutorial Misconduct.” (Ex. B.) The Motion raised the issue of prosecutorial misconduct by “setting up” Dr. Everington and intimidating her were in violation of Laney’s Due Process rights and prosecutorial standards of ethical conduct. *Id.* The Motion to Quash cited specifically to *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998), *State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997), and Rule 3.8 of the Rules of Professional Conduct.

On April 24, 2007, the Solicitor filed the “State’s Memorandum In Opposition to the Defendant’s Motion to Quash the Death Notice.” (Ex. C.) In responding to the allegation of prosecutorial misconduct, the Solicitor tried to distinguish *State v. Needs* and *State v. Williams*. Having signed his name to this response, he cannot contest that he was on notice of these two cases and their content.

On May 21, 2007, the *Laney* defense team filed “Defendant’s Reply Memorandum in Support of His Motion to Quash the Death Notice Based on Prosecutorial Misconduct.” (Ex. E.) The memorandum addressed the ethics of “setting up” Dr. Everington for potential criminal sanctions, reiterated her impeccable credentials, and renewed the assertion of a Due Process violation. *Id.* No further response was filed by the Solicitor, however, the Solicitor initiated plea negotiations for the first time in the case.

On August 27, 2007, the *Laney* defense team filed their “Renewal of Defendant’s Motion to Quash the Death Notice Based on Prosecutorial Misconduct.” (Ex. N.) This motion put Solicitor Ariail on notice for the third time of the cases interpreting substantial government interference with a defendant’s witness and Rule 3.8 of the South Carolina Code of Professional Conduct. In addition, the motion put Solicitor Ariail on notice that his attempts to contact Laney’s witness and ask her questions was another incident considered intimidation and harassment.

b. Ariail’s Recognition of his Prosecutorial Misconduct

While it is possible that Solicitor Ariail was initially unaware of these constitutional and ethical prohibitions in the *Laney* case, it is clear that he ultimately concluded the issues raised were valid and potentially damaging to him personally as a lawyer and politically as a Solicitor. It was this conclusion that led to the memos he authorized regarding the *Laney* plea.

i. Memo Seeking Exchange of LWOP for Finding of No Misconduct in *Laney*.

On August 28, 2007, prior to the hearing on the Defendant's Motion to Quash Death Notice for Prosecutorial Misconduct in the *Laney* case, Solicitor Ariail requested a meeting with John Mauldin. At that meeting or shortly thereafter, the Solicitor offered to withdraw the death notice. After the meeting, the Solicitor requested in a written memorandum that John Mauldin agree to a finding that there had been no prosecutorial misconduct. (Ex. F First *Laney* Plea Memo.) This proposal was rejected by Mr. Mauldin. *See id.* (hand written notes).

ii. Memo Seeking Exchange of LWOP for Dismissal of Motion Alleging Prosecutorial Misconduct.

With his first attempt to eliminate his potential ethical and political problem rejected, the Solicitor had to settle for leaving the issue open. The Solicitor made a second proposal that required that *Laney's* Motion to Quash the Death Notice Based on Prosecutorial Misconduct be withdrawn. This request was memorialized in writing by the Solicitor and submitted to John Mauldin in a second document. (Ex. G Second *Laney* Plea Memo.) Mr. Mauldin accepted this proposal. At the final hearing in the *Laney* case, the deal was consummated. (Ex. H. *Laney* Sentencing Tr. at p.38). Solicitor Ariail stated on the record that he was withdrawing the death notice. Then, John Mauldin stated on the record that the Motion to Quash the Death Notice Based on Prosecutorial Misconduct was withdrawn. *Id.*

2. Solicitor Ariail Acted With Bad Purpose – Personal Animosity Against Dr. Loring.

Solicitor Ariail cross-examined Dr. Loring in two death penalty cases prior to the case *sub judice*. The first time was in the *Motts* trial. The second time was in the highly publicized *Edens* and *Holloway* trial. He never raised the issue of potential criminal conduct in these two proceedings.

a. Questioning during the *Motts* trial.

On November 26, 2007, the Solicitor heard Dr. Loring testify that she was a clinical social worker and sociologist. (Ex. I. *Motts* Tr. p. 1660 ln 21.) She testified that her role as an expert is "trying to get to know the inside head and then the outside, their behaviors, looking at their history, and records about the person to understand how they come to behave the way they do." (*Id.* at p. 1661 ln.2-9.) She was qualified in the fields of "social history analysis and assessment, as well as trauma and abuse analysis." (*Id.* at p. 1664 ln.7-10.) Dr. Loring specifically testified that she was licensed in Georgia as a clinical social worker. (*Id.* at p. 1663 ln. 6-11.) When the *Motts* trial judge inquired if Solicitor Ariail had any voir dire, the Solicitor responded: "We have no questions or objection at this time." (*Id.* at p. 1664 ln. 12-13.)

Ultimately, the jury returned a death verdict in this case. *State v. Motts*, Indictment No. 2006-GS-23-5622.

b. Questioning during the *Edens and Holloway* trial.

On June 26, 2006, the Solicitor heard Dr. Loring testify again that she was licensed in Georgia as a clinical social worker. (Ex. J. p. 5 ln.1-8.) For the second time, Dr. Loring was qualified in the fields of “social history analysis and assessment and trauma and abuse.” (*Id.* at p. 5 ln. 12-14.) For the second time, when asked by the trial judge if there was any voir dire, the Solicitor responded: “No voir dire.” (*Id.* at p.5 ln.20.) What changed the Solicitor’s position regarding Dr. Loring?

c. Ariail was upset about the life verdict in *Edens and Holloway*.

The Defendant has witnesses who will testify that upon finding out that the sentence would be Life Without Parole in the *Edens and Holloway* case, the Solicitor became visibly upset.

Further evidence of Solicitor Ariail’s emotional response to the verdict is his conduct at a post-trial dinner he hosted for the *Edens and Holloway* jurors. Within 4-6 weeks of the conclusion of the *Edens and Holloway* case, the Solicitor sent invitations to the *Edens and Holloway* jurors inviting them to come to a dinner at the Solicitor’s expense. The dinner was held at Stax Peppermill. During the meal, the Solicitor made it clear in his remarks and attitude that he wanted answers as to why certain jurors had not voted for death. Whether or not this conduct was ethical, see *In re: Delgado*¹, 279 S.C. 293, 296, 306 S.E.2d 591, 594 (1983), it showed how upset the Solicitor was about that verdict and the risk he was willing to take to find out what happened.

¹ “In former years, it was considered the better practice that attorneys refrain altogether from approaching a juror relative to the action of the juror (and the jury) in a case already tried. This limitation has been somewhat watered down by DR 7-108(D). It provides:

After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

While the rule has been somewhat relaxed, an attorney approaching a juror after a verdict is rendered, does so at his own peril. Approaching jurors normally serves no purpose other than to satisfy curiosity.” *In re Delgado*, 279 S.C. 293, 296, 306 S.E.2d 591, 594 (1983)

d. Dr. Loring was a significant factor in the verdict of life in *Edens and Holloway*.

Witnesses for the Defendant will testify to the following: In the *Laney* case, the jury was very interested in Dr. Loring's testimony. When they began to deliberate the sentence to be imposed, they requested testimony from Dr. Loring be read to them as part of their deliberations. This was the only request for evidence made by the jury during their deliberations. The jury was unable to reach a unanimous verdict, splitting roughly 6/6, and the trial judge imposed a Life Without Parole sentence. It is easy to conclude that the information gained from the Stax Juror Dinner and what happened in Court led Solicitor Ariail to be very wary of the potential impact Dr. Loring could have in a capital case.

e. Solicitor Ariail was wary of Dr. Loring's testimony in the case *sub judice* because he was afraid of the impact Dr. Loring might have on the potential sentence.

On July 25, 2008, the Solicitor filed a motion "To Produce Underlying Data, Documents And Facts Supporting Any Expert Testimony By Defense Witnesses Under Rule 705." That motion was denied.

On September 9th, the Solicitor moved the Court to force the Defendant to turn over all the materials that had been used by Dr. Loring to form her opinion. The following statements were made by the Solicitor regarding Dr. Loring.

11 as a specific motion, but to give the Court some sort of
 12 heads up. We -- having dealt with these experts that we
 13 have been given names to testify today, having dealt with
 14 them previously, there are a couple that we have grave
 15 concerns as to their ability to testify in the manner in
 16 which they have previously testified.
 17 And to be specific about that, Dr. Loring has been --
 18 has a PhD in social work. And Dr. Loring has a
 19 testimonial style that does not confine itself to any
 20 subject or any -- it just doesn't confine itself. It is a
 21 rambling recitation of rank hearsay. And it becomes, to
 22 some degree, so difficult to keep things hemmed up as to

23 what her opinion is, if she has an opinion, that we would
 24 like to alert the Court, we're going to have some serious
 25 argument about the 703, and what it's applicability is

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13 you know, based -- I'm not objecting to her detailing
 14 categories of who she talked to and the general discussion
 15 about what the subject matter was, but to repeat things
 16 that would normally be inadmissible -- well, not normally,
 17 would be totally inadmissible and very well may be
 18 self-serving.

19 Because all the information they have compiled is for
 20 one purpose and one purpose only, and that's to present as
 21 mitigating evidence. So it's already got an agenda when
 22 it gets started. And our concern is in viewing these
 23 things, **there needs to be some limitation.**

(Ex. K. *Inman* Sentencing Transcript pp. 250-253.)

It bears repeating that the Solicitor stated that Dr. Loring's testimony was "a rambling recitation of rank hearsay" and he needed some way to limit her testimony. *Id.* He received no relief from the Court. It was at this point on September 9th that he set his course for how he would "handle" Dr. Loring.

The Defendant called Dr. Loring to the stand on September 10th. The Court was asked to qualify Dr. Loring as an expert "in the field of trauma, abuse, forensic and therapeutic interviewing, and as a social historian in capital sentencing." *Id. at p. 327* ln. 1-3.) When the witness was tendered to the Solicitor, he asked Dr. Loring the same set up questions as he had asked Dr. Everington in the *Laney* trial. He did this knowing full well the objection and motion that would be filed by Defense counsel. The pattern was as follows:

7 VOIR DIRE EXAMINATION

8 BY MR. ARIAIL:

9 Q Dr. Loring, as a part of the services that you

10 provided in this case, have you performed services under

11 your licensed clinical social worker status?

12 A Yes, sir.

13 Q All right. And, as part of that, have you

14 interviewed the Defendant?

15 A Yes, sir.

16 Q Have you had conversations with him?

17 A Yes, sir.

18 Q And have you charged a fee for those services?

19 A A fee is being paid to the Center for Mental Health,

20 yes, sir.

21 Q All right. And you derive an income from the Center

22 for Mental Health?

23 A No, sir.

24 Q You don't get any money for your services?

25 A No, sir.

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1 Q Okay. Are you a licensed clinical social worker in

2 the State of South Carolina?

3 A No, sir.

(Ex. K. *Inman* Sentencing Transcript pp. 327-328.)

Next, he informed the court that her testimony involved criminal conduct:

11 MR. ARIAIL: Your Honor, I would direct the Court's

12 attention to the licensing requirements of Section

13 40-63-200, which deals with the unauthorized practice of

14 social work within the State of South Carolina.

15 And one of the requirements of this section is that

16 anyone who practices license -- or practices social work

- 17 within the State must be licensed prior to any performing
 18 of those services, particularly, Section 40-63-30.
 19 And, in addition to that, it carries penalties for --
 20 both civil and criminal penalties for violation.

Id. This juncture in the proceedings was the first moment that the Solicitor made the Court or Defense counsel aware of his belief that Dr. Loring was violating the law. (*Id.* at p. 328.) Solicitor Ariail stated: “[W]hether or not I present an indictment against her is a totally separate issue.” (*Id.* at 331.) Throughout the argument, the Solicitor maintained that Dr. Loring was in violation of a criminal statute.

f. Solicitor Ariail’s animosity toward Dr. Loring is evident by his attempts to have her arrested in Georgia.

On April 14, 2009, a hearing was held in which the State requested an Out of State Subpoena be issued pursuant to South Carolina’s statute and Georgia’s reciprocating statute to obtain the presence of Dr. Loring. Upon information and belief the State sought and obtained a Rule Nisi hearing pursuant to Georgia’s Out of State Witness statute. The hearing was set for April 16, 2009 at 3:00 p.m. Upon information and belief the Rule Nisi was never served nor attempted to be served on Dr. Marti Loring who was the subject of the Rule to Show Cause.

On April 15th, 2009, a “Rule Nisi” was signed at 2:20 p.m. by a Senior Appellate Court Judge Presiding by Designation as a Judge of DeKalb County Superior Court in Georgia. The Rule Nisi set a hearing date on April 16th at 3:00 p.m. requiring Dr. Loring to be present to show why she should not be ordered to appear in Pickens County to testify in this case. The Rule Nisi was clocked into the DeKalb County Clerk’s Office on April 16, 2009 at 10:12 a.m. Simultaneously, Don Geary, Chief Assistant DA for DeKalb County filed a Motion requesting that the Court sign an “order for said Dr. Marti Loring to attend” this trial. This Motion was clocked into the DeKalb County Clerk’s Office on April 16, 2009, at 10:13 a.m. Simultaneously, Linda Warren Hunter, Judge DeKalb County Superior Court signed an order stating that the matter was heard by the Court on April 16th, 2009. The Order further stated that satisfactory representations had been made that Dr. Marti Loring is “purposefully avoiding service” and “may flee if served with a Rule Nisi.” As a result, the Order directed the Sheriff’s office to take Dr. Loring into custody and held. This Order stating that Dr. Loring was avoiding service was clocked into the DeKalb County Clerk’s Office less than 60 seconds after the Rule Nisi was clocked in; April 16, 2009, 10:12 a.m. The documents filed in DeKalb County Georgia are attached hereto collectively as Exhibit O.

The Defendant is aware of witnesses who could testify that on April 16, 2009, late in the evening, Dr. Loring’s house was surrounded by law enforcement officers from DeKalb County Georgia and investigators from the DeKalb County District Attorney’s office who requested that she come out of her house and that they had a warrant for her arrest. Thankfully this Court intervened and obtained assurances from Dr. Loring that she would be present in the Courtroom in Pickens County, South Carolina on April 20, 2009.

This course of action was premeditated, deliberate, and the result of a calculated strategy on Solicitor Ariail's part. He drove her from the stand as he intended. He intimidated Dr. Loring in exactly the same fashion as he had with Dr. Everington in the *Laney* case. The Solicitor furthered the intimidation, harassment, and interference by directing law enforcement to arrest her without any meaningful attempt to comply with Dr. Loring's rights and the rule of law.

3. Solicitor Ariail Disobeyed And/Or Disregarded The Law.

Three separate and distinct prohibitions exist that govern Solicitor Ariail's misconduct. First, the U.S. Constitution and the case law interpreting the 6th Amendment Compulsory Process Clause and the 14th Amendment Due Process Clause have unequivocally prohibited Solicitor Ariail's misconduct since 1972. *Webb v. Texas*, 409 U.S. 95 (1972) and its progeny. Second, South Carolina Code § 16-9-340 prohibits intimidation of a witness and carries criminal penalties. Third, the ethics applicable to a prosecutor prohibit the intimidation of a witness. Rule 3.8 S.C. Rules of Professional Conduct (Cmt. 1 Referencing *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993)).

a. Solicitor Ariail is on notice of the Constitutional prohibition to his conduct and the case law verifying the prohibition.

Webb v. Texas, 409 U.S. 95 (1972) was the seminal United States Supreme Court case involving the substantial interference with a witness. Since 1972, when the *Webb v. Texas* decision was handed down, it has been clear that interfering with a defense witness is a violation of the Due Process Clause, the 6th and the 14th Amendments. *State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997) (citing *Webb v. Texas* and stating that intimidation of witness may violate defendant's due process right). Virtually every case cited within this memorandum contains a reference to *Webb v. Texas*. The thirty-seven (37) years of jurisprudence involving this issue are readily accessible through the Shepherd's citation list. Due process and its prohibition against intimidating a witness has its own key number: "92K4689". As a reference tool, this key number provides every case in the United States, both Federal and State, that discuss the Due Process clause and the intimidation of a witness.

Solicitor Ariail was on record-notice regarding the holding in *State v. Williams* and *Webb v. Texas* on April 16th, 2007 when the *Laney* motion on the issue was filed. (Ex. B.) For close to 1 and ½ years prior to trial of the case *sub judice* Solicitor Ariail knew about the issue.

Solicitor Ariail was also on record-notice regarding the holding in *State v. Needs* on April 16, 2007, through *Laney* case. (Ex. B at p. 5.) Solicitor Ariail cannot deny that he read *State v. Needs* as evidenced by the fact that he cited the case in the "States' Memorandum In Opposition to the Defendant's Motion to Quash the Death Notice" and tried to distinguish the case. (Ex. C. at p. 4.)

A scintilla of basic research behind the holdings in *State v. Williams* and *State v. Needs* reveals that a prosecutor cannot inform a witness on the stand that his or her expected testimony presents potential criminal sanctions. Therefore, even if the level of intent to prove prosecutorial misconduct was the highest known to the law, Solicitor Ariail had actual knowledge on the record of the prohibitions in the Constitution and the case law governing his actions.

b. Solicitor Ariail is guilty of violating S.C. Code § 16-9-340.

S.C. Code § 16-9-340(A)(1) states in pertinent part: “It is unlawful for a person by threat to intimidate or impede a witness in the discharge of his duty.”² Criminal negligence is implied when the legislature does not state a specific intent. *State v. Taylor*, 323 S.C. 162, 473 S.E.2d 817 (Ct.App.1996) (holding that the state must show the defendant was at least criminally negligent if a statute is silent concerning mental state”). Criminal negligence is a lower standard of conduct than knowledge. *Id.*

Criminal negligence only requires a showing of reckless disregard. *S.C. Requests to Charge – Criminal* § 29-2. “Recklessness implies the doing of a negligent act knowingly.” *Id.* “Recklessness exists where one who is aware that ordinary care or prudence requires him to use certain precautions for the safety of others, with unconcern or indifference fails to use them, or who, aware that a course of conduct or acts is negligent, with unconcern or indifference follows such course or does such act. This signifies indifference to the consequences of one’s acts.” *Id.*

It has already been established that Solicitor Ariail acted with specific intent. Even if this were not the case, this Court has recently determined that Solicitor Ariail’s objection was without merit. At a pre-trial hearing held on April 14, 2009, this Court stated that Dr. Loring had not committed a crime. This Court announced that our Supreme Court has made it clear the type of objection propounded by the Solicitor is without basis in the law. The case law and administrative orders of the Supreme Court have already held the objection to be without merit as it relates to physicians and engineers. (Ex. L. Transcript of 4/14/09 Hearing)³. Therefore, criminal negligence is a foregone conclusion. Given the record in this case and this Court’s position on the legal basis for the Solicitor’s objection, Solicitor Ariail would be guilty of violating § 16-9-340 beyond a reasonable doubt. However, the Defendant need only make a showing by a preponderance of the evidence.

c. Solicitor Ariail knew he was violating the rules of ethics applicable to a prosecutor.

On April 16, 2007, the Solicitor was on record-notice that his conduct in *Laney* involved ethical issues. (Ex. B.) Aside from the ethical implications of interfering with a defense witness, the *Laney* Motion to Quash cited specifically to Rule 3.8 of the Rules of Professional Conduct. It alleged that this rule was violated when Solicitor Ariail “set up” Dr. Everington with his questions for potential criminal sanctions. Specifically, the motion put Solicitor Ariail on

² A person who violates the provisions of S.C. Code § 16-9-340(A) is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than ten years, or both.

³ At this time, the transcript has been ordered, but not received. The recitation herein is based on counsel’s notes from the hearing and is subject to review of the actual transcript.

record-notice that this conduct was specifically prohibited by Rule 3.8's prohibition against a prosecutor allowing a person to waive important pre-trial rights or make incriminating statements without proper advisements of the right to counsel. *Id.*

On May 21, 2007, the Laney defense team filed "Defendant's Reply Memorandum in Support of His Motion to Quash the Death Notice Based on Prosecutorial Misconduct." (Ex. D.) The memorandum addressed the ethics of "setting up" Dr. Everington for potential criminal sanctions, reiterated her impeccable credentials, and renewed the assertion of a Due Process violation. *Id.* Again, Rule 3.8 of the Rules of Professional Conduct was a central theme of the motion. *Id.*

Rule 3.8 states in pertinent part: "The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights"

South Carolina has already recognized the applicability of the *ABA Guidelines for the Performance of Defense Counsel in Death Penalty Cases*. *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007); *Council v. State*, 380 S.C. 159, 172-73, 670 S.E.2d 356, 363 (2008). At a minimum, the *ABA Criminal Justice Standards, Prosecution Function* are instructive in interpreting South Carolina Rules of Professional Conduct as it relates to a Solicitor,⁴ because they are specifically mentioned in the comments to Rule 3.8. Many states have adopted these guidelines. See, e.g., *Baker v. State*, 906 A.2d 139 (Del. 2006) ("For over twenty-five years, we have admonished prosecutors to follow the ABA standards governing the prosecution function. One such standard is 3-5.7, which governs the prosecutor's examination of witnesses.").⁵

⁴ Copies of the guidelines regarding Prosecutors are available at http://www.abanet.org/crimjust/standards/pfunc_toc.html.

⁵ *U.S. v. Morris*, 988 F.2d 1335 (C.A.4 1993); *State v. Salamon*, 287 Conn. 509, 949 A.2d 1092, (Conn. 2008); *Justice v. State*, 947 A.2d 1097 (Del. Supr. 2008); *Dotson v. Zenon*, 549 F.Supp.2d 1291 (D.Colo. 2008.); *State v. Maluia*, 107 Hawai'i 20, 108 P.3d 974 (Hawaii 2005); *State v. Werts*, 677 N.W.2d 734 (Iowa 2004); *Wilde v. State*, 74 P.3d 699 (Wyo. 2003); *Farewell v. State*, 150 Md.App. 540, 822 A.2d 513 (Md.App. 2003); *Johnson v. State*, 905 P.2d 818 (Okla.Crim.App. 1995); *Scott v. Com.*, 18 Va.App. 692, 446 S.E.2d 619 (Va. App. 1994); *State v. Adams*, 335 N.C. 401, 439 S.E.2d 760 (N.C. 1994); *Freeland v. U.S.*, 631 A.2d 1186 (D.C. 1993); *Pearson v. State*, 828 P.2d 663 (Wyo. 1992); *Battenfield v. State*, 816 P.2d 555 (Okla.Crim.App. 1991); *People v. Kosters*, 437 Mich. 937, 467 N.W.2d 311 (Mich. 1991); *State v. Kills on Top*, 243 Mont. 56, 793 P.2d 1273 (Mont. 1990); *State v. Wille*, 559 So.2d 1321 (La. 1990); *U.S. v. Stroup*, 29 M.J. 224 (CMA, 1989); *People v. Adams*, 708 P.2d 813 (Colo.App. 1985); *Com. v. Larkins*, 340 Pa.Super. 56, 489 A.2d 837 (Pa. Super. 1985); *Brown v. State*, 693 P.2d 324 (Alaska App. 1984); *People v. Galloway*, 54 N.Y.2d 396, 430 N.E.2d 885, 446 N.Y.S.2d 9 (N.Y. 1981)

The *ABA Criminal Justice Standards, Prosecution Function* has a section that deals specifically with the examination of Witnesses.

Standard 3-5.7. Examination of witnesses

(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and **without seeking to intimidate** or humiliate the witness unnecessarily. Proper cross-examination can be conducted without violating rules of decorum.

ABA Standards for Criminal Justice, Prosecution Function 2nd Ed. (1980) (emphasis added). In a case almost directly on point, the North Carolina Supreme Court cited approvingly to 3-5.7 in vacating a death sentence due to the prosecutor's harassment of the defendant's mental health expert on cross-examination. *State v. Adams*, 439 S.E.2d 760 (N.C. 1994).⁶

Rule 3.4(a) of the South Carolina Rules of Professional Conduct is similar in effect. This rule states the following: "[A lawyer shall not] unlawfully obstruct another party's access to evidence." The Solicitor has "limited" and "hemmed up" Dr. Loring's testimony by improperly seeking to chill or exclude her expert testimony for the Defendant.

Rule 3.4(e) of the South Carolina Rules of Professional Conduct states as follows: "A lawyer shall not, [i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or . . . state a personal opinion as to . . . the guilt or innocence of an accused." The Solicitor has "alluded "in trial" to his belief that Dr. Loring is guilty of violating § 44-63-200.

Rule 4.4 of the South Carolina Rules of Professional Conduct states as follows: "a lawyer shall not use . . . methods of obtaining evidence that violate the legal rights of such a person." Solicitor Ariail asked question of Dr. Loring designed to obtain evidence implicating Dr. Loring's criminal conduct in violation of her constitutional rights. Solicitor Ariail has sought to obtain Dr. Loring's testimony by violating her rights to Due Process in Georgia. (Ex. O.)

Rule 8.4 of the South Carolina Rules of Professional Conduct at note [5] puts a particular emphasis on a Solicitor: "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."

Comment [1] to Rule 3.8 specifically references the *ABA Criminal Justice Standards, Prosecution Function*, and states that: "knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute [misconduct]."

The pattern of misconduct evidenced in this case indicates a deliberate disregard for the all of the Rules of Professional Conduct cited above. In both *Laney* and this case, the Solicitor waited until the expert defense witness was on the stand to raise issues regarding licensing

⁶ It should be noted that the expert in the NC case actually testified fully. It was the belittling nature of the Prosecutions cross-examination that required the mistrial.

requirements in the State. In both *Laney* and this case, the Solicitor asked questions designed to set the witness up for a criminal violation of a professional licensing statute. In both *Laney* and this case, the Solicitor did not warn the witnesses of their right to obtain counsel prior to the set up questions. In both *Laney* and this case, the Solicitor did not warn the witnesses of their right not to incriminate themselves. In both *Laney* and this case, the Solicitor made sure that the allegation of criminal conduct was brought to the trial judge's attention during the trial, after asking the set up questions, and in front of the expert witness. In both *Laney* and this case, the Solicitor asserted his opinion that the expert witnesses were guilty of violating a criminal statute. In both *Laney* and this case, the Solicitor continued the intimidation of the defense experts by attempting to elicit further testimony from the witnesses prior to the ultimate hearing on the issue of prosecutorial misconduct. In *Laney*, the Solicitor did this by issuing Dr. Everington a letter requesting an interview to "discuss several areas of [her] testimony." (Ex. E.) Testimony he had already asserted was illegal. In this case, the Solicitor did the same thing by seeking to subpoena Dr. Loring to the resumption of the trial and stating that she was a "material witness." (Ex. M Petition for Out of State Subpoena ¶ 3.) A material witness for testimony the Solicitor asserted and continues to assert was illegal. Next, he sought to have her arrested and brought back to his jurisdiction. (Ex. O.)

Solicitor Ariail was on record-notice of at least Rule 3.8 of the South Carolina Rules of Professional Conduct. A scintilla of research would quickly have guided him to his obligations regarding interfering with or intimidating a defense witness. Solicitor Ariail engaged in the same pattern of conduct in this case that he did in the *Laney* case. This pattern is evidence of both a knowing disregard for his ethical obligations and a systematic abuse of those ethical obligations. Therefore, the Defendant has satisfied his burden of proof that the Solicitor acted to intentionally disregard the law.

IV. PROSECUTORIAL MISCONDUCT MANDATES LIFE WITHOUT PAROLE

In *Oregon v. Kennedy*, 456 U.S. 667 (1982) the U.S. Supreme Court stated the role of the Double Jeopardy Clause in a situation where the prosecution provokes a mistrial.

Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *United States v. Dinitz*, *supra*, 424 U.S., at 609, 96 S.Ct., at 1080. Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

Id. at 676.

“Goadings may be found where the government in bringing about the original mistrial [did so] due to ‘gross negligence or intentional misconduct.’” *U.S. v. Serra*, 882 F.2d 471, 473 (11th Cir. 1989). As discussed above, the Defendant has easily shown gross negligence. As discussed above, the Defendant has shown intentional misconduct as well.

While the Solicitor’s motive for goading the mistrial is not a requirement, in this case it is clear and evidenced by the record. Solicitor Ariail sought to “goad” the Defendant into a mistrial in order to resolve a number of problems perceived by the Solicitor. First, whether successful in goading the mistrial or not, the Solicitor sought to eliminate Dr. Loring as an expert witness. Second, whether true or not, the Solicitor believed that a mistrial would enhance his chances of obtaining a death verdict. Third, the Solicitor knew that a mistrial would potentially eliminate the issue of jury-trial-sentencing-after-a-guilty-plea raised by the Defendant. Finally, the Solicitor sought to take away from the Defendant “primary control over the course to be followed” after the error.

First, Solicitor Ariail did not want Dr. Loring to testify. Despite the Solicitor’s diatribe about “rank hearsay”, the bottom line is that Solicitor Ariail’s objection, if granted, would have precluded her testimony. As evidenced by her assertion of the 5th Amendment Right against self-incrimination, Dr. Loring was effectively side-lined from the case by the Solicitor’s conduct. Regardless of the motives the Solicitor asserts, the purpose of the objection was to keep Dr. Loring off the stand. At a minimum, the allegation of criminal conduct is evidence of an attempt to chill her testimony. The Solicitor has succeeded with his primary objective.

Second, the Solicitor made it clear at the entry of the Defendant’s guilty plea that he had concerns about whether this Court would be willing to consider imposing a death sentence. While this concern is without merit, it was a concern of the Solicitor. The Solicitor specifically asked this Court at the conclusion of the plea if the Court felt like it could consider both sentences fairly. Solicitor Ariail stated, “[T]he Court has made no indication to the State of any—indication as to which sentence would be appropriate. Therefore, it is our understanding that we are moving forward with the Court able to conclude to impose either sentence available based upon what your determination of the facts is.” (Ex. P. *Inman* Guilty Plea Transcript, p. 45 ln. 20-25.) Counsel for the Defendant is unaware of any other capital guilty plea where Solicitor Ariail has made the same type of inquiry to the trial judge. See e.g., *State v. Owen*, 362 S.C. 175, 607 S.E.2d 78 (2004) (transcript of guilty plea proceeding). This type of inquiry is expressly precluded by *State v. Mathews*, 296 S.C. 379, 373 S.E.2d 587 (1988) (holding that a trial judge is not required to submit to voir dire on personal views of the death penalty). A mistrial would potentially have the result of having this case re-assigned to another trial judge.

Third, one of the Defendant’s primary issues for appeal is his right to have a jury trial after the entry of his guilty plea. Those motions and argument are a matter of record. A mistrial in this case would potentially put the Defendant in a legal position to successfully request jury trial sentencing. The situation would, at least, be analogous to a situation where a capital defendant is remanded after appeal for a sentencing trial and proceeds with a jury. See e.g. *State v. Owen*, 362 S.C. 175, 607 S.E.2d 78 (2004). Granting the Defendant a jury trial would take away what is currently a viable avenue for a successful appeal.

Finally, the Solicitor's actions have taken away the Defendant's ability to have "primary control over the course to be followed." Specifically, the Defendant is now in the position of having to acquire another mitigation expert. That mitigation expert may or may not be able to testify to some of the first-hand observances made by Dr. Loring as family members came forward and revealed information about the Defendant's past. Furthermore, the Defendant is now being put in the position to rush its new expert to reach expert opinions because of the age and posture of the case. See (Ex. L. 4/14/09 Transcript of Hearing). The Defendant has been placed in a position that forces him to request more time to prepare with the very real possibility that this Court may deem the requested delay as a waiver.

As a result, the Defendant has met the requirements of the Double Jeopardy Clause of the 5th Amendment as interpreted by *Oregon v. Kennedy*. Therefore, the Double Jeopardy Clause prohibits the State from proceeding any further.

V. CONCLUSION

The Defendant's 14th and 6th Amendment Rights were violated when Solicitor Ariail drove the Defendant's witness from the stand with threats and/or implications of criminal misconduct. No showing of prejudice is required, but it exists in this case.

The forms that such prosecutorial misconduct may take are many and varied. They include statements to defense witnesses warning them concerning a crime about to be revealed in the course of their testimony. *People v. Warren*, 207 Cal.Rptr. 912 (Ct. App. 1984) (warning concerning crime expected to be revealed); *People v. Robinson*, 193 Cal.Rptr. 92 (1983) (warning concerning crime expected to be revealed); *United States v. Blackwell*, 694 F.2d 1325, 1336-1337 (D.C. Cir. 1982) (warning concerning crime expected to be revealed); *United States v. MacCloskey*, 682 F.2d 468, 476, fn. 16, 479 (4th Cir. 1982) (same); *United States v. Morrison*, supra, 535 F.2d 223, 226-228 (3rd Cir. 1976) (warning concerning both crime expected to be revealed and expected perjury); *United States v. Thomas*, 488 F.2d 334, 335-336 (6th Cir. 1973) (warning concerning crime expected to be revealed); *United States v. Smith*, 478 F.2d 976, 977-979 (D.C. Cir. 1973) (warning concerning crime expected to be revealed.)

"Whether the testimony of [a] witness . . . would . . . change the . . . verdict is conjectural, but in the interests of justice and a fair trial, all important available evidence must be presented [for] deliberations. Any interference, intimidation, or prevention concerning the right to have a witness heard leads to injustice, and our review of the entire record persuades us that there was uncalled for intimidation of this witness. A prosecutor's duty is as much to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. He must see that the defendant has a fair trial and protect the public who are as concerned with protecting the innocent as convicting the guilty. *Michigan v. Butler*, 186 NW2d 786, 788 (Mi. Ct. App. 1971) (internal citations omitted).

Solicitor Ariail was well aware of the prohibitions against his conduct. He had been informed in writing and on the record nearly 1 and ½ years prior to this case of the Constitutional and ethical prohibitions against his conduct. Like every Defendant in the State, he was on notice of the criminal statute prohibiting his conduct. Solicitor Ariail had improper personal reasons to

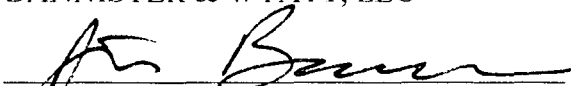
try to keep Dr. Loring from testifying and as much as said so prior to her taking the stand in this case. He participated in this unlawful course of action not once but twice. The Court has already concluded that his threats were baseless. The Defendant has far exceeded the requirement that he prove substantial government interference with his witness.

Deliberate prosecutorial misconduct to this degree mandates a mistrial. Deliberate prosecutorial misconduct to this degree satisfies the requirements of *Oregon v. Kennedy*. As a result, Double Jeopardy bars the retrial of the case, and, therefore, requires imposition of a Life Without Parole sentence.

WHEREFORE the Defendant requests an Order of the Court granting a mistrial, prohibiting the State from seeking the Death Penalty, and imposing a sentence of Life Without Parole.

Respectfully submitted,

BANNISTER & WYATT, LLC

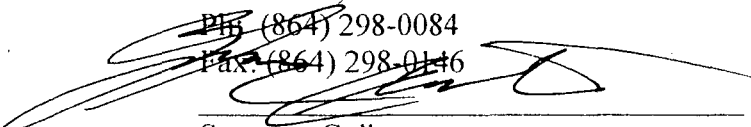

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ATTORNEYS FOR THE DEFENDANT

April 19, 2009

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
2009 JUN -5) IN THE COURT OF GENERAL SESSIONS
COUNTY OF PICKENS) THIRTEENTH JUDICIAL CIRCUIT

THE STATE)

VS.)

STATE'S RESPONSE TO MOTION TO
RECONSIDER AND FOR NEW TRIAL

JERRY BUCK INMAN,)

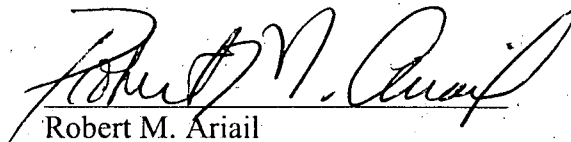
DEFENDANT)

2006-GS-39-2222, 2006-GS-39-2223
2006-GS-39-2224, 2006-GS-39-2225

Comes now the State of South Carolina, by and through its attorney, Robert M. Ariail and responds to the defendant's Motion to Reconsider and for a New Trial as follows:

The state would rely upon its written responses to the particular motions, said responses having been filed in the Pickens County Clerk of Court's office as well as any oral responses and arguments made to the court during the proceedings.

Respectfully submitted this 4th day of June, 2009.


Robert M. Ariail
Solicitor, Thirteenth Judicial Circuit

COURT OF GENERAL SESSIONS

COUNTY OF PICKENS

THIRTEENTH JUDICIAL CIRCUIT

THE STATE

VS.

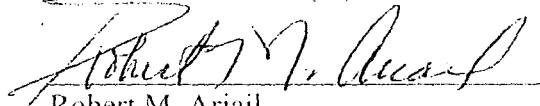
RESPONSE TO MOTION TO
SUSPEND PROCEEDINGS

JERRY BUCK INMAN,

2006-GS-39-2222, 2006-GS-39-2223,
2006-GS-39-2224, 2006-GS-39-2225

DEFENDANT

The State of South Carolina by and through its undersigned attorney, Robert M. Ariail, Solicitor for the Thirteenth Judicial Circuit, hereby responds to and moves for the dismissal of the Defendant's Motion to Suspend Proceedings dated April 17, 2009 on the basis of the affidavit of Mr. Don Geary attached hereto setting forth the circumstances surrounding the service of papers on Dr. Marti Loring relating to an out of state subpoena.


Robert M. Ariail
Solicitor, Thirteenth Judicial Circuit

Dated: April ____, 2009

2009 APR 20 AM 11:02

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)
State of South Carolina,)
Plaintiff,)
v.)
Jerry Buck Inman,)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2006-GS-39-2222-2225

**Motion To Reconsider
and for New Trial**

To: Solicitor, Thirteenth Judicial Circuit

2009 JUL -1 PM 4:25

The Defendant, JERRY BUCK INMAN, moves this Court for recon-sideration on the sentence of death imposed on the Defendant on April 23, 2009, and for resentencing to Life Without Parole and, in support of such motion, asserts the following trial and sentencing errors:

- A. The Court erred in denial of the Motion and Memorandum to Determine Mode of Trial filed on August 17, 2007, wherein the Defendant sought to enter a plea of guilt and demand a jury trial for sentencing and asserted that the statutory scheme under which the State of South Carolina seeks the death penalty is unconstitutional by requiring the entry of a not guilty plea by the Defendant in order to have a jury impose sentence;
- B. The Court erred in denial of the Motion for Change of Venue filed on April 22, 2008, wherein the Defendant that sought jury selection pursuant to SC Code § 17-21-85 to empanel a jury venire from outside the range of the influence of local and national media;
- C. The Court erred in denial of the Motion to Prohibit Victim Impact Evidence from Victim's of Prior Crimes filed on July 11, 2008, wherein the Defendant sought to exclude evidence from victims of crimes unrelated to the facts and circumstances of the indictments referenced above;
- D. The Court erred in denial of the Motion to Prohibit Introduction of Un-adjudicated Criminal Conduct filed on July 11, 2008, and the oral motions made at trial regarding the same, wherein the Defendant sought to exclude evidence from victims of un-adjudicated crimes;

- E. The Court erred in denying the Motion to Prohibit Introduction of Defendant's Prior Convictions as Non-Statutory Aggravation filed on July 11, 2008, and the oral motions made at trial regarding the same, wherein the Defendant sought to exclude evidence of non-statutory aggravation in the form of prior convictions;
- F. The Court erred in denying the Defendant's Motion to Order Independent Investigation of Dissemination of "Live Fed" by Broadcast Media at the 8/19/08 Hearing filed on August 20, 2008 wherein the Defendant sought an independent investigation into the Thirteenth Circuit Solicitor's Office regarding attorney/client privileged communications and attorney work product privileged communications;
- G. The Court erred in denying the Motion to Reconsider Order Dated November 15, 2007 re: Jury Trial Sentencing After Entry of Guilty Plea filed on August 25, 2008 along with oral motions made during the guilty plea hearing wherein the Defendant sought to demand a jury trial after the entry of a guilty plea and/or find the statutory scheme of entering a guilty plea unconstitutional;
- H. The Court erred by denying the Defendant's Motion to Require Members of 13th Circuit Solicitor's Office to Preserve and Produce Text Messages on 9/19/08 for In Camera Inspection and oral motions to require the Solicitor to submit to cross-examination wherein the Defendant sought to preserve and create a record regarding the dissemination of attorney/client privileged and attorney work product privileged communications;
- I. The Court erred in denying the Defendant's Motion to Preserve the Record Regarding Dissemination to the Public and the 13th Circuit Solicitor's Office of Privileged Communications filed on August 25, 2008 wherein the Defendant sought to preserve and create a record regarding the dissemination of attorney/client privileged and attorney work product privileged communications;
- J. The Court erred in denying the Defendant's Motion to Bar Broadcast Media from All Court Proceedings filed on August 25, 2008, wherein the Defendant sought to prohibit the broadcast media from further participation in the trial of the Defendant;
- K. The Court erred in denying the Defendant's Oral Motions for Mistrial, Imposition of Life Without Parole, Recusal of the 13th Circuit Solicitor's Office and a Finding of Prosecutorial Misconduct, and renewed Motion for Jury Trial Sentencing made during the trial proceedings on or about September 10-11, 2008, wherein the Defendant sought relief from the Solicitor's substantial interference with the Defendant's expert witness through implied threats of prosecution;

- L. The Court erred in denying the Defendant's Renewed Motion for Recusal of Thirteenth Circuit Solicitor's Officer filed on or about April 20, 2009, wherein the Defendant sought to recuse the 13th Circuit Solicitor's Office as they were material witnesses to the Defense;
- M. The Court erred in denying the Defendant's Motion to Seek Out-of-State Witnesses Appearance in South Carolina filed on or about April 20, 2009, wherein the Defendant sought the Court's assistance in requiring material witnesses from DeKalb County Georgia to appear for testimony when the same had been done for the State;
- N. The Court erred in denying the Defendant's Motion to Suspend Proceedings filed on or about April 20, 2009, wherein the Defendant sought to have the Court suspend proceedings to enable the Defendant to have time to create and preserve the record regarding the 13th Circuit Solicitor's complicity in attempting to have Dr. Loring arrested in Georgia;
- O. The Court erred in denying the Defendant's Motion to Determine Role of Solicitor Ariail and Prosecution Team filed on or about April 20, 2009, wherein the Defendant sought to take the testimony of the Solicitor and other Prosecution team members to create and preserve the record regarding the 13th Circuit Solicitor's complicity in attempting to have Dr. Loring arrested in Georgia;
- P. The Court erred in denying the Defendant's Renewed Motion for Mistrial, Motion to Impose Life Without Parole, and Memorandum in Support Thereof filed on April 20, 2009, wherein the Defendant sought to have the Court declare a mistrial for prosecutorial misconduct and impose a life without parole sentence based on the misconduct;
- Q. The Court erred in denying the Defendant's Motion for Continuance Based Upon Duty to Present Mitigation Evidence filed on April 20, 2009, wherein the Defendant sought more time to prepare its mitigation expert pursuant to the alternatives stated on the record on September 10-11, 2008;
- R. The Court erred in denying Dr. Loring's Motion for Release of Witness and Related Relief wherein Dr. Loring sought to have the Court release her as a witness based on the Solicitor's continued misconduct in attempting to have her arrested in Georgia without proper service or due process which resulted directly in prejudice to the Defendant;
- S. The Court erred in denying the Defendant's oral motions made during the trial of the case held on September 8, 2008 and thereafter, and on April 20, 2009 and thereafter wherein the Defendant sought relief from the procedural due process violations, fundamental fairness violations, the prejudice inherent in the failure to

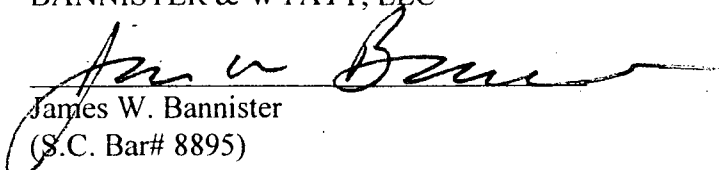
have jury trial sentencing, and the prejudice from forcing the Defendant to use Dr. Loring as his mitigation expert through the Court's interrogation;

- T. The Court erred in denying the Defendant's motions both oral and written objecting and requesting relief from violations of the Defendant's 6th Amendment right to Compulsory Process, Confrontation and Right to Present a Defense, and Due Process, the Defendant's 14th Amendment Right to Due Process, Fundamental Fairness, and Right to Present a Defense, the Defendant's 8th Amendment Right to Present any and all Mitigation, the Defendant's 5th Amendment Right to be free from Double Jeopardy;
- U. The Defendant incorporates herein any and all objections made a part of the record, any and all motions written or oral made a part of the record, any and all the authorities cited, and any and all the constitutional provisions cited as if set forth verbatim.

The Defendant hereby moves the Court to vacate the sentence of death and immediately sentence the Defendant to Life in Prison Without Parole or in the alternative for a New Trial.

Respectfully submitted,

BANNISTER & WYATT, LLC


James W. Bannister

(S.C. Bar# 8895)

P.O. Box 10007

Greenville, SC 29603

Ph: (864) 298-0084

Fax: (864) 298-0146

ATTORNEY FOR THE DEFENDANT

May 1, 2009

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

CLERK OF THE COURT OF GENERAL SESSIONS
 PICKENS COUNTY
 SOUTH CAROLINA
 THIRTEENTH JUDICIAL CIRCUIT

2009 JUL 28 A 10:46

STATE OF SOUTH CAROLINA

vs.

JERRY BUCK INMAN,

Defendant.

ORDER

Case Number(s): 2006-GS-39-2222

2006-GS-39-2223

2006-GS-39-2224

2006-GS-39-2225

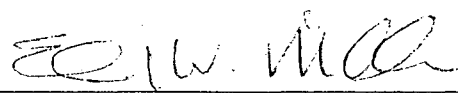
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 7/17/09 Init. [Signature]

This matter comes before the Court upon Defendant's Motion to Reconsider and For New Trial upon the conviction of Defendant on April 23, 2009 pursuant to Rule 29 of South Carolina Rules of Criminal Procedure.

The Defendant submitted various arguments to the Court and the State has responded with the same. Based on the pleadings filed and upon full consideration of the Defendant's Motion, this Court is not persuaded to reconsider its ruling in this matter, nor alter or amend the sentence.

THEREFORE, it is ORDERED ADJUDGED AND DECREED that the Defendant's Motion to Reconsider and for New Trial is DENIED.

AND IT IS SO ORDERED.


 Edward W. Miller
 Circuit Court Judge

Greenville, South Carolina
 July 17, 2009

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS) 2006-GS-39-2222, 2006-GS-23-2223
2009 APR - 1 P 2006-GS-23-2224, 2006-GS-23-2225
THE STATE)
VS.)
JERRY BUCK INMAN.)
_____)

PETITION FOR ATTENDANCE FOR
AN OUT-OF-STATE WITNESS

The Petitioner would respectfully allege and show unto the Court as follows:

1. The Petitioner is the Solicitor for the Thirteenth Judicial Circuit for the Counties of Greenville and Pickens, State of South Carolina.
2. That the said Jerry Buck Inman, the Defendant in this case, has pled guilty in Pickens County, South Carolina to Murder, Criminal Sexual Conduct, First Degree, Kidnapping and Burglary, First Degree. The State of South Carolina served Notice of Intent to Seek the Death Penalty in this case and the sentencing phase of this matter has been set to resume on April 20th, 2009 at the Pickens County Courthouse in the city of Pickens, State of South Carolina before the Honorable Edward W. Miller, Judge, Thirteenth Judicial Circuit.
3. That DR. MARTI LORING, 411 Claire Drive NE, Atlanta, Georgia 30307-1827, is a necessary and material witness in the sentencing phase of the death penalty trial of this case.
4. That the presence of DR. MARTI LORING will be required for the continuation of the sentencing portion of the trial of this case which will commence on Monday, April 20th, 2009 and will last for a period of up to seven days.

TRUE COPY

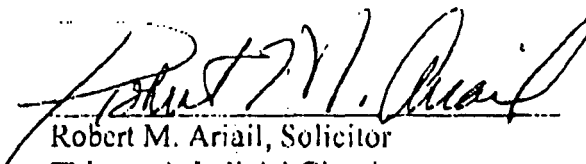
Handwritten signature: *Harold P. W. [unclear]*
CLERK OF COURT
PICKENS COUNTY, S.C.

that the Court is informed and believes that pursuant to Section 19-9-10, et seq. of the South Carolina Code of Laws and Georgia Code Annotated Section 24-10-90, et seq. or "The Uniform Act to Secure the Attendance of Witnesses from Without the State", that a certificate and subpoena should be ordered by this Court securing the presence of this witness at the sentencing phase of the trial of Jerry Buck Inman.

6. That DR. MARTI LORING was retained by the defense to provide testimony in this capital proceeding. Pursuant to South Carolina law, the fees, expenses and other costs have been approved previously by an order of this Court and the witness will, in accordance with that order, receive payment for her services and incurred expenses.
7. That the State will withdraw this Petition in the event counsel for the defense assures the witness' presence on April 20th, 2009 in the Court of General Sessions for Pickens County, South Carolina.

WHEREFORE, the State of South Carolina moves this Court to issue a subpoena and certificate pursuant to Section 19-1-10, et seq. of the South Carolina Code of Laws which certifies to the Superior Court of the Stone Mountain Judicial Circuit in Dekalb County, Georgia that DR. MARTI LORING of 411 Claire Drive NE, Atlanta, Georgia 30307-1827 is a necessary and material witness in the sentencing phase of the trial of the case of the State vs. Jerry Buck Inman and requests that a Judge presiding over the Superior Court of the Stone Mountain Judicial Circuit in Dekalb County, Georgia, issue an Order pursuant to Georgia Code Annotated Section 24-10-90, et seq. and Section 19-9-10, et seq. of the South Carolina Code of Laws requiring DR. MARTI LORING to

through April 27th, 2009 or at such time as the Court finds appropriate to testify at the sentencing phase of the trial of Jerry Buck Inman.


Robert M. Ariail, Solicitor
Thirteenth Judicial Circuit

Greenville, South Carolina

3/31, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	2006-GS-39-2222
COUNTY OF PICKENS	)	2006-GS-39-2223
	)	2006-GS-39-2224
	)	2006-GS-39-2225
State of South Carolina,	)	
	)	
v.	)	RETURN TO PETITION FOR ATTENDANCE
	)	FOR AN OUT-OF-STATE WITNESS
Jerry Buck Inman,	)	
	)	
Defendant.	)	

2009 JAN - 7 A 10:15
CLERK OF COURT
SOUTH CAROLINA

Dr. Marti Loring, through undersigned counsel, in Return to Petition for Attendance for an Out-of-State Witness would respectfully show unto the Court as follows:

1. Dr Marti Loring is not a necessary and material witness in the sentencing phase of the death penalty trial. A material witness is "[A] person who can give testimony no one else, or at least very few, can give." Black's Law Dictionary 881 (5th ed. 1979). Any one with the education, training and experience can testify as a social historian in the sentencing phase of a death penalty case. There are a number of people who are available to testify and can testify as social historians both in this state and nearby states. As such, Dr. Marti Loring is not a necessary and material witness. As the Court said, "I'm sure there are many, many, qualified, highly qualified persons that can perform the same job that Dr. Loring has done so far. Okay." Partial Transcript of Record, September 10 and 11, 2008 (hereafter designated as tr); p. 116, ll 17-19.
2. Dr. Marti Loring's presence is not required for the continuation of the sentencing portion of the trial of the case, and her presence cannot be required by the state to be a witness in this case. The basic and elementary fact about our judicial system is that it is an advocacy system. The state simply cannot control who the defense will call as a witness. If the state could

control who testifies as a defense witness, it would destroy the system.

3. While Dr. Marti Loring was initially retained as a defense expert to testify as a social historian in this case, the threats and intimidation directed at Dr. Loring by Solicitor Ariail caused her to assert her 5th amendment privilege under the United States Constitution. After Dr. Loring was granted immunity for her testimony in this particular case the following occurred:

THE COURT: You are granted immunity. So you will not be indicted based on your work in this case. Now, do you feel secure?

THE WITNESS: First, thank you for asking. I appreciate your concern. I wouldn't be honest if I didn't tell you that what I just heard alarmed and concerned me a great deal. So I will hope that I can return my attention to what I came here to do in the first place and be as effective as I would hope to be. But to tell you that I'm not alarmed and concerned at what I heard would not be truthful.

Tr. p16, ll 8-18. And after further consideration and consultation with counsel, Dr. Loring refrained from testifying in this case.

4. After the defense team moved for a mistrial based upon due process violations by the state, and upon the grounds of prosecutorial misconduct and unethical behavior of Solicitor Robert M. Ariail, the Court said

I could declare the mistrial that you want, or I could continue this case, remove Dr. Loring as a potential witness, and ask you all to obtain a new social historian expert and give you as much time as you need.

Tr. p. 98, ll 12-15. After further discussion regarding the defense motion for mistrial and Dr. Loring the Court said

I'm not going to grant your mistrial. I'm going to continue the case. I would instruct counsel to seek another social historian so that Dr. Loring will never have to deal with this case again.

Tr. p. 115, ll 11-13. After further discussion, the Court said

Okay. You just – I would ask you [Bannister] to inquire into – well, let me ask you this. I think part of your – I want to give you the opportunity – well, I wouldn't rule that Dr. Loring is completely out of the case. . . . She can – well, you look into that. But I don't know how long it's going to take. But if you determine or she determines that she doesn't want to participate any longer, I'll give you an opportunity to show how you've been prejudiced by not having her, in particular, if that's what you want to do. I want to give you that opportunity. I'm sure there are many, many, qualified, highly qualified persons that can perform the same job that Dr. Loring has done so far. Okay.

Tr. p116. ll 3-7 and 11-19. Solicitor Robert Ariail did not take exception with or objection to the ruling of the Court. The Court then adjourned the case. Dr. Loring, through counsel, would now respectfully submit that it is now way too late for Solicitor Ariail to object to or argue against the ruling of the Court.

5. Subsequent to the hearing on September 11, 2008 and the ruling of the Court, Jim Bannister came to an understanding that Dr. Marti Loring would not be in a position to testify. As a result, Dr. Marti Loring is no longer on the defense team representing Jerry Buck Inman, and undersigned counsel was advised by Jim Bannister that he would not be call Dr. Marti Loring as a witness in this case. The affidavits of Dr. Marti Loring and Jim Bannister are attached hereto and incorporated herein by reference.
6. Dr. Marti Loring has become a formerly retained and now non-testifying defense expert in this case. None of her investigative notes, materials, or interview notes can be the subject of a state subpoena. South Carolina Criminal Practice Rule 5(b)(2) states

Except as to scientific or medical reports, this subdivision does not

authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, his agents or attorneys.

By implication, Rule 5 suggests that, since Dr. Loring is now a non-testifying former agent for the defense, neither her expertise nor her testimony are available to the State. See *State v. Northcutt*, 272 S.C.207, 641 S.E.2d 873 (2007). More affirmatively, the Sixth Amendment right to effective assistance of counsel is also a “proper basis upon which to bar the state from attempting to compel the testimony of a non-testifying, consultative witness formerly retained by the defendant.” *State v. Dunn*, 154 N.C. App. 1, 571 S.E.2d 650, 659 (2002). In order for defense counsel to provide effective assistance:

[I]t is essential that he be permitted full investigative latitude in developing a meritorious defense on his client’s behalf. This latitude will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial.

State v. Mingo, 77 N.J. 576, 392 A.2d 590, 592 (1978). “The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.” *United States v. Alvarez*, 519 F.2d 1036, 1047 (3rd Cir. 1075). “The Sixth Amendment right to effective assistance of counsel, therefore, encompasses the right of the defense attorney to formulate strategy and conduct a defense free from government interference.” *Dunn*, 571 S.E.2d at 660. In short, an expert engaged by the defense as a non-testifying expert is simply “unavailable to the State as a witness.” *Mingo*, 392 A.2d at 595. Also, the United States Supreme Court recognized a work-product privilege in *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947), wherein it stated:

It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

In short, the State and in particular, Solicitor Ariail, has no right to subpoena Dr. Loring for any reason. "[U]nlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985).

7. Solicitor Ariail's one-hundred and eighty degree change in strategy about the proposed testimony of Dr. Marti Loring is breathtaking. At the trial on September 11, 2008, Solicitor Ariail did not want Dr. Marti Loring to be qualified to testify in the case. Jim Bannister advised the Court, "[Y]our Honor, at this point, I would offer her [Dr. Loring] as an expert in the field of trauma, abuse, forensic and therapeutic interviewing, and as a social historian in capital sentencing cases." Tr. pp7-8, ll 25-3. Jim Bannister did not attempt to have Dr. Marti Loring qualified as a licensed clinical social worker. However, the first question asked by Solicitor Ariail during his voir dire of Dr. Marti Loring was, "Dr. Loring, as part of the services that you provided in this case, have you performed services under you licensed clinical social worker status?" Clearly Solicitor Ariail was not interested in the offer of expertise by the defense; he was going for something more, and that was threat and intimidation of Dr. Loring.
8. Solicitor Robert Ariail's threats and intimidation of Dr. Loring began when he advised the court

Your Honor, I would direct the Court's attention to the licensing requirements of Section 40-63-200, which deals with the

unauthorized practice of social work within the State of South Carolina. And one of the requirements of this section is that anyone who practices license – or practices social work within the State must be licensed prior to any performing of those services, particularly, Section 40-63-30. And, in addition to that, it carries penalties for – both civil and criminal penalties for violation. And, based on that, I would submit that she's not qualified as an expert in this state to testify or to render those services until she gets licensed.

Tr. p.9, ll, 11-23. After some discussion and argument regarding this issue Solicitor Ariail continued in his threats and intimidation of Dr. Loring by advising the Court

I'm raising the issue of licensing for the purpose of voir dire. And that's as far as we've gotten. And whether or not I present an indictment against her is a totally separate issue.

Tr. pp. 11-12, ll, 24-2. Again, after further discussion, Solicitor Robert Ariail advised the Court

All right. So we're to the issue now of whether or not she can testify. The issue – as I see it, there's two issues: Number one, whether or not she would qualify under the statute as being a witness that could testify in the area of licensed clinical social work. You qualified her. The issue then becomes – if he's raising some issue of intimidation, to begin with, I think that also has two parts: Number one, her prior history, which is well known of testifying in the Courts of this State, for which I can't grant her immunity for that. As to the present testimony going forward from this juncture forward, I can easily grant her immunity as to that to eliminate any problem. That's not the purpose. If somebody wanted to indict her for violating the statute, they could have already done that many, many times based on her prior testimony. That's not the issue. The issue is whether or not she qualifies as a witness under the law of this state. If the issue is now being raised that her testimony is somehow being curved because of the vast power of this office, then I'll gladly grant her immunity from whatever violations she may be –

Tr. p. 14, ll 2-23. Since Jim Bannister did not offer Dr. Marti Loring as a licensed clinical social worker in South Carolina, it is clear that Solicitor Robert Ariail's line of questioning regarding licensed clinical social work was solely for the purpose of threats and intimidation

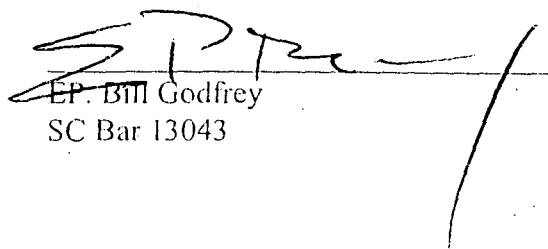
of Dr. Marti Loring so the State could attempt to gain an advantage.

Dr. Marti Loring has a doctorate in Sociology, with a major in Social Psychology, she is a Licensed Clinical Social Worker in the State of Georgia, and she is a board certified expert in traumatic stress. Knowledge is seamless much like a glass of water cannot be divided in half by thought. It may be that her expertise in social work may have helped her complete her work as the former social historian in this case. The obvious fact remains, however, that she did not treat anyone while completing her job as the former social historian in this case.

9. The question becomes why Solicitor Robert Ariail has made a complete about face regarding the testimony of Dr. Marti Loring. It appears that it could either be for the continued harassment of Dr. Marti Loring by the State or it could be a face-saving attempt of Solicitor Ariail. Maybe Solicitor Robert Ariail is afraid that there might be another continuance in this case. In either event, it appears that Solicitor Robert Ariail is guilty of prosecutorial misconduct and unethical behavior towards Dr. Marti Loring. If he is concerned about another continuance or delay such concern, because of his own actions, lies squarely at the feet of Solicitor Robert Mills Ariail.

WHEREFORE, having made the Return, Dr. Marti Loring, through counsel, requests that this Court dismiss the Petition for Attendance for an Out-of State Witness.

Respectfully submitted,


EP. Bill Godfrey
SC Bar 13043

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Greenville, South Carolina 29601
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bill@godfreylawfirm.com

ATTORNEY FOR DR. MARTI LORING

April 6, 2009

Greenville, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)
State of South Carolina,)
Plaintiff,)
v.)
Jerry Buck Inman,)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT
Case No.: 2006-GS-39-2222-2225

**MOTION TO SEEK ASSURANCE
OF OUT OF STATE WITNESSES
APPEARANCE IN SOUTH CAROLINA**

TO: THIRTEENTH CIRCUIT SOLICITOR'S OFFICE

The Defendant, by and through the undersigned attorney, moves the Court at a time convenient to be heard for assistance from the trial Court to obtain the appearance of witnesses from Dekalb County, Georgia. The Defendant is entitled to compulsory process on par with that of the State pursuant to the 6th Amendment compulsory process and 14th Amendment due process clauses of the United States Constitution. *United States v. Morrison*, 535 F2d. 223, 226-227 3rd Circuit (1976)(interpreting 6th Amendment compulsory process clause). On April 14, 2009, a hearing was held in which the State requested an Out of State Subpoena be issued pursuant to South Carolina's statute and Georgia's reciprocating statute. Upon information and belief the State sought and obtained a Rule to Show Cause hearing pursuant to Georgia's Out of State Witness statute. The hearing was set for April 16, 2009 at 3:00 p.m. Upon information and belief the Rule to Show Cause was never served on Dr. Marti Loring who was the subject of the Rule to Show Cause.

On April 15th, 2009, a "Rule Nisi" was signed at 2:20 p.m. by a Senior Appellate Court Judge Presiding by Designation as a Judge of DeKalb County Superior Court in Georgia. The Rule Nisi set a hearing date on April 16th at 3:00 p.m. requiring Dr. Loring to be present to show

why she should not be ordered to appear in Pickens County to testify in this case. The Rule Nisi was clocked into the DeKalb County Clerk's Office on April 16, 2009 at 10:12 a.m.

Simultaneously, Don Geary, Chief Assistant DA for DeKalb County filed a Motion requesting that the Court sign an "order for said Dr. Marti Loring to attend" this trial. This Motion was clocked into the DeKalb County Clerk's Office on April 16, 2009, at 10:13 a.m. Simultaneously, Linda Warren Hunter, Judge DeKalb County Superior Court signed an order stating that the matter was heard by the Court on April 16th, 2009. The Order further stated that satisfactory representations had been made that Dr. Marti Loring is "purposefully avoiding service" and "may flee if served with a Rule Nisi." As a result, the Order directed the Sheriff's office to take Dr. Loring into custody and held. This Order stating that Dr. Loring was avoiding service was clocked into the DeKalb County Clerk's Office less than 60 seconds after the Rule Nisi was clocked in; April 16, 2009, 10:12 a.m. The documents filed in DeKalb County Georgia are attached hereto.

On April 16, 2009, late in the evening, Dr. Loring's house was surrounded by law enforcement officers from DeKalb County Georgia and investigators from the DeKalb County District Attorney's office who requested that she come out of her house and that they had a warrant for her arrest. Thankfully this Court intervened and obtained assurances from Dr. Loring that she would be present in the Courtroom in Pickens County, South Carolina on April 20, 2009.

If the Defendant's Motion to Suspend proceedings is denied, then the Defendant seeks the same affirmative help from the Court that it provided to the State for the obtaining of an Out of State witness. Specifically, the Defendant seeks to have the Court obtain assurances from the law enforcement offices involved with the arrest warrant, all of the personnel who communicated

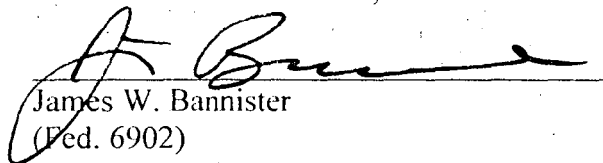
with the Solicitor's Office regarding the issuance of the Rule Nisi, individuals who made assertions to Judge Linda Warren Hunter that Dr. Loring was avoiding service and a flight risk and Dr. Loring's neighbor who convinced the Georgia law enforcement officers not to break down the front door of Dr. Loring's residence. The Defendant asserts that these witnesses are material witnesses and necessary to the development of a full record of the issue of prosecutorial misconduct and the Defendant's Motion for Mistrial and imposition of Life Without Parole sentence.

In the event that the Court is unable to obtain these witnesses' presence, the Defendant seeks an affirmative finding that intentional prosecutorial misconduct is presumed on the part of the Thirteenth Circuit Solicitor's Office and that these actions, coupled with the allegations of criminal misconduct asserted September 10-11, 2008, have substantially interfered with the free and unhampered presentation of the Defendant's expert witness.

WHEREFORE, the Defendant seeks affirmative assistance from the Court to obtain Out of State witnesses in the event that the Defendant's Motion To Suspend Proceedings is denied or the alternative relief of an affirmative finding of intentional prosecutorial misconduct.

Respectfully submitted,

BANNISTER & WYATT, L.L.C.



James W. Bannister

(Fed. 6902)

(S.C. Bar# 8895)

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Fax: (864) 298-0146

ATTORNEY FOR THE DEFENDANT

April 19, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)
STATE OF SOUTH CAROLINA,)
Plaintiff.)
VS.)
JERRY BUCK INMAN,)
Defendant.)

IN THE GENERAL SESSIONS COURT
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2006-GS-39-2222-2225

**MOTION FOR CONTINUANCE
BASED UPON DUTY TO PRESENT
MITIGATION EVIDENCE**

The Defendant, Jerry Buck Inman, by and through undersigned counsel, moves this Court for an Order continuing this matter until such time as counsel can meet their obligation to present mitigation testimony.

It is well established that counsel in a death penalty case have a duty to investigate and present mitigation information to the finder of fact in an effort to advocate for a sentence less than death. See Wiggins v. Smith, 539 US 510 (2003)(quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p. 93 (1989)). “Even when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will rely on as evidence of aggravation at the trial’s sentencing phase.” Rompilla v. Beard, 545 US 374 (2005). Both the United States Supreme Court and the South Carolina Supreme Court recognize the important role the ABA Guidelines serve in delineating the obligations of counsel to a client in death penalty case. See Wiggins; Rompilla; and Council v. State, 670 SE2d 356 (SC 2008).

Further, while relief from a denial of a motion for a continuance is about as “rare as the

proverbial hen's teeth," when a continuance is requested and denied and prejudice is demonstrated, then relief will be granted. See Morris v. State, 639 SE2d 53 (SC 2006)(Reversing conviction because petitioner "would have been prejudiced by the denial of a continuance.")

In the case at bar, undersigned counsel have a duty to fully investigate and present evidence in mitigation and rebut evidence in aggravation. Such a duty is fulfilled through the employment of a mitigation specialist, commonly working in conjunction with a testifying social worker.

As the evidence presented along with this Motion will demonstrate, undersigned counsel previously employed Dr. Marti Loring as a testifying expert social worker. Threats of prosecution directed at Dr. Loring have made her unavailable as a witness for the Defendant. Efforts to replace Dr. Loring have only been partially successful. Because of the legal controversy raised by the Solicitor, willing and able replacements are not available for some period of time due to obligations in other court proceedings.

Also, undersigned counsel respectfully submit that the Court was aware of this time issue when the continuance was granted on September 11, 2008 to allow for the employ of replacement members of the defense team. In fact, the transcript indicates that the defense should inform the court of the time necessary to replace the previous testifying social worker. See Inman Transcript p. 434 line 15; p. 435 ln. 18-23. Counsel for the Defendant, in good faith, believes that they have complied with the Court's directives on September 10, 2008. The Defendant is prepared to present evidence of prosecutorial misconduct and inform the Court of when their presentation of the mitigation evidence can be completed. *Id.*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James W. Bannister", written over a horizontal line.

James W. Bannister

(Ped. 6902)

(S.C. Bar#8895)

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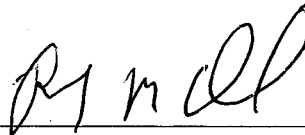
ATTORNEY FOR DEFENDANT

April 16, 2009

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 16th, 2011



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Pickens County

Edward W. Miller, Circuit Court Judge

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

JERRY BUCK INMAN,

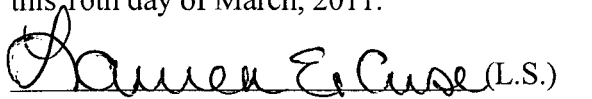
APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201 this 16th day of March, 2011.


Anna Lacke
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 16th day of March, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014