THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2012-212107

JONATHAN KYLE BINNEY, SK 6009 ..... Petitioner/Respondent,

v.

STATE OF SOUTH CAROLINA ..... Respondent/Petitioner.

APPENDIX
VOLUME XI OF XII

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, South Carolina 29201
(803) 765-1044

JOHN H. BLUME
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

Counsel for Petitioner

WILLIAM EDGAR SALTER, III
Office of the Attorney General
P.O. Box 11549
Columba, SC 29211
(803) 734-6305

Counsel for Respondent

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INITIAL CLASSIFICATION INTAKE SHEET

(Form C-1)

NAME Jonathan K Bittell A.K.A. Booze

D.O.A. 11-1-91 SEX Male D.O.B. 10-9-73

1. ANY VISIBLE INJURIES ____ YES [redacted] X NO

IF YES, DESCRIBE: ____

2. a.) APPEARS INTOXICATED ____ YES X NO

b.) USING ILLEGAL DRUGS ____ YES States NO X NO

3. MEDICAL CONDITIONS States he has a bad back - Sinuses, Allergies.

4. ON ANY MEDICATION X YES ____ NO

IF YES, LIST TYPE & AMT: Seldane - 2 x a day

5. MENTAL CONCERN States none

6. PHYSICAL CONCERN Back pain.

6. a.) PRIOR INCARCERATION A.C.C.F. 91

7. ASSESSMENT OF INMATES APPEARANCE AND BEHAVIOR:

8. TIER PLACEMENT 4E CELL L11

DATE 11-1-91 TIME 7:47 p.m.

ADMISSIONS & DISCHARGE UNIT STAFF W. Sydbee

ALBANY COUNTY JAIL AND PENITENTIARY

TO: Tour Commander

FROM: Medical Department

DATE: 10-2-91

SUBJECT: Form for Medical Restriction/Lock-Ins

Inmate's Name Barney Jordan Tier 4E Class Level _____

Type of Restrictions (Check all that apply)

Lock-Ins	X	School	X
Restricted to Tier	X	Consultations	
Restricted from Recreation	X	Church Services	X
Contact Visitation	X	Commissary	X
Non-Contact Visitation		Isolate/Possible Contagious	
Legal Library Keep	X	Meals on Disposable Utensils	
Library	X	Special Instructions (see below)	
Work	X		

Medical Staff ordering restriction _____ (Must be reviewed by doctor if not ordered by doctor)

Brief statement of reason for restriction:

Med lock - refuses to leave cell

Special Instructions: _____

Ordered by: _____ (Doctor's Signature) _____ (VIA Phone - Doctor's Name)

Nurse _____ Review by Tour Commander _____

Original - Medical File
cc - Superintendent
Inmate's File

ALBANY COUNTY JAIL & PENITENTIARY
ALBANY, NEW YORK 12211

REQUEST TO SEE FACILITY'S DOCTOR — SUBMIT TO NURSE ON 8AM MEDICATION ROUND ONLY

DATE: 9-29-91

DESCRIPTION OF PROBLEM: Neck and back hurts.

NAME OF REQUESTER: Jon Binney TIER: 4E L-11

10/1/91

FOR OFFICE USE ONLY

DATE OF REQUEST: _____

DATE SEEN: _____

_____
(SIGNATURE)

WHITE - MEDICAL
YELLOW - CAPT. OFFICE
PINK - INMATE

BENDER HYGIENIC LABORATORY

9 SAMARITAN DRIVE ALBANY, NEW YORK 12208 518-472-9124

Patient: KINNEY,JONATHAN Instit: ALBANY COUNTY JAIL
ALBANY SHAKER ROAD
ALBANY, NY 12211

Bender #: 913120113 Page: 1
Collect Dt: 11/08/91 Dt Prt: 11/11/91
Doctor: CUTTITA MD,GEORGE @ 14:05
DOB: 05/09/74

TEST	RESULT	UNITS	REFERENCE	STATUS
SYPHILIS SEROLOGY (RPR):				
RPR	NON-REACTIVE			

Ent: DD Rel: COS

THIS COMPLETES THE REPORT FOR ACCESSION # 913120113.

MOBILE IMAGING LTD.
6 Dyer Drive
Latham, New York 12110
(518) 785-3511

REQUEST FOR PORTABLE PROCEDURE

MEDICAL RECORD NO. N/A

Name: Binney, Jonathan (LAST, FIRST, MIDDLE)

D.O.B. 05-09-74

Facility Albany County Jail

Referring Physician Dominick Moffre, M.D.

AREA TO BE EXAMINED: RIGHT ORBIT

REASON FOR EXAMINATION

Involved in Altercation

REPORT OF PHYSICIAN'S CONSULTATION

DATE OF EXAMINATION November 26, 1991

There is no sign of any fracture involving the right orbital region. There is opacity of much of the left maxillary sinus, probably due to either some chronic sinusitis or to a large retention cyst here.

Thomas Burnane, M.D.

329267 DOW-85

NEW YORK STATE DEPARTMENT OF HEALTH
Wadsworth Center for Laboratories and Research
Bacteriology Laboratories
P.O. Box 509, Albany, New York 12201-0509

Gonorrhea Screening

Type of Institution
- Family Planning 1 ☐
- Private Practice 2 ☐
- VD Clinic 3 ☐
- Hospital (Non-VD Clinic) 4 ☐
- Health Dept. (Non-VD Clinic) 5 ☐
- Neighborhood Health Center 6 ☐
- Student Health Service 7 ☐
- Correctional Institution 8 ☑
- Mental Hygiene 9 ☐
- Other _____ 0 ☐

Taken for
- Screening (No suspicion of gonorrhea) ☑
- Diagnosis ☐
- Test of cure ☐

Culture specimen incubated before sending? No ☐ Yes ☐

Slide ☐

DOH 190 (5/88)

Date specimen taken 7/7/91

Sex
Male ☑ Female ☐

Age 18

Source of Culture Specimen
- Cervix ☐
- Urethra ☑
- Rectum ☐
- Throat ☐
- Other (specify) _____ ☐

Medical History (this visit)

	No	Yes
Exposure to a known case	☐	☐
Symptoms	☐	☐
Prior history	☐	☐
Treatment	☐	☐

Patient's Name and Address

Print Last Name: BINNEY
Print First Name: JONATHAN

Address _____

City _____ State _____ Zip _____

Physician's Name and Address

Name Dr. D. Maffee
Address ALBANY COUNTY JAIL & PENITENTIARY
City 840 ALBANY SHAKER RD. State ALBANY, NY Zip 12211-1088
Physician's VD Code 011504L

New York State Health Dept. Laboratory Results

Messages from Laboratory			Culture (see source)		
			Negative		Positive

03 – No Neisseria gonorrhoeae identified

JM

ALBANY COUNTY JAIL AND PENITENTIARY

TO: Tour Commander

FROM: Medical Department

DATE:

SUBJECT: Form for Medical Restriction/Lock-Ins

Inmate's Name Binney Johnathan Tier 1E Class Level _____

Type of Restrictions (Check all that apply)

Lock-Ins	☐	School	☐
Restricted to Tier	☐	Consultations	☐
Restricted from Recreation	☒	Church Services	☐
Contact Visitation	☐	Commissary	☐
Non-Contact Visitation	☐	Isolate/Possible Contagious	☐
Legal Library	☐	Meals on Disposable Utensils	☐
Library	☐	Special Instructions (see below)	☐
Work	☒		

Medical Staff ordering restriction 073 (Must be reviewed by doctor if not ordered by doctor)

Brief statement of reason for restriction:

? Injury to Rt eye & orbit -

Special Instructions: Restrict until Xray report returned

Ordered by: _____ (Doctor's Signature) D.D. Modre/073 (VIA Phone - Doctor's Name)

Nurse 073 Review by Tour Commander _____

Original - Medical File
cc - Superintendent
Inmate's File

MOBILE IMAGING LTD.
6 Dyer Drive
Latham, New York 12110
(518) 785-3511

REQUEST FOR PORTABLE PROCEDURE

MEDICAL RECORD NO.

Name: Birney, Jonathan (LAST, FIRST, MIDDLE)

D.O.B. 05-09-74

Facility Albany County Jail

Referring Physician Dominick Roffre, M.D.

AREA TO BE EXAMINED: RIGHT ORBIT

REASON FOR EXAMINATION

Involved in Altercation

REPORT OF PHYSICIAN'S CONSULTATION

DATE OF EXAMINATION: November 26, 1991

There is no sign of any fracture involving the right orbital region. There is opacity of much of the left maxillary sinus, probably due to either some chronic sinusitis or to a large retention cyst here.

11-27-91

Thomas Furnone, M.D.

ALBANY COUNTY JAIL

ALL ENTRIES MUST BE PRINTED — **MEDICATION ADMINISTRATION RECORD** — DATES ADMINISTERED — OF FORMS IN USE

DATE	MEDICATION - DOSAGE - FREQUENCY RT. OF ADM.	HOUR															
	Celebrex 1	9a	BE	VH	RS	DI	UC	LH		UP	UC	OW	BE	UC	JJ		
	Bid WH	5p	3	3	W	W	BE	BE	BE	HE	NJ	HE	LW	BE	BE	BE	BE
			10	11	12	13											
	Celebrex 1 BID	9a	HA		R	R											
	W/H	5p	BE	R	R	R											

SIGNATURE RECORD

SIGNATURE	STATUS	INITIALS	SIGNATURE	STATUS	INITIALS
[illegible]	LW	LW			
[illegible]		HA			
[illegible]		BE			
[illegible]		PM			
[illegible]	HA	CO			

NAME | ROOM | ALLERGIC TO | DIAGNOSIS | DOCTOR | EFF. DATE | DIET RESTRICTIONS

D.O.B. ~~5-9-74~~ 10-9-73

Inmate Service Unit

NAME: Brinsey Jonathan Kyle

DATE	
9-18-91	Felonies Judge Criscone 71693
DJ	Charge - CPSP 3rd CPSP 4th CPSP 5th Burg 3rd
9/18/91	$0 Bail JS
9/19/91	M.H.C-2 cleared for class, intake interview completed visit card and instructions given file sent to Class JS
10/9/91	Released by Court (DW)
10/18/91	Soc Ser letter given RT
11-1-91	Felonies Judge Criscoe 71461
DJ.	Charge - Forgery 8th $2,000 Bail
11/4/91	Med Lock, cleared for class, intake update completed visit card and instructions given, file sent to Class JS
11-7-91	M.H.C-4 Cleared - No Mental Illness KB
11/25/91	M.H.C-4 return to class D.H
12/2/91	MHC-4 form Return to class file to class (R)
12/3/91	M.H.C-4 - return to class - file to class D.H
12-2-91	MH Referral JS
12/18/91	Rel Ot
12/19/91	Social Service letter given T.D.

ALBANY COUNTY JAIL AND PENITENTIARY
ADMISSIONS & DISCHARGE UNIT
BOOKING SHEET (PRINT OR TYPE)

Date Rec [illegible] Sex [X] Male [ ] Female

Time Rec [illegible] [X] AM [ ] PM P.H. D.O.B. [illegible] Age [illegible]

Order # [illegible] SID [illegible]

Printed & Photo taken by [illegible] D.O. S.S.# [illegible]

JACIN ID# [illegible] NYSID [illegible] NCIR Hispanic [ ] Yes [X] No

Race [X] W [ ] B [ ] Asian [ ] Amer Ind [ ] Other

U.S. Citizen [X] Yes [ ] No

Read/Write [X] Yes [ ] No

Name [illegible] (Last) (First) (Middle Name) (Suff) Alias

Residence [illegible] (Street) (City) (State) Tele (Area)

Maiden Name/If Married [illegible] Military Yes/No Discharge

Next of Kin [illegible] Relationship [illegible]

Address [illegible] Tele [illegible]

In case of Emergency Notify [illegible] Relationship [illegible] Tele [illegible]

Religion [X] Bapt [ ] RC [ ] Hebrew [ ] Muslim [ ] Protestant [ ] None [ ] Other

Highest Grade Completed [illegible]

Marital Status [ ] Divorced [ ] Married [ ] Separated [X] Single [ ] Widowed

Occupation [illegible] Employer [illegible] (Name) (Address)

PHYSICAL DESCRIPTION

Ht [illegible] Wt [illegible] Eyes [illegible] Hair [illegible] Glasses [ ] Yes [X] No

Skin Tone [illegible] Right or Left Handed [illegible]

False Teeth [ ] Yes [ ] No Upper [ ] Lower [ ] Both [ ] Partial [ ] Plate [ ]

Scars, Marks or Tattoos [illegible]

IS THERE ANY EVIDENCE OF RECENT PHYSICAL INJURY SEEN ON THE INMATE [X] Yes [ ] No

If yes describe injuries [illegible]

How were injuries received according to inmate [illegible]

Location and Date of Treatment [illegible]

ARREST INFORMATION

Arresting Agency [illegible] Committing Judge [illegible]

Court of Arraignment [illegible] Bail [illegible]

IS THERE AN EXAMINATION ORDERED BY THE COURT [X] MD BOOKING [ ] WATCH [ ]

MENTAL HEALTH EXAMINATION [ ] PHYSICAL EXAMINATION [ ]

CHARGED [illegible]

ARREST DISPOSITION

Awaiting Further Court Action? Yes [ ] No Holds/Detainers

Sentenced to Abc County Pen [ ] Yes [ ] No Term of Sentence [illegible]

Parole [ ] Probation [ ] Parole Officer's Name [illegible]

Officer Completing Form [illegible] Badge [illegible]

Copy Distribution: White-Identification Bureau Art Yellow-Medical

PINK-Front Office DK Gold-Inmate Services

COMMITMENT TO LOCAL CRIMINAL COURT
C. P. L. 170.10. 510.40. 180.10

STATE OF NEW YORK: COUNTY OF Albany

Justice COURT Town OF Colonie

The People of the State of New York

against

JONATHAN X. BINNEY

Defendant

COMMITMENT
TO LOCAL CRIMINAL COURT

TO THE SHERIFF OF THE COUNTY OF Albany

A Securing Order having been this day made by this court that the above named defendant be held for further action of this court upon a charge of CPSP 3rd, CPSP 4th, CPSP 5th, BURG 3rd 2cts

and bail having been fixed in the amount of $ None, and said defendant having failed to post bail as therein required, you are commanded to receive said defendant into your custody, detain him, and produce said defendant before this Court on SEPT 18th 19 91 at 7 P m.

Dated at

Town of Colonie, N. Y.

9-18, 19 91.

Justice

SEP 10 12 22 PM '91

Form # 13

STATE OF NEW YORK : COUNTY OF ALBANY

JUSTICE COURT TOWN OF COLONIE

The People of the State of New York
Against
Jonathan Binney
Defendant

Discharge of Defendant From Custody

TO THE SHERIFF OF THE COUNTY OF ALBANY

A Securing Order having been heretofore made by this Court holding the above named defendant for further aciton of this court on a charge of Burglary 3rd 140.20 PL

and said defendant having been committed to the Sheriff of the County of ALBANY in connection therewith and a final disposition of the said charge having been made, it is

ORDERED, that the Sheriff of the County of ALBANY forthwith discharge said defendant from custody.

Dated at:

COLONIE, N.Y.

10/9, 1991

Judge-Justice

10-9-91
9:50
Jon

ALBANY COUNTY JAIL AND PENITENTIARY
ADMISSIONS & DISCHARGE UNIT
BOOKING SHEET (PRINT OR TYPE)

Date Rec'd 1-7-91 Sex: [X] Male [ ] Female

Time Rec'd 6:23 [ ] AM [X] PM P.H. D/O/B 10-7-73 Age 18

[illegible] R.S. Place/Birth HEB Boston, MA

A.S.T. [illegible]

Print Photo Taken By O.C.A.S.I.S. # 91A 5[illegible]

[illegible] N.P. Hispanic [ ] Yes [X] No

A.K.A. Race B W I [illegible] [ ] Asian

NYSID [illegible] [ ] Amer. Ind. [ ] Other

U.S. Citizen [X] Yes [ ] No

Pad/Write [X] Yes [ ] No

Name (Last) (First) (Middle Name) (Suffix) Alias

Residence (Street) (City/V.) (State) Tele. (Area)

Maiden Name/If Married Nationality Discharge

Next of Kin Relationship

Address Tele. (Area)

In Case of Emergency Notify Relationship Tele. (Area)

RELIGION [X] Baptist [ ] Catholic [ ] Hebrew [ ] Muslim [ ] Protestant [ ] None [ ] Other

HIGHEST GRADE COMPLETED

MARITAL STA [ ] Divorced [ ] Married [ ] Separated [X] Single [ ] Widowed

Occupation Employer

(Name) (Address)

PHYSICAL DESCRIPTION

Est. Height 5'6" Est. Weight 130 Eyes BR Hair BK Glasses [ ] Yes [X] No

Skin Tone MED Build MED Right or Left Handed

Facial Hair [ ] Yes [X] No [ ] Upper [ ] Lower [ ] Both [ ] Partial [ ] Mustache

Scars, Marks or Tattoos

IS THERE ANY EVIDENCE OF RECENT PHYSICAL INJURY SEEN ON THE INMATE [ ] Yes [X] No

If yes, describe injuries

How were injuries received according to inmate

Location and Date of Treatment

ARREST INFORMATION

Arresting Agency COURT Committing Judge CASTORA

Court of Arraignment TOWN OF COLONIE Bail $500.00

IS THERE AN EXAMINATION ORDERED BY THE COURT [ ] BY BOOKING [ ] WATCH [ ]

MENTAL HEALTH EXAMINATION [ ] PHYSICAL EXAMINATION [ ]

CHARGES 1) [illegible]

ARREST DISPOSITION

Awaiting further court action [X] Yes [ ] No Holds/Detainers

Sentenced to Albany County Penitentiary [ ] Yes [X] No Term of Sentence

Parole [ ] Probation [ ] Top or Name

Officer completing form Badge

Copy Distribution: WHITE - Records CANARY - Police Bureau BLUE - Arrow Medical

PINK - Front Office BLACK - Yellow - Inmate Services

COMMITMENT TO LOCAL CRIMINAL COURT
C.P.L. 170.10. 510.40. 180.10

STATE OF NEW YORK: COUNTY OF Albany

Justice COURT Town OF Colonie

The People of the State of New York

against

JONATHAN K. BINNEY

Defendant

COMMITMENT
TO LOCAL CRIMINAL COURT

TO THE SHERIFF OF THE COUNTY OF Albany

A Securing Order having been this day made by this court that the above named defendant be held for further action of this court upon a charge of FORGERY 3rd- BENCH WARRANT

and bail having been fixed in the amount of $ 2000.00 and said defendant having failed to post bail as therein required, you are commanded to receive said defendant into your custody, detain him, and produce said defendant before this Court on NOVEMBER 6th 19 91 at 7 P M.

Dated at Town of Colonie N.Y.

NOVEMBER 1 19 91

Justice

Rec'd
11-1-91
6:28 pm

Memorandum

from

Inmate Service Unit

TEL 869-2600

DATE: 11/13/91

SUBJECT: Educational Service Request

TO: Sr. J. Mittnight

From: Joseph Stanbach

out 12/19

The attached is for your retention. Please note below your approval/disapproval and return to the Inmate Service Unit.

Inmate Jonathon Binney housed on the 7E Tier has been approved _____ disapproved _____ to attend the Education Program.

Comments: _____

_____

_____

_____ _____

Date School Coordinator

CONSULTATION

Name Rev. Love

Affiliation Georgia Baptist Convention

Inmate Dominique Bunsey

Tier

Date 12/9/98 (Wed.)

Time 1:30 p.m.

Staff T.R.

Recorded -staff T.R.

CONSULTATION

Name Rev. Dudley Long

Affiliation Peoples Baptist Church

Inmate Jonathan Benney

Tier 4E L-2

Date 12/5/91

Time 1:45 pm

Staff RB

Recorded -staff RB



To Whom it may concern. My name is Jonathon Kyle Binney. I am presently at 1E. First I was in 7E. I had received quite an amount of being teased, criticised, and threatened. An Inmate teased me to the point to where I am now having depression. It was about 2:07 when I stood up and went over to his bed to ask him to quite making fun of me. The inmate stood up and started arguing. We were put on 2W as a result of it. When I got there I [illegible] my bed sheet up on the bars. Reason, last time I was on 2nd west I was beat up for 30 min. I was sent back to 1E R12. When the "Shrink" called me to his office, he told me I was being back to 2W. I did that night. About 5-10 min after I was in my cell, (door was closed) I sat on my table to think, consider if I was going to get hurt, and talk to people who were asking me questions. A black boy came up and started talking to me. As I looked away he punched me in the face. [illegible] When the CO came by I told him I was going to hang up. He pulled me out of the cell and started to tell me what was wrong. I told him. I know I am back on 1E. I like the people here and the people like me. I can get the substances of the people who are out all day to shine the floor their the lower me out with them. That is what I am requesting. I can go back to 7E where all the white up. I can go back to 2W cause I'll get beat up. Character (one of the sergeants even said so.) I have to be anyway. So I would like to be classified as Craft a Level 5 so I can get out and play games with the other guys, (who was, me to stay with them.) I will be awaiting your answer.

Thank YOU! Jonathon Binney

Sex MH Referral 25

© Institute in Basic Life Principles 1991 Printed in U.S.A.

5019

SPECIAL VISIT (non-contact)

Name: Jon Bunney
Barbara Bunney

Relationship: Father
Mother

Inmate: John Bunney

Tier: [redacted] (E)

Date: 12/4/91

Time: 3300

Staff: (CC)

Recorded-staff: (D)

Parents out of Town Spoke to PC
She Spoke to Sgt Stack O/K'd (CC)

ALBANY COUNTY JAIL AND PENITENTIARY

TO: Tour Commander

FROM: Medical Department

DATE: 11/25/91

SUBJECT: Form for Medical Restriction/Lock-Ins

Inmate's Name Benney Johnathan Tier 1E Class Level _____

Type of Restrictions (Check all that apply)

Lock-Ins	☐	School	☐
Restricted to Tier	☐	Consultations	☐
Restricted from Recreation	☒	Church Services	☐
Contact Visitation	☐	Commissary	☐
Non-Contact Visitation	☐	Isolate/Possible Contagious	☐
Legal Library	☐	Meals on Disposable Utensils	☐
Library	☐	Special Instructions (see below)	☐
Work	☒		

Medical Staff ordering restriction VTS (Must be reviewed by doctor if not ordered by doctor)

Brief statement of reason for restriction:

? L Injury to Rt eye & orbit

Special Instructions: Restrict until Xray report returned

Ordered by: _____ Dr O. Mostre VTS
(Doctor's Signature) (VIA Phone - Doctor's Name)

Nurse VTS Review by Tour Commander _____ 11/26/91

Original - Medical File
cc - Superintendent
Inmate's File

INSTRUCTIONS:
WHITE - CAPTAIN
YELLOW - I. D.
PINK - INMATE COPY

SHERIFF'S OFFICE
ALBANY COUNTY JAIL & PENITENTIARY
ALBANY, NEW YORK 12211

JJ Capt BR

INMATE DISCIPLINARY REPORT FORM

NAME OF INMATE Johnathon Binney TIER 2W CELL 2,11

LOCATION OF INCIDENT 7E Bay 105 DATE 11/24/91 TIME 2:15 ~~PM~~ AM

CHARGE(S) AGAINST INMATE Verbal Altracation with another Inmate Being out of his bunk after 12:30 A.M. Causing a disturbance on the tier.

NAME OF OFFICER WHO DELIVERED COPY OF CHARGE(S) TO INMATE C.O. R. Moos

DESCRIPTION OF ABOVE CHARGES On above date and time, Inmate Binney was seen by this officer, out of his bunk, Face to Face with another inmate, arguing. Both inmate Seperated when ordered to do so. Both inmates moved to 2W without any further problems

WAS MORE THAN ONE INMATE INVOLVED? (X) YES ( ) NO IF YES LIST NAMES (IF KNOWN) & DESCRIBE WHAT ACTION THEY TOOK Norman White 2W 2,16 Inmate was face to face with inmate Binney arguing

SIGNATURE OF OTHER EMPLOYEES WHO WITNESSED THE INCIDENT:
1. Edw C SIGNATURE 2. _____ SIGNATURE
3. _____ SIGNATURE 4. _____ SIGNATURE 5. _____ SIGNATURE

WAS INMATE LOCKED IN CELL AFTER INCIDENT? Yes WAS INMATE LOCKED IN OTHER HOUSING UNIT? Yes

SERGEANT IN CHARGE OF SECTION Sgt. W. Lafontaine TOUR COMMANDER Capt. P. McGeough

SIGNATURE OF REPORTING OFFICER C.O. R. Moos DATE 11/24/91

INSTRUCTIONS: 3 COPIES
1. INMATE COPY
2. DISCIPLINARY FILE COPY
3. SUPERINTENDENT COPY (ATTACHED TO INCIDENT WRITE UP)

SHERIFF'S OFFICE
ALBANY COUNTY JAIL AND PENITENTIARY
ALBANY, NEW YORK 12211

Capt HB

INMATE DISCIPLINARY REVIEW FORM

NAME OF INMATE Jonathon Binney TIER EAST CELL A-1

DATE OF REVIEW 11/24/91 TIME 12:25 (AM) PM REVIEW LOG BOOK NUMBER 59

INMATE'S STATEMENT: Inmate Binney did receive a copy of his write-up. Binney did not have any witnesses to call for his hearing

Inmate Binney admitted to the charges.

REVIEW BOARD DISPOSITION Based on officer's report + inmate Binney admitting to the charges 8 days lock in given as date 12/1/91.

____ VISITING REMOVED (WITH PROPER FORM) 8 days REMOVED FROM WORK CREW

____ RELIGIOUS SERVICES REMOVED (WITH PROPER FORM) 8 days COMMISSARY REMOVED

____ RECREATION REMOVED (WITH PROPER FORM) ____ REMOVED FROM PROGRAMS (LIST PROGRAMS REMOVED FROM)

8 days TELEPHONE CALLS REMOVED (EXCEPT LEGAL)

SIGNATURE OF INMATE Jonath Binney DATE 11/25/91

HEARING OFFICER Capt. Tedesco DATE

WITNESS Sgt. J. Lewis II DATE

WITNESS [illegible] DATE

CONSULTATION

Name Rev Long.

Affiliation Peoples Bapt Church Colon.s

Inmate John B. Nny.

Tier

Date 11/26/91

Time 1300 hr.

Staff PC

Recorded -staff (PB)

CONSULTATION

Name Rev. Dudley Long

Affiliation Peoples Baptist Church

Inmate Jonathan Bennett

Tier 7E

Date 11/22/91

Time 11:00AM

Staff RB

Recorded -staff RB

[redacted]

Memorandum

from

Inmate Service Unit

TEL 869-2800

DATE: 11/13/91

SUBJECT: Educational Service Request

TO: Sr. J. Mittnight

From: [signature]

The attached is for your retention. Please note below your approval/disapproval and return to the Inmate Service Unit.

Inmate [redacted] housed on the 7E Tier has been approved ____ disapproved ____ to attend the Education Program.

Comments: _____

_____

_____

_____ _____

Date School Coordinator

[redacted]

EDUCATIONAL SERVICES INFORMATION FORM

Inmate Binney (Last) Jonathon (First) K (M.I.) D.O.A. 11/1/91

Age 18 D.O.B. 10/9/73 Sex Male

Part I

If you are under the age of twenty one (21), do not have a high school diploma and are likely to be incarcerated for ten (10) or more days, you may attend the school program, held here at the Jail. If you choose to attend, you will be in class for three hours a day, on scheduled school days.

Inmate Service Unit staff will assist you in completing Part II of this form. If you do not choose to attend school at this time, but want to attend at a later date you can, by submitting a written request to the Inmate Service Unit

Further educational services may be available after your release, as long as you are under the age of twenty one (21). If you want more information or assistance on how to return to school, submit a written request to the Inmate Service Unit.

Please ask questions about anything you don't understand

The information noted in Part I has been explained to me and I understand its contents.

Inmate Signature Jonathon Binney Date 11/4/91

Part II

Read and check the appropriate statement(s)

1. I am under the age of 21 and do not have a high school diploma ✓
2. Last school grade completed 11
3. I want to receive educational services while I am incarcerated ✓
4. I do not want educational services at this time ____

Inmate Signature Jonathon Binney Date 11/4/91

I.S.U. staff Joseph Stanton Date 11/4/91

Part III

1. Inmate's address _____

_____

2. Last school attended Rubicon Charleston Freedom Village WSP

3. Parent/guardian address _____

_____

4. Parent/guardian school _____

5. Date file reviewed ___/___/___ Decision to process ___yes ___no

Note: if denied, justification must be in writing and attached to this form

6. Inmate re-contacted on ___/___/___ to verify, still wants school

7. Copy of Page I forwarded to Educational Supervisor on ___/___/___

8. STAC-201 Form filled out and forwarded to Educational Supervisor on ___/___/___

Other

CONSULTATION

Name: Paston Dudley-Long

Affiliation: Calvary Baptist Church

Inmate: Jonathan Binney

Tier: 4E

Date: 11/6/91 Wed.

Time: 1:30pm

Staff: (RB)

Recorded -staff: (RB)

ALBANY CITIZENS COUNCIL ON ALCOHOLISM, INC.
Sarah R. Hall, R.N., M.Ed., C.A.C.
Executive Director

Marietta P. Sousis, R.N., C.A.C.
Program Director

P.O. Box 14075
Albany, New York 12212-4075
Phone 465-5829

COMMUNITY EDUCATION

ADDICTIONS REFERRAL FORM FOR ALCOHOL AND CHEMICAL DEPENDENCY

Inmate Name: [redacted] Date 11/4/91

Tier: H E

Criminal Charge: Burglary 3rd

Referral Source: Jan Stanbach

Reason for Referral: ___ AA ___ NA

Other (Explain) Requested alc. counselor Referral

Court Date: ?

5030

SPECIAL VISIT (non-contact)

Name James Bonney
Also Known As Jonathan

Relationship Father

Inmate Jonathan Bonney
Tier 7-East

Date 10/2/91 (Wednesday)

Time 4:30 P.M.

Staff [illegible]

Recorded -staff T.R

To: Inmate Service Unit

From: Jonathan Binney Outdate 10-9-91 Tier 7E

D.O.B. 5-9-74 S.S.# [redacted]

I Jonathan Binney request the dates of my present or recent incarceration at the Albany County Jail.

Jonathan Binney
Signature

10-10-91
Date

Witness: _____

Date: _____

I.S.U. USE ONLY

Date received 10/10/91

Form given _____ yes _____ no

Staff _____

Date 10/10/91

5/86

CONSULTATION

Name Father Long

Affiliation Baptist Church

Inmate Jimmy Bundy

Tier Tier

Date 10/7/91 (Mon.)

Time 1:30 p.m.

Staff J.R.

Recorded - staff

55

I, John Binney request protective custody status, knowing that some restrictions of normal activities may occur.

This has been explained to me by: C.O. W. Crowick

Signature of Inmate: Jonathan Binney

Date: 9-21-91

Time: 6:30 pm

Unit Supervisor Signature: Sgt Leary

Date: SEPT. 21 1991

Time: 6:20pm

Tour Commander Signature: [illegible]

Date: 9-21-91

Time: 6:30 pm.

Comments: WAS housed on 3W R-34 moved TO 4E L-11

CC: Ass't Sup
Classification
ISU
Cpt Ofc (File)

Memorandum

from

Inmate Service Unit

TEL. 069

DATE: 7-27-87

SUBJECT: Educational Service Request

TO: Sr. J. Mittnight

From: [signature]

The attached is for your retention. Please note below your approval/disapproval and return to the Inmate Service Unit.

Inmate [redacted] housed on the 4E Tier has been approved ____ disapproved ____ to attend the Education Prog

Comments: _____

Date

School Coordinator

I, John Binney request to be taken OUT of 55
protective custody status, knowing I will return to normal activities and
will be subject to general housing. This has been explained to me by:
Richard T. Lemon.

Signature of Inmate: John Binney

Date: 10-3-91

Time: 10:35 AM.

Unit Supervisor Signature: Lt Lemon

Date: 10-3-91

Time: 12:20 pm

Tour Commander Signature: C/Mercer

Date: 10-3-91

Time: 1151 hrs

Inmate Relocated YES / NO

If YES to what tier: X / cell: X

Comments:

CC: Ass't Sup
Classification
ISU
Cpt Ofc (file)

ALBANY COUNTY JAIL AND PENITENTIARY

TO: Tour Commander

FROM: Medical Department

DATE: 9.25.91

SUBJECT: Form for Medical Restriction/Lock-Ins

Inmate's Name Barney Dolgrath Tier 4E Class Level _____

Type of Restrictions (Check all that apply)

Lock-Ins	☐	School	☐
Restricted to Tier	☐	Consultations	☐
Restricted from Recreation	☒	Church Services	☐
Contact Visitation	☐	Commissary	☐
Non-Contact Visitation	☐	Isolate/Possible Contagious	☐
Legal Library	☐	Meals on Disposable Utensils	☐
Library	☐	Special Instructions (see below)	☐
Work	☒		

Medical Staff ordering restriction HT Zuck (Must be reviewed by doctor if not ordered by doctor)

Brief statement of reason for restriction:

_____

_____

Special Instructions: _____

_____

Ordered by: _____ _____
(Doctor's Signature) (VIA Phone - Doctor's Name)

Nurse _____ Review by Tour Commander _____

Original - Medical File
cc - Superintendent
Inmate's File

SPECIAL VISIT (non-contact)

Name: James Benney
Landon Benney

Relationship: Father
Mother

Inmate: Jonathan Benney

Tier 4 East

Date: 9/30/01 (Sunday)

Time: 6:00 P.M.

Staff: D H

Recorded -staff: [redacted]

CONSULTATION

Name Rev - Quality Ivy

Affiliation Temple Baptist Church

Inmate Jonathan Bunny

Tier 4-East

Date 9/23/91 (Monday)

Time 10:00 AM

Staff D.H

Recorded -staff D.H

CONSULTATION

Name Rev. Cubby Long

Affiliation People Baptist Church

Inmate Jonathan Bunney

Tier Y East

Date Thurs. 9/26/91

Time 10:30 am

Staff (K)

Recorded -staff

Need Copy of ordination Papers

[redacted]

Set for the Defence of the Gospel



This is to Certify that after a satisfactory relation of his Christian experience, call to the Ministry, and views of Christian doctrine,

Dudley R. Long

was publicly ordained to the work of

The Gospel Ministry

on the Twenty-eighth day of August, 1952
by the Calvary Baptist church at Akron, Ohio
having been duly recommended for ordination by a Council of Baptist Churches of the Akron Baptist Association composed of Sixteen messengers from Ten churches, convened at the call of the Calvary Baptist church on the Sixth day of August, 1952.

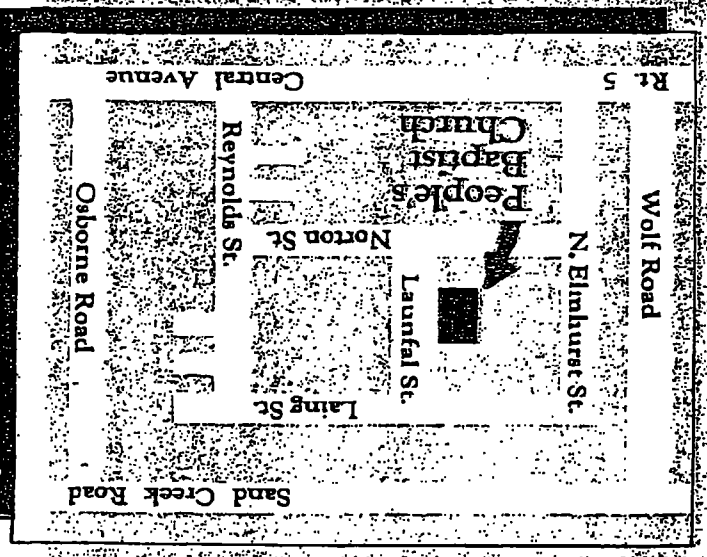
N. E. Wilson — Moderator of the Council
George Hobbick — Clerk of the Council
T. W. Binford
C. L. Dorsey

N. E. Wilson — Moderator of the Church
Rodney Hardesty — Clerk of the Church
Frederick Harrold
Elijah B. Swingfield

No. 120 S — The Judson Press — Printed in U.S.A.

God's Truth For You

1. *God Loves You.*
   "For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life." *(John 3:16)*
2. *Jesus is the Only Way to Heaven.*
   "Jesus said unto him, I am the way, the truth, and the life: no man cometh unto the Father, but by me." *(John 14:6)*
3. *You Are a Sinner.*
   "There is none righteous, no, not one: for all have sinned, and come short of the glory of God." *(Romans 3:10, 23)*
4. *The Result of Sin is Spiritual Death.*
   "For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord." *(Romans 6:23)*
5. *Jesus Paid the Penalty for Your Sin.*
   "Who his own self (Jesus) bare our sins in his own body on the tree, that we, being dead to sins, should live unto righteousness: by whose stripes ye are healed." *(I Peter 2:24)*
6. *You Can be Saved from Your Sin.*
   "If thou shalt confess with thy mouth the Lord Jesus, and shalt believe in thine heart that God hath raised him from the dead, thou shalt be saved." *(Romans 10:9)*



Does Your Life Need Changing?

Are you absolutely sure where you'll go when you die! Are you dissatisfied and frustrated in life! Are you lacking an inner peace you feel you should have! Are you searching for the true meaning of life!

If the answer is yes, then you need to know what God has to offer you.

God created you to have a relationship with Him, but sin has separated you from Him. Because God loves you, He has made a way for you to know Him and have eternal life.



Introducing To You and Your Family...

PEOPLES BAPTIST CHURCH

12 Launfal St., Albany, NY 12205
459-2717

Dr. Dudley R. Long, Pastor

THE LORD'S DAY, SEPTEMBER 22, 1991

Dr. Dudley R. Long, Pastor
Mr. Brendan Doerstling, Organist
Miss Lorraine E. Dyer, Organist Emeritus

WELCOME

Whosoever thou art who entereth this church, remember it is the House of God. Be reverent, be thoughtful, be attentive, and leave it not without prayer to God for thyself, for those who minister and those who worship here.

MORNING WORSHIP SERVICE

Prelude	"Jesus, Thy Blood and Righteousness", arr. Bish
*Hymn No. 255	"In Thy Name, O Lord Assembling"
*Invocation	
*Doxology	
* Hymn No. 205	"Oh, Could I Speak the Matchless Worth"
Responsive Reading	Jeremiah 51:20-40
*Hymn No. 1	"Praise My Soul, the King of Heaven"
Scripture Lesson	Luke 18
*Pastoral Prayer	
The Lord's Tithes and Our Offerings (Preceded by Prayer)	
Offertory	"All Glory, Laud and Honor", arr. DeCou
Sermon	"A MAN WHO COULD BUT WOULD NOT"
*Hymn No. 396	"Jesus is Calling"
*Benediction	
Postlude	"Short Prelude VI", Bach

"Sorry, we don't have potted geraniums," said the nursery clerk. "Could you use African violets?" "No," the man sadly replied. "It was geraniums my wife told me to water while she was away."

Remember, when you tell others your troubles, half of them aren't interested, and the other half are glad to see you finally getting what you deserve.

EVENING SERVICE

Prelude	"It is Well with My Soul", arr. DeCou
*Hymn No. 23	"To God be the Glory"
*Prayer	
*Hymn No. 868	"Fully Trusting"
Scripture Lesson	Psalm 78
Duet	Kimberly Heller and Beth Drobinski
*Hymn No. 983	"When the Roll is called Up Yonder"
The Lord's Tithes and Our Offerings (Preceded by Prayer)	
Offertory	"I am His and He is Mine", arr. Warren
Solo	Miss Kimberly Heller
Sermon	"LEARNING FROM HISTORY"
*Hymn No. 656	"O Gentle, Sweet and Tender Love"
Postlude	"The Solid Rock", Bradbury

It was John Wesley who long ago declared: "Get on fire for God, and men will come to see you burn." And, it might be added, you will be like Moses' burning bush. You will burn with a fire that gives warmth and light, but that does not consume.

"You can't turn back the clock. But you can wind it up again. Bonnie Prudden.

God often digs wells of joy with the spade of sorrow.

Every minute you are angry, you lose sixty seconds of happiness.

THIS WEEK AT PEOPLES BAPTIST

Today 6:30 PM Awana Leaders Meeting
Wed., 7:00 PM Prayer Meeting and Bible Study
Thurs. 6:30 PM Awana Clubs Begin
Fri., 6:30 PM Fellowship Dinner
Sun., 9:15 AM Sunday School Teachers Prayer Time
9:30 AM Sunday School - a class for every age.
10:55 AM Morning Worship Servic
6:30 PM Youth Groups
7:30 PM Evening Service

NURSERY SCHEDULE SEPTEMBER 22

AM Mrs. Donald Hover
TODDLERS Mrs. Frank Gullie
Miss Laura Genthner
PM Miss Margaret Welch

NURSERY SCHEDULE SEPTEMBER 29

AM Mrs. Thomas Sicko
TODDLERS Mrs. William Genthner
Miss Laura Genthner
PM Miss Mable Seeley

DATES TO REMEMBER

Sunday, September 22, 6:30 PM, Awana Leaders Meeting.
Thursday, September 26, 6:30 PM, Awana begins.
Friday, September 27, 6:30 Fellowship Dinner.
Saturday, October 5, Craft Fair at Dublin Christian Academy.
Saturday, November 1, Art Show at Dublin Christian Academy.

TAKE NO THOUGHTS

"Take no thought for your life, what ye shall eat, or what ye shall drink; nor yet for your body, what ye shall put on." Matthew 6:25.

It has been well said that no man ever sank under the burden of the day. It is when tomorrow's burden is added to the burden of today that the weight is more than a man can bear. Never load yourselves so, my friends. If you find yourselves so loaded, at least remember this: It is your own doing, not God's. He begs you to leave the future to Him, and mind the present.

cont'd. from page 1

danger, her testimony of love for her child carries no weight with intelligent people. People may sing, "Oh, how I love Jesus," until the stars fall, but if they refuse to do His will, people know they do not love Him.

We should all give our testimony. There are two ways to do it—one is by what we say, and the other is by what we do. The Bible gives much emphasis to tongue testimony. We are told that if we confess Him before men, He will confess us before His Father. The Bible does not discount tongue testimony. The Gospel message can be carried by word of mouth and should be so carried, but there is more than this to be done. We folks who claim to have salvation should live it day by day. What you are speaks so loud I cannot hear what you say, may be said of many professing Christians. GLEANINGS FROM A RICH LIFE, Dr. Bob Jones, Sr.

A COMFORTING RETREAT

"They all made us afraid, saying, Their hands shall be weakened from the work, that it be not done. Now therefore, O God, strengthen my hands>" Nehemiah 6:9 a.m.

Do not measure the blessing of prayer by feelings. When you feel least like praying you need it most. satan uses discouragement and despondency to break up the habits of supplication; but a traveler might as well give way to drowsiness and inaction when in danger of freezing.

CONTENTMENT

There is a sense in which a man looking at the present in the light of the future, and taking his whole being into account, may be contented with his lot: that is Christian contentment. But if a man has come to the point where his is so content that he says, "I do not want to know any more, or do any more, or be any more," he is in a state in which he ought to be changed into a mummy! Of all hideous things, a mummy is the most hideous; and of mummies, the most hideous are those that are running about the streets and tailing. H. W. Beecher.

One on God's side is a majority.

File

5

$400

INSTRUCTIONS: 3 COPIES
1. INMATE COPY
2. DISCIPLINARY FILE COPY
3. SUPERINTENDENT COPY (ATTACHED TO INCIDENT WRITE UP)

SHERIFF'S OFFICE
ALBANY COUNTY JAIL AND PENITENTIARY
ALBANY, NEW YORK 12211

INMATE DISCIPLINARY REVIEW FORM

NAME OF INMATE Jonathan Binney TIER 2nd HC CELL C-11

DATE OF REVIEW 9-22-91 TIME 6:45 AM (PM) REVIEW LOG BOOK NUMBER 352

INMATE'S STATEMENT:

Inmate did receive a copy of his charges. He stated that he was forced to fight B. Austin by other inmates on the tier. He admits to fighting with B. Austin.

REVIEW BOARD DISPOSITION Based on admission of guilt and request he is to be locked in 14 days (Out date 10-4-91).

____ VISITING REMOVED (WITH PROPER FORM)

____ REMOVED FROM WORK CREW

____ RELIGIOUS SERVICES REMOVED (WITH PROPER FORM) 10-4-91 COMMISSARY REMOVED

____ RECREATION REMOVED (WITH PROPER FORM)

____ REMOVED FROM PROGRAMS (LIST PROGRAMS REMOVED FROM)

10-4-91 TELEPHONE CALLS REMOVED (EXCEPT LEGAL)

SIGNATURE OF INMATE Jonathan Binney DATE 9-22-91

HEARING OFFICER Lt Linda C. Brink DATE

WITNESS Lt. K. Jones DATE

WITNESS C.O. Aguavarra DATE

INSTRUCTIONS:
WHITE - CAPTAIN
YELLOW - I. D.
PINK - INMATE COPY

SHERIFF'S OFFICE
ALBANY COUNTY JAIL & PENITENTIARY
ALBANY, NEW YORK 12211

INMATE DISCIPLINARY REPORT FORM

NAME OF INMATE John Rimmey TIER 2W CELL R24

LOCATION OF INCIDENT 2 west R24 cell DATE 9/21 TIME 612 AM PM

CHARGE(S) AGAINST INMATE Fighting causing a disturbance

NAME OF OFFICER WHO DELIVERED COPY OF CHARGE(S) TO INMATE S/Sgt

DESCRIPTION OF ABOVE CHARGES while S/Sgt Geevers was making a round of the tier he noticed Rimmey had been in a altercation with Richard Moore. Rimmey stated he had been in a fight with Richard Moore

WAS MORE THAN ONE INMATE INVOLVED ? (X) YES ( ) NO IF YES LIST NAMES (IF KNOWN) & DESCRIBE WHAT ACTION THEY TOOK Richard Moore, fighting

SIGNATURE OF OTHER EMPLOYEES WHO WITNESSED THE INCIDENT:

1. _____ SIGNATURE
2. _____ SIGNATURE
3. _____ SIGNATURE
4. _____ SIGNATURE
5. _____ SIGNATURE

WAS INMATE LOCKED IN CELL AFTER INCIDENT ? yes WAS INMATE LOCKED IN OTHER HOUSING UNIT? yes

SERGEANT IN CHARGE OF SECTION _____ NAME TOUR COMMANDER _____ NAME

SIGNATURE OF REPORTING OFFICER _____ DATE 9/21/94

Memorandum from

Inmate Service Unit

TEL. 869-260(

DATE: 9-24-91

SUBJECT: Educational Service Request

TO: Sr. J. Mittnight

From: [signature]

The attached is for your retention. Please note below your approval/disapproval and return to the Inmate Service Unit.

Inmate [redacted] housed on the 4E11 Tier has been approved ____ disapproved ____ to attend the Education Program.

Comments: in lock until 10-4-91

10/9/91
Date

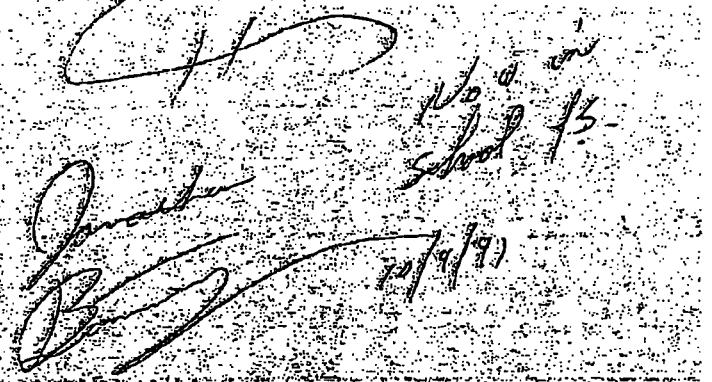
Sr. Counselor
School Coordinator

[redacted]

Hello, Howsit? (35)

Well, I have not heard from you yet about taking my G.E.D. I would really like to take it.

So Long



The University of the State of New York
THE STATE EDUCATION DEPARTMENT
1 COMMERCE PLAZA, ROOM 1603 T.T., ALBANY, NY 12234

REQUEST FOR EDUCATIONAL SERVICES TO AN INCARCERATED YOUTH

STAC - 201

STAC CHILD ID

CHILD'S NAME LAST	FIRST	MI	(MONTH / DAY / YEAR) DATE OF BIRTH	SEX M / F
Binney	Jonathan	K	5-9-74	M

LAST KNOWN RESIDENCE

Box 312
STREET

New Concord Ohio
CITY STATE ZIP CODE

- [x] NEW STAC - 201
- [ ] CORRECTIONS TO A PREVIOUS STAC - 201

LEGISLATIVE AUTHORIZATION:

[15] 3202.7 - EDUCATION OF INCARCERATED YOUTH

Dublin Christian Academy - Dublin New Hampshire
PUBLIC SCHOOL DISTRICT OF RESIDENCE AT TIME OF COMMITMENT TO CUSTODY

(MONTH / DAY / YEAR) DATE OF INCARCERATION IN THIS CORRECTIONAL FACILITY	(MONTH / DAY / YEAR) EXPECTED DATE OF RELEASE
9/18/91	

Colonie
PUBLIC SCHOOL DISTRICT IN WHICH CORRECTIONAL FACILITY IS LOCATED

10
LAST GRADE COMPLETED

Albany Correction Facility
NAME OF CORRECTIONAL FACILITY IN WHICH CHILD IS INCARCERATED

ADDRESS OF FACILITY

840 Albany Shaker Rd
Albany, NY 12211

IT HAS BEEN REPORTED TO ME THAT THIS CHILD IS UNDER THE AGE OF 21 YEARS, HAS NOT RECEIVED A HIGH SCHOOL DIPLOMA AND IS THEREFORE ELIGIBLE FOR EDUCATIONAL SERVICES UNDER THE LEGISLATIVE AUTHORIZATION INDICATED ABOVE AND HAS BEEN ADVISED OF THE AVAILABILITY OF SUCH EDUCATIONAL SERVICES.

Signature of Person Completing this Form	Title	Date
[signature]	ISS	10/3/91

Name of Facility	(Area Code) Telephone No.
Albany C Correction Facility	518 869 2600

CORRECTIONAL FACILITY COPY

EDUCATIONAL SERVICES INFORMATION FORM

Inmate Binney Jonathon K. D.O.A. 9/18/91
Last First M.I.

Age 17 D.O.B. 5/9/74 Sex Male.

Part I

If you are under the age of twenty one (21), do not have a high school diploma and are likely to be incarcerated for ten (10) or more days, you may attend the school program, held here at the Jail. If you choose to attend, you will be in class for three hours a day, on scheduled school days.

Inmate Service Unit staff will assist you in completing Part II of this form. If you do not choose to attend school at this time, but want to attend at a later date you can, by submitting a written request to the Inmate Service Unit

Further educational services may be available after your release, as long as you are under the age of twenty one (21). If you want more information or assistance on how to return to school, submit a written request to the Inmate Service Unit.

Please ask questions about anything you don't understand

The information noted in Part I has been explained to me and I understand its contents.

Inmate Signature Jonathon Binney Date 9/19/91

Part II

Read and check the appropriate statement(s)

1. I am under the age of 21 and do not have a high school diploma ✓
2. Last school grade completed 10
3. I want to receive educational services while I am incarcerated ✓
4. I do not want educational services at this time

Inmate Signature Jonathon Binney Date 9/19/91

I.S.U. staff Joseph Stanbert Date 9-19-91

Part III

1. Inmate's address _____

_____

2. Last school attended _____

3. Parent/guardian address _____

_____

4. Parent/guardian school _____

5. Date file reviewed ___/___/___ Decision to process ___yes ___no

Note: if denied, justification must be in writing and attached to this form

6. Inmate re-contacted on ___/___/___ to verify, still wants school

7. Copy of Page I forwarded to Educational Supervisor on ___/___/___

8. STAC-201 Form filled out and forwarded to Educational Supervisor on ___/___/___

Other

I, Jonathon Binney request to be taken OUT of protective custody status, knowing I will return to normal activities and will be subject to general housing. This has been explained to me by: Thomas J Nelson.

Signature of Inmate: Jonathon Binney

Date: 11/7/91

Time: 9:25 AM

Unit Supervisor Signature: Lt Otero

Date: 11-7-91

Time: 9:46 AM

Tour Commander Signature: Capt Seibert

Date: 11-7-91

Time: 9:52 AM

Inmate Relocated YES / NO

If YES to what tier: _____ / cell: _____

Comments: He signed into P.C. because while on 2nd he was assaulted by 2 inmates. Now that he feels better about his safety he is signing out of P.C. Also inmate has been released to 3M2 and when screened by medical will be going to 7B-7D

CC: Ass't Sup
Classification
ISU
Cpt Ofc (file)

ALBANY COUNTY JAIL
MENTAL HEALTH UNIT

INMATE Vinny J. Johnson

DATE 11.25.81

TIME 0?

M.H. STAFF: [signature]

RECOMMENDATIONS:

~~REMAIN IN~~ CLEARED FOR CLASSIFICATION ✓

RETURN CLOTHING AND TAKE OUT OF LOCK

RETURN CLOTHING AND REMAIN IN LOCK ✓

ONE-ON-ONE WATCH until morn

RECLASSIFICATION REQUEST FORM

(Form C-4)

NAME Bussey, Johnathon DATE 11-25-91

D.O.B. 10-9-73 SEX M TIER 1E CELL 1R

Reason for reclassification request: For mental illness. Not suicidal. Return to classification.

On Dr. Cusumi - does not need to be W.D. unless

Inmate Signature:

Staff Signature: Wm. McINTYRE, Ph.D. - Mental Health Unit

CLASSIFICATION UNIT USE ONLY

Reclassification request approved _____ disapproved _____

Reclassification to Level _____

Housing Unit assignment _____ Tier _____ Cell

Reason(s) for disapproval _____

_____ _____

Classification Unit Staff Date

NOTICE OF CLASSIFICATION DECISION

(Form C-6)

TO: Jonathan Binney

DATE: 11-7-91

On: 11-7-91 a decision was rendered by the Classification Unit as to your Classification Level, as noted below.

Classification Level: 2 200

Housed on 2 E 23 Tier

NOTIFICATION & EXPLANATION:

Jonathan Binney 11-7-91
Inmate Date

Daniel J. Turner 11/7/91
Staff Date

CC: Admission & Discharge
Inmate File

~~WHITE~~ COPY- INMATE YELLOW COPY- ADMISSION & DISCHARGE ~~PINK~~ COPY- INMATE FILE

ALBANY COUNTY JAIL
MENTAL HEALTH UNIT

INMATE Binney, Jonathan

DATE 11-C-91

TIME 12:05

M.H. STAFF: Wm F. McLaughlin MHP

RECOMMENDATIONS:

CLEARED FOR CLASSIFICATION ✓

RETURN CLOTHING AND TAKE OUT OF LOCK

RETURN CLOTHING AND REMAIN IN LOCK ✓
until meds

ONE ON ONE WATCH

ALBANY COUNTY JAIL
MENTAL HEALTH UNIT

INMATE Binney, Jonathan

DATE 12/3/91

TIME 1:05

M.H. STAFF: Maureen Farmer

RECOMMENDATIONS:

Returned to
~~CLEARED FOR~~ CLASSIFICATION ✓

RETURN CLOTHING AND TAKE OUT OF LOCK

RETURN CLOTHING AND REMAIN IN LOCK ✓

ONE ON ONE WATCH

ALBANY COUNTY JAIL
MENTAL HEALTH UNIT

INMATE Binney, Jonathan

DATE 12/2/91

TIME 12:30

M.H. STAFF: Wm F. McLaughlin, CRC

RECOMMENDATIONS:

Return to
~~CLEARED FOR~~ CLASSIFICATION ✓

RETURN CLOTHING AND TAKE OUT OF LOCK

~~RETURN CLOTHING AND~~ REMAIN IN LOCK ✓
until meds

ONE ON ONE WATCH

RECLASSIFICATION REQUEST FORM

(Form C-4)

11/6/91 - Talk in Classification D.H

NAME Binney, Johnathon DATE 11-6-91

D.O.B. 10-9-73 SEX M TIER 1E CELL

Reason for reclassification request: Has mental illness - not suicidal. Has requested PC. Refer to Class

Inmate Signature:

Staff Signature: In Sanna 3-A Unit

CLASSIFICATION UNIT USE ONLY

Reclassification request approved _____ disapproved _____

Reclassification to Level _____

Housing Unit assignment _____ Tier _____ Cell

Reason(s) for disapproval _____

Classification Unit Staff _____ Date _____

I, Jonathan Binney request protective custody status, knowing that some restrictions of normal activities may occur.

This has been explained to me by: C/O [illegible]

Signature of Inmate: Jonathan Binney

Date: 11-4-91

Time: 1:15 PM

Unit Supervisor Signature: [illegible]

Date: 11-4-91

Time: 1:17 pm

Tour Commander Signature: Capt. Teabout

Date: 11-4-91

Time: 1:18 pm

Comments: Inmate Binney is a very small person. He is afraid of other inmates.

CC: [redacted]
Classification
ISU
Cpt Ofc (File)

ALBANY COUNTY JAIL AND PENITENTIARY

INMATE CLASSIFICATION

RECOMMENDATION

(Form C-2)

DATE: 11/2/91

TO: Classification Unit

FROM: Medical Department M Courter Staff

Inmate: Burney, Jonathan D.O.A. 11/1/91

Sex: Male D.O.B. 10-9-73 Age: 18

Assessment:

Injured Lab Work

Recommendation: Medical Lock

Cleared for Classification

For usage by: Medical Department
Mental Health Unit
Inmate Service Unit

INMATE CLASSIFICATION

RECOMMENDATION

(Form C-2)

TO: Classification Unit

From: Inmate Service Unit Staff Joseph Stanbach

Date: 11/14/91

Inmate: Bennie, Jonathon Kyle D.O.A. 11/1/91

Sex: Male D.O.B. 10/9/73 Age 18

Assessment: Polite and Cooperative.

Recommendation: Level 2 due to Current Charge and only report disciplinary problem

For usage by: Inmate Service Unit
Medical Department
Mental Health Unit

BEHAVIOR OBSERVATION FORM
(Form C-3)

Inmate Johnathan Binney D.O.B. 10-9-73 Tier 4E Cell L-11
D.O.A. 11-1-91

Reception Unit Officers, on each shift, will denote inmate's behavior, attitude and other pertinent information. When recording information, officers must print their name and date next to said information as well as print name and date next to appropriate shift on bottom of page.

MENTAL HEALTH CONCERN

MEDICAL CONCERN

DISCIPLINARY PROBLEMS

GENERAL COMMENTS Quiet No Problems

Behavior Observation form will be picked up at time of I.S.U. Intake Interview.
If inmate is moved to another tier before classified, form must go with inmate.

DATE	SHIFT	OFFICER (Print)	DATE	SHIFT	OFFICER (Print)
	7-3			3-11	
	3-11			11-7	
11-4-91	11-7	Devine		7-3	
11-4-91	7-3	[signature]		3-11	
	3-11			11-7	
	11-7			7-3	
	7-3			3-11	

INITIAL CLASSIFICATION INTAKE SHEET

(Form C-1)

NAME Jonathan K Binney A.K.A. Booze

D.O.A. 11-1-91 SEX male D.O.B. 10-9-73

1. ANY VISIBLE INJURIES _____ YES [redacted] X NO

IF YES, DESCRIBE _____

2. a.) APPEARS INTOXICATED _____ YES X NO

b.) USING ILLEGAL DRUGS _____ YES States no X NO

3. MEDICAL CONDITIONS States he has a bad back - sinuses, Allergies.

4. ON ANY MEDICATION X YES _____ NO

IF YES, LIST TYPE & AMT. Seldane - 2 x a day

5. MENTAL CONCERN States none

6. PHYSICAL CONCERN Back pain.

5. a.) PRIOR INCARCERATION A.C.C.F. 9-91

7. ASSESSMENT OF INMATES APPEARANCE AND BEHAVIOR:

8. TIER PLACEMENT 4E CELL L11

DATE 11-1-91 TIME 2:47 p.m.

ADMISSIONS & DISCHARGE UNIT STAFF W. Gallare

CLASSIFICATION DATA

Inmate Bussey, Jonathan D.O.A. 9-18-91

A.K.A. _____

D.O.B. 5-9-74 17 Sex male

Initial Classification Placement 4E RD

Classification Level Good Housed 2W 24R

Reclassified on _____ to Level _____ Housed _____

Reason _____

Reclassified on _____ to Level _____ Housed _____

Reason _____

REclassified on _____ to Level _____ Housed _____

Reason _____

Notes: Burg 3rd, cpsp 3, 4, 5

9/20/91 Couldn't fit a Money Asst problem.
Non Violent first time incarcerated Theft

NOTICE OF CLASSIFICATION DECISION

(Form C-6)

TO: Jonathan Owney

DATE: 5-20-91

On: 5-20-91 a decision was rendered by the Classification Unit as to your Classification Level, as noted below.

Classification Level: Level 2

Housed on 2W 24R Tier

NOTIFICATION & EXPLANATION:

Jonathan Owney 5-20-91
Inmate Date

David J. Sturtevant 5-20-91
Staff Date

CC: Admission & Discharge
Inmate File

WHITE COPY- INMATE YELLOW COPY- ADMISSION & DISCHARGE PINK COPY- INMATE FILE

ALBANY COUNTY JAIL AND PENITENTIA

INMATE CLASSIFICATION

RECOMMENDATION

(Form C-2)

DATE: 9-18-91

TO: Classification Unit

FROM: Medical Department [signature] RN Staff

Inmate: Binney Jonathan D.O.A. 9-18-91

Sex: Male D.O.B. 5-9-74 Age: 17

Assessment:

Recommendation: Cleared For Classification

For usage by: Medical Department
Mental Health Unit
Inmate Service Unit

INMATE CLASSIFICATION
RECOMMENDATION
(Form C-2)

TO: Classification Unit

From: Inmate Service Unit Staff Joseph Stuckert

Date: 9/19/91

Inmate: Barney, Jonathan Kyle D.D.A. 8/16/91

Sex: Male D.O.B. 5/9/74 Age 17

Assessment: Polite and Cooperative

Recommendation: Lock 4 Due to Current Charges and lack of Stability to Date stated 1st incarceration.

For usage by: Inmate Service Unit
Medical Department
Mental Health Unit

BEHAVIOR OBSERVATION FORM
(Form C-3)

Inmate John Binney D.O.B. 5-9-74 Tier 4E Cell R-3
D.O.A. 9-18-91

Reception Unit Officers, on each shift, will denote inmate's behavior, attitude and other pertinent information. When recording information, officers must print their name and date next to said information as well as print name and date next to appropriate shift on bottom of page.

MENTAL HEALTH CONCERN

MEDICAL CONCERN

DISCIPLINARY PROBLEMS

GENERAL COMMENTS Inmate Quiet @

Behavior Observation form will be picked up at time of I.S.U. Intake Interview.
If inmate is moved to another tier before classified, form must go with inmate.

DATE	SHIFT	OFFICER (Print)	DATE	SHIFT	OFFICER (Print)
9-19-91	7-3	Devine		3-11	
	3-11			11-7	
	11-7			7-3	
	7-3			3-11	
	3-11			11-7	
	11-7			7-3	
	7-3			3-11	

Revised 2/91

Page 1

UNIT INTAKE INTERVIEW FORM

11/1/91

BACKGROUND

Name Bunney Jonathan Kyle D.O.A. 9/18/91
Last First Middle 10-9-93

A.K.A. Boyzer Age 17 D.O.B. 5/9/74

Race W Sex M Social Security Number [redacted]

Address Box 312 - New Concord, Ohio Phone 614-872-3816

With Whom Parents Length 3 yrs Marital Status Sing

Spouse Address Phone

Employed No Employer Length

Address Position Salary

Source of income (if not employed) N/S

Veteran No Service Dates Type of discharge

Education 10 years Where Dublin Christian Academy, ? New Hamps

Diploma/Ged — College # of years

Religion N/S Where/Clergy

Prior living arrangements Length

Prior living arrangements Length

FAMILY BACKGROUND

	Name	Residence	Phone
Mother	Sandra Bunney	as inmate	
Father	Jim "	"	
Siblings # 0			
Children # 0			

Contact Person Jim Bunney Relationship Fr

Address as inmate Home phone 614 872 3816

Work phone —

Second Contact Person Relationship

Address Home phone

Work phone

I.S.U. Intake Interview Form

CRIMINAL HISTORY

Court Colonia ✓ Judge Krumme ✓ Charges/Convictions Forging 3rd
CPSP 3, 4 + 5th Burg 3rd

Bail 2000 Arr. unk Attorney Pub Def. Pub Def Phone

On Probation ✓ yes ~~no~~ P.O. Une Court Colonia Date sent. 10/9/91

Conviction ~~CPSP 5th~~, Sentence 3 yrs. Time left 3 yrs.

Violated yes

On parole ~~yes~~ no P.D. Court Date sent. / /

Conviction Sentence Date paroled / /

Time left Violated

Other pending court actions N.S. ✓

PRIOR OFFENSES

Date	Court	Offense	Disposition
90	Grand, Ohio	U/A MV	dropped
91	Colonia	CPSP 3+4+5, Burg	3 yrs prob CPSP 5

**Escape/Attempted Escape ~~no~~ yes If yes, describe

PRIOR INCARCERATIONS

Date	Court	Offense/Conviction	Length of stay
91	NS adj	CPSP 5th	30 Days

Initial phone call ~~no~~ yes No one to Call

Any problems during present/prior incarceration ~~no~~ yes

Case History

Code 1 = daily 3 = several times a week 5 = doesn't use 7 = prior
2 = once a week 4 = several times a month 6 = other

Substance	Frequency/Quantity	Substance	Frequency/Quantity
Alcohol	3 5 /	Crack	5 /
Marihuana	5 /	Hallucinongen	/
Heroin	/	Tranquilizer	/
Cocaine	/	Methadone	/

Other drug usage Pcp (NS)

Using any of above at time of arrest No What

I.V. drug usage No Needle shared No Comments

Gillespie

Alcohol/Drug Treatment History

Date__/__/__ Where N.S Length Finish

Date__/__/__ Where Length Finish

Mental Health Concerns

Depression N S V

Suicide thoughts/attempts N/S 7 yrs ago - put a gun over head - not serious / None at this time

Suicide in family yes (no)

Mental Health Treatment History

Date__/__/__ Where N.S Reason

Date__/__/__ Where Reason

Medical Concerns

Any major medical concerns N.S - bad back pain

On any medication (yes) no List allergies - Benzoral

Seen by Medical (yes) Inform medical of above (yes) no

Other N.S

Note: Information as noted on pages one to three, as stated by inmate

Inmate Intake Interview Findings

Prior Criminal History

Misdemeanor Convictions ✓ yes ✓ no Number 1 91 CP50 5 3 yrs prob

Felony Convictions ___ yes ✓ no Number ___

Classification Concern

Suicide attempt ___ yes ✓ no

Escape history ___ yes ✓ no

Disciplinary Problem ✓ yes ___ no 1 fighting

Alcohol abuser ✓ yes ___ no

Drug abuser ___ yes ✓ no

Staff Notes

Very Polite and Cooperative
applying for ed-services
Same

Intake conducted by Joseph Stanbaugh Date 9/19/91

Update conducted by Joseph Stanbaugh Date 10/4/91

BEHAVIOR OBSERVATION FORM
(Form C-3)

Inmate John Binney D.O.B. 5/9/74 Tier 4E Cell E-3
D.O.A. 9/18/91

Reception Unit Officers, on each shift, will denote inmate's behavior, attitude and other pertinent information. When recording information, officers must print their name and date next to said information as well as print name and date next to appropriate shift on bottom of page.

MENTAL HEALTH CONCERN

MEDICAL CONCERN

DISCIPLINARY PROBLEMS

GENERAL COMMENTS sleeps well
Quiet, Cooperative

Behavior Observation form will be picked up at time of I.S.U. Intake Interview.
If inmate is moved to another tier before classified, form must go with inmate.

DATE	SHIFT	OFFICER (Print)	DATE	SHIFT	OFFICER (Print)
	7-3			3-11	
	3-11			11-7	
9/20/91	11-7	Martin		7-3	
9-20-91	7-3	Devine		3-11	
	3-11			11-7	
	11-7			7-3	
	7-3			3-11	

(Form C-1)

NAME JOHN BINNEY A.K.A. _____

D.O.A. 9-18-91 SEX MALE D.O.B. 5-9-74

1. ANY VISIBLE INJURIES _____ YES V NO

IF YES, DESCRIBE _____

2. a.) APPEARS INTOXICATED _____ YES X NO

b.) USING ILLEGAL DRUGS _____ YES V NO

3. MEDICAL CONDITIONS STATES HE HAS ALLERGIES

4. ON ANY MEDICATION _____ YES X NO

IF YES, LIST TYPE & AMT. _____

5. MENTAL CONCERN STATES NONE

6. PHYSICAL CONCERN STATES NONE

6. a.) PRIOR INCARCERATION NO PRIOR

7. ASSESSMENT OF INMATES APPEARANCE AND BEHAVIOR:

COOPERATIVE

8. TIER PLACEMENT UE CELL 8-3

DATE 9-18-91 TIME 1223 AM

ADMISSIONS & DISCHARGE UNIT STAFF J. Rivera

MENTAL HEALTH UNIT

INMATE REFERRAL FORM

Inmate Name: Sullivan - Sidney Classification Level: SM2

Date: 12-24 Time: 4:30 a.m./p.m. Tier: 4F Cell: 22 Age: 18

Staff member referring: Officer Williams Growick

1. Reason for referral: While making 4:30 pm round on inmate he stated to his officer that he was scared and said he was hearing voices telling him to kill himself & inmate Corathers better B.

2. If above information from outside:

Name of person: Telephone #:

Agency/family/other:

3. Inmate behavior noticed by Correction Staff:

- X Talks about suicide
- Suicide act/gesture
- X Depressed
- Withdrawn
- X Crying
- X Anxiety/fear
- Obsessions/compulsions
- Other (please note)
- Disorientation
- Inappropriate behavior
- Drastic changes in behavior
- Not sleeping
- Not eating
- Problem at court
- Problem at home

4. Corrective action taken by Supervisor: Moved to MH Cell

Moved to Mental Health Tier: yes no Stripped, given gown: yes no

Inmate Consultation by:

Mental Health	yes	no	Staff
Medical Unit	yes	no	Staff
Supervisor	yes	no	Staff
Other	yes	no	Staff

5. Additional comments:

6. Reviewed by: Todd [illegible] Tour Commander

Original - Mental Health Unit

cc: Superintendent

Inmate File

5073

MENTAL HEALTH UNIT
INMATE REFERRAL FORM

Inmate Name JOHN SIDNEY Classification Level A

Date 11-29 Time 1925 a.m. (p.m.) Tier 1E Cell R-12 Age 18

Staff member referring: Co. Su Spruill

1. Reason for referral: Inmate states that if need to Invest in he will hang up.

2. If above information from outside:

(Name of person) Telephone #

Agency/family/other

3. Inmate behavior noticed by Correction Staff:

- X Talks about suicide
- Suicide/self-injurious
- Depressed
- Withdrawn
- Crying
- Anxiety/fear
- Obsessions/compulsions
- Other (please note)
- Disoriented
- Inappropriate behavior
- Drastic change in behavior
- Not sleeping
- Not eating
- Problem at school
- Problem at home

4. Corrective action taken by Supervisor: Moved to Mental Health Tier X yes no Stripped/given gown X yes no

5. Inmate Consultation by:

Mental Health	yes	no
Medical Unit	yes	no
Supervisor	yes	no
Other	yes	no

Additional Comments:

6. Reviewed by Capt. Wood Tour Commander

Original - Mental Health Unit
cc: Superintendent
Inmate file

MENTAL HEALTH UNIT
INMATE REFERRAL FORM

Inmate Name JOHNATHAN BINNEY Classification Level 2

Date 11-24-91 Time 258 a.m./p.m. Tier 2W Cell 17L Age 18

Staff member referring: SGT. W. LAFONTAINE

1. Reason for referral: INMATE WAS FOUND TO HAVE SHEET TIED TO HIS CELL GATE AND BARS. STATED ALLEIE HAS TO DO IS PUT HIS HEAD IN, TURN 3 TIMES AND DROP. THIS INMATE GAVE NO EARLIER INDICATION THAT THIS ATTEMPT WOULD BE MADE. INMATE WAS TO RECEIVE COPY OF A WRITE UP FROM ANOTHER TIER WHEN THIS WAS DISCOVERED.

2. If above information from outside:

Name of person Telephone #

Agency/family/other

3. Inmate behavior noticed by Correction Staff:

- Tears about cheeks
- Suicide face/gesture
- Depressed
- Withdrawn
- Crying
- Anxiety/fear
- Obsessions/compulsions
- Other (please note)
- Disoriented
- Inappropriate behavior
- Drastic change in behavior
- Not sleeping
- Not eating
- Problematic Contact
- Problems at home

4. Corrective action taken by Supervisor: SHEETS PLACED IN I/P

Moved to Mental Health Tier: yes / no Stripped/given gown: yes / no

Inmate consultations by:

Mental Health: yes no Staff

Medical Unit: yes no Staff

Supervisor: yes no Staff

Other: yes no

5. Additional comments:

6. Reviewed by: Tour Commander

Original - Mental Health Unit
cc: Superintendent
Inmate File

MENTAL HEALTH UNIT
INMATE REFERRAL FORM

Inmate Name JONATHON BINNEY Classification Level SMU

Date 11/4/94 Time 5:10 a.m. p.m. Tier 1 EAST Cell 2-1 Age 18

Staff member referring: P.O. T DeBoot

1. Reason for referral: INMATE CAME OUT OF CELL TO GET FOOD TRAY AND STATED THAT HE WOULDN'T MAKE IT ANYMORE AND HE WAS GOING TO HANG UP.

2. If above information from outside:

Name of person Telephone #

Agency/family/other

3. Inmate behavior noticed by Correction Staff:

- X Talks about suicide
- Suicide act/gesture
- Depressed
- Withdrawn
- Crying
- X Anxiety/fear
- Obsessions/compulsions
- Other (please note)

Disoriented
Inappropriate behavior
Obvious change in behavior
Not sleeping
Not eating
Problem at court
Problem at home

Corrective action taken by Supervisor

Moved to Mental Health Unit yes no Stripped/given gown yes no

Inmate consultation by:

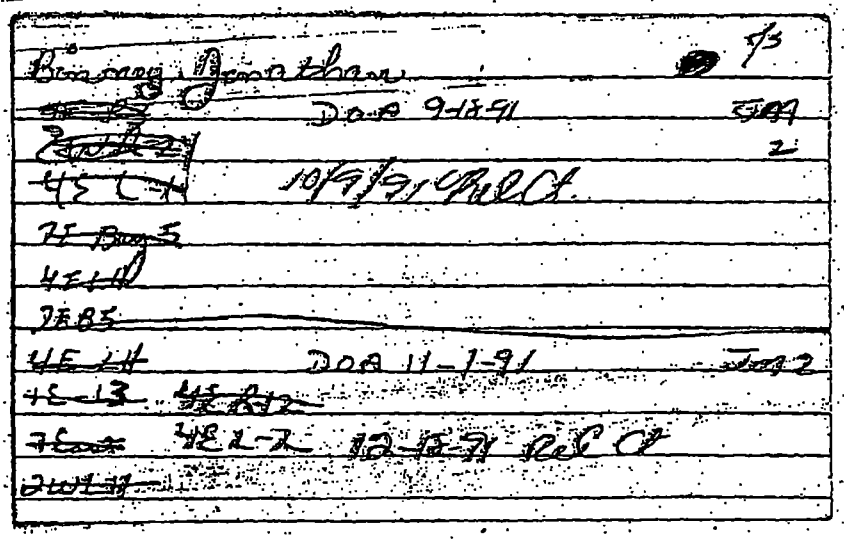
Mental Health yes no
Medical Unit yes no
Supervisor yes no
Other yes no

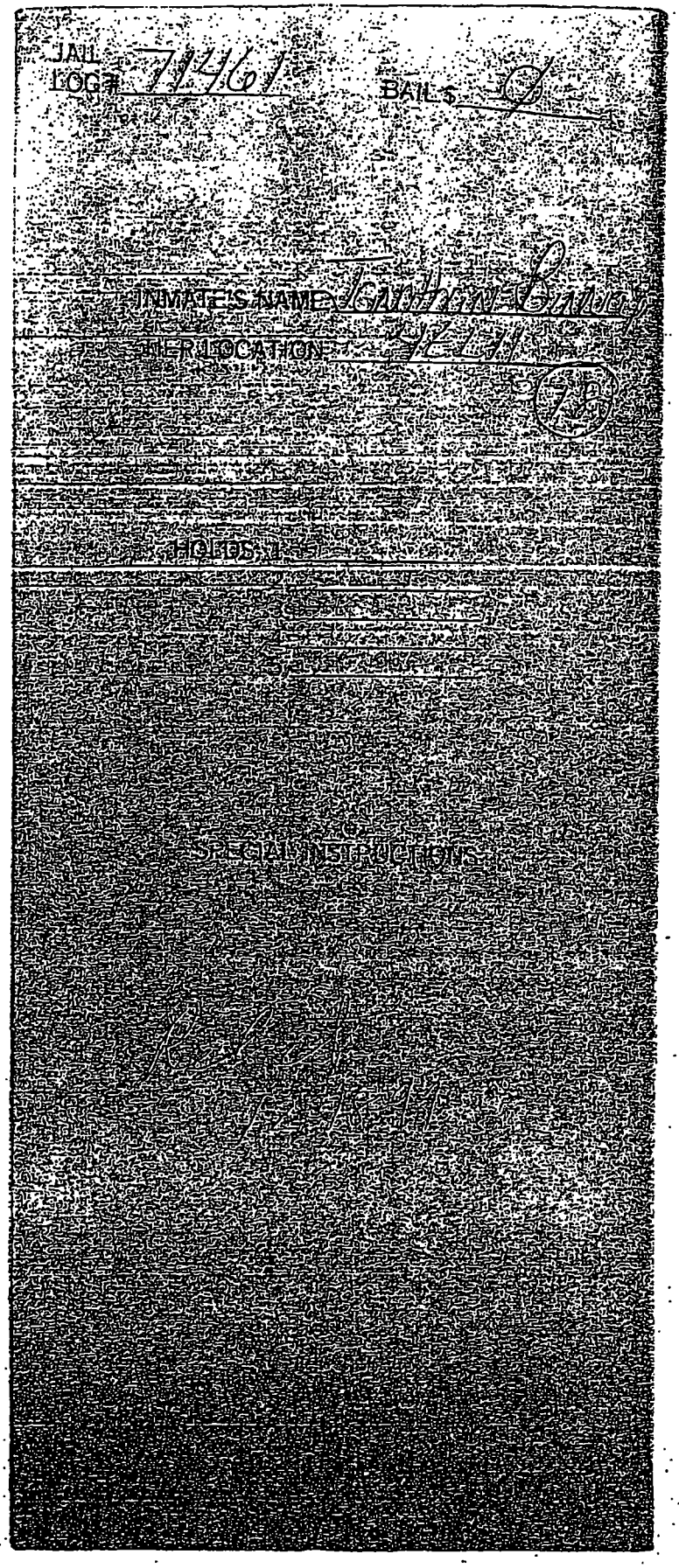
Additional comments:

Reviewed by [signature] Tour Commander

Original - Mental Health Unit
cc: Superintendent
Inmate file


JONATHAN BINNEY
ID BUREAU
ALBANY COUNTY JAIL


DOA 9-18-91
DOA 11-1-91


JAIL
LOG# 11461
BAIL $ 0
INMATE'S NAME Gaines, Quincy
HER LOCATION 4L11
HOLDS
SPECIAL INSTRUCTIONS

STATE OF NEW YORK : COUNTY OF ALBANY

JUSTICE COURT TOWN OF COLONIE

The People of the State of New York
Against
Jonathan Benney
Defendant

Discharge of Defendant From Custody

TO THE SHERIFF OF THE COUNTY OF ALBANY

A Securing Order having been heretofore made by this Court holding the above named defendant for further aciton of this court on a charge of

140.20 p l

and said defendant having been committed to the Sheriff of the County of ALBANY in connection therewith and a final disposition of the said charge having been made, it is

ORDERED, that the Sheriff of the County of ALBANY forthwith discharge said defendant from custody.

Dated at

COLONIE, N.Y.

Dec. 18, 1991

Judge-Justice

RECEIVED

ALBANY COUNTY JAIL AND PENITENTIARY
ADMISSIONS & DISCHARGE UNIT
BOOKING SHEET (PRINT OR TYPE)

Date Rec: 11/1/91 Sex: [X] Male [ ] Female

Time Rec: 6:28 [ ]AM [X]PM P H D/O/B: 10-9-73 Age: 18
E I
Tier: 4E Cell: L11 R S Place/Birth: Hattiesburg, Mississippi
S T
Prints & Photo taken by: O O S.S.#: 371-92-0346
W. Stallone N R Hispanic: [ ]Yes [X]No
A Y Race: [X] W [ ] B [ ]Asian
ACCF LOG#: 71461 NYSID L [ ] Amer.Ind [ ] Other[ ]
U.S.Citizen: [X]Yes [ ]No
Read/Write: [X]Yes [ ]No

Name: Binney Jonathan Kyle Alias: Boozer
(Last) (First) (Middle Name) (Suxf)

Residence: Box 312 New Concorde, Ohio Tele: (614) 872-3816
(Street) (C/T/V) (State)

Maiden Name/If Married: Military —— /Discharge: ——
Next of Kin: Jim Binney Relationship: Father
Address: Same Tele: Same
In case of Emergency Notify: Same Relationship Same Tele: Same
RELIGION: [X]Bapt [ ]Rm Cat [ ]Hebrew [ ]Muslim [ ]Protestant [ ]None [ ]Other
HIGHEST GRADE COMPLETED: 11th
MARTIAL STA: [ ]Divorced [ ]Married [ ]Separated [X]Single [ ]Widowed
Occupation: Student Employer: ——
(Name) (Address)

****PHYSICAL DESCRIPTION****
Est.Height: 5'7" Est.Weight: 120 Eyes: BL Hair: BR Glasses: [ ]Yes [X]No
Skin Tone: L[X] M[ ] D[ ] Right or Left Handed: Right
False Teeth: [ ]Yes [X]No /Upper[ ] Lower[ ] Both[ ]/Partial[ ] Full Plate[ ]
Scars, Marks or Tattoos: ——

IS THERE ANY EVIDENCE OF RECENT PHYSICAL INJURY SEEN ON THE INMATE: [ ] Yes [X] No
If Yes descripe injuries: ——
How were injuries received according to inmate? ——
Location and Date of Treatment: ——

****ARREST INFORMATION****
Arresting Agency: Colonie P.D. Committing Judge: Criscone
Court of Arraignment: Town of Colonie Bail: $2,000.00
IS THERE A EXAMINATION ORDERED BY THE COURT: [ ] BY BOOKING [ ] WATCH: [ ]
MENTAL HEALTH EXAMINATION [ ] PHYSICAL EXAMINATION [ ]

CHARGES 1: Forgery 3rd
2: ——

****ARREST DISPOSITION****
Awaiting further court action: [X]Yes [ ]No Holds/Detainers
Sentenced to Alb County Pen: [ ]Yes [X]No Term of Sentence: ——
Parole [ ] Probation [ ] P.O.'s Name ——
Officer Completing Form: W. Stallone Badge # 242
Copy Distribution White-Identification Bureau LT YELLOW-Medical
PINK-Front Office DK YELLOW-Inmate Services

INITIAL CLASSIFICATION INTAKE SHEET

(Form C-1)

NAME Jonathan K. Binney A.K.A. Booze

D.O.A. 11-1-91 SEX Male D.O.B. 10-9-73

1. ANY VISIBLE INJURIES YES [redacted] X NO

IF YES, DESCRIBE

2. a.) APPEARS INTOXICATED YES X NO

b.) USING ILLEGAL DRUGS YES States no X NO

3. MEDICAL CONDITIONS States he has a bad back

Sinuses & Allergies

4. ON ANY MEDICATION X YES NO

IF YES, LIST TYPE & AMT Seldane - 2 x a day

5. MENTAL CONCERN States None

6. PHYSICAL CONCERN Back pain.

6. a.) PRIOR INCARCERATION ACCF 9-91

7. ASSESSMENT OF INMATES APPEARANCE AND BEHAVIOR:

8. TIER PLACEMENT 4E CELL L11

DATE 11-1-91 TIME 7:47 p.m.

ADMISSIONS & DISCHARGE UNIT STAFF W. Wallace

COMMITMENT TO LOCAL CRIMINAL COURT
C.P.L. 170.10, 510.40, 180.10

STATE OF NEW YORK: COUNTY OF Albany

Justice COURT Town OF Colonie

The People of the State of New York
against
JONATHAN K. BINNEY
Defendant

COMMITMENT
TO LOCAL CRIMINAL COURT

TO THE SHERIFF OF THE COUNTY OF Albany:

A Securing Order having been this day made by this court that the above named defendant be held for further action of this court upon a charge of FORGERY 3rd- BENCH WARRANT

and bail having been fixed in the amount of $ 2000 ea, and said defendant having failed to post bail as therein required, you are commanded to receive said defendant into your custody, detain him, and produce said defendant before this Court on NOVEMBER 6th, 19 91, at 7 p. m.

Dated at:

Town of Colonie, N.Y.

NOVEMBER 1, 19 91.

Judge

Rec'd
11-1-91
6:28 pm

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHEROKEE

JONATHAN KYLE BINNEY,

Plaintiff,

-vs- C/A NO.: 06-CP-11-223

JOHN OZMINT, COMMISSIONER, S.C. DEPARTMENT OF CORRECTION; and HENRY MCMASTER, ATTORNEY GENERAL, STATE OF SOUTH CAROLINA,

Defendants.

COPY

Deposition of **HENRY VIQUEZ**, taken on behalf of the Defendants, in the Solicitor's Office, Spartanburg County Courthouse, 180 Magnolia Street, 3rd Floor, Spartanburg, South Carolina commencing at 2:45 p.m., on Tuesday, the 15th day of May, 2007, before Tammera R. Leonard, a Certified Stenographic Reporter and Notary Public within and for the County of Spartanburg, State of South Carolina.

APPEARANCES:

FOR THE PLAINTIFF: MS. EMILY C. PAAVOLA, ESQUIRE
BAKER & DANIELS, LLP
300 N. Meridian Street
Suite 2700
Indianapolis, Indiana 46204

FOR THE DEFENDANTS: MR. WILLIAM EDGAR SALTER, III,
SENIOR ASSISTANT ATTORNEY GENERAL,
MR. ANTHONY MABRY,
ASSISTANT ATTORNEY GENERAL,
OFFICE OF THE ATTORNEY GENERAL
STATE OF SOUTH CAROLINA
1000 Assembly Street, 5th Floor
Columbia, South Carolina 29201

STIPULATIONS:

This deposition is being taken by agreement of the parties and pursuant to South Carolina Rules of Civil Procedure. The deponent does waive the right to read and sign the transcript of the deposition.

INDEX TO EXAMINATIONS:

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3. 5/8/07 Letter from Mr. Salter to Mr. Blume, Ms. Johnson and Ms. Paavola	120

Plaintiff's No.:

1. Affidavit of Henry Viquez	103

REPORTER'S NOTE:

THIS TRANSCRIPT CONTAINS QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

(Defendant's Exhibit Nos. 1 and 2 were premarked for identification.)

MR. MABRY: My name is Anthony Mabry. I'm an Assistant Attorney General with the State Attorney General's Office in Columbia, South Carolina. Also with me is Ed Salter, who is a Senior Assistant Attorney General, and also Emily Paavola, who is an attorney representing Jonathan Binney.

This is a post conviction relief matter. We have noticed the deposition of Henry Viquez. I want to put on the record at this time the reason this deposition is being taken. Mr. Viquez was a juror in the death penalty case, the State versus Jonathan Kyle Binney, 00-GS-11-526. Neither myself, nor Mr. Salter, nor any member of the Attorney General's Office, nor anyone at their direction prior to receiving a statement from Mr. Binney's attorneys signed by Mr. Viquez had we approached or directed anyone to approach a juror in this case.

However, approximately two weeks ago we received an Affidavit from Mr. Binney's attorneys. I'm not sure of the exact date, but

I believe it was about two weeks ago. This purported Affidavit -- it's not witnessed by anyone. It's not notarized, but it's signed by -- it looks like the signature is Henry Viquez. I don't know if I'm pronouncing that correctly or not.

But after receiving this Affidavit, we in the Attorney General's Office did direct Deputy Solicitor Donnie Willingham to approach any jurors who were willing to talk to our office. We have been able to talk to one juror, who was a juror on this case, and that juror has been informed of the contents of this purported Affidavit or statement of Henry Viquez and has informed us that the information contained in this Affidavit is not correct.

Therefore, we have noticed Mr. Viquez's deposition not only to investigate the information we received back from this juror, but also to question Mr. Viquez regarding how he came to sign this document and who filled it out.

Prior to beginning this deposition, we want to place on the record our objection to the admission of this statement of Mr. Viquez.

First of all, it is not notarized by anyone, nor is it witnessed by anyone, nor do we know at this time even if this is Mr. Viquez's signature. Those are just some procedural objections.

Our major objection to the consideration of this Affidavit are the cases from South Carolina, State versus Franklin, State versus Hunter, State versus Osborne, State versus Pittman and State versus Kennerly. All of those cases clearly stand for the proposition that an Affidavit from a juror cannot be used to attack the verdict, unless it fits within a specifically carved out exception by our Court set forth in State versus Hunter, a case that I prosecuted myself.

We, therefore, object to the consideration of anything in this Affidavit that falls outside the parameters of State versus Hunter and falls into those line of cases. We also object -- this is a discovery deposition to determine the validity or nonvalidity of this Affidavit, how it came about and, if for some reason the judge decides to consider any portion of this statement or

Affidavit, to consider the testimony of Mr. Viquez on credibility and whether or not any of this testimony is believable.

So, therefore, we're taking this deposition as a discovery deposition, and we object to the admission of any of the testimony from this deposition under those cases, State versus Franklin, State versus Hunter, State versus Osborne, State versus Pittman and State versus Kennerly, which, again, stand for the proposition that testimony of a juror to attack a verdict is not admissible and shall not be considered, especially where the testimony deals with internal -- alleged internal misconduct of the juror or some other juror on the case, which, from reviewing this alleged Affidavit or statement, appears to be what the allegations appear to be. At this time, again, I don't know. I have not deposed the witness at this point in time.

So we would object to the consideration of anything in this deposition testimony, and it should only be allowed if for some reason the Court, the trial judge, Judge

Baxley, or some of the Supreme Court decide to consider this Affidavit that the deposition testimony would be considered on the issue of credibility and believability of this witness and how this information was developed.

We would also place on the record Rule 606(b), which sets forth the rule that the validity of a verdict, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations, or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or descent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror. Nor may any juror's Affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying would be received for these purposes. And that's Rule 606(b), I believe, of the South

Carolina Rules of Evidence as amended and adopted by our Supreme Court and our state legislature as the law of this state.

And in reviewing the cases that I've cited, I believe it is State versus Franklin or Pittman, the Court was very cognizant of the fact of going into jury deliberations and what took place in there and asking -- opening up jury deliberations and asking a juror about what took place. In fact, the Court in State versus Franklin set forth that -- and I want to try to get the language, "The integrity of the jury system is jeopardized by any" -- this is the Court's language. "The integrity of the jury system is jeopardized any time a Court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be made lightly.

Therefore, we proceed with this deposition of Juror Viquez, who was one of 12 jurors in the case who voted for the death penalty and was also polled in this case and affirmed his ascent to both guilt and the death penalty. We proceed with this deposition for that reason and that reason only, that this

Affidavit was submitted to us and, therefore, we had to investigate this Affidavit and conduct this deposition.

With that, I will have Mr. Viquez come in and ask him questions. The first thing I'm going to do before I ask him any questions is, I will read to him Statute 16-3-21, which is a juror's right to discuss or not discuss the verdict and ask him if he is willing to participate in this deposition at this time. So I'll bring Mr. Viquez, if I'm pronouncing it correctly, in at this time.

MS. PAAVOLA: Mr. Mabry, may I add something to the record, since you made such a lengthy objection?

MR. MABRY: Go ahead.

MS. PAAVOLA: I would just like to note that it is our position that the Affidavit does fall within the parameters of the rules that allow it to be admitted. However, I feel that that's a legal argument that can be more appropriately addressed before the Court. I just want to note that we -- that's our position.

MR. MABRY: I understand. Okay.

(**HENRY VIQUEZ**, having been duly sworn, testified as follows:)

DIRECT EXAMINATION BY MR. MABRY:

Q. You are Henry Viquez?

A. Correct.

Q. All right. Mr. Viquez, again, my name is Anthony Mabry. I'm an Assistant Attorney General. I work for the Attorney General's Office in Columbia. We are involved in a postconviction relief matter involving Jonathan Binney.

I believe you were a juror in the original trial of Mr. Binney in November of 2002 in Cherokee County. Is that correct?

A. Yes, sir.

Q. Okay. Before I ask you any questions, other than who you are, I want to read you the Statute 16-3-21. Okay. I believe it's already been read to you a long time ago by Judge Cole after you reached your verdict, you and the other jurors, but I'm going to read it to you again. Okay?

A. (The witness nodded affirmatively.)

Q. 16-3-21, this is law of South Carolina, Section A, "In all cases in which an individual is sentenced to death, the trial Judge shall before the dismissal of the jury verbally instruct the jury concerning the discussion

of its verdict. A standard written instruction shall be promulgated by the Supreme Court for use in all capital cases. That's a death penalty case. The verbal instruction shall include the right of the juror to refuse to discuss the verdict, the right of the juror", that would be you, "to discuss the verdict to the extent that the juror so chooses, the right of the juror to terminate any discussion pertaining to the verdict at any time the juror so chooses, the right of the juror to report any person who continues to pursue a discussion of the verdict or continues to harass the juror after the juror has refused to discuss the verdict or communicated a desire to terminate discussion of the verdict and the name, address and phone number of the person or persons to whom the juror should report any harassment concerning the refusal to discuss the verdict or the juror's decision to terminate discussion of the verdict. In addition to the verbal instruction of the trial judge, each juror upon dismissal from jury service shall receive a copy of the written jury instructions set forth in Subsection (a)."

Do you remember the Judge telling you all this after you reached your verdict?

A. It was a long time. Yeah, but yeah, they have to.

Q. Okay. All right. Do you understand you don't have to talk about this verdict if you don't want to? Your jury service --

A. Correct.

Q. -- in this case, you don't have to talk about it if you don't want to. Do you understand that?

A. Yes, sir.

Q. Okay. And are you willing to talk with us about it today under oath?

A. I don't mind.

Q. You don't mind?

A. Yeah.

Q. Okay. I may have some trouble understanding you today.

A. No problem. You let me know. You let me know.

Q. You let me know, and I'll let you know.

A. I'll let you know.

Q. Okay. All right. If at any time you feel like you don't want -- you decide you don't want to answer anymore questions, will you please let me know?

A. I will. I will.

Q. Okay. Because I don't want to do anything that violates this law. Okay?

A. Correct.

Q. All right. And if at any time you feel like you're being harassed by anybody today, would you please stop me and tell me and we'll see if we can't remedy that situation?

A. Okay.

Q. All right. Okay. Tell me how old you are, Mr. Viquez.

A. 43.

Q. All right. Do you understand today that you are under oath just like if you were in the courtroom?

A. Yes.

Q. All right. Do you understand that being under oath that you're subject to the penalty of law if you commit perjury and don't tell the truth?

A. Oh, yeah.

Q. Do you understand that?

A. Yes.

Q. All right. Are you under the influence of any kind of drugs or alcohol today?

A. I never smoke. I never drink in my life.

Q. I gotcha. I have to ask these questions before we get started.

Do you understand my questions that I'm asking you here today?

A. For right now, yes.

Q. Okay. Is there anything that would prohibit you from understanding my questions today? Do you have a problem hearing at all?

A. No, I'm fine.

Q. So is there anything that would prohibit you from understanding my questions today? Let me see if I -- right now is there anything that's stopping you from understanding what I'm saying?

A. No, I'm fine.

Q. Okay. All right. I gotcha.

Do you understand that, Ms. Paavola or myself or Mr. Salter, we won't be able to help you answer any questions today? Do you understand that?

A. Uh-huh. Yes, sir.

Q. You have to answer the questions on your own without help from anybody else.

A. That's fine.

Q. Okay.

A. If I don't know, I can tell you I don't know.

Q. Tell me you don't know. That's fine. If you don't know the answer, you don't remember, you tell me. That's all you have to tell me.

A. Okay.

Q. Okay. All we want to get today are your answers and your answers alone, okay, to the questions.

A. Yes, sir.

Q. And if you could say yes or no, give a verbal answer when I'm asking questions rather than nod your head because she's tape recording it and she's taking it down, and she can't -- this won't pick up. Do you understand?

A. I remember.

Q. Okay. You remember.

All right. If at any time we take a break or you need a break to go to the bathroom, to get something to drink, will you let me know?

A. I will.

Q. Okay. I'm hoping you won't be here very long.

A. Okay.

Q. But it will just depend on how fast we go and whether I can understand you and you can understand me. Okay?

A. Okay.

Q. All right. If at any time for some reason we do have to take a break and you go outside this room, you won't be able to talk to anybody about your testimony. Do you understand that?

A. Yes, same as the courtroom.

Q. Right, just like in court. Unless you talk to one of the lawyers, but then when you come back in here

you'll have to put on the record and so will the lawyer what was said outside this room. Do you understand that?

A. Yes, sir.

Q. Okay. Are you laboring under any kind of disability today that would prevent you from understanding what we're doing? Do you have any disability that would prohibit you from understanding my questions?

A. No, sir. Like no hear or not talk or something like that?

Q. Right. Right. You don't have any of those problems?

A. No, sir.

Q. What's your date of birth, Mr. Viquez?

A. 3/5/64.

Q. We're about the same age.

A. Oh, really?

Q. Yeah.

What is your Social Security number? I won't give it out to anybody, I promise. Go ahead.

A. 156-84-6839.

Q. Okay. And where do you currently live?

A. Right now in Costa Rica.

Q. Okay. Tell me where you live in Costa Rica.

A. Grecia.

Q. You're going to have to spell that for this lady.

A. Okay. G-R-E-C-I-A.

Q. Grecia?

A. Grecia, like Greece, in Spanish, yes.

Q. What is your address there in Costa Rica? Sure. Let me give you something. You can write on the back of that. Is it numbers?

A. I'll put --

Q. Okay. Go ahead.

A. I usually put my mama's address because it's easy, and she stay all the time there.

Q. I would rather have where you live. I need to know where you live.

A. Well, I'm going to Mexico.

Q. You're going to Mexico?

A. Yes.

Q. From Costa Rica?

A. From here to Mexico and stay for seven months there, and I don't know the address there.

Q. All right. What's your address in Costa Rica, where your mother lives?

A. Well, that's what I give because I'm moving.

Q. Okay. All right. Well, give us that address.

Where did you last live in Costa Rica?

A. Okay.

Q. Give me that. And we'll get your mother's, too.

A. Okay.

Q. Okay.

A. The bottom is my mama. The top is what --

Q. Where you live before?

A. Yeah, we have the apartment there.

Q. Okay. When you say we had the apartment, who is that? Who is "we"?

A. My wife.

Q. Your wife?

A. Yeah.

Q. Okay. 125 --

A. West.

Q. Mountains, is that mountains, "MTS"? What does that stand for?

A. Meters.

Q. Middles?

A. Yeah. We don't go in square foot. We go in 1 meters, 2 meters.

Q. I gotcha.

A. The fire department.

Q. Okay.

A. And this is Grecia, the city, the state and --
Q. Costa Rica?
A. Costa Rica.
Q. All right. Then this is?
A. "Urb." is like an abbreviation, "El Bosque de La Paz, Casa 14A, Grecia, Alajuela, Costa Rica".
Q. Okay. And you're moving to Mexico now?
A. Yes.
Q. And you don't know where you're going there?
A. To a hotel.
Q. Okay. What hotel? Where?
A. Mexico City.
Q. Do you know what hotel?
A. Well, we don't know. Let me see.
Q. Okay. And this is your cell phone number on here, too?
A. In Costa Rica, not here.
Q. Okay.
A. I don't have a cell phone here.
Q. All right.
A. Intercontinental.
Q. Intercontinental Hotel?
A. Yeah.
Q. In Mexico City?
A. Mexico City.

Q. All right. You said you're married?
A. Yes, sir.
Q. Okay. What is your wife's name?
A. Do we have to do that?
Q. No, we don't have to.
Do you have children?
A. One.
Q. Okay. How old is your --
A. 19.
Q. Son?
A. Yes.
Q. All right. And do you attend church anywhere?
A. Yes.
Q. Where do you attend church?
A. Catholic.
Q. Is it a specific one here?
A. One here? Yes. One in Costa Rica, yeah.
Q. Where do you attend church here?
A. In Gaffney.
Q. Which one?
A. There's only one.
Q. Okay. What about in Costa Rica?
A. In my city, same City.
Q. El Bosque?

A. Grecia.

Q. Grecia.

Okay. What is the name of that church?

A. Eglesia Las Mercedes.

Q. Eglesia?

A. Las Mercedes.

Q. Las Mercedes?

A. Uh-huh.

Q. Okay. And are you an American citizen?

A. Yes, sir.

Q. For how many years have you been an American citizen?

A. 1999, about seven years.

Q. Are you a citizen of any other country?

A. I'm dual citizen.

Q. Okay. Of Costa Rica?

A. Yeah.

Q. When did you come to the United States?

A. 1988.

Q. 1988; is that right?

A. Uh-huh, approximately.

Q. And tell me why you came to the United States.

A. To live better, have a better life here.

Q. Did you have a job lined up when you left Costa Rica to come here?

A. Say again.
Q. Did you have a job, work?
A. Here?
Q. Yeah. Trabaja I guess. I'm not very good at spanish.
A. No.
Q. You came here --
A. My uncle. My uncle bring me.
Q. Okay. Your uncle brought you.
And did you meet your wife here?
A. No.
Q. She came, too, or --
A. No, I met her in Costa Rica.
Q. Okay.
A. That's my second wife.
Q. When did you leave the United States? You came in 1988. When did you leave?
A. Like I live here. What do you mean? Leave what?
Q. Okay. I thought you had gone back to Costa Rica.
A. I go back all the time, going back and forth.
Q. Okay.
A. But now this time, you're talking about right now? A year ago.

Q. You left a year ago?

A. Yeah, to go back to Costa Rica, yeah, but I still have a house here.

Q. Okay. So you left in 2006?

A. In July, 2006, yes.

Q. Okay.

A. That's a question?

Q. Yes, that's a question. I'm sorry.

July, 2006 you moved back to -- you kept your house here, but you moved back?

A. Yeah. The house is for sale.

Q. Okay. Well, tell me why did you move -- why did you leave the United States and go back to Costa Rica?

A. It doesn't work anymore. I'm retired. I'm disabled.

Q. Carpal tunnel?

A. Carpal tunnel.

Q. Syndrome?

A. Syndrome.

Q. All right. And you retired from where?

A. Yeah. How do you know?

Q. It's in your questionnaire. I'm sorry.

A. Oh.

Q. I'm sorry.

A. That's okay.

Q. I was just trying to save time --

A. No, that's fine.

Q. -- instead of asking you the question. It's in your questionnaire that you filled out when you were a juror.

A. Pardon me?

Q. It's in your questionnaire.

A. Yeah. I was disabled at that moment, yes.

Q. And what I was asking is, where did you work before you were disabled?

A. Freightliner.

Q. Freightliner?

A. Yes.

Q. What you did do for Freightliner?

A. Assembly line.

Q. And where did you work before Freightliner?

A. Champion.

Q. What did you do for Champion?

A. Shipping and receiving.

Q. Okay. Exactly what did you do in shipping and receiving? Were you a manager, supervisor?

A. No, regular employee.

Q. Regular.

Where did you work before Champion, if you

can remember? I tell you what, rather than do that, just kind of tell me what you've done in your life. What kind of jobs have you done?

A. Most of the time textiles, textiles. My last one was different. Most was textiles, shipping, receiving and warehouse.

Q. And when did you become disabled from Freightliner? Do you remember what year that was?

A. I think 2000, 2001 when I have the accident. I don't really remember.

Q. You had some kind of accident?

A. Yes.

Q. At work?

A. At work, yeah.

Q. Okay. One of your arms?

A. Yeah.

Q. I gotcha.

Okay. All right. Since you had that accident, have you worked anywhere else?

A. No, sir.

Q. Even when you go back to Costa Rica you haven't?

A. No. No.

Q. Okay. And why are you going to Mexico?

A. My wife, she work there.

Q. Okay. What does she do? If you don't want to answer, you don't have to answer.

A. No.

Q. Okay. Tell me -- I've been sent this document, which is a statement signed by you. It's got 14 paragraphs on it. Do you recognize that document?

A. Yes, sir.

Q. Okay. Does that have your signature on it?

A. Yes, sir.

Q. Okay. Tell me how you came to put your signature on that document.

A. I don't understand your question.

Q. Okay. How did that come to be? How did that document come to be? Did you call somebody, or did they call?

A. They called me.

Q. All right. Where did they call you at? Where were you?

A. At my house here in Gaffney.

Q. Here in Gaffney?

A. Yes.

Q. What year did they call you?

A. I think last year.

Q. Last year. So some time in 2006?

A. I think so.

Q. All right. Who called you? Did they come to your house, or did they call you on the phone?

A. They called me on the phone.

Q. They called you on the phone.

A. She did. I think she did it.

Q. You think it was Ms. Paavola that did it?

A. Yes.

Q. All right. Tell me -- she called you on the phone. Tell me what conversation took place. What did she say when she called you? I want to know word for word what she said to you when she called you.

A. Oh, she wanted to talk to me about the case.

Q. All right. Was anything else said during that phone call?

A. I don't remember, but she was supposed to come to my house and talk to me.

Q. Who did she tell you she was, and who did she tell you she was working for?

A. Oh, she told me that she was the lawyer for the case of Binney.

Q. The case of Binney?

A. Uh-huh.

Q. Did she tell you who she represented?

A. Yes.

Q. Who did she tell you she represented?

A. Binney.

Q. Mr. Binney.

A. Uh-huh.

Q. all right. Did she say anything else to you on the telephone?

A. I don't remember, sir.

Q. Had anybody -- before Ms. Paavola called you, had anybody else come approached you about talking about this case?

A. No, sir.

Q. Had any college students come to your house?

A. My neighbor say to me that some lawyer come to my house looking for me. I don't know if that's for this case or say this young guy or young lawyer asking me questions about me coming to my house, but I wasn't there. I was in Costa Rica.

Q. Okay. You were in Costa Rica at that time?

A. Yes, sir.

Q. Do you know how many of them there were?

A. No. He said only one I think.

Q. Only one. Young though?

A. Young.

Q. Did they say where they were from?

A. I think he told me, but I don't remember.

Q. How about Cornell Law School?

A. I don't remember.
Q. Was it somewhere far away from South Carolina?
A. Yes.
Q. Okay.
A. I think north.
Q. Up north?
A. Yeah, I think so.
Q. Okay. Did you ever have any contact with that person, or did they call you on the phone?
A. They called me, yes, a lawyer from Columbia.
Q. Okay. Columbia, you think?
A. Yes.
Q. Columbia, South Carolina or Columbia University?
A. Columbia, South Carolina. Capitol of South Carolina, right?
Q. Yeah, last time I checked it still is.
Okay. Tell me when did they call you.
A. When?
Q. Yeah. Was that before Ms. Paavola called you?
A. After.
Q. After she called you?
A. After.
Q. All right. What did they say to you on the

phone?

A. They wanted to have -- ask me questions, --

Q. Uh-huh.

A. -- but they never say to me they're going to do a deposition.

Q. Okay. They just wanted to ask you some questions?

A. Some questions about the Affidavit.

Q. About what?

A. The question about the -- what's it called?

MS. PAAVOLA: Affidavit.

A. Affidavit. I'm sorry. Affidavit.

BY MR. MABRY:

Q. All right. Was that after you talked to Ms. Paavola on the phone but before you met her in person, or was that --

A. No, after.

Q. After you met her in person?

A. I'm talking about a couple weeks.

Q. Oh, a couple weeks ago?

A. Yeah.

Q. Okay. Tell me, after you had the -- well, the phone conversation you had with Ms. Paavola, what else was said to you on the phone besides she just wanted to talk to you and who she was? Did she say anything else?

A. I don't remember, sir, really. I don't remember what we talked about, but most of the time she was talking about he wanted to interview about the case.

Q. Okay. How many phone calls were there before you met her or somebody else?

A. None.

Q. Was there any other phone calls besides from Ms. Paavola?

A. Oh, yes. The other lawyer, I don't remember her name.

Q. Ms. Johnson, Sheri Johnson?

A. The person -- she can't talk?

Q. She can't talk. She can't answer the question.

It was another woman?

A. I don't remember names.

Q. That's fine.

Another woman attorney?

A. Yes.

Q. And she called you. What did she want, or what did she say?

A. Talking about she bring this paper to me.

Q. She bring that paper to you?

A. Uh-huh.

Q. Okay. Who wrote that paper up up? Who wrote

the words on that paper?

A. Oh, this is based on what I said, but I don't did this. They did it. I signed.

Q. Okay. Those are their words that they wrote up?

A. It was almost my words. It's my words, but they wrote this.

Q. All right. They typed it up and brought it to you?

A. Yes.

Q. Is that correct?

A. That's correct.

Q. You had a call from Ms. Paavola, and you had a call from this other lawyer. You think that -- you don't remember her name? Is that right?

A. Yes.

Q. When did that call take place in relation to when Ms. Paavola called?

A. With her I think we did it last year or before. I can't remember if it was last year or before last year. Last year I think it was, if I remember, but I can't remember that well.

And with the other attorney that bring this to me, --

Q. Uh-huh.

A. -- it's a couple weeks ago.

Q. Okay.

A. They called to my country.

Q. Uh-huh. Costa Rica?

A. Costa Rica.

Q. okay.

A. And my brother give my telephone where I stay now here, a friend of mine, and they give the phone number and they call me and they told me about this.

Q. All right. What did they tell you about that? What did they say?

A. If they can talk to me about it and they have the paper, if I can sign for.

Q. Sign for it?

A. Uh-huh.

Q. Is that right?

A. Yes.

Q. All right. When Ms. Paavola called you back in the summer, the first time, you said last year she called you, --

A. The first time. I don't remember. Yeah.

Q. -- the first time she called you, did you talk about anything on the phone, or she just said she wanted to meet with you?

A. Yes, she wanted to meet with me.

Q. All right. When did you meet with her?
A. It was at my house.
Q. How soon after the phone call?
A. Oh, I don't remember.
Q. A couple of days, a couple of weeks, months?
A. No. I don't think a month.
Q. A couple of weeks?
A. I think. I'm not sure. I can't say yes or no because I don't remember.
Q. All right. Did she come to your house in Gaffney?
A. Yes.
Q. All right. Tell me what took place when she came to your house in Gaffney.
A. Pardon me?
Q. Tell me what took place when she came to your house in Gaffney.
A. At my house, 113 Center (sic) Road.
Q. Right. Okay. Let me rephrase it.
A. Maybe I don't understand your question.
Q. Yeah. Let me rephrase it.
Okay. When she got to your house, --
A. Uh-huh.
Q. -- tell me what she said to you and what you said to her. What took place? What happened?

A. Oh, this is -- we're talking about -- she say to me -- because I asking her why she had come to me, --

Q. Uh-huh.

A. -- and she say the -- talking about the case of Mr. Binney and that she was talking with other jury and did they tell you was the last person to sign for the death penalty on the jury.

Q. Okay.

A. And she started talking about -- ask me, you know, questions, and she asked me what happened and I told how the other people treated me --

Q. Okay.

A. -- and the pressure they did to me, and mostly what is here that's what I talk to her.

Q. All right. So she came to your house. Was she by herself, or did she have somebody else with her?

A. By herself.

Q. By herself.

All right. And she told you that she had talked to the other jurors in the case?

A. Yes.

Q. She told you she had talked to all the other jurors?

A. Not all, some.

Q. How many of them did she say she talked to?

A. I don't know.

Q. Most of them?

A. I don't know.

Q. A lot of them?

A. I think so. She said she had been talking to people. Some people told -- some juror talked about how they treated me.

Q. Oh, they did.

Have you seen any Affidavits from any other jurors?

A. No, sir.

Q. Did she tell you she took any Affidavits from any other jurors?

A. I asked.

Q. You asked her?

A. Yes.

Q. What did she say?

A. If she needed to she will go with other.

Q. She'll get other jurors?

A. Yes.

Q. Have you been told that there are Affidavits from other jurors?

A. No. Say again the question, sir.

Q. Have you been told by -- Ms. Paavola or any other lawyer representing Mr. Binney or anybody on his

behalf, have they told you that they got Affidavits from other jurors?

A. No, sir.

Q. Have you seen any Affidavits from any other jurors?

A. No, sir.

Q. Well, what did they tell you the other jurors told them?

A. Oh, they find out I was the last person to vote for the death penalty.

Q. All right. So she said these other jurors had told her that you were the last person to vote for the death penalty?

A. Yes. That's why she found out who I was.

Q. How did that make you feel when she told you what these other jurors had told her?

A. I don't understand. What is the question?

Q. The question is, how did that make you feel -- how did that make you feel when she told you she knew you were the last person to give the death penalty?

A. I didn't feel -- you're talking about feel guilty or feel -- I don't --

Q. How did it make you feel when she told you that she knew that you were the last person?

A. I don't feel anything.

Q. You didn't feel anything?

A. No.

Q. All right. Did she tell you these jurors told her anything else?

A. I can't recall.

Q. You can't remember?

A. No.

Q. All right. So I understand, the only thing she told you about the other jurors is that they told her that you were the last person to vote for the death penalty?

A. Uh-huh.

Q. Is that correct?

A. That's correct.

Q. All right. She didn't tell you anything else that these other jurors said?

A. I don't remember. What we're talking about, the other jury, I don't remember really. I remember what we're talking about the case and I explain to her what happened.

Q. Okay. I guess you sat down and talked with her for a while about -- well, let me ask you this. Did she want to know though -- did Ms. Paavola want to know about the case, about the evidence in the case and the testimony?

A. No.

Q. Did she want to know about what evidence you-all considered important and not important?

A. No, sir.

Q. What did she want to know about.

A. How they treated me.

Q. Okay. She wanted to know how they treated you?

A. Uh-huh.

Q. All right. Well, what did she tell you about that?

A. About what?

Q. How they treated you.

A. No. I say to her -- when she asked me that asking a question.

Q. Tell me what kind of questions she asked you when she asked you about how they treated you. Did she ask you did they call you any names?

A. No. No.

Q. She didn't ask you that?

A. No.

Q. Did she ask you, did they mistreat you in any way?

A. No. She only listened to what I say to her. She listened to me.

Q. All right.

A. She asked me how it was, and I told her, you know, how they treated me and how they did and how they called me, the jury.

Q. Okay. How many days did this trial last? Do you remember?

A. Two weeks.

Q. Two weeks?

A. A long two weeks.

Q. And was the jury sequestered during that time?

A. Say again.

Q. Were you sequestered? Like did you-all stay in a hotel?

A. Yes.

Q. Did you have a roommate?

A. No.

Q. You didn't.

You had your own room?

A. Own room.

Q. All right. Did you become friends with anybody on the jury?

A. Not really.

Q. Not really.

Was there anybody that you became friends with?

A. I don't think so.

Q. All right. How many men were on the jury?

A. Mostly men.

Q. How many women?

A. Women? Let me see. Four or five.

Q. Uh-huh. Four or five women?

A. Uh-huh. I think so.

Q. Do you remember any of their names?

A. (The witness shook his head negatively.)

Q. Have you seen any of them since the trial?

A. Only one.

Q. Who did you see?

A. The person to say guilty or not guilty, what is it called?

Q. The foreman?

A. The foreman.

Q. Okay.

A. I saw him one time.

Q. Okay. Did you talk to him?

A. Yes.

Q. All right. What did you-all talk about?

A. We talk about the case and how it was and talking, you know, everything happening.

Q. About the case?

A. The case, yes.

Q. All right. Where did you see him? Where did

you run into the foreman?

A. At Wal-Mart or --

Q. Somewhere like that?

A. Something like that, yeah.

Q. Okay. Do you know what his name was?

A. No.

Q. You don't remember?

A. No, sir.

Q. Okay. And how long did you talk to Ms. Paavola when she came to your house that day?

A. About 30 minutes, something like that.

Q. Just 30 minutes?

A. Something like that.

Q. And did she tape record the conversation with you?

A. No.

Q. She wrote down what --

A. Yes. She wrote it down.

Q. She was writing down something while you were talking to her?

A. Yes, sir.

Q. All right. Do you know what she wrote down?

A. No, sir.

Q. Okay. Did you see her again after that? I assume she left.

A. No, I never until now.
Q. Until now?
A. Yes.
Q. And when was the next time you had any contact with anybody on behalf of Mr. Binney?
A. No, sir. Say when?
Q. When is the next time that somebody --
A. A couple weeks ago.
Q. Okay.
A. Asked when I coming back from Costa Rica, --
Q. Right.
A. -- and that's what start call me to the house I stay and the place I going to hang out some time.
Q. Okay. Tell me about that. Were you in Costa Rica when they contacted you?
A. No, sir, I was here.
Q. You was here?
A. Yes. My brother answered the phone.
Q. In Costa Rica?
A. Costa Rica.
Q. And he called you?
A. No. He give the phone number where I was here.
Q. Where you were here?
A. Uh-huh.
Q. When did you come back to the United States

from Costa Rica? You said you left --

A. March, this year.

Q. All right.

A. It was a month ago, almost two months.

Q. Okay. Tell me -- why did you come back to the United States?

A. Why? I can come here when I want.

Q. I'm sorry?

A. I can come here when I want. I'm a United States citizen. That's your question.

Q. Okay.

A. I don't understand why you say why.

Q. Well, some people might come here on a vacation. Some people might come here to see family.

A. I'm USA citizen.

Q. I understand.

A. I have a house here. You know, there is no reason to say why.

Q. All right.

A. If I come here it's because I want to come here to. I have to sell my house.

Q. The house is up for sale?

A. Yes.

Q. All right. And you left Costa Rica about a month ago?

A. A month and a half ago, yes.

Q. All right. Did you have any contact with Ms. Paavola or anybody --

A. No, sir.

Q. -- at Cornell Law School or anybody like that before you left Costa Rica and came back a month ago?

A. (The witness shook his head negatively.)

Q. No?

A. No, sir.

Q. All right. They called Costa Rica looking for you?

A. Yes, sir.

Q. And your brother said he's in --

A. Gaffney.

Q. -- Gaffney?

A. Yes, sir.

Q. Okay. And how did they reach you? Where did they reach you at?

A. In the house I stay.

Q. And where are you staying and who --

A. A friend of mine.

Q. Okay. Where is that house that you're staying at?

A. In Gaffney.

Q. Okay. Give me an address that it's located.

That's all right. You don't know?

A. I don't know.

Q. Okay.

A. I know how I can get there, but I don't know the --

Q. All right. What I'm asking I guess is, you left here about a year ago.

A. In July.

Q. In July.

A. Last year.

Q. All right. And you went back to Costa Rica.

A. Yes, sir, I stayed there.

Q. What was your reason for going back to Costa Rica?

A. Because I'm disabled. I can live better there than here with the money I'm making.

Q. Okay. So then why did you come back? I'm just trying to understand why you came back a month ago. If you can live better there, why did you come back?

A. The house for sale.

Q. All right. To sell the house?

A. Yes. I had to change the real estate.

Q. You had to change the realtor?

A. Realtor, yeah.

Q. Who was it listed with before?

A. Joan Wall now.

Q. Joan Wallace?

A. Wall.

Q. Wall?

A. Yeah, I think. Let me look. And before -- it's two different people. I can give you the information if you want it later.

Q. That's fine.

Who was it listed with before Wall? Do you know? Just take your time. We're not in a hurry. You don't know?

A. I don't remember right now, but I can give you that information any time you want. That's no problem.

Q. All right. And you got back about a month ago, and you changed who the realtor was?

A. I changed, yes. I have to.

Q. After you changed the realtor, why did you continue to stay here and not go back to Costa Rica?

A. Because I'm going to Mexico.

Q. Because you're going to Mexico?

A. Uh-huh.

Q. Okay.

A. And the ticket was for a month and a half wait period of time to see if I can sell the house.

Q. All right. And you got a ticket to go to

Mexico. Is that right?

A. Yes.

Q. Okay. All right. My original understanding was, you were going to leave today to go -- you weren't going to be here but through today, at least that's what we had been told. You were going to leave the country on the 15th.

A. No, sir, I never said that.

Q. Okay. When are you leaving?

A. Saturday.

Q. Saturday.

Is there some reason you have to leave Saturday?

A. Well, the reason, I have to see my wife.

Q. She's already in Mexico?

A. Yes, sir.

Q. Is she a citizen of Mexico?

A. No. They transfer her to Mexico for a period of time, a couple months. I don't know.

Q. I gotcha.

Is there any reason you can't stay here until after the trial of this case? The trial of this case is coming up on the 29th.

A. Coming?

Q. May 29th. Is there any reason you can't stay

here and testify?

A. Oh, no. Stay here? No. How -- no, can't do it.

Q. Well, you're staying with a friend. Right?

A. Yes.

Q. And the reason you're leaving -- you don't have to go to Mexico for a job, but your wife does. She's already there.

A. Yes.

Q. So what would prohibit you from staying here and testifying before the judge in this case about what you know?

A. I don't understand your question. Say again.

Q. Okay. You're staying here with friends. Right?

A. Uh-huh.

Q. You've been staying with friends for how long, about a month and a half?

A. Yes.

Q. All right. And your wife is in Mexico City --

A. Waiting for me, yes.

Q. -- because she has a job there?

A. Yes.

Q. All right. But you don't have a job in Mexico City, because you're disabled. Right?

A. I don't work nowhere. Yeah.

Q. Okay. So what I'm saying is, why could you not stay here two more weeks and testify at the trial in front of the judge?

A. If you pay my ticket, I will stay, but I want to be with my wife.

Q. All right.

A. That's more reason, you know. It's not the first time -- sorry. When I was called for jury, I have to cancel the trip to go to Costa Rica for my high school reunion.

Q. Okay.

A. You see, I did that because they called me to do it.

Q. Right.

A. But, you know, I don't see my family, and I have a wife now and I want to be with my wife.

Q. Okay. I'm not saying I'm going to make you stay. I'm asking, is there anything that would prohibit you from staying and testifying, and you told me the plane ticket.

A. The first reason is to go and stay with my wife, you know. I don't want to be by myself here alone, you know. We planned to come here because she have to have everything right waiting for me.

Q. How long has she been in Mexico City?

A. Same time. She leave a week before I come to here.

Q. So she's been in Mexico City for --

A. Almost the same.

Q. -- a month and a half?

A. Yeah. Yeah. And she have to have everything ready there before I left, and I told her I would come to here to do the work I have to do to the house and send things to Costa Rica what I have owned, the furniture and have it sent back to Costa Rica. That's mostly the reason I'm here.

Q. Is there any expiration date on your plane ticket?

A. Yeah, the 19th.

Q. When?

A. This Saturday.

Q. You have to use it by Saturday?

A. Yes.

Q. And who is the plane ticket with?

A. U.S. Airways.

Q. U.S. Air?

A. Uh-huh.

Q. Has anybody told you to leave the country by Saturday?

A. Me and my wife.

Q. Has anybody else told you to leave the country?

A. No, sir.

Q. When they contacted you here about this Affidavit, Mr. Viquez, did they talk to you again like Ms. Paavola did about the jury deliberations or what went on?

A. No, sir.

Q. They didn't?

A. No, sir.

Q. What did they call you for? What did they say?

A. Oh, say again.

Q. When they called you here a couple of weeks ago or a month ago, --

A. Uh-huh.

Q. -- tell me what they said on the phone when they called you.

A. About they want to meet me to do this, talk to me about this.

Q. Okay.

A. Yeah.

Q. All right. So they wanted to meet you and talk to you about that?

A. Affidavit.
Q. I'm sorry?
A. I can't say that word.
Q. Affidavit?
A. Affidavit.
Q. Okay. Statement, Affidavit. That's fine.
A. It's hard sometimes. Affidavit. It's two words together.
Q. Right.
Was it just one phone call or more than one?
A. More than one.
Q. Okay. Why was there more than one phone call?
A. To see when they would meet me.
Q. All right. Where did they meet you?
A. To sign this paper.
Q. I don't know.
How many times did you meet with them?
A. One with her and second time when I signed this.
Q. Okay. Once with her, when was that?
A. The first time I saw her.
Q. Last year?
A. Yeah, if I'm not mistaken, it was last year.

Q. Have you met with Ms. Paavola in the last two months prior to today?

A. Talk to her on the phone. Or meet? No. No. Only one time, this is the second time.

Q. Second time you've met her face-to-face?

A. Yes, sir.

Q. Okay. Have you talked to her on the phone?

A. Yes.

Q. I'm not talking about last year. She said she called you one time last year and came to see you.

Have you talked to her on the phone since then?

A. I think so.

Q. What was that about?

A. About this.

Q. Okay.

A. Yeah, and somebody else called me.

Q. Okay. About what?

A. Yeah, the same -- to sign.

Q. Well, what was the problem? Why were all these telephone calls? Why were they having to call you over and over again?

A. Well, because I no was here. I don't know. The first one called me to say -- you know, to talk to me, I did it. And, second, they call me if I can meet to

do this.

Q. Uh-huh.

A. And I meet with and they have this ready.

Q. Okay. Were there ever any times when they called you on the phone or brought you this and you said, no, that's not right, take it back, you're going to have to change it and they had to change it?

A. No.

Q. You understand what I'm saying?

A. Yeah. No, no, never.

Q. Ever a time where they read it to you over the phone and you said, no, that's not right, change it, you need to change the wording?

A. No.

Q. Was there ever a time when they brought it to you and you said you need to change the wording?

A. No, I read it.

Q. Okay.

A. And I read it, and I say that's correct.

Q. All right. So the first time they brought it to you typed up like that, you signed it?

A. Yes, sir.

Q. All right. Can you tell me why no one witnessed it, why there is no witness on there or no notary? Do you know what I'm talking about?

A. No.
Q. Another person --
A. Yeah, I know. I know what you're talking about.
Q. -- witness your signature?
A. I don't know why.
Q. Why there is no notary public, you know, to put the seal on it?
A. No, sir.
Q. You don't know?
A. No, I don't know.
Q. Who were these people, do you know who they were, that came and brought you the paper?
A. I can't remember her name.
Q. What's her name?
A. I can't remember her name.
Q. Oh, you can't.
A. I can't.
Q. I'm sorry.
A. I can't remember.
Q. I'm sorry.
Was there one or more of them? How many were there, one?
A. Uh-huh, one.
Q. And was there any discussion about this

paper?

A. No, sir.

Q. Okay. Any discussion at all, or she just brought the paper and you signed it?

A. She brought the paper, I read and I sign.

Q. Did you talk to anybody else?

A. No, sir.

Q. Did they ever read it to you on the phone?

A. No, sir.

Q. They just brought it, just brought it to you and no conversation?

A. No, sir, like that.

Q. Do you remember when you signed that? When was the date?

A. I think two weeks ago.

Q. About two weeks ago?

A. Between two or three weeks ago. I think two weeks ago, two and a half weeks, something like that.

Q. What were you promised if you got involved in this case and signed this Affidavit?

A. I don't promise anything.

Q. Have you been paid any money by anybody who represents Mr. Binney?

A. No.

Q. Any lawyer at all or anybody acting on his

behalf paid you any kind of money?

A. No.

Q. Have they paid any expenses for you?

A. No.

Q. Any plane tickets or anything like that?

A. No, sir.

Q. Anybody from Cornell Law School promised you anything or paid you any money?

A. Nobody. And I no would take it.

Q. Sir?

A. I no would take it.

Q. Have you had any contact with Mr. Binney's family since this trial?

A. No, sir.

Q. Have you met with any other lawyers that represent Mr. Binney besides Ms. Paavola and I believe there was one other woman you told me about?

A. Emily.

Q. That's Emily.

Was there any other --

A. No.

Q. No men lawyers, any male lawyers?

A. No, sir. The only male lawyer was from South Carolina, Columbia, call me.

Q. Columbia?

A. Yeah.
Q. Okay.
A. I don't know who it was.
Q. When was that?
A. I think it's week -- last week. They want to talk to me about this, --
Q. Uh-huh.
A. -- but he never say it would be like a -- what do you call this?
Q. Deposition?
A. Deposition.
Q. Okay. And you were noticed for this deposition today by the State, is that correct, by myself and Mr. Salter?
A. Say again your question.
Q. We noticed your deposition today. We asked you to be here today to give this deposition. Is that correct?
A. Yeah.
Q. Okay. Were you asked by anybody else to give a deposition or give a testimony?
A. No.
Q. How long did the deliberations last in the guilt phase of the trial? You know what I'm talking about? There's two phases.

A. Yeah, two phases. The first one was a week and a week. I think one week and one week, if I'm --

Q. Okay. The trial --

A. The trial was a week, and the second trial was a week.

Q. All right. After all the evidence was in in the guilt phase, the first phase, --

A. Uh-huh.

Q. -- how long did you-all deliberate before you decided he was guilty of murder and guilty of burglary?

A. I think it was a day or two days.

Q. Okay. So it was pretty long deliberations?

A. Because I have a lot of questions.

Q. Okay. All right. I don't want to get -- I'm not going to get into your questions or your deliberations, except -- excuse me just a second.

(A break was taken.)

BY MR. MABRY:

Q. The guilt phase deliberations you said lasted about a day you think?

A. Two days, a day to two days.

Q. Okay. Did you agree to a guilty verdict and to -- a guilty verdict of murder and a guilty verdict of burglary?

A. The burglary we decided he was not guilty, if I

remember. He was guilty for -- let me remember. Burglary, burglary he was not guilty, but guilty for killing. Uh-huh.

Q. Okay. I hate to correct you.

A. If I can remember, I think.

Q. It was guilty of murder and guilty of burglary.

A. Okay. I can't remember.

Q. All right. Did you agree to the verdict of guilty of murder in the first phase and guilty of burglary?

A. Yes, we did, complete.

Q. Okay. You agree to that?

A. Yes.

Q. All right. Were you coerced in any way to agree to that verdict, guilty of murder and guilty of burglary?

A. Say again your question.

Q. Were you coerced?

A. coerced? I don't understand that word.

Q. You don't understand what the word coerced means. Is that correct?

A. No.

Q. All right. Did you agree that he was guilty of murder and guilty of burglary?

A. Yes, sir.

Q. You did?

A. Oh, yes. Everybody was.

Q. Everybody was in agreement to that?

A. Yeah, no problem.

Q. Okay.

A. And I still say he's guilty.

Q. Okay. You still say he's guilty.

Were you the last person to agree that he was guilty of murder and guilty of burglary or do you remember?

A. No, everybody says, 12.

Q. Okay. All 12?

A. Yeah, we no have no problem with that.

Q. Okay. After you reached your verdict of guilty of murder and guilty of burglary, all the jurors were brought in the courtroom and the verdict was handed to the Court. Do you remember that?

A. Yes.

Q. all right. And the clerk of court read the verdict, guilty of murder and guilty of burglary. Do you remember that?

A. Yes.

Q. Were you polled? Was the jury polled? Do you know what I mean by "polled"? Each juror has to stand up, they ask you a question, is this your verdict and is

it still your verdict. Were you asked that question? Were you polled?

A. Everybody did.

Q. Everybody was polled?

A. Yeah.

Q. All right. And did you agree and say, yes, that's my verdict and it's still my verdict?

A. Yes, still is.

Q. Still is. Okay. I gotcha.

All right. Now, there was a 24-hour waiting period -- you-all had to wait 24 hours before you started the penalty phase of the trial?

A. No, sir.

Q. You don't remember that?

A. No, no wait time.

Q. Okay.

A. It was straight through.

Q. Straight through?

A. Yes.

Q. As you remember it?

A. Oh, yeah. It was two weeks.

Q. Yeah, a long time.

A. Two weeks straight.

Q. All right.

A. Yeah.

Q. Okay. During the trial of the case, I'm talking about the whole trial, --

A. Correct.

Q. -- do you remember -- who was the judge? Do you remember?

A. I can remember his face very well.

Q. Okay.

A. I remember faces, but I don't remember names.

Q. All right. Judge Cole, Derham Cole, blond hair, kind of blond hair, --

A. No.

Q. -- some brown?

A. No, I don't think so.

Q. Mustache? You don't remember?

A. No, he had black hair, tall.

Q. Okay.

A. If I see the picture --

Q. Picture, you can point him out?

A. Yes, I can point and say who.

Q. All right. What did you think of Judge Cole? What did you think of Judge Cole during the trial?

A. I don't understand what you said. Cole what? I don't understand.

Q. The Judge's name was Cole, C-O-L-E.

A. Oh, Cole. Cole.

Q. That's it. I'm sorry.

A. Okay.

Q. We're having a breakdown, and it's my fault. Don't worry about it.

A. Yeah. Yeah.

Q. What did you think of the judge during the trial?

A. Good.

Q. Good?

A. Yeah.

Q. Did you like him?

A. (The witness nodded affirmatively.)

Q. All right. Did you think he did a good job?

A. Yeah.

Q. Did you have any problems with the judge?

A. No.

Q. All right. Were you afraid of him at all?

A. No, sir.

Q. No?

A. No.

Q. All right. Did he and the jury seem to get along well during the trial, the judge?

A. I don't know about the other people. I can say about me.

Q. Okay. Did you have any problem with

communicating with the judge?

A. No, sir.

Q. What about the bailiffs? Did you have any problem with the bailiffs? Do you know who the bailiffs are, the men in the red suit that take you in and out, get you something to drink, the old guys?

A. The old guys.

Q. J.B.?

A. The retired.

Q. Yeah, the old retired guys. Did you have any problem with them?

A. No.

Q. All right. Did you have any problem communicating with them, --

A. No, sir.

Q. -- getting anything you need?

A. Anything I need, yes, yes, we were okay.

Q. Did they have SLED agents guarding you at the hotel?

A. Yes.

Q. All right. Did you have any problem with them?

A. No.

Q. No.

Any problem communicating with them?

A. No.

Q. Did they get you anything you needed?

A. Yeah. Whatever I needed, yeah, they called my brother and they bring it back to me.

Q. Okay. Your brother was up here?

A. Up here, yeah.

Q. All right. During the trial, did Judge Cole instruct you and the other jurors that your verdict, whatever it was, had to be unanimous?

A. Correct.

Q. All right. Did he instruct you that you-all had to agree? Whatever you did, everybody had to agree to the verdict?

A. I remember, yes.

Q. All right. Did you understand his instructions regarding that, that they had to be unanimous?

A. Yes, sir.

Q. And everybody had to agree?

A. Yes, sir.

Q. And I believe -- I looked back at the transcript. I believe he told you-all that at the beginning of the trial -- probably told you when you -- I'm sorry. I'm pointing at you.

A. That's okay.

Q. Remember when they asked you questions by yourself? Do you remember that, each juror by themselves

got asked questions?

A. Yes, I was by myself --

Q. Right.

A. Both lawyers? Both sides?

Q. Right. And I think the judge told you then that it had to be unanimous and you-all had to agree, and he told you that at the beginning of the trial, the end of the --

A. Yes.

Q. Okay. Let me finish this question.

-- at the end of the guilt phase before you deliberated, at the beginning of the penalty phase and at the end of the penalty phase. Do you remember that?

A. Yes.

Q. He told you-all over and over that whatever decision you reached had to be unanimous

A. Yes

Q. And you-all had to agree?

A. Yes.

Q. And did you understand his instructions when he told you that?

A. Yes.

Q. All right. Do you remember taking an oath when you -- at the beginning of the case, after all of you got

picked, they picked the 12 of you and two alternates. Do you remember you-all had to stand up and take an oath? Do you remember that?

A. Yes.

Q. And the oath was that you would truly try the facts according to the law that the judge gave you and the evidence that you heard from the stand, and you render a verdict according to the law and the evidence. Do you remember that?

A. Yes.

Q. Did you take that oath? Did you swear?

A. Yes, I swear to God. Yeah.

Q. Yeah.

Did you understand that?

A. Yes.

Q. Did you do that in this case?

A. Yes.

Q. You did? You followed your oath?

A. Yes. I have to be honest and be asking a lot of questions to the jury and the evidence. I asked more questions.

Q. You followed the judge's instructions?

A. Yes. Oh, yes.

Q. And what he told you. Is that correct?

A. Uh-huh. Yes.

Q. We need to move. We're going to take a little break. Do you want to go to the restroom?

A. No, we can finis.

Q. I'm going to try to finish as quick as I can.

(A break was taken.)

MR. MABRY: All right. We're ready to resume. We are back on the record with Mr. Viquez.

BY MR. MABRY:

Q. Mr. Viquez, you're still under oath. Do you understand that?

A. Yes.

Q. And I'm going to try to be as brief as possible and get you out of here as quick as possible. All right?

A. All right.

Q. Let's talk about this -- excuse me a second. Let's talk about this statement that is signed by you, and it doesn't have a date on it. And I'm going to go over to the second page of the statement.

Is everything in this statement -- well, first of all, I'll ask you to read over it. Have you had a chance to read over it today, or have you had a chance to read over this in a while?

A. Yes, today.

Q. Okay. You have.

A. Yes.

Q. All right. Is there anything in this statement that is incorrect?

A. No.

Q. No.

Okay. If you would, tell me about -- let me talk about -- the penalty phase, you-all had found him guilty, as you told me, guilty of the murder and guilty of the burglary. And then you-all went into the penalty phase and all that testimony put up lasted about a week. Is that right?

A. Something like that, yes. Yes.

Q. Approximately?

A. Approximately a week.

Q. And then I guess the lawyers made their closing arguments, and the judge charged the jury about the penalty phase deliberations, about everything involved in that and then you-all deliberated.

How long did the deliberations last during the penalty phase? Do you remember?

A. The penalty phase for death penalty or --

Q. For death or life, how long were you-all out deliberating?

A. I think two days.

Q. Okay. You think two days.
A. I think so.
Q. All right.
A. A day and a half, two days.
Q. Okay. Were you the last person that voted for the death penalty?
A. Yes, sir.
Q. Okay. Approximately how long into the deliberations was it down to 11 people for death penalty and one --
A. Almost a day.
Q. Almost a day?
A. Over a day.
Q. Over a day you think?
A. We left late.
Q. Okay. All right. So it was -- was it the first day that you deliberated that it was down to 11/1, or was it --
A. The next day.
Q. It was the second day?
A. Second day.
Q. Do you remember how long it was before you reached the final verdict?
A. It was a long time.
Q. It was a long time before then?

A. Yes.

Q. Okay. How long do you think it was?

A. Well, we started almost half and half or less than that, the guilty, no guilt -- death penalty or no.

Q. Okay.

A. The first vote we did it was almost more life --

Q. It was. Okay.

A. -- and coming down, eventually coming down all the way to 11 to 1.

Q. Okay. All right. And do you have any idea how long before you reached the unanimous verdict of death was it -- how long before that unanimous verdict, before you-all came in with the unanimous verdict was it that it was 11 to 1 where you were the last person -- it was 11 for death and you still wanted to talk about it or you wanted to discuss it? Do you remember how long before you reached the verdict?

A. No, I don't remember. Specifically how long, no.

Q. Could it have been an hour, two hours or do you know?

A. I really don't remember.

Q. All right. So tell me -- the other jurors wanted to vote for the death penalty. Is that correct?

A. Correct.

Q. All right. And my understanding you wanted to continue to discuss it?

A. I want to life.

Q. Okay. You wanted to vote for life?

A. Life.

Q. All right. Tell me then what took place during those -- tell me what you remember occurring I guess when you-all got to that point in the discussions. It was 11 for death, and you wanted to vote for life. Did you want to continue to discuss it and they didn't want to discuss it?

A. They wanted to go home.

Q. Okay. They wanted to go home?

A. Yeah.

Q. All right. Did they tell you they wanted to go home?

A. Yes.

Q. All right. And what took place? What discussions took place?

A. Well, they start -- everybody against me.

Q. Everybody was against you?

A. Yeah.

Q. Okay.

A. And I ask questions, you know, about

everything. We have to go --

Q. You asked questions about the evidence?

A. You know, evidence, and let's go, you know --

Q. Go over it again?

A. Because I wanted to be sure 100 percent --

Q. Okay.

A. -- what we are going to do, and that's what I was for.

Q. Okay. You was for --

A. Trying to find really --

Q. -- 100 percent for doing, being sure?

A. What's right.

Q. What's right. Okay. Okay. I understand that. And I guess did you-all deliberate some more? Did you discuss it some more?

A. Yeah, we did, and coming to the point to start vote to see again, and it was a lot of pressure and telling me I can go to jail. If I vote no guilty or death penalty, it's 11 to 1. They can put me in jail because I say -- they started doing a lot of things.

Q. Okay. Well, let me stop you there.

A. The jury told me that, people on the jury.

Q. All right. You were on the jury.

A. Yeah.

Q. All right. It's 11 for the death penalty, and

you're wanting to go over the evidence some more to make sure you're doing the right thing. Is that correct?

A. That's correct.

Q. All right. What, if anything, did -- because that's not -- I didn't see that in your Affidavit anywhere. Tell me what the other jurors said to you or what --

A. Call me names.

Q. Somebody called you a name?

A. Yes.

Q. Okay.

A. And why I'm here, why I'm not going back to my country.

Q. Okay. Well, let me stop you.

A. Okay.

Q. Who called you a name?

A. I cannot remember names who did it.

Q. All right. Was it a male juror or female juror?

A. Both.

Q. Both.

Okay. How many jurors? How many jurors called you a name?

A. A couple that I can remember.

Q. A couple?

A. Yeah.

Q. Okay. What name did they call you?

A. Like illegal or foreign, you know, -- names, that's what you ask me?

Q. Yeah. I want to know what names they called you. You were -- I wasn't there, and I don't know. So I want to hear what name they called you.

A. Oh, my goodness. Well, names specifically I can't remember, but I can remember the one lady told me if I don't condemn him the death penalty because maybe I did the same like he did it.

Q. Okay. A lady said --

A. A lady, yeah.

Q. A lady juror said you're not voting for the death penalty because you don't think he did it?

A. No. She say I did it is saying like he did it, like I agree with him, why he did it, maybe I did it myself.

Q. Maybe you did what yourself?

A. Like, well, he abused his own daughter; right?

Q. Yeah. Slow down. I'm sorry.

MS. PAAVOLA: I think he said, he abused his own daughter. Is that what you said?

A. Yeah. He abused his own daughter, and she

tried to say maybe I don't decide he's guilty because I did it is saying like -- what's his name?

Q. Binney?

A. Binney did it. In other words, what she tried to say, I don't want the death penalty because I did the same.

Q. You did the same thing as he did. Is that what she was saying?

A. Yes.

Q. Okay. Okay. So she said -- she accused you of doing the same thing that Binney had done?

A. Yes, because that's why I don't want death penalty.

Q. Okay. All right. And how did you respond to that?

A. No. I told her, I said, I don't look at it that way. I look at it because it's a person here. If it's one of your son, do you like to try to do it the same way like we did it to him?

Q. Uh-huh.

A. We tried to do the best for both sides. I want to be sure 100 percent sure what we are going to do because that's why we're here.

Q. Okay.

A. They wanted to go home. They have family. I

said --

Q. They said they wanted to go home?

A. Yeah.

Q. Okay.

A. Because they have family, they have children, they're waiting for me. I said, I have family. I'm going back to Costa Rica. I can't go because I am here.

Q. Okay. So you told them you can't -- you got family, too, and you can't go back, that kind of thing?

A. Yes.

Q. Okay.

A. The name, see, I can't remember.

Q. You can't remember what names they called you?

A. Yeah.

Q. But they called you some kind of name?

A. Yes.

Q. Okay. And somebody -- and do you remember anything else that they said?

A. One, a black girl, she say if I not decide to vote they're going to have a new trial.

Q. Okay.

A. And they can't condemn me for saying no.

Q. She said --

A. She say to me if I say no --
Q. Right?
A. If I say no and go 11/1 and stay like that, --
Q. Right.
A. -- after we finish, they can come to me and condemn me for saying no.
Q. They can do what to you for saying no?
A. Condemn.
Q. Condemn you?
A. Yeah.
Q. What does that mean, condemn you?
A. Well, you know, like take me to the court.
Q. They can take you to court for saying no?
A. Yeah, that's what she say to me.
Q. Why did she say that to you?
A. You'll have to ask her.
Q. This was another juror?
A. Yeah, a black girl.
Q. Okay. Let me ask you this. All these things that you're talking about were said by other jurors in the juror room. Is that right?
A. Jury room.
Q. okay. Did anybody outside the jury say anything to you or do anything to you to try to get you to vote a certain way?

A. No.

Q. Okay. So it was all -- this was all --

A. What happened in the jury?

Q. Between you and the other jurors. Is that right?

A. That's right. I don't want to be on it again.

Q. Okay. All right. So you don't remember what the names were that somebody called you?

A. No. I tried to forget everything.

Q. All right. Did -- okay. And how did you come to agree? You told me earlier that you followed the judge's instructions. You took an oath to decide the case based on the evidence and the law as he gave it to you?

A. Yeah.

Q. On nothing else?

A. Nothing else, --

Q. Right.

A. -- coming to the point of saying yes.

Q. Right.

How did you come to the point of deciding that it was the right thing to do, 100 percent the right thing to do to give him the death penalty?

A. We can talk about what we're talking that day while we discussed or no?

Q. Well, yeah, that's what we're here about today. How did you come to the decision --

A. Well, the decision was we're talking about -- okay, we decided he was guilty.

Q. Right. That's all done. You-all were in the penalty phase.

A. Okay. And the point was, if he stay in the jail, you know, and stay there, it's not right to keep him food and keep him there and air condition or heating or whatever. They were talking about that. If he was guilty, we decide the death penalty. That's mostly the point that we were talking about.

Q. All right. And so after discussing all that and considering all the evidence and the judge's instructions, you came to the -- you made the decision to impose the death penalty?

A. The last person, yes, I did it.

Q. Okay. You did?

A. Yeah. Because I don't want something like that going over and over it because the State costs a lot of money to do it, and I don't think it's fair to go again.

Q. Okay.

MS. PAAVOLA: I'm sorry. I didn't hear that last part. Can you read it back or --

(The reporter read the requested portion of the

record.)

BY MR. MABRY:

Q. "To go again", what do you mean by that?

A. Do again the trial.

Q. Okay. All right. So you were the holdout, but you ultimately decided that you wanted to impose the death penalty?

A. Yes.

Q. Okay. In this case?

A. Yes.

Q. All right. And that was independent of what these other jurors said to you during all these discussions?

A. Well, it's hard to say right now, you know. When you're in the jury with the people, 11 people against you.

Q. Uh-huh. Sure.

A. You know, I don't know if you've been in one jury before, and I hope you're never going to be in one, and you're going to see how the people react and how they call you. I don't want to be again. One is enough for me.

Q. Right.

But any time you're the last juror, you're going to be isolated somewhat, aren't you, any time

you're the last person to --

A. If it's something not right, the most question I have I will ask to be 100 percent of that what I want to do.

Q. By the time this case ended, you were sure you were doing the right thing?

A. Oh, yes.

Q. In imposing the death penalty?

A. After, yes. After, yeah. Yeah. But this happen, everything here, that's what they told me, you know. I also told her, I said, you know, that's what we did. That's right. We did it.

Q. Okay. Oh, you did tell her that?

A. Yes, I did.

Q. That what you did, the death sentence that you imposed was the right thing to do?

A. Yes, I did.

Q. Okay.

A. But this here, it happened. This happened. You know, that happened with me.

Q. That happened?

A. Yeah. I told her I would sign because this is what they did to me.

Q. Okay. All right. So if I understand you correctly, --

A. Go ahead.

Q. -- you -- irregardless of what they said to you and all that, you ultimately made up your own mind that the death sentence was the right thing to do in this case?

A. Yes, sir.

Q. Okay. And was that based on the evidence in the case that you had heard and the law that the judge gave to you?

A. Yes, sir.

Q. In keeping with the oath that you had given the Court?

A. Yes, sir.

Q. All right. And you understood Judge Cole's instructions throughout the trial, instructions to the jury that he gave you?

A. Yes.

Q. I want to show you what's been marked Defendant's Exhibit No. 1. Is that -- that's a sheet titled, "Evidence of Statutory Aggravating Circumstance". It says you-all found -- the 12 of you found the aggravating circumstance that Ms. Southern was murdered in the Commission of a burglary, and you signed that. Is that your signature on that?

A. Right here.

Q. Okay. Which one is yours? I think the fourth one from the bottom?

A. Yes.

Q. All right. And does that signify your assent and your agreement that you-all found an aggravating circumstance in this case?

A. Yes.

Q. All right. Is that true?

A. Yes.

Q. All right. Defendant's Exhibit No. 2, and that is titled at the top, "Recommendation of Death Sentence". Do you remember that?

A. Yes. That's what we're talking about.

Q. Right.

Does that bear your signature on it?

A. Same position, fourth.

Q. Is that fourth from the bottom?

A. Fourth from the bottom.

Q. And does that signify that you agree to impose the death penalty in this case?

A. Yes.

Q. And you signed that form?

A. I signed for it.

Q. All right. After you-all came in with the death sentence and it was read to the Court, were you-all

polled again? Did the judge poll you?

A. I don't remember.

Q. Okay.

MR. MABRY: Have you got that?

A. I can't remember if we did or not.

BY MR. MABRY:

Q. I'm going to try to find it and see if I can show it to you.

A. Okay.

Q. I understand.

MR. MABRY: It would be in the penalty phase.

BY MR. MABRY:

Q. This is a transcript or this is a record on appeal, which includes the transcript, and page 3,493 of the transcript, they're polling the jurors, and the clerk says, "Henry Viquez, Juror No. 317". And what was your answer?

A. Yes.

Q. Okay. And did that signify that you agreed with the other 11 jurors that the death penalty was appropriate in this case?

A. Oh, yes.

Q. Given the facts and the evidence?

A. Yeah.

Q. And the law as the judge gave it to you?

A. Yes.

Q. Okay. All right. So I understand your testimony, these things that occurred in the jury room, you didn't like them and you felt intimidated or pressured somewhat by the other jurors, but ultimately, that's not what made up your mind in this case?

A. Well, it's hard to say right now.

Q. Right.

A. You know, why I changed my mind about that, but it's really hard for one person coming from other country and have 11 people against you.

Q. Okay.

A. And to keep what -- you know, if you want to do the death penalty or life.

Q. Right.

A. See, that's hard to tell you right now if I changed for that reason or -- but this one here, you know, that's really what happened, what they did to me. And if I changed my mind for this one or for other things, I can't tell you right now why I did it.

Q. Okay. Well, a minute ago I asked you that question, and you said -- a similar question, and you said that the reason that you voted for the death penalty is because ultimately you felt like it was the right

thing to do in this case given the facts and the law.

A. Yeah. After we've -- you know, we sit down, we're still talking, and I decided to say, okay, go forward, you know, let's vote again, and I changed my mind and say and I say, yes, let's go with the death penalty.

Q. Okay. And that was based on the evidence and the law as the judge gave it to you in this case?

A. Yes.

Q. Is that correct?

A. Yes. Correct. I never say the evidence, he's no guilty, he's guilty.

Q. Right. I understand that.

But what I'm asking you is, the sentence that you imposed, --

A. Okay.

Q. -- you decided to impose the death penalty because of the evidence that you heard and the law that the judge instructed to you. Is that correct?

A. Correct.

Q. Okay. And you were polled -- when you were polled, that indicated that you agreed to that sentence. Is that correct?

A. That's correct.

Q. All right. Since the trial, the trial was in

2002, November of 2002.

A. Correct.

Q. All right. Have you sat on any other juries since the trial in 2002?

A. Have I saw somebody?

Q. No. Have you been on a jury?

A. Oh, yes, but city.

Q. City court?

A. City court.

Q. How many juries have you been on since this trial?

A. It was a week. It was one week, and they pick and I was there for a week. I was in maybe three or four trials.

Q. Three or four trials.

A. Yes.

Q. Okay. Do you remember who the lawyers were on the other side?

A. There was -- this was not the county. It was city.

Q. City court, I know.

A. Yeah.

Q. Do you remember there being lawyers involved in some of the cases?

A. In some, yes, but I don't remember.

Q. Do you remember Mr. Pruett? Do you remember Mr. Pruett from this trial, from Binney?

A. On this? Yes, face.

Q. Yeah.

Do you remember Mr. Binney had two lawyers?

A. Two lawyers.

Q. He had Mr. Slade --

A. And you have two, one was coming, asking for you in the office. Now, when we was in the other room, --

Q. Uh-huh.

A. -- he was one.

Q. Oh, Trey, yeah. Mr. Gowdy, yeah, he was the Solicitor.

A. Okay.

Q. Okay. Mr. Binney had two lawyers that sat with him. Do you remember those two?

A. Yes, faces.

Q. Right.

Do you remember that one of those jurors -- I mean, one of those lawyers -- excuse me. Let me start over.

One of Mr. Binney's lawyers in this trial was also a lawyer when you were on the jury in city

court. Do you remember that?

A. I think so, yes.

Q. And he came up and talked to you after the trial, and you convicted his client again but a different client. You found another person guilty. Do you remember that?

A. I can't remember what we decide.

Q. What you decided. Okay.

A. But if you remind me what case, I can remember what happened.

Q. Okay. Do you remember him coming up and talking -- Mr. Pruett coming up and talking to you?

A. I don't remember.

Q. Okay.

A. I think I talked to him -- I think I talked to him because I remember us talking. He remembered me.

Q. Right. Right. At any time did --

A. Oh, you knew that I was in jury before, after that?

Q. Well, he told us that. So I'm just asking you. He said he saw you again, and you convicted another client of his. So -- and he said he talked to you.

A. Uh-huh.

Q. Okay. At any time when you-all were deliberating, did you ever go and tell Judge Cole what

had happened in the jury room?

A. No, sir.

Q. All right. Did you ever report to Judge Cole in the last four and a half years since that trial what went on in the jury room?

A. No, sir.

Q. All right. Is there anything that would have prevented you from going to Judge Cole and telling him what went on in the jury room?

A. No. I wanted to forget about it.

Q. Okay. Did you ever talk to Mr. Binney's lawyers, Mr. Pruett or Mr. Slade, about what went on in the jury room?

A. No, sir.

Q. Okay. When Mr. Pruett saw you again at city court, you know when you had jury duty again in city court, --

A. Uh-huh.

Q. -- did you tell him about what went on in the jury room?

A. No.

Q. When is the first time that you ever reported what went on in the jury room?

A. When I reported it? No, when they asked me --

Q. When --

A. -- when she called me.

Q. When she called you.

Okay. And that would have been last year?

A. Last year or before last year. I can't remember to be honest. I think it have to be last year. I don't know.

Q. Okay. All right.

A. It was --

Q. I'm sorry. Go ahead.

A. No, no.

Q. Since this trial, has your views on the death penalty changed at all?

A. Say again.

Q. Since this trial, --

A. This trial?

Q. -- this trial, have your views on the death penalty changed at all?

A. View?

Q. Do you like the death penalty more now, or do you dislike it more?

A. Like I said before, and I will say now, it's going to depend what the people do that did it.

Q. What they did.

A. Yeah.

Q. Okay. Since this trial, have you ever -- have

you told anybody that you're morally opposed to the death penalty since this trial?

A. I feel the same way.

Q. Still the same way?

A. Still the same way. I go back again if they call me --

Q. Same thing?

A. -- same thing. If the evidence in the case --

Q. Deserves?

A. -- deserves it, you know, but I will say no because jury --

Q. Do you believe this case deserved the death penalty?

A. Based on my belief, nobody on this earth can take the life of somebody else's life. You understand what I say?

Q. Okay. Explain that to me.

A. Explain it to you? I no have the right to kill somebody.

Q. Okay.

A. It's only God can do it.

Q. Okay.

A. And I keep that word, and that's why I was disgusted with the jury.

Q. Okay. Because you don't believe that you have

the right to take somebody's life?

A. Correct.

Q. All right. So you don't believe you should be imposing the death penalty on somebody?

A. It depends on the case.

Q. Okay. All right. Well, I'm confused.

A. No, no. It depends, you see. In some case how we can finish things. See, I'm not the person going to kill him. That's the only thing. I hope, you know, he'll forgive me about deciding that.

Q. Okay.

A. Let me explain.

Q. Sure.

A. It's belief in something and the right.

Q. Belief in something --

A. Believe in God and the right why we're here, you know, because the -- we live here for the people. God say to us, come unto the earth and you decide what's right or wrong, right, --

Q. Uh-huh.

A. -- with freedom to do what we want to do. Right?

Q. Right.

A. Okay. My belief is, you know, nobody can take the life of nobody.

Q. Okay.

A. Okay. But in this case it was very hard to decide to the point to death penalty or life.

Q. Okay.

A. It really was a big decision for myself.

Q. Sure. Sure.

A. It's a huge decision.

Q. Huge.

A. You know, and that's what I say before. I don't want to go again on a trial with the death penalty.

Q. Okay. In this case, you correct me if I'm wrong, you decided that the death penalty was appropriate in this case?

A. I think so.

Q. All right. Have you ever expressed the opinion to anyone that because of my religion, my faith -- and there's nothing wrong with that, but have you expressed to anyone at any time that because of your faith you did not believe in the death penalty?

A. They asked me that question.

Q. Who asked you that question?

A. When they picked me, I was the first person they picked.

Q. Okay. Qualified.

A. The first number.
Q. Right.
A. And they -- the first person to start asking questions, and I don't know what lawyer asked me, you know, are you Catholic.
Q. Uh-huh.
A. And I said, yes. Do you believe in the death penalty?
Q. Okay.
A. And he asked me the same question as you, do you believe in that, and I say depends the case --
Q. Okay.
A. -- and the reason circumstance. And I still believe in that.
Q. Okay. Did you ever tell any of the other jurors that you were morally opposed to the death penalty because of Catholic faith?
A. I don't remember.
Q. Could you have told them that?
A. After or on the jury?
Q. In the jury during the deliberations.
A. I can't remember if I did it or no.
Q. Is that possible?
A. You know, it's hard to remember every detail.
Q. Do you remember telling them that you had a

friend or someone that you knew that had been railroaded, that someone had been charged with a crime or something and had been railroaded? Do you remember anything about that?

A. Yes. A friend? No.

Q. Somebody you knew about?

A. That they -- that the jury decided was guilty. He was innocent.

Q. Uh-huh.

A. And they put him in jail for 20 some years, and finally they've got it right, the person that did the crime.

Q. Okay. They got the right person?

A. The right person. And I told them, I said, I don't want to be the same, and the jury to decide one person is guilty or death penalty when it's not the right person.

Q. Okay.

A. That's why I wanted to be 100 percent sure that what we are going to do is the right thing to do.

Q. Okay. So you told that to the other jurors, and that was during the penalty phase deliberations?

A. The whole time, yes.

Q. The whole time?

A. The whole time.

Q. Okay. All right. And so you made 100 percent sure that what you were doing was the right thing. Is that correct?

A. That's why they don't like me.

Q. But I'm asking you, you made 100 percent sure you were doing the right thing?

A. Yes.

Q. Is that correct?

A. That's correct.

Q. All right. I think that's about it.

Mr. Viquez, am I pronouncing it right, Viquez?

A. Viquez.

Q. Viquez.

Okay. I apologize for having to ask you-all of these questions. If we hadn't got this statement from you, I wouldn't even have asked you to come here today, and I appreciate your time and talking to us. I don't have anymore questions for you. Thank you very much.

A. Okay. No more questions?

Q. I don't know. She might have some.

MS. PAAVOLA: I'm sorry. I have a few. I'll be very quick.

MR. MABRY: I won't ask you anymore.

Depending on what she asks you, I don't have anymore.

CROSS EXAMINATION BY MS. PAAVOLA:

Q. Mr. Viquez, you've answered Mr. Mabry's questions that you wanted to make sure that your decision was right in this case. Is that right?

A. Correct.

Q. And I think you said earlier that part of the reason you felt you made the right decision was that you didn't think it was fair to go again. Do you remember when you said that?

A. Yes.

Q. Can you explain in a little bit more detail what you mean by that?

A. The cost for the city and we have to pay taxes.

Q. The cost for the city to do what?

A. Do the trial again.

Q. To try again?

A. When this was the right -- you know, when he was guilty. If I decide no, they have to do it again.

Q. Because you thought if you decided no they would have to try it again?

A. Yes.

Q. And why did you think that?

A. Oh, because some of the jury told me that.

Q. I would like you to look at this Affidavit. It hasn't been marked. Could we mark it --

MS. PAAVOLA: You have two exhibits. Is that correct?

MR. MABRY: It would be your Defendant's 1, I mean, Plaintiff's 1.

MS. PAAVOLA: We'll mark it Plaintiff's 1. You've referred to it as well. So I assumed you would mark it, but that's okay. We'll mark it.

MR. MABRY: We have to stop and let her mark it.

(Plaintiff's Exhibit No. 1 was marked for identification.)

BY MS. PAAVOLA:

Q. Okay. So Mr. Viquez, I'd like you to look at what's now been marked as Plaintiff's Exhibit 1, and I would just like to make sure we go through each of the paragraphs if you don't mind. Paragraph 1 says, "My name is Henry Viquez. I reside in Costa Rica. I am now, and at all times to which I refer in this affidavit, more than 18 years of age. I have personal knowledge of the matters to which I refer in this affidavit."

Do you see where it says that?

A. Yes.

Q. Is that a true and accurate statement?
A. Yes.
Q. Paragraph 2, it says, "I was born in Costa Rica." Do you see where it says that?
A. 2?
Q. Yes. Paragraph 2 says, "I was born in Costa Rica."
A. Yes.
Q. Is that a true and accurate statement?
A. That's true.
Q. Paragraph 3 says, "I am a citizen of the United States of America." Do you see where it says that in paragraph 3?
A. Yes.
Q. Is that a true and accurate statement?
A. That's true.
Q. Paragraph 4 says, "I maintained my primary residence in the United States for approximately seventeen years, from 1989 through 2006." Do you see where it says that in paragraph 4?
A. Yes.
Q. Is that a true and accurate statement?
A. Yes.
Q. Paragraph 5 says, "I served on the jury in the case of South Carolina versus Jonathan Binney." Do you

see where it says that in paragraph 5?

A. Yes.

Q. Is that a true and accurate statement?

A. Yes.

Q. Paragraph 6 says, "During deliberations in the guilt-or-innocence phase of the trial, I was the last juror to vote for guilt. I was pressured by the other jurors to hurry up and vote for guilt when I wanted to discuss the evidence in the case." Do you see where it says that in paragraph 6?

A. Yes.

Q. Is that a true and accurate statement?

A. Yes.

Q. Paragraph 7 says, "The other jurors argued with me and became agitated when I would not immediately vote for guilt." Do you see where it says that in paragraph 7?

A. Yes.

Q. Is that a true and accurate statement?

A. Yes.

Q. Paragraph 8 says, "During the deliberations in the penalty phase, I again wanted to discuss the case with the other jurors and review the evidence. The other jurors did not agree with me and wanted to vote for death almost immediately." Do you see where it says that in

paragraph 8?

A. Yes.

Q. Is that a true and accurate statement?

A. That's true.

Q. Paragraph 9 says, "At this point the other jurors became more and more angry with me." Do you see where it says that in paragraph 9?

A. Yes.

Q. Is that a true and accurate statement?

A. Yes.

Q. Paragraph 10 says, "The other jurors began to call me names and say things to me like, why don't you go back to your own country. These comments were made directly to me and there were no other Latin Americans on the jury." Do you see where it says that in paragraph 10?

A. Yes.

Q. Is that a true and accurate statement?

A. Yes.

Q. Paragraph 11 says, "No other jurors disagreed with these comments or came to my defense. I believe that the other jurors agreed with these comments, and I felt singled out as the only Latin American juror." Do you see that in paragraph 11?

A. Yes.

Q. Is that a true and accurate statement?

A. Yes.

Q. Paragraph 12 says, "I felt intimidated and pressured by the other jurors because it was 11 against 1." Do you see where it says that in paragraph 12?

A. Yes.

Q. Is that a true and accurate statement?

A. Yes.

Q. Paragraph 13 says, "I voted for the death penalty because I felt intimidated and pressured by the other jurors to agree with them. Do you see where it says that in paragraph 13?

A. Yes, I do.

Q. Is that a true and accurate statement?

A. Yes.

Q. Paragraph 14 says, "Also, another juror told me that if we could not agree on the penalty, we would have to start all over and the defendant would get a whole new trial and on both the guilt or innocence phase and the penalty phase." Do you see where it says that in paragraph 14?

A. Yes.

Q. Is that a true and accurate statement?

A. That is true.

Q. Is that your signature at the bottom of page

2?

A. Yes.

Q. Did you testify earlier that you signed this Affidavit approximately two weeks ago?

A. Yes.

Q. You testified earlier that an attorney a couple of weeks ago from Columbia called you on the telephone. Is that correct?

A. Yes, a week ago.

Q. Do you remember where -- do you remember who that attorney said he was?

A. He told me a name, but I don't remember.

Q. Do you remember who that attorney said he represented?

A. The State.

Q. The State?

A. Uh-huh.

Q. And what did that attorney say to you on the telephone?

A. That he wanted to discuss this Affidavit.

Q. He wanted to discuss the Affidavit. And what did you say?

A. Yeah. I said, yeah.

Q. You said you would discuss it with him?

A. Yes.

Q. And did he say anything else to you on that telephone call?

A. No.

Q. And then what happened after that phone call?

A. Oh, they sent the paper that I have to be at deposition. I have to be. If I don't be in the deposition, I'll be in trouble.

Q. They sent you a subpoena?

A. They never said that to me.

Q. Okay. They sent you a paper that said you had to attend the deposition?

A. Yes.

Q. And that paper you received from the State as well?

A. Yes.

Q. Okay. That's all the questions I have for you, Mr. Viquez.

REDIRECT EXAMINATION BY MR. MABRY:

Q. I just have a few on redirect. Do you remember somebody from the Attorney General's Office calling you last week and wanting to come up and talk to you in person before your deposition, talk to you about this before your deposition, before today?

A. Yeah, before that.

Q. Like last week, do you remember somebody

calling and saying they would like to come up and talk to you before we took your deposition?

A. Yes, Friday.

Q. Okay. And you told them that you weren't interested in doing that, you would just wait until this week. Do you remember that?

A. Yes.

Q. Okay. Did you get any more calls from them?

A. No.

Q. All right. Your Affidavit, paragraph 6 says, "During deliberations in the guilt-or-innocence phase of the trial, I was the last juror to vote for guilt."

A. Wait. Let me see.

Q. Okay. Yeah. No. 6, it says, "I was the last juror to vote for guilt."

A. For guilty or for death penalty?

Q. No, just guilty of murder and guilty of burglary. It says, "I was the last one to vote for guilt." Earlier you said that wasn't true.

A. No, no. I'm sorry. Sorry.

Q. That's not right?

A. No, this is not.

Q. That's not right.

A. In the trial, --

Q. Right.

A. -- it was everybody vote for --
Q. Guilty?
A. -- guilty.
Q. Okay.
A. The only problem, I was the last person to vote was in the death penalty.
Q. Only in the penalty phase?
A. In the penalty phase.
Q. All right. So paragraph 6 is not correct?
A. Sorry.
Q. That's okay. I just want to understand.

All right. Paragraph 7, still talking about the guilt phase, okay, we're still talking about the guilt phase, "The jurors argued with me and became agitated when I would not immediately vote for guilt." That's not correct either; is it?

A. But we're talking about that's death penalty.
Q. Huh-uh. If you'll look, this is talking about the guilt phase, because it goes from paragraph 6 to 7, "During deliberations in the guilt-or-innocence phase".
A. I was saying this is for --
Q. Penalty phase?
A. -- penalty phase.
Q. Okay. So in the guilt phase there was no -- that's not right, paragraph 7 is not right?

A. Because everything -- in the first trial --

Q. Right.

A. -- we discussed it, but coming everybody, we --

Q. Everybody thought he was guilty?

A. Guilty. And I decided he was guilty. In the second for death penalty and --

Q. Penalty phase?

A. Yeah, that's when we have. If it's wrong, that's what it was an agreement almost -- I think that we vote the one time, that's it, the first time, guilty.

Q. Just one time?

A. One time I think so, and the second one was when there was more --

Q. Discussion?

A. -- discussion about the death penalty or life. but before we decide to guilty or no guilty, we have a lot of questions.

Q. Sure. A lot of questions, but then everybody voted for guilty; right?

A. Yes.

Q. Okay. All right. So paragraphs 6 and 7 are not correct.

Paragraph 8, "During the deliberations in the penalty phase, I again wanted to discuss the case

with the other jurors and review the evidence."

A. Guilty, you're talking about guilty?

Q. Now we're talking about the penalty phase.

A. Okay. Yeah.

Q. Okay. "I wanted to discuss the case with the other jurors and review the evidence. The other jurors did not agree with me and wanted to vote for death almost immediately."

A. That's correct.

Q. Okay. Well, let me ask you this. A while ago when we were talking about the penalty phase, you said the penalty phase deliberations took place over two days. Remember that?

A. Uh-huh.

Q. You said the first time you-all voted it was like 6 to 6. Right?

A. It was more than that. It was more --

Q. 7 to 5?

A. Something, I can't remember. The first vote we did was more death penalty -- no, life prison than death penalty.

Q. Okay. So more for life than death --

A. Yeah.

Q. -- when you first voted?

A. Yes.

Q. So that's not correct, "Almost immediately all the other jurors wanted to vote for death."? See what I'm saying? "They wanted to vote for death almost immediately."

A. They wanted to when we were talking.

Q. Toward the end?

A. Toward the end, but when we vote there was people decide to change.

Q. Right, people changed over time.

A. When we discussed it, they wanted immediate death penalty.

Q. I understand.

A. And that's when I come and say let's go and do everything, bring the evidence and bring to me and listen to this and do this because I want to be sure about it.

Q. Okay. So you wanted to look at -- they brought evidence to you and discussed the evidence?

A. Yes. I'm the person asking for that.

Q. You were asking for that?

A. Yes.

Q. And that's what you were considering in making sure you were 100 percent right?

A. Correct.

Q. Okay. That's all I have, I believe. Let me check one more thing.

Do you remember what evidence they brought to you? What did you look at?

A. Yes, I remember. The tape.

Q. The tape.

A. The one I can remember, the tape --

Q. 911?

A. 911 tape, yeah. How did you know that?

Q. It's the only one I could think of.

Do you remember anything else?

A. Yeah. I can't remember the other one.

Q. The statements, any of his statements?

A. Something about when the -- they shot outside, looking for the casings. That's what they call them?

Q. Casings, the physical evidence?

A. The physical evidence.

Q. Okay.

A. We discussed that.

Q. Right.

A. And we discussed about the -- the specific 911 and the tape that they don't want to bring her was -- the guy that owned the house.

Q. Uh-huh, the husband?

A. The husband, they have a tape --

Q. Right. He was tape recording her phone calls?

A. -- recording her.

Q. Right.

A. And I wanted to hear that, and they don't bring that.

Q. Right.

That wasn't introduced in the trial?

A. But I wanted to know something, you know.

Q. What was going on?

A. Yeah.

Q. Yeah, they were having problems.

A. Yeah, but this -- I don't know. A lot of things there they don't make sense, and I still think they don't make sense.

Q. Right.

But you believe he's guilty?

A. Not for that one.

Q. Right.

Just the husband and the wife were having problems and all that was going on?

A. It confused me.

Q. Okay.

A. You know, I don't want to discuss something and get in trouble.

Q. No, you're all right.

Okay. And you based your decision, your

death penalty, on that evidence that you reviewed and you-all discussed?

A. Uh-huh.

Q. And that's what made you 100 percent correct, believed you were 100 percent correct? Is that right?

A. After -- well, in the beginning, no, I was, you know --

Q. Right, but eventually?

A. Eventually coming to the point of saying, go for it, and doing the right thing and I vote for the death penalty.

Q. And that was based on the evidence that you reviewed?

A. Correct.

Q. Okay. That's all I have.

RECROSS EXAMINATION BY MS. PAAVOLA:

Q. One more question. Mr. Viquez, you've just told Mr. Mabry that you spoke on the telephone again to someone from the State on Friday.

A. He called me.

Q. He said he wanted to come and meet with you in person?

A. Yeah, but I say no, I can't.

Q. And you said you would rather wait until the deposition?

A. Yes.

Q. So that was after you had received the Notice of Deposition from the State?

A. Yes.

Q. Okay. That's all I have.

MR. MABRY: Nothing further

Q. Thank you, sir, for your time.

MR. MABRY: Do you have any?

(Discussion held off the record.)

FURTHER REDIRECT EXAMINATION MR. MABRY:

Q. Mr. Viquez, I forgot to tell you at the beginning of the deposition. You have a right to read and sign your deposition if you want to. You don't have to. Okay. Most people waive it. I leave that up to you. She's got a tape recorder, and she's typing it, too. Okay. But you have a right, if you want to, she'll type it up and send it to you and you can read over it before you sign it. Okay? That's your right.

A. Uh-huh.

Q. If you don't sign it within 30 days, that becomes your testimony anyway in this case. Okay. That's totally up to you. Every person that gives a deposition has a right to read and sign their deposition to make sure she took down what you said accurately.

A. Correct. I don't think I'm going to be here.

Q. Okay. So you want to -- she can send it to you if you want to, but what I'm telling you is, she's taking it down with a tape recorder and she's also taking it down, you know, like this with her hands.

A. That's fine.

Q. So if you want to waive it you can, or she can send it to you in Mexico.

A. That's fine.

Q. Which one would you rather do?

A. No, I don't have to.

Q. You just want to waive it?

A. I don't have to sign.

Q. You don't have to if you don't want to.

A. Okay. Whatever I say here. That's --

Q. All right. Mr. Viquez, it's my understanding from what you said that you want to waive signing the deposition. You don't want the court reporter to send it to you in Mexico City? You just want her to type it up, and that will be your testimony. Is that correct?

A. Correct.

Q. Okay. Thank you. That's all we have. We can go off the record.

(Discussion held off the record.)

MR. MABRY: We'll mark the Notice of Deposition as Defendant's Exhibit No. 3, and on

the back is his address,

(Defendant's Exhibit No. 3 was marked for identification.)

(The deposition concluded at 5:10 p.m.)

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

REPORTER'S CERTIFICATE

I, the undersigned, **Tammera R. LEONARD, a Certified Stenographic Reporter and Notary Public for the State of South Carolina,** do hereby certify that the foregoing deposition was taken on the 15th day of May, 2007;

That the within deponent, **HENRY VIQUEZ,** was sworn to tell the truth and that the foregoing deposition is an accurate transcription of the testimony taken under oath.

I further certify that I am neither counsel nor solicitor to any of the parties in said suit, nor interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 25th day of May, 2007.

Tammera R. Leonard, CSR

Tammera R. LEONARD, CSR and
Notary Public for South Carolina
My commission expires June 21st, 2012.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHEROKEE	)	
THE STATE,	)	JURY FINDING OF **EXISTENCE OF STATUTORY AGGRAVATING CIRCUMSTANCE**
vs.	)	
JONATHAN KYLE BINNEY,	)	CASE NO.: **00-GS-11-526**
DEFENDANT.	)	

We, the jury in the above-entitled case, unanimously find beyond a reasonable doubt the existence of the following **statutory aggravating circumstance:** ~~Burglary 2nd~~ ~~in the First Degree~~ That the murder of Judge Southern was committed while in the commission of the crime or act of Burglary in the First Degree

FOREPERSON Bruce Lavender

JUROR Joyce Rochester

JUROR Freida Spencer

JUROR Kayse Daniels

JUROR [illegible]

JUROR Charlene Yates

JUROR Sedric L Yates

JUROR Danny D Cole

JUROR [illegible]

JUROR Marion Tucker

JUROR Mickey Scott

JUROR Robert Pettit

November 14, 2002.

DEFENDANT'S EXHIBIT
5-15-07
1 Viguez

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	)	IN THE COURT OF GENERAL SESSIONS
THE STATE, vs. JONATHAN KYLE BINNEY, DEFENDANT.	)	RECOMMENDATION OF **DEATH SENTENCE** CASE NO.: **00-GS-11-526**

We, the jury in the above-entitled case, having unanimously found beyond a reasonable doubt the existence of the following **statutory aggravating circumstance**, to wit:

Burglary in the first Degree, i.e. that the murder of Jude Southern was committed while in the commission of the crime or act of Burglary in the first Degree

now unanimously recommend to the Court that the defendant, Jonathan Kyle Binney, be **sentenced to death.**

FOREPERSON Bruce Lavender
JUROR Joyce Valentin
JUROR Freida Spencer
JUROR Kayce Daniels
JUROR [signature]
JUROR Charlene Dale
JUROR Debra D. Yates
JUROR Danny D. Cole
JUROR [signature]
JUROR Mary A. Bell
JUROR Mickey Smith
JUROR Robert Pettit

November 14, 2002.

DEFENDANT'S EXHIBIT
5-15-07
2 - Viquez

HENRY MCMASTER
ATTORNEY GENERAL

May 8, 2007

John H. Blume, Esquire
Post Office Box 11744
Columbia, SC 29211

Sheri Lynn Johnson, Esquire
Cornell Law School
Myron Taylor Hall
Ithaca, New York, 14853

Emily C. Paavola, Esquire
Baker & Daniels, LLP
300 North Meridian St., Suite 2700
Indianapolis, Indiana 46204

Re: Jonathan Kyle Binney v. Jon Ozmint, et al.
C. A. No. 06-CP-11-223

Dear Mr. Blume, Ms. Johnson and Ms. Paavola:

I enclose herewith and serve upon you a copy of the Notice to Take Deposition in the above captioned matter. I will provide you with copies of the subpoena and proof of service once it has been served.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/hfb

Enclosures

DEFENDANT'S EXHIBIT
5-15-07
3 Viguez

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STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	)	IN THE COURT OF COMMON PLEAS
Jonathan Kyle Binney, Applicant, v. John Ozmint, Commissioner, S.C. Department of Corrections; and Henry McMaster, Attorney General, State of South Carolina, Respondent.	)	C/A No.: 06-CP-11-223

AFFIDAVIT OF HENRY VIQUEZ

Henry Viquez being first duly sworn upon his oath, now deposes and says:

1. My name is Henry Viquez. I reside in Costa Rica. I am now, and at all times to which I refer in this affidavit, more than 18 years of age. I have personal knowledge of the matters to which I refer in this affidavit.

2. I was born in Costa Rica.

3. I am a citizen of the United States of America ("United States").

4. I maintained my primary residence in the United States for approximately seventeen years, from 1989 through 2006.

5. I served on the jury in the case of South Carolina v. Jonathan Binney.

6. During deliberations in the guilt-or-innocence phase of the trial, I was the last juror to vote for guilt. I was pressured by the other jurors to hurry up and vote for guilt when I wanted to discuss the evidence in the case.

PLAINTIFF'S EXHIBIT
1 5-15-07 Viquez

7. The other jurors argued with me and became agitated when I would not immediately vote for guilt.

8. During the deliberations in the penalty phase, I again wanted to discuss the case with the other jurors and review the evidence. The other jurors did not agree with me and wanted to vote for death almost immediately.

9. At this point, the other jurors became more and more angry with me.

10. The other jurors began to call me names and say things to me like "why don't you go back to your own country." These comments were made directly to me, and there were no other Latin Americans on the jury.

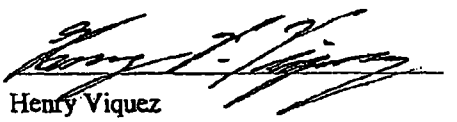
11. No other jurors disagreed with these comments or came to my defense. I believe that the other jurors agreed with these comments, and I felt singled out as the only Latin American juror.

12. I felt intimidated and pressured by the other jurors because it was eleven against one.

13. I voted for the death penalty because I felt intimidated and pressured by the other jurors to agree with them.

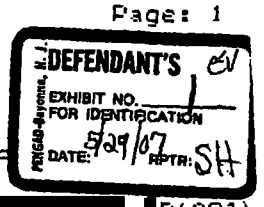
14. Also, another juror told me that if we could not agree on the penalty, we would have to start all over and the defendant would get a whole new trial on both the guilt-or-innocence phase and the penalty phase.

AFFIANT SAYS NOTHING FURTHER



Henry Viquez

BILOXI VAMC 520
** FINAL **



For POST-TRAUMATIC STRESS DISORDER Exam

==========

Name: DOVE,GAYLE A SSN: [redacted] D6094)
C-Number: 515646094
DOB: AUG 15,1957

Address: 4457 POPPS FERRY RD.LOT 195

City,State,Zip+4:
BILOXI MISSISSIPPI 39532

Res Phone: 601-396-1919
Bus Phone: NONE

Entered active service: SEP 4,1975 Last rating exam date:
Released active service: SEP 16,1987

Priority of exam: Original SC

==========

Examining provider: B. FRANK VOGEL, M.D.
Examined on: JUN 28,1995

==========

Examination results:

HISTORY:
This veteran left the 8th grade at 16 because she had become pregnant in a brief relationship with a much older man, a policeman, who did not want to marry her. Later, at the age of 17, she did get her GED. While still in high school, she was briefly in the choir and also was a junior swimming instructor for junior high school kids.

She was sexually abused by two different men at the age of 8; this was just fondling and on another occasion, an older man performed oral sex on her.

She was sent to a home when she became pregnant at the age of 16, had a boy baby which she adopted out and then worked in the home for about six months and then decided to enlist in the Air Force.

She joined the Air Force on September 4, 1975, and was stationed at a number of posts in the United States as well as Greenland and Alaska. Her job was that of a radar operator. She got along well until she was in Greenland, which was a very isolated posts and everybody there did a good deal of drinking, and she also started to drink heavily, and then even more heavily when she learned that her mother had attempted suicide, and also when a man to whom she was engaged abruptly broke the engagement. She talked about suicidal feelings, cried all the time, was depressed and she was hospitalized at the station hospital in Greenland for a week and was diagnosed has having a depression. but apparently was given no special treatment and was returned to duty. When she was at the Langley Air Force Base in Virginia, she was doing a good deal of drinking and her supervisor - a Master Sergeant - came to her house one night at 10 PM towards the end of August 1987 and found her drunk and forced intercourse on her three times that night, and she finally got away from him and reported it to the

Continued on next page
VA Form 2507

Name: DOVE,GAYLE A [redacted] C-number: 515646094
For POST-TRAUMATIC STRESS DISORDER Exam

Exam Results Continued

City Police who informed the Office of Special Investigation of the Air Force,and they investigated a situation and were questioning ~~the~~ Master Sergeant and after one such period of investigation, he committed suicide.

Her presence in the Air Force on that base was felt to be,she says, "an embarrassment" and they hurried her into making a decision of leaving the Air Force and she received an honorable discharge as an E5 on September 16, 1987. Since that time, she has worked as a clerk, as apprentice water ~~analyst~~ analyst, as a hotel maid, a waitress, a night auditor, a rose girl - a woman who sells roses in bars and ~~sells~~ solicits, as well as a warehouse ~~assistant~~ assistant. At this time, she is working in one of the Coast's casinos,as a poker dealer and has done so for three months. She is concerned,about the stress of the job, and concerned about making an error and losing her position.

She has been married a number of times, she had the relationship at age 16 as already mentioned,and then was married for the first time from 1980 to 1982 but they were too much apart because of the demands of the military service and there were no children, and they got a divorce. Again, in 1983, she was married a second time and this broke up in 1984 because he drank a good deal, used drugs and beat her almost everyday.

A third marriage was from 1990 and they separated in March 1995 and she is expecting a divorce next month. Again, he has been on foreign duties being in the Air Force and is always away from home,and there were no children, so, she is getting the divorce.

In 1992, for eight or nine months, she was going to the Keesler Mental Health Center and talked to a ~~psychiatrist~~ psychologist because she felt depressed and worthless and that life was not worth living. She talked to a psychologist and never received any medication and looking back, she says that the talking to the psychologist was of no value.

She was drinking very heavily, and in October 1994, with the urging of her father she entered the SATP at the Gulfport VA and stayed in it for 30 days. She was also prescribed Zoloft but does not know the dose and that helped here. Since that time, she has stopped drinking and has been attending the AA, going not only daily but sometimes twice daily, and her only friend,she says,is her sponsor. At this time, because of the work situation, she is going three or four times a week. It should be said that she began drinking at the age of 14, but this was once a week or once every two weeks,and it became heavy when she was 21 and she was drinking s much as a half gallon in three or four days. She has been abstinent nine months now.

MENTAL STATUS EXAMINATION:
This is a 37 year old white separated woman who is 5'6-1/2" tall and

Continued on next page

Exam Results Continued

weighs 135 pounds. Her forehead is lined, her eyes are pouched, and she appears depressed. She is casually dressed but quite neatly groomed.

She finds she cannot easily talk about her rape experience even to a professional person such as a psychologist. She has troubling intrusive thoughts about the sexual trauma at least twice a week, nightmares once or twice every two weeks, and flashbacks are especially troubling when she is having sexual intercourse with her present man friend. It occurs about once every three times, and especially if her eyes are closed, and she will suddenly have the impression that it is the Master Sergeant who was forceably attacking her and raping her. She has to keep her eyes open, otherwise, she has this flashback and has to remember with whom she is. This has been a problem in her relationship with men since the experience, and is causing problems presently, because she pulls away from experiences.

She has lost interest in previous activities and has a great deal of difficulty in relating to people. She does not want to let people get close to her, especially men. She dislikes being touched and sometimes if a man who casually touches her shoulder or arm, she gets the impression that there is a sexual meaning and pulls away. She will always sit in the back of a room and she says "so no one would notice me or so no one could come up behind me". She also told me she does the same thing in restaurants where she sits so she can see the door.

At a sudden noise behind her, she would scream, jump and swing around with her fist clinched.

This woman is also markedly depressed and on two different occasions during the interview, her eyes filled with tears and she had to wipe them away. She feels sad most of the time and has crying spells twice a week and feels as if she wants to cry but holds it in almost daily. She feels that he thinking, her concentration, and her memory are not as good as they used to be, prior to this sexual trauma.

She has a fair self-opinion, has a low energy level, feels tired all the time, has no friends and again, this is to be emphasized. She distrusts people and says "everybody is out to screw me"- she laughed, her. "I don't mean literally, I don't feel I can rely on people".

About a year and a half ago, she had daily suicidal thoughts and took about 90 tablets of Elavil that had been given her at the Keesler Mental Health Center. She swallowed these pills with the help of a pint or more of alcohol, and was semi-conscious for the next three days, but unable to walk, she had to crawl on the floor from her bed to the bathroom and then back to her bed, but did recover without medical help.

Her sleep is poor; she averages five hours of broken sleep, feels tired

Continued on next page

Name: DOVE,GAYLE A SSN: [redacted] C-number: 515646094
For POST-TRAUMATIC STRESS DISORDER Exam

Exam Results Continued

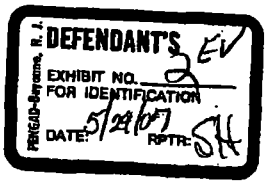
when she wakes up. In the past 2-1/2 months, she has lost 20 pounds because she wasn't really interested in eating. About once a week, she will wish to die in her sleep. About once a week, she will have the thought that she would be better off dead.

This woman is in the range of average intelligence. She is competent for VA purposes.

DIAGNOSES:
AXIS I. A. Post-traumatic stress disorder; 309.81.
B. Dysthymic disorder; 300.4.
C. Alcohol dependence (in beginning remission); 303.90.
AXIS II. V71.09.
AXIS III. Abdominal pains; migraines.
AXIS IV. Money worries; ~~enlist her father~~; impending divorce; sexual trauma: Extreme.
AXIS V. Current GAF 55.

/pw

Approved by: _____ Date: _____
ter signature: _____ Date: July 3, 1995
2507



SOCIAL WORK DATA BASE/ASSESSMENT

ıte Printed: OCT 24,1994
)urce of Referral: 4G
)urce of Information: Veteran, chart and the computer.
eferral Date: OCT 24,1994

. Demographic
1. Date of Admission: OCT 4,1994@10:08:26
2. Date of Previous Admission: NONE
3. Veterans's Home Address:
5246 A STREET BILOXI, MISSISSIPPI 39530
4. Veteran's Telephone: HOME #: 601-436-9642 WORK #:
5. Next-of-kin: RAY DOVE JR / FATHER
ADDRESS:5246 A STREET
BILOXI, MISSISSIPPI 39530
HOME #: 601-436-9642 WORK #:
6. Veteran's date of birth: AUG 15,1957
7. Veteran's place of birth: WITCHIA FALLS, TEXAS
8. Veteran's sex: FEMALE
9. Veteran's race:
10. Veteran's religious preference: PROTESTANT, NO DENOMINATION

I. Employment/Financial
1. Veteran's employment status: NOT EMPLOYED
2. Usual Occupation: SALES
3. Present Source of Funds:
Total Income: _____
HB: _____ Employment: _____ Social Security: _____
VA Pension: _____ Retirement: _____
SSI: _____ VA Compensation: _____ Other Disability: _____
A&A: _____ None: _____ Other: _____
4. Potential source of other financial resources:

5. Assets: _____
6. Potential Employability: YES
7. Insurance Coverage:

'eteran's Name: DOVE,GAYLE A
:D# [redacted]
ED-SECTION: 125-21 GUS RIVERS, MSW, CSW, Social Worker

Social Work Service Reports and Summaries
10-9034 VAF VICE 10-1349

8. Employment/Financial Assessment:
Usually employed in clerical positions.

:I. Education:
1. Highest educational level attained: 12 - 16 YEARS
2. Special educational training or skills:
3. Is not, or unknown if currently enrolled in an educational program or trade school.
4. Educational Assesment:
Veteran completed 10 years 0of public education, earned a GED and completed 100 hours of college credits toward a degree.

V. Military History:
1. Period of Service: POST-VIETNAM
2. POW - NO
3. Combat - NO
4. Service Connected Disability:
5. Military Assessment:
Veteranb is NSC with service in the U. S. Air Force 9/4/75 to 9/16/87. Military Occupational speciality was Aerospace control and warning systems operator. Highest paygrade wa E-5. No substance use related disciplianry action with the exception of a letter of reprimend for a DUI citation. Receive an honorable ischarge.

. Social/Family Relationship:
1. Marital status: MARRIED
2. Spouse:
3. Children:
4. Describe Social Support System:
SOCIAL SUPPORT NETWORK: Veteran's father is willing tpo participate in treatment and discharge planning.

5. Present use of Community Resources:
Reports no use of community resources prior to admission.

6. Current Living arrangements: SPOUSE
7. Social/Family Assessment:
SEXUAL HISTORY: First sexual experience at 15 with an older male. She considers herself heterosexual in orientation and denies any history of homosexual activities pr being a sexual abuser. She acknowledges being a victim of sexual abuse. Multiple episodes of sexual abuse to include childhood and adult life, while on active duty. Received brief therapy for incident of abuse, while on active duty. Not current involved in VA Sexual Trauma treatment program. Not sexually active. When sexually active report relationship with a single partner. Reports sexual dysfunction as evident by lost of desire, uncomfortable with touching of a sexual nature and numbing during experience. Results from most recent HIV test pending.

MARITAL HISTORY: In 1980, shie was married to Michael Bruce Vogel. They had no children and the marriage lasted for two years. Substande use was not considered a contributing factor by veteran. !in 1983, she was married to Lloyd Smith Howell. They had no children and the marriage lated for 18 months. Substance abuse was a factor in the divorce, as both were substance abuser and she reports physical abuse by her husband. There was a subsequent mariage in 1990 to Richard Allen Parke. There substance use has been a source of marital discord and she has no plans for reconciliation.

FAMILY BACKGROUND. SOCIAL AND CULTURAL INFLUENCES AND SPIRITUAL ORIENTATION: Veteran grew up in a single parent dysfunctiional household consisting of her mother, Marilyn who was a turnpike tole collector and two brothers. Reports no physical abuse during early childhood, however she recalls mental abuse as a teenager. His father and mother separated by her secon birthday and was divorced when she was five. She is the youngest child. Early religious orientation was as Episcopalian and orientation during teen years was Baptist. Maintains contact with familly of origin. Expresses a belief in a higher power, however she is not active in organized religion.

I. Legal Situation:

Living Will: NO

Legal Assessment:
Report A DUI, in 1981. The incident occured on a military base. Denies any history of jail or prison and there are no pending legal issues, which will impact on treatment.

II. Current Substance Abuse Problems: YES

Comments on Substance Abuse:
HISTORY OF SUBSTANCE USE/ABUSE : Reports first drink of beer at 14 with an increase in consumption prior to entry in the Air Force at 17. At 21 regular drinking commenced and she recalls averaging about six mixed drinks a day. This pattern continued for about a year and decreased folowing her transfer from Greenland. She recalls drinking about a 12 pack of beer a week and continued at this level until 1984. She was transferred to Alaska and consumed about 20 mixed drinks a week and maintained this pattern until 1986, when there was a decrease in consumption. In 1987 there was a gradual escalation to daily drinking of at least the equivalent of 12 ounces of whiskey for most of 1987 with a breg period of reduction, followed by an increase to a case of beer and two liters of whiskey a week. This pattern continued to 1990, when wine became beverage of choice and she consumed an average of a gallon of wine a week. She continued this pattern for six months. She maintained six months sobriety in 1991. There was a return to drinking wine. She reports having two glasses of wine a day for a period of about four months, then she switced to mixed drinks and consumed three to four a day. This pattern continued to 1994,

[redacted]

GUS RIVERS, MSW, CSW, Social Worker

when drinking was restricted to Cosino Visits about twice a month. She drank until she got drunk at the cosino and reports that she no longer drank at home. This pattern continued until she presented for treatment in September 1994. There is a history of blackouts, however she recalls no incidents of DT's or seizures. This is her second treatment program. She completed a 28 day program in the Air Force, prior to release from active duty in 1987. Treatment is voluntary.

FAMILY'S HISTORY OF SUBSTANCE USE/ABUSE: There a history of her father's father and brother dying from alcohol related conditions. Her father had an alcohol problem until 1987, when he stopped drinking, her brother had a substance abuse problem and stopped using when he became a Morman about eight years ago. She considers her older brother a "controlled drinker". No other patterns of familial substance abuse disclosed.

III. Psycho-Social Assessment:

OTHER HEALTH PROBLEMS: Veteran reports history of brief therapy following suicide of person who sexual assualted her. She has received no therapy for sexual trauma. Medical issues of concern includes pelvic adhesive disease, recurring cyst right wrist and history of headaches almost daily.
No DOM history.

PATIENT'S DAILY ACTIVITY PATTERNS: Hobbies includes making rugs and needle works. Leisure activities includes bowling, playing pool, gambling and shopping at the mall. She was working prior to admission and reports getting up about 1800, report for work at 2000 and worked until 0320, go home and change clothes prior to a night at the cosino. When she did not go to the cosino to drink and gamble, She watched

televison until about 0700. There is a pattern of sleep disruption aand she reports getting about five hours sleep a day. This pattern was repeated routinely.

PATIENT'S PERCEPTION OF OWN DEPENDENCY: Veteran is of the opinion that her dependency has contributed to marital problems and divorce, affected work ethic, ending military career and relationship problems.

Expectations from treatment includes, education about the disease concept, tools to improve coping skills and initiate behavioral changes necessary to maintain long term sobriety.

IMPRESSION/ASSESSMENT OF PATIENT: Veteran is motivated for treatment and should have no problems relating to peers in treatment or meeting the criteriors for satisfactory completion of inpatient SATP. Recommend referral to address sexual trauma issues. Asset includes support system and some financial resource. Liabilities includes issues around pending divorce, addressing housing needs following divorce.

TENTATIVE DISCHARGE PLAN: Veteran will participate in MHC-SATP, as a continuum of care for a period of a year to address unresolved issues and reinforce inpatient treatment inorder to facilitate continuing sobriety.

X. Preliminary List of Problems
1. SUBSTANCE
2. SEXUAL DYSFUNCTION
3. OTHER BEHAVIOR PROBLEMS

Initial Plan of Action
She remained at home awaiting treatment and attended pre -amission groups at MHC-SATP.

eteran's Name: DOVE,GAYLE A
D#: [redacted]

ED-SECTION: 125-21 GUS RIVERS, MSW, CSW, Social Worker

DEFENDANT'S EXHIBIT NO. 3EV FOR IDENTIFICATION DATE: 5/29/07 RPTR: SH
PENGAD-Bayonne, N.J.

Standard Form 507

CLINICAL RECORD

10/13/94

Report on Dove, Gayle

or

Continuation of S. F. Psychology Report

(Strike out one line) (Specify type of examination or data)

(Sign and date)

Tests Administered: Ms. Dove was administered the MMPI-2 on 10/11/94 and her chart has been reviewed.

Results: Ms Dove obtained a valid profile. Patients of this kind are often described as having a definite drinking problem and are more likely to be labeled as alcoholics than patients generally. This type of patient is also more likely to be labeled diagnostically as depressive neurosis and to display depressive mood than the average patient. A recent history of crying episodes and, more important, of suicidal behavior may be present. The latter usually takes the form of attempts or gestures. Scores in this range suggest adequate regard and consideration for others, a flexible approach and no undue sensitivity. Such persons are likely to display a normal combination of practical and theoretical interests. Normal energy and activity level are suggested. A capacity to maintain rewarding social relationships is suggested. Trauma scales were mildly elevated and she felt this was due to an abusive relationship she was involved in many years ago. She has a poor self concept, is self-dissatisfied, and lacking in the skills that would lead to her improvement. Daily life is not interesting nor exciting.

Danger to Self or Others: Ms Dove denied recent suicidal thoughts. She is uncertain if she will be going through a divorce in the very near future and she stated that she has had thoughts of physically harming her husband but she has no plans to do so. She made a suicide attempt at the age of 16 by an overdose of pills after learning that she was pregnant. She was taken to a hospital and released the same day.

Mental Health History: Ms Dove stated that she has never been treated for mental health related issues as an inpatient. In 1987 while still on active duty in the Air Force she was prescribed Elavil for Major Depression. She reported that she was also prescribed an antidepressant by Dr. Bain at the MHC in Gulfport shortly before entering this program. She is currently on Zoloft. This is her second treatment program for Alcohol Depenedence.

Diagnostic Impression: Major Depression, Moderate

Steve McNally PhD
Steve McNally PhD
Staff Psychologist

(Continue on reverse side)

DOVE,GAYLE A 25
5246 A STREET C47
BILOXI MS 39530

PATIENT'S IDENTIFICATION (For typed or written entries five: Name—last, first, middle; grade; date; hospital or medical facility)
515 64 6094 MF 081557 52S

REGISTER NO. | WARD NO.

REPORT ON _____ or CONTINUATION OF _____

C-554 5 8

STANDARD FORM 507
General Services Administration and Interagency Committee on Medical Records

Standard Form 507

CLINICAL RECORD

Report on ~~Diagnostic Summary~~

or

Continuation of S. F. ~~Master Treatment Plan~~ /

(Strike out one line) (Specify type of examination or date)

(Sign and date)

Diagnosis: AXIS: I

Alcohol Dependence

2ND TX Program - 1 prior TX in Military 1987 Andrews, AFB

History Substance Abuse Dependence:

Vet is a 32 year old Female, Alcoholic Binge drinker. She started drinking at age 14 and it became a problem for her at age 21. She has been drinking for 23 years. She drinks Vodka ½ Pint - Her longest Period of Sobriety is 8 months. She has a positive FH - Father & 2 brothers Are Alcoholics

Psychiatric/Psychological:

Vet is Alert & Oriented Thoughts are relevant & Coherent - Recent/Remote memory is intact. She denies any Suicidal ideation. She is somewhat Depressed (marital Problems) She is pleasant & Cooperative - She denies any physical Abuse - but was sexually Abused at age 9 by a non-family member.

Social Support Network/Recreational Skills/Spiritual Orientation:

Vet has 2 brothers who are both Alcoholics and her Father is recovering at present - Mother is a non drinker. She has poor AA Attendance. Last Attended AA 5 years ago. She enjoys Bowling & Shooting Pool in her Leisure Time. She Also enjoys collecting old Coins as a hobby. She believes in and calls GOD her "Higher Power" married X3 Divorced X2 no children currently married for 4 ½ years - Husband informed her - He WANTS A divorce

Medical/Legal/ Vocational:

Veteran has a severe pelvic inflammatory disease with adhesions and has had a hysterectomy. Lab work completed prior to admission All lab work is within Normal Limits - Some Further Testing has been ordered. No Acute Distress Normal Hetero sexual development Ganglion ® wrist No legal issues are pending. She has a High School Ed. and has 3 years of college - She has worked as an auditor until 2 yrs ago. She Also worked in a warehouse - she is presently unemployed

Assessment of Needs/Outpatient Referrals: She has some Denial - Appears to be motivated & is receptive to Treatment

Aftercare Planning
Support System
Guide to Control urges to DRINK
Improving Marital Relations
vet will return Home after Completion of Treatment

AA & Sponsor
MHC - Follow-up SATP out patient clinic - VA Outpatient

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

DOVE, GAYLE A
5246 A STREET
BILOXI

25
047
MS 39530

REGISTER NO.

REPORT ON _____ or CONTINUATION OF

STANDARD FORM 507

General Services Administration and Interagency Committee on Medical Records

Department of Veterans Affairs

MEDICAL RECORD | SUPPLEMENT DEFINED DATA BASE

SUPPLEMENT TO STANDARD FORMS (Check one): ☐ SF 509 ☐ SF 510 ☐ SF 516

SUPPLEMENT TO VAF 10-7978g SERIES (Check one): PART ☐ I ☐ II ☐ IV ☐ V

PREPARED BY (Signature & Title)	SERVICE	DATE
Edward B. Dowdy Chaplain	CH	10/17/94

CHAPLAIN SERVICE SPIRITUAL ASSESSMENT

1. CURRENT RELIGIOUS PREFERENCE: Episc

2. RELIGIOUS UPBRINGING: Bapt

3. PRESENT RELIGIOUS PARTICIPATION:

___ MUCH ___ SOME ✓ LITTLE ___ NONE

4. COMMENTS: (Significant changes, activities, if any, etc.)

5. PASTORAL CARE PLAN:

✓ INFORM OF CHAPLAIN SERVICE RESOURCES

✓ ENCOURAGE WORSHIP ATTENDANCE

___ FURTHER VISITS FOR PASTORAL SUPPORT

___ PASTORAL COUNSELING

✓ PROVIDE LITERATURE AS REQUESTED AND APPROPRIATE

___ OTHER (Specify)

___ NONE INDICATED

6. ADDITIONAL COMMENTS:

(Continued on reverse)

DOVE, DAVID A
5[illegible] A STREET
BILOXI MS 39530

515 64 6094 MF C21557 520

SUPPLEMENT DEFINED DATA BASE

VA FORM 10-7978g

SPIRITUAL HISTORY

1. Who knows or care that you are here? husband, father, mother, some friends

2. From whom do you seek help with your problems? father

3. To whom were you closest as you were growing up? no one

4. Describe your relationship with your family (parents, brothers, sisters, spouse, children) best friends with father, close to mother, friendly but distanced from one brother, non-speaking terms with oldest brother, friendly but strained relations with husband.

5. What significant events happened to you in the past year? Earlier in your life? father came to live with me and my husband.

6. If you have had an important spiritual experience in your life, what was it like?

7. What has been your experience with wonder or awe? I've always been awed by nature

8. How would you describe your relationship to God? I've been away for a long time, but I've come back

Department of Veterans Affairs | MEDICAL RECORD | RECREATION SVC. DATA BASE AND ASSESSMEN

INSTRUCTIONS: *This form will be used by all therapists to document: 1) individual patient data used in multidimensional analysis of health care related factors; 2) findings of Leisure Problem Screening (LPS), Comprehensive Leisure Assessment (CLA) and/or Activity Assessment.*

RECREATION THERAPY SERVICE ASSESSMENT

AGE: 37 MARITAL STATUS: Married X3 BILOXI VAMC - Gulfport DIVISION SATP

Information pertinent to skills, talents, attitudes, aptitudes, needs, interests, life experiences, capacities and any noted deficiencies in leisure functioning.

1. Current Recreation/Leisure activities or those participated in prior to hospitalizatio
Vet enjoyed Bowling Pool Shooting
2. Educational Background: 3 years College (completed)
3. Occupation: Auditor — not employed
4. Time Available for Leisure Pursuits: Inpatient yes Outpatient yes
5. Special Interest, Skills, Talents: Collects old Coins (Hobby
6. I AGREE/DISAGREE WITH THE THERAPEUTIC RECREATION ASSESSMENT/TREATMENT PLAN:
PHYSICIAN'S SIGNATURE [signature] DATE: 10/5/94
RECOMMENDATIONS:

****

7. Answer the following:

YES	NO	N/A		
	✓		a.	Do you have difficulty making leisure choices?
✓			b.	Would you like to learn new leisure skills?
✓			c.	Have you ever been involved in the organization of any recreation Activities?
✓			d.	Do you know your community's recreational areas, facilities and their accessibility?
✓			e.	Are you aware of the leisure time pursuits and adaptive sports activities available at this medical center?
		✓	f.	Do you have financial resources available for leisure pursuits?
✓			g.	Since you have been here, have you pursued any recreation activities?
			h.	Do you feel comfortable interacting socially?

(CONTINUED ON REVERSE)

SIGNATURE/TITLE-PRACTITIONER [signature], CTRS, M.P.A. DATE 10/11/94

PATIENT IDENTIFICATION (Treating Facility - Ward No.)

DOVE, GAYLE A
5248 A STREET
BILOXI MS 39531

25
047

[redacted]

C-55% 5 8

RECREATION SERVICE
DATA BASE
AND
ASSESSMENT
520-OP-44-11K FEB 93

VA FORM 10-9021

Department of Veterans Affairs

S.A.T.P. AFTERCARE PLAN

SOBRIETY MAINTENANCE	What I Will Do: (Goal) attend AA meetings, find a permanent sponsor, work on the 12 steps, attend therapy sessions How Often Will I Do It: (PLAN - BE SPECIFIC) I will go to meetings every day, especially in early sobriety. I will find a female sponsor who is working the program and who has been in sobriety for awhile. I will work on the 12 Steps daily and go to therapy as needed.
VOCATIONAL/ SCHOOL	What I Will Do: (GOAL) I will finish college and possibly go for a master's degree. I will get a job that I like that will hopefully lead to a career. How Will I Do It: (PLAN - BE SPECIFIC) Check with VA benefits rep. check into grants, go to USM to find out class schedules, requirements, etc. I will complete my resume and send it out to various companies. Will complete a SF171 and check federal job listings.
FAMILY AND/OR PRIMARY RELATIONSHIPS	What I Will Do: (GOAL) Obtain a divorce from my husband. Establish a friendship with sister-in-law, get closer to my family. ~~How I Will Do It: (PLAN - BE SPECIFIC) I will discuss my husband ASAP. I will either call or write my sister-in-law a letter. I will stop distancing myself from the rest of my family. I will call them more often, write letters etc.~~
SOCIAL/ RECREATIONAL ACTIVITIES	What I Will Do: (GOAL) make new friends, become a volunteer at VA and Keesler AFB, keep busy How Will I Do It: (PLAN - BE SPECIFIC) See volunteer services rep. take class courses offered on the base, see base volunteer rep. become involved in base activities, start making rugs and other crafts again.
HEALTH ISSUES: (EXERCISE, DIET, MEDICAL)	What I Will Do: (GOAL) I will continue working out, exercising, and stay on a diet until I reach goal weight. I will eat healthier. Also take my bicycle more. How Will I Do It: (PLAN - BE SPECIFIC) Will try to power walk daily except at least 3-4 days a week. Ride my bicycle instead of driving my car. Stay on a 1200 calorie diet until I reach goal weight then go on a maintenance plan.

Gayle A. Dove
PATIENT SIGNATURE

WITNESS

SIGNATURE AND TITLE OF PRACTITIONER

DATE

IMPRINT PATIENT DATA CARD

DOVE, GAYLE A
5245 A STREET
BILOXI
MS 39530

25
047

515 64 6096 MF 081557 520

C-554 5 8

MEDICAL RECORD SUPPLEMENT TO PROGRESS NOTE FOR SPECIALIZED DISCIPLINES

520-OP-123-116A-1 DEC. 1993

VA FORM

MARY BLACK MEMORIAL HOSPITAL

CCR EMERGENCY ROOM

301

DATE: 6/7/00 TIME: 1640 ARRIVED: Walked ____ W/C ____ EMS ____ AGE: ____ SEX: f

VITAL SIGNS: BP: Ø P: Ø R: ____ T: ____ SaO2: ____ RA ____ O2 ____ L/MIN WEIGHT: ____

Repeat Vital Signs: Time: ____ BP: ____ P: ____ R: ____ T: ____ SaO2: ____

CHIEF COMPLAINT: husb states "she's been shot" & husb found pt in field - pt had called him on cell phone to inform him she's been shot - bullet wound to abd noted

TX PTA: ____ Triage Nurse: Barbara Summitt

ALLERGIES: NKDA Latex: ☐ Yes ☒ No Food: ____

PPMH: Ø

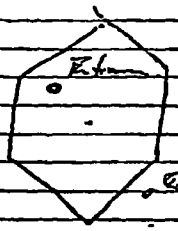
MEDICATIONS: HOME MED SHEET ☐ Ø

EVT/MD: ____ ERMD: ____ Tet Tox: < > Unknown IMMUNIZATIONS: UTD Need:

Social Hx: Smokes: Yes No PED: Alcohol: Yes No Frequency: Domestic Abuse: Yes No Reported:

Pain Level: /10 LMP: G: P: A: EDC: HYST: Notified ☐ Police ☐ Animal Control ☐ D

TIME: ____ HPI: ____



PE: ____

SKIN: ____

HEENT: ____

NECK: ____

CHEST: ____

HEART: EKG - NSR c RVR @ 161 ventricularly

ABD: ____

EXTREMITY: ____

NEURO: ____

CONSULT: ____ *Time:* ____ *Physician Signature:* ____

Diagnostic Test **Orders**

	TEST	TIME/INI		TEST	TIME/INI	
✓	CBC	6/7 /	✓	EKG	/	KVRS - 6/7
	BMP	/		BHCG	/	Monitor
✓	CMP	6/7 /		U/A CATH	/	type & screen c X match
	BUN	/	✓	CXR Portable	6/7 /	
	CREAT	/		TRAUMA PANEL	/	
	PT/PTT	6/7 /		OLD RECORDS	/	
	MI PROFILE	/		ABG	6/7 /	
	TROPONIN	/		BS SEMI	/	

DEFENDANT'S EXHIBIT NO. 4 FOR IDENTIFICATION DATE 5/30/07 REPTR. SH

PROVISIONAL DIAGNOSIS: GSW to abd c cardiac arrest

Discharge Time: ____ *Admit Time:* ____ *Room#:* ____ *Admitting Physician:* ____

Discharge Instructions: ____

LEVEL (1) 2 3 4 5

NAME: Judy Southern

SOCIAL SECURITY #: ____

6/07/00 *Addressograph* ____

Distribution: White, Chart

302

MEDICATION			
TIME	DRUG DOSE / ROUTE/SITE	INITIALS	PATIENT RESPONSE
	See code sheet		

6/07/00 105131S E
SOUTHERN, JUDY HENRI 5039Y
8405106539
8445 COMPEONS PACOLET HWY
[illegible] SC [illegible] URG

NAME: Judy Southern

VITAL SIGNS ☐ SEE NIBP RECORDING							OTHE
TIME	T	P	R	BP	Sa-O_2	RHYTHM	TRAUMA SCORE

TIME	MD / NURSES NOTES IMPLEMENTATION	INITIALS
1639	Pt taken from truck - husb brought pt to ED - states she's been "shot" pt has no pulse - unresponsive - taken to room #2 via Stretcher - 1640 Code called - see code sheet - 1725 TO OR via Stretcher c 3 nurses + Dr Tate in attendance. [illegible]	

/ALUATION: OUTCOMES MET ☐ YES ☐ NO EXPLAIN:

ORK/SCHOOL EXCUSE ☐ # OF DAYS _____

ICHARGE: TIME _____ TO ☐HOME ☐OTHER _____ BY ☐STRETCHER ☐W/C ☐AMBULATORY ☐ CARRIED

ACCOMPANIED BY ☐FAMILY ☐SELF ☐EMS ☐OTHER _____ TIME OF DEATH _____

ED DISCHARGE SHEET ☐ COMPLETED AND ☐ SIGNED CORONER CALLED ☐ YES ☐ NO TIME _____

MITTED: TIME _____ ☐ TO ROOM _____ ☐ TO OR

NSFERRED TO HOSPITAL: _____ TRANSFER FORM DONE ☐ YES

ORT CALLED TO: _____ BY _____ TIME _____

NSPORTED BY: ☐ STRETCHER ☐ W/C ☐ EMS ☐ POV

NSPORTED ON: ☐ CARDIAC MONITOR ☐ PULSE OX ☐ O_2 (O_2 LITERS _____) ☐ PATENT IV SITE ☐ OTHER _____

RECORDS TRANSFERRED WITH PATIENT: ☐YES ☐NO ☐N/A BELONGINGS SENT WITH PATIENT ☐YES ☐NO EXPLAIN _____

Date 6/7/00 7-1569

Patient History

Type of Arrest: ☒ Respiratory ☒ Cardiac ☐ EKG monitor
Rhythm: ☐ Ventricular Tachycardia ☐ Ventricular Fibrillation

Attending Physicians Dr Bourdon

Attending Nurses Barbara Jurick RN, Amanda Hansen RN cath lab, Teresa Guest, Cindy Hall Chest (Resp), Ann Brannon

Support Services: ☒ Respiratory ☒ Radiology ☐ Pharmacy ☒ Lab ☐ Chaplain ☒ Cardiology ☒ Code Members from other Units

Time Code Began 1640 +CPR started Time Intubated 1645 Intubated By Dr Bourdon

1st line 1642 LAC 2nd line RAC

I.V. Fluids & Drips					
Type	D5NS	D5NS	NS	ONegBlood	ONegBlood
Time	1645	1654	1711	1658	1710
Dose	1000cc	1000cc	1000cc	ALL	ALL

Time	Resr. A-Assit S-Spon.	Pupils	BP	Pulse	Monitor Rhythm	Defib Joules	Epine.	Lido.	Atro.	Brethy.	Other Comments
1646	A	fixed dilated	Ø	Ø			1amp				
1648	A	"	Ø	Ø	VTAC	300J					
1650	A	"	Ø	Ø	"	300J					+asystole
1651	A	"	Ø	Ø				1amp			
1652	2nd INT		started								CPR cont.
1653	A	Fixed dilated	Ø	Ø	VTAC	360J					
1654	A	"					1amp	1amp			
1657	"	Fixed			VTAC	360J					
1658	"									ONEG	Blood 1 unit unmatched per blood warmer
1659	"						1amp				
1700	"		149/91								BP cuff to leg
1703	"	~~Fixed~~		178							SVT
1704	"	dilated									ABG drawn by Resp.
1706	"		128/40	165	SVT						16F foley inserted

atropine 1mg = 1 amp
Epi 1mg = 1 amp
Lidocaine 100mg = 1 amp 2%
50 Bicarb 50meq = 1 amp

Stamp Plate

[redacted]

Time	A-Assist S-Spon.	Pupils	BP	Pulse	Monitor Rhythm	Defib Joules	Epine.	Lido.	Atro.	Brethy.	Other Comments
1707	A	fixed dilated		166				blood drawn femoral stick for D Bourg			
1709	A	" "		166							C
1710	A	fixed		148	surgeon paged				2nd unit ONeg blood started		
1713	A	dilated			Dr Tate here						CXR + Abd xray (KUB
1714	A	" "	149/91	145	Tamp bicarb pushed						
1717			Afib & rapid ventricular response								EKG done
1725	TO OR										

...ration of Artificial Circulation/Ventilation

Recorder Tracey Coakley Charge Nurse Teresa Guest Attending Physician Bourdon Tate

Results: ☒ Successful ☐ Unsuccessful

Cardiac Status Afib & rapid Ventricular Respirat Respiratory Status Assisted Neuro Status pupils remain fixed & dilated

SOUTHERN, Judy
Patient Name

[redacted]
Patient #

OPERATIVE NOTE
Report

102312

DATE: 6/07/00

SURGEON: John T. Tate, M.D.

PREOPERATIVE DIAGNOSIS: Gunshot wound to abdomen with shock.

POSTOPERATIVE DIAGNOSIS: Gunshot wound to the abdomen with entry in and out the duodenum, head of pancreas, jejunum, left kidney, mesenteric vein with shock, DIC, cardiac arrest and death.

OPERATION: Laparotomy with pancreatic duodenectomy, left nephrectomy, left greater saphenous vein cut-down, cardiopulmonary resuscitation.

ANESTHESIA: General.

SPECIMEN REMOVED: Duodenum and head of pancreas, left kidney.

PROCEDURE: The patient was secured for operation, position defined. Findings: The patient is a 39 year old white female who was brought to the Emergency Room with a history of gunshot wound to the abdomen and cardiac arrest with no pulse or blood pressure. Cardiopulmonary resuscitation was successful in re-establishing a heart beat and pressure for ten minutes. The patient was then intubated and given two units of uncross-matched blood. She was being ventilated. Entry wound in the right upper quadrant of the abdomen, exit wound left posterior flank. The patient was taken to the operating room where she underwent exploratory laparotomy with the above findings with in and out injury to the duodenum and the head of the pancreas with entry into the mesenteric veins, jejunum and lower pole of the left kidney. The wounds were packed off and injuries identified. After evacuating a large amount of blood from the abdomen, active bleeders were clamped and suture ligated. The injuries were examined and because of oozing around the area of the pancreas two injuries to the duodenum and the mesenteric veins, it was felt the duodenum and head of the pancreas needed to be removed and this was resected. The patient was unstable and developed cardiac arrest four times during the procedure. The first three pulse blood pressures re-established after CPR and intra-cardiac Epinephrine. The patient never demonstrated any clotting in the abdomen and progressively developed more and more oozing and bleeding with picture of DIC. She was given blood transfusions, fresh frozen plasma and after the fourth cardiac arrest we were unable to re-establish a heart beat or blood pressure. By this time, operating on and off between the cardiac arrests, the resections had been accomplished and anastomoses nearly completed. Because of the need for IV access, cut-down was placed in the left groin. The patient never made any urine nor demonstrated any cerebral activity.

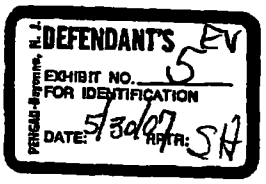
PROCEDURE IN DETAIL: The patient was placed in the supine position. A satisfactory level of general anesthesia was obtained. The patient was prepped with Betadine and draped in a sterile manner. A midline incision was made using electrocautery, but when the abdominal cavity was entered

SOUTHERN, Judy | [redacted] | OPERATIVE NOTE
Patient Name | Patient # | Report

with the above findings noted. Blood was evacuated from the abdomen. Packs were placed over the areas of hematoma, to control blood loss until identified bleeders could be clamped and suture ligated for control. The above findings were noted with injury to the duodenum, head of pancreas, mesentery and the left kidney. After closing the injuries identified and trying to control bleeding because of persistent oozing, it was felt that these areas needed to be removed for any chance at controlling the bleeding and the duodenum was mobilized and dissection around the duodenum was accomplished separating a vascular between clamps using 2-0 Vicryl ties. The jejunum mesentery was divided between clamps and jejunum transected with GIA stapler with duodenum passed behind the superior mesenteric vessels. The pancreas was exposed and the vascular distal to the injury was secured with suture ligatures on either side, the mesenteric vein followed down under the pancreas. The stomach was transected at the antrum with the GIA stapler, after dividing the vasculature around the greater and lesser curvature between clamps. The pancreas was divided sharply using 2-0 Vicryl ties, preserving the portal vein, identifying the common duct. The common duct was divided after several blank stay sutures of 2-0 Vicryl. The specimen was removed, area packed and the left kidney examined. It was felt that it also needed to be removed. It was mobilized and hemostasis through Vicryl ties, electrocautery and renal pedicle clamped with clamps and divided. Suture ligatures of #1 Vicryl were placed on the renal pedicle and the ureter was tracked down to the pelvic rim where it was transected and suture ligated with 0 Vicryl. The area was packed off. Hemostasis was checked and bleeding areas were suture ligated. The patient continued to ooze from all sites. The in and out anastomosis of the jejunum to the pancreas was then carried out with 4-0 Vicryl to the pancreatic duct and 2-0 Vicryl, inverting the end of the pancreas into the jejunum. The jejunum was then _____ by the stomach and gastric jejunal anastomosis was carried out, using one suture of 0 Vicryl in an inner layer and external layer with interrupted six 2-0 Vicryl. The common duct anastomosis was carried out, using interrupted sutures of 5-0 Vicryl on the internal layer and interrupted sutures of 2-0 Vicryl in the external layer. A cut down had earlier been placed in the left greater saphenous vein. By the time of the completion of the anastomosis to the common duct, the patient coded for the fourth time and we were unable to re-establish a heartbeat or pulse. The patient was pronounced expired at 22:57.

DD: 6/07/00
DT: 6/09/00
BY: sm

SIGNATURE: _____
John T. Tate, M.D.



Inmate Disciplinary System Summary Receipt

I have received a copy of the Inmate Disciplinary Summary. I have been instructed to read the Inmate Disciplinary Summary and to thoroughly familiarize myself with the contents. I have been further advised that if I am unable to read, it will be my responsibility to have someone read the Inmate Disciplinary Summary to me or to request Department of Corrections authorities to have it read to me. I understand that I am to keep the Inmate Disciplinary Summary in my possession so that I may use it for future reference.

Date: 02-28-02

Inmate Number: 244644

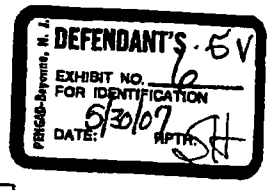
Inmate Name (PRINTED): Jonathon Binney

Inmate Signature: X Jonathon Binney

Issuing Official's Signature: Sgt D. Carder

Central Record Copy

.....



SOUTH CAROLINA DEPARTMENT OF CORRECTION
INCIDENT REPORT

Page 1 of 1

Institution/Center: Lieber	
Date of Report: 4-5-05	Time of Report: 12:00 Noon
Reporting Official: Natalie Scott	Date of Incident: 4-5-05
Location of Incident: Death Row Awing	Time of Incident: 11:10 Am
Inmate(s)/Resident: SCDC# Age Race Sex	Employee(s) Involved:
1. Johnathon Binney 6009 w/m.	1. Cpl. Natalie Scott.
2.	2.
3.	3.
4.	4.
5.	5.

On the above date and approximate time: I/M. Scott Natalie was conducting my shower as I walked pass I/m Johnathon Binney 6009 w/m Cell 228 A wing he asked me why he couldn't get his Shower. I told him because it was 11:10 Am and he knew that he was to get his Shower before 10:00am because she didn't go out to recreation I/m Binney stated you Bitch ass McGhee right now as you and me are going to have a problem get outta McGhee you Bitch. McGhee and Cpl Haynes with the keys had I/m Binney stated to himself at that Bitch wouldn't come pass his Shower I/m Scott told Sgt McGhee that I/m Binney was mouthing and the rest I was Ignoring I/m Binney with disrespect Sgt McGhee was informed of the incident 836

Signature: Natalie Scott C/O.

Evidence:

Witness(es): Sgt McGhee and Cpl Haynes

Supervisor's Comments: [illegible]

Signature: [illegible] Title: [illegible] Date/Time: [illegible]

Major/Responsible Authority:

Admin Resolution
I/m Counseled and
Reduced in Custody

Signature: [illegible] Title: MAW Date: 4/6/05

STG Related - Refer to STG Committee
( ) Yes (X) No ( ) Unknown

This Incident is DRUG related
( ) Yes (X) No ( ) Unknown

Action Taken
( ) Informal Resolution
(X) Administrative Resolution
( ) Refer to Disciplinary Hearing

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INMATE DISCIPLINARY SYSTEM
INFORMAL RESOLUTION/ADMINISTRATIVE RESOLUTION

Inmate Name: Johnathon Binney	Inmate SCDC Number: 6009
Number/Type of Violation: (SCDC Form 19-29, "Incident Report" attached) 836	
Date of Violation: 5 Apr 05	Institution: Lieber

I find the inmate committed the charge(s) specified, offer the inmate the option to resolve the violation (place check in appropriate box)

☐ INFORMALLY ☒ ADMINISTRATIVELY

and impose the following sanction(s):

Sanction		Number of hours/days of sanction or amount of restitution
Counseling	(Check box if imposing this sanction)	☑
Instructions or directives	(Check box if imposing this sanction)	☐
Verbal reprimand	(Check box if imposing this sanction)	☑
Extra duty or chores up to 40 hours		_____ Hours
Restriction of recreation time (general population only) up to 30 days		_____ Days
Restriction of canteen, visitation, or other privileges up to 90 days		_____ Days
Restriction of television viewing and/or radio up to 90 days for Informal Resolution or up to 120 days for Administrative Resolution		_____ Days
Payment of restitution		$
Cell restriction up to 30 days for Informal Resolution or up to 60 days for Administrative Resolution		_____ Days
ADMINISTRATIVE RESOLUTION ONLY: Disciplinary detention up to seven (7) days time in an institutional Special Management Unit.		_____ Days
ADMINISTRATIVE RESOLUTION ONLY: Failure to earn good time		_____ Days

☐ The above sanctions are suspended for (UP TO 90 DAYS) _____ days. If the inmate commits no additional disciplinary infractions during that time period, the sanctions will be lifted and the inmate will not have to serve them. If the inmate commits an additional disciplinary infraction, s/he will have to serve the above sanctions and may be subject to additional disciplinary action.

Thierry Matthis	Lieber	[signature]	04/08/05
Major/Responsible Authority (Print Name)	Institution	Signature	Date

INMATE'S ACCEPTANCE OF INFORMAL OR ADMINISTRATIVE RESOLUTION:

This is to certify that I, Johnathon Binney, understand that as a result of the above incident, I have been offered the option to resolve the violation (place check in appropriate box)

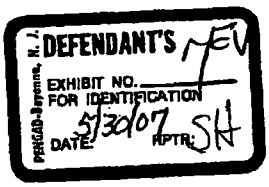
☐ INFORMALLY ☒ ADMINISTRATIVELY

☒ Yes, I accept the sanctions listed above. I understand that I have the privilege of requesting this case be referred to a disciplinary hearing, and I waive that privilege. I further agree that by accepting this informal or administrative resolution, I waive all appeals, including those pursuant to Al-Shabazz v. State.

☐ No, I do not want to accept the sanctions listed above and request that this case be referred to a disciplinary hearing.

04/08/05	[signature]
Date	Inmate's Signature

White: Central Records Green: Institutional Records Goldenrod: Inmate cc: **Financial Accounting (forward copy only when restitution is to be paid)



SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

LETTER OF VISITATION SUSPENSION

Inmate Johnathon Binney, #6009

TO: SMU
Lieber Correctional Institution

FROM: Stan Burtt, Warden
Lieber Correctional Institution

DATE: January 21, 2004

This document serves as written notification that your visitation privileges in the South Carolina Department of Corrections have been suspended for a period of 120 Days (Length of time)

from 1/15/04 (Date) to 5/14/04 (Date).

The reason for the suspension is that on January 8, 2004 (Date) at Lieber Correctional Institution (Location) you were charged with The Use or Possession of Narcotics, Marijuana, or Unauthorized Drugs, Including Prescription Drugs (Reason) and on January 15, 2004 you were found guilty of this charge.

Should you have any questions or comments regarding this decision, you may write:

Stan Burtt, Warden

cc: Robert E. Ward, Acting Division Director of Operations
Inmate's Central Record
Inmate's Institutional Record
Central Visitation Center
Warden's File

DEFENDANT'S EXHIBIT NO. 8 FOR IDENTIFICATION DATE: 5/30/07 RPTR

REQUEST TO STAFF MEMBER

TO: NAME: Warden Stan Burtt	TITLE:	DATE: 3-17-03
INMATE'S NAME: Jonathan Binney		SCDC #: SK6009
INSTITUTION: Lieber Correctional		LIVING QUARTERS: RA143

MAR 17 2003 WARDEN'S OFFICE LIEBER C.I.

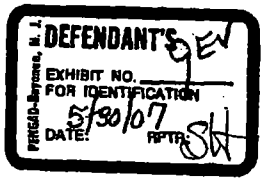
Mr. Burtt, this request form is being used as my "Notice of Intent to Sue" you and Lt. Miller, under 42 USC. §1983. I ask that respond & make a photo copy for your record. This is in regards to my property which was improperly locked in a secure room and subsequently was stolen by an inmate or an SCDC Officer. I have exhausted my grievance procedures, and even though I have proof, you & the Dept. of Corrections choose to ignore it.

Jonathan Binney

DISPOSITION BY STAFF MEMBER: Proof of what? Ignore what?

DATE: 3/17/03	SIGNATURE:

SCDC FORM 19-11 (REV.FEB 2001)



1/9/04

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INCIDENT REPORT

Page 01 of 01

Institution/Center: Lieber C.I.					
Date of Report: 1-8-04				Time of Report: Approx. 1400	
Reporting Official: Cpl. Donald Adcox				Date of Incident: 1-8-04	
Location of Incident: U-2 SMU A-Wing Cell 133				Time of Incident: Approx. 1235	
Inmate(s)/Resident:	SCDC#	Age	Race	Sex	Employee(s) Involved:
1. Johnathon Binney	6009		W/M		1. Cpl. Donald Adcox
2. # 9	RA133,	3,	DIR		2.
3.					3.
4.					4.
5.					5.

On the above date and approximate time: I/M Johnathon Binney W/M Agency # S/K 6009 was picked for a Random, and Target Inmate Drug test conducted by Cpl. Donald Adcox. I/M Binney provided a urine sample which was tested using an Ontrak test stick for THC-marijuana, and Cocaine. I/M Binney's urine sample tested positive for THC-marijuana.

Cpl. Adcox then tested I/M Binney's urine sample using a Confirmation American Bio-medico test stick for THC-Marijuana, which also tested positive for THC-marijuana.

I/M Johnathon Binney W/M S/K # 6009 is being charged with Violation 1.10, The use, or possession of narcotics, marijuana, unauthorized Drugs, Including Prescription Drugs;

Signature: Cpl. Donald Adcox

Evidence: One Agency form 19-79 for testing positive on both tests for THC.

Witness(es):

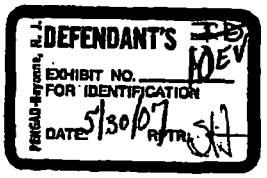
Supervisor's Comments:	Action Taken
S/K Johnathan Binney W/M 6009 is being charged as stated above. Forward to DHO.	( ) Counseling ( ) Informal Resolution
	( ) Extra Duty / Other
	( ) Incident is STG related
Signature: J.M. Bush Title: Lt Date/Time: 01/08/04 4:45 PM	(X) Refer to Disciplinary Hearing 1.10
Major / Responsible Authority:	Refer to STG Committee:
Major charge 1.10	( ) Yes (X) No ( ) Unknown
	This Incident is DRUG related:
	(X) Yes ( ) No ( ) Unknown
Signature: [illegible] Title: Maj Date: 1/9/04	Disciplinary Classification:
	(X) Major ( ) Minor ( ) Informal Resolution

SCDC19-29A (Rev. November 2002)

COP

PRUETT LAW FIRM

Trent N. Pruett, Attorney At Law
202 North Petty Street
Gaffney, South Carolina 29340
Phone (864) 488-0120 Fax (864) 488-0803



August 13, 2002

Dr. David L. Bachman
MUSC-IOP
P.O. Box 250861
67 President's Street
Charleston, SC 29425
(843)792-5567 TELEPHONE
(843)792-7374 FAX

Re: Examination of Jonathan Binney

Dear Dr. Bachman:

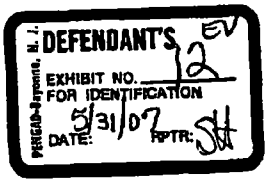
Pursuant to your request we contacted the parents of Jonathan Binney, and they forwarded to us the photographs that I have enclosed. Although we stressed the need for childhood photos at an early age, what we received from the parents are what I have enclosed. If you need any additional information, please do not hesitate to contact my office.

Sincerely,

Trent N. Pruett

Encl.: Photographs

c: Mitch Slade
P.O. Box 1007
Spartanburg, SC 29304



PRUETT LAW FIRM

Trent N. Pruett, Attorney at Law
202 North Petty Street
Gaffney, South Carolina 29340
Tele phone: (864) 488-0120
Fax (864) 488-0803

FROM: Trent N. Pruett
Pruett Law Firm

TO: Dr. Schwartz-Watts
(803 434-2367 FAX)

DATE: October 29, 2002

RE: State v. Binney

Pages: Page 1 of 11

MESSAGE: What follows is a very rough draft of a Q & A --- I have to start somewhere. A lot of the answers to basic questions I intend to just let you explain, e.g., What is pedophilia? If I had to make four points in your testimony (if possible), they would be: (1) This person does suffer from genuine disorders; (2) His actions (especially in this case) are impulsive, not premeditated; (3) There is recognition by Mr. Binney of the wrongness of his actions, and that he is remorseful; (4) The actions and statements of suicide by Mr. Binney are credible.

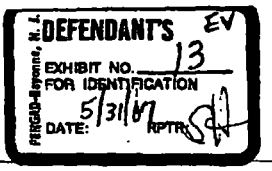
As I have stated on earlier occasions, the parents of Mr. Binney have stressed, and continued to stress, that they believe the actions of Jonathan are the direct result of FAS or FAE. I've tried to address this in my questions, but I don't want you to state a position you are not comfortable defending. The articles I have read on FAE and FAS are all based on questionable scientific surveys and apocryphal reports. I therefore understand that such "data" necessarily renders the science of establishing a diagnostic criteria for FAS or FAE difficult, and the predictability of the behavior of persons purportedly suffering from FAS or FAE dubious. Nevertheless, I feel that this area must be sufficiently addressed during the trial, because if it is not addressed in this trial, it will surely be addressed in a PCR hearing.

Lastly, over our objection, Judge Cole has ordered the disclosure of your preliminary report to the defense, and that Mr. Binney be examined by the State's expert, Dr. Pamela Crawford. I intend to be present during any examination, and if possible, to record the examination. Any helpful hints in this regard would be appreciated. Thank-you.

END MESSAGE.

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of the message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service.

Thank you.



PRUETT LAW FIRM

Trent N. Pruett, Attorney At Law
202 North Petty Street
Gaffney, South Carolina 29340
Phone (864) 488-0120 Fax (864) 488-0803

DATE: 8-22-02

FAX TO: _____

ATTENTION: Dr. David L. Bachman

FAX NUMBER: (843) 792-7374

NUMBER OF COPIES INCLUDING COVER SHEET: 2

MESSAGE: _____

PRUETT LAW FIRM

Trent N. Pruett, Attorney At Law
202 North Petty Street
Gaffney, South Carolina 29340
Phone (864) 488-0120 Fax (864) 488-0808

August 21, 2002

Dr. David L. Bachman
MUSC-IOP
P.O. Box 250861
67 President's Street
Charleston, SC 29425
(843)792-5567 TELEPHONE
(843)792-7374 FAX

Re: Examination of Jonathan Binney

Dear Dr. Bachman:

Yesterday I spoke to your office and was informed that the photographs of Mr. Binney did not, in and of themselves, indicate that he would be a likely candidate of fetal alcohol syndrome. I understood from speaking to your office that the diagnosis of fetal alcohol syndrome could not be completely ruled out just by his appearance as a child. I also wanted to touch base with you as to the scheduling of any examination or tests that need to be done on Mr. Binney. The judge assigned to this case has asked that we complete these examinations in the next few weeks in order to timely proceed with this case. It would be extremely helpful to me if you could give me a time table as to what test you wish to have conducted on Mr. Binney, when these tests might be performed, and of anything I can do to help expedite the examinations being done Mr. Binney's behalf.

Sincerely,

Trent N. Pruett

Trent N. Pruett

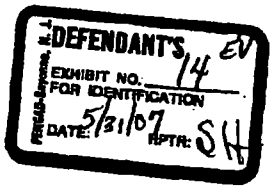
c: Mitch Slade
P.O. Box 1007
Spartanburg, SC 29304

MUSC
INSTITUTE OF PSYCHIATRY

GERIATRIC SERVICES
67 PRESIDENT STREET
PO BOX 250861
CHARLESTON • SC 29425

Ph (843) 792-5567
FAX (843) 792-7374

November 25, 2002



Mr. Trent N. Pruett
Attorney at Law
202 N. Petty St.
Gaffney, SC 29340

RE: Jonathan Binney

Dear Mr. Pruett:

This letter will serve as my report summarizing my findings in regard to your client Mr. Jonathan Binney. I had the opportunity to review records that you provided for me previously. These records included an admission to Patrick B. Harris Hospital in May, 2000 and records from an admission to hospital in Chicago, IL in May, 1992. They also include the record of testimony of Dr. Geoffrey McKee. I had the opportunity to exam your client, Mr. Binney, at Leiber Correctional Institute on September 28, 2002. The patient reported to me that he has had problems with depression and suicidal ideation. This has been better, however, since he was placed on Paxil. His current medications include Paxil and Zantac. He tells me that prior medication trials had included Remeron which made him too sleepy and gave him disturbing dreams, Serzone which increased his anger, Wellbutrin which produced no significant benefit, and Prozac which resulted in side effects.

Previous Medical History: The patient was seen in the emergency room at Spartanburg Regional Medical Center in 1999. He was seen for depression and two suicide attempts. There was some paranoia. At that time of that evaluation, he was on medical leave for back pain secondary to a motorcycle injury.

He was diagnosed as having Attention Deficit Disorder at the age of 17 or 18 in addition to depression. He had had trials of desipramine and imipramine. A trial of Ritalin had reportedly resulted in headaches.

He has a history of having had a vasectomy in the past. At the time of his alleged crime he apparently had tried to commit suicide by using 14 nicotine patches. The patient denies any significant childhood illnesses. He started school at the usual age. He had problems with school attendance. He also had a problem with kleptomania by his account. He says, "I would steal even if I didn't need it." There is no known history of febrile convulsions. There is no known history of head injuries. He did have a motorcycle accident in 1999 as noted above. He injured his back and was seen in the emergency room. He may have had a concussion in association with this accident because he was dazed for about 30 seconds. He reports that he did strike his head; however, he is able to provide details of the accident.

Review of Systems: The patient reports difficulty judging when things occurred in time. This has been a lifelong problem. He also reports sudden jerking movements of his body that are relatively random. This will occur as a single isolated movement. They may occur several times a day and have been present for years. He has no known history of seizures or other seizure-like episodes. He did have a syncopal episode at age 18 while in jail for stealing. This occurred when he awoke during the night to urinate. He did strike his head on the sink. It is unclear whether

he had any further evaluation. He admits to some exaggerated emotional responses that are usually triggered by environmental stimuli. However, he can inhibit these and has good insight into them. He admits to frequent handwashing, some 20-60 times a day. He reports that other ritual behaviors are common. For instance, he may feel that if he moves the toes on his left foot that he has the need to move the toes on his right foot.

Intercurrent Medical History: He has been diagnosed as having ADD and by his report "antisocial personality disorder." He has also been treated for depression and has had counseling for sexual disorder in the past. He also likely has some gastroesophageal reflux when not taking Zantac. These symptoms have been present for about four years. As noted, he has also had a vasectomy.

Family History: His biological mother committed suicide in her late 40s. She had depression and may have been raped. She was pregnant at age 15. His biological maternal grandfather may have been homosexual. There is no information on his biological father. He is an only child.

Developmental History: In addition to those notes above, the patient had difficulty with English, biology, and advanced math. He does not report being good in any particular subjects. He did enjoy computers, especially the hardware aspect of computers. He is right handed. He may have had problems with being "tongue-tied" when he was a child.

Examination: The patient is a slender young man who was cooperative for testing. He scored 27/30 on a Mini Mental State Exam. He did not know the name of the city of county where he currently was. He also made a single subtraction error on serial 7 subtraction task. Proverb interpretation was generally abstract. He was generally quite articulate in his answers. There was no evidence of perseveration noted on continuous motor performance tasks. He copied two complex figures easily. He had no difficulty with a mathematical or multiplication problem. He wrote a very good sentence. He was able to correctly draw a clock and place the hands on the face of the clock. He quickly learned a hand sequence task. He had no difficulties with a go/no go task.

His head circumference is 56.5 cm. He has an intercanthal distance of 3 cm. No obvious dysmorphic features are noted. His palpebral fissures are slightly asymmetric with the left slightly greater than the right. He also has a slightly high arched palate. He has a previous piercing of his left ear. Head and neck examination and cranial nerve examination are otherwise unremarkable.

He does have a hyperpigmented hairy nevus that is about 1 cm in diameter on the upper chest. Hands are symmetrical without dysmorphic change. He has good strength and normal tone throughout. Gait and posture are good. He hops easily on either leg and has no abnormalities on a stressed gait. Deep tendon reflexes are 1-2+ and symmetric. Tone is normal. Sensation is intact to touch and joint position sense. There is no tremor or ataxia on finger-to-nose examination. No other abnormal movements are noted.

An MRI scan of the head was performed on 9/25/02 at Medical University Hospital. It is an unremarkable MRI scan of the brain. I had the opportunity to review the scan myself and concur with the findings. The patient had a PET scan performed at MUSC on the same date, and that study is entirely unremarkable. I also had the opportunity to review that scan. The patient had an EEG performed on 9/20/02 also at MUSC. That study was mildly abnormal because of marked slowing during hyperventilation. That finding is more often associated with children or adolescents. The persistence of that finding into adulthood is of uncertain significance.

Impression: Based on my review of the records available to me, my examination of the patient, and the diagnostic studies described above, I can find no evidence of any specific neurologic abnormality in your client. These findings, however, do not exclude the possibility of other significant psychiatric illness. I would defer to your psychiatric experts as to whether or not significant psychiatric illness may have played a role in your client's alleged activities.

I hope this report answers any questions that you have. Should you have any other questions, please do not hesitate to contact me.

Sincerely,

David L. Bachman, M.D.
Professor of Psychiatry and Neurology

DLB:vb

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	C/A No.: 06-CP-11-223
JONATHAN KYLE BINNEY	)	
Applicant,	)	
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	

AFFIDAVIT OF DR. FRED BOOKSTEIN

Dr. Fred Bookstein, who appeared personally before me, affirms and states the following:

1. I am a Professor of Statistics in the College of Arts and Science at the University of Washington. I am also Adjunct Professor of Psychiatry and Behavioral Sciences at the Fetal Alcohol and Drug Unit in the School of Medicine at the University of Washington and Professor of Morphometrics at the University of Vienna, Austria.

2. I obtained a Bachelor of Arts Degree in Mathematics from the University of Michigan in 1966. I have a Master's Degree in Sociology from Harvard University, and I have a Ph.D. in Statistics and Biology from the University of Michigan. I was trained in both statistics and the behavioral sciences through the Harvard Social Relations Graduate Program.

3. Within the field of statistics, my particular area of expertise is morphometrics. This involves measuring parts of the body, discovering predictable patterns, and investigating the cause of that pattern and what effects it may have.

4. I have extensive experience with mapping a particular area of the brain called the corpus callosum. I have studied the corpus callosum of hundreds of individuals, some with Fetal Alcohol Spectrum Disorder (FASD) and some without, and developed a very precise method for measuring the corpus callosum, and compiled the results of my findings.

5. I have published over forty (40) papers and one book relating to my research in FASD. I was awarded the University of Michigan Distinguished Research Scientist Award in connection with my work in morphometrics.

6. I have been qualified to testify as an expert witness in the fields of morphometrics and fetal alcohol statistics approximately 10 times in courts in California, South Carolina, New Jersey, Montana, and the state of Washington.

7. I was retained by Jonathan Binney's attorneys to compare certain measurements upon Mr. Binney's brain images, compare them to statistical summaries of corresponding measurements from adults with FASD and from normal adults, and report my findings. My findings in Mr. Binney's case are recounted in detail in my report dated April 6, 2007.

Further affiant sayeth naught.

Dr. Fred Bookstein

DR. FRED BOOKSTEIN

Sworn to and subscribed before me
This 2ND day of JANUARY, 2010

Rivkah S Madison

Notary Public for the State of Washington
My commission expires: 2/11/2013

Notary Public
State of Washington
RIVKAH S MADISON
MY COMMISSION EXPIRES
February 11, 2013

April 6, 2007

Emily Paavola, Esq.
Baker & Daniels, LLP
300 North Meridian Street, Suite 2700
Indianapolis, Indiana 46204
by email to emily.paavola@bakerd.com

Dear Ms. Paavola,

This report conveys my analysis of a magnetic resonance image (MRI) of the brain of your client Jonathan Binney. The image was sent to me in March from the Medical University of South Carolina where it was produced using a particular combination of MR machine settings that I specified in a document sent to you for forwarding to them. My aim was to compare certain measurements upon your client's brain image to statistical summaries of the corresponding measurements in analogously specified MR images for adults with fetal-alcohol-related diagnoses, and likewise normal adults, as published in two peer-reviewed scientific papers that appeared in 2002:

> Bookstein, F. L., A. P. Streissguth, P. D. Sampson, P. D. Connor, and H. M. Barr. Corpus callosum shape and neuropsychological deficits in adult males with heavy fetal alcohol exposure. *NeuroImage* 15:233–251, 2002.
>
> Bookstein, F. L., P. D. Sampson, P. D. Connor, and A. P. Streissguth. The midline corpus callosum is a neuroanatomical focus of fetal alcohol damage. *The Anatomical Record – The New Anatomist* 269:162–174, 2002.

The purpose of this report is to summarize the measurements and comparisons in terms that would be useful in combination with evidence that your client was exposed to high levels of alcohol before birth. In that context my findings mean it is highly likely that his brain was damaged by that exposure. These findings serve as part of the documentation that supports the production of a specific diagnosis within the range of particular disorders (patterns of damage) that prenatal alcohol is known to produce. While these diagnoses vary to accommodate variability of the associated facial features and of the childhood size deficits, according to the most current U. S. federal guidelines the diagnostic process always incorporates evidence of a central nervous system (CNS) abnormality in terms of "structural, neurological, or functional deficits, or a combination thereof." The finding here meets the requirement via the structural prong (I explain this in the memorandum appended to this letter, intended for forwarding to the diagnostician). Furthermore, as diagnosis from a combination is likely to be more persuasive than diagnosis from just one single channel, it would be helpful if an additional expert report (perhaps from a neuropsychologist, neurologist, or psychiatrist) was used in the course of diagnosis along with this report of mine and the evidence for exposure.

Fetal Alcohol Syndrome (FAS) and what used to be called Fetal Alcohol Effects

(FAE)---this report will usually refer to them together as "Fetal Alcohol Spectrum Disorder" or FASD, as they entail the same typical brain damage—are irremediable congenital conditions found in a substantial fraction of persons exposed to high levels of alcohol before birth. The principal focus of damage is the brain. This damage is expressed in a variety of encephalopathies (brain structural abnormalities) as well as a range of specific neurological, cognitive and neurobehavioral deficits. The brain measurements that my colleagues and I use to assess the structural damage concentrate on the cerebral neural structure called the *corpus callosum*, the arch of neural tissue that links the two halves of the cerebral cortex.

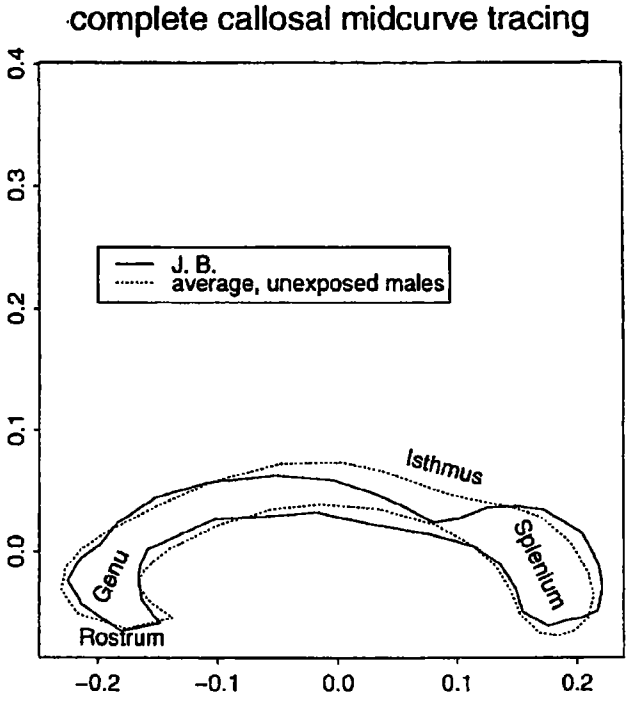


Jonathan Binney's callosal midcurve,
superimposed over a nearby section of his MR image

Summary. Clear effects of heavy prenatal alcohol exposure can be detected in regions of Mr. Binney's corpus callosum where the literature of this disease spectrum typically finds effects. In one of these regions, the *isthmus* (the narrowing just right of center), Mr. Binney's callosum shows **a very severe deformity, nearly a disconnection of the callosum (partial callosal agenesis)**, that is more extreme than anything we see in our Seattle sample but that is reported in samples of more severely alcohol-damaged patients.

As a specific sign of prenatal alcohol damage this feature would have been recognized by any competent examiner of the image examining it in 1995 or later. In the other region, the *rostrum* (hook at lower left), Mr. Binney's callosum shows localized shape characteristics that we have previously encountered only in some of our Seattle adult males who had been diagnosed with a fetal alcohol spectrum disorder. These quantitative features, interpreted in the context of the extensive fetal alcohol research literature, comprise sufficient evidence that Binney's brain should be considered as having been damaged by his prenatal exposure.

Persons with FASD generally have specific difficulties with "executive function"—making plans, regulating their own behavior, understanding the consequences of their behavior, and understanding the reactions of others *to* their behavior—that bring them frequently into repeated trouble with the law. That some of Mr. Binney's difficulties in these domains owes to circumstances preceding his birth, and to that extent were beyond his control, should be held as mitigating of culpability in respect of the crime for which he has been judged.

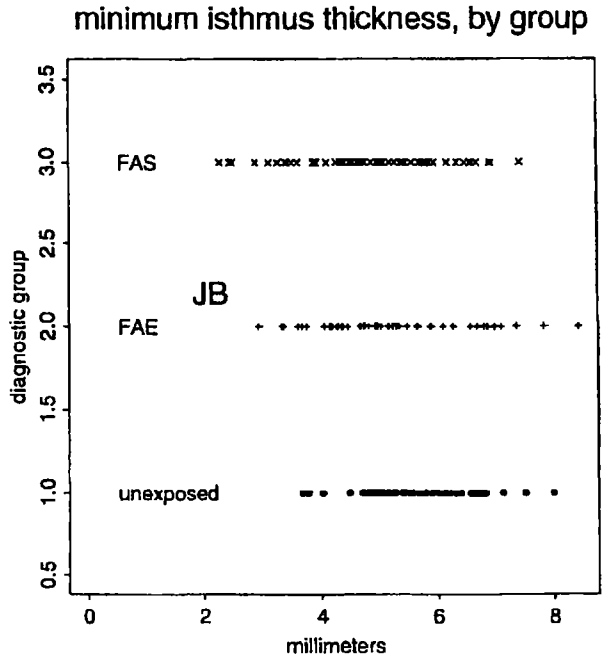


Comparison of Mr. Binney's callosal midcurve with the unexposed Seattle adult male average

Detailed physical findings. I reformatted the March MR image for analysis by the computer program Edgewarp and traced its callosal midcurve at forty points, as described in detail in the references cited on page 1. The corpus callosum is the bundle of nerve fibers that connects the two halves of the cortex across the middle of the brain, and the

midcurve is the "waist" of this bundle of fibers, the curve across which the full three-dimensional bundle is most nearly symmetric. Once this curve has been located in an MR image, its points can be shown as if superimposed over some nearby cut through the original image. The figure on page 2 shows how this set of forty points (the plus signs) represents the form of that arch it is tracing. (But the points of Mr. Binney's callosal midcurve do not lie exactly in this picture plane or any other exact mathematical plane. Their exact relationship to the callosal bundle can be viewed only in 3D, as described in the references.)

As shown in the comparison of Mr. Binney's callosal outline to the average for the 15 normal adult male Seattle subjects (previous page), the outline shape of his callosal midcurve appears abnormal both at the left of the figure (the anatomical anterior, the regions called "genu" *[knee]* and "rostrum" *[beak]*) and just to the right (the anatomical posterior) of the top of the arch, the region called "isthmus" *[narrowing]*. I will review these two aspects separately.

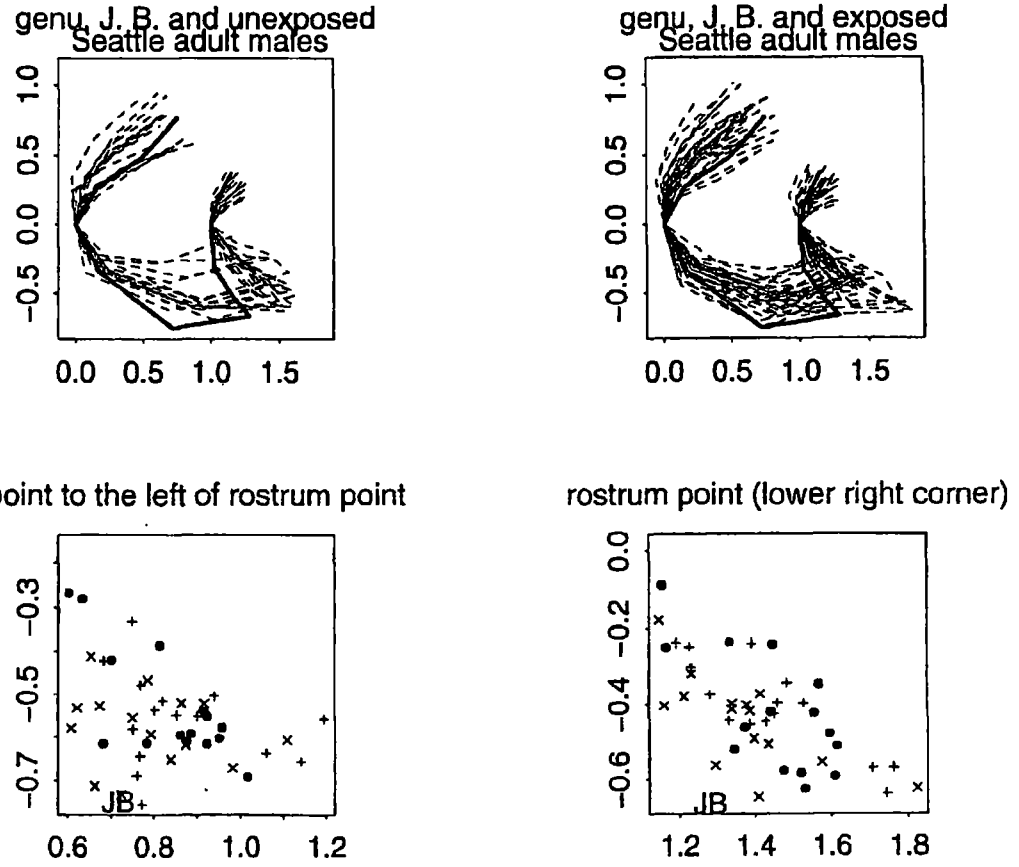


Comparison of Mr. Binney's isthmus thickness with that of the Seattle subjects by group

The figure on this page considers the more striking of the two features, the isthmus thinning. The figure here shows the range of minimum isthmus widths in the entire Seattle sample of 180 subjects. The solid dots are for the 60 subjects unexposed to alcohol, while the +'s and ×'s denote the FAE and FAS cases, respectively, and "JB" stands for Mr. Binney. The horizontal axis of the graph sets out millimeters of separation in the actual

brain, distance from top to bottom in the narrowing corresponding to the crimp in Mr. Binney's outline (page 3). One out of every nine of the FASD isthmuses (top two rows) is thinner than the thinnest Seattle unexposed isthmus.

But Mr. Binney's isthmus thickness of 2.1 millimeters is not even 40% of the Seattle normal average — it is less than two-thirds the thickness of any isthmus in our normal sample, and is in fact 10% thinner than even the thinnest isthmus in our sample of Seattle patients with FASD. Put another way, **Mr. Binney's isthmus is the thinnest on this entire chart of 178 callosa,** including 117 from people diagnosed with FASD. It is almost two-thirds of the way to the actual disconnection (a "thickness" of 0) that is reported to characterize some of the earliest-affected FASD cases, whose neuropsychological deficits are usually seen to be particularly severe.



Comparison of the lower border of rostrum, Mr. Binney versus the Seattle adult males, by group

The other striking feature of Mr. Binney's callosal outline as displayed on page 3 is the deformity at the lower left (lower anterior) of the callosum, the structure called rostrum.

In the top row of the four-part figure above I have displayed this part of the callosal outline as if two of its points, the "front" and the "back" of the knee, were both fixed in position. (This is called *two-point shape coordinates*, a standard technique in the kind of statistics I am using.) The heavy line is Mr. Binney's genu outline; the dashed lines on the left are those for the Seattle unexposed adult males, and on the right for the FASD adult males. In the region of the rostrum, Mr. Binney's outline clearly drops well below and to the left — anterocaudally — with respect to the normal outlines, but it is not at all far from some of the outlines in the panel at the right that show the shape of this part of the callosum in our Seattle FASD subsample. In the bottom row I convert these patterns to little dot diagrams as I did for the isthmus thickness data on page 5. At both of the lowest points on this outline, Mr. Binney's callosal form is much more similar to that of some of our Seattle adult males with FASD than it is to any of the Seattle normals.

A useful way to summarize the information in a diagram like this one for the purpose of detecting FASD damage that we are pursuing here is to pretend that Mr. Binney was a 46th "subject" in our Seattle adult male study, then inquire as to the odds of his having come from the FASD group vs. from the group of unexposed. This standard statistical computation proceeds by a version of the familiar bell-curve model used for many other kinds of statistical reasoning. The statistic corresponding to the odds-ratio we were asking about is called a *likelihood ratio*. Judging by his rostrum, Mr. Binney's odds of having come from the FASD group are about 80 to 1. This inference is separate from the inference based in the obvious damage at isthmus, and, clearly, each strengthens the other.

Conclusions. Mr. Binney's midline callosal outline shows clear features of damage from high prenatal exposure to alcohol. No similar pattern of callosal damage has been reported in connection with any other prenatal exposure than to alcohol or as a sign of any other syndrome occurring with any frequency in a general population. Once the fact of his exposure is established, then, one infers that this callosal shape abnormality is a direct effect of the prenatal environment: that is, that Mr. Binney's brain was permanently damaged before birth by the prenatal alcohol exposure. The callosum shape abnormalities demonstrated here serve as a detection of the CNS abnormality that is required for most of the diagnoses in the FASD range. His seems to be an unusually severe case, in view of the magnitude of that deformity at isthmus.

Recall that FASD is a collection of irreversible congenital syndromes of organic brain damage induced by heavy prenatal exposure to alcohol. One looks at the callosum because it's the brain region that shows most clearly whether there has been alcohol damage. That's partly because it is so sensitive to alcohol (the cells are moving around early in embryonic life, and alcohol confuses the signals they use for deciding when to stop moving); partly because it is relatively feasible to measure carefully, as I have done to produce the shape and the statistics here; but mainly because its shape is stable among normal individuals yet so variable among the alcohol-damaged as to be suitable for use as a reliable sign of

damage the way we are using it here. For these three reasons, an abnormality of shape of the corpus callosum in a person who has been exposed to high levels of prenatal alcohol counts as evidence of the CNS abnormalities that must be detected in order to assert that that person has actually incurred one of the fetal alcohol spectrum of disorders.

It appears from the analysis detailed above that Mr. Binney shows CNS structural abnormalities, namely, abnormalities of callosal shape, similar to those encountered in some patients already diagnosed in the FASD range. Once exposure is established, a specific diagnosis in the FASD range would then follow from a professional who is licensed to pronounce diagnoses in this way. Additional evidence of alcohol-related neurobehavioral abnormalities often strengthens inferences like these. I detail the logic of the associated diagnosis in the memorandum appended to this report, a memorandum intended for forwarding to a diagnosing physician.

There are typical ways that persons diagnosed with fetal alcohol spectrum disorder behave in specific social contexts requiring competent *executive functioning* (P. D. Connor, P. Sampson, F. Bookstein, H. Barr, and A. Streissguth, "Direct and indirect effects of prenatal alcohol damage on executive function," *Developmental Neuropsychology* 18:331–354, 2000): contexts involving, in particular, authority, rule-based behavior, or assessment of the intentions of others. The damage at the anterior (left) end of Mr. Binney's callosum correlates with associated deficits in the functioning of the corresponding parts of the cortex, the frontal lobes, which specialize in these executive functions.

In particular, the great majority of persons diagnosed with FASD have specific deficits of "social intelligence" much more profound than their deficits of IQ (see Ann Streissguth, F. Bookstein, H. Barr, P. Sampson, and J. Young, "Risk factors for adverse life outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects," *Journal of Developmental and Behavioral Pediatrics* 25:228–238, 2004). They are typically rated, for instance, as unaware of the consequences of their behaviors, as sharing poor judgment in choosing whom to trust, and as having specific deficits in the domain of moral reasoning (telling right from wrong: A. M. Schonfeld, S. N. Mattson, and E. P. Riley, "Moral maturity and delinquency after prenatal alcohol exposure," *Journal of Studies of Alcohol* 66:545–554, 2005). For a discussion of these and other typical behaviors, see, for example, Ann Streissguth, *Fetal Alcohol Syndrome: A Guide for Families and Communities* (Paul H. Brookes, Inc., 1997), or A. P. Streissguth, F. L. Bookstein et al., "A Fetal Alcohol Behavior Scale," *Alcoholism: Clinical and Experimental Research* 22:325–333, 1998. Persons with FASD typically have great difficulty staying out of trouble and make terrible decisions under stress, often over and over again. Often they have special difficulties with inappropriate sexual behaviors. Any forensic construal of Mr. Binney's crimes should take into account the possible origin of typical behaviors like these in the congenital brain damage that, pending evaluation of exposure, has been statistically detected here — damage for which, of course, Mr. Binney bears no personal responsibility.

Availability of this knowledge as of the date of the trial. Mr. Binney's trial took place in 2003. Fetal alcohol syndrome has been known since 1973, and the shared aspects of behavioral deficit between patients who did and did not have the facial stigmata (patients with diagnoses of FAS vs. FAE) were well known to the research community by the early 1990's. In respect of the neuroanatomical signs, the fetal alcohol research community already knew by 1995 that the corpus callosum was a particular focus of the structural damage caused by prenatal alcohol exposure, that the midline isthmus was the most sensitive part of the callosum for measurement of this damage, and that the most common sign of the disease was a thinning of the arch in that region. (Edward P. Riley et al., "Abnormalities of the corpus callosum in children prenatally exposed to alcohol," *Alcoholism: Clinical and Experimental Research*, volume 19, pp. 1198–1202, 1995; this paper had been presented in many national conferences beginning in 1992.) Riley was then, and remains, the most senior neuropsychologist in the American fetal alcohol research community, and so his result would be known to any competent expert examining Mr. Binney's MR image. In fact, it was this Riley paper that stimulated our own research into improved quantification of this same region, the research published in 2002 as cited on page 1. By 2003, the combination of Riley's results, ours, and additional confirmations by groups at UCLA and elsewhere had already led to the recommendation (part of the 2004 U. S. government guidelines) that "change in shape of the corpus callosum" would count as confirmation of the brain damage component needed for an FASD diagnosis. (The recommendation was already present in the drafts of those guidelines circulated to the scientific working group of 40—an unusually large group of experts—who ratified them the same year.) In short, as of the date of Mr. Binney's trial, any clinician competent to examine a brain image for evidence of FASD would know he needed to look at the slice on page 2 of this report and would recognize the implications for the decision at hand of what is so obvious in that image.



Fred L. Bookstein
Professor of Statistics, College of Arts and Sciences, and
Professor of Psychiatry and Behavioral Sciences, School of Medicine
Scientific Director, Fetal Alcohol and Drug Unit
The University of Washington

1505 11th Avenue #403, Seattle, Washington 98122
phone: (734) 657-3240

March 27, 2007

MEMORANDUM

TO: any physician who may be considering diagnosing Mr. Jonathan Binney with a fetal-alcohol-related disorder

FROM: Fred L. Bookstein

RE: the logical role of my structural finding in producing an FASD diagnosis

Dear Doctor,

This memorandum is appended to a letter setting out my technical findings regarding the form of Mr. Jonathan Binney's midline corpus callosum in a recent MR image of his brain. I have detected abnormalities in that image, namely, shape features noted in his image that are also found in some patients in our sample of Seattle adult males with an FAS or FAE diagnosis (which today would be lumped together as FASD, "fetal alcohol spectrum disorders") but that are not encountered in our sample of adult males prenatally unexposed to alcohol. Once it is established that Mr. Binney was prenatally exposed to high levels of alcohol, these abnormalities become clinically significant. My report should have been accompanied by a dossier of the evidence for that exposure and possibly also by an evaluation of neurological or functional performance deficits, the other prongs of the standard diagnostic protocols. This memo is to set out the role of my specific finding within the data flow according to which diagnoses in the FASD domain are generally produced.

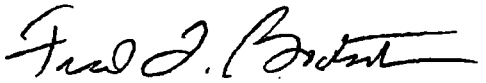
Fetal Alcohol Syndrome is a specific medical diagnosis based on a joint assessment of prenatal alcohol exposure, growth deficiencies, particular facial signs, and central nervous system (CNS) abnormalities. Fetal alcohol spectrum disorder (FASD) is an "umbrella"—a range of diagnoses that modify the preceding list to accommodate (i) evidence for alcohol-related brain damage without all of the growth-related or face-related features or (ii) evidence of that damage as observed at ages at which the corresponding growth effects or facial effects are no longer reliably detectable.

Protocols for assessing CNS damage are the same throughout the FASD range. For instance, in the definitions of ARND [alcohol-related neurodevelopmental disorder] and FAS as tabulated in Stratton et al., eds., *Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment*, Institute of Medicine, National Academy [of Sciences] Press, 1996, pages 76–77, the language about "CNS neurodevelopmental abnormalities" in ARND, paragraph D of that characterization, is identical to the language about the same class of abnormalities as they pertain to FAS, paragraph A of *that* characterization.

These CNS assessments are typically classified as structural, neurological, or functional. Abnormalities must be noted under one or more of these three headings, as set out in the current United States federal guidelines (*Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis*, National Center on Birth Defects and Developmental Disabilities,

Centers for Disease Control and Prevention, Department of Health and Human Services, 2004). On page 14 of that document, "reduction in size, or change in shape of the corpus callosum" is explicitly noted as one of the officially recognized varieties of CNS structural abnormalities associated with confirmed exposure to high levels of alcohol before birth. The federal guidelines also suggest assessments of size or shape of the cerebellum and the basal ganglia. Of these three brain structures, the corpus callosum seems to afford the optimal combination of ease and reliability of assessment with strength of the discriminatory signal. I would be happy to supply you with electronic copies of either of the documents mentioned in this paragraph or the preceding one.

My finding of an alcohol-related callosal abnormality, by counting as a "structural" abnormality in the sense of the CDC document, satisfies the requirement that there be evidence of CNS abnormality in terms of "structural, neurological, or functional deficits, or a combination thereof." The particular callosal criterion of the finding put forward here is consistent not only with the publications of my group cited above and of other groups also interested in the human callosum but also with a great range of experimental findings in laboratory animals. For a good recent review volume on all these matters, please see Michael W. Miller, ed., *Brain Development: Normal Processes and the Effects of Alcohol and Nicotine*, Oxford University Press, 2006. The chapters by Claire Coles and by Susanna Fryer et al. are particularly helpful for placing the current standards for detection of CNS abnormalities in their experimental and epidemiological context. The discrimination protocol used for this report is explicitly approved as an "especially useful diagnostic tool" on page 147 of this authoritative review volume. In practice, an FASD diagnosis will better lead to an understanding of the individual defendant when this assessment of alcohol-related brain structural abnormalities is combined with assessments of cognitive or neurobehavioral deficits as well, and in the course of the main text of my report I have recommended this supplementary strategy to defense counsel, even though it is not strictly necessary for the production of the diagnosis you have been asked to consider.



Fred L. Bookstein
Professor of Statistics, College of Arts and Sciences, and
Professor of Psychiatry and Behavioral Sciences, School of Medicine
Scientific Director, Fetal Alcohol and Drug Unit
The University of Washington

1505 11th Avenue #403, Seattle, Washington 98122
phone: (734) 657–3240

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	C/A No.: 06-CP-11-223
JONATHAN KYLE BINNEY	)	
Applicant,	)	
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	

AFFIDAVIT OF MELANIE BINNEY

Ms. Melanie Binney, who appeared personally before me, affirms and states the following:

1. I met Jonathan Binney in February of 1996, and we married near the end of that year. We have two children together.

2. Jonathan could be very sweet, charming and caring. He was funny, and he could be very attentive. For example, on one of our anniversaries he surprised me by buying a ring for me and presenting it to me at work. He would sometimes surprise me after a long day of work by running a hot bath for me and adding scented candles. He often gave me flowers or cards expressing that he was grateful for our relationship.

3. On the other hand, Jonathan could also be very impulsive and very easily influenced. It was like a thought would just pop into his head, or someone would suggest an idea to him, and then he would impulsively act on it. He did not seem to be able to think through the long-term consequences of his decisions. For example, he would often want to make impulsive purchases. He got in trouble for speeding several times and had his license suspended.

4. Jonathan had a hard time staying on task. He could not focus on things for very long. His impulsiveness and difficulty focusing made it hard for him to keep a job. He would get decent jobs but not be able to keep them. For example, he was fired from his job as a computer consultant when he stole a laptop computer during the lunch break. Jonathan was very good at working with computers and electronics, but he would often do something illogical like that and mess things up.

5. Jonathan was extremely suggestible and often did not distinguish between reality and fiction. He would have wild ideas or make statements that seemed to just come out of nowhere.

6. In early 2000, Jonathan found his birth mother, Gayle Dove. He briefly lived with her, but she got married and pushed Jonathan out of the picture. Jonathan was really desperate at that time because he had no place to go and no ability to fend for himself.

7. It was very upsetting to me that during Jonathan's capital trial, the solicitor argued that the jury should sentence Jonathan to death for our daughter, [redacted] I was upset by this because it was not going to help [redacted] or our son [redacted] – if Jonathan was sentenced to death. Because Jonathan was ultimately sentenced to death, there has been more media coverage and the process has been even longer than it would have been if he did not receive that sentence. This has been extremely difficult for me and my family. This is especially the case since Solicitor Trey Gowdy repeatedly tells the public about what happened to [redacted] He did this earlier this year during his bid for Congress. [redacted] is now ten years old and trying to grow up in this community. It is extremely hard for all of us, and it is growing harder and harder to protect her from the media and from our solicitor. I feel that a solicitor should protect victims of crime and not use my daughter and my family's situation for his own political gain.

8. Prior to Jonathan's trial, I met with his trial attorneys, Trent Pruett and Mitch Slade. I was willing to testify at Jonathan's trial, but they did not call me to testify. I did love Jonathan when we were married and even after he was arrested for this crime, I still cared about what happens to him. I do not want Jonathan to be executed, and I think that it would be damaging to my family if he were executed. I would have been willing to say any of the things recounted above if Jonathan's attorneys had called me to testify at his trial.

Further affiant sayeth naught.

MELANIE BINNEY

Sworn to and subscribed before me
This 25 day of January 2010

Notary Public for the State of South Carolina
My commission expires: Aug 10 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	C/A No.: 06-CP-11-223
JONATHAN KYLE BINNEY	)	
Applicant,	)	
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	

AFFIDAVIT OF DR. JANET YORK

Dr. Janet York, who appeared personally before me, affirms and states the following:

1. I am a Professor in the College of Nursing and a Psychiatric Mental Health Track Coordinator at the Medical University of South Carolina ("MUSC"). I received a Bachelor of Science in Nursing and a Master of Science in Psychiatric Nursing from the University of Cincinnati. I received my Doctorate in Nursing Science from Rush University.

2. I am a fellow in the American Academy of Nursing, an ANCC Certified Specialist in Psychiatric and Mental Health Nursing, and a graduate of the Cincinnati Family Institute. I am also a member of the SC Task Force on Suicide Prevention and a national trainer in suicide prevention for clinicians. I have extensive experience speaking and consulting nationally on the topic of suicide prevention. I have published a number of peer-reviewed articles on suicide prevention. I am currently funded by the VAMC to train and evaluate mental health professionals in the assessment and management of suicidality.

3. I have received (along with Drs. Markus Kruesi and Jay Hirsch) the Norbert and Charlotte Rieger Service Award from the American Academy of Child and Adolescent Psychiatry, the Psychiatric Nursing Clinical Practice Award from the Society for Education and Research in Psychiatric Nursing, MUSC CON Outstanding MSN Faculty Award (twice), and the Distinguished Alumnus Award from the University of Cincinnati College of Nursing.

4. My clinical and research interests involve the study of suicide prevention and the development and evaluation of evidence based mental health interventions and health outcomes in family drug courts and school-based health clinics. I am coauthor of the Emergency Department Means Restriction Intervention, now designated as an effective program in the Suicide Prevention Resource Center Registry of Evidence-Based Suicide Prevention Programs.

5. I was asked by Jonathan Binney's attorneys, Mr. John Blume and Ms. Emily Paavola, to review a number of materials and render an opinion regarding Mr. Binney's mental state at the time of his capital crime, which occurred on or about June 7, 2000 (hereafter referred to as "the incident"). I reviewed portions of the trial transcript from Mr. Binney's capital trial, records related to his past medical and mental health treatment, records related to his birth mother's medical and mental health treatment, and records related to Mr. Binney's criminal record. Paragraphs 6 through 10 of this affidavit contain my opinions, to a reasonable degree of certainty in my field of suicidology, regarding Mr. Binney's state of mind at the time of the incident.

6. This is a man who was in an acute suicidal state at the time of the incident. He also was also a high chronic suicidal risk. In regards to psychological risk, he had multiple psychiatric diagnoses (comorbidity), including polysubstance abuse, mood disorder, and personality disorder, all of which independently increase suicide risk as does comorbidity. Personality disorders are known to increase impulsivity, another risk for suicide. Alcohol is associated with a disinhibing effect and more frequent choices of firearms as a method of attempting suicide. One week prior to the incident he ran out of his psychotropic medication which often causes rebound (reoccurrence of acute psychiatric symptoms). Twenty-eight days prior to the incident he was released from a psychiatric hospitalization, and the risk of a suicide attempt increases within a month of discharge. He had active suicidal ideation as expressed within the note found at the house, continued verbalization of ideation after two recent suicide attempts (May 3 and 6), and as expressed after the incident. He had active violent ideation (rape and murder) and was extremely angry. Suicidal and violent ideation has been shown to coexist at the time of suicide attempts in a subgroup of individuals.

7. In regards to environmental risk, he sought access to a gun and had a suicidal rehearsal (holding the loaded firearm to his head) the day of the incident. Rehearsals also are known to have a disinhibiting effect and serve as a kind of practice for an attempt. In regards to psychosocial risk, he was homeless, unemployed, and facing incarceration. Legal difficulties are a common risk factor for a suicide attempt, including an intent to avoid incarceration. In addition, these social stressors could contribute to hopelessness (a major predictor of suicide and stronger predictor of attempts than previous attempts).

8. In regards to chronic risk of suicide, he had multiple previous suicide attempts (psychological risk). Those persons with multiple attempts are known be at higher risk for suicide as compared to persons with a single attempt. He had a history of impulsive behavior, poor judgment reality testing, and disorganized thinking, all of which contribute to suicide risk. He had a history of being abused himself. He was a perpetrator of sexual abuse of his child and experienced shame (a risk for suicide) over the abuse of his daughter. He had extensive interpersonal loss (psychosocial risk). In addition he had multiple exposures to suicide (his biological mother died by suicide which is a familial risk factor) and his cellmate attempted suicide (environmental risk factor). In addition, discovery of a person after suicide and physical and psychological proximity increases risk. He stated he had intended to

make a conjoint attempt with his cellmate. By history, he had an early suicide attempt (ingestion), early psychiatric hospitalization, and early antisocial behavior and incarceration. Demographically, he is in a high risk group being a young, Caucasian male.

9. In regards to the incident, he entered a house (impulsiveness), he used alcohol (which has a disinhibiting effect) and multiple nicotine patches (which have an energizing effect). He was prepared with a means (if one uses a firearm to commit suicide there is an approximately 88% likelihood) of death. The fact that he did not complete suicide is consistent with the ambivalence of acute suicidal states.

10. Given his history, a systematic suicide assessment and risk for violence assessment were indicated at the time of discharge from the last hospitalization. A safety plan would have been indicated. Given his poor adherence to psychiatric treatment in the past, he needed intensive outpatient services, such as psychiatric day hospitalization. Given his homeless state at the time of discharge, he most likely needed a temporary residential placement or a forensic placement if the risk of violence was shown to be moderate to high.

Further affiant sayeth naught.

Janet A. York

JANET A. YORK, PhD, PMHCS, BC, FAAN

Sworn to and subscribed before me
This 22 day of February, 2010

Carolyn J. Page

Notary Public for the State of South Carolina
My commission expires: My Commission Expires April 6, 2016

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

COURT OF COMMON PLEAS

Jonathan Kyle Binney,

Applicant,

v.

C.A. No. 06-CP-11-223

Jon Ozmint, Director, South Carolina Department of Corrections; and Henry McMaster, Attorney General State of South Carolina,

Respondents.

D E P O S I T I O N

WITNESS: FRED LEON BOOKSTEIN

DATE: Monday, June 7, 2010

TIME: 11:10 a.m.

LOCATION: Padelford Hall
University of Washington
Seattle, Washington

TAKEN BY: Attorneys for the Respondents

REPORTED BY: Ronald L. Cook
CCR, RMR, CRR

- -

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(INDEX AT REAR OF TRANSCRIPT)

STIPULATION: It is stipulated by counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, and that the deponent reserves the right to read and sign the deposition transcript.

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The following colloquy was had with the witness out of the deposition room:

MR. MABRY: At this time we're going to place our objection to Dr. Bookstein's affidavit on the record. We object under Rule 704 and State vs. Jones. We don't think that his testimony or his science would be generally accepted in the scientific community, and we also believe his testimony would be irrelevant because this case was tried in 2003, so it would be irrelevant as to the ineffective assistance of trial counsel.

That's all I have to put on there for now, and Mr. Bookstein can step back in.

MS. PAAVOLA: Actually, Mr. Mabry -- well, it doesn't matter if Dr. Bookstein is in or out, but I also have a brief thing to add to the record before we begin.

MR. MABRY: Okay. Well, go ahead.

MS. PAAVOLA: I just received a stack of

materials about five minutes ago, they were hand-delivered from your office. I assume they're some sort of documents you intend to use during the deposition.

MR. MABRY: That is correct.

MS. PAAVOLA: I haven't ever seen any of these documents, and as I say, I just received them about five minutes ago, so we object to using them. If you plan to use them during your cross-examination, I think that we would need to have a continuance to allow us to review the documents and see what they are.

MR. MABRY: Well, under the rule -- the civil rule is Rule 30. If you get a copy of your rulebook, it says that we can provide the exhibits at the time of deposition, and if I use them, you can take a break, and Dr. Bookstein and you can talk about them if you want to, and that will be private. You'd have to call him on a different line, but y'all can talk about it.

I don't think there's going to be a problem. I'll tell you what they are. One of them is a PowerPoint that was put on by his research group last year. There's three transcripts of a trial he testified to in New Jersey. And then there is a paper that he published in 2005. And he has been cross-examined about that paper that he published before, in the trial in New Jersey.

So I don't think there's going to be any

surprise to him. These are all things that he's familiar with. But if you need a break during the deposition, we'll take one, but that's what the rules provide.

MS. PAAVOLA: Well, that's fine, but I think our objection is not that you -- because they're exhibits but because you've never previously disclosed them, and I think aside from using them as exhibits, you have an ongoing discovery obligation to produce materials that you intend to use, and I've never seen these documents before. So that's the basis of the objection. We haven't had time to review them.

Now, I understand you're suggesting we can take a break, but -- and I guess we'll have to do that, but just even based on my initial review of them, the presentation wasn't done by Dr. Bookstein's group, he's not associated -- he's not part of that group. So I don't even know what relevance that has.

MR. MABRY: Well, first of all, this is cross-examination that the court ordered that we could allow to do. This is like the witness is testifying in trial.

MS. PAAVOLA: Right.

MR. MABRY: And we're not required to provide information that we're going to use to impeach the witness prior to his deposition, when it's a de bene esse deposition or any deposition.

And further, we checked your discovery requests, both your interrogatories and your requests to produce, and there was nothing in those about providing any impeachment material of any witness or expert witness of yours. Mr. Salter reviewed that very carefully, and there's nothing in there. So we haven't violated any discovery requests that you have made.

And this is in compliance with Rule 30. We can -- because we're cross-examining the witness, we can provide the exhibits for the first time when the witness testifies, but if he's got some question about them or needs to talk to you about them, then we can take a break and you can do that, and it's privileged. Whatever y'all talk about is privileged; I'm not going to ask about them.

MS. PAAVOLA: All right. Well, I guess we will probably have to do that, depending on how it works out.

MR. MABRY: Sure.

MS. PAAVOLA: Okay.

(Discussion off the record, at which time the witness entered the deposition room.)

MR. MABRY: I'll just put on the record that Mr. Salter is also present on my end, and Mr. Zelenka just walked in. I don't know how long he's going to stay. He

may be in and out.

He's nodding his head, so he probably won't be here for the whole deposition.

I guess we need to go ahead and swear Dr. Bookstein.

FRED LEON BOOKSTEIN, being first duly sworn, testified as follows:

EXAMINATION

BY MR. MABRY:

Q. Are you Fred Bookstein?

A. Yes, I am.

Q. All right.

Mr. Bookstein, I'm required under South Carolina law at the start of any deposition to tell you a few things.

A. Could I be addressed as Dr. Bookstein? I'm more used to that.

Q. Sure. Sure.

We'll get to that in a minute.

I've got to instruct you that if you have some question or you don't understand a question, you have to direct it to me and not Ms. Paavola. Any kind of clarifications or definitions or any explanations to any words or questions or documents presented during the course of the deposition you're to direct to me.

Now, if there's something you haven't seen before, if I show you an exhibit, you can take a break and review those with Ms. Paavola at that time, but I'm required under the rules to instruct you.

Did you understand those instructions?

A. Yes, I did.

Q. Okay.

All right, well, give me your full name.

A. My full name is Fred Leon Bookstein.

Q. All right.

And where did you attend medical school?

A. I have not attended medical school.

Q. Okay.

You're not a medical doctor?

A. That is correct.

Q. In looking at your affidavit, it sets forth that you -- and you asked to be addressed as Dr. Bookstein. Why do people refer to you as Dr. Bookstein if you're not a medical doctor?

A. I have a Ph.D.

Q. Okay.

And what's that Ph.D. in?

A. It's in statistics and zoology.

Q. Zoology. Okay.

And where did you get that Ph.D.?

A. University of Michigan Ann Arbor.

Q. All right.

And where did you go to undergraduate school?

A. University of Michigan Ann Arbor.

Q. What degree did you get there?

A. I got a Bachelor of Science, with high honors in mathematics.

Q. Okay.

Did you get a master's degree anywhere?

A. Yes.

Q. Tell me where you got your master's degree.

A. I have a master's in sociology from Harvard University.

Q. Did you hear the question?

A. Yes. I believe -- I believe I answered it.

Q. I didn't hear the answer. I'm sorry.

A. Ah.

Q. We're having some breakup on this end.

A. Okay. Sorry.

I received a master's degree in sociology from Harvard University.

Q. Okay.

In sociology?

A. Yes.

Q. And can you tell me why you pursued a degree

in sociology?

A. Yes. I had arrived at Harvard University at the age of about 19 having finished my undergraduate degree, but I discovered that I did not have the talent necessary to continue with a professional career in mathematics, so I decided to back off a bit and look around for fields that might either complete my undergraduate education or use mathematics in an applied way.

At the time there was a program called social relations, which was in the next building -- or next --

Q. BY MR. MABRY: You're breaking up.

A. At the --

Q. Hello?

A. Hello?

Q. Yeah, I lost you there. I've got to where you said there was a program in social relations, and then I lost you.

A. Okay.

Q. Are you wearing the microphone or is it on the table?

A. It's on the telephone.

Q. Okay.

I don't know why we're breaking up, but you're drifting off, and I can't hear.

A. Okay. Let me try speaking more directly into

the microphone.

Q. Okay. Thank you.

A. Okay.

So I was looking around for ways to broaden my education, and there was a program called social relations in the next building over from mathematics, that combined sociology, social anthropology, social psychology and personality psychology, and that welcomed me because I was a mathematician. So I moved into that program, and while I was a student in it, the program broke apart into those four components, and I had to pick one in which to get my degree. So I picked --

Q. And you picked sociology?

A. I picked sociology.

At the time it was the most mathematical of those four fields.

Q. Okay.

Have you ever been employed as a social worker?

A. No.

Q. Hello?

A. No.

Q. No? Okay. I lost you again.

Have you ever done any volunteer work as a social worker?

A. No, I have not.

Q. Are you a member of any kind of association or group of social workers?

A. No, I am not.

Q. Have you ever been?

A. No, I have not.

Q. All right.

And then you got your Ph.D. in statistics; is that correct?

A. Statistics and zoology.

Q. Zoology. Okay.

Have you ever testified as an expert before?

A. Yes, I have.

Q. How many times?

A. Perhaps 10. I'd have to consult my CV to get an accurate count, but it's about 10.

Q. Have you got your CV with you?

A. No, I do not. It's on my computer screen a few -- a few feet from here, if you need me to consult it.

Q. Well, I'm interested in knowing what cases you testified in, so if you can pull that up.

A. Okay. Excuse me for a moment.

Q. How long will that take you?

A. 20 seconds.

Q. Okay. I'll wait.

A. Okay. Let's see.

(Telephone connection disconnected.)

(Discussion off the record.)

MR. MABRY: All right, I put mine on speaker. Y'all still there?

THE WITNESS: Yes.

MS. PAAVOLA: Yes.

MR. MABRY: Okay.

THE WITNESS: Sorry.

Q. BY MR. MABRY: Did you get your CV?

A. Yes, I did.

Q. Okay. All right.

If you would, just tell me the cases where you've testified as an expert.

A. Okay. There was a case in civil court about 13 years ago. I'll skip that one unless you want to know about it.

Q. Where was that?

A. That was in 11th Judicial Circuit, Dade County, Florida, it says here, Norma Broin vs. Philip Morris Companies, et al.

Q. That was involving cigarette --

A. Yes.

Q. Something to do with cigarettes?

A. Yes.

Q. And what did you testify -- what kind of expert were you in that case?

A. I don't know what kind of expert I was. I was testifying that I had used the Surgeon General's report about passive smoking in my teaching, and that it was -- it was a generally respected document among statisticians.

Q. Did you give an expert opinion in that case?

A. No, I just testified.

Q. Well, I mean, did they ask you what your opinion was as to cigarette smoke or something of that nature?

A. Yes, they did. I did. Best I recall. It's been a long time now.

Q. Okay.

You don't remember exactly what you were qualified as?

A. In that case I was qualified as a statistician.

Q. Statistician. Okay.

All right, give me the names of the other cases.

A. Okay. I -- let's go here. And then there's one more. People vs. Ronnie R. Pintor.

Q. Okay.

A. People vs. Chadrick R. Fulks.

Q. Okay.

A. People vs. David J. Ziesmer.

Q. I'm sorry. I missed the last one. I got Fulks. What was the next one?

A. People v. David J. Ziesmer.

Q. Ziesmer?

A. Ziesmer.

Q. Z-e-i-s-m-e-r?

A. Z-i-e-s-m-e-r.

Q. All right. Go ahead.

A. People vs. Lawrence Jackson, Jr.

Q. Okay.

A. People vs. David Cooper.

Q. Okay.

A. That was two sessions.

Q. Sorry. I missed that.

A. That was two days of testimony.

Q. Okay.

A. People vs. John Stokke, S-t-o-k-k-e.

Q. Okay.

A. People vs. George A. Johnson, Jr.

Q. Okay.

A. People vs. Donte McDaniel. That was also two days of testimony.

Q. McDaniel?

A. McDaniel.

Q. Okay.

A. People vs. Christopher Smith.

Q. Okay.

A. That was wrong. That's an error in the resume. It's People vs. Christopher Kennedy.

Q. Christopher Kennedy?

A. Yes.

And just last week People vs. Christopher Smith.

Q. Okay.

All right. If you would, tell me when you testified in these cases. What year?

A. Okay. Pintor, 2004.

Q. Okay.

A. Fulks, 2004.

Q. Okay.

A. Ziesmer, 2005.

Q. Objection.

A. Jackson, Jr., 2005.

Q. Okay.

A. David Cooper, 2006.

Q. Okay.

A. John Stokke, 2006.

Q. Okay.

A. George Johnson, 2007.

Q. Okay.

A. McDaniel, 2008.

Q. Okay.

A. Kennedy, 2009.

Q. Okay.

A. And Smith, 2010.

Q. Okay.

All right. And in those cases -- in all of those cases did you testify for the defense?

A. Yes.

Q. Hello?

A. Yes.

Q. I couldn't hear you. I'm sorry. Did you say yes?

A. Yes, I said yes.

Q. Okay.

In each of those cases did you -- were you qualified as an expert in statistics?

A. In each of those cases I believe I was qualified as an expert in statistics and in the behavioral statistics of persons with fetal alcohol spectrum disorder.

Q. Okay.

And in each of those cases did you testify only in the penalty phase?

A. Not all of these cases were capital cases.

Q. Okay.

A. And in those cases, I think it was Stokke and Johnson I testified in the -- in the course of ordinary felony trial.

Q. Okay.

So it would be just a guilt phase trial?

A. For those two, I believe it was just a guilt phase trial, yes.

Q. The rest of them were capital cases?

A. I believe so. And those were all penalty phase.

Q. All right.

Have you spoken at a conference called Life in the Balance, which is a conference put on for defense attorneys in death penalty cases?

A. I've spoken at one or -- at some number of conferences put on by defense attorneys in penalty cases. I don't actually recall the titles of the conferences.

Q. How many of those have you spoken at?

A. I think there have been three. Possibly four.

Q. Okay.

And were those all over the country?

A. Monterey, Seattle, Washington, D.C., and I'm

blocking on the fourth one.

Q. I lost you again.

A. Oh, yeah. Two in Seattle, one in Monterey, California, one in Washington, D.C.

Q. Okay.

Tell me, did you get the MRIs on Mr. Binney from the Medical University of South Carolina?

A. Yes, I did.

Q. All right.

Did you conduct any kind of measurement error study on the MRI machine at MUSC?

A. No.

Q. And what's the importance of a measurement error study?

A. For -- there are a couple of different kinds of measurement error studies. The kind that I conduct I'd like to answer about first, and then the kind that you asked about just a minute ago I'll answer about second.

The kind that I conduct is a study of the reliability of the measurements that I myself make, and for the research projects that went into my opinion here, such a study was conducted and was published as part of one of the papers in the series that's referred to in my written report. Normally what one does for that is measure the same image multiple times and compare the measurements to see

that they're close enough together.

In addition, to respond to the question you asked a couple of moments ago, there is the study that one carries out on a medical imaging machine itself.

Q. Right.

A. Excuse me?

Q. You still there?

A. Yes.

Q. Okay.

A. The study that one carries out on the medical imaging machine itself, that is normally done by the physicists or the staff who run the machine.

Q. Okay.

A. It's -- as I understand it, it's done periodically to make sure that the general geometry of the image corresponds to the geometry of the heads or bodies that are put into it, and that is not the kind of error study that I carry out. These are both -- these are both important, but I don't have anything to do with the second kind.

Q. Okay.

And you're not involved in actually giving the people the MRIs, you have to have a technician do that, correct?

A. A technician administers the MRI with

small --

Q. That was my question. You don't administer the MRIs; is that correct?

A. Yes, a technician administers the MRI.

Q. Okay.

Now, did you know -- you said you had some general knowledge of MUSC. Did you know that when a MRI is run at MUSC, no matter who it's run on, a report is generated by a radiologist or a neuroradiologist that reviews it?

A. I'm not surprised to hear that. Different medical centers have different policies, and what you quote could very well be true of MUSC.

Q. Okay.

Did you get a copy of the report from MUSC where Mr. Binney's MRI was reviewed?

A. Not to my recollection, no.

Q. So we don't have that report and you don't know what was in that report?

A. I don't know what was in that report.

Q. Okay.

Now, when you got the MRIs, did you warp the MRIs that you received on Mr. Binney?

A. No. I took them in the geometry in which they were sent to me.

Q. What did you do with them?

A. I have to back up a little bit to explain the -- the setting for the answer to your question.

Q. Sure.

A. Some years earlier, in the 1990s, it was discovered by others that there was useful information in the MRI -- the brain MRI of patients with a diagnosis that we now call fetal alcohol spectrum disorder. Back then it was called either FAS, fetal alcohol syndrome, or FAE or PFAS or any of a number of other options. But I'll call it FASD now because that's the current term. It was discovered, as I said, that there was information in these brain images relevant to understanding the disorder.

Based on those papers by other people, a group at the University of Washington, to which I was consultant, applied for and received federal funds to carry out a study of the actual measurements of the -- some of the interesting structures in these brains, and one of the interesting structures turned out to be the corpus callosum.

Q. My question to you was: When you got these MRIs on Mr. Binney, what did you do with them?

A. Ah.

Q. Did you --

A. Okay, that's --

Q. -- put them in a computer and have the

computer program warp them into a three-dimensional shape of the brain or what?

A. Okay. I apologize. The word "warp" is a term of art in my field, and I was treating it as such.

Q. I'm familiar with it, so just tell me, is that what you did with images that you got from --

A. I received the images --

Q. -- MUSC on Mr. Binney?

A. No, I received the images of Mr. Binney in what is called a DICOM format, which is a stack of slices. I used a computer program to reassemble them but not to warp them. It's -- they're reassembled into a volume without warping.

In that volume I carried out measurements exactly analogous to the measurements that I carried out for the Seattle study that was published in the early part of the last decade. So there was no warping involved.

Q. You did a Seattle study that involved I think -- what y'all believed to be 60 normal people and 120 fetally alcohol exposed people; is that correct?

A. Close. There was 60 normals and 120 people who had previously been diagnosed with a fetal alcohol spectrum disorder.

Q. Okay. I thought that's what I said.

A. You said fetal alcohol exposed. They were

exposed and affected.

Q. Okay.

And when you did those MRIs -- those are MRIs that were taken at Seattle; am I correct?

A. That is correct.

Q. Okay.

And you put those MRIs into a program called Edgewarp; am I correct?

A. Yes.

Q. Okay.

Well, what does Edgewarp do to the MRIs when you run it -- run the program on it, on the MRIs?

A. Edgewarp takes a stack of what are called DICOM images, assembles it into a volume, and then allows me to trace around the middle of the corpus callosum as a geometric structure in that volume.

Q. Okay.

Well, why is the program called Edgewarp?

A. Historical accident. Versions of it 15 years earlier were actively involved in warping images, but the application here doesn't do any warping.

Q. Okay.

Well, then how come you've got to put it in the computer and run the program on it?

A. It is --

Q. Why is that necessary?

A. It is necessary because the structure that one is tracing in the brain doesn't show up like a surface under the normal conditions of the MR. It is an edge in each image, and to trace its middle, which is a structure in 3D, one needs a computer program that lets you look at it in three dimensions.

There are several different computer programs that permit this, and Edgewarp is just the one that I am the most familiar with.

Q. Okay.

And Edgewarp is a program that was written by you; am I correct?

A. No. It was written by a programmer under my supervision, using federal research funds.

Q. Well, it's referenced in different materials as being written by -- I don't remember the gentleman's name, but also by you, or in conjunction or with your help.

A. Yes. He programmed it, I raised the money for the salary for the programmers and for the machines, and so it's customary to refer to both of us as its developers.

Q. Okay.

So you warped -- you used Edgewarp on these MRIs from the Seattle MRIs machine, and you compared them to the MRIs that were taken at MUSC that was run through your

Edgewarp program; is that correct?

A. Close. From the Seattle study, we pulled out this tracing of the midcurve of the corpus callosum for those 180 subjects. Well, for 177 of the 180. Three of them had unreadable callosa.

Q. I lost you again.

A. Sorry.

We pulled it out for 177 of the 180 subjects. Three of them, all alcohol exposed, had unreadable callosal images. And --

Q. Are you saying they had agenesis?

A. They -- let's see. I'm trying to remember now.

I actually can't recall. They were all in the fetal alcohol exposed group, and for one reason or another their callosal images could not be used in the research.

Q. Okay.

A. I think they may have had partial agenesis. I don't recall now.

Q. Okay.

So you couldn't read them?

A. Excuse me?

Q. What's agenesis?

A. Agenesis is partial or total congenital

absence of the corpus callosum.

Q. Okay.

A. So I was correcting the question, I think. I took the measurements of the corpus callosum from the Seattle MRIs and compared that set of measurements for the adult male subset to the comparable measurements for Mr. Binney.

Q. Okay.

And that was both -- after both the Seattle MRIs and after Mr. Binney's had been run through your computer program, Edgewarp?

A. They were measured in the context of that computer program, yes.

Q. But the answer to my question is yes; is that right?

A. I'm trying to correct the phrasing. You said run through the computer program. The computer program is a platform by which they're measured, and they were all measured using the same computer program, yes.

Q. Which is Edgewarp?

A. Yes.

Q. Okay.

Can you tell me why a radiologist or a neuroradiologist would not rely on a three-dimensional image that had gone through Edgewarp to make a medical diagnosis?

A. I can tell you what we published about that.

Q. No, I'm asking you, can you tell me why a radiologist or a neuroradiologist would not rely on such an image in making a diagnosis?

A. Yes, I can tell you based on my published papers, the --

Q. Again, my question is why they wouldn't rely on your three-dimensional image.

A. Why they would not rely on the image.

The reason is that in the study I was just quoting, the neuroradiologist looking at the two -- the three-dimensional images using his own viewer --

Q. Wait a minute. Let me stop you a second. I don't want to talk about your neuroradiologist. There's been a ruling from the court regarding some discovery in this case that wasn't complied with.

What I'm asking you is why would a neuroradiologist or radiologist not rely on a three-dimensional image generated by you using Edgewarp in making a medical diagnosis?

A. Ah. If I understand the question, it is because the neuroradiologist has his own three-dimensional viewer.

Q. All right.

That's your answer?

A. Well, that was part of my answer. I was also going to say that --

Q. We're not going to get in --

A. I'm sorry. There's some -- I'd like to try my answer here, because there seems to be some confusion.

We published a paper --

Q. Let me tell you the confusion. There's been a ruling by the court regarding Dr. Adler.

A. I'm not talking --

Q. Anything regarding him is not admissible.

A. Can I explain that the neuroradiologist I'm talking about is not Dr. Adler?

Q. Okay.

A. Would this help?

Q. Well, anybody else that was involved with Mr. Binney --

A. Yes, it's not someone involved with Mr. Binney. Will this help?

Q. Okay. Then go ahead.

A. Thank you.

In our publications, the neuroradiologist on the study, looking at the same images that I was measuring, discovered that a total of three of them looked abnormal out of the 120 with fetal alcohol diagnoses, and our measurements found 100 that were measurably abnormal in the

same subgroup. And that was to be my answer to why a neuroradiologist would not rely on a three-dimensional image to diagnose fetal alcohol spectrum disorder. They would rely on measurements.

Q. Have any neuroradiologists or radiologists communicated to you that they don't believe these three-dimensional images are reliable?

A. No, no one has communicated that to me.

Q. Have you heard of anybody testifying to that effect in any case where you've been involved?

A. No, I have not.

Q. Are you usually sequestered before you testify?

A. I am not usually in the courtroom prior to my own testimony. I don't know if that counts as sequestering or just an accident of my travel schedule.

Q. That was my question. Okay.

Can you tell me what rotation and translation are and their effect on landmark coordinate data?

A. It would be easier if we were in the same room and I could use my hands, so let me try to do this in words.

Q. Okay.

A. An image comes in some coordinate system. The person sticks his head in the MRI, he's a certain

distance --

Q. I'm sorry. We lost you.

A. A person sticks his head in the MRI, he's a certain distance from the back of the machine, thickness of the skull, thickness of the hair, and his neck muscles hold his head in some particular position that can tip forward or backward.

To do an analysis of measurements of a structure, like the tracing of the corpus callosum in the midline, which I do, those two particular features have to be adjusted out, and so for any dataset that starts with the locations of labeled points, there has to be a standardization for translation, which means position, and a standardization for rotation before you begin talking about how the shapes actually vary. I think that's the best I can do without my hands to answer your question. It's something you do --

Q. Who traces this corpus callosum midline that you trace or -- does the computer trace the midline, your program, or do you actually do that yourself after the 3D image is generated?

A. I trace it myself on the 3D image.

Q. Okay.

And are you a radiologist?

A. No, I am not.

Q. Are you a neuroradiologist?

A. No.

Q. And what is your understanding of what a neuroradiologist does?

A. My understanding is that a neuroradiologist looks at an image in two dimensions or in three dimensions and typically will name features that appear to be abnormal or inform -- informational about diagnoses based on his or her training and experience.

Q. Okay.

And do you remember testifying in the David Cooper case --

You testified twice, I believe, didn't you?

A. Yes, I did.

Q. Okay.

And after you testified I believe a neurologist named Dr. Lee -- tell me if this is true or not. He looked at the same MRIs you had and said there was nothing wrong with the corpus callosum; is that correct?

A. Almost. He actually looked at it before I testified the second time, I believe.

Q. And then you came back as a rebuttal witness to his testimony?

A. Yes, I did.

Q. Okay.

And you're not a psychiatrist, either; am I correct?

A. Correct. That's a medical degree.

Q. Okay.

And you can't legally make a diagnosis?

A. Correct.

Q. Did you hear my question?

A. Yes, and my answer was, "Correct."

Q. Okay. I couldn't hear you. I'm sorry.

You can't issue an MRI report from a hospital; is that correct?

A. That is correct.

Q. And you're not a psychologist, either; am I correct?

I'm sorry, I didn't hear your answer.

A. I didn't answer.

As I mentioned, I was a graduate student in social relations, and when I started, that program included training in psychology. Because it forced me to choose among fields, I chose sociology instead, but I do have some graduate training in courses in psychology.

Q. But that wasn't my question. My question is: Are you a psychologist?

A. If that's a legal term, no.

Q. Okay.

Have you ever been qualified as a psychologist or expert in being a psychologist?

A. Not in that -- not in so many words, no.

Q. Okay.

Now, you use landmark points to measure these images; is that correct?

A. No, not in the case of the corpus callosum itself. We use what are called semilandmark points, which are points that lie on the curve that goes around the corpus callosum.

Q. Okay.

And who decides what are semilandmarks on the 3D image?

A. I locate them by hand, using the visualization tools of the Edgewarp computer program.

Q. Okay.

Which you and this other doctor wrote; is that correct?

A. He did most of the writing. I did most of the design.

Q. Okay.

What kind of landmarks are these? Are these traditional landmarks, fuzzy landmarks, constructed landmarks?

Do you know what I'm talking about?

A. Yes.

One of them is a traditional landmark, the one called Rostrum. Two others are often used as landmarks. There's a point at the front of genu and a point at the posterior splenium. And the others are -- are called semilandmarks. They are not fuzzy, and they are not -- they're not constructed in the sense in which that word is usually used in my field.

Q. Okay.

Well, what are they? They're semilandmarks?

A. They're called semilandmarks. They've been called that --

Q. How many landmarks are there?

A. There's a total of 40 on the curves we're using, if that's your question.

Q. And who decided where these other 37 landmarks will be located?

A. Based -- the decision as to where to locate them is done by the computer program based on a published algorithm from the 1990s.

Q. Okay.

The algorithm decides where the landmarks are?

A. The algorithm decides where they should be located on a curve that is located by hand, so there's --

there's a curve, and on the curve you have to take some points. The algorithm takes the points.

Q. Is that which you referred to in your book, 1994 book, where you talked about carefully contrived formulas?

Do you know what I'm talking about?

A. No, I -- not -- 1994 doesn't sound like the date of one of my books. Might be a separate printing.

Q. Okay.

A. The -- the 1991 book did not yet have this formalism. It appeared first in a paper dated 1997.

Q. When?

A. It appeared first in a paper of mine dated 1997, and has since appeared in probably a dozen or more other papers, yes.

Q. Okay.

Well, I'm looking at Morphometric Tools for Landmark Data: Geometry and Biology, by Fred Bookstein.

A. Yeah, that's 1991, I think, but in any case, I know the book. It's right here in my office, if you --

Q. And there's four fundamental principles. One is archiving biological forms by locations and landmark data, converting sets of three locations to pairs of shaped coordinates, three, processing these variables by carefully contrived multivariate statistical procedures, --

A. Yes.

Q. -- and four, interpretation of the results in a picture plane or space data.

Is No. 3 what you're talking about, processing the variables by carefully contrived multivariate statistical procedures?

A. No. No. 3 there is talking about how you do multivariate statistics when translation and rotation have to be corrected. That's what the word "carefully contrived" meant there.

Here what we're talking about is instead how you extend procedures from landmark points to points on curves, and it's actually hinted at I think in Appendix A2 of that book, where there's an example --

Q. You said that algorithm. What is that algorithm? What do you commonly refer to it as?

A. It's the algorithm for sliding semilandmarks.

Q. Sliding semilandmarks. Okay.

Is that partially squares? Is that what we're talking about?

A. No. That's a multivariate statistical technique. We're talking about something specific to the morphometrics of curves. That was first --

Q. What is thin-plate splines? What's that?

I think I'm pronouncing that right.

A. Yes, you are.

Q. What's that?

A. That's a device for showing differences in shapes as if they were produced by growing biological tissue. It's a very useful kind of graphic for some biologists.

Q. Okay. All right.

Is it true that the -- now, you're measuring these distances with a caliper; is that correct?

A. No, a caliper is a physical machine.

Q. Okay.

So you didn't measure these distances of his corpus -- Mr. Binney's corpus callosum with a caliper; is that right?

A. Actually, I don't believe I measured distances at all.

Q. Okay.

Well, with regard to distance, is it true that the proportion of error is greater over smaller distances than over longer distances?

A. If what you're referring to is measurement -- or reliability, and if the distances are measured with a machine that has a constant spacing of its measurements, then that's generally considered true for measured distances, yes.

Q. All right.

And you're measuring distances on his corpus callosum between 40 different points; am I correct?

A. I'm looking in my report here.

No, actually, it's not correct. I located --

Q. How many?

A. I located points on -- I located 40 points on a curve. I didn't actually measure distances, I located points.

Q. Well, how -- you located 40 points. Did you measure the distances between those points?

A. If I'm recalling correctly from my report, I concentrated on one particular distance.

Q. Okay.

What distance was that?

A. The distance that I concentrated on was the one that was most consistent with the very first papers from the 1990s, the papers by those other groups that I referred to.

Q. Okay.

Why didn't you measure between the other distance?

A. This distance is often considered wise to be the first distance measured, because in those early papers it is the distance that is most typically found to be

informative in connection with a fetal alcohol spectrum diagnosis.

Q. But you didn't measure the other distances; is that correct?

A. Let's see. I'm trying to recall.

No, I didn't measure any other distances on the callosum, I only inspected its shape variables.

Q. Okay.

What is EDMA?

A. Euclidian distance matrix analysis.

Q. I'm sorry?

A. Euclidian distance --

Q. I didn't hear the first word.

A. Euclidian.

Q. Okay.

Is that different from the methodology that you use?

A. Yes.

Q. Okay.

Are there scientists or statisticians who do not recommend the method you use but recommend EDMA?

A. Not for this area of application, no.

Q. For any application. Or for morphometrics in general.

A. For morphometrics in general, I think the

people who used to recommend against this have ceased to recommend against it.

For instance, there was a textbook of about 2003 by Subhash Lele and Joan Richtsmeier, but Joan Richtsmeier now, in 2010, is using these methods. I haven't been in communication with Subhash Lele, the other statistician. He's now working mostly in ecology.

So the answer to your question is, for applications in the fields that are closest to the application here, which is neuroanatomy and physical anthropology, no, there seem to be no remaining senior voices arguing against --

Q. I'm sorry, I'm losing you again.

A. In the areas near this application, which is neuroanatomy, I think, and physical anthropology, there are no remaining senior voices arguing against these methods.

Q. As of 2010?

A. As of the last time I looked, right.

Q. Okay.

A. The argument ran about 10 years ago and is basically over.

Q. Mr. Lele published a book called An Invariant Approach to Statistical Analysis of Shapes, along with Ms. Richtsmeier, where they recommended EDMA --

A. Mm-hmm. Right.

Q. -- not your methodology at the time; is that correct?

A. Yes. Richtsmeier, as I mentioned, has now changed her view to the extent of having hired one of the postdocs from our research group as her postdoc.

Q. When did she change her opinion?

A. Must have been sometime like last year, when she decided to hire this postdoc.

Q. Okay. So 2009.

A. Roughly.

Q. All right.

Can you tell me what biological variability is?

A. Roughly. When one is doing a study of any quantity in biology, natural -- if you've measured a quantity, it is going to vary.

Q. Why?

A. Well, there are three sources of that variability. One is measurement error, which we've already talked about. One is what's called sampling variability, which is just the accidents of how you pick your organisms or your people to study. And then biological variability is what's considered in some sense the true underlying variation of whatever you're measuring as it grows out of a combination of genetics and developmental circumstances.

Q. Okay.

Can I briefly summarize that as everybody's a little bit different based on their own unique DNA?

A. No, it's not just based on their DNA. It's also --

Q. That's just my layman's guess, but --

A. Yeah. No, it's based on both genetics and what is usually called epigenetics, which is the environment through which a fetus and then a born child develops.

Q. Okay.

A. So it's not just --

Q. Genetics is part of it?

A. Genetics is part of it.

Q. Okay.

And tell me what -- what is invariance?

A. Invariance --

Q. Its importance.

A. Sorry. Repeat the question, please.

Q. What is invariance, i-n-v-a-r-i-a-n-c-e?

A. I'd need a context for that question. The word has mathematical meanings and biological meanings and all sorts of other meanings.

Q. Okay.

Well, what's the importance of invariance to biology? Tell me what invariance is first, as far as

biology, and then what's its importance?

A. Okay. There are some features of organisms in a species that are found for almost all those organisms.

For instance, I'm guessing we both have 10 fingers. So the number 10 tends to be an invariant. There are some few people who have 11 fingers or 12, but the typical number is 10. So that's an invariant. It's a number that varies less than some others or a number that varies less in some group than it does in other groups.

Q. Okay.

And did you cover statistics, as well?

A. In statistics an invariant is a description of a distribution that doesn't depend on what are called nuisance variables. For instance, shape descriptors are invariant against translation and rotation, to use those words from your earlier question.

Q. Okay.

Let me read you this sentence, and tell me if you agree with this or not, okay? "In any geometrically based analysis of biological form, the choice of a coordinate system is arbitrary."

Do you agree with that statement?

A. No, because --

Q. I'm sorry, I missed the first part of your answer.

A. I don't agree with that because there are other geometrically based approaches to biological form.

Well, let me back up. The --

Okay, I guess I agree with that statement, but normally there's an additional statement that says, therefore, we need to use those aspects of descriptors that are invariant against coordinate systems.

So yes, that's a better way of saying it. Yes, I agree with that statement, coordinate systems are arbitrary, and therefore our reports need to be invariant against changes of coordinate system. That's the better way to say it.

And spoken that way, I may have written it myself.

Q. Let me read you this sentence, and you tell me if you agree with this. "Alignment of specimens (registration and superimposition are terms used synonymously with alignment) is required for many morphometric techniques and for all methods of visualization. Alignment is usually accomplished by selecting either a subset of landmarks, a line or a plane for superimposition of all specimens. When alignment is required, the scientist should be cautioned to run the same analysis trying varying alignments of the same specimens. If results of the comparison specimens vary between the

analysis done using different alignments, then the method used for comparison reflects the effects of the chosen method of alignment rather than the biology of the organism."

Do you agree with that long statement?

A. I guess I have to agree with it, but there was a clause somewhere near the beginning where it said, "normally analyses are a function of alignment," and we try fairly hard in morphometrics to report mostly analyses that are not functions of alignment.

Q. Okay.

A. For that reason.

Q. And you said that you -- are you the one that decides where the mid-callosal curve on this 3D warped image is or 3D image generated by Edgewarp?

A. I locate it, based on published rules.

Q. Okay.

Are abnormalities in the corpus callosum unusual in the general population?

A. Yes. In terms of named abnormalities, they -- they're reported as having a frequency of something like one in 800 normal people. That's partial callosal agenesis.

Q. Do people with attention deficit disorder show abnormalities in the corpus callosum?

A. Not according to my knowledge of the research literature. Certainly not to the extent that the corpus callosum contributes to any part of the diagnosis of attention deficit disorder, to my knowledge.

Q. So you're saying that people with ADD do not show abnormalities in the corpus callosum?

A. Again, the research literature might find differences in groups, averages. I don't think that as individuals typically they show diagnoses. The prevalence of ADD in random -- in studies of people in schools, elementary schools, is something like five to 10 percent, so they couldn't possibly all have abnormalities of the corpus callosum or anything else.

Q. That wasn't my question. My question was, if you listen to my question, do people with ADD show abnormalities in the corpus callosum?

A. Right, and I was answering that saying there -- there are studies that show differences on the average, but usually those are not considered abnormalities of the individuals in the study. So the answer is no.

Q. Do people with XXXY syndrome show abnormalities in the corpus callosum?

A. I'm not an expert on that. It is possible. There are some genetic disorders that are manifested in the corpus callosum. I don't know if XXXY is among them.

testified that the defendant met all the criteria of FASD but she still believed he was not legally insane and he could conform his conduct?

A. I don't know the definition of legal insanity so I can't answer that part of your question.

Q. Okay. That's fine.

A. I do know that the assessment of ability to conform conduct in FASDExperts.com is carried out not by a forensic psychiatrist but, in fact, by a neuropsychologist, who has special tools that measure what's called executive function, which is more or less your ability to manage your own conduct, and I believe that that assessment would be made numerically.

Q. Okay.

What if a defendant wrote out a note that he was planning on killing himself and killing a whole family, and then he drove to that home and broke in that home and then carried out part of that plan, a least killed one person there, do you think that person's ability -- does that demonstrate to you that he could conform his conduct and knew what he was doing?

A. The behavior you describe is actually relatively typical of FASD in forensic settings of making -- making very bad --

Q. Would you call it FASD for somebody to write

out a note that they were going to kill a whole family and then kill themselves, and then drive several miles, hike into the house, break in, and kill somebody?

A. I wasn't speaking --

Q. Typical of FASD patients?

A. No, I wasn't speaking in terms of the details, but the construction of really bizarre plans, plans that pay no attention to social responses or risks, is actually one of the published psychological characteristics of this class of patients. So --

Q. That's also a characteristic of somebody with antipersonality disorder, as well, isn't it?

A. It's odd that you mention that, because if you look at the definition of antisocial personality disorder in DSM-IV, it -- the definition overlaps a great deal with the characteristics that are published as characteristics of FASD.

Q. Okay.

So the answer to my question would be yes?

A. The answer to your question is that antisocial personality disorder appears to be a name for part of FASD.

Q. Well, not everybody that has antisocial personality disorder has FASD, do they?

A. No, but I think more than half the people

with FASD who are in prison could be diagnosed --

Q. I missed the last part. I'm sorry.

A. Oh. I believe it goes the other way, that the majority of people in prison with an FASD meet the qualifications for antisocial personality disorder. I don't recall where I remember that from.

Q. That was my next question. Where did you get that from?

That's not something based on any study you've done, is it?

A. Let me think.

Q. I can't hear you.

A. Yeah.

I cannot recall where that one comes from. The numbers that I published -- the numbers I've seen published go the other way, that in a group of -- this is something that I just read recently, and so I'm at a loss for not having the papers in front of me, but the --

Q. Well, do you agree with me that people commit suicide for a reason?

A. I'm not an expert on suicide.

Q. Well, based on your experience, do they usually commit suicide for a reason?

A. I -- I don't actually have any experience with people committing suicide.

Q. Okay.

Well, were you aware that Mr. Binney was facing charges for raping his three-month-old daughter and that's why he was going to commit suicide, because he didn't want to go to prison as a child molester?

A. I am actually not aware of any facts regarding Mr. Binney's crime or case at all.

Q. Okay.

A. So I have to answer no.

Q. That's fair.

If you'll turn over to the next page, it talks about "History of FASD in Court."

A. "History" -- okay, I see those words.

Q. Okay.

Yeah, I know it's hard to see. It's hard to see for me.

And at the bottom of that page it says, "Absent a link between the brain damage and the criminal conduct ('the nexus'), a history of behavior problems may only convince the jury that the defendant is a 'bad actor.'"

Do you agree with that?

A. I certainly agree with it as my informal summary of what I've seen as prosecutorial strategy, yeah.

Q. Okay.

To your knowledge, is FASD a differential

standardized test scores for neurological impairment support whatever the PCR hearing is about in this particular case, which is, of course, not stated on this slide.

Q. Okay.

It says, "We need a neuropsychologist to test for current, standardized evidence of neurological impairment," doesn't it?

A. It says "need," yes.

Q. Okay.

The next page talks about FASD experts, outcomes -- I'm sorry. The title is "Outcome: FASD Experts."

A. Mm-hmm.

Q. And then it has on the far right "Judicial/Legal Consultant."

A. Yes.

Q. See that?

A. I see that.

Q. Okay.

And it says -- now, who is the judicial/legal consultant for FASDExperts.com?

A. That would be Judge Anthony Wartnik.

Q. He's a retired judge?

A. Yes.

Q. Retired juvenile court judge; is that right?

A. I believe so.

Q. Okay.

And it says, "Legal guidance re: forensic issues & legal strategy." Is that what he does?

A. I don't know what he does for FASDExperts.com. I'm not a member of that group.

Q. Okay.

So he hasn't advised you?

A. That is correct, he has not advised me in the course of any of my cases.

Q. Okay.

It also says, "Consult with Defense Team."

A. Yes, it says that.

Q. You don't know what that's talking about?

A. Actually, I don't have any idea what that's talking about.

Q. Okay. That's fair.

You're not involved with this -- you've never been involved with these people, FASDExperts.com?

A. Before they incorporated, we were together on a small number of cases.

Q. Okay.

A. And then we went our separate ways.

Q. Okay.

A. We all live in Seattle.

Q. What was it called before it was incorporated?

A. It wasn't called anything.

Q. Okay.

Was that the research group?

A. No. This was a collection of experts that were often -- I'm looking -- I'm blocking on a word here -- were often suggested by people like Kay Kelly, who were often called by attorneys asking for experts.

Q. I lost you there at the end.

A. Oh, yes. That there is a -- at my research group there was an employee named Kay Kelly, who handed the legal outreach Web pages, and she would often be asked by attorneys to suggest the names of experts in various aspects of an FASD-related defense, and the names on the front page here -- well, not Judge Wartnik but Novick Brown, Connor, Adler, and separately me, were among -- were in the Rolodex that Kay Kelly would use. There are other --

Q. When did Judge Adler join the team?

A. Judge Wartnik, you mean?

Q. Or Judge Wartnik.

A. I -- I would -- I would gather as much from the fact that he's on the PowerPoint now. That was after --

Q. When did he join the team, do you know?

A. It would have -- I don't know.

Q. Did you have any interaction with him when you were on the team?

A. When I was there it wasn't a team.

Q. Well, group, whatever it was.

A. I had -- I was at a dinner party at his house once.

Q. That wasn't my question. My question was: Did you have any interaction with him when you were part of this group of experts --

A. I replied, I wasn't part of the group of experts. I was -- I was on a list of experts.

Q. Okay.

When you were on the list did you have anything to do with Judge Wartnik?

A. Yes. I was --

Q. Did he advise you and the other members on the list?

A. He did not advise me. I was a guest at a dinner party at his house.

Q. That's all I was asking.

When was the first time that you received the title professor of morphometrics?

A. I got that officially last summer, July 1st, 2009.

Q. Okay.

A. At the University of Vienna.

Q. Okay.

And was that the first time anyone in the world had been named professor of morphometrics?

A. I believe so, yes.

Q. Okay. All right.

Mr. Court Reporter, I have another document that's -- a paper that's entitled "My Unexpected Journey." Do you see that?

THE REPORTER: One moment, please.

THE WITNESS: I just gave him back the first exhibit.

MR. MABRY: Okay.

THE WITNESS: He's now typing, and then he'll go get your exhibit.

MR. MABRY: I'm sorry.

(Discussion off the record.)

(Deposition Exhibit 2 was marked for identification.)

Q. BY MR. MABRY: Tell me when you're ready.

A. I'm ready.

Q. Oh, okay.

Dr. Bookstein, do you have Respondent's Exhibit 2?

A. Yes, I do.

Q. Okay.

It's entitled "My Unexpected Journey in Applied Biomathematics." My first question is: Did you write this paper?

A. Yes, I did.

Q. Okay.

And what year did you write or publish this paper?

A. It was written about the middle of 2005, published I believe in 2006.

Q. Okay.

And I believe it was published in the very first issue of a new journal, called Biological Theory; is that correct?

A. That's correct.

Q. Do you remember when in 2006 it was published?

A. I'm guessing October.

Q. Okay.

Looking at that paper that was published, it starts off with "Abstract" and talks about fetal alcohol syndrome, and if you'll go to -- there's a sentence in the first paragraph that starts with "An," A-n. Do you see that?

A. First paragraph of the main part of the paper

or the first --

Q. Very first page of the paper, under "Abstract."

A. "An academic"?

Yes, I see it.

Q. Okay.

It says, "An" -- and I'm going to read from it, then I'm going to ask you about it. "An academic biomathematician and statistician, since 1984 I have collaborated with one American research group studying this condition."

Okay. That's talking about you and the Seattle research group; am I correct?

A. Yes, I -- I first became their consultant in 1984.

Q. Okay.

Then the next paragraph says, "First we examined mainly these patients'"--

And we're talking about FAS; am I correct?

A. FASD, yeah.

Q. Okay. That's fine.

"First we examined mainly these patients' behavioral deficits, but more recently we have been pursuing an interdisciplinary 'endophrenology,' the correlated brain abnormalities and behavior problems among these patients.

As the research has become more interdisciplinary, it has become better science, with deeper implications for social medicine, but at the same time its reception by our colleagues has become steadily more negative. This essay, in the form of a memoir, reviews the new quantitative techniques we contributed to the research community so our research could go forward, and also the estrangement that each successful innovation engendered between our group and the same research community. There are implications here for how the field of science and technology studies construes and recounts novelties of quantitative interdisciplinary bioscience."

Did I read that correctly?

A. Yes, you did.

Q. Okay.

And you wrote that?

A. Yes, I did, sometime in 2005.

Q. Now, who is -- when you refer to "our group," are you referring to the Seattle research group?

A. "Our group."

Yes, in that sentence I was.

Q. Okay.

And who are the other research groups or the colleagues that had become steadily more negative?

A. At the time they were the groups under people

like Ed Riley, professor at San Diego.

Q. Okay.

A. It turns out he had changed his mind and I didn't know it yet.

Q. Okay.

And he published something after this paper?

A. He published something that appeared the year after this paper.

Q. Okay.

A. That expressly approved the methods that we had been publishing for some time.

He also pointed out --

Q. Published in 2006?

A. 2006.

Q. And he published something in 2007?

A. No, this was -- this -- he published it in 2006, but it was after this paper had gone to press.

You see the date of 2005 down there at the bottom of Page 67?

Q. I gotcha.

A. Yeah. So a paper dated 2006 stated that he, in fact, approved of the methods we were using. It appeared too late for this paper.

And also, frankly, this -- this paper was aimed at a -- an audience in the history of science who

loves irony. Biological theory -- biological theory isn't a scientific journal, it's a -- it's an intellectual journal, philosophical journal.

Q. But you're talking about the work that you and your group did in Seattle and as each -- as you say in here, each new quantitative technique was not -- innovation was not accepted by people in the same community; is that correct?

A. Not until 2006, and then everything changed, that is correct.

Q. That was my question.

And what was that work you were referring to?

A. The work that I was referring to was at first the behavioral statistics on effects of exposure to low doses of alcohol, and then the lack of, I guess -- imitation would be the right word, of these findings based on MRI.

Q. Okay.

A. And then --

Q. Same thing we're talking about here, the three-dimensional MRI, your studies that your group did; is that correct?

A. Right.

It also turns out that the CDC report, although dated 2004, hadn't come to my attention until after this paper was in press, and that report dated 2004 also

explicitly approved careful measurement of the corpus callosum, so the effective date where this started to change should probably be set as 2004 rather than 2006.

Q. The CDC was published?

A. That's dated I think May 2004. I don't have my copy here.

Q. Okay.

If you'll turn over to the next page, Page 68.

A. Got it.

Q. Do you see there's a sentence in the first paragraph that says, "Twenty years ago"?

A. Yes.

Q. Okay.

You're talking about fetal alcohol syndrome above, and then you say, "Twenty years ago I joined a small academic research project in Seattle that needed help with biostatistical methodology. The collaboration proved much more productive for the methodologist than for the scientist: findings were routine, with lots of publications but no breakthroughs."

Did you write that?

A. Yes. That was the study of the behavioral profiles of people exposed to low doses of alcohol.

Q. Okay.

And you said, "Separately, I was developing modern morphometrics in the rather different scientific context of evolutionary and developmental biology"; is that correct?

A. Yes.

Q. The next sentence.

A. Yes.

Q. Okay.

And then in the next paragraph you talk about fusing these two lines of work into an interdisciplinary endophrenology of FAS. Now, the word "endophrenology" was originally a joke, wasn't it?

A. Yes, it was.

Q. And it was the study of bumps on the head and trying to correlate that with behavior.

A. That's phrenology, the study of bumps on the head and behavior, yes.

Q. Endophrenology, then, was a joke. What was the joke about endophrenology?

A. Bumps on the brain.

Q. Oh, okay, bumps on the brain. All right.

If you'll go down in that same paragraph, the paragraph that starts, "In the late 1990s," and it says, "Just since 2002." Do you see that?

A. Yes.

Q. "Just since 2002, this interdisciplinary work has spun off new and practical screening protocols for making the brain damage visible in exposed newborn babies, and equally practical methods for arguing against some proposed American executions of convicted murders" -- I think it's supposed to be "murderers" but it says "murders" -- "who have clear organic brain damage because of the same prenatal exposure."

Did I read that correctly?

A. Yes, you did.

Q. Okay.

And if you'll go down to the next paragraph, you say, "Cognitively, this is a fine match between a fully biomathematical pattern engine and an emerging clinical medical imperative, one that has transformed a merely academic exercise into a splendid example of applied biomathematics as knowledge engineering. But in terms of the relevant social knowledge structures, especially the economic control structures, the corresponding developments are far from clear. The more directly relevant the work to concerns of social medicine, the lower, apparently, the willingness of the mainstream scientific community to support it."

Did I read that correctly?

A. Yes, you did.

Q. All right.

Tell me what you're talking about there.

A. That it was -- it proved and is still proved impossible to get research grants from NIH, who funded the brain studies in the first place, to apply this work in forensic settings, to do brain studies of people charged with felonies or convicted of felonies, to do brain studies of intake at juvenile courts, such as Judge Wartnik's court and so on.

We can get research support for the scientific hypotheses but not for the translation into jurisprudential --

Q. Medical settings?

A. Not for the translation into jurisprudential practice. That's what I meant by the economic control structure. Getting money for research grants.

Q. Okay.

And you describe that as the willingness of the mainstream scientific community to support it, --

A. Yes, because --

Q. -- correct?

A. -- NIH study sections are mainstream scientists, and they decide which grants get supported and which don't, right.

Q. All right.

And the next paragraph says, "It seems that one individual's work" --

And I assume you're talking about yourself?

A. Actually, I was talking about the team.

Q. Okay.

The team at Seattle. That's you and Ms. Novick Brown --

A. No, it's me and the people on the papers. Me and Sampson and Streissguth and Barr and Connor, and I'm missing one. But the people writing these papers were about six of us. The research team.

Q. Okay.

"It seems that one individual's work, no matter how interdisciplinary, is not sufficient to reify an interdiscipline as a thought community. The trail my colleagues and I leave of publications, diagrams, and software is constantly changing in rhetoric, audience, and level of abstraction or mathematization. This instability may bear implications for social studies of frontier science in a wide variety of ways: as a narrative of the haphazard progress of translational research, as a confrontation between biographical and institutional narrative styles in the history of science, or (the mode I prefer) as a fable about videospatial rhetoric as a particularly contentious scientific Denkstil. Alternatively, one might infer that

regardless of the apparent sophistication of modern commercial bioinformatics, the actual quantitative sciences of human biology are still stuck at the stage at which Ludwik Fleck (1935) observed them 70 years ago."

Did you write that?

A. Yes, I did.

Q. Okay.

And that was in 2005 when you wrote that?

A. Yeah. Yes, it was.

Q. All right.

And again, you're talking here about the work of your team being -- not being recognized by the mainstream scientific community?

A. By the mainstream of American fetal alcohol researchers, which was represented and still represented by Ed Riley down in San Diego.

Q. Fair enough.

A. And that was -- we -- as written here, it was actually wrong, in that he had changed his view and we just didn't know it yet.

Q. He hadn't published that he had changed his view until --

A. Until a year later.

Q. -- 2006; is that correct?

A. Right.

And to publish that he changed his view would make a much less interesting essay for this journal.

Q. All right.

Then if you'll skip over, because you talk about prenatal exposure and about yourself, and then you go to "From the Acceptable Disciplinary to the Unacceptable Interdisciplinary."

A. Mm-hmm.

Q. And that goes on for another page, and where I want you to go to is Page 70.

A. Got it.

Q. Down to the third paragraph. And I'm going to read this and then I'll ask you about it. "Unfortunately, there proves to be essentially nothing of any practical medical or psychological use in the signal here. The correlation to which the beautiful chart of the Figure 1 led is only about 0.25, much too low to justify continuing this research style (which is nevertheless, here in 2005, still funded: we seem to have done a good job of calming the technical reviewers regarding the sanity of the new statistic). A full-length monograph on the method and the findings (Streissguth et al. 1993) immediately went out of print and is now unobtainable. We have continued to struggle with our audiences in the psychosocial sciences right up to the present day. For instance, in a table

computed in 1996 that could not be published until 2004, and then only in a very narrowly cast specialty journal (Streissguth et al. 2004), we summarize a collection of psychometric scores and 'risk and protective factors' in order to highlight the truly awful things that happen to these patients in the course of their lives. My colleagues and I had to invent a whole new method of statistical inference to demonstrate that one of these measures, 'age at diagnosis,' was in fact statistically significant. The Journal of the American Medical Association, which had published several papers on FAS in the early 1990s, showed no interest (in 2002) in explaining to its readers that inasmuch as age at diagnosis is to some extent under the control of the diagnosing physicians, they could that do something about this problem."

Did you write that?

A. Yes.

Q. Okay.

And you're talking about the fact, as I understand it, you couldn't get this work published in the Journal of American Medical Association, at least up until 2004, 2002?

A. Right, it never did appear there.

Q. So they would not publish that?

A. Yeah, the official response said, "This is

too technical to be of interest to our readers."

Q. Okay.

A. And we disagreed with them, but it's their call.

Q. What is the -- you talked about a new statistical -- "My colleagues and I had to invent a whole new method of statistical inference to demonstrate this."

What is that statistical method you invented?

A. It was a version of nonlinear regression, nonlinear stepwise regression.

Again, without using my hands it would be hard to explain, but it was a modification of something in the textbooks that could handle the fact that you can't have a -- you can't diagnose older than you have interviewed a person with a diagnosis. So if you're studying people at various ages, the age of diagnosis has to be less than the age at which you've interviewed them, and that's an interesting statistical problem, at least interesting to the statisticians.

Q. Okay.

If you'll turn over to the next page, Page 71.

A. Yeah.

Q. You tell me if I read it wrong.

A. Where are you --

Q. "Current funding of" --

Do you see where I am?

A. Yes, I do.

Q. Halfway down the first paragraph.

A. Mm-hmm.

Q. "Current funding of psychological aspects of FASD continues to center either on yet more studies of grouped test scores, an approach that I believe to be pointless at this time, or else on the search for a 'behavioral phenotype' that will characterize the damaged patients well enough to justify the more intensive medical observations required for an effective diagnosis. In short, this 20 years of intensive quantitative psychological research into FASD has not ultimately amounted to much. In retrospect, it was the wrong discipline from which to have borrowed methodology and rhetoric. Fetal alcohol is not at root a psychometric phenomenon."

Did I read that correctly?

A. Yes, you did.

Q. Okay.

Did you write that?

A. Yes, I did.

Q. And tell me what you're talking about there.

A. In retrospect, it was lucky, because that's the same conclusion that the CDC came to. The CDC, in

describing the ways that you use psychological observations in its 2004 guidelines, referred to a variety of different domains, some of which are quantitative, like IQ scores and executive function, and then also emphasized that you should at the same time look at real-life outcomes and their difficulties, which is an area in which statistics hadn't been used before, and they agreed, more or less, that those were the domains that were equally important and rather more characteristic of people with FASD than the classic areas of, say, IQ deficits. So the -- the statement here has been borne out by changes of opinion at about the same time. That psychological measurement is one part of an FASD diagnosis but it cannot serve only by itself.

Q. Okay.

Well, I'm specifically asking about any -- you answered the first part. I understand that. The last part, "In short, this 20 years of intensive quantitative psychological research into FASD has not ultimately amounted to much," you're talking about your group's research; am I correct?

A. No, I was talking about the psychological part of my group's research.

Q. Okay.

A. The part that didn't have the brain images.

Q. Okay.

"In retrospect, it was the wrong discipline from which to have borrowed methodology and rhetoric."

And then you say, "Fetal alcohol damage is not at root a psychometric phenomenon."

A. Right.

Q. What do you mean by that last sentence?

A. It is at root a phenomenon of organic brain damage and should be founded on observations of the -- of the physical brain.

Q. Okay.

And you wrote this in 2005?

A. Yes.

Q. Okay.

And that's what you were arguing, but nobody had accepted it, that you knew of, in 2005 except your group?

A. That's right.

Q. Okay.

A. And then we got lucky.

Q. Okay. All right.

Now, the next little part of the paper says "Toward an Unacceptable Interdiscipline, I: New Graphical Tools," and you talk about an algorithm. If you go over to the second part of Page 71 --

A. Mm-hmm.

Q. You've applied this algorithm I think to evolutionary psychology of attractiveness and mating between humans and great apes, and then you describe even a dance concert in 2000 in which the algorithm engaged in a duet with a human dancer. Tell me what you're talking about there.

A. Okay. The applications in this paragraph are indeed throughout now the anatomical sciences and anthropological sciences. That part is true and continues. The total number of citations to that one paper is now more than 1,250. For the dance concert, a thin-plate spline is a graph, and when it -- you can make it move, and when it moves, the pictures are really quite beautiful, and my computer program produced one of threes dances -- one of these moving grids driven by a dancer we had photographed, and that dancer did a duet with a computer program, and it was watched by about 2,000 people, who applauded at the end.

This has nothing to do with science, it was just beautiful visual art.

Q. Is one of these -- did you use thin-plate spline graph in this case, in this report, on Binney?

A. Let me see. Is there a spline in here?

Q. Okay.

Just yes or no. I don't need --

A. No, I did not.

Q. Okay. That's fine.

But you go on in the next paragraph and say, "The power of the new graphics turned out to be applicable to our studies of fetal alcohol spectrum disorders as soon as computer techniques could catch up with the necessary data resources. In one early example of a wholly unexpected finding, a technique designed as a cognitive prosthesis (a search engine for local features of these grids) turns up a characterization of FASD patient group as showing excess variation ('hypervariability') in one part of the front of the brain."

Do you see that?

A. Yes.

Q. Okay.

Now, is that thin-plate spline you're talking about there?

A. The thin-plate spline is the figure on the previous page, yeah.

Q. Well, I'm talking about that paragraph, where you say, "The power of the new graphics turned out to be applicable to our studies of fetal alcohol."

A. Right. And that sentence includes a reference to Figure 2, which is the figure on the previous page, and that's a thin-plate spline, right.

Q. Then the next parenthese says, "(Underlying

the announcement is another of those nearly silent statistical innovations, never published before and 'sneaked by the reviewers.')"

A. Yes.

Q. Okay.

Tell me what you snuck by the reviewers, and what is the statistical innovation you snuck by them?

A. There is a statistical technique that looks to see where two groups have the greatest difference in variance, or, let's say, the least invariance, to use that word we used an hour or so ago. That technique had always been used for studies of differences between groups, and we used it instead for a study of what was funny about the fetal alcohol people as their own group. It was an application that is now used a good deal but at the time had not been used in this field.

Q. So as of 2005 --

A. That technique is called a relative eigenanalysis, e-i-g-e-n-a-n-a-l-y-s-i-s.

Q. What do you mean by "snuck by the reviewers"?

A. If we had highlighted the technique, the reviewers would have said, "I didn't learn that in graduate school," and probably would have bounced the paper. So instead we just mentioned it and said, this is what we did, and no reviewer noticed that they had never been taught it

before. Because it was a reasonable thing to do.

Q. Okay.

So you didn't put it in there to keep the paper from getting bounced?

A. We didn't identify it as new, in order to increase the probability that the paper would be published.

Q. Okay. Thank you. I think you answered my question.

Then the next line says, "The black points are 20 named locations near the middle of the brain; the ones involved in the folding at upper left in the left panel are all on the corpus callosum, a tissue of nerve fibers that connects the two halves of the cerebral cortex across the middle of the brain. The grids show the brain region that is, in this extensive and expensive study of 120 adolescent and adult patients and 60 normals, just too variable in the FASD group to be confounded with any normal variant."

Are you still referring to the same thing, the thin-plate spline?

A. At this point I'm referring to the measures of the thin-plate spline.

Q. Okay.

A. Not to the picture itself.

Q. And then the next paragraph you say, "But

scientific audiences still do not accept this as science unless it is demystified in the familiar terms of measured ratios," such as your coordinates in parentheses, and I'm not going to read all that, but talk about your shape coordinates -- "and cutoffs for the corresponding 'decision rule' that classifies a particular candidate brain as either fetal-alcohol-affected or not. In this form the discovery turns out to be the first practical technique for a detection making no specific reference to any assumption about group mean differences."

Did you write that?

A. Yes, I did.

I have to explain that the name Bookstein shape coordinates was not put on there by Bookstein. They were named Bookstein shape coordinates by somebody else.

Q. Oh, okay. That's fine. I didn't read all that because I knew you knew what I was referring to.

You said, "scientific audiences still did not accept this as science unless" --

A. Unless it's turned into things they can measure.

Q. Okay.

And then in the next parenthese it says, "(useful, as in this example there are no such mean differences, only the extra variation that permits

detection)."

Did I read that correctly?

A. You read it correctly, yes.

Q. Okay.

And I understand that to mean there are no mean differences -- no such mean differences between the unexposed group and the fetal-alcohol-diagnosed group, only the extra variation that permits detection?

A. That's true for this set of 20 points, which don't include the curve on the corpus callosum. That's -- it's coming up later in the paper.

Q. Okay.

A. It's true as a technical statistical --

Q. And then you say, "and also no specific reference to any psychological variables." Okay?

A. Right.

Q. What is a psychological variable?

A. Oh, a measurement of IQ or being kicked out of school or being in prison. Real-life outcomes or --

Q. Are there any others?

A. Yeah, there are basically four kinds of things we measure besides brains. There are first test scores, like IQ, verbal performance, motor control. There's what's called executive function, which is the general name for how you sort of manage your own behavior, how you

understand your own behavior and decide what people's reactions will be. There's rating scales. People who know you well will rate you as impulsive or taking terrible advice or making terrible plans. And then there's real-life outcomes, like being kicked out of school, inappropriate sexual behaviors, going to prison. Those are the four categories in all of which we've actually published papers that would come under the heading of psychological.

Q. Variables?

A. Psychological observations.

Q. I thought -- I couldn't hear if you added another word.

A. No, I didn't. That would be thought of as psychological.

Q. Okay.

And then the next paragraph you say, "At just about this same time, an even more beautiful new visualspatial technique emerged, supported by new grants from the National Institutes of Health (one for the Human Brain Project, and one for the Visible Human Project) that were later evaluated as failures and not renewed."

And what --

First of all, did I read that correctly?

A. Yes, I did.

Q. Okay.

And what is this new visualspatial technique that was emerging?

A. It's --

Q. That you're referring to in this paragraph.

A. It's the one referred to in Figure 3, which is actually a figure of a corpus callosum in color in the original publication. It is a way of moving through a brain -- a brain image as if it was a Walt Disney animation, as if it was something like a dance. So you can see how the geometry is curving in all parts of it just by sitting there and watching for a while.

Q. Okay.

Is that the 3D that we're talking about in this case, that you used in this case?

A. No, I did not use that visualization in this case.

Q. Okay.

But you did use a 3D visualization?

A. I used a 3D program to gather the data. The thing we're talking about here is a different -- a different kind of scientific purpose, to see how else you could show a 3D structure besides by a series of pictures, and this image in terms of motion turned out to be tremendously powerful to me but not to the people who could supply the money to do more work with it.

Q. Okay.

Well, I'm looking at Figure 3.

A. Yup. And it looks like shit.

I'm sorry, court reporter.

My copy is a xerox of a xerox of a xerox. In the original it's --

Q. Well, I'm looking at it, too, and it talks about, "Callosal midline" --

A. Right.

Q. -- "of the NIH Visible Female, 'Eve,'" and if you read through there, at the very end it talks about, "This image was produced by the pencil function of W. D. K. Green's program package Edgewarp for the navigation and digitizing of solid medical images."

A. Right. This is the --

Q. The program Edgewarp.

A. Yeah. This is the same program. It's something else it does.

Q. Okay.

A. Unrelated.

Q. Same program. All right.

Now, you talk about this grant "from the National Institutes of Health (one from Human Brain Project, and one for the Visible Human Project) that were later evaluated as failures and not renewed"; is that correct?

A. That's correct.

Q. Okay.

A. Edgewarp is now supported by grants from Europe.

Q. I'm sorry?

A. Edgewarp has since become supported by grants out of Europe, out of my University of Vienna title.

Q. But it was shut down for a while. When was it shut down?

A. Our last funding for Edgewarp was probably 2 -- funding continued through 2007, then there was a gap of about a -- about a year and a half, and then picked up again in early 2009.

Q. Okay.

Well, you wrote this in 2005, and you say that "as failures and not renewed."

A. Right. When a grant isn't renewed you still get to spend the money that you had when they decided not to give you any more, and we were continuing to spend that money for about two years.

Q. Why did they decide not to give you any more money for Edgewarp?

A. The -- the navigation -- these features that moved the image were not in keeping with what other people were doing in terms of image analysis at the time. It

wasn't related to the main things that NIH wanted its brain funding to do, which was to lead to better and better understanding of how the normal brain works. It was too concentrated on abnormalities, and, as this article said at the beginning, it was too concentrated on showing what's wrong with individual brains for purposes of the medical and jurispruda and forensic systems. NIH was not interested in that kind of application. Oddly, Europe was.

Q. They shut the funding down?

A. They stopped the funding. We were allowed to spend it down.

Q. All right.

And if you go over to the next page -- on the same page, I'm sorry, Page 72, but the top of the same page, on the right --

A. Mm-hmm.

Q. I'll start at the bottom of the left-hand column. "We believe that it is a fine scientific datum for diagnosing individual cases. Although this proposition was not even enunciated at the outset of our research program, our research of the last five years has demonstrated its truth pretty thoroughly, and, in doing so, has made possible the efficient detection of alcohol-related brain damage even in the presence of the very large number of other developmental and socioeconomic factors that likewise lead

to bad behavior among some American adults."

Did I read that correctly?

A. Yes, you did.

Q. Okay.

And tell me, what are the very large number of other developmental and socioeconomic factors that lead to bad behavior among American adults?

A. Well, we've -- we've published on a lot of those. They include being raised in homes where there's a lot of violence visible, being the subject of violence or sexual abuse oneself, being raised by alcoholic or drug-using parents, bouncing around from school to school, not having anyone in the schools take charge of you. This paper itself already mentioned early on not having an early diagnosis of FASD, which commonly comes if you don't have good kinds of medical care or referral for diagnostic services.

What else comes to mind?

Certainly bad prenatal care, not having an obstetrician say to the mother don't drink, don't drink any more. That's --

Q. How about wrong personal decisions, is that one?

A. No, because that's a symptom of the disease.

Q. Is the wrong personal decision always a

symptom of fetal alcohol syndrome?

A. No, but it's pretty high in frequency on all of the checklists that characterize people with the syndrome. It's described by -- again, the chart isn't in front of me, but it would be something like 75 percent of the people reporting on these behavioral traits of people with this diagnosis mention not understanding the consequences of one's action, deciding too quickly or impulsively, as I say, overwhelmingly frequent characteristics of people with the disease. This is in general -- general free-living communities community study, not a study in prisons.

Q. Well, the prisons are filled with people that don't have fetal alcohol syndrome that have also made bad personal decisions. Would you agree with me on that?

A. No, we don't know what fraction of people in the most serious -- convicted of the most serious crimes have fetal alcohol spectrum disorder. The last guess that I saw, which was in a published article by somebody else, estimated it at just under half. A published study from 1999 quoted 24 percent in one particular juvenile incarceration, psychiatric prison in Canada, but the numbers are now getting bigger. So, no, it's not the overwhelming majority.

Q. The question was: Prisons are filled with

people that have made bad personal decisions who do not have fetal alcohol syndrome?

A. Yes, and my answer was we don't know what fraction of them have or do not have fetal alcohol syndrome. It might be half. It's not clear that the -- it's not clear to what extent the prisons would be filled if we took out the people with FASD. It's just not known.

Q. Okay.

In the next sentence you said, "We detect over 80% of the affected patients this way while misclassifying only 18% of the actually normal."

Did I read that correctly?

A. Yes, you did.

Q. And that's using the three-dimensional format with Edgewarp looking at the MRIs, that's what you're talking about, and you said you were able to correctly detect over 80 percent of the affected patients by looking at these three-dimensional generated MRIs; is that correct?

A. Yeah, that's the published statistic from one of the papers that's cited here. That's from one of the -- one of the papers on the corpus callosum.

Q. Okay.

So 20 percent of the people who were diagnosed with fetal alcohol syndrome you were not able to detect while looking at the three-dimensional MRI?

A. Right. Looking at the measurements of the corpus --

Let's see. That was mostly corpus callosum.

Yeah, looking at these structures, corpus callosum and the landmarks, about 19 percent of the patients appeared to have normal -- normal structures in this part of their brain, right. We picked up about 81 percent.

Q. So there was 20 percent of the group who y'all knew -- who came into the Seattle study, you knew they had fetal alcohol or FASD, but you were unable to detect that in the MRIs because they didn't have any damage to this portion of the brain?

A. Right. That's correct.

Q. Okay. All right.

And then you said you misclassified 18 percent of the actual normal people; is that correct?

A. That is correct, using the rule that was -- was used by the statistics textbooks, the ones that made for the lowest overall error rate.

Q. Okay.

A. Not the rule attempting to detect damage but the rule attempting to minimize the total error count, which is the --

Q. Well, I'm reading a sentence that you wrote. You wrote this, right?

A. Yes. So it's -- what's missing from the sentence is a statement of what the threshold was, and I'm telling you that.

Q. Okay.

It says, "We misclassified only about 18% of the actually normal," so of the people that you knew were normal, that came into the Seattle study as normal, by looking at the 3D image of the MRIs generated through Edgewarp, you misclassified 18 percent of the normal people as having fetal alcohol syndrome?

A. No. That is what the sentence says, but that was only for one --

Q. That's what the sentence says.

A. Yes, that was for one specific form of statistics, not for the detection of abnormalities.

Q. Does it have more than one form?

A. Yes. There's the form of detecting abnormalities and the form of summarizing group differences. And the statistics here is for summarizing group differences.

My report on Mr. Binney, by contrast, was about the form in which he most differed from our Seattle normals in a way that agreed with our Seattle syndromals, and that is not the statistic here. The statistic here is for a different purpose, a description of two groups. It's

not the statistic in the report.

Q. Well, I'm reading what you wrote, and you talk about -- starting at the bottom of Page 72, and I'm using your words, --

A. Yes.

Q. -- "We believe that it is a fine scientific datum" --

And I'm -- go back up -- you were talking about "Eve's corpus callosum is now visible" in the first paragraph, "gently curving cream-colored arch up the middle of the backplane in Figure 3"; is that correct?

A. Yes.

Q. Okay.

"(All the other planes shown here are actually frozen images from one single moving 'filmstrip' that navigates through this volume along the outline, in both 2D and 3D, under computer-aided control by the viewer's hand.) For some time this structure had been suspected" -- and there's the word you used, "suspected" -- "(on both clinical and animal-experimental grounds) of being important to the understanding of fetal alcohol damage. It is laid down early in embryonic life, partly before the mother has missed a second consecutive menstrual period and so is sure that she is pregnant; it is sensitive to alcohol damage; and it is partly or wholly missing in some of the most severe

FASD patients. We believe that it is a fine scientific datum for diagnosing individuals. Although this proposition was not even enunciated at the outset of our research program" -- and again, let me stop right here. You're talking about the corpus callosum -- "our research of the last five years has demonstrated its truth pretty thoroughly, and, in doing so, has made possible the efficient detection of alcohol-related brain damage even in the presence of the very large number of other developmental and socioeconomic factors that likewise lead to bad behavior among some American adults. We detect over 80% of the affected patients this way while misclassifying only about 18% of the actually normal."

So you missed -- according to that statement, you misclassified 18 percent of your normal group in Seattle who said they were normal and you took to be normal. Looking at the corpus callosum, you said, these people have fetal alcohol syndrome.

A. No. We said these people have brains outside the normal range. Let us see if they're consistent with fetal alcohol syndrome. The -- I don't have it in front of me, but the paper that you're quoting is not about the kind of statistics that were used in the report on Mr. Binney, which consisted in finding a specific feature of his that is known from the literature to be specific to fetal alcohol

syndrome and is way outside the normal range. The description here is for trying to classify all of those 117 -- 177 corpus -- corpora callosa at once. The report is about looking for the specific features that can be measured in this data with actually that arise from the literature.

Q. Okay.

Do you agree with me -- do you read this paragraph as it is written in 2005 by you -- you're talking about the corpus callosum as a -- as a means of detecting fetal alcohol syndrome, and you said, We're able to detect 80 percent of the affected patients this way, using the corpus callosum, while misclassifying only about 18 percent of the actual normal. Isn't that what it says in what you wrote in 2005?

A. It does, but the phrase "this way," that is the subject of that paper, is not the way that it is used in the forensic work, and I'm looking through here to see if I've got an example of the forensic use later in this article.

No, I don't seem to.

So the phrase "this way" isn't what was done in the case of Mr. Binney, which was to look much more specifically --

Q. I'm not asking about Mr. Binney. I'm asking about the paper you wrote in 2005.

A. Yes, the paper in 2005 tried to classify all 177 people at once, and made -- and achieved the error rates published here.

Q. By corpus callosum?

A. By two specific measures of the corpus callosum, neither of which are relevant to this case, because I didn't use them here. I went back to older material.

Q. It doesn't say that in the paragraph what was used, it just talks about using the corpus callosum.

A. That's right, but in the papers that are cited here at the end, it does say what the techniques were, and it was those -- those relative eigenanalysis.

It's in the scientific publications, not in the memoir.

Q. Okay.

Whatever means you used in the Seattle group in -- when you wrote this paper in 2005, whatever means -- statistical measure you used with the Seattle group, you only were able to detect 80 percent of the affected patients, while misclassifying about 18 percent of the actual normals; is that correct?

A. That is correct, because we were not trying to optimize those statistics. We were trying to use a simple statistic, as it said somewhere at the top of the

previous line, the thing that would sneak by the reviewers.

Q. Okay.

A. We're both reading the same page here.

Q. Right. And I'm just understanding, there was 18 percent of the normal people that y'all identified as actually having FASD.

A. No, --

Q. According to the statistics you used in your study.

A. No, we didn't identify them as FASD, we referred to them as misclassified by the statistic that we were demonstrating there.

Q. Okay, the misclassified as FASD --

A. By the statistic that was demonstrated there. That is, again, not the statistic for the forensic use.

Q. Okay.

But you compared Mr. Binney's MRI run through Edgewarp with your Seattle study --

A. I compared it to the data from the Seattle study, yes.

Q. Okay.

All right, the next paragraph says "Toward an Unacceptable Interdiscipline, II: Endophrenology for the 21st Century."

A. If I can interrupt just a minute.

Q. You talk about if you can detect brain damage without reference to behavior, you might be able to account --

A. Excuse me.

Q. -- for bad behavior by brain damage; is that right?

A. May we take a biological break? I need a bathroom.

Q. Sure. Yes. Anytime. Take a break. 10 minutes, whatever you need.

A. Well, also, is there some chance that we will be running this past five o'clock your time? Because I have a student that I need to tell to delay.

Q. What time is it now?

MS. PAAVOLA: 4:23.

MR. MABRY: I'm going to try to finish by then.

THE WITNESS: Okay. Let me take a brief bathroom break.

MR. MABRY: Go ahead and take a break.

(Short recess.)

Q. BY MR. MABRY: I want to turn over to -- well, I guess we'll go down to the bottom of Page 72.

A. Got it.

Q. It says, "Thus independent of retardation

(low IQ) per se, we can predict behavioral problems from anatomical defects. We have clearly come a very long way from those earliest studies of grouped averages."

And then go over to the next page, and I read that so we'd understand the context of the next paragraph. "This finding proved unpublishable in the alcohol literature. After about nine diverse rejections, it finally appeared only in a journal of neuroimaging, and we have not been funded to replicate it in any way (different age ranges, different sampling frames) in spite of many plaintive requests."

Now, what finding are you talking about there that you could not get published in the alcohol literature?

A. It was the finding here in Figure 4, of the correlation between one feature of the corpus callosum and a profile of executive function deficit. Figure 4 on Page 74 of the same paper.

Q. Okay. I see you're referring on Page 72 to Figure 4.

A. Yeah. Again, since that was written other people have begun indeed doing research of exactly this type. Mainly down at UCLA.

Q. This was in -- and when you wrote this in 2005 --

A. No one else had begun -- no one else had been

doing that, and in the five years since then a lot of other people have been studying the correlations of brain form with psychological deficit exactly this way.

Q. Okay.

And when you say "that time," you're referring to 2005?

A. Actually, it looks --

Q. 2006, when this was published.

A. Actually, by -- let's see. "By this time in the research program (early in the present decade)," it says, so that must have been about 2002 when we finally decided to publish it in the scientific neuroimaging literature instead of the alcohol literature.

Q. Okay.

A. So the --

Q. I'm reading, "This finding proved unpublishable in the alcohol literature. After about nine diverse rejections" --

Okay. So y'all had tried to get it published in --

A. In the alcohol literature. And it --

Q. Alcohol literature.

A. And finally appeared --

Q. Rejected nine times?

A. Yeah, it finally appeared in 2002 in the main

journal of Neuroimaging, the journal called Neuroimaging. So it appeared in a journal about brain anatomy, not a journal about alcohol damage.

Q. Okay.

And then you were unable to replicate it in any way. What does that mean?

A. We were unable to get money to -- to study it in other samples. That was 2005. Since then other people have been able to get money to study correlations of brain form and psychological deficit in fetal alcohol and come up with many of the same findings, corpus callosum and behavioral deficits.

As I say, that work is done to a great extent at UCLA, University of California at Los Angeles.

Q. Okay.

And that was after the publication of this --

A. Their publications were after the publication of this. The work was actually ongoing before.

Q. Okay.

And you said, "By this time in the research program (early in the present decade)," and I'm just continuing with that same paragraph.

A. Yes.

Q. "By this time in the research program (early in the present decade), in other words, the audiences for

the methodology and for the findings had irrevocably diverged. We needed a new audience (in effect, a whole new set of colleagues) if we were to be able to continue to learn useful things about alcohol damage." Okay?

Tell me what you're talking about there when you say, "the audiences for the methodology and for the findings had irrevocably diverged."

A. Yes. The people we had been writing for before were typically psychologists. The people who were interested in methods like these were the neuroimaging community, and the work about this is now overwhelmingly done by people who are in departments of neuroscience, not people who are in departments of birth defects or psychology of abnormalities, abnormal behavior.

So that particular prediction turned out to be true. The whole center of this work is now in medical schools, not in departments of psychology. And it's centered with --

Q. I understand that statement that you made, or that answer, but if you look at this paragraph, you said, "We needed a new audience (in effect, a whole new set of colleagues) if we were able to continue to learn useful things about alcohol damage."

Then it goes over into the next topic, "Escape from the Academic: Interdisciplinary in the Wider

World," where you go into your association with the legal community.

A. There's a new subheading, though. It's a change of subject here to correspond to the translational aim that was mentioned many pages back.

Q. So you agree with me that the last sentence of the paragraph before the "Escape from the Academic: Interdisciplinary in the Wider World," where you talk about your relationship with legal -- the legal community, you say, "By this time in the research program (early in the present decade), in other words, the audiences for the methodology and for the findings had irrevocably diverged. We needed a new audience (in effect, a whole new set of colleagues) if we were to be able to continue to learn useful things about alcohol damage."

That's the lead-in to the next --

A. No, it isn't.

Q. -- paragraph or next subject.

A. It's not the lead-in. The new audience was the audience in neuroimaging. The subject then changes, as you see from what continues there in the text. Now that we can predict from the brain to behavior, how about the other direction, from behavior to the brain, and the interest comes from an entirely different context, namely, the Legal Issues Resource Center. So no, this is not the lead-in.

There's a --

Q. Well, would you agree with me that somebody that reads this article, it would appear that that's the lead-in to your relationship with the legal community?

A. No.

Q. You had to find new colleagues to be able to continue to learn useful things about alcohol damage?

A. No.

Q. New audience?

A. No, that's -- this audience would understand that the sentence that begins "Now that," which I've already read once, is just that, it's a hinge. It's a change of direction on the part of the writer. This is -- the sentence "We needed a new audience" is not the lead-in to the next paragraph.

Q. Well, the first sentence of that paragraph says, "This finding" -- I'm talking about the paragraph before you start talking about your relationship with the legal community. "This finding proved unpublishable in the alcohol literature. After about nine diverse rejections, it finally appeared only in a journal of neuroimaging, and we have not been funded to replicate it in any way (different age ranges, different sampling frames) in spite of many plaintive requests. By this time in the research program (early in the present decade), in other words, the audiences

for the methodology and for the findings had irrevocably diverged. We needed a new audience (in effect, a whole new set of colleagues)," and then it goes on to say, "if we were to be able to continue to learn useful things about alcohol damage."

That is what you wrote.

A. Yes. That's about the research. And the next text is about translation into practical context. It's not a lead-in, it's a change of subject.

Q. Okay.

Following that paragraph, whether it's a lead-in or not -- and I understand your position, but following that paragraph you start talking about your relationship with the legal community and your study of Atkins vs. Virginia.

A. Well, I didn't study Atkins v. Virginia, I read it.

Q. Okay, you read it.

A. Yes.

Q. And then I guess you had the idea of the application in the legal world?

A. No, actually, the idea came from these other people in the Legal Issues Resource Center at the University of Washington. I mentioned Kay Kelly, who is I believe an attorney. And there were some of her -- her acquaintances.

But the idea of possibly applying this was not mine. It came from other people.

Q. It was suggested by somebody else?

A. Right.

Q. Okay.

In the legal community?

A. Yes.

Q. Okay.

And if you'll go over to Page 74 --

A. Mm-hmm.

Q. On the right-hand column. And you talk about -- I'm talking about the paragraph that begins with, "This has been tremendously exciting," --

A. Yes.

Q. By diagnosing FASD patients on death row, you talk about diagnosing them early, and then you say -- and I'm going to read starting at "The most." "The most important study of all is likely to be one just accepted after four rejections, and over the objections of all its final reviewers, in a new and risk-accepting journal of alcohol research--even so, the editor required us to add the phrase 'Preliminary evidence that' to the title 'Prenatal alcohol damage may be visible in averaged ultrasound images of the neonatal human corpus callosum' we had originally crafted."

Okay? Did you write that?

A. Yes, I did.

Q. Okay.

And that was a study of ultrasounds in newborn children?

A. Right. A study published in 2005.

Q. All right.

And it was rejected four times?

A. Yes. Shortly after this paper went to press a larger study of twice as many kids was accepted in the main journal of alcohol -- fetal alcohol research, so, again, history overtook the paper here, and --

Q. I gotcha.

That's in 2005?

A. Yeah.

So that the paper that didn't have the title "Preliminary Evidence" finally appeared in 2007, and has actually been cited a lot.

Q. Okay.

And then you go down and talk about, "I will spare you the additional details of how the images are constructed (again, a brand-new form of analysis for instrumentation data proved necessary for us to get ordinary cheap clinical ultrasound into a format sharp enough to be measured)."

What are you talking about there? Is that Edgewarp?

A. No, this has nothing to do with Edgewarp. It's two-dimensional --

Q. For the ultrasound?

A. Well, it was using a piece of Edgewarp that had nothing to do with the 3D part. Edgewarp also had some 2D features, and we just used it to average the images, which is nothing that had anything to do with 3D.

Q. All right, if you'll turn over to the next page, 75.

In the first full paragraph you say, "Turnabout is fair play. Finally the research has progressed to a stage at which we need to turn back to the statistician (or, rather, to your author, now wearing his mathematical-statistical cap) for a new statistic."

What are you talking about there?

A. It's the picture in Figure 6.

Q. Okay.

A. And that actually got published in a mathematics journal as the first-ever diagram of a new kind of statistical process that hadn't been looked at before.

Q. That's in 2005?

A. We finally appeared in 2006.

Q. Oh, okay.

"Such a model has" -- I'm reading down at the bottom of that paragraph. "Such a model has never been put forward in any other applied discipline. Late in the summer of 2005 I pitched it optimistically to a conference on automated systematic biology, which needs considerable biometric help if it is to safe the planet's biodiversity in the absence of government salaries for systematists."

I hope I said that right.

A. "Systematists." You got close.

Q. Okay. All right.

And then "Concluding Commentary," the next paragraph says, "Cognitively, I have shown you, I hope, a startingly good match, in the work of essentially one loan research program" --

That would be the Seattle group?

A. Pretty much, yes.

Q. -- "between a fully biomathematical pattern engine and an emerging clinical medical imperative with major social implications. In principle, we have transformed a merely academic exercise into a splendid example of applied biomathematics as knowledge engineering."

Did I read that correctly?

A. Yes.

Q. Did you write that?

A. Yes.

Q. Okay.

And then the next sentence says, "In practice, nothing of the sort was planned, and none of this technology transferred" --

I guess from statistics to biology?

A. No, from biology to forensics.

Q. Okay.

"In practice, nothing of the sort was planned, and none of this technology transfer ever corresponded to instructions or permissions from the scientific funding agencies or from any of our reviewers."

Did I read that correct?

A. Yes, you did.

Q. Okay.

Then you say, "Neither I nor my colleagues were encouraged by others in the same application areas to do anything that I have showed you beyond a very first few very boring developments, the ones that were the most conventional in their statistical rhetoric. Everything else was serendipitous."

Did I read that correctly?

A. Yes, you did.

Q. Okay.

And let me start with that last phrase again because it really begins the sentence. "Everything else was

serendipitous, and neither funding agencies nor peer reviewers are comfortable with reports of serendipitous findings. We are unable to gets the study of the infant brain published at the level of publicity we think it deserves--we are unable, indeed, to get it funded, beyond those first 18 infants, in spite of nine separate attempts."

Did I read that correctly?

A. Yes, you did.

Q. Okay.

And as you told me, that changed after this was published.

A. Correct, that changed.

Q. And then the next sentence says, "We were unable to publish any aspect of the work with adult brains in the alcohol literature or the psychiatric literature, and the grants and contracts that underwrote the software for the 3D image analysis and its animation have all been defunded."

Did I read that correctly?

A. Yes.

Q. Did you write that?

A. Yes, I did.

Q. Okay.

And that's talking about the 3D image analysis that you used in this case?

A. Yes. It's also talking about the situation in the middle of 2005.

Q. Correct.

A. Yeah.

Q. Okay.

So at that time you could not get this process, the three-dimensional process that you were using Edgewarp to look at these MRIs, published in any alcohol literature or any psychiatric literature, and the grants and the contracts that underwrote the software were all defunded; am I correct?

A. Yes. And then everything changed.

Q. Everything changed after this publication in 2006?

A. After the writing in 2005.

Q. Okay.

A. They changed enough actually -- I asked the editor if he wanted me to revise the paper, and he said no, it reads better the way it came out. He didn't want it updated.

Q. I gotcha. Because it was basically detailing all of your work and how it hadn't been accepted in the scientific community; is that correct?

A. No, it's because, as I said a long time ago, it was for a journal in the philosophy of biology, and it

made the editor's point about the social constraints on science much better than a story a couple of years later, where virtue triumphs and all the rest of that. It's just a better story, especially for Volume I, No. 1 of a new journal, if it has these ironies in it.

Q. And when you're talking about this research, you're talking about novel or frontier research as you refer to in this paper?

A. Yes. That's actually a standard phrase in science studies, "frontier research."

Q. And in the next paragraph you say, "By this point the gentle ironies with which I have perhaps entertained you over the first few pages evidently have ceased to be gentle. You have just been shown a survey of what should be a classic 'emerging interdisciplinary nexus,' combining the tools of geometry, computer science, statistics, and biomedicine in wonderfully supple maneuvers and manipulations engendering translational activities of all sorts, in public policy contexts from adoption to capital punishment, and yet the thought-collective still consists of a sample of one."

Did you write that?

A. Yes, I did.

Q. Okay.

And did I read it accurately?

A. Yes.

Q. And that was in 2005 when you wrote that?

A. Yes.

Q. Okay.

And what are you talking about when you say "supple maneuvers and manipulations"?

A. Oh, that's just a statistician talking about how nice measurements of images are. Geometry, computer science, statistics and biomedicine all affect the way you measure a brain image, the way you get the brain image. They're analytically gorgeous.

And the sample of one there, of course, is the one research team that as of 2005 was --

Q. Right.

A. -- was speaking for it.

Q. Nobody was accepting this science except your research team?

A. Well, the reviewers in those other journals were. They were not alcohol reviewer -- researchers, they were neuroimage researchers, the field that our work was moving into the laboratories of, because that field has always been much more tolerable of advanced statistics and of reliance on the medical imaging machines.

Q. Research? You said the neuroimaging journals --

A. Yeah --

Q. Research.

A. Yeah, moving the work into a context of neuroimaging research was the way to get it read.

Q. I gotcha. Okay.

All right. And then you talk about, "There are other ways to phrase the core irony as well" --

And again, you're talking about history of biology --

A. Yeah, these are all comments that are in terms of art for the people who do history of biology, right.

Q. Right.

If you'll turn over to Page 76.

Are you there?

A. Yes.

Q. Okay.

The second column, and then the first full paragraph, "Thus, however fine the advances in understanding the brain damage engendered by fetal alcohol exposure, in terms of the relevant social knowledge structures and economic control structures the implications of the 20 years of work I've reviewed for you are far from clear. One individual's work, no matter how disciplinary" --

A. "Interdisciplinary."

Q. -- "how interdisciplinary, may simply not be sufficient to reify an interdiscipline as a thought community, and the only way to survive (economically or rhetorically) may be to" -- "may be to be perforce constantly changing one's audience."

Did you write that?

A. Yes, I did.

Q. Did I read that correctly?

A. Yes.

Q. Okay.

The next sentence is, "Where do I go after forensics and adoption?"

Now --

A. Yes.

Q. That follows the preceding paragraph I just read you, doesn't it? That sentence. "Where do I go after forensics and adoption?"

A. Mm-hmm.

Q. Does it?

A. Yes, it says that.

Q. Okay.

And that's the audience that you're referring to when you say one has got to change one's audience. Your audience became forensics and adoption.

A. Well, that's a bit of an exaggeration.

There's a quote from testimony on Page 74. The forensics hasn't led to any publications; the adoption did. The adoption being the ultimate --

Q. Just a second.

A. 74 had a quote from testimony in the Pintor case.

Q. And then you say, "I'd like to end up back in the aesthetics of those grids, actually, but having lost one big grant specifically over that issue (the reviewer never forgave me for mentioning that my computer program performed in a dance concert)."

We already talked about that, correct?

A. Yes, mm-hmm.

Q. Right?

A. Yeah, this is --

Q. "I am loath to merge those purposes again in any context involving the transfer of funds."

A. Yeah.

Q. You'd like to get back to just doing grids, but you can't get the funds except through forensics and adoption.

A. No, I'd like to end up getting -- I'd like to end up with grids, and I need to figure out a way that doesn't require funding.

Q. Okay.

A. Which is just working on the mathematics.

Q. Okay.

A. That's what that means.

And indeed, it's written in a somewhat wistful style. The style is -- is aimed at the readers of this journal, historians of biology, who have often been intrigued by the way that biologists change their -- change their audiences over a course of a career, and this ended up agreeing with one of the points of the editor of the journal, that he encouraged me to put in here.

Q. But those sentences I just read followed immediately the question, "Where do I go after forensics and adoption?"

And you talk about losing one big grant. You're loath to merge those purposes again in any context involving transfer of funds.

A. Yes, but you're reading the paper too literally. Forensics and adoption are actually --

Q. Okay. I apologize for reading it literally.

A. This is a memoir --

Q. The next paragraph says, --

A. I'm still answering.

Q. -- "That the trail I have left" --

A. Excuse me. I'm still answering.

Q. I'm sorry.

A. I'm still answering.

Q. Oh, go ahead.

A. This is a memoir, not a scientific paper. Forensics and adoption were the last two topics described, and that's a hinge for the reader, not a hinge for the personal history.

Q. Okay.

A. You're reading this too literally, as if it was a scientific narrative. It is not. It is a memoir.

Q. Okay.

"That the trial I have left of publications, diagrams, and software is constantly changing in rhetoric, audience, and level of abstraction or mathematization is perhaps owing to the sheer press of funding."

Again, you're talking about funding with regard to your audience --

A. Funding for whatever research or writing is necessary to reach out to audiences, yes.

Q. Okay.

And then the next paragraph down says, "Or perhaps this seemingly random walk I have been narrating for you bears implications for your social studies of frontier science in a wide variety of less political, more centrally scholarly ways: as a narrative of the haphazard progress of translational research, as a confrontation between

biographical and institutional narrative styles in the history of science, or (the mode I prefer) as a fable about videospatial rhetoric as a particularly contentious scientific Denkstil far more suited to quantitative bioscience than anybody except for a few fallen mathematicians like me knows it to be. Alternatively, one might infer that regardless of the apparent sophistication of modern bioinformatics, the actual quantitative sciences of human biology are still stuck at the stage at which Ludwik Fleck observed in 70 years ago: still unable to select, from among all the directions of random exploration, which ones are pointing forward."

Did you write that?

A. Yes, I did.

Q. Did I read that correctly?

A. Except for the fact that "Denkstil" is a German word, yes.

Q. Okay. Well, I'm sorry. Thanks. Thanks for correcting me.

And you refer to your work here as frontier science; is that correct?

A. Yes, but this is being written, as it says in that second line, for people who do social studies of science.

Q. Sure. Okay.

A. So it's -- I'm referring to what they're -- I'm referring to what they are studying as frontier science. This is -- my work, of course, combines frontier science, established science, and some applications.

Q. Okay.

And then finally, under "Moral" --

A. Yes. Got it.

Q. You say, "Establishing a new interdisciplinary thought style takes more man-years than one man has to invest."

Are you talking about yourself?

A. I'm that one man, yes.

Q. Okay.

"There is a limit to the number of battles that can be fought with the same reviewers, and a limit to the speed with which any institutionalized scientific context can turn from one rhetoric of self-justification to another, no mater how much more powerful the new one is in comparison to the old. In words borrowed from Fleck: no one person, alone, can constitute a thought-community. But in words of equal portent borrowed from Philip Kitcher (2001): the social control of science is far too important nowadays to be left to scientists."

And there I guess you're again talking about the difficulty as of 2005 in getting this work recognized.

A. Getting it recognized in the translational context of the alcohol applied research community, yes.

Q. Okay. All right.

Now, earlier you told me --

I've just got a few more questions.

A. Can I give this back to the reporter, then, this document?

Q. Yes, sir. Please. Thank you.

The first time you testified as an expert was in 2004? A forensic expert statistician in fetal alcohol.

A. Yes. That was the case of --

Q. Is that correct?

A. That was the case of Ronnie Pintor, from which I quoted for -- in the course of the essay we were just looking at, right.

Q. Okay.

And the 10 times you testified after Mr. Pintor were all -- except for Mr. Fulks you testified in 2004, all of them were after 2004?

A. Correct.

Q. 2005, 2006, 2007, 2008, 2009, 2010?

A. Yes.

Q. Okay.

Why did you start testifying as an expert in 2004?

Q. Where did that money go? Did it go to you or did it go to the Seattle research group?

A. Yeah, that money goes to me.

Q. Okay.

Have any defense attorneys contributed any money or any defense attorney organizations contributed any money to your research group?

A. Not to my knowledge.

Q. When you go and speak at these seminars for defense attorneys, like Life in the Balance, do they pay for your plane ticket and are you compensated for speaking there?

A. My expenses are covered but there is no honorarium.

Q. Can you tell me when this case was tried, Mr. Binney, what year?

A. No, I can't --

Oh. Actually, I can. Something about it in my report.

Yeah, somebody told me his trial took place in 2003. It's in my report, Page 8.

MR. MABRY: Okay. All right. That's all the questions I have, Doctor. Thank you.

THE WITNESS: Thank you.

Does anybody else have questions or are we

done?

MS. PAAVOLA: Nope. We're finished here.

MR. MABRY: Thank you, court reporter.

(Discussion off the record.)

MR. MABRY: Respondent's Exhibit No. 2, which is the paper published by Dr. Bookstein, "My Unexpected Journey in Applied Biomathematics," I'm going to move that into evidence as respondent's exhibit.

That's all I have.

(The deposition concluded at 2:06 p.m.)

SIGNATURE OF DEPONENT

I, the undersigned, FRED LEON BOOKSTEIN, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

FRED LEON BOOKSTEIN DATE

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, the undersigned officer of the Court, under my commission as a Notary Public in and for the State of Washington, hereby certify that the foregoing deposition upon oral examination of the witness named herein was taken stenographically before me and thereafter transcribed under my direction;

That the witness before the examination was first duly sworn by me to testify truthfully; that the transcript of the deposition is a full, true and correct transcript of the testimony, including questions and answers and all objections, motions, and exceptions of counsel made and taken at the time of the foregoing examination;

That I am neither attorney for nor a relative or employee of any of the parties to the action; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 18th day of June, 2010.

NOTARY PUBLIC in and for the State of Washington, residing at Redmond. My commission expires 04-6-14.

I N D E X

EXAMINATION BY:		PAGE
Mr. Mabry		7

* * *

EXHIBIT	DESCRIPTION	FOR I.D.
EX. 1	PowerPoint presentation, entitled "(A10) FASD in the Legal System: A Multidisciplinary Assessment Model for Adults & Adolescents," dated March 11, 2009.	50
EX. 2	Document entitled "My Unexpected Journey in Applied Biomathematics," by Fred L. Bookstein.	66

Certificate of Reporter

Case Name: Jonathan Kyle Binney v. Jon Ozmint, et al.

Date of Deposition: June 7, 2010

Case Number: 06-CP-11-223

Deponent: Dr. Fred L. Bookstein

I, Ronald L. Cook, Court Reporter and Notary Public, do hereby certify that the foregoing deposition was taken before me and that the deponent was advised of his/her right to read and sign said deposition.

This deposition has been sealed absent the deponent's signature for the following reason:

Deponent failed to return signature sheet and deposition within the allotted time.

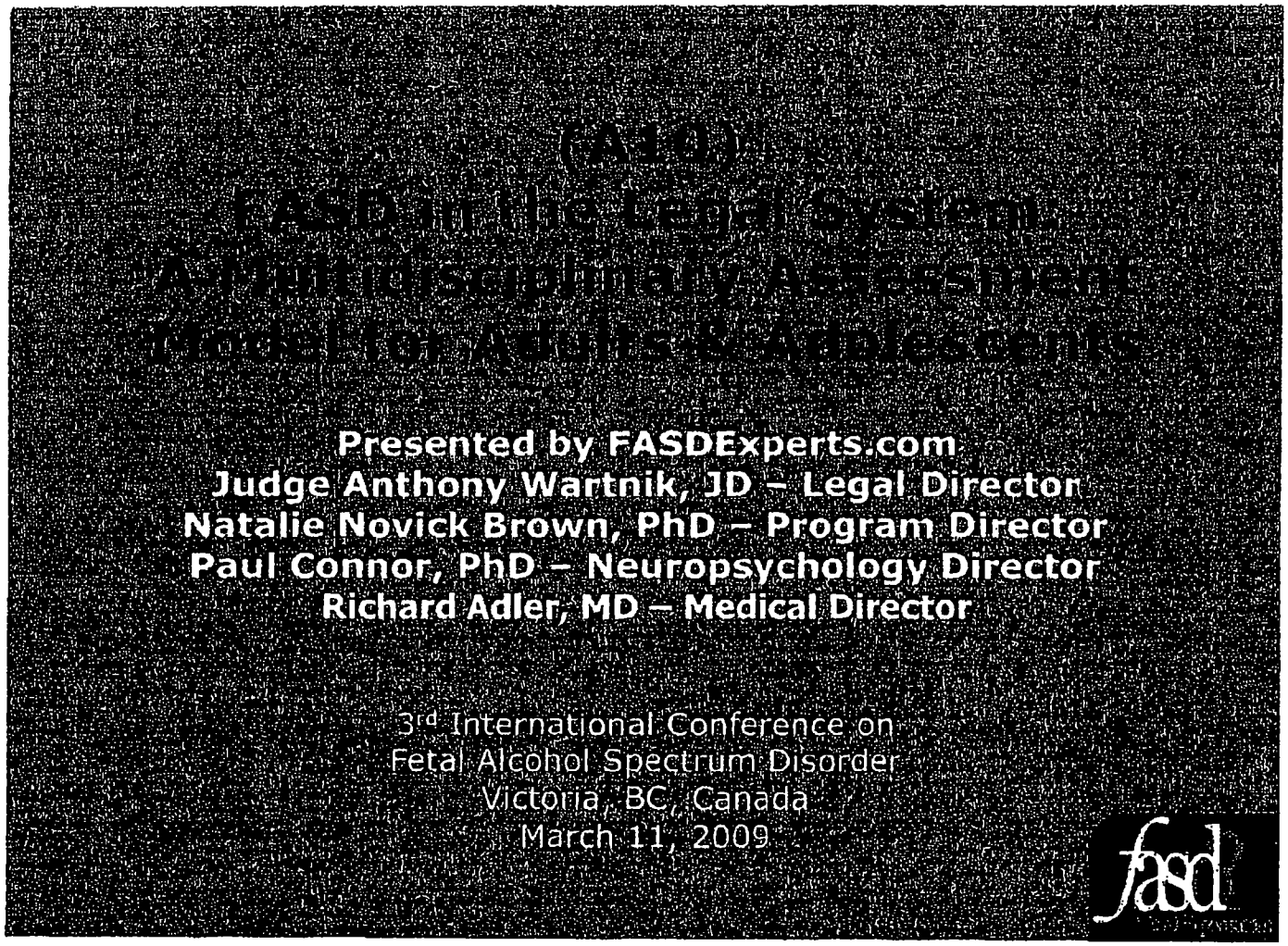
R L Cook

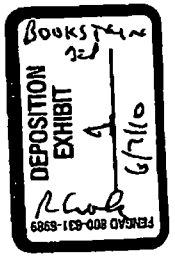
Court Reporter 7/30/2010

Notary Public

Commision Expires

April 6, 2014


(A-MA)
FASD in the Legal System
A Multidisciplinary Assessment
Protocol for Adults & Adolescents
Presented by FASDExperts.com
Judge Anthony Wartnik, JD – Legal Director
Natalie Novick Brown, PhD – Program Director
Paul Connor, PhD – Neuropsychology Director
Richard Adler, MD – Medical Director
3rd International Conference on
Fetal Alcohol Spectrum Disorder
Victoria, BC, Canada
March 11, 2009
fasd

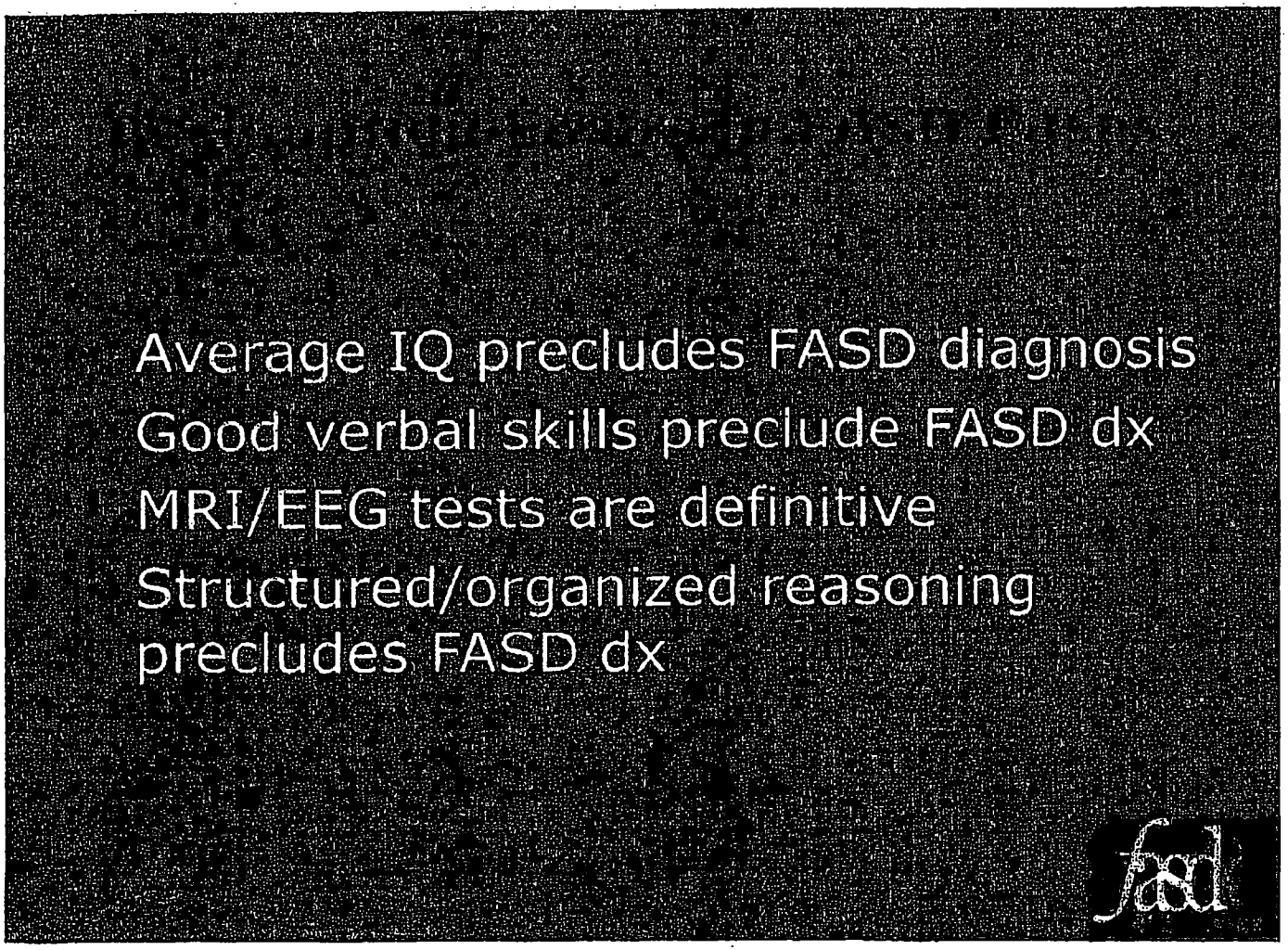

DEPOSITION
EXHIBIT
FENDAO 800-631-6989

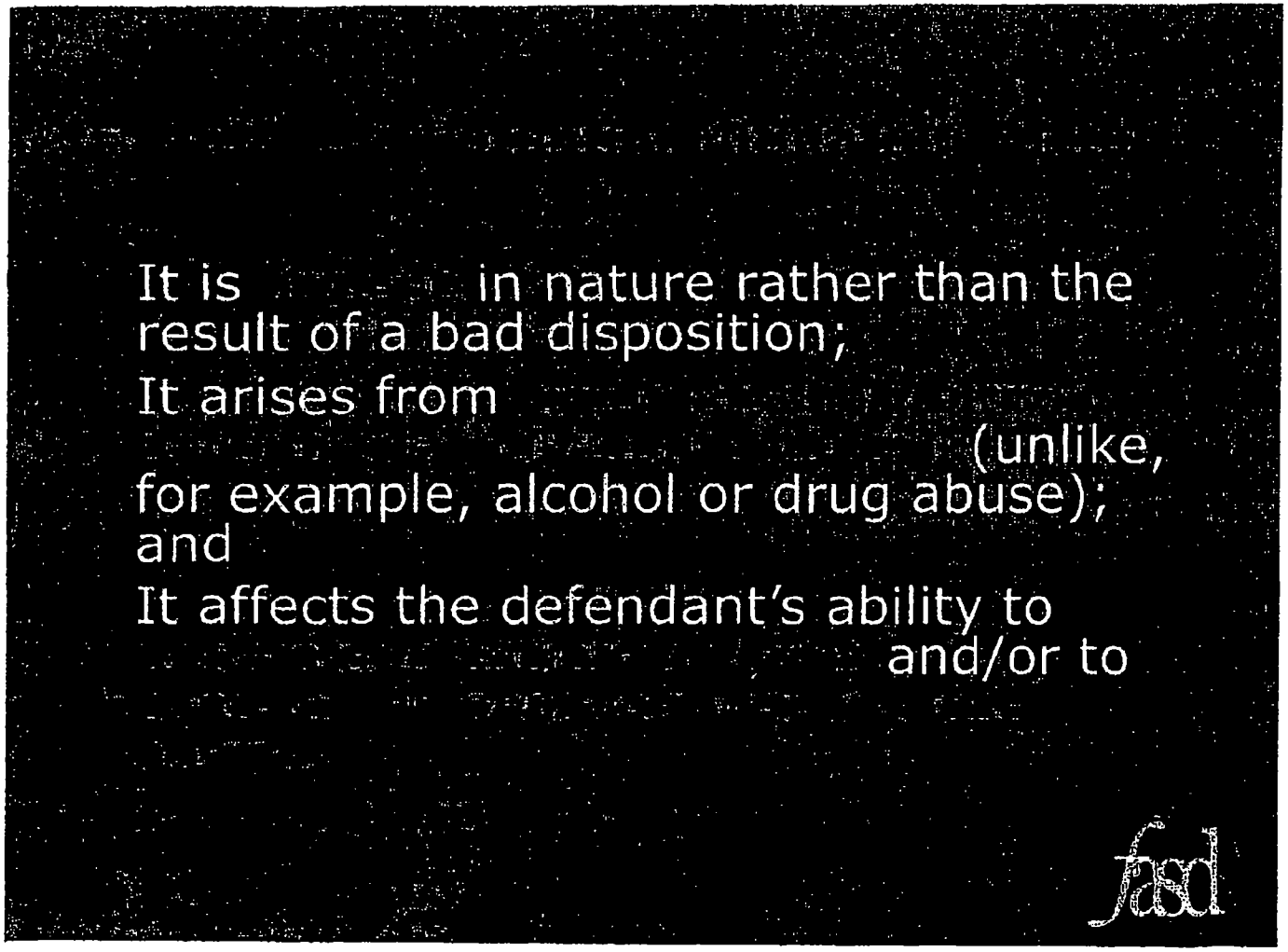
State of the Art in Forensic Assessment of FASD

Pre-2007: "Hit or Miss"

Post-2007: FASD Experts →

– First systematic, structured approach to forensic assessment of FASD


Average IQ precludes FASD diagnosis
Good verbal skills preclude FASD dx
MRI/EEG tests are definitive
Structured/organized reasoning precludes FASD dx
fasd


It is in nature rather than the result of a bad disposition;
It arises from (unlike, for example, alcohol or drug abuse); and
It affects the defendant's ability to and/or to
fasd

5401

There is a world of difference between evidence of past behavioral problems and evidence that a defendant has

A critical question in law is whether a defendant is fully responsible for his criminal actions.

Absent a link between the brain damage and the criminal conduct ("the nexus"), a history of behavior problems may only convince the jury that the defendant is a "bad actor."

fasd

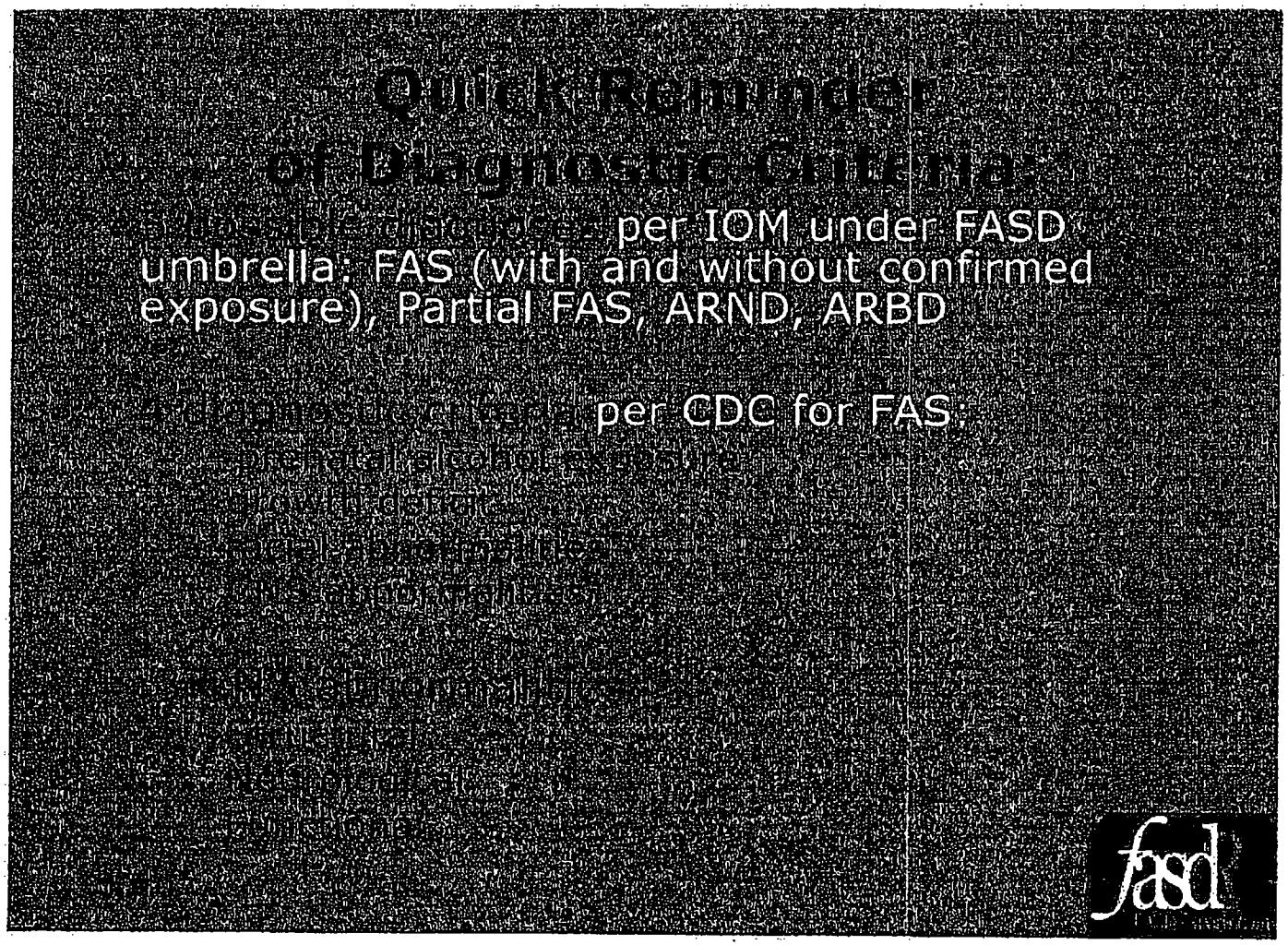
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FASD Diagnostic Criteria

- Institute of Medicine (1996)
- 4-Digit Diagnostic Code (2000)
- Centers for Disease Control (2004)

- ICD-10
- DSM-IV
- Neurobehavioral Disorder Not Otherwise Specified




Quick Reminder
of Diagnostic Criteria:
per IOM under FASD
umbrella: FAS (with and without confirmed
exposure), Partial FAS, ARND, ARBD
per CDC for FAS:
fasd

5404

Why Use A Multidisciplinary Team Assessment In The Forensic Context?

CDC (2004) guidelines:

"FAS Diagnosis (is) confirmed using dysmorphic and anthropometric assessment procedures along with appropriate neurodevelopmental **data**" (p. 8).

fasd

Case #2

- Case Outcome: PCR hearing on hold pending ruling from South Carolina Supreme Court on another matter
- Lessons Learned:
  - We need a neuropsychologist to test for *current* neurotoxic evidence of neurological impairment

fasd

Outcome: FASD Experts

Psychologist	Neuro-psychologist	Psychiatrist	Judicial/ Legal Consultant
Lifelong functional assessment, maternal drinking	Current functional assessment	Conduct physical, medical analyses & review functional assessments → diagnosis	Legal guidance re: forensic issues & legal strategy
DIFFERENTIAL DIAGNOSIS	DIFFERENTIAL DIAGNOSIS	DIFFERENTIAL DIAGNOSIS	
REPORT	REPORT	REPORT	Consult w/ Defense Team
TESTIMONY	TESTIMONY	TESTIMONY	

Psychologist's Role
(FASD Experts)

Element	Criterion
Maternal Drinking	Confirmed vs. Unconfirmed
CNS Functional Deficits	**Cognitive deficits:** 2 s.d.'s below mean on IQ test **Neurodevelopmental deficits:** 1 s.d. below mean in ≥ 3 domains

fasd

5408

Neuropsychologist's Role

(FASD Experts)

Element	Criterion
Functional	**Cognitive deficits:** ≥ 2 s.d. below mean on IQ test **Neurodevelopmental deficits:** 1 s.d. below mean in ≥ 3 domains

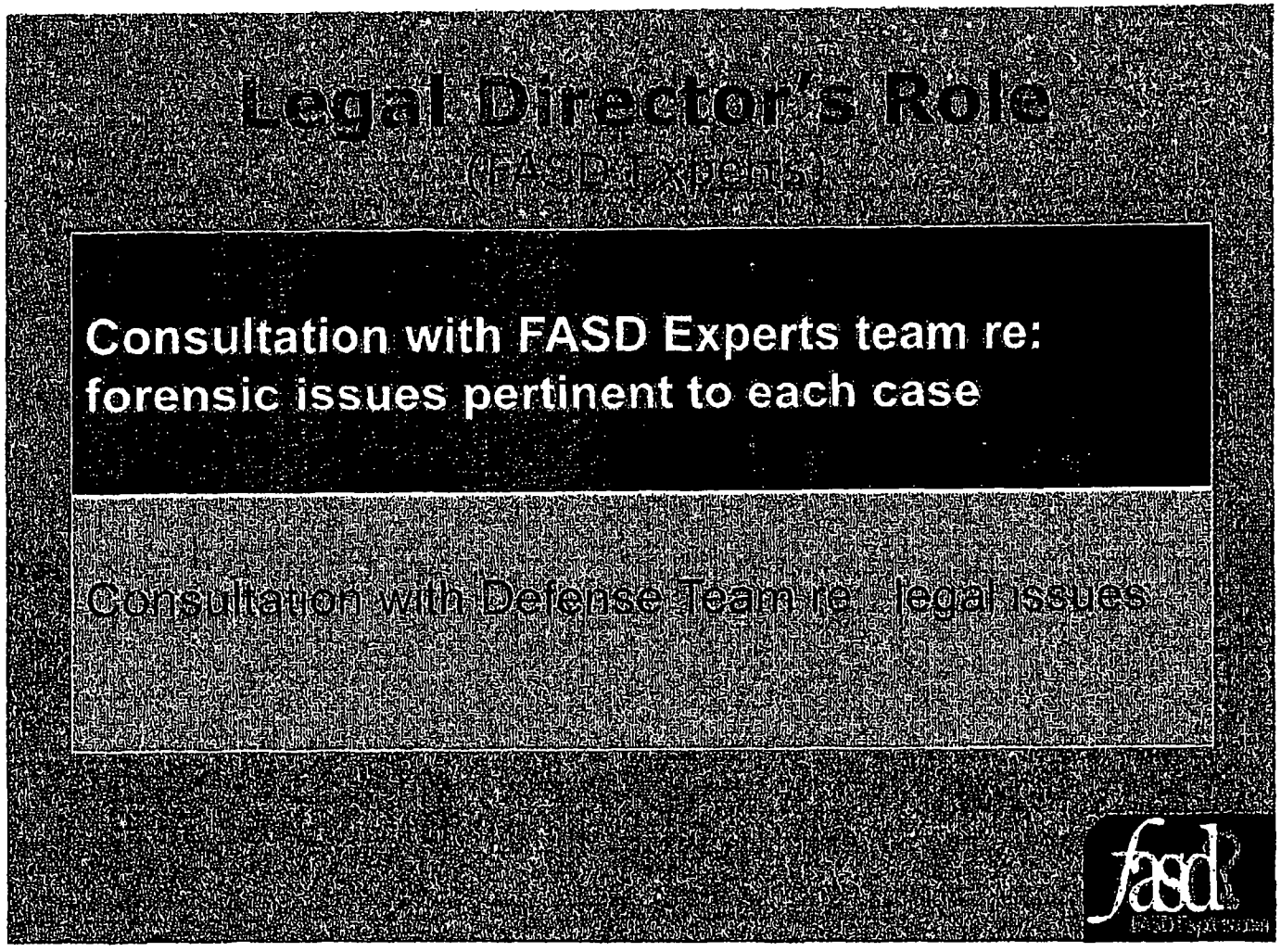


Medical Doctor's Role

(FASD Experts)

Element	Criterion
Structural	Face / Growth Head circumference ≤ 10th percentile Abnormal brain on CT/MRI
Neurological	Motor problems, seizures not due to postnatal insult, soft signs

fasd


Legal Director's Role
(FASD Experts)
Consultation with FASD Experts team re: forensic issues pertinent to each case
Consultation with Defense Team re: legal issues
fasd

FASD Experts' Protocol: Forensic Application of the Scientific Method

- Structured case initiation: Program Director
- Explicit written retainer agreements with each Team member
- Consultation from FASD Experts' Legal Advisor Judge Wartnik
- Standardized (yet flexible) assessment process
- Clear division of labor/unique contributions from each Team member
- Reliance on external experts for structural/neurological deficits
- Standardized tests with published norms and known reliability/validity
- Reliance in record review on *observable behavior*
- Group consultation (including legal expertise) and consensus

fasd

FASD Expert's Protocol

Empirically-based Criteria

- CDC, 2004
- IOM, 1996

Reliability Enhancement

- malingering assessment
- informant selection criteria
- differential diagnosis

Evidentiary Compliance

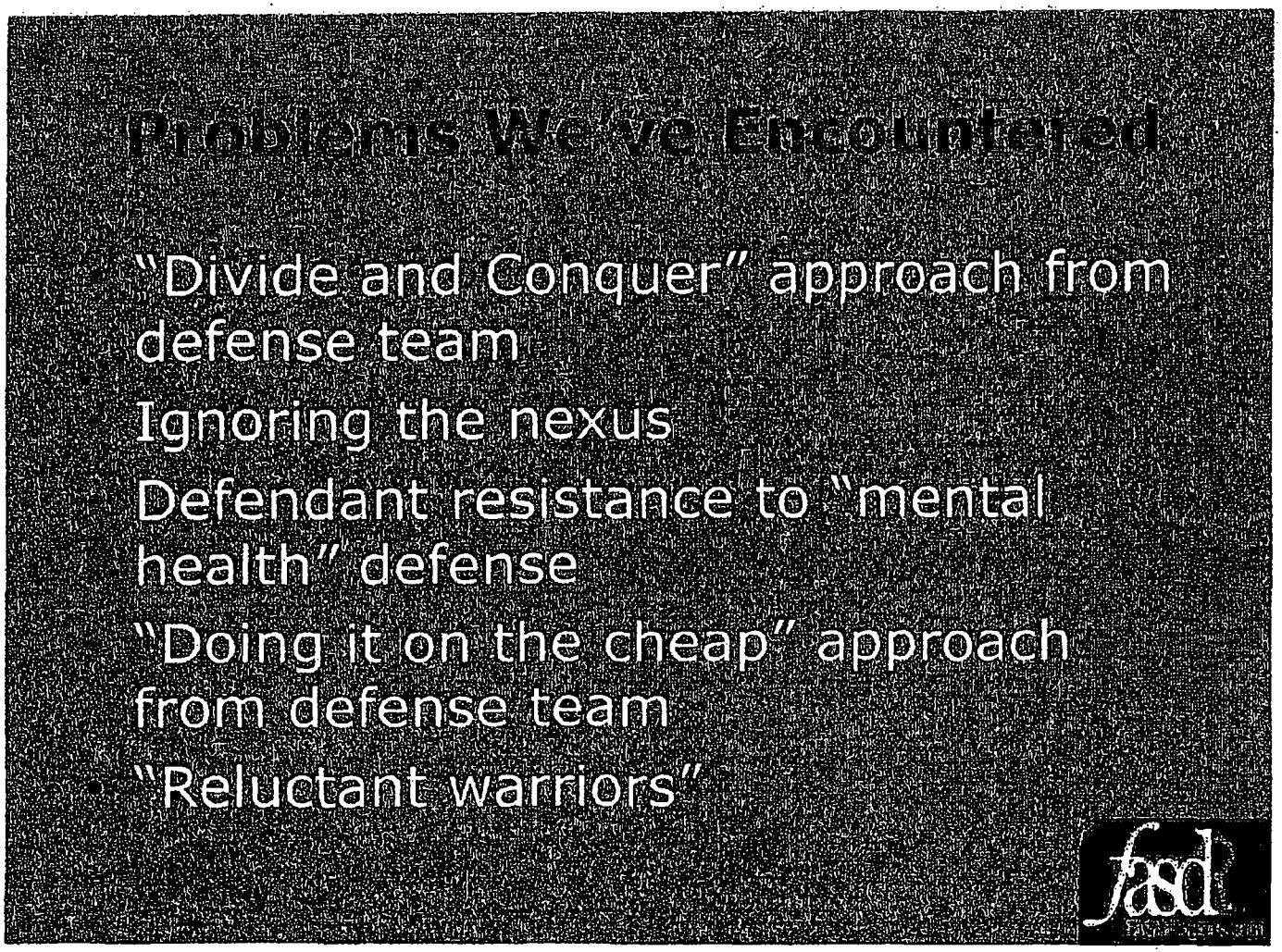
- ***relevance***
- ***reliability*** (testable, peer-reviewed/published, known error rate, generally accepted in scientific community)
  - Frye: evidence must have general acceptance in relevant scientific community
  - Daubert: 2-pronged test of evidence admissibility

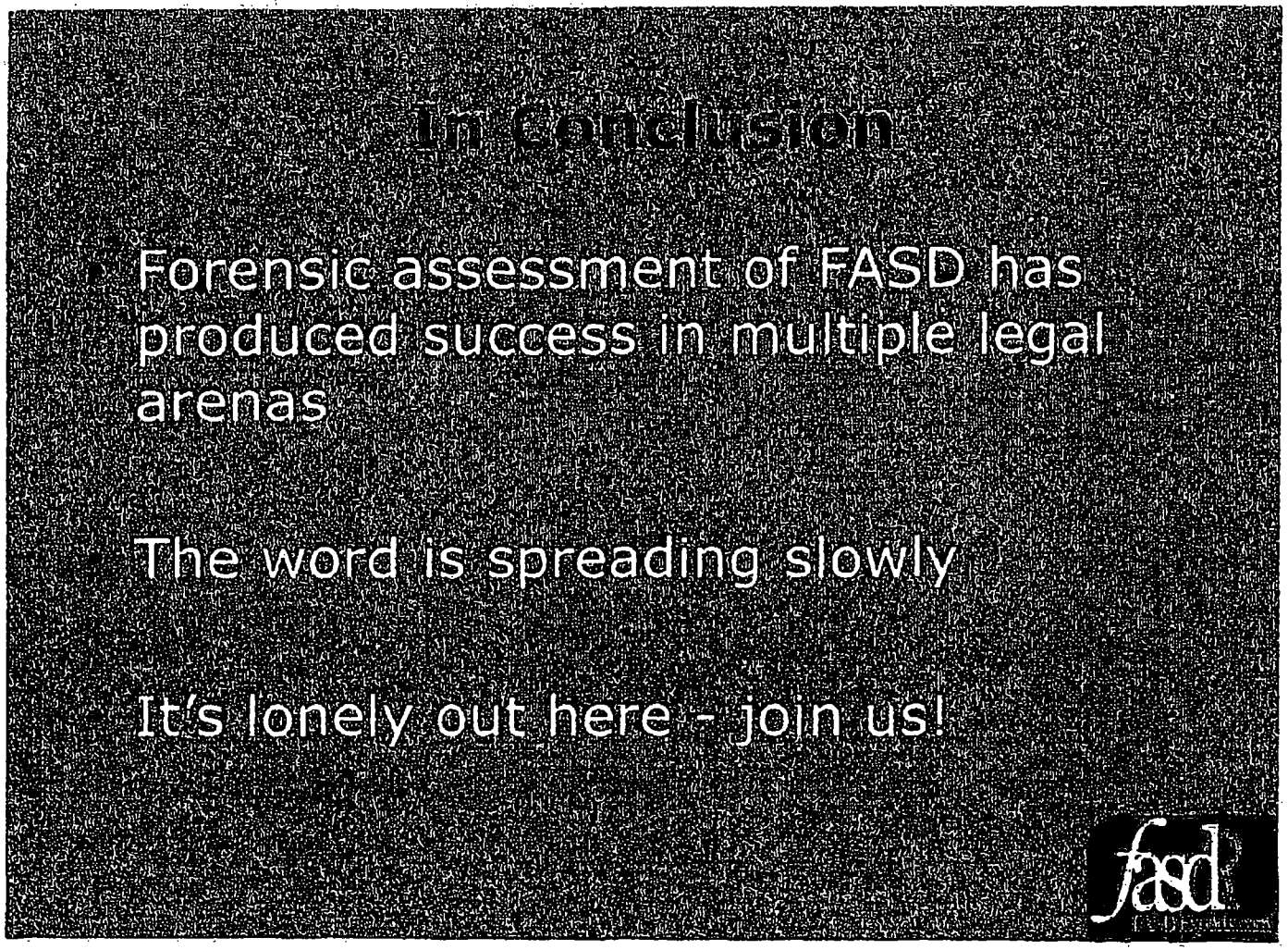
fasd

Why go we go to all this trouble?

- Adversarial context
- "Heinous Crimes" / unsympathetic to a trier of fact
- FASD isn't "intuitively obvious" to trier of fact
- Lack of extensive forensic history with FASD
- Difficulty of relating scientific information to judges/lay juries
- Absence of FASD in DSM-IV-TR Axis I
- FASD Experts is unique → no prior established assessment procedure for adults

fasd


Problems We've Encountered
"Divide and Conquer" approach from defense team
Ignoring the nexus
Defendant resistance to "mental health" defense
"Doing it on the cheap" approach from defense team
"Reluctant warriors"
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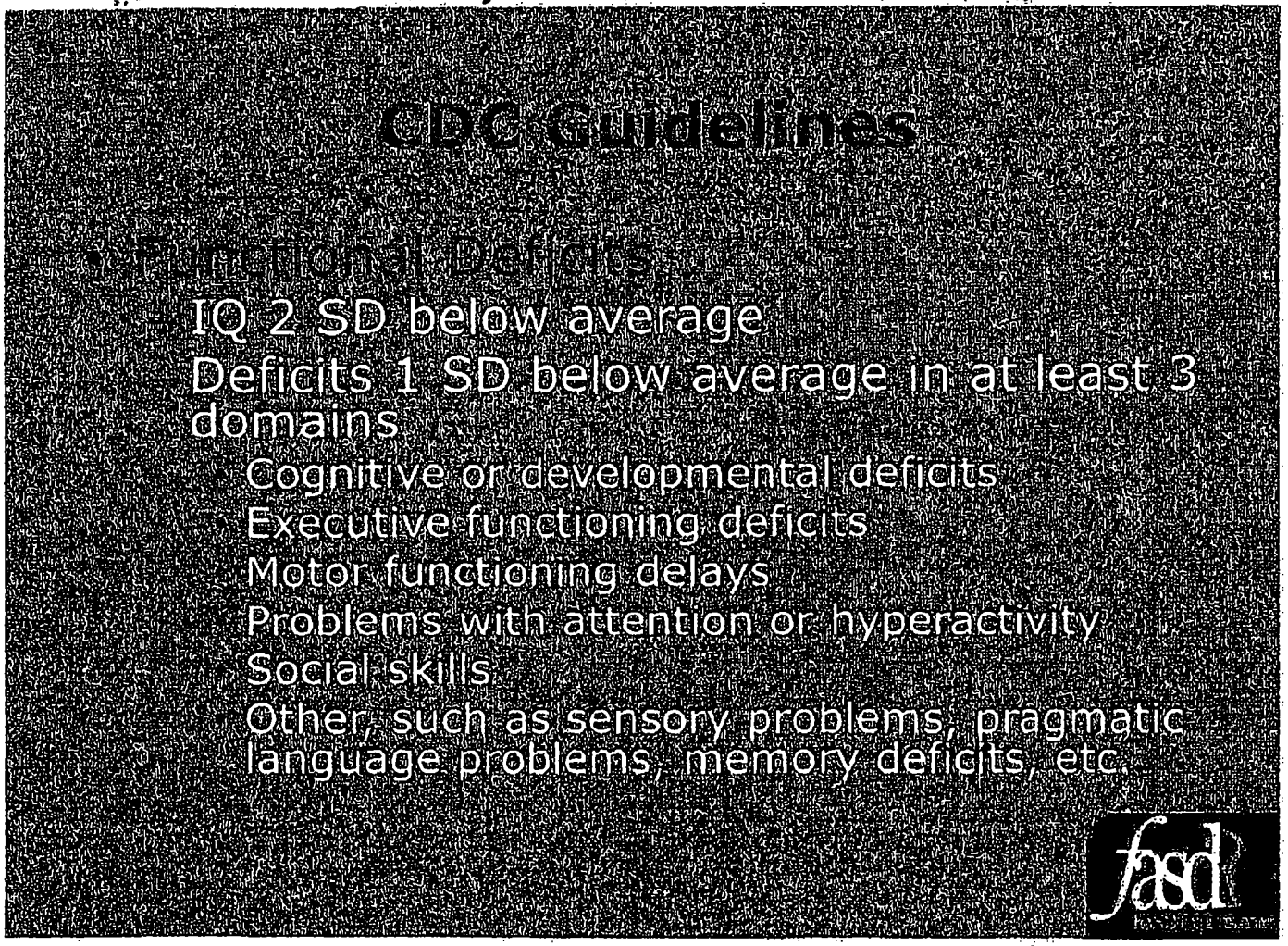

In Conclusion
Forensic assessment of FASD has produced success in multiple legal arenas
The word is spreading slowly
It's lonely out here - join us!
fasd

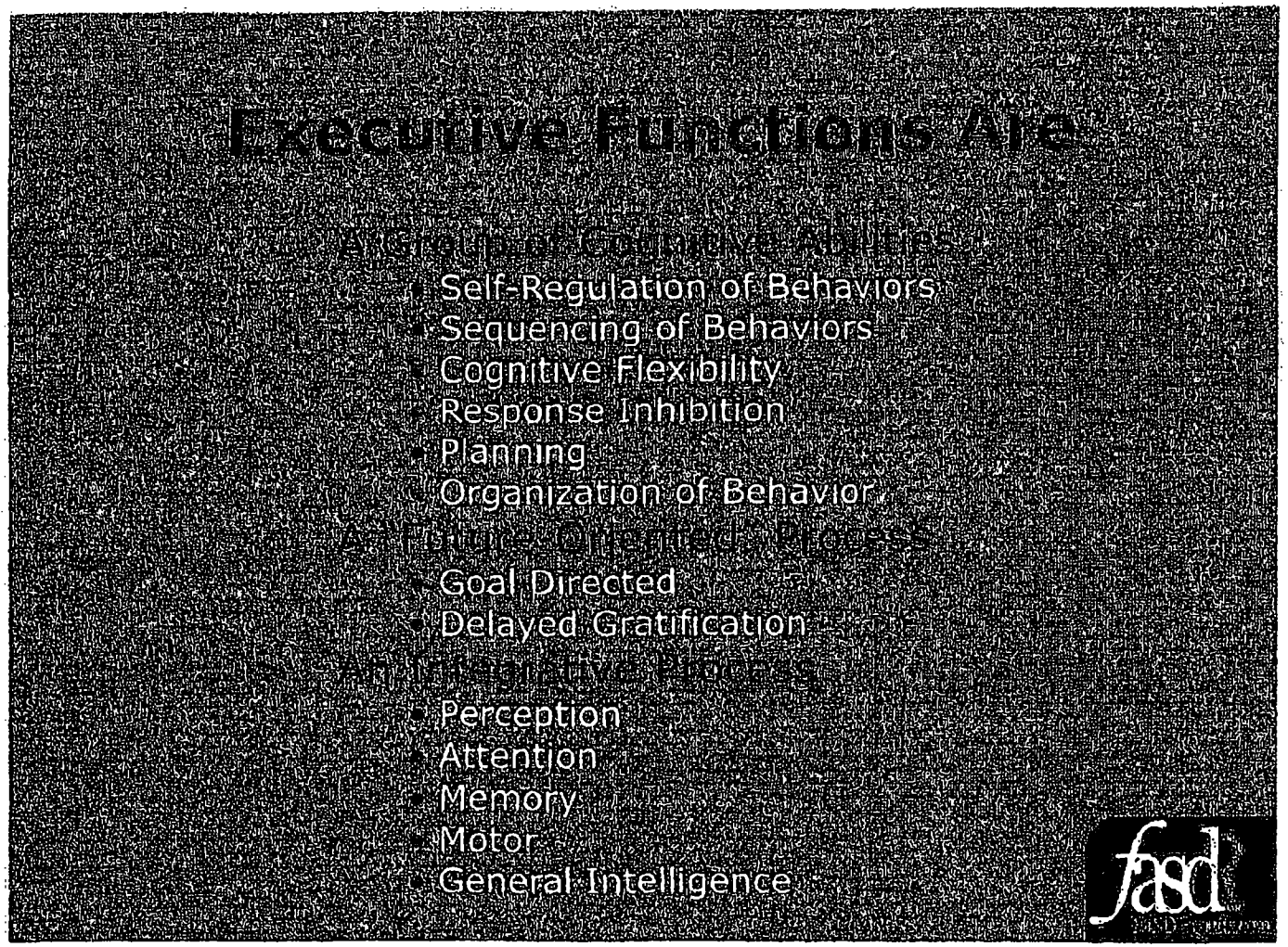
CDC Guidelines

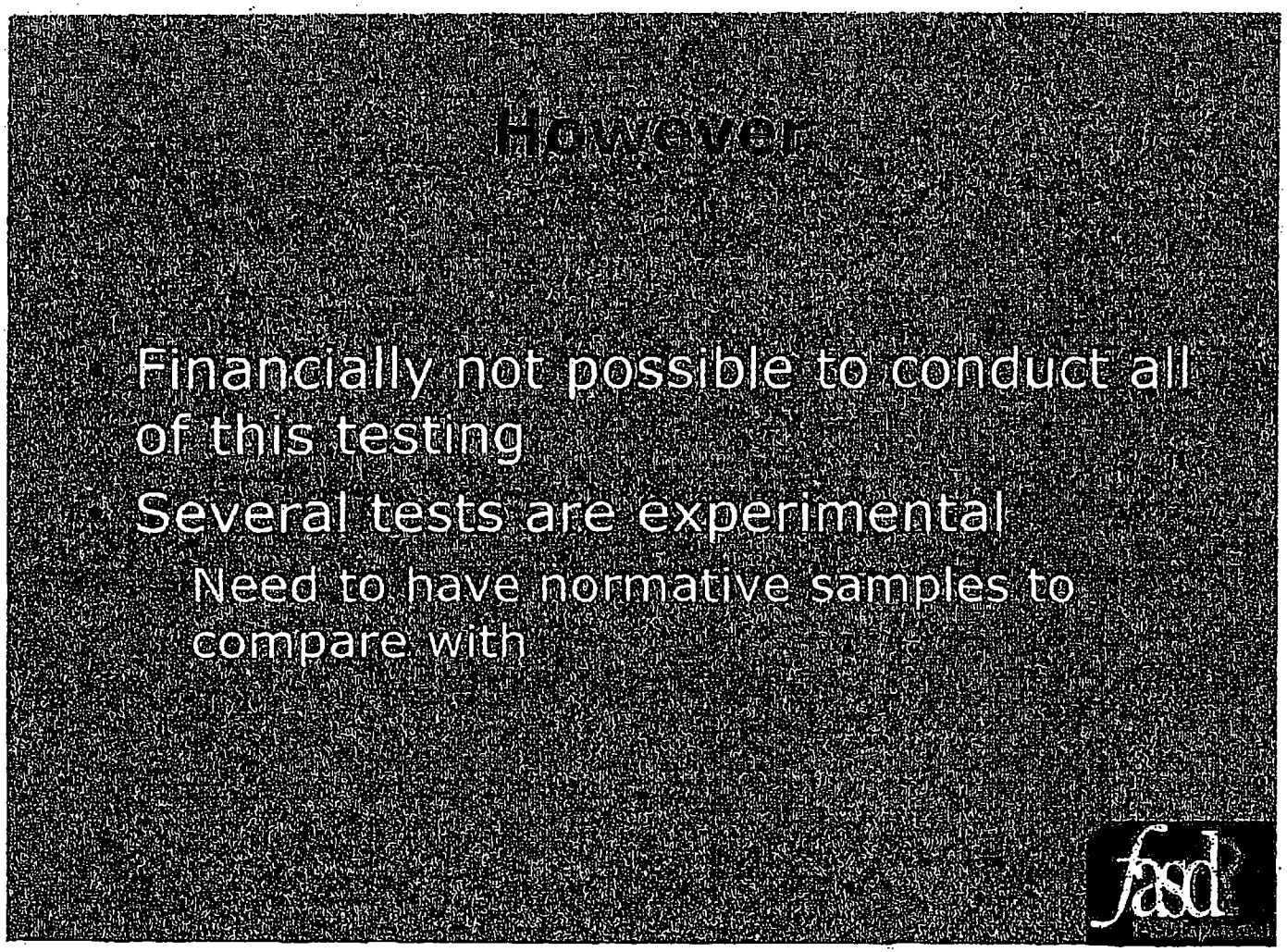
- Confirmed prenatal alcohol exposure
- Facial Dysmorphology
  - Smooth Philtrum
  - Thin upper lip
  - Small palpebral fissures
- Growth Deficits
  - Confirmed height, weight or both below 10th percentile at one point in time
- CNS Abnormalities
  - Structural
    - Head circumference below 10th percentile
    - Evidence of brain abnormalities in imaging
  - Neurological impairments
- And /or...

fasd

5417


CDC Guidelines
Functional Deficits
IQ 2 SD below average
Deficits 1 SD below average in at least 3 domains
Cognitive or developmental deficits
Executive functioning deficits
Motor functioning delays
Problems with attention or hyperactivity
Social skills
Other, such as sensory problems, pragmatic language problems, memory deficits, etc.
fasd

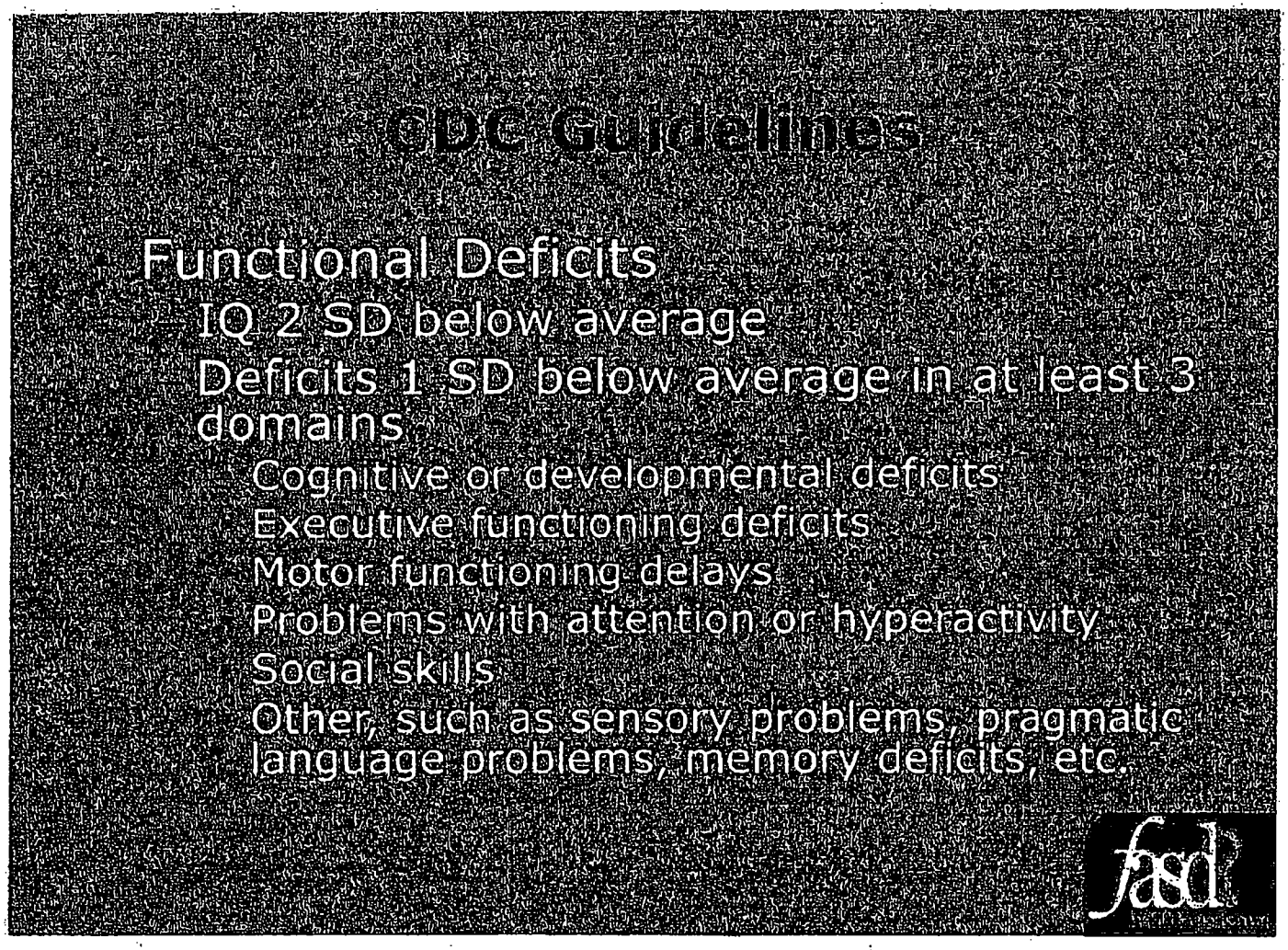

Executive Functions Are
A Group of Cognitive Abilities
Self-Regulation of Behaviors
Sequencing of Behaviors
Cognitive Flexibility
Response Inhibition
Planning
Organization of Behavior
A Future Oriented Process
Goal Directed
Delayed Gratification
An Interactive Process
Perception
Attention
Memory
Motor
General Intelligence
fasd

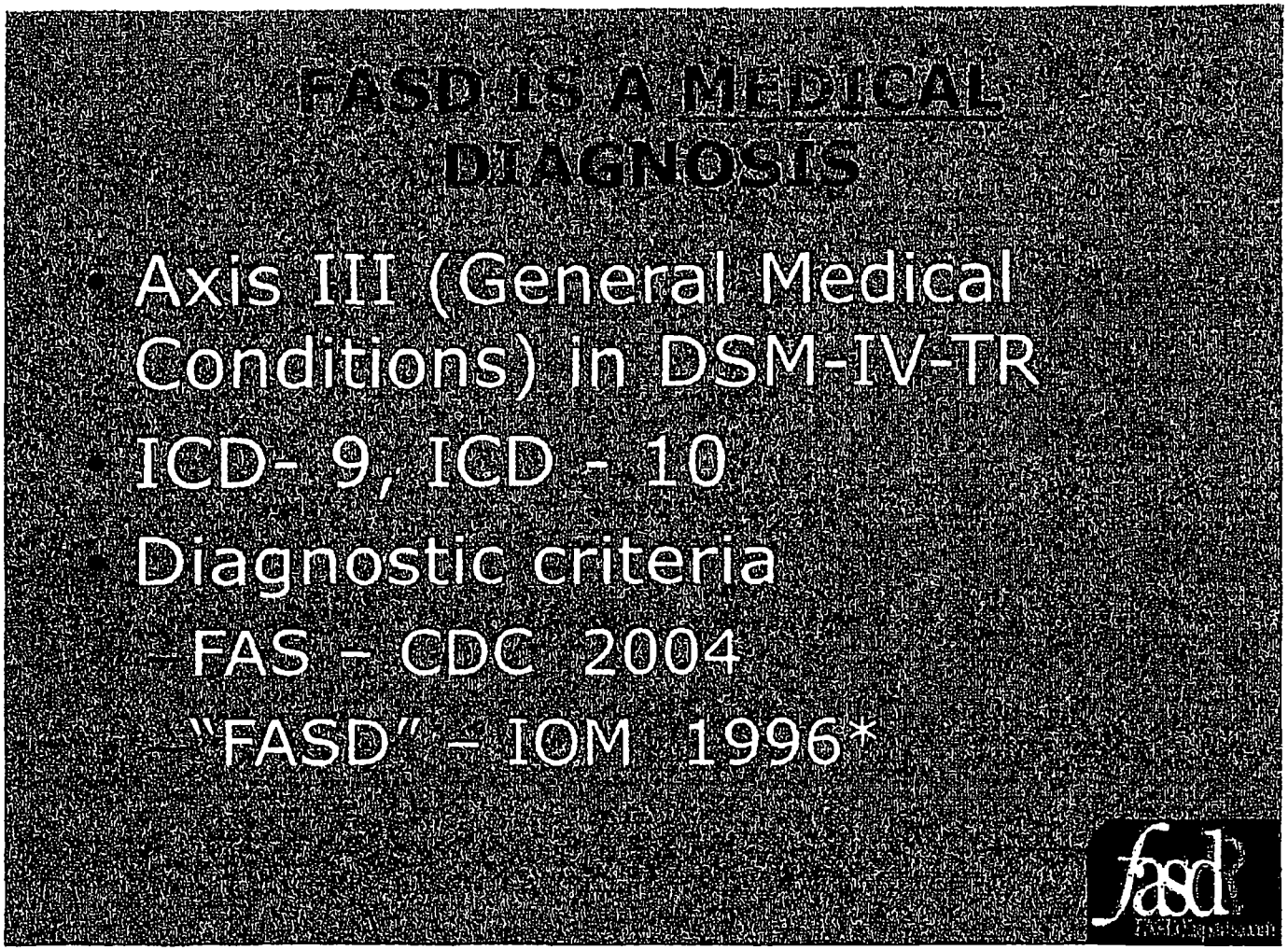

However
Financially not possible to conduct all of this testing
Several tests are experimental
Need to have normative samples to compare with
fasd

So

Created a battery that incorporated many of the most salient clinical tests based on 30+ years of research experience

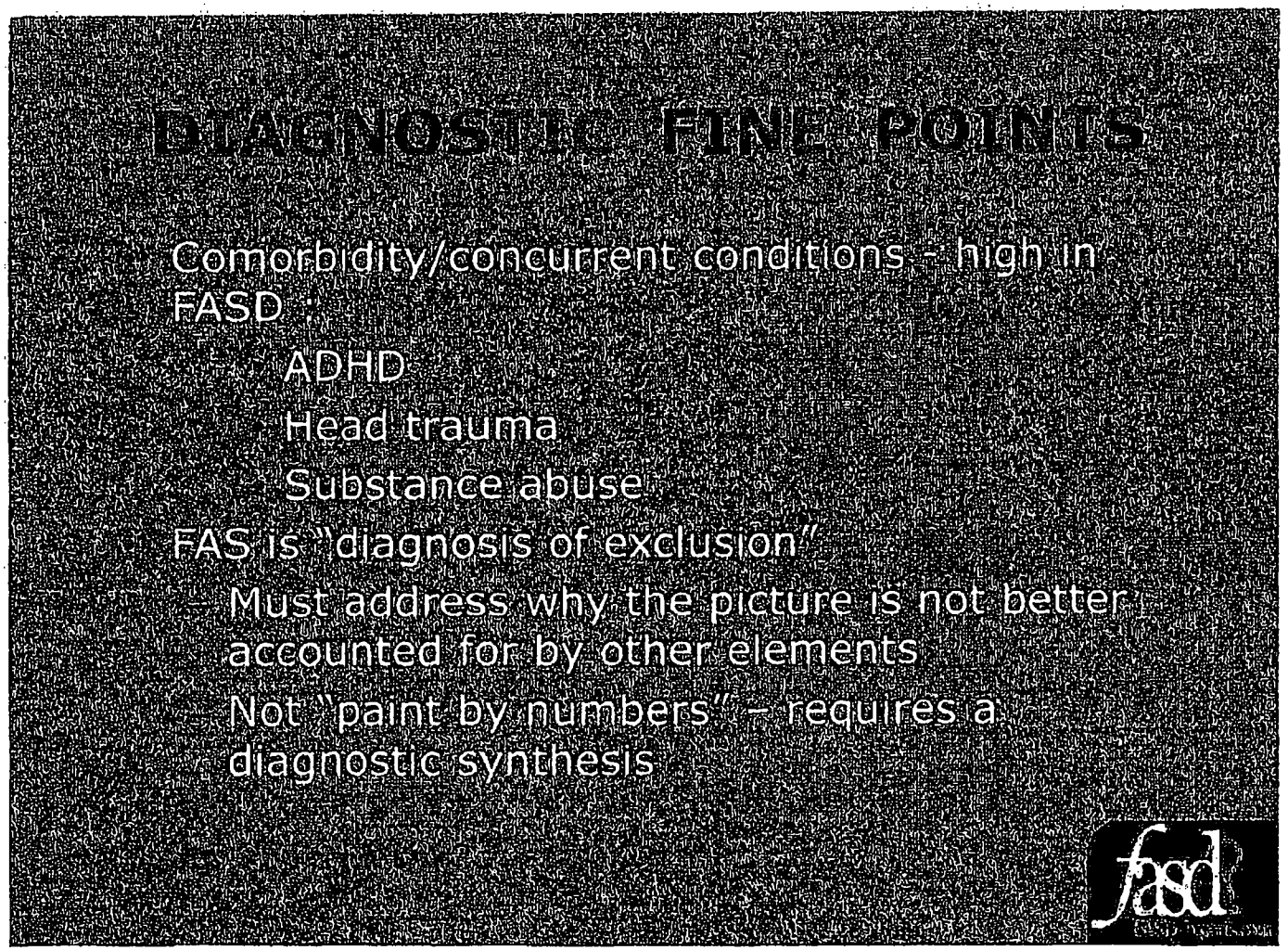
- IQ
- Achievement
- Learning and Memory (verbal and visual)
- Attention
- Motor Coordination
- Executive Functions
- Psychiatric Symptoms
- Adaptive behaviors


CDC Guidelines
Functional Deficits
IQ 2 SD below average
Deficits 1 SD below average in at least 3 domains
Cognitive or developmental deficits
Executive functioning deficits
Motor functioning delays
Problems with attention or hyperactivity
Social skills
Other, such as sensory problems, pragmatic language problems, memory deficits, etc.
fasd


FASD IS A MEDICAL DIAGNOSIS
• Axis III (General Medical Conditions) in DSM-IV-TR
• ICD- 9, ICD - 10
• Diagnostic criteria
– FAS – CDC 2004
– "FASD" – IOM 1996*
fasd

ELEMENTS IN MAKING THE DIAGNOSIS WHICH UNIQUELY REQUIRE M.D. INVOLVEMENT

- Medical chart review
- Physical examination (general and specialized)
- Facial Photographic Analysis (current and historical)
- Ancillary testing (ordering de novo, review of prior)
  - MRI/DTI
  - EEG
  - Other


DIAGNOSTIC FINE POINTS
Comorbidity/concurrent conditions - high in FASD
ADHD
Head trauma
Substance abuse
FAS is "diagnosis of exclusion"
Must address why the picture is not better accounted for by other elements
Not "paint by numbers" – requires a diagnostic synthesis
fasd

pdf
DIFFERENTIAL DIAGNOSIS

DIFFERENTIAL DIAGNOSIS

Dec 2004 pp. 17 - 18

It is important to determine that the observed functional deficits are not better explained by other causes

significantly disrupted home environments or other external factors can produce functional deficits in multiple domains that overlap with the domains that are affected by FAS

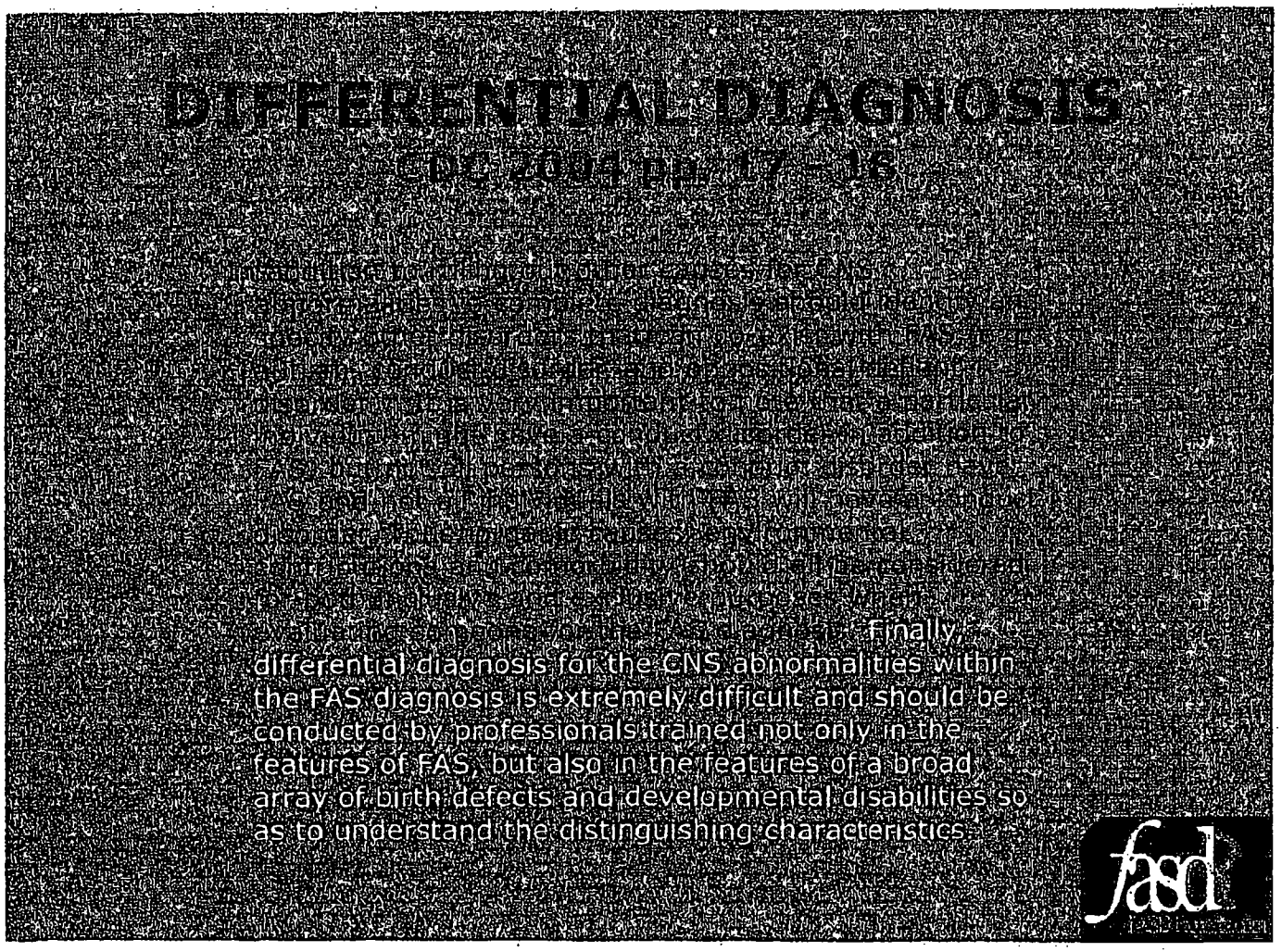
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DIFFERENTIAL DIAGNOSIS

CDC 2004 pp. 17 - 18

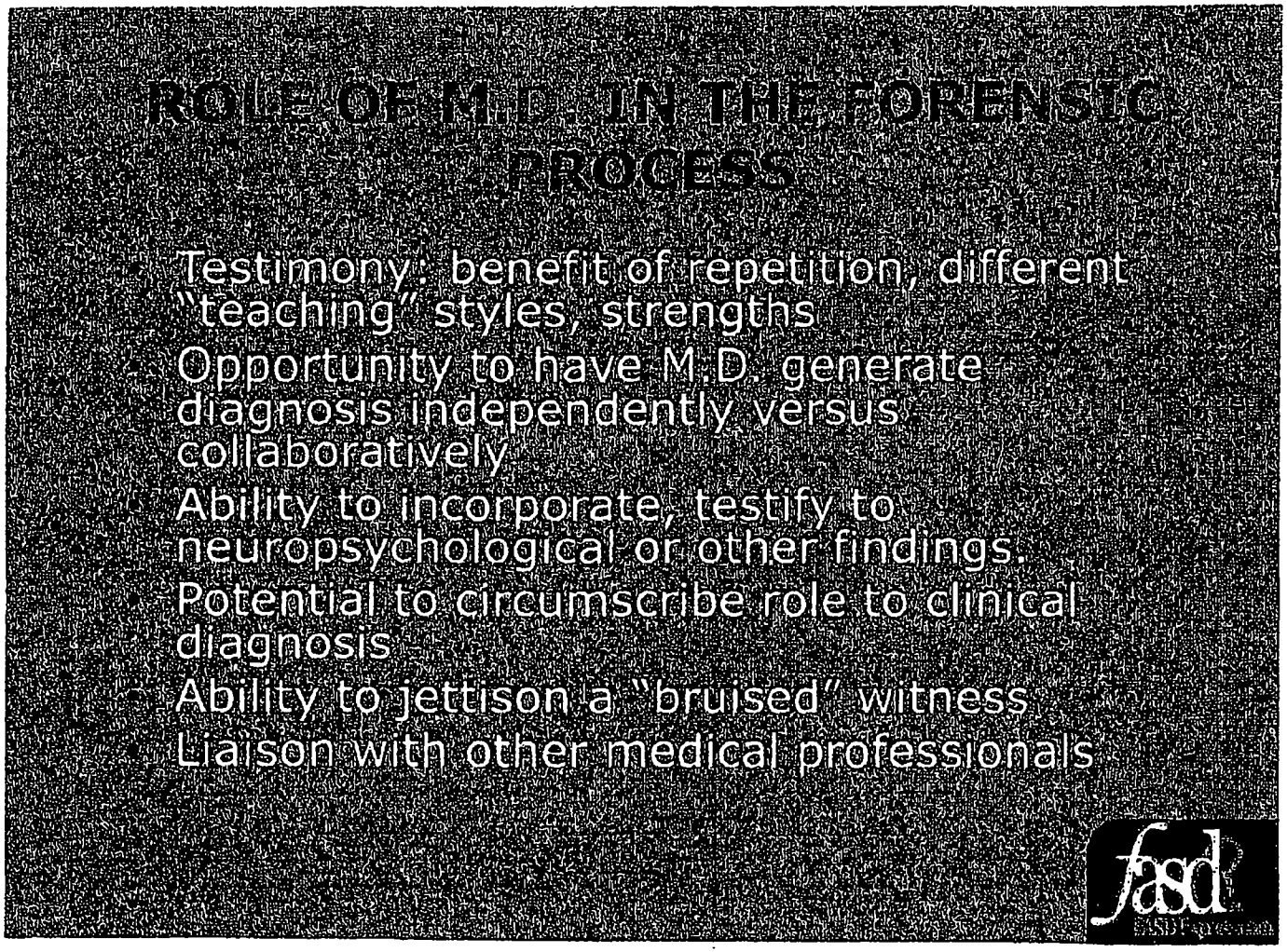
- The more difficult differentiation is for CNS abnormalities resulting from environmental influences (e.g. abuse or neglect, disruptive homes, and lack of opportunities)

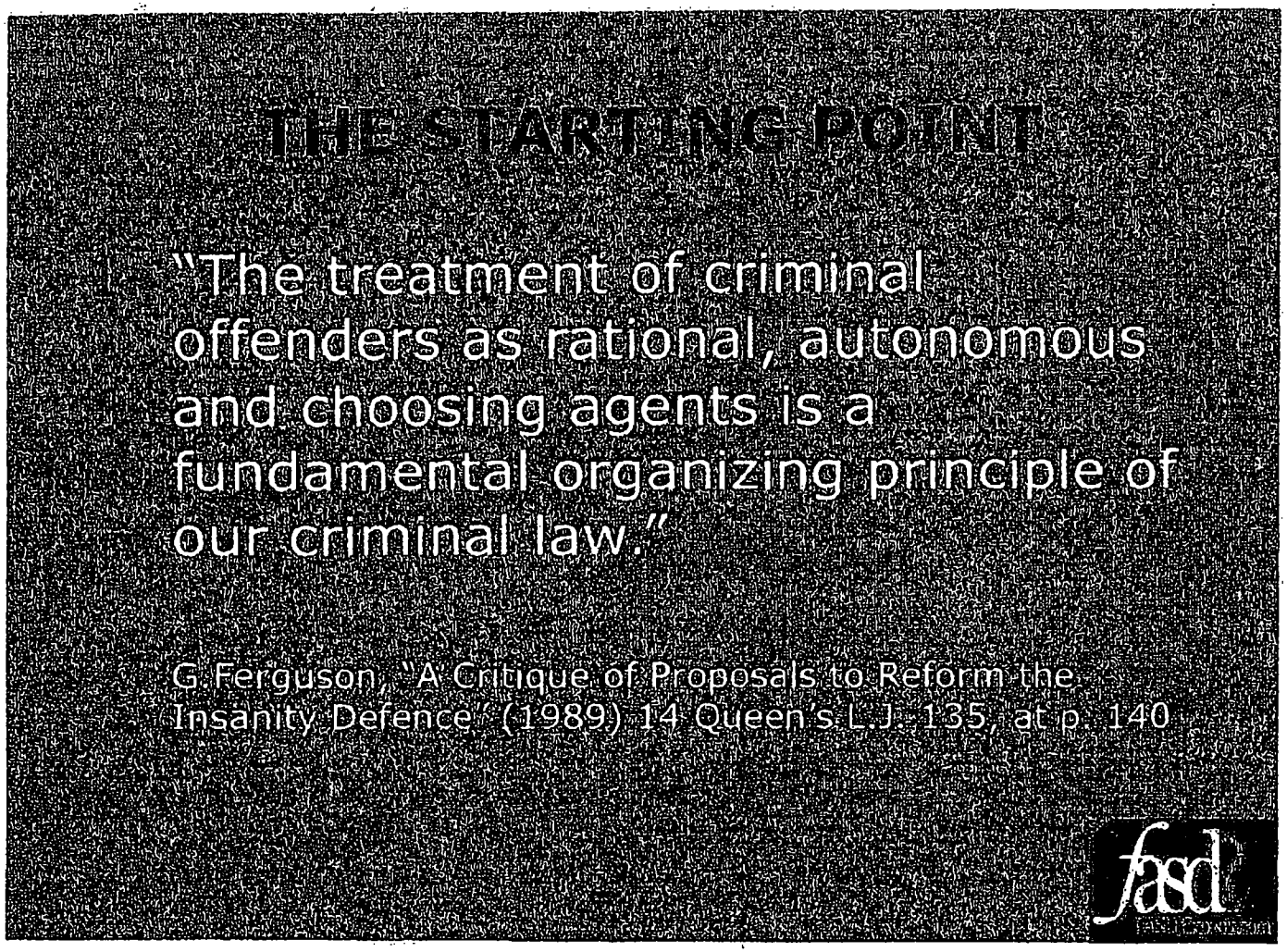
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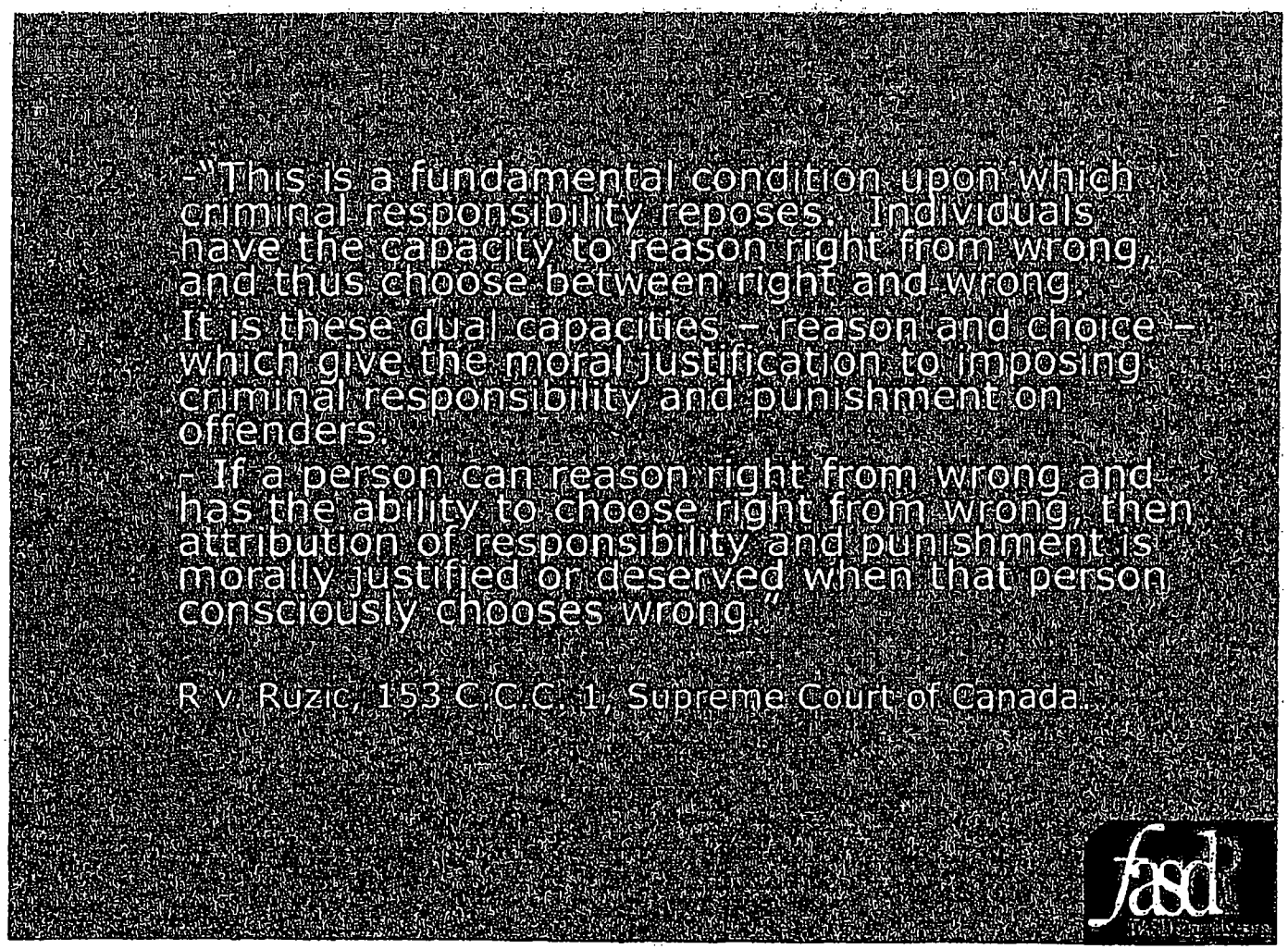

DIFFERENTIAL DIAGNOSIS
(pg 2004 pp. 17 - 18)
Finally, differential diagnosis for the CNS abnormalities within the FAS diagnosis is extremely difficult and should be conducted by professionals trained not only in the features of FAS, but also in the features of a broad array of birth defects and developmental disabilities so as to understand the distinguishing characteristics.
fasd

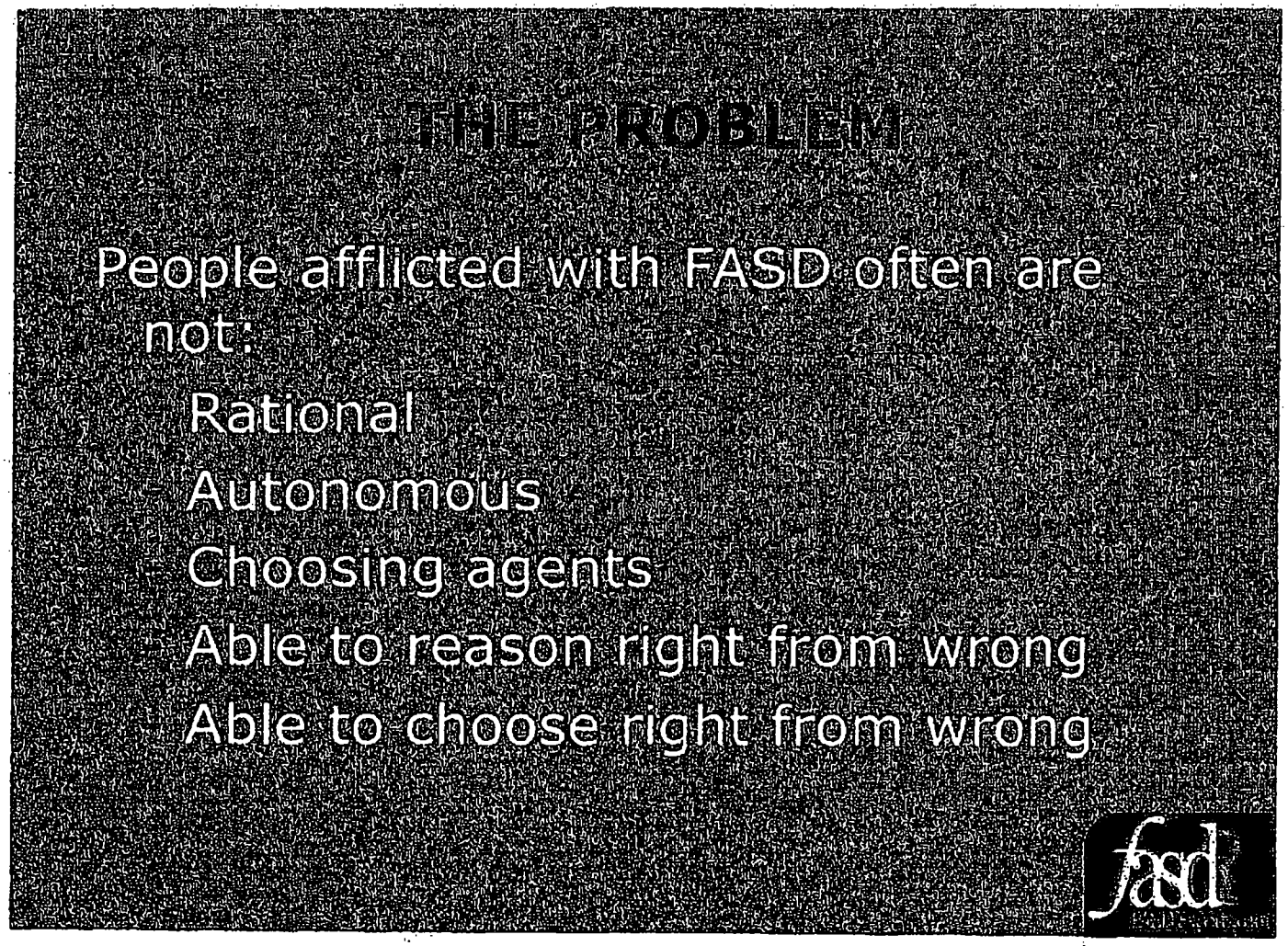
FAMILIARITY WITH FORENSIC NUANCES

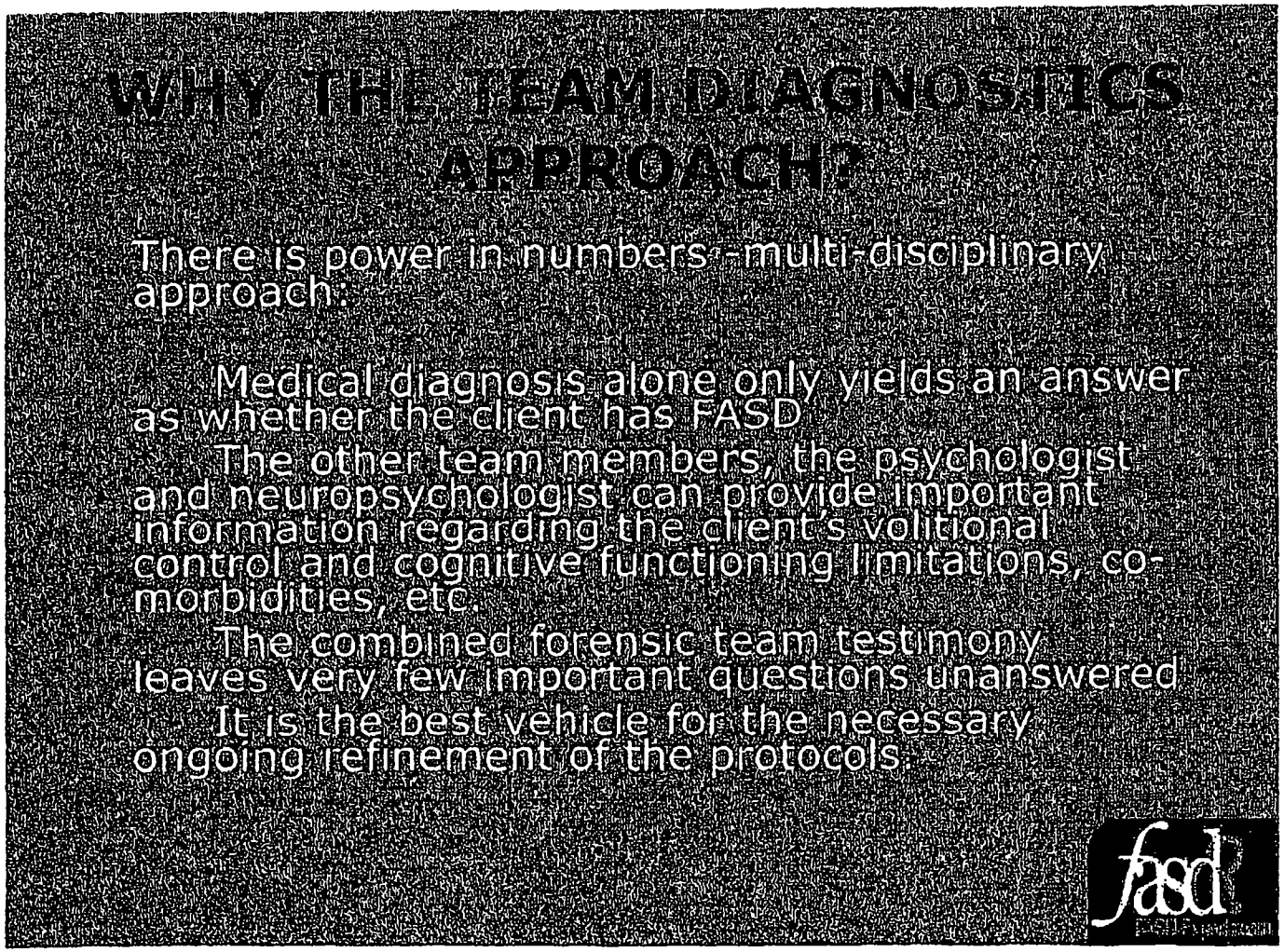
- General forensic background (familiarity with procedural issues, terminology, report standards)
  - Standard for "reasonable medical certainty"
  - Distinction between forensic and clinical roles
  - Licensing requirement in venue
- Admissability/evidentiary issues of data relied upon:
  - Frye
  - Daubert
  - Standard unique to the venue

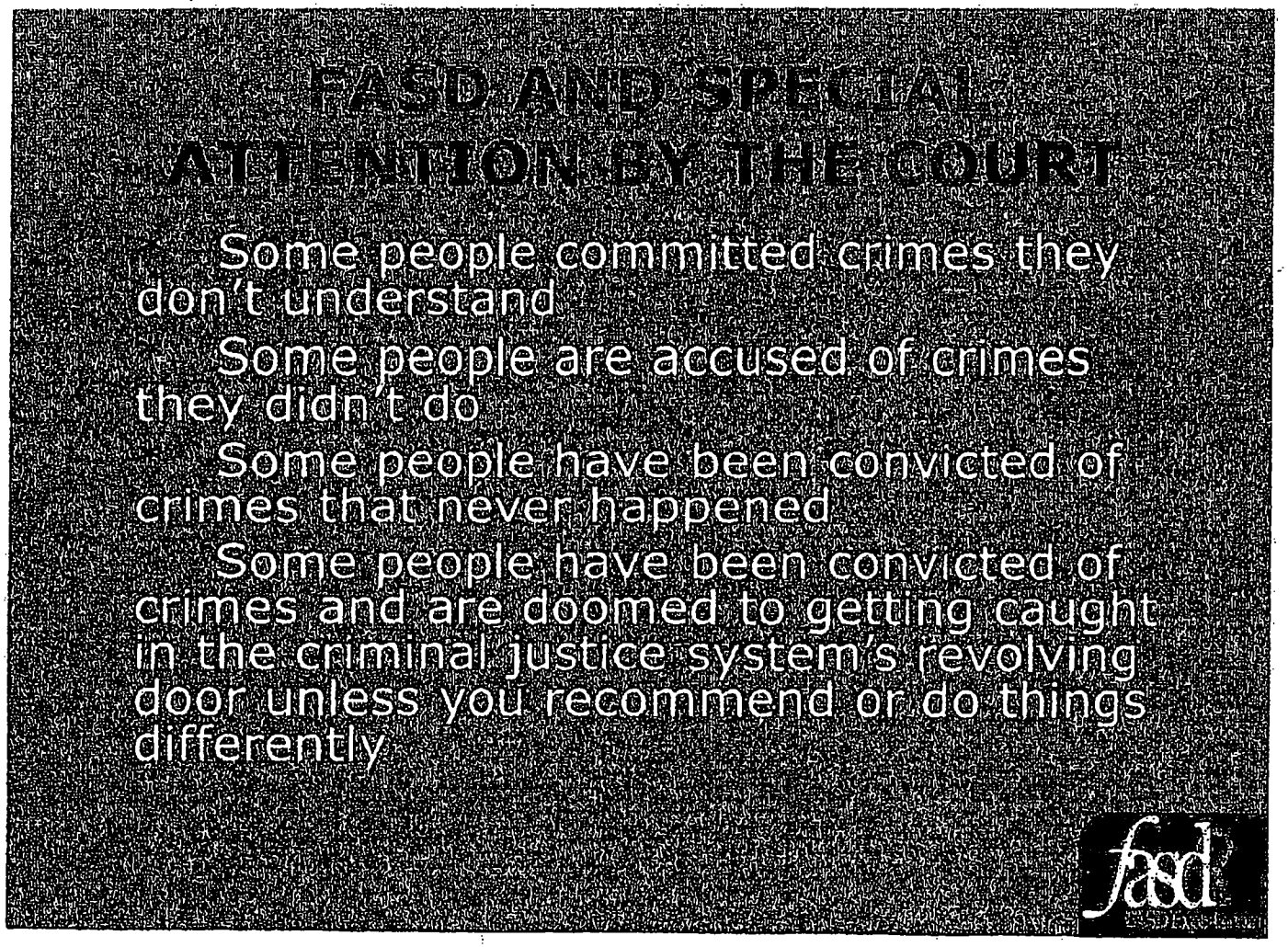

ROLE OF M.D. IN THE FORENSIC PROCESS
Testimony: benefit of repetition, different "teaching" styles, strengths
Opportunity to have M.D. generate diagnosis independently versus collaboratively
Ability to incorporate, testify to neuropsychological or other findings.
Potential to circumscribe role to clinical diagnosis
Ability to jettison a "bruised" witness
Liaison with other medical professionals
fasd

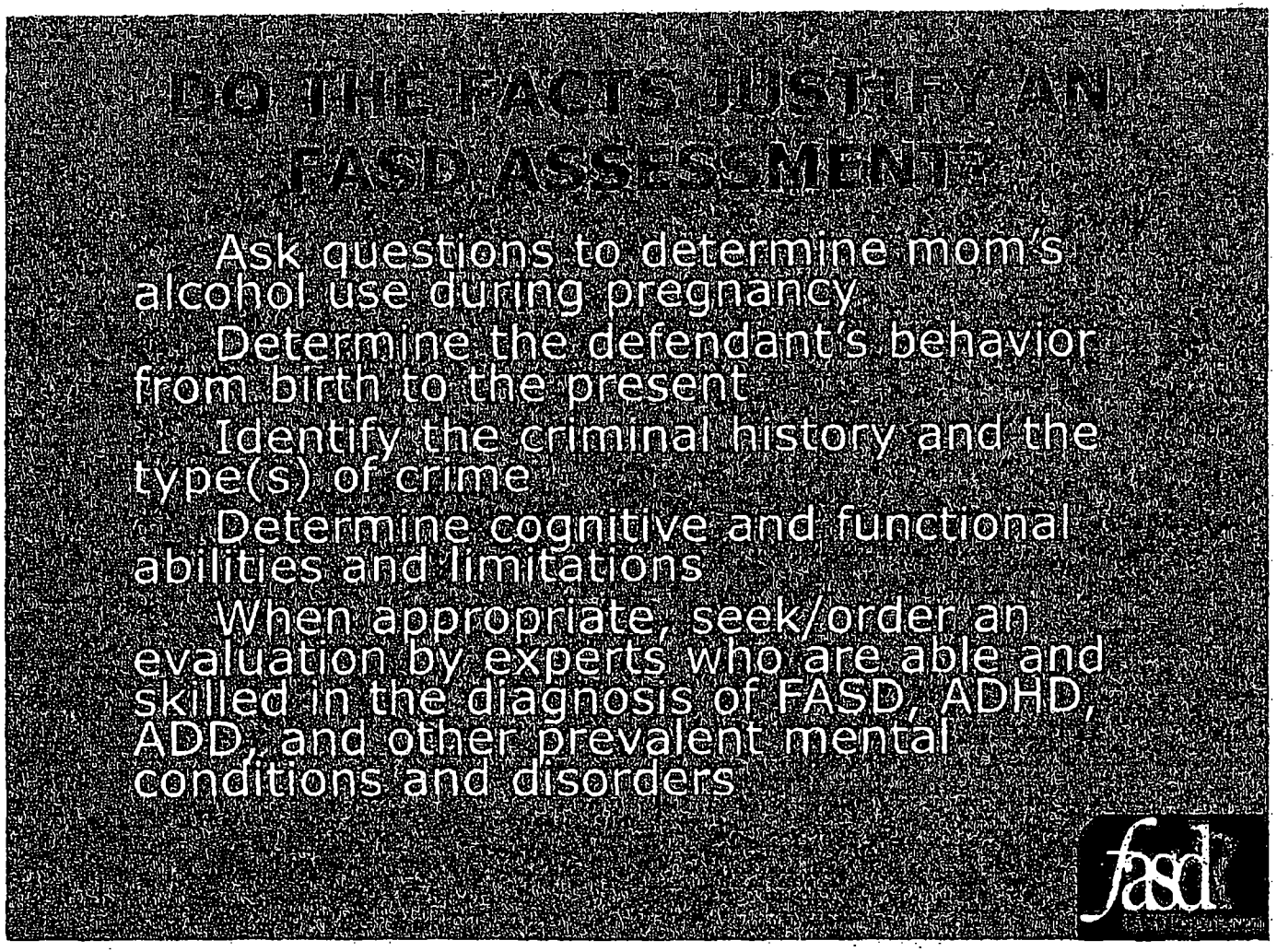

THE STARTING POINT
"The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law."
G Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 Queen's L J 135 at p. 140
fasd


- "This is a fundamental condition upon which criminal responsibility reposes. Individuals have the capacity to reason right from wrong, and thus choose between right and wrong. It is these dual capacities – reason and choice – which give the moral justification to imposing criminal responsibility and punishment on offenders.
- If a person can reason right from wrong and has the ability to choose right from wrong, then attribution of responsibility and punishment is morally justified or deserved when that person consciously chooses wrong."
R v. Ruzic, 153 C.C.C. 1, Supreme Court of Canada
fasd


THE PROBLEM
People afflicted with FASD often are not:
Rational
Autonomous
Choosing agents
Able to reason right from wrong
Able to choose right from wrong
fasd


WHY THE TEAM DIAGNOSTICS APPROACH?
There is power in numbers--multi-disciplinary approach:
Medical diagnosis alone only yields an answer as whether the client has FASD
The other team members, the psychologist and neuropsychologist can provide important information regarding the client's volitional control and cognitive functioning limitations, co-morbidities, etc.
The combined forensic team testimony leaves very few important questions unanswered
It is the best vehicle for the necessary ongoing refinement of the protocols
fasd


FASD AND SPECIAL ATTENTION BY THE COURT
Some people committed crimes they don't understand
Some people are accused of crimes they didn't do
Some people have been convicted of crimes that never happened
Some people have been convicted of crimes and are doomed to getting caught in the criminal justice system's revolving door unless you recommend or do things differently
fasd


DO THE FACTS JUSTIFY AN FASD ASSESSMENT?
Ask questions to determine mom's alcohol use during pregnancy
Determine the defendant's behavior from birth to the present
Identify the criminal history and the type(s) of crime
Determine cognitive and functional abilities and limitations
When appropriate, seek/order an evaluation by experts who are able and skilled in the diagnosis of FASD, ADHD, ADD, and other prevalent mental conditions and disorders
fasd

FASD Experts: Future Directions

- Increasing capacity: Training/consultation with other forensic groups
- Continuous refinement of our protocol (e.g., a priori hypotheses re: potential findings)
- Adding additional consulting specialists as needed (e.g., radiologist)
- Research: Suggestibility, FABS

My Unexpected Journey in Applied Biomathematics

Fred L. Bookstein
Department of Anthropology
University of Vienna, Austria
&
Department of Statistics, and Department of Psychiatry & Behavioral Sciences, University of Washington, Seattle, WA, USA
&
Fetal Alcohol and Drug Unit, University of Washington
Seattle, WA, USA
fib@stat.washington.edu

Abstract

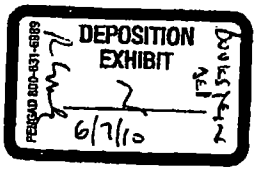
Fetal alcohol syndrome (FAS), the most common avoidable human birth defect, is the extensive irreversible brain damage caused by heavy prenatal alcohol exposure. Following the discovery of FAS in 1973, a multidisciplinary research community began applying discipline-specific methods to investigate the mechanisms underlying FAS and its consequences for the victims' cognition and social behavior. An academic biomathematician and statistician, since 1984 I have collaborated with one American research group studying this condition.

First we examined mainly these patients' behavioral deficits, but more recently we have been pursuing an interdisciplinary "endophrenology," the correlated brain abnormalities and behavioral problems among these patients. As the research has become more interdisciplinary, it has become better science, with deeper implications for social medicine, but at the same time its reception by our colleagues has become steadily more negative. This essay, in the form of a memoir, reviews the new quantitative techniques we contributed to the research community so our research could go forward, and also the estrangement that each successive innovation engendered between our group and the same research community. There are implications here for how the field of science and technology studies construes and recounts novelties of quantitative interdisciplinary bioscience.

Keywords

birth defects, corpus callosum, death penalty, endophrenology, fetal alcohol spectrum disorders, fetal alcohol syndrome, multivariate statistics, neuroanatomy, partial least squares, science and technology studies, sociology of science, thin-plate spline

September 4, 2005; accepted October 5, 2005
Biological Theory 1(1) 2006, 67–77. © 2006 Konrad Lorenz Institute for Evolution and Cognition Research



My topic here is twofold: a bit of history of an emerging interdisciplinary endeavor and then the possible import of that narrative for studies in the history and philosophy of contemporary quantitative biomedical science. The content domain is what used to be called fetal alcohol syndrome (FAS), the earliest recognized member of the class of irremediable (but avoidable) neurological birth defects caused by prenatal exposure to high levels of alcohol. Twenty years ago I joined a small academic research project in Seattle that needed help with biostatistical methodology. The collaboration proved much more productive for the methodologist than for the scientist: findings were routine, with lots of publications but no breakthroughs. Separately, I was developing modern morphometrics in the rather different scientific context of evolutionary and developmental biology.

In the late 1990s, supported by a risk tolerance in the United States health research establishment that has since evaporated, we were able to fuse these two lines of work and in fact were able to establish an interdisciplinary "endophrenology" of FAS. The midline of the corpus callosum is a brain part quite easy to measure from images, and its shape is quite sensitive to damage from prenatal alcohol. The damage is strongly correlated with particular profiles of behavioral deficit, specifically the kinds of behavior problems that get these patients into serious legal trouble in the United States. Just since 2002, this interdisciplinary work has spun off new and practical screening protocols for making the brain damage visible in exposed newborn babies, and equally practical methods for arguing against some proposed American executions of convicted murders who have clear organic brain damage because of the same prenatal exposure.

Cognitively, this is a fine match between a fully biomathematical pattern engine and an emerging clinical medical imperative, one that has transformed a merely academic exercise into a splendid example of applied biomathematics as knowledge engineering. But in terms of the relevant social knowledge structures, especially the economic control structures, the corresponding developments are far from clear. The more directly relevant the work to concerns of social medicine, the lower, apparently, the willingness of the mainstream scientific community to support it.

It seems that one individual's work, no matter how interdisciplinary, is not sufficient to reify an interdiscipline as a thought community. The trail my colleagues and I leave of publications, diagrams, and software is constantly changing in rhetoric, audience, and level of abstraction or mathematization. This instability may bear implications for social studies of frontier science in a wide variety of ways: as a narrative of the haphazard progress of translational research, as a confrontation between biographical and institutional narrative styles in the history of science, or (the mode I prefer) as a fable about visuospatial rhetoric as a particularly contentious scientific *Denkstil*. Alternatively, one might infer that regardless of the apparent sophistication of modern commercial bioinformatics, the actual quantitative sciences of human biology are still stuck at the stage at which Ludwik Fleck (1935) observed them 70 years ago.

Although the essay to follow lies mainly in the genre of memoir, the reader may benefit from two short reviews: a sketch of the scientific and political history of the underlying medical condition and a very brief biographical note about the author's academic trajectory.

Prenatal exposure to high levels of alcohol damages fetuses FAS is an ancient human birth defect recognized only about 30 years ago. The first report of this disease appeared in a medical journal, *Lancet*, as recently as 1973 (Jones et al. 1973). Its authors emphasized how unexpected it was that seven babies born in a Seattle hospital all had the same odd facial signs and all had alcoholic mothers. A community of "fetal alcohol researchers" quickly emerged that set out to borrow a variety of methodologies from adjacent fields in order to explore this interesting phenomenon. That facial pattern—short palpebral fissures (eyelids), flat midface, thin upper lip, indistinct philtrum (the groove in the middle of the upper lip)—was quickly confirmed in samples in other cities and countries, and earlier publications were unearthed in which the connection with alcohol had been suspected before. Studies in animals went forward whereby the mechanism of the damage could be traced, its focus on the fetal *brain* demonstrated, and the uniqueness of the cause established (specifically, exposure to "high" levels of alcohol, meaning binge drinking or steady drinking by the pregnant mother). At the same time, it was becoming obvious that people with FAS and related conditions (the patients now labeled more broadly as fetal alcohol spectrum disorders, FASD) have severe behavioral deficits that make their later lives miserable. Nowadays fetal risk is mentioned on those American wine-bottle labels (along with the advice not to operate heavy machinery), there are signs in restaurants telling pregnant women not to drink, and, in general, fetal alcohol damage is widely regarded as the world's most prevalent "totally avoidable birth defect." The topic is clearly of some interest to the wider public and the wider political system—in the United States, that broad public awareness began with Michael Dorris's autobiographical essay (Dorris 1989), *The Broken Cord*, a surprise best-selling book of 1989. For a good introduction, see the book by my colleague Ann Streissguth (1997), *Fetal Alcohol Syndrome*.

About the author A child prodigy in mathematics, I graduated college at age 18 with an honors degree in mathematics and physics, somehow acquired a master's degree in sociology, and finally, at age 30, was granted a PhD in statistics and

zoology for work on the methodology of biological shape. In the quarter-century since then I've turned up in a wide range of research contexts, including human growth and development, gerontology, geology, radiology, and, lately, human evolution. Currently, as the author's block of this article should be confirming, I am an academic *malgré lui* on two continents in three disparate disciplines: statistics, psychiatry, and anthropology. My teaching is in science and technology studies (specifically, the history and psychology of the quantitative physical and natural sciences), along with courses in the professional specialty, morphometrics, that I founded via my 1977 dissertation (Bookstein 1978). (Morphometrics is the quantitative study of biological shape.) My emergence as a recognized expert in fetal alcohol matters has come as a genuine surprise to my teachers, to my colleagues, to my family, and to me. This essay, along with the talks on which it is based, is my first public memoir of this trajectory.

From the Acceptable Disciplinary to the Unacceptable Interdisciplinary

Early in the evolution of the fetal alcohol research community, participants drawn from neighboring fields by the novelty or import of the topic would naturally exploit the toolkits in which they were trained to pursue research and to evaluate others' research for funding or publication. When a haphazard personal contact first led me to attend to this topic, in the mid-1980s, I began in the same way, bringing my training in social statistics to bear on collaborations with the clinical psychologist who was one author of the 1973 publication. Papers in the psychological tradition typically use entirely conventional rhetoric for most of their quantitative work, and the traditions we borrowed were subject to the same constraint. For instance, one of our early papers (Clarren et al. 1987), concerned with points located on facial photographs, emphasized the dominance of human expertise and the logic of conventional statistical significance tests, because that is what people who studied photos of these patients did in their publications at the time. The abstract of the article states clearly that our analysis confirmed (i.e., no surprises were encountered, nor would any have been considered desirable by the authors) that human judges identify those children as alcohol-affected whose faces match the published criteria, suggesting that judges might also be useful in "other conditions diagnosed primarily on the basis of subjective clinical criteria." Figure captions emphasize the parts of the work with which the clinician was likely already familiar—"the facial landmarks usually scrutinized"—and the analysis goes forward in terms of averages and significance tests even though there is no actual scientific benefit from having done so.

The one technical maneuver I personally contributed, while based in sophisticated theorems from the contemporary statistical literature, was presented naively to the reader, as if no more than common sense. In a gentle irony, this technique for representing shape variation, a technique actually published by Francis Galton (1907), is nevertheless named "Bookstein coordinates," after me (an example of Stigler's Law of Eponymy, namely, that statistical innovations are named after the second person to discover them). This device had appeared over my name in the formal biostatistical literature only the previous year (Bookstein 1986), and getting it into a content-area journal was a matter of luck.

Using photographs at all was a departure for my colleagues from the accustomed methodology of their field, which is to study group differences on suites ("batteries") of psychometric measurements. Reviewers were much more comfortable with the style of some of our other papers, which might, for instance, present bar charts of IQ scores comparing diagnosed patients to "normals" and then carry out analyses of variance or of correlations. There are several serious flaws in this approach, one of which we realized rather early on: the inconvenient fact that we could not decide either who the "heavily drinking mothers" were or which of their children were actually "affected." Around 1987 we had to begin explicitly lecturing (well, hectoring) the FAS community on the perdurable theme that the standard methods they were all using were grossly inadequate for the phenomenon they were all studying.

The study for which I was working had in fact measured alcohol in 13 different ways: measures of average alcohol intake in ounces per day, monthly drinking occasions, average and maximum drinks per occasion, bingeing, and other summaries, both before awareness of pregnancy and during midpregnancy. A technique was needed to extract whatever information this suite proffered for the context of scientific explanation (response calibrated to dose) that suited the hypotheses. Such a technique was available for borrowing from econometrics, but had hitherto been applied mainly in industrial chemistry and food science. (Lately there have been applications in neuroimaging as well.) We *still* have not figured out how to explain this technique, which bears the unfortunate name of "partial least squares" (PLS), to the nonspecialist in psychology.

It is one of the central pitfalls of the mathematical cognitive style that the essence of PLS can be written in about two inches of type as follows:

Write $S = \Sigma_{cases} X^T Y$, where X and Y are two centered data matrices, each tupping its own underlying measurement domain, having the same number of rows of data (the same cases of analysis). The celebrated *singular-value theorem* guarantees that S can be expressed in essentially one way as UDV^T, where U and V are orthonormal matrices and D is diagonal. Then good quantitative scientific analysis of "the relation between X and Y" can often proceed by joint examination of the first few paired columns of U and V, which characterize the variables, along with the first few pairs of columns of XU and

YV, which characterize the cases; and significance testing of any findings that emerge can scrutinize the entries of D, the pattern of the columns of U or V, or the correlations of XU and YV with variables not constraining the analysis.

This is intentionally terse and abstract. It is so different from other approaches that editors continually require much longer explanations, not just demonstrations, and although it has been 16 full years since we began publishing papers using this technique, it has still failed to appear in any handbook of applied psychometric statistics. Reviewers go on complaining, and we are required to repeat the same lengthy explanations every time we publish an application.

Nevertheless, the associated findings are often gorgeous in their iconics, even though the size of the audience capable of understanding this beauty is perhaps small. Figure 1 shows an early pattern finding for the "two-dimensional prediction" of a general space of "latent brain damage" by alcohol. The variables sort magnificently by face validity (binge measures at the upper right, and everybody else's preferred measures, alas, at the lower left), and the finding of a nearly straight line here is outrageously unexpected (a model from geology, actually). The variable we used in the paper on faces, AAP, is evidently worse than average here (in a sense in which merit, roughly speaking, is distance from the point (0, 0) at the origin of all those lines; this stands for the net predictive power of the individual alcohol measure for the set of all the outcome measures taken together). We knew that when we published that paper, but chose to fight only one battle at a time.

Unfortunately, there proves to be essentially nothing of any practical medical or psychological use in the signal here. The correlation to which the beautiful chart of the Figure 1 led is only about 0.25, much too low to justify continuing this research style (which is nevertheless, here in 2005, still funded: we seem to have done a good job of calming the technical reviewers regarding the sanity of the new statistic). A full-length monograph on the method and the findings (Streissguth et al. 1993) immediately went out of print and is now unobtainable. We have continued to struggle with our audiences in the psychosocial sciences right up to the present day. For instance, in a table computed in 1996 that could not be published until 2004, and then only in a very narrowly cast specialty journal (Streissguth et al. 2004), we summarize a collection of psychometric scores and "risk and protective factors" in order to highlight the truly awful things that happen to these patients in the course of their lives. My colleagues and I had to invent a whole new method of statistical inference to demonstrate that one of these measures, "age at diagnosis," was in fact statistically significant. The *Journal of the American Medical Association*, which had published several papers on FAS in the early 1990s, showed no interest (in 2002) in explaining to its readers that inasmuch as age at diagnosis is to some extent under the control of the diagnosing physicians, they could do

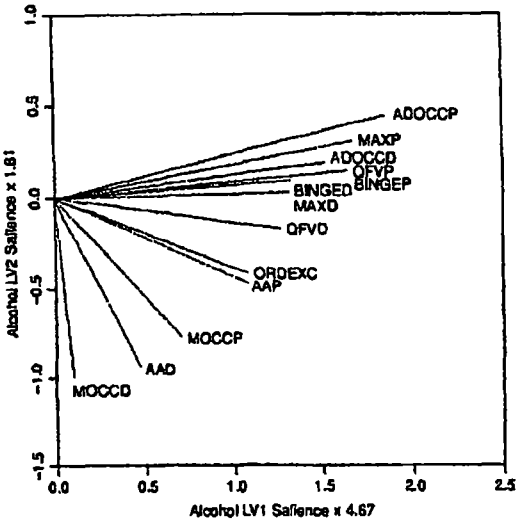
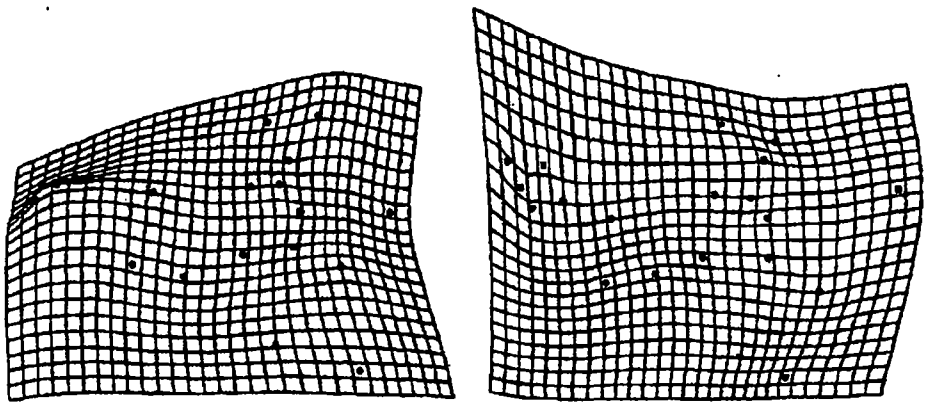


Figure 1.
Predictive power of 13 alcohol measures for 474 outcomes on 582 children aged 0 through 7 years in the Seattle Longitudinal Study of Pregnancy and Offspring Development. D, P: reported alcohol intake Prior to awareness of pregnancy or During midpregnancy; AA: absolute alcohol, oz/day; MOCC: monthly drinking occasions; DOCC: drinks per occasion; BINGE: bingeing, five or more drinks on an occasion; ADOCC, average drinks per occasion; QFV, quantity–frequency–variability score; ORDEXC: a priori subjective guess of likelihood of detectable damage. Horizontal, the "volume-salient axis," predicting generalized brain damage on a wide range of measures (examples: IQ scores, arithmetic ability). Vertical, the "binge-salient" axis, predicting more focused damage on a shorter roster of outcomes (examples: following instructions, adjustment to preschool). The net predictive power of any alcohol measure here is proportional to the squared length of the line from (0, 0) to the place at which its acronym is printed. The appearance of the nearly straight line here was utterly unexpected. (From Streissguth et al. 1993.)

something about this problem. Presented in the entirely elementary rhetoric of bar charts, however, without any of the machinery of scientific inference, the same data and analysis proved very popular among groups (parents, teachers, social workers) who in reality had to deal with children with this problem. For instance, the relatively higher IQ patients, and those without the facial signs, actually do worse on the social outcomes, because they are less likely to be labeled and thereby protected from the consequences of their own deficits. A monograph explaining the implications of these risks for typical caregivers has gone out in more than 20,000 copies—my best-selling reprint of all time (Streissguth et al. 1996).

Otherwise, as I noted above, the basic assumptions of the disciplinary methodology borrowed did not actually obtain. We have learned, for instance, that we had in fact been studying the wrong group of patients: those facial stigmata central to the original *Lancet* report make very little difference for the brain damage (although they affect the societal response, as I just noted). The newly coined acronym of FASD (for "fetal alcohol



Relative Eigenvector 1, 11 Dimensions, Female — The Other Direction

Figure 2.

The shape dimension showing the greatest variation in the 60 FASD females of our adolescent–adult brain study as a multiple of the variation in the 30 unexposed female Seattleites. (A similar finding obtains for the males.) Black dots: 20 landmark points (reliably identifiable point locations) in the solid MR brain image, on or near the plane of symmetry up the middle of the head. Left, the "crease" in the grid at the upper left in this presentation draws the viewer's (and the scientist's) attention to the locus of the largest focal effect on shape, which happens to be specific to the front of the corpus callosum in this plane. Right, the opposite transformation, just as abnormal but much less visually striking. The spatial concentration of that crease was quite unexpected. (From Bookstein, Sampson, et al. 2002.)

spectrum disorder") now labels the appropriately generalized class we should be studying: those patients who, regardless of facial form, have the demonstrably alcohol-damaged brains. (In particular, the FASD label combines the FAS category which what used to be called "fetal alcohol effects," FAE, which was a clinically vague grouping of people who showed "some but not all" of the facial and other physical features of FAS along with the same evident brain damage.) Current funding of psychological aspects of FASD continues to center either on yet more studies of grouped test scores, an approach that I believe to be pointless at this time, or else on the search for a "behavioral phenotype" that will characterize the damaged patients well enough to justify the more intensive medical observations required for an effective diagnosis. In short, this 20 years of intensive quantitative psychological research into FASD has not ultimately amounted to much. In retrospect, it was the wrong discipline from which to have borrowed methodology and rhetoric. Fetal alcohol damage is not at root a psychometric phenomenon.

Toward an Unacceptable Interdiscipline, I: New Graphical Tools

Let me turn now to an apparently unrelated methodological effort of mine that was being funded at about the same time in the quite separate field of neuroanatomy: the development of an algebraically rigorous technique for an old but hitherto unformalized diagram style, the *transformation grid* associated with the name of the natural philosopher D'Arcy Thompson but actually invented half a millennium ago by Albrecht Dürer (1528). In 1985, in the course of a lecture of mine in Seattle about the unsatisfactory state of what I had been doing up to that time (including the analysis of faces that I reviewed a few paragraphs above), a mathematician in the audience, David Ragozin, suggested I look at a new bit of applied mathematical analysis, the *thin-plate spline*, that had just been introduced into the literature of numerical interpolation.

This mathematics is, again, concise and wholly unpromising in any exoteric context; but unlike PLS, in graphic form the thin-plate spline is both elegant and readily assimilated (Bookstein 1989). When embedded in the appropriate context of geometric data, it turns into a wonderful tool for analysis and display that has now been cited at least a thousand times in the primary scientific literature. Not all of these are citations of Bookstein. (Even more flattering than having something named after you is the phenomenon whereby something you invented is now mentioned in papers *without any citation at all*.) In fact, there is far more cognitive power in this technique than we can use in any natural-science context. Applications include the evolutionary psychology of attractiveness and mating behavior among humans and great apes (*pace* creationists) and even a dance concert in 2000 in which the algorithm engaged in a duet with a human dancer.

The power of the new graphics turned out to be applicable to our studies of fetal alcohol spectrum disorders as soon as computer techniques could catch up with the necessary data resources. In one early example of a wholly unexpected finding (Figure 2), a technique designed as a cognitive prosthesis

(a search engine for local features of these grids) turns up a characterization of the FASD patient group as showing excess variation ("hypervariability") in one part of the front of the brain. (Underlying the announcement is another of those nearly silent statistical innovations, never published before and "sneaked by the reviewers.") The black points are 20 named locations near the middle of the brain; the ones involved in the folding at upper left in the left panel are all on the *corpus callosum*, a tissue of nerve fibers that connects the two halves of the cerebral cortex across the middle of the brain. The grids show the brain region that is, in this extensive and expensive study of 120 adolescent and adult patients and 60 normals, just too variable in the FASD group to be confounded with any normal variant.

But scientific audiences still do not accept this as *science* unless it is demystified in the familiar terms of measured ratios (such as the Bookstein shape coordinates I mentioned before) and cutoffs for the corresponding "decision rule" that classifies a particular candidate brain as either fetal-alcohol-affected or not. In this form the discovery turns out to be the first practical technique for a detection making no specific reference to any assumption about group mean differences (useful, as in this example there are no such mean differences, only the extra variation that permits detection) and also no specific reference to any psychological variables.

At just about this same time, an even more beautiful new visuospatial technique emerged, supported by new grants from the National Institutes of Health (one for the Human Brain Project, and one for the Visible Human Project) that were later evaluated as failures and not renewed. Figure 3, my favorite single frame, served as the cover of an anatomy journal generally indicating the idea: multiple parallel sectioning planes of the same medical solid. The specimen here is the Visible Female, "Eve," in living color except for the blue bits, which are latex that kept her from falling apart during the serial planing-down required in the course of preparing this single 7-GB medical image.

Eve's corpus callosum is now visible, in section, as the gently curving cream-colored arch up the middle of the backplane in Figure 3. (All the other planes shown here are actually frozen images from one single moving "filmstrip" that navigates through this volume along the outline, in both 2D and 3D, under computer-aided control by the viewer's hand.) For some time this structure had been suspected (on both clinical and animal-experimental grounds) of being important to the understanding of fetal alcohol damage. It is laid down early in embryonic life, partly before the mother has missed a second consecutive menstrual period and so is sure that she is pregnant; it is sensitive to alcohol damage; and it is partly or wholly missing in some of the most severe FASD patients. We believe that it is a fine scientific datum for diagnosing individual cases. Although this proposition was not even enunciated at the outset of our research program, our research of the last five years has demonstrated its truth pretty thoroughly, and, in doing so, has made possible the efficient detection of alcohol-related brain damage even in the presence of the very large number of other developmental and socioeconomic factors that likewise lead to bad behavior among some American adults. We detect over 80% of the affected patients this way while misclassifying only about 18% of the actually normal.

Toward an Unacceptable Interdiscipline, II: Endophrenology for the 21st Century

If we can detect brain damage without reference to behavior, we might be able to account for bad behavior by brain damage. Now, at last, we can combine the neuroanatomical with the psychological, using the same PLS method we had developed 15 years earlier just to describe the effect of all those alcohol measures. As always, the algebra is opaque (it consists of substituting Bookstein shape coordinates for the X's in the equations presented earlier, with the Y's still neurobehavioral scores). And yet, once again, the graphics are clear.

There are two principal dimensions of variation of this shape in the population of patients with FAS. One dimension, indicating general callosal arch height, is correlated with general IQ deficits; another, combining thinning with repositioning of the front of the callosum, shows an astonishing *endophrenology*, a correlation of better than 0.8 between a brain structure and a corresponding pattern of psychological deficits. ("Endophrenology" was originally coined as a joke term, but it has turned out to be a useful neologism: the study of the bumps on the head, *this time from the inside*, in terms of their implications for observable behavior.) Again we reduced the finding, for purposes of persuasion, to a familiar sort of graphic, a scatterplot. Figure 4 shows that the FASD patients differ from the unexposed in two aspects of psychological deficit, not one, and that one pattern of deficit is correlated with the thin variant of the corpus callosum and the other, a pattern of problems with "executive function" (EF), with the thick variant. (The original article went on to both show and explain how the "thin" version actually penetrated more deeply than the thick into the frontal lobe, the brain region apparently responsible for the judgments, reasoning, and self-insight usually lumped under the heading of "executive function.") The numbers plotted inside the diagram are IQ scores, showing that IQ is not correlated with these patterns within the diagnostic groups. Thus, independent of retardation (low IQ) per se, *we can predict behavioral problems from anatomical defects*. We have clearly come a very long way from those earliest studies of grouped averages.

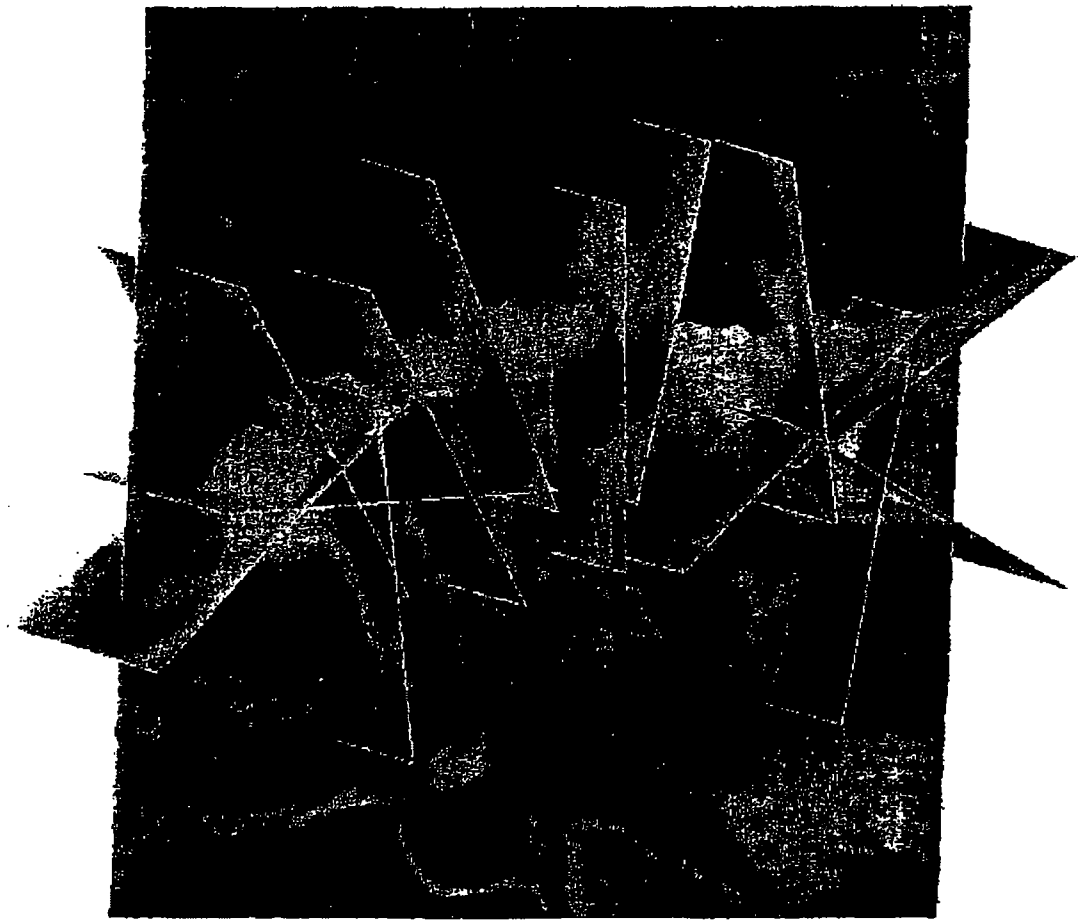


Figure 3.
Callosal midline of the NIH Visible Female, "Eve," as a navigation in its normal planes. Backplane: estimated plane up the middle of the brain; obliquely observed sections: perpendicular slices through the same volume at a series of locations normal to the outline along a curve near the backplane. Color in the image is the true color of the specimen (flash-frozen just after death) except for the bright blue, which is latex injected in the course of image production. This image was produced by the *pencil* function in W. D. K. Green's program package *Edgewarp* for the navigation and digitizing of solid medical images. (After Bookstein, Sampson, et al. 2002, cover of *The Anatomical Record—The New Anatomist*.)

This finding proved unpublishable in the alcohol literature. After about nine diverse rejections, it finally appeared only in a journal of neuroimaging, and we have not been funded to replicate it in any way (different age ranges, different sampling frames) in spite of many plaintive requests. By this time in the research program (early in the present decade), in other words, the audiences for the methodology and for the findings had irrevocably diverged. We needed a new audience (in effect, a whole new set of colleagues) if we were to be able to continue to learn useful things about alcohol damage.

Escape from the Academic Interdisciplinary in the Wider World

Now that we can predict from the brain problem to behavioral problems, how about the other direction, inverse inference from gross behavioral problems to the brain problem? My interest in this arose during a series of conversations with colleagues in the FAS/FAE Legal Issues Resource Center (University of Washington). We became aware that defendants in the criminal justice system whose behavior aligned with the characteristics of FASD and in whose prenatal biography there

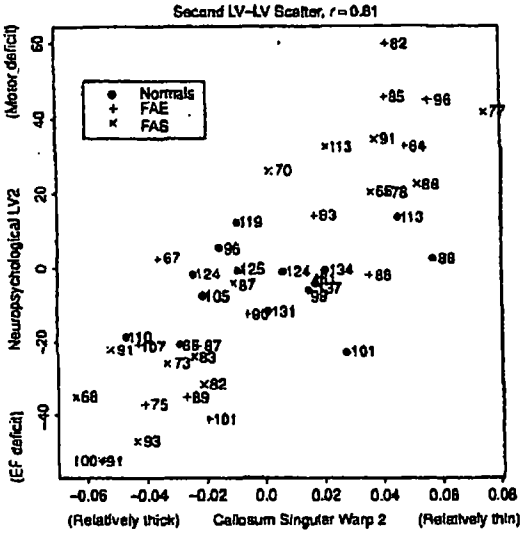


Figure 4.
An endophrenological surprise. Correlation of 0.81 between a measure of callosal midline shape and a bipolar profile of two different patterns of neuropsychological deficit in a sample combining 30 adult males with FASD and 15 adult males unexposed to prenatal alcohol. Numbers: fullscale IQ, uncorrelated with this shape factor and also with the neuropsychological dimension within groups. The figure suggests the existence of two subtypes of FASD, but they are not the usual FAS and FAE (damage with/without complete facial signs), but instead, perhaps, damage to motor function vs. damage to executive function (EF). The magnitude of this correlation is unprecedented in brain-behavior studies. (From Bookstein, Streissguth, et al. 2002.)

was some evidence of alcohol exposure could greatly benefit from the entirely separate information derived from brain images that would likewise suggest a diagnosis in that range. Among these behavioral characteristics are being impulsive, stubborn, unaware of the consequences of actions, not taking hints, being too easily led, overreacting, and showing poor judgment, all of which are reported for at least 70% of our sample of patients with FASD.

The lawyers' comment led me to examine the language of a 2002 U.S. Supreme Court decision, *Atkins v. Virginia*, announcing that this sort of mental deficit was explicit grounds for eliminating the risk of capital punishment. *Atkins* is the decision ruling out capital punishment for the mentally retarded on the grounds that, as Justice Stevens wrote, the mentally retarded, "because of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Specifically, the mentally retarded have, "by definition, diminished capacity to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"—but these are, at the same time, typical observations on adolescents and adults with FASD.

The idea is, in effect, to apply the classifications you have already been shown to a quite specialized group of brain images: images from people on death row for foolish or thoughtless crimes whose lawyers have heard about fetal alcohol disorders and have persuaded a judge to allow expert testimony about this brain damage. As of this writing I have testified in open court in three cases (another is likely to have taken place before this text is printed) and written expert evaluations of two others. What results is a very strange form of "publication" indeed:

> Q: What is your level of certainty regarding the cause of Mr. Pintor's abnormally shaped corpus callosum?
>
> A: In view of what I was told, which is that he was exposed to high levels of alcohol, I think beyond a reasonable doubt the alcohol exposure is the cause of this anomaly.

Of course somebody else has to testify in these cases as to the facts of the actual prenatal exposure, and I am pretty strenuously cross-examined, but I've been on the winning side (i.e., a sentence of Life Without Possibility of Parole) two cases out of three, including the case of the unfortunate murderer Pintor.

This has been tremendously exciting, but diagnosing FASD on death row is not particularly therapeutic for the "patient." It is far better to diagnose earlier (you may remember from one of those mostly conventional statistical papers), and the earliest you can get your hands on reliable data from a human with fetal alcohol brain damage is the earliest you can get your hands on reliable data from a human: immediately after birth. The most important study of all is likely to be one just accepted after four rejections, and over the objections of all its final reviewers, in a new and risk-accepting journal of alcohol research—even so, the editor required us to add the phrase "Preliminary evidence that" to the title "Prenatal alcohol damage may be visible in averaged ultrasound images of the neonatal human corpus callosum" we had originally crafted. The paper's implications for adoption courts, for special education, and for the great reduction of cases of additional fetal alcohol cases born to a mother who has already borne one are genuinely revolutionary.

I will spare you the additional details of how the images are constructed (again, a brand-new form of analysis for instrumentation data proved necessary for us to get ordinary cheap clinical ultrasound into a format sharp enough to be measured). In a sample of midline brain images of 7 infant children exposed to high alcohol, 4 differed in one simple angle measure from all 11 children not so exposed and from the other three exposed babies. We think we can tell, among the babies born to alcoholic mothers, which ones actually sustained the

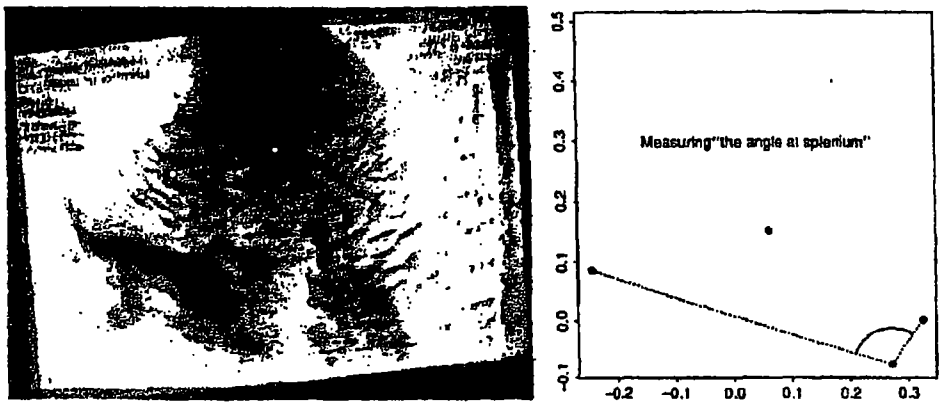


Figure 5.
The unwarped average of nine midsagittal transfontanelle intracranial ultrasound images for an 8-week-old full-term infant exposed to high amounts of alcohol in utero. The corpus callosum is the downward-pointing hook-shaped arch in the center of the image. The obtuse angle at its far right is not typical of the normal infant; we believe it is likely a sign of actual prenatal brain damage within the class of high-exposed infants. Note the inset (also present in the original publication), directing the reader to a specific numerical summary of this abnormal image. The clarity of unwarped average images like these was unexpected, and also the emergence of such a clearly abnormal feature solely in the exposed subsample. (From Bookstein 2005.)

brain damage. Again, for scientific communication, the analysis had to be "conventionalized" into ordinary measurements (Figure 5) and ordinary p values.

Turnabout is fair play. *Finally* the research has progressed to a stage at which we need to turn back to the statistician (or, rather, to your author, now wearing his mathematical-statistical cap) for a new statistic: models for variation that are more in keeping with the generalized damage we see in alcohol-affected populations, both newborn and adult. Figure 6 shows one realization of the fundamental statistical model for "noise" that we need: a model that has the same likelihood of showing deformations at all geometric scales simultaneously. (In other words, nothing whatever is happening "anywhere in particular" in this grid. Everything your eye is picking up is meaningless by explicit construction.) Such a model has never been put forward in any other applied discipline. Late in the summer of 2005 I pitched it optimistically to a conference on automated systematic biology, which needs considerable biometric help if it is to save the planet's biodiversity in the absence of government salaries for systematists.

Concluding Commentary

Cognitively, I have shown you, I hope, a startlingly good match, in the work of essentially one lone research program, between a fully biomathematical pattern engine and an emerging clinical medical imperative with major social implications. In principle, we have transformed a merely academic exercise into a splendid example of applied biomathematics as knowledge engineering. In practice, nothing of the sort was planned, and none of this technology transfer ever corresponded to instructions or permissions from the scientific funding agencies or from any of our reviewers. Neither I nor my colleagues were encouraged by others in the same application areas to do anything that I have showed you beyond the very first few very boring developments, the ones that were the most conventional in their statistical rhetoric. Everything else was serendipitous, and neither funding agencies nor peer reviewers are comfortable with reports of serendipitous findings. We are unable to get the study of the infant brain published at the level of publicity we think it deserves—we are unable, indeed, to get it *funded*, beyond those first 18 infants, in spite of nine separate attempts. We were unable to publish any aspect of the work with adult brains in the alcohol literature *or* the psychiatric literature, and the grants and contracts that underwrote the software for the 3D image analysis and its animation have *all* been defunded.

By this point the gentle ironies with which I have perhaps entertained you over the first few pages evidently have ceased to be gentle. You have just been shown a survey of what should be a classic "emerging interdisciplinary nexus," combining the tools of geometry, computer science, statistics, and biomedicine in wonderfully supple maneuvers and manipulations engendering translational activities of all sorts, in public policy contexts from adoption to capital punishment, and yet the thought-collective still consists of a sample of one. There are other ways to phrase the core irony as well: the incompatibility of conventional Whig history-of-science narrative with actual cognitive mobility (the Whig narrative is required, alas, for grant review); the scarcity of the actual visuospatial cognitive style in quantitative biology (as distinct from, say, natural history, in which it has ruled for centuries); the way

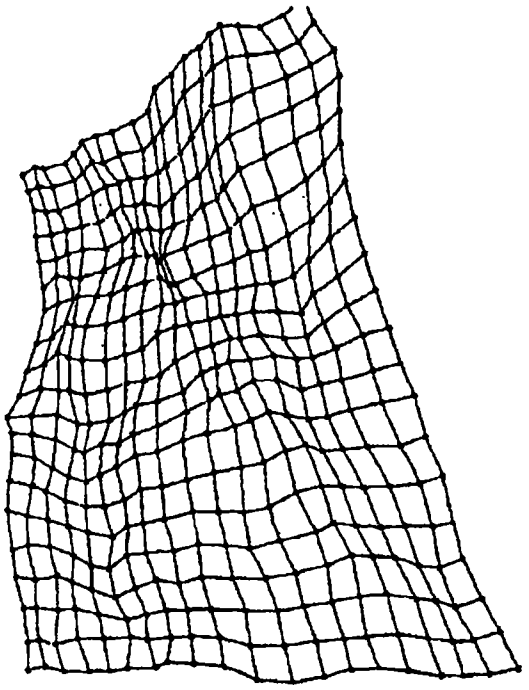


Figure 6.
One instantiation of an intrinsic random field of order 1 on a 20 × 20 grid. An intrinsic random field is a pattern of shape variation that is the same regardless of scale. In this example, all squares of whatever size or orientation (1 × 1, 2 × 2, 4 × 4 diamonds rotated by 45°, etc.) have exactly the same shape distribution up to a uniform shear (up to orthogonal projection). Thus every single local feature your eye finds in this image—centers of large or small spacing of dots, "crenses," etc.—is wholly random, hence wholly misleading. The scheme shown here is intended as the replacement of the idea of a "bell curve" for models of pure noise in systematic and evolutionary biology. (From Bookstein forthcoming.)

a problem becomes defined by one approach to its solution, resisting a change of definition pursuant to a change of method (a statistical gloss on Fleck's fundamental point).

I think, also, that there may be a core issue here at the intersection of science studies and biography: the relation of individual investigators to scientific disciplinary and interdisciplinary communities. At a time of rapid technological change (such as that which characterizes any computer-based or indeed Internet-based domain nowadays), individuals are not usefully described any longer as being "in" disciplines in any sense spanning long durations of time. At least for quantitative domains, the tools, the personnel (and skill sets), and the existing pool of patterned knowledge shape a dynamic context of investigation that does not seem to me to match anything I've read about in our applied literatures of history and philosophy of science. Both the narrative style of the typical scientific paper and the narrative style of the typical history-of-science paper seem unsuited to this dynamism, where pattern engines from the explanatory to the multivariate contest for interpretation of imagery that, however "real," changes machine by machine and year by year. Perhaps the least dissimilar classic quantitative natural science is astronomy, which (at least in Martin Harwit's [1981] interpretation) is always trying to push its instruments to reveal phenomena that will not be understood for years or decades. The joy is in the pattern perception as much as in any ultimate explanation. And astronomy, like the alcohol teratology I've been reviewing for you here, is likewise pushed forward mainly by persons outside the core discipline: the instrument designers and builders, and the statisticians who process the resulting data flows.

Thus, however fine the advances in understanding the brain damage engendered by fetal alcohol exposure, in terms of the relevant social knowledge structures and economic control structures the implications of the 20 years of work I've reviewed for you are far from clear. One individual's work, no matter how interdisciplinary, may simply not be sufficient to reify an interdiscipline as a thought community, and the only way to survive (economically or rhetorically) may be to be perforce constantly changing one's audience. Where do I go after forensics and adoption? I'd like to end up back in the aesthetics of those grids, actually, but having lost one big grant specifically over that issue (the reviewer never forgave me for mentioning that my computer program performed in a dance concert) I am loath to merge those purposes again in any context involving transfer of funds.

That the trail I have left of publications, diagrams, and software is constantly changing in rhetoric, audience, and level of abstraction or mathematization is perhaps owing to the sheer press of funding. People like you, dear reader and scholar in the history or theory of biology, need to turn more attention to the unpleasant details of the contemporary funding of science, and teach us, if you can, how we can better match the funds to the promise.

Or perhaps this seemingly random walk I have been narrating for you bears implications for your social studies of frontier science in a wide variety of less political, more centrally scholarly ways: as a narrative of the haphazard progress of translational research, as a confrontation between biographical and institutional narrative styles in the history of science, or (the mode I prefer) as a fable about visuospatial rhetoric as a particularly contentious scientific *Denkstil* far more suited to quantitative bioscience than anybody except for a few fallen mathematicians like me knows it to be. Alternatively, one might infer that regardless of the apparent sophistication of modern commercial bioinformatics, the actual quantitative sciences of human biology are still stuck at the stage at which Ludwik Fleck observed them 70 years ago: still unable to select, from among all the directions of random exploration, which ones actually are pointing forward.

Moral

Establishing a new interdisciplinary thought style takes more man-years than one man has to invest. There is a limit to the number of battles that can be fought with the same reviewers, and a limit to the speed with which any institutionalized scientific context can turn from one rhetoric of self-justification to another, no matter how much more powerful the new one is in comparison to the old. In words borrowed from Fleck: no one person, alone, can constitute a thought-community. But in words of equal portent borrowed from Philip Kitcher (2001): the social control of science is far too important nowadays to be left to scientists.

Acknowledgments

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References

Bookstein FL (1978) The Measurement of Biological Shape and Shape Change. Lecture Notes in Biomathematics, Vol 24. New York: Springer.

Bookstein FL (1986) Size and shape spaces for landmark data in two dimensions. (With Discussion and Rejoinder.) Statistical Science 1: 181–242.

Bookstein FL (1989) Principal warps: Thin-plate splines and the decomposition of deformations. IEEE Transactions on Pattern Analysis and Machine Intelligence 11: 567–585.

Bookstein FL, Connor PD, Covell KD, Barr HM, Gleason CA, Streissguth AP, Sze RW, McBroom JA (2005) Preliminary evidence that prenatal alcohol damage may be visible in averaged unwarped ultrasound images of the neonatal human corpus callosum. Alcohol 36: 151–160.

Bookstein FL (forthcoming) Morphometrics and computed homology: An old theme revisited. In: Proceedings of a Symposium on Algorithmic Approaches to the Identification Problem in Systematics (Macleod N, ed). London: Museum of Natural History.

Bookstein FL, Sampson PD, Connor PD, Streissguth AP (2002) The midline corpus callosum is a neuroanatomical focus of fetal alcohol damage. Anatomical Record (New Anatomist) 269(3): 162–174.

Bookstein FL, Streissguth AP, Sampson PD, Connor PD, Barr HM (2002) Corpus callosum shape and neuropsychological deficits in adult males with heavy fetal alcohol exposure. NeuroImage 15: 233–251.

Clarren SK, Sampson PD, Larsen J, Donnell DJ, Barr HM, Bookstein FL, Martin DC, Streissguth AP (1987) Facial effects of fetal alcohol exposure: Assessment by photographs and morphometric analysis. American Journal of Medical Genetics 26: 651–666.

Dorris M (1989) The Broken Cord. New York: Harper and Row.

Dürer A (1528) Vier Bücher von menschlicher Proportion. Nürnberg.

Fleck L (1935) Entstehung und Entwicklung einer wissenschaftlichen Tatsache. Einführung in die Lehre vom Denkstil und Denkkollektiv. Basel: Schwabe. (English: Genesis and Development of a Scientific Fact (Trenn TJ, Merton RK, eds), Chicago: University of Chicago Press, 1977).

Galton F (1907) Classification of portraits. Nature 76: 617–619.

Herwit M (1981) Cosmic Discovery. New York: Basic Books.

Jones KL, Smith DW, Ulleland CN, Streissguth, AP (1973) Pattern of malformation in offspring of chronic alcoholic mothers. Lancet 1: 1267–1271.

Kitcher P (2001) Science, Truth, and Democracy. Oxford: Oxford University Press.

Streissguth AP (1997) Fetal Alcohol Syndrome: A Guide for Families and Communities. Baltimore: Paul H. Brookes.

Streissguth AP, Barr H, Kogan J, Bookstein FL (August 1996) Understanding the occurrence of secondary disabilities in clients with fetal alcohol syndrome and fetal alcohol effects. Final report, CDC grant CCR.008315. Fetal Alcohol and Drug Unit, University of Washington School of Medicine.

Streissguth AP, Bookstein FL, Barr HM, Sampson PD, Young JK (2004) Risk factors for adverse life outcomes in fetal alcohol syndrome and fetal alcohol effects. Journal of Developmental and Behavioral Pediatrics 25: 228–238.

Streissguth AP, Bookstein FL, Sampson PD, Barr HM (1993) The Enduring Effects of Prenatal Alcohol Exposure on Child Development, Birth Through Seven Years: A Partial Least Squares Solution. Ann Arbor: University of Michigan Press.

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	)	IN THE COURT OF COMMON PLEAS
Jonathan Kyle Binney Applicant, v. **State of South Carolina,** Respondent.	)	C. A. No. 06-CP-11-223 **ORDER DENYING POST-CONVICTION RELIEF**

This death penalty Post-Conviction Relief (PCR) action is before the Court pursuant to an April 7, 2006 application filed on behalf of Jonathan Kyle Binney (hereafter Applicant), as amended. The Court conducted an evidentiary hearing on the Application from May 29 to June 1, 2007, at the Cherokee County Courthouse. Applicant was present at the hearing, and attorneys John H. Blume, III, Sheri Lynn Johnson, and Emily C. Paavola represented him in the trial. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Anthony Mabry represented the State. After full review, the Court denies relief and dismisses the Application for the reasons stated herein.

I. PROCEDURAL HISTORY

Applicant is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC), as the result of his Cherokee County murder and first degree burglary convictions and death sentence. The Cherokee County Grand Jury indicted him in July 2000 for murder (2000-GS-11-526) and burglary in the first degree (2000-GS-11-525). The State timely served a Notice of Intent to Seek the Death Penalty.

Don A. Thompson, Esquire, initially represented Applicant; however, he was relieved as counsel following a July 11, 2001 pretrial hearing before the Honorable J. Derham Cole.

Thereafter, attorneys Trent N. Pruett and Samuel "Mitch" Slade, Jr. were appointed to represent Applicant in all other proceedings in the trial court. Seventh Circuit Solicitor Harold W. Gowdy, III, and Deputy Seventh Circuit Solicitor J. Donald Willingham, II, represented the State.

After pretrial hearings on March 25, and October 25, 2002, Applicant received a jury trial before Judge Cole on November 4-14, 2003. The jury convicted him of murder and burglary in the first degree. The sentencing phase was conducted following Applicant's exercise of the twenty-four hour waiting period for the presentation of penalty evidence to the jury, pursuant to S.C. Code Ann. §16-3-20(B).

In the sentencing phase, the State relied upon the statutory aggravating circumstance that the murder was committed while in commission of burglary in any degree.[1] §16-3-20(C)(a)(I)(c). Judge Cole also charged the jury on the three statutory mitigating circumstances found in § 16-3-20(C)(b)(2), & (6)-(7). The jury found the alleged statutory aggravating circumstance and recommended a death sentence. Judge Cole sentenced Applicant to death for murder, and to life without parole for burglary in the first degree. **R. pp. 3491-94; 3499-3501.**

Applicant timely perfected a direct appeal. Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented him on direct appeal.[2] The South Carolina Supreme Court affirmed Applicant's convictions and sentences in a published Opinion filed on September 21, 2004. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005). The Court denied a timely

[1] The trial judge granted the defense's directed verdict motion on the statutory aggravating circumstance of larceny while armed with a deadly weapon, and the State voluntarily abandoned the aggravator that "[t]he offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value." *See* § 16-3-20(c)(a)(4).

[2] Applicant raised the following issue on direct appeal:

> The judge erred by admitting into evidence a statement Applicant gave to the police, in which he confessed that he was guilty of murder and first degree burglary and requested "the death penalty" because "[t]he crime I committed definitely warrants it" because this statement was the product of police-initiated custodial interrogation, undertaken after Applicant had invoked his Fifth Amendment right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981).

petition for rehearing on February 17, 2005, and sent the Remittitur to the Cherokee County Clerk of Court on the same date.

Applicant, again through Mr. Savitz, filed a Petition for Writ of Certiorari to the South Carolina Supreme Court in the United States Supreme Court on May 18, 2005. The State filed a Brief in Opposition dated July 5, 2005. Certiorari was denied on October 3, 2005. *Binney v. South Carolina*, 546 U.S. 852 (2005).

On November 3, 2005, the South Carolina Supreme Court granted a Stay of Execution so that Applicant could pursue PCR remedies pursuant to *In Re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). Initially, Circuit Judge John C. Few was appointed to preside over the PCR proceeding; however, Chief Justice Jean H. Toal filed an Order on November 10, 2005, finding that Judge Few must recuse and vesting the undersigned with exclusive jurisdiction to complete the case. This Court filed an Order appointing Mr. Blume and Ms. Johnson to represent Applicant on March 15, 2006. Mr. Blume was designated to act as lead counsel. Ms. Paavola was appointed later in the proceedings.

Through counsel, Applicant's March 1, 2006 Application raised the following grounds for relief:

1. Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.

2. Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.

3. Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United

States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the appellate phase of his trial.

Respondent submitted its Return on May 5, 2006.

On May 1, 2007, Applicant served Respondent with an amended PCR Application. Based upon information that Respondent's counsel had been provided a copy of Attorney Pruett's trial file, Mr. Blume moved to disqualify Respondent's counsel because Mr. Pruett's disclosure of his file to Respondent allegedly violated the attorney-client privilege. On May 21, 2007, this Court held a hearing on Applicant's motion. Mr. Blume was present on Applicant's behalf, and Mr. Salter represented Respondent. Following arguments by counsel, including an *ex parte* argument by Mr. Blume, the Court issued a bench order denying Applicant's motion on the basis that Applicant had waived all attorney-client privilege in filing his PCR claim due to the broad nature of the PCR allegations. Additionally, because both sides had received a copy of the trial file, the State had not gained some unfair advantage in obtaining the file.

Applicant then filed an Amended Application dated May 21, 2007. He also served and filed a notice of appeal from this Court's refusal to disqualify Respondent's counsel and require the State to surrender the trial file. The South Carolina Supreme Court initially dismissed this appeal in an Order filed May 22, 2007.

The PCR trial began on May 29, 2007, at the Cherokee County Courthouse, with the State making motions to deny Applicant's request to amend his application on May 21 as untimely, which was denied; to require Applicant to disclose the affidavit of Dr. David Bachman, neurologist and consulting expert for Applicant, which was granted; and to exclude the affidavit of Juror Henry Viquez proffered by Applicant, which was excluded as not sworn and unreliable. Both sides were then allowed opening statements. Thereafter, Applicant presented his case, in which the following live witnesses were called, in order: Dr. Leroy

Riddick (forensic pathologist); Dr. Arlene Bowers-Andrews (professor of social work); James E. Aiken (prison consultant); Dr. Natalie Novick-Brown (forensic psychologist); Tonya Brown (friend of victim); John Purvis (jail employee); Allison Haygood (cousin of Applicant); Sandra Applicant (adoptive mother of Applicant); Teresa Lynn Norris, Esquire (in reply, attorney in Mr. Blume's office); and Jill Rider (in reply, paralegal in Mr. Blume's office). After the close of testimony, as discussed below, Applicant presented three additional witnesses by affidavit: Melanie Binney, Dr. Fred Bookstein, and Dr. Ronald W. Maris.

After the close of Applicant's case, Respondent presented the following witnesses/evidence: Harold W. "Trey" Gowdy, III (Seventh Circuit Solicitor, lead prosecutor in trial below); publication of 911 tapes; S. Mitchell Slade, Esquire (trial defense counsel, second chair); Trent N. Pruett (lead trial defense counsel); Dr. Donna Schwartz-Watts (forensic psychiatrist); J. Donald Willingham, II, Esquire (prosecutor, second chair); and Joseph L. Savitz, III, Esquire[3] (Applicant's appellate counsel).

The record before this Court also contains numerous affidavits, reports, and documents submitted by both sides. Additionally, at the conclusion of the hearing, upon request of Applicant, the Court left the record open for thirty (30) days so that Applicant's counsel could take depositions of three witnesses: Melanie Binney, Dr. Fred Bookstein, and Dr. Ronald W. Maris. **PCR Tr. pp. 465; 827-29**. Without objection, the Court later permitted Respondent to supplement the current record with Applicant's sworn testimony from his January 12, 2005 Spartanburg County PCR hearing (arising from his criminal sexual conduct conviction). After the passage of substantial time without Applicant's counsel attempting to take the depositions, this Court closed the testimony and announced an intention to deny the PCR application.

[3] This witness was taken out of order to accommodate his schedule.

After the PCR trial, Applicant filed a petition for rehearing of the South Carolina Supreme Court's dismissal of his appeal over this Court's denial of the motion to disqualify Respondent's counsel. In a June 21, 2007 Order, the Supreme Court granted rehearing and reinstated the appeal. Petitioner filed a Petition for Writ of Certiorari, dated September 4, 2007. The Supreme Court granted supersedeas in an Order filed on December 5, 2007, and that Order vacated this Court's earlier Order closing the record and its statement of intention to deny PCR relief. The Supreme Court's Order also stayed the taking of the remaining depositions and any final ruling on the merits while the appeal was pending. After briefing and arguments by the parties, the Supreme Court affirmed this Court's ruling on Applicant's disqualification motion on September 21, 2009, finding that "[t]he breadth of three particular allegations constituted a complete waiver of Petitioner's attorney-client privilege." *Binney v. State*, 384 S.C. 539, 545, 683 S.E.2d 478, 481 (2009). The Supreme Court Order also lifted the Stay as to further PCR proceedings, and remitted the case to this Court.

This Court then held a telephone status conference on January 28, 2010.[4] At that time, the Court agreed with Mr. Blume's proposal for Applicant to submit affidavits from the remaining three witnesses under *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006). Applicant submitted affidavits from Dr. Bookstein, Melanie Binney, and Dr. Janet Grossman on February 24, 2010. Respondent took Dr. Bookstein's deposition on June 7, 2010. With all testimony complete, the matter was re-submitted to the Court for a decision. The Court notified the parties of its ruling denying PCR in a July 6, 2010 letter, requesting that Respondent's counsel prepare a proposed Order in this matter. Several extensions were granted to Respondent in the preparation of the proposed Order.

[4] Mr. Blume represented Applicant, while Mr. Salter and Mr. Mabry represented the State in this phone conference.

In addition to the evidence and exhibits discussed above, this Court has reviewed the various exhibits introduced in the original trial (**PCR Tr. p. 408**), the parties' briefs, the Record on Appeal, the South Carolina Supreme Court's Opinion, the Order of the United States Supreme Court denying certiorari from Applicant's direct appeal; the various pleadings, Orders, and opinions filed in the PCR case; the Cherokee County Clerk of Court's file; and, Applicant's SCDC records. **PCR Tr. pp. 23-24.**

II. STATEMENT OF FACTS IN THE UNDERLYING CASE

By the close of evidence in the sentencing phase of Applicant's capital trial, the prosecution had established the following facts. In early June of 2000, Applicant was facing thirty years in prison for sexually assaulting his three-month-old daughter, [redacted] by vaginally penetrating her with a vibrator device, requiring her to have surgical repair and a hysterectomy. He confessed to this crime, and admitted he had been viewing child pornography on the internet before the assault occurred. He had been released on bond after his arrest on this charge, but could not reside with his wife and children because of the nature of this charge. Although he lived with his biological mother for a short period of time, she eventually asked him to leave her residence. As a result, he was living at the Villager Lodge Inn, in Spartanburg, on June 6, 2000. **R. pp. 2344-55; 2332-33; 3100-57; 3163; 3311-12; State's Exhibit 119.**

On June 6, Applicant purchased a pistol from a friend. After completing the transaction at Melanie Binney's (his wife's) residence, Applicant drove back to the Villager Lodge Inn. Later that evening, he drove to a Big K department store in Spartanburg and purchased bulbs for his flashlight. He then drove from the department store to Cowpens on his moped. He eventually hid his moped in a wooded area approximately one-quarter mile from the rural Cherokee County residence of Judy Southern, his victim. Mrs. Southern lived at this residence

with her husband, Allen, and her young son. **R. pp. 2344-50; 2252-53; 2570-92.**

Applicant then hiked to the victim's residence and conducted surveillance on the home from the nearby woods for the remaining nighttime hours of June 6 and the early morning of June 7, 2000. He had brought with him his black flashlight, black gloves, the 9mm pistol he had purchased, and a police scanner. During the night, he listened to the police scanner, and by his own admission, pondered whether he should go into the house "to commit suicide or rape someone, or just shoot all of them and kill [himself]." **R. pp. 2344-50; 3339; 3312.**

After sunrise, Applicant moved closer to the Southern residence and hid inside a barn, which gave him a better view of the residence. He waited there until Judy Southern and her husband left their home for work. He then went up to the residence and rang the doorbells to ensure that no one was home. Once he was convinced no person was inside, he entered the residence through an unlocked back door. **R. pp. 2344-50.**

After entering the residence, he cut all the phone lines in the house and hid kitchen knives and other possible weapons so that they would be out of reach. He remained in the house all day. **R. pp. 2344-50.**

Judy Southern returned home late that afternoon and found Applicant in the bathroom. Applicant later claimed that she had startled him because he did not hear her come into the house. When he saw Mrs. Southern in the bathroom doorway, he shot her. He then chased her through the residence and outside the home, firing more shots at her as she fled the home and ran into a nearby field. **R. pp. 2344-50.**

Mrs. Southern called Roy Chapman, an employee of her husband's bowling alley, on her cell phone and reported the attack. She told the employee that the man who attacked her had been waiting on her inside the bathroom of the house. The employee called Allen Southern, who

was on the way home at the time, and reported the attack. Mr. Southern arrived home, searched for his wife, and eventually found her several hundred yards from the home in a pasture. He carried his wife back to his vehicle and arrived at the residence about the same time as the employee, who had rushed to the home from the bowling alley. **State's Exhibit # 72 (911 tape), R. pp. 2229-34.**

Mr. Southern immediately drove his wife to Mary Black Hospital, the closest hospital to the Southern residence. The employee called 911 and told the operator what had occurred. As Mr. Southern was driving his wife to the hospital, 911 staff reached him by cell phone. He explained what he had been told by the employee and his wife before she lost consciousness. Mr. Southern told the 911 operator that the perpetrator had left "a note." When Mr. Southern reached Mary Black Hospital, his wife was in cardiac arrest. She had lost a significant amount of blood, her pupils were fixed and dilated, and there was neither blood pressure nor pulse. Hospital staff re-established a heart rate through electro-cardiac shock. Surgery was later performed in an attempt to save her life; however, Judy Southern died after more than five hours of surgery. The cause of death was loss of blood as a result of a through-and-through gunshot wound to the abdomen. **State's Exhibit # 72 (911 tape), R. pp. 2229-34; 2252-73; 2657-65; 2668.**

After shooting Judy Southern, Applicant fled into the woods. He buried the murder weapon under some leaves and hid from police for several hours. He eventually ended up in the basement of his wife's home, located a few miles from the Southern residence. **R. pp. 2344-50.**

When police arrived at the crime scene, the employee to whom Mrs. Southern had reported the attack was waiting for them. Outside the home, officers found a note, later determined to have been written by Applicant and addressed to his wife. The note stated in part,

"Honey, I did this first of all because I will not let them send me to prison. Second, they think I was a horrible person . . . Well, I decided to prove them right."

Further, the note contained directions to the location of his moped and included instructions leaving all of Applicant's worldly goods to his wife. He also stated that he knew from his attorney that he was going to get at least ten years in prison for the sexual assault of his infant daughter. He signed the note "Jonathan Binney," and his fingerprint was found on it. A SLED handwriting expert later opined Applicant had indeed written the note. **R. pp. 2218-21; 2227-28; 2322; 2544-45; 2648-54.**

Police found two fired 9 mm shell casings inside the crime scene. One was on the bathroom floor, and the other was located in the living room of the home. They also found a fired 9 mm casing on a side porch and two fired 9 mm bullets inside the home. Applicant's DNA was found on cigarette butts located inside the home and on more cigarette butts found in the wood-line surrounding the victim's home. Applicant's flashlight and gloves were also found in the woods near the victim's home. **R. pp. 2464; 2468-94; 2499-2500; 2557-65; 2599-2602.**

Police arrested Applicant in the basement of his wife's home on the morning of June 8. They also found Applicant's police scanner in the basement. As he was being arrested, Applicant turned to a Cherokee County deputy and said, "She's dead, isn't she?" The Deputy replied "Who?" Applicant responded, "The woman I shot." **R. pp. 2327; 2301-10.**

Police seized a pair of Applicant's pants in a search of his hotel room. In a pocket, they discovered one unfired 9 X 18 Makarov bullet, which is the same bullet as the fired shell casings recovered at the crime scene. **R. p. 2563.**

On June 16, after Applicant initiated contact with law enforcement, he gave a detailed statement about the burglary and murder. He also told police that he did not know Judy Southern

before her death. After giving the statement, he led investigators to the moped and the murder weapon hidden in the woods. Police recovered the murder weapon, a 9 mm Makarov pistol, exactly where Applicant said he buried it. Forensic examination matched the fired 9 mm shell casings and bullets found inside the victim's home to this weapon. Applicant also requested the death penalty in his June 16 statement, saying that the crime he committed definitely warranted it. **R. pp. 2344-50; 2495-97.**

Applicant subsequently asked to meet with law enforcement again, and gave another voluntary statement to investigators on June 19. This statement provided more details of why he had burglarized the home and killed Judy Southern. He explained that he was feeling anxious and nervous that day, and that he would go out and commit a burglary, or do what he called "snooping," whenever he felt that way. He explained that he was very angry and frustrated about his criminal sexual conduct charge involving the sexual assault of his daughter, the loss of his family, the lack of money, and the time he was facing in prison. He said that he chose the Southern residence because it was in a secluded location and was an affluent home.

He stated he had entered the home after determining that there was a man and woman living there. He again stated that he did not know Mrs. Southern before he burglarized her home and shot her, and that he had no connection to her.

Applicant also wrote a letter to Mr. Southern, dated June 19, 2000, in which he told Mr. Southern that, if Mr. Southern had come home, Applicant would have murdered the entire family and attempted suicide, robbed Mr. Southern or committed suicide, or he would have raped or killed Judy Southern.[5] He apologized and stated he never knew the Southerns and he did not

[5] Applicant further explained that he "had a lot of anger, frustration, bitterness, and resentment inside of me and had decided not to control his actions" on the day of the burglary and murder. He also stated that he did not hear the victim when she came in the house, and that he had hoped he only wounded her, instead of killing her.

have any grudge against them. Finally, he told Mr. Southern he wished to receive the death penalty and that the death penalty was warranted not only by man's law but by God's law. **R. pp. 2387-88.**

Applicant also confessed to a fellow inmate and gave the inmate a map of the victim's home while he was in the Cherokee County Detention Center. Among other things, he told this inmate he had "scoped out" the victim's home a few days prior to the murder; he went there on his moped and burglarized the home; he was in the bathroom using the bathroom when the victim came in; they saw each other about the same time; and, he pulled out a 9mm pistol and shot the lady. He also said, when the victim ran, he ran after her and shot again. He said he ran out of the home and went behind the house and into the woods. Helicopters were after him and hovering over him, but he was able to make it back to his house. When he got home, he hid in the basement, where officers found him behind some boxes. A SLED handwriting expert opined that Applicant, in fact, drew the map given to the inmate. **R. pp. 2618-21; 2642-56.**

III. OVERVIEW OF ALLEGATIONS AND DEFENSES

In opening statements, Applicant's lead counsel, John Blume and Respondent's lead counsel, Edgar Salter, set forth the primary allegations upon which Applicant's case is grounded and the primary defenses upon which the State relies. This recitation is not intended to be an exhaustive listing of each and every fact the parties raised, but rather provides an overview of the issues raised in the trial.

In his opening for Applicant, Attorney Blume recognized that trial counsel had a three-pronged defense in the trial below, as follows: (1) Applicant's entry into the residence was for the purpose of committing suicide, which is not a crime in this state, and thus there was no burglary nor aggravating factor warranting the death penalty; (2) the victim's husband had a role

in her death motivated by marital discord, and the victim lived in fear of her husband; and, (3) in the sentencing phase, Applicant, relying upon the testimony of Dr. Donna Schwartz-Watts, argued that his sexual disorders led to the commission of the crime.

With regard to allegations of trial counsel's deficient performance within the parameters of these case theories, Attorney Blume argued that counsel's investigation was deficient in the following ways: (1) Applicant was a fetal alcohol syndrome baby, which ultimately caused his mental health abnormalities and behavioral problems leading to this crime, yet no fetal alcohol expert was called as a witness; (2) counsel failed to adequately prove the suicide attempt, and did not present evidence of the suicide issue in the guilt phase, instead waiting until the penalty phase; (3) counsel failed to adequately determine and call to trial witnesses regarding the husband's culpability in the death of his wife; and, (4) counsel failed to adequately produce, analyze, and offer at trial mitigating evidence such as school records, early life witnesses, and other available sources showing Applicant's dysfunction from an early age.

Attorney Blume also raised other alleged procedural and substantive errors by trial counsel and the Court that had the effect of depriving Applicant of his constitutional due process rights. These include: (1) counsels' general failure to follow ABA guidelines for performance of defense counsel in the representation of death penalty defendants; (2) counsel's failure to adequately protest the introduction of allegedly false jailhouse snitch evidence from inmate Danny Ray Edwards, who specifically lied about his prior assistance to law enforcement; (3) failure to adequately challenge testimony from inmate witness Jerry Johnson who was allegedly untruthful about whether he received a benefit to testify against Applicant; (4) failure to persist in obtaining funding for a jury consultant; (5) failure to adequately challenge improper closing

arguments by the solicitor; and, (6) failure to adequately pursue the issue of coercion raised to PCR counsel by juror Henry Viquez.

With regard to appellate counsel, Attorney Blume raised three main points: (1) failure to attack an indictment amendment at the end of trial; (2) failure to raise Fifth and Sixth Amendment rights other than in a Miranda context; and, (3) failure to pursue prohibitions against execution of a mentally ill individual pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002).

In his opening statement for the Respondent, Attorney Salter argued that Applicant's allegations and proof fail to meet the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), requiring that Applicant's counsels' representation at trial fell below the standards required of criminal defense attorneys, and that Applicant was prejudiced thereby. Our courts have defined prejudice as meaning that, but for counsels' unprofessional errors, the outcome of the trial would have been different. Counsel opined that Applicant's evidence with regard to deficient performance was without merit, and the evidence concerning prejudice was speculative at best. In fact, counsel pointed out that Applicant's trial attorneys were two longstanding, experienced members of the criminal Bar, and that they did not hire multiple investigators because they chose to do the investigative "legwork" themselves to be more familiar with the factual nuances of the case.

With respect to certain pivotal issues that Respondent believed would be raised at trial, counsel argued the following: (1) Applicant's psychiatric witness at trial, Dr. Donna-Schwartz-Watts, did in fact testify at trial about fetal alcohol syndrome, and thus that issue was brought forth to the jury; (2) there was no credible evidence of the victim's husband's guilt in this case, either directly or indirectly, particularly in light of the overwhelming evidence of Applicant's guilt; (3) counsel made a strategic decision for Applicant to wear jail clothes during the trial

because he was in custody and counsel wished to allay jury concerns over his possible release; and, (4) counsel did not object to evidence of Applicant's previous CSC with a minor charge in the penalty phase because it was coming into evidence anyway, regardless of their objections, and they did not wish to highlight the issue. Attorney Salter's conclusion of his opening statement was that each action or non-action at the trial below now complained of by Applicant was the result of a trial tactic or strategy employed in an effort to save the life of the Applicant against very strong state's evidence in both the guilt and penalty phase of the trial.

IV. DISCUSSION OF THE LAW

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "[E]very effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective at the time." *Id* at 689. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.*, at 689, 104 S.Ct. 2052. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687, 104 S.Ct. 2052. *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*).[6]

The inmate must also demonstrate that he was prejudiced by his attorneys' ineffectiveness. *Strickland*, 466 U.S. at 691. In other words, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

[6] "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id* at 787 (citation omitted).

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id* at 693. Rather, "[c]ounsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).

Applying these well-established legal principles to the present case, this Court finds that Applicant has failed to meet either prong of the *Strickland* test as to any and all of the issues that he has raised. The record reflects that he was represented by capable and experienced counsel at both the jury trial and on appeal, and that each of the complaints now asserted at PCR were the result of either an articulated and reasonable trial strategy, or they were not raised due to a lack of meritorious proof or supporting law. Further, Applicant has not established prejudice under *Strickland*, as there has been no showing of proof or argument that would have changed the outcome of this case.

As a threshold issue, this Court does not accept Applicant's counsels' argument that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases establish *the appropriate standard* for counsel's investigation and presentation of mitigating evidence in the penalty phase of a capital trial, and that all capital defense counsel must fully comply with those standards. **PCR Tr. p. 66.** The United States Supreme Court re-emphasized in *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009), that these are, at best, merely guidelines, and that trial counsel need not comply with them to render objectively reasonable representation. *See also id* at 20 (Alito, J., concurring). Moreover, it appears to this Court that the Guidelines did not exist at the time of this trial. Indeed, Attorney Pruett testified that he did

not consult the ABA's 2003 Guidelines because they did not yet exist. Rather, they were in the process of being revised at the time that of Applicant's trial. **PCR Tr. p. 735.**

V. APPLICANT'S GROUND 11(a) – GUILT PHASE

Applicant's Ground 11(a), set forth in his amended petition for PCR, forms the crux of his case with respect to the **guilt phase** of the trial below and presents allegations of ineffective assistance of trial counsel in the guilt phase. The Court has divided these arguments into six (6) specific points, each discussed individually below. Both of Applicant's trial attorneys testified at the PCR hearing. The Court specifically finds that counsels' testimony and supporting evidence is credible as to all of the allegations of ineffectiveness raised by Applicant, and the Court accepts counsels' testimony in ultimately denying those allegations.

V. (1) – *VOIR DIRE* ISSUES

Applicant's **Ground 11(a)(1)** challenges trial counsel's conduct of *voir dire* and their failure to employ a jury selection expert. Respondent asserts that counsel made a reasonable determination not to employ a jury consultant and that Applicant did not prove either deficient performance or prejudice resulting from counsel's handling of *voir dire.*

Effective assistance of counsel is required during the *voir dire* process. *Brown v. Jones*, 255 F.3d 1273, 1279-80 (11th Cir.2001). However, the conduct of *voir dire* is particularly within the control of counsel and *voir dire* techniques are vastly different for each attorney. *Cf. Strickland*, 466 U.S. at 689. Therefore, the review of counsel's performance in *voir dire* is "highly deferential," and any *voir dire* error must be egregious and obvious. *E.g., Yeatts v. Angelone*, 166 F.3d 255, 265 (4th Cir. 1999).

The Court finds that Applicant's Application does not allege any specific juror whose *voir dire* was supposedly inadequate, or any specific juror who was erroneously accepted to

serve, or any specific juror who was erroneously removed for cause because of counsel's allegedly ineffective performance during *voir dire*. The PCR record reflects that Applicant's counsel during examination did not ask any questions of either Mr. Slade or Mr. Pruett about trial counsel's *voir dire* of any potential juror (**PCR Tr. pp. 548-93; 679-735**), and counsel did not present any evidence that any seated juror should have been removed for any reason.

Applicant also challenges trial counsels' decision not to hire a jury expert. The evidence at PCR is that trial counsel made an effort to obtain funding for a jury consultant in accordance with S.C. Code Ann. § 16-3-26(C)(1) (Supp. 2002), but the trial judge refused to approve funding for the expert because he found that counsel should be able to select the jury without the assistance of an expert, given counsels' level of experience.

The evidence before the Court reveals that, after the trial judge's adverse ruling, counsel took steps to familiarize themselves with the type of information that a jury selection expert would have provided. Both attorneys contacted another defense attorney who had utilized the services of a jury consultant in a capital case tried within a year of Applicant's trial, and they acquired and reviewed the materials the jury consultant had provided to counsel in that case. Given the variety of circumstances faced by defense counsel and the range of legitimate decisions regarding how best to represent a criminal defendant, this Court finds that counsels' assistance in *voir dire* was reasonable considering all the circumstances.

Both trial attorneys had substantial criminal felony trial experience; they had obtained and reviewed jury selection information that a jury consultant had provided to another attorney in a recent capital trial, and they had both participated in the capital *voir dire* process as attorneys in other cases. Also, Cherokee County has a relatively small population, Mr. Pruett had practiced criminal defense work in Gaffney for roughly six years at the time of trial, and he knew the

community well. Thus, this Court finds Applicant has failed to prove deficient performance under *Strickland* with regard to the jury consultant issue.

Applicant has also failed to prove any prejudice resulting from counsels' failure to utilize a jury consultant because Applicant did not present a jury consultant at the PCR hearing to testify as to specific prejudice resulting from the failure to employ a jury consultant at trial. Nor was any other evidence presented showing that a particular juror should have been removed or seated by counsel. As a result, Applicant has failed to establish how the utilization of a jury consultant would have created a reasonable probability of a different result, as required for relief under *Strickland*. See also *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999). This absence of prejudice is supported by Applicant's failure to specifically allege which jurors he contends should have been struck for cause but were not, or which jurors were improperly removed for cause when they could have been rehabilitated but were not.

Finally, it was argued at PCR that counsel was deficient for failing ensure that their *ex parte* funding request for a jury consultant was transcribed and preserved for appellate review. The Court is not persuaded by this argument because the leading Supreme Court case on this point does not require funding for a defense jury consultant. *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Constitution only requires that indigent defendants be provided with "[m]eaningful access to justice," so that they receive the "basic tools of an adequate defense or appeal." *Id.*, 470 U.S. at 77; and federal courts have consistently rejected the idea that *Ake* requires such funding. *Moore v. Johnson*, 225 F.3d 495, 502-04 (5th Cir. 2000). Thus, even if the issue had been preserved and appealed, Applicant could not have demonstrated on appeal that the trial court's decision to deny the motion was constitutional error. Further, assuming *arguendo* that the

failure to preserve the issue was deficient performance, Applicant failed to demonstrate at PCR that such failure was prejudicial.

V. (2) – JURY CHARGE ON BURGLARY

Ground 11(a)(2) alleges that counsel erroneously failed to request a jury charge "stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in this case. Trial counsel further failed to seek an instruction stating the specific elements of the crime named in the burglary charge."

As correctly stated by trial counsel Slade when explaining why he did not request such a charge (**PCR Tr. pp. 588-91**), South Carolina law does not require the State to prove that the defendant intended to commit a specific crime at the time he entered a dwelling. *Accord Pinckney v. State*, 368 S.C. 502, 504-05, 629 S.E.2d 367, 369 (2006).[7] Thus, this Court finds that Applicant's counsel were "not ineffective for failing to request a more emphatic or specific charge since the charge adequately stated the elements of first degree burglary." *Id* at 504-05, 629 S.E.2d at 369.

Reviewing the federal cases raised on this point by Applicant, this Court further finds that neither *Ring v. Arizona*, 536 U.S. 584 (2002), nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), require a different result. This is because neither decision mandates a change in state substantive criminal law. Stated differently, these cases do not require our courts to charge that there must be one, specific crime in the mind of the defendant at the time of entry. The case of *Ring*, like *Apprendi*, was a rule of procedural due process. *See Schriro v. Summerlin*, 542 U.S. 348, 354

[7] In *Pinckney*, the Court rejected an almost identical argument to the allegation raised by Applicant. The first degree burglary jury instructions in *Pinckney* were very similar to the instructions given to Applicant's jury. The Supreme Court found "[t]his charge adequately instructed the jury that the State must prove that the intent to commit a crime existed at the time of entry." *Id* at 504, 629 S.E.2d at 369.

(2004).[8] See *also id* at 353-58 [because the Court's decision in *Ring* was properly classified as procedural rather than substantive and because *Ring* did not announce a watershed rule of criminal procedure, retroactive application of the holding in *Ring* to death penalty cases already final on direct review is barred by *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion)].

V. (3) – ISSUE OF THIRD-PARTY GUILT

In **Ground 11(a)(3)**, Applicant alleges *inter alia* that counsel was ineffective for not adequately investigating and presenting evidence of the possibility that the victim's husband had direct involvement in procuring the murder of his wife, or was so intentionally or grossly negligent in assisting the victim after her injury, that he thereby contributed to her death.

In reviewing this allegation, the Court is aware that the holding in *Strickland* explains that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690-691. *See also Wiggins*, 539 U.S. at 521-22. Further, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691.

[8] In *Apprendi*, the Court "interpreted the constitutional due-process and jury-trial guarantees to require that, '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' . . . . In *Ring*, we applied this principle to a death sentence imposed under the Arizona sentencing scheme at issue here. We concluded that, because Arizona law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of such a factor to be proved to a jury rather than to a judge." *Schriro*, 542 U.S. at 351 (citations omitted).

The PCR and trial records reflect that trial counsel conducted an extensive investigation into Mr. Southern's possible involvement in his wife's murder. First, counsel repeatedly discussed the matter with Applicant, who gave law enforcement differing accounts that he later admitted were false, before he ultimately and repeatedly denied that there was any connection between him and Mr. Southern at all. Outside of Applicant's conflicting statements, counsel further investigated whether or not there was a connection between Mr. Southern and Applicant. Counsel also investigated whether the actions of Mr. Southern, or his employee Roy Chapman's actions after he received the victim's calls for help, amounted to a superseding or intervening cause that was capable of breaking the chain of causation triggered by the shooting.

The record before this Court reflects that, with regard to this issue, trial counsel: (1) obtained and reviewed the prosecutor's file; (2) interviewed Tonya Brown and at least one other friend of the victim; (3) interviewed the Southerns' marriage counselor; (4) obtained and reviewed the counseling records; (5) obtained the Southerns' cell phone records; (6) obtained, listened to, and had transcriptions of Mr. Southern's recordings of Mrs. Southern's calls on her home phone; (7) listened to the tape of the 911 call; (8) learned of employee Chapman's financial dependence on Mr. Southern; (9) determined the length of time it would take to drive from the bowling alley to the Southern residence, as well as the time it would take to drive from the residence to Mary Black Hospital, and ascertained that these times were consistent with Mr. Southern's subsequent trial testimony; (10) ascertained that Upstate Carolina Medical Hospital was further away from the Southern residence than Mary Black Hospital; (11) visited and walked through the Southern residence and the surrounding area; (12) obtained the relevant medical records related to the victim's treatment; (13) were aware that Mr. Southern's truck was not processed by law enforcement and that the home computer had not been seized; (14) spoke to the

pathologist about her findings; (15) were aware of the delay by Roy Chapman in calling 911 and that Mr. Southern did not call 911; (16) were aware that Mr. Southern failed to stop at an EMS substation on the highway; (17) were aware that only Applicant's blood was drawn for testing against evidence found at the crime scene and around the Southern property; (18) were aware that Mr. Southern owned a small caliber weapon; and, (19) were aware both that Applicant's fingerprints were the only prints found on the suicide note and that an identifiable print, inconsistent with Applicant, had been lifted from one of the knives recovered from the house, but that there was no known standard with which to compare the print.

Counsel testified that in spite of their thorough investigation, they were unable to develop credible evidence supporting a third-party guilt theory that Allen Southern had killed his wife, or to develop any link between their client and Mr. Southern. Without establishing a link between the men, they could not establish the existence of a conspiracy, a murder for hire scenario,[9] or that the actions of Mr. Southern (or Chapman) after the shooting were a superseding, intervening cause of the victim's death. The Court finds that counsel made a reasonable strategic decision to present much of the information that they had uncovered as part of the surrounding circumstances of the crime, and to keep that door open if during the trial Applicant credibly told counsel that there was a connection between him and Mr. Southern. The Court further finds that it was reasonable for counsel not to pursue a theory of third-party guilt because they did not have evidence that satisfied the requirements of *State v. Gregory*, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534-35 (1941). *See also Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). The evidence of Mr. Southern's behavior in the months leading up to the shooting, as well as his actions on that

[9] The State was unaware of the precise defense that trial counsel would present, but had anticipated that the defense might present evidence of third-party guilt if they could establish some connection between Applicant and Mr. Southern. **PCR Tr. pp. 471-72; 482-83.**

day or in the days that followed, simply did not "raise a reasonable inference or presumption as to [Applicant's] own innocence" and did not constitute "such a train of facts or circumstances, as tends clearly to point out [Mr. Southern] as the guilty party," *see Gregory*, 16 S.E.2d at 534-35. This is because, to present date there is no direct, admissible evidence that Mr. Southern, in fact, played a role in his wife's death, or that he and Applicant were somehow connected. The only evidence of a connection between Applicant and Mr. Southern was in a statement that Applicant had given to his first attorney, Donald Thompson; however, he later admitted to both trial counsel and Mr. Thompson that this statement was fabricated. Counsel clearly were not deficient in failing to present evidence that their client and his previous attorney had both confirmed was untrue.[10]

While the evidence that counsel elicited was only admissible for purposes other than suggesting that Mr. Southern was responsible for his wife's death, it still permitted counsel to argue that the State had "to improve the evidence a little bit to get it to fit their theory" of the case. It likewise allowed counsel to leave the door open to more fully develop Mr. Southern's culpability. **R. pp. 2235-48; 2273-90; 2292-93; 2319-20; R. pp. 2503-07; 2510-17; 2546-47; 2550-51; 2665-66; 2676-80.**[11] The Court finds that counsel reasonably determined that, absent a "smoking gun" implicating Mr. Southern that Applicant did not and apparently could not provide, they could not go further with this issue than they later did at trial.

The need for a smoking gun was especially important because of other evidence that counsel was aware that the jury would hear, and ultimately did hear, that was inconsistent with a

[10] The Court notes that the State did not object to the evidence that was presented, even though it contemplated and was concerned that the defense would present evidence of third party guilt. **PCR Tr. pp. 471-74; 482-83.**

[11] This explains why Mr. Slade's closing argument stopped short of suggesting that Mr. Southern actually killed his wife or was otherwise responsible for her death. **R. pp. 2761-68.**

theory that Allen Southern was involved in his wife's death, such as the 911 call. This Court listened to the 911 tape and the conversation between the dispatcher and Mr. Southern when it was published by the State at the PCR hearing. Mr. Southern's emotional demeanor and the information that he provided in the call do not appear to be consistent with the theory that he was involved in the shooting of his wife. His voice and actions reflect a genuine concern for his wife. Also, he explained the circumstances surrounding the calls he received from employee Chapman, where he was when he spoke to Chapman, as well as how and why he first looked for his wife in their house. He further explained his delay in getting her to his truck after finding her in the pasture some 300 yards from the house, that his wife told him that her assailant was waiting on her in the bathroom, and that the assailant left a note that was in the yard. More importantly, he provided information that the Court concludes is inconsistent with his own culpability and tends to refute any connection between him and Applicant. Specifically, even though Mr. Southern owned a small caliber handgun, he told dispatch that there appeared to be two wounds that were caused by a small caliber weapon. Further, he said that although his wife was not very coherent, she told him that the assailant's name was Berry and that he lived near the Southerns.

Also, the Court finds that counsel correctly viewed the scenario later posited by PCR counsel as implausible—that Applicant had not actually shot Judy Southern and that Mr. Southern had shot her. Nothing in the record supports this theory, other than PCR counsel's conjecture, and such speculation does not satisfy the strict requirements of *Gregory* and *Holmes*.

On the issue of third-party guilt, Applicant asserts that counsel should have called Tonya Brown as a witness at trial. This witness was a friend of the victim and testified at the PCR hearing that the Southerns were experiencing marital difficulties, that a breakup was coming, and

that the victim felt she was going to die that very day of the murder (presumably at the hands of her husband). This Court finds that testimony was potentially inadmissible as hearsay at trial. But even if it passed muster under the hearsay rules, it was likely inadmissible under *Gregory* and *Holmes*, since it did not raise a reasonable inference or presumption as to Applicant's own innocence, nor constitute such a train of facts or circumstances that tends clearly to point out Mr. Southern as the guilty third party. Moreover, calling this witness may have opened the door on admissibility of Applicant's conflicting statements about a link between Mr. Southern and Applicant, depicting him as a non-credible individual.

Assuming *arguendo* that counsel's performance was deficient in not calling Brown as a witness, Applicant has not proved any prejudice resulting therefrom. Applicant admitted that he killed the victim and apologized to the sentencing-phase jury in his final statement. While this statement to the jury does not bar the present PCR claim, *see Johnson v. Catoe*, 336 S.C. 354, 520 S.E.2d 617 (1999), it is relevant to whether he was prejudiced by the failure of his trial attorneys to further advance the theory of Mr. Southern's involvement in his wife's murder. Further, this Court finds that Ms. Brown is not a credible witness, as evidenced by her conduct before the murder and her testimony in PCR.[12] Also, the jury had the benefit of receiving from other sources evidence of the Southerns' marital discord, including the fact they were supposed to attend marriage counseling on the day of the shooting.

[12] Brown socialized with the victim and the victim's paramour while their affair was ongoing, shortly before the murder; she actively encouraged Mrs. Southern to leave Mr. Southern, and she concealed the affair from Mr. Southern. Yet, she denied disliking Mr. Southern on cross-examination. She also reluctantly admitted that she now has a prejudice against the Seventh Circuit Solicitor's Office and the Gaffney Police Department, stemming from the prosecution of her daughter. While she could not have been impeached with the law enforcement bias at the time of Applicant's trial because her daughter was not charged until 2006, it is proper for this Court to consider that bias in assessing whether her PCR testimony was truthful, and that it negatively impacts upon her credibility. Also, any subsequent fact-finder would be presented with this same evidence if she is called as a witness.

Finally, Applicant cannot establish prejudice resulting from any of the supposed deficiencies claimed in this allegation because there was overwhelming evidence proving that Applicant is guilty of murder and the aggravating circumstance of burglary. *See Strickland*, 466 U.S. at 694.[13] In light of this overwhelming evidence of guilt, Brown's lack of credibility and the finding that her testimony is likely inadmissible, the Court finds that Applicant has failed to establish that there is a reasonable probability that, but for counsel's failure to call Brown as a witness, the result of the proceeding would have been different. *See Strickland, Id.* at 694.

As a last comment on this issue, the Court would be remiss in failing to note that the entire argument of third-party guilt may be of no consequence. The evidence in this case clearly proves that Applicant was the shooter in the murder. Even if evidence could be adduced that Mr. Southern somehow procured Applicant's services in a murder for hire scheme, this would in itself be an aggravating circumstance warranting a capital prosecution against Applicant pursuant to S.C. Code Ann 16-3-20(C)(a)(4).

The Court finds Applicant has not proven either deficient performance or resulting prejudice from counsel's investigation into and presentation of evidence concerning the allegation that Mr. Southern had some direct or indirect involvement in his wife's death.

[13] The State introduced the June 16th statement (**State's Ex. 3**), his letter to Mr. Southern (**State's Ex. 6**) and the suicide note left at the scene (**State's Ex. 34**). The State corroborated most details of the statement and the information he provided to fellow inmate Danny Edwards, *see* **Ground 11(c)(4)**. For instance, Applicant's DNA was found on cigarette butts in the victim's residence, as well as on evidence found in a trash can in the victim's master bathroom. His DNA was also found on cigarette butts located in the woods along the fence line of the victim's residence. Officers found a pair of gloves and a flashlight in one of these locations. **R. pp. 2478-90; 2599-2602.** Also, police tied the murder weapon to Applicant, and shell casings and projectiles that were found in the areas of residence described by Applicant to Edwards (and in **State's Exhibit #3**) were also positively determined to have been fired by the murder weapon. **R. pp. 2332-33; 2468-75; 2491; 2552-64.** Further, the "suicide note" was in his handwriting and his fingerprint was found on it; his moped was found where the note indicated that he had hidden it; Applicant fled the scene after the killing; and he hid in the woods at night, before being arrested as he hid under his wife's residence. Additionally, Applicant took officers to where he had hidden the murder weapon, which may not have otherwise been found.

V. (4) – FAILURE TO HIRE A PRIVATE INVESTIGATOR

Ground 11(a)(3), also alleges that counsel was ineffective for "failing to retain the services of a private investigator to assist in the investigation of the case." In reviewing this allegation, the Court is aware that Applicant's trial attorneys had almost forty years of practice experience between them, both were skilled criminal lawyers at the time they were appointed, and both had used the services of investigators in the past. The evidence reveals that counsel discussed whether or not they should hire an investigator before ultimately deciding in the negative because they felt that the primary reason to retain one would be to pursue issues of third-party guilt and murder for hire; but the extensive information that they had uncovered about Mr. Southern's potential involvement, although raising some suspicion, did not provide them with a sufficient factual basis to warrant further pursuit of these theories.

More importantly, the possibility of third-party guilt was completely inconsistent with the evidence in the case and information that Applicant was providing to them. The Court finds that counsels' decision not to request funds for the use of a private investigator, based upon Applicant's statements to them, was objectively reasonable and in the best interests of the appropriate use of resources and the representation of their client at the time, and not deficient under *Strickland*. *See Stevens v. Delaware Correctional Center*, 295 F.3d 361, 373 (3d Cir. 2002).

As to the second prong of ineffectiveness on this point, Applicant has not shown any prejudice arising from the failure to employ an investigator. Because Applicant did not present a private investigator at the PCR hearing, he has failed to establish what additional information a private investigator might have been able to uncover or how counsel's use of one would have

otherwise created a reasonable probability of a different result, as required for relief under *Strickland*. *E.g.*, *Bannister*, 509 S.E.2d at 809.

V. (5) – FAILURE TO HIRE A FORENSIC PATHOLOGIST OR SUICIDOLOGIST

Ground 11(a)(3) also alleges that trial counsel was ineffective for failure to investigate, develop, and present all available evidence from a forensic pathologist and/or suicidologist, or other appropriate expert, in support of the defense that Applicant entered the Southern residence with the intent to commit suicide.

In defense of Applicant at trial, it is admitted that counsel did not retain the services of a forensic pathologist or an expert in the area of suicide. On this point, Attorney Slade testified that he reviewed the findings of state pathologist Dr. Ross with her roughly one month to six weeks prior to trial. She told him at that time in her opinion the victim had suffered a contact wound caused by a small caliber weapon. Because these findings were consistent with the planned defense and inconsistent with the State's theory of what had occurred, counsel was not deficient in retaining an independent forensic pathologist. Further, it is clear from the Record on Appeal that Dr. Ross subsequently changed her opinion, and did not alert counsel that she had amended her findings to say that the wound was a distant wound (as opposed to a contact wound), since she did not issue an amended report. **R. p. 2679**.

Viewing this evidence in light of the global evidence, however, one is mindful that Applicant admitted to counsel he had shot the victim, that there was no connection between him and Mr. Southern, and that Mr. Southern was not involved. Under these circumstances, trial counsel were reasonable in relying upon cross-examination of Dr. Ross as opposed to incurring the costs of retaining their own forensic pathologist. *See Strickland*, 466 U.S. at 690; *Smith v. Angelone*, 111 F.3d 1126, 1132-33 (4th Cir. 1997). The relevant inquiry is not what could have

been pursued but whether the choices that were made were reasonable. Here, the Court finds counsel's choice on this point was reasonable.

On the second prong of ineffectiveness, Applicant failed to establish any prejudice from the failure to call a forensic pathologist as a witness at trial. The jury received the benefit of counsel's challenge to Dr. Ross at trial through the use at cross-examination of the initial report of Dr. Ross, which was not changed until after she met with the prosecution, stating that the wound could have been caused by a small or medium caliber bullet. **R. pp. 2672-80.** At PCR, Applicant's counsel called Dr. Riddick on these points. A review of the trial record shows that counsel presented the jury with the similar information about the type of bullet used as that presented in PCR through Dr. Riddick. Dr. Riddick disputed the trial testimony of Dr. Ross that the victim's injuries were caused by "a distant gunshot wound . . . consistent with a medium caliber weapon," such as a .357 caliber bullet, a .38 caliber bullet, or a 9 mm bullet. He opined that the wound could have been caused by a small or medium caliber bullet: a 9 mm bullet, a .22 caliber, or a .38 caliber bullet. **PCR Tr. pp. 87-88; 91-92.** Although trial counsel did not create a battle between two competing experts, counsel effectively exploited Dr. Ross' amended findings as part of the defense's theme that the State was forced to "change" the evidence to fit its theory of the case.

Dr. Riddick further opined at PCR, based on his review of the medical records, that the victim could have survived "with very rapid medical intervention." However, this Court finds counsel's failure to present expert testimony to this effect was neither deficient performance nor prejudicial to Applicant. Counsels' investigation revealed that they could not establish that either Mr. Southern's actions upon finding his wife after the shooting or the subsequent treatment by the hospital staff was a superseding, intervening cause of death. Nevertheless,

counsel elicited on cross-examination of the emergency room surgeon that the victim bled to death; that he "would hope" that "there is always a point at which someone can be saved or resuscitated, whenever someone bleeds to death;" and he did not know what time she was wounded. **R. pp. 2665-66**. The Court finds that Dr. Riddick's testimony does not establish that either Mr. Southern's actions or the subsequent medical treatment was a superseding, intervening cause of death. *See State v. Jenkins*, 276 S.C. 209, 211, 277 S.E.2d 147, 148 (1981); 40 CJS Homicide, § 11.

Dr. Riddick's main concern was not the time it took for Mr. Southern to get his wife to the hospital. Instead, his chief concern was the delay of almost an hour between her arrival at the ER and the time that she went into surgery. **PCR Tr. pp. 88-90**. Thus, his testimony does not support Applicant's allegation that counsel were ineffective for not presenting evidence of Mr. Southern's potential involvement. His testimony also fails the test for admissibility of evidence of third-party guilt under *Gregory*. Likewise, his testimony does not establish that the subsequent medical treatment was grossly negligent. Rather, the State's cross-examination established that the victim had lost seven of the ten to fourteen units of blood that were in her system before she was shot, and that *only the surgeon* could answer whether it was necessary to stop the bleeding before surgery could have been performed. Also, Dr. Riddick's opinion was only that the victim would have had a better chance of surviving if there had been a rapid response time, but he could not assign any figure to a real chance of saving the victim if she had been taken into surgery within thirty minutes of being shot. **PCR Tr. pp. 90-96**. Similarly, the surgeon opined at trial that it was uncertain he would have been able to save her "if she had been shot in the waiting room of Mary Black Hospital" because "there is a lot of injury, a lot of bleeding, and a lot to go through to try to be saved, even at that point." **R. pp. 2663-64.**

Therefore, based on all the foregoing, this Court finds that Applicant has failed to establish there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different if counsel had retained the services of a forensic pathologist. *See Strickland*, 466 U.S. at 694.

Applicant further maintains that counsel were ineffective for failing to present a suicidologist or "other appropriate expert" to support the defense's position that Applicant entered the Southern residence with the intent to commit suicide, and that he therefore lacked the intent to commit a burglary.

The evidence reveals that counsel did consider presenting expert testimony, through either Dr. Morton or Dr. Schwartz-Watts, to support their guilt phase defense that Applicant's intent when he entered the Southern house was to commit suicide, and that he therefore lacked the intent to commit a crime for purposes of the burglary charge. However, counsel testified that they decided not to introduce such expert testimony in the guilt phase because (1) they were reasonably concerned that the presentation of any expert opinion of a suicidal mental state would open the door for the State to present evidence of the CSC and negative mental diagnoses, such as the diagnosis that Applicant is a sexual sadist, consistent with the State's theory that Applicant broke in the home to rape and kill Judy Southern; and (2) the State was unaware of how the defense planned to utilize evidence of Applicant's suicidal intent, and counsel wanted to avoid alerting the State to the defense's intended strategy. By following this strategy, Counsel testified that they hoped the State would be unprepared to respond to the defense's position that suicide is no longer a crime, contrary to *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1819). The Court thus finds no deficient performance in this trial strategy.

Further, Applicant has not shown any prejudice on this point. Solicitor Gowdy confirmed that the State was unprepared for the defense that counsel presented. Also, there was extensive evidence presented in the guilt phase that supported the defense's theory that Applicant was suicidal at the time of the murder, even without the benefit of expert testimony.[14] To the extent that counsel's performance may be deemed deficient because they predicated this defense on a position contrary to older precedent from the South Carolina Supreme Court, any deficiency was not prejudicial, since the trial judge instructed the jury in accordance with trial counsel's position that suicide is not a crime.

Moreover, if the defense had chosen in the guilt phase of the trial to present expert testimony regarding Applicant's depression and suicidal intent—or the evidence in the February 22, 2010 PCR affidavit of Dr. Janet A. York, PhD (a psychologist and professor in the College of Nursing and a Psychiatric Mental Health Track Coordinator at the Medical University of South Carolina)—this, too, would open the door for damaging responsive evidence as discussed above. The presentation of any such evidence would ultimately have been damaging to Applicant and such prejudice would greatly outweigh the minimal benefit gained through expert testimony that he was suicidal. The Court rejects Applicant's current implication that counsel could have presented this evidence in some limited form that would not have opened the testimonial door for damaging reply consistent with the prosecution's theory of the case. This would potentially include the type of information that the State elicited on cross-examination of Dr. Morton about

[14] For instance, the witness who found the note he left at the scene (**State's Ex. 34**) and the parties referred to this note as a "suicide note;" he was placed on "suicide watch" at the jail; and he was not taken off of suicide watch until he gave his June 16, 2000 statement. **R. pp. 2358; 2362-64; 2366; 2368-69; 2389-91.** Further, he said in his June 16, 2000 statement that "[b]etween the hours of 12 midnight & 7 am on June the 7th, . . . I wasn't sure if I just wanted to go in the house to commit suicide, or to rape someone, or to just shoot all of them [and] then kill myself." **R. pp. 2345-46; State's Ex 3, R. pp. 3617-21.** He also stated that he intended to commit suicide when he later broke into the Southern residence (**R. p. 3618**), and he asked to be given the death penalty because "the crime I committed definitely warrants it." His letter to Mr. Southern, **State's Ex. 6, R. pp. 3624-25**, also expresses his intent to commit suicide. *See* **R. p. 2387.**

Applicant's depression at sentencing, **R. pp. 3378-92**, as well as Applicant's statement to Agent Prodan that he contemplated committing a "mass murder" before he committed suicide, or raping his brother-in-law's wife and killing his brother-in-law before he committed suicide. **R. pp. 3161-62.**

The Court finds that counsel's determination that they did not want the guilt-phase jury to hear such evidence was reasonable and not prejudicial. Further, because there was overwhelming proof of guilt of murder and burglary, Applicant has failed to establish a reasonable probability of a different result but for counsel's failure to present this expert testimony. *Strickland* at 687.

V. (6) – APPLICANT WEARING PRISON CLOTHES/RESTRAINTS AT TRIAL

Ground 11(a)(4) raised by Applicant is that counsel were ineffective because they failed to ensure that jurors did not see Applicant in prison clothes in the guilt phase. **Ground 11(b)(7)** asserts the same error in the penalty phase.

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The evidence on this issue in the record reveals that this decision was made only after counsel had (1) researched the applicable law; (2) discussed the proposed strategy with other attorneys experienced in trying capital cases, who agreed with the strategy; (3) thoroughly explained their proposed strategy to both Applicant and his parents; (4) informed Applicant and his parents that counsel would not follow the strategy if they objected to it; and (5) obtained Applicant's consent to the strategy.[15] Although Applicant's consent to trial strategy does not, alone, vitiate all ineffective assistance claims, his consent is probative both of the reasonableness of the chosen strategy and of counsel's performance. *Strickland*, 466 U.S. at 689; *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

[15] The Record on Appeal corroborates counsel's testimony because the trial judge conducted an on-the-record waiver of Applicant's right not to appear in prison garb, and Applicant confirmed that he consented to jurors seeing him so attired. **R. pp. 43-44**. *See also* **R. pp. 44-45.**

Counsel testified that they adopted this strategy to impress upon jurors that, regardless of the sentence he received for murder, Applicant was already incarcerated, he would not be going home, and he was not a public threat. They also sought to avoid any juror backlash from their strategy of not putting information of the CSC before the jury in the guilt phase, based upon their decision to attack the prosecution's evidence of burglary and thereby attempt to undermine the State's ability to obtain a death sentence. The Court finds this part of counsels' strategy complemented their sentencing phase strategy of how to best deal with the evidence that Applicant committed CSC on his infant daughter, because the jury would have already seen the visual reminder that Applicant was already being punished for the CSC. Also, trial counsel opined that his appearance in prison garb might potentially have a positive effect upon the jury's sentence, based upon the inference that incarceration for life imprisonment would be rough for someone looking as youthful as Applicant did at the time of trial. *See Estelle v. Williams*, 425 U.S. 501, 507-08 (1976); *Humbert v. State*, 345 S.C. 332, 337-38 & n. 4, 548 S.E.2d 862, 865 & n. 4 (2001) (acknowledging that this may be sound trial strategy). It appears to this Court that the decision to wear prison garb at trial was part of a reasonable trial strategy, undertaken with the consent of Applicant, who should not now be allowed to claim this decision was deficient performance.

Nor has Applicant proven any prejudice on this issue. There was overwhelming evidence Applicant was guilty of murder and burglary in the first degree. *See Humbert*, 548 S.E.2d at 865-66. Also, he did not object to counsel's chosen strategy when the trial judge gave him the opportunity to do so in chambers, **R. pp. 42-45**, or at any point in either phase of his trial. Finally, at PCR he neither presented any evidence nor alleged that he disagreed with counsel's

chosen strategy, or that the State compelled him to stand trial while dressed in prison attire. For these reasons, this allegation lacks merit.

In **Ground 11(a)(5)**, Applicant contends that counsel were ineffective in the guilt phase because they failed to ensure that jurors did not see him in restraints. In **Ground 11(b)(8)**, he raises the same claim with respect to the penalty phase. Both allegations lack merit because Applicant has failed to present *any* evidence that, in fact, jurors saw him in visible restraints. The Court has reviewed the Record on Appeal, and there is no indication that Applicant was in restraints in the jury's presence at any time during his trial.

To the contrary, during the pre-trial in chambers hearing, the trial judge addressed the question of whether counsel wanted Applicant shackled or handcuffed in the jury's presence. Mr. Pruett stated that counsel wanted the restraints and handcuffs removed. The trial judge then stated that "[t]hey will be removed before the defendant is brought into the courtroom." **R. p. 46, ll. 11-19**. There is no indication in the remaining portions of the record that this directive was disobeyed or that any juror witnessed Applicant in handcuffs or restraints.

Also, Applicant did not present any evidence to support this claim at the PCR hearing. Mr. Slade testified that he did not recall Applicant ever appearing in leg irons or shackles at trial **(PCR Tr. p. 587, ll. 15-21)** and Mr. Pruett testified that Applicant did not wear leg irons or shackles in front of the jury. **PCR Tr. p. 733, ll. 3-9**. Because there is no evidence to support Applicant's conclusory allegation, he has failed to prove either deficient performance by his attorneys or any prejudice under *Strickland*. *See Fountain v. United States*, 211 F.3d 429, 434-35 (7th Cir. 2000); *Marquard v. Secretary for D.O.C.*, 429 F.3d 1278, 1310 (11th Cir. 2005).

Therefore, for all of the foregoing reasons cited above in discussion of the law and facts of the case on all of Applicant's claims of ineffective assistance of counsel relating to the guilt

phase of Applicant's trial, this Court finds there has been no showing of deficient performance or resulting prejudice on the part of trial counsel, nor constitutional violations in the proceeding below. Applicant has failed to meet the necessary burden of proof entitling him to relief at PCR on guilt-phase issues; thus, Applicant's claims relating thereto are denied.

VI. APPLICANT'S GROUND 11(b) – PENALTY PHASE

Applicant's **Ground 11(b)**, set forth in his amended petition for PCR, forms the crux of his case with respect to the **penalty phase** of the trial below and presents allegations of ineffective assistance of trial counsel in the penalty phase. The Court discusses these allegations in six specific topic areas. Some of these issues were also raised with respect to the guilt phase of the trial. Each of these issues will be discussed individually below. As stated previously, both of Applicant's trial attorneys testified at the PCR hearing. The Court specifically finds that counsels' testimony and supporting evidence on the issues relating to the penalty phase of the trial are credible as to all of the allegations of ineffectiveness raised by Applicant, and the Court accepts their testimony in ultimately denying those allegations.

VI. (1) FAILURE TO PRESENT ADEQUATE MITIGATING EVIDENCE

Applicant claims in **Ground 11(b)(1)** of his amended petition that trial counsel "failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence," and "failed to retain a mitigation specialist or social history investigator to conduct a mitigation investigation and develop an adequate social history." The Court recognizes "it is trial counsel's responsibility to adequately investigate and present evidence in mitigation of guilt." *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir.2003). However, counsel is only required to make a reasonable investigation for possible mitigating evidence. *Id.*

On this point, counsel testified that after consideration, they decided not to retain a social worker or mitigation specialist because they were able to effectively present most of their case in mitigation through witnesses Reverend James Dale Binney (Applicant's adoptive father) and Dr. Donna Schwartz-Watts (forensic psychiatrist). According to counsel, they did not hire a social worker or mitigation investigator simply to assist with their investigation because counsel, who had at the time almost forty years of experience practicing law between them, decided that they could do the investigative work themselves and retain a closer focus on the issues of the case.

From a review of the entire record, the credible evidence is that counsel made a reasonable investigation into and presentation of mitigating evidence under prevailing professional norms. *Strickland*, 466 U.S. at 686. This Court finds that the decision to conduct mitigation investigation and presentation in this way was reasonable under *Strickland.*

Attorney Pruett has a great deal of experience in gathering the types of records that a mitigation specialist would gather, both in his former work as a prosecutor and from obtaining family court records while in private practice. Also, Attorney Slade has years of experience in conducting an investigation to prepare for trial. Counsel discussed the case with Applicant a number of times prior to trial, with greater frequency as the trial date approached. Counsel's various discussions with Applicant covered everything, including his relationship with his adoptive parents, with his natural mother, and with his wife. The uncontroverted testimony reveals that counsel spent a lot of time discussing Applicant's relationship to his wife and whether she should be presented as a witness.

Further, counsel met with Rev. and Mrs. James Binney on six occasions, for a number of hours each visit. They also met separately with Rev. Binney to prepare him as a witness at trial. Counsel testified that Rev. and Mrs. Binney gave counsel a complete social history of Applicant

from the date they adopted him at the age of four days until the time of the trial. Anything about his history that his adoptive parents could not tell counsel, counsel obtained directly from Applicant. Counsel also obtained background information from Melanie Binney. Mr. Slade discussed the case with Melanie Binney "between six and ten times," according to his testimony, either in person or by telephone. Counsel spoke to a Mr. Bolt, a former employer of Applicant, who had some positive things to say about Applicant, but also said he ultimately had to fire Applicant for engaging in criminal activities at the car dealership where they worked. Counsel obviously contacted Mr. Noel Swain, who testified as a sentencing phase witness.

Further, counsel contacted various places where Applicant had been hospitalized and several schools that he attended to gather relevant records, such as the Alpha Facility Aftercare. Counsel also obtained records from Spartanburg Regional Hospital, Upstate Carolina Medical Center, and Patrick Harris Psychiatric Hospital by either writing these institutions or personally going to them; counsel had a copy of an evaluation of Applicant by Dr. Geoffrey McKee, who had evaluated Applicant in connection with the CSC charge; Mr. Slade spoke to Applicant's former attorney on the CSC case; counsel had a copy of the trial transcript from the CSC case; and, counsel had Applicant's records of his prior convictions for larceny and related crimes, the Spartanburg jail records, and the records from the Gaffney County Detention Center.

Counsel's investigation showed that Applicant did not come from a dysfunctional family where the parents may be responsible for abuse that resulted in his behavior. Rather, no evidence was uncovered of any physical or sexual abuse by Applicant's adoptive family; to the contrary, they are clearly loving and supportive adoptive parents who provided a nurturing environment for their son during his childhood, and had continued to advocate for him all of his life, including at the PCR proceeding.

Counsel presented the results of their investigation to their retained experts, Drs. Schwartz-Watts and Morton. Neither Dr. Schwartz-Watts nor Dr. Morton told them that more information or records were needed to accurately form a mitigation opinion. The defense eventually called five sentencing phase witnesses in mitigation of punishment: Capt. Rocky Jones from the Cherokee County Detention Center, Dr. Donna Schwartz-Watts, Dr. William A. Morton, Jr., Mr. Noel Swain, and Rev. James Dale Binney.

Counsel considered hiring a social worker to assist them in presenting the background information at trial, but ultimately made a strategic decision to present information about Applicant's background through Rev. Binney. Counsel testified that the experience of both attorneys was that for the most part, social workers are ineffective, since the social worker's only connection with the defendant is as a retained expert. On the other hand, Rev. Binney, a well-educated and articulate man, "was a good person to make that kind of contact that we needed . . . with the jury" because of his background and because he had a good way of presenting himself. Also, Mr. Slade wanted Rev. Binney to have a prominent role in the trial. Counsel did not interview any other biological or adoptive family members, such as Ms. Haygood who testified at PCR, but did not perceive such was necessary or helpful.

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More importantly, counsel had uncovered more than enough evidence to support the theories to which the defense experts testified – including a history of multiple sexual disorders, a diagnosis of Fetal Alcohol Syndrome, and evidence of his suicidal intent. In light of all of the evidence that counsel unearthed from those closest to Applicant's upbringing and from Drs. Schwartz-Watts and Morgan, who had reviewed Applicant's history, it was reasonable for counsel not to identify and interview every other living family member or every therapist who had once treated Applicant's biological mother, as argued by PCR counsel (See *Van* Hook, 130

S.Ct. at 19). Further, trial counsel made a reasonable presentation of their case in mitigation to the sentencing-phase jury.

The testimony in the case reveals that counsel considered but decided against calling Applicant's adoptive mother, Mrs. Sandra Binney, in the sentencing phase because counsel did not think that she would be a very good witness. In the judgment of both attorneys, she was extremely focused on the sole issue of Fetal Alcohol Syndrome. In the words of counsel, this "made her appear that she was trying to distance herself from [Applicant's] problems," as if to say that he was "very flawed" when adopted. Further, she was overwhelmingly emotional in pretrial preparation and during the trial.

The testimony reveals that counsel also strongly considered using Melanie Binney as a witness in the penalty phase because Mr. Slade thought that she could humanize Applicant.[16] However, counsel testified that "there was a downside to her testimony." In particular, a prosecution witness was prepared to testify that, when Melanie Binney went to the hospital in connection with the CSC case, she said words to the effect of "can't we keep this in the family? . . . Do we have to make a police matter out of this?" Whether or not that witness testified, the State would question her about these remarks, and Mr. Slade reasonably felt this would degrade her in jurors' eyes because jurors would want to know how a wife could stay with the man who had raped her infant daughter. Mr. Slade was also worried that the State might potentially cross-examine her about bizarre or unusual sexual practices in which she and Applicant engaged. While this information was not in Dr. Schwartz-Watts' report and she did not later testify to it, counsel was aware that the State had an independent evaluation undertaken.

[16] Mr. Slade thought that Melanie Binney could do this because she was "a likeable person." Also, counsel hoped that she might potentially lessen the negative impact of the CSC case.

Given the numerous sexual disorders that Dr. Schwartz-Watts did find and the various things that Applicant had told the State's examiner, the Court finds that this was a reasonable concern and strategic response by Mr. Slade. Mr. Slade discussed his concerns with Melanie Binney and, by the time of the sentencing phase, she was reluctant, if not completely unwilling, to testify. For these reasons, the Court finds that Applicant has failed to prove deficient performance in either counsel's investigation into or presentation of mitigating evidence.

Further, Applicant has not met his burden of proving that he was prejudiced by counsels' failure to employ a social worker or mitigation specialist or by their failure to call Sandra Binney, Melanie Binney, or Ms. Haygood at trial. To establish prejudice in a capital sentencing proceeding, Applicant must prove that "there is a reasonable probability that ... the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Wong*, 130 S.Ct. at 386 (to determine whether there was prejudice, "it is necessary to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path—not just the mitigation evidence [counsel] could have presented, but also the negative information that would have come in with it"). This Court finds that Applicant has not met this burden.

Unlike *Sears v. Upton*, 130 S.Ct. 3259, 3261-63, 3267 (2010), this is not a case where PCR counsel uncovered and presented significant mental and psychological impairments that trial counsels' investigation failed to uncover. Instead, the evidence that Applicant presented at PCR supported the same three theories that trial counsel had presented: that Applicant was suicidal at the time of the murder; that he suffered from Fetal Alcohol Spectrum Disorder or

Fetal Alcohol Effects; and, to a lesser extent than argued by trial counsel, that he suffers from several sexual disorders.

PCR counsel introduced a voluminous amount of Gayle Dove's (Applicant's birth mother) VA medical records as **Applicant's Ex. 3** in furtherance of the argument that trial counsel should have had assistance in investigating mitigating evidence. A review of these records by the Court reveals that these documents mostly reflect her treatment for migraine headaches and post-traumatic stress disorder as the result of being sexually assaulted after she had given Applicant up for adoption, and these are irrelevant to the issues before this Court. The best and most credible evidence that Gayle Dove drank while she was pregnant was presented at trial through Dr. Schwartz-Watts—that Ms. Dove admitted to Mrs. Sandra Binney that she drank alcohol while she was pregnant. Dr. Andrews also claimed that the VA records reflect that Ms. Dove admitted to a suicide attempt when she was sixteen. However, the suicide information in this record was already before the sentencing-phase jury, which heard testimony that Ms. Dove had committed suicide. The jury also heard other evidence that Applicant was suicidal at the time of the murder, including Dr. Schwartz-Watts' extensive testimony about Applicant's "history of suicide attempts, suicidal ideation that you commonly see when he's been under stress." She further testified that he has a history of depression, that he had been diagnosed with various forms of depression, and that he had previously been hospitalized for treatment of depression. *See* **Ground 11(b)(2).**

Moreover, Applicant offered as an exhibit a group of records that he claims PCR counsel were able to locate but that were not in the file of either attorney, as **Applicant's Ex. 15.** Even assuming that these records were not uncovered until PCR, for the reasons more fully discussed, *infra*, Applicant did not establish that this evidence, when considered in connection with the

totality of the available mitigation evidence adduced at trial and in the PCR proceeding, was such for the Court "to conclude that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Thus, the PCR evidence produced by witness Dr. Andrews (professor of social work) on behalf of Applicant that Ms. Dove's family had a history of suicide attempts would not have greatly added to the information that was uncovered and presented by trial counsel. It would merely have provided additional information to corroborate the opinions of Drs. Schwartz-Watts and Morton.

Also, this Court finds counsel's failure to present the evidence of Applicant's background through a social worker, instead of or in addition to Rev. Binney, was not prejudicial. With the exception of Dr. Andrews' testimony about Ms. Dove's family suicides and her VA records, virtually every point to which she testified concerning Applicant's background was presented to the sentencing-phase jury through either Rev. Binney or Dr. Schwartz-Watts. Thus, the Court finds the information to which Dr. Andrews testified was largely cumulative to the evidence that trial counsel presented. Additionally, counsel was able to present this information through a respected family member, as opposed to a paid expert. Rev. Binney was not cross-examined, whereas Dr. Andrews' testimony was impeached and undermined through cross-examination, exposing her personal opinion against capital punishment and critical weaknesses in the manner that the information she relayed was gathered.

Likewise, there was no prejudice from the failure to call either Sandra Binney or Melanie Binney at trial because there is no credible evidence that either woman would have testified at trial. Sandra Binney's contrary PCR testimony (**PCR Tr. p. 447**) is both inconsistent with the testimony of both trial attorneys and with Rev. Binney's testimony that "I speak for . . . his mother, . . . this is more difficult for her, I believe, as a mother, and – [that] is why I have opted

to speak for her on her behalf in this setting." **R. p. 3423, ll. 7-11.** Likewise, Melanie Binney's representation in ¶ **8** of her affidavit that she was willing to testify, but that counsel did not call her, is inconsistent with her failure to be deposed and subject herself to cross-examination. Further, neither woman would have presented the jury with any additional information "of value," *see Van Hook*, 130 S.Ct. at 19, because every important point in the evidence presented from these women was presented to Applicant's sentencing-phase jury. Also, Melanie Binney would be subject to impeachment with her comments and efforts at the hospital to prevent Applicant's arrest for sexually assaulting her daughter; with evidence of her willingness to violate a court order by allowing her husband to live under her house, where he was found by police and arrested; and potentially by evidence of the unusual sexual practices in which she and Applicant engaged. *See Wong*, 130 S.Ct. at 386. Similarly, there was no prejudice from the failure to present Ms. Haygood. As the Court's synopsis of her testimony reflects, she also "would have added nothing of value." *Id.*

Thus after review, this Court finds that trial counsel did not in this case present a superficial mitigation theory during the penalty phase. Further, the evidence and records Applicant presented in PCR were largely cumulative to the evidence presented at trial. As a result, he presented, at best, "a fancier mitigation case," *Jones*, 332 S.C. at 339, 504 S.E.2d at 827; *see also Sears*, 130 S.Ct at 3266 ("there is no prejudice when the new mitigating evidence would barely have altered the sentencing profile presented to the decisionmaker") (citing *Strickland*, 466 U.S. at 700). This Court has weighed the totality of the mitigating evidence presented, both at trial and in PCR, against the State's extremely strong case proving Applicant guilty of murder and the statutory aggravating circumstance of burglary, and the Court cannot

"conclude that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

VI. (2) FAILURE TO PRESENT A SUICIDE EXPERT

Applicant's **Ground 11(b)(2)** is that counsel were ineffective for not retaining "an expert in suicide to support their theory that [Applicant] had entered the Southern residence with the intent to commit suicide." As in the guilt phase, the Court finds this allegation to be without merit in the penalty phase. Because of counsels' need for a means to mitigate the CSC charge and because counsels' investigation had uncovered possible evidence of FAS, trial counsel made a reasonable decision to employ Dr. Schwartz-Watts. She is a forensic psychiatrist with substantial expertise in diagnosing and treating persons who have sexually-related mental health issues. Also, she testified extensively about Applicant's suicidal intent at the time of the crimes and past evidence of suicide intent and attempts.[17]

Nor has Applicant shown prejudice resulting from counsel's failure to retain and present a suicidologist. All salient points in Dr. York's affidavit were extensively covered by either Dr. Schwartz-Watts or Dr. Morton, and Dr. Schwartz-Watts was able to testify about her diagnoses of Applicant's various sexual disorders, unlike Dr. York. Also, considering the totality of the evidence presented, including the overwhelming evidence of guilt of murder and the statutory aggravating circumstance, Applicant failed to establish "that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

[17] She also has a great deal of experience in conducting forensic evaluations of an accused's competency to stand trial and criminal responsibility. Further, her training and experience make her more than competent to testify about whether Applicant was suicidal at the time of the murder, and she is as qualified as a psychologist to render such an opinion. Thus, the Court cannot find that it was unreasonable for counsel not to employ a suicidologist.

VI. (3) FAILURE TO PRESENT A FETAL ALCOHOL EXPERT

Applicant's **Ground 11(b)(3)** is that counsel were ineffective for not retaining an expert in Fetal Alcohol Spectrum Disorder, also known as Fetal Alcohol Syndrome or Fetal Alcohol Effects, although they knew Applicant's birth mother drank alcohol during her pregnancy. Applicant also claims that counsel further failed to obtain his medical, school, and other records, as well as his birth mother's medical and other records to document that he suffered from Fetal Alcohol Spectrum Disorder.

The evidence before this Court reflects that trial counsel pursued Fetal Alcohol Syndrome (FAS) through a neurologist and a forensic psychiatrist who had treated numerous individuals suffering from FAS. Dr. Schwartz-Watts, the forensic psychiatrist, represented to counsel that she had expertise in this area. She found that Applicant suffered from FAS. Neurologist Dr. David Bachman of MUSC reviewed an MRI, PET scan, and EEG of Applicant, as well as early childhood photographs of Applicant. He did not find any organic brain abnormality, nor could he determine Applicant had FAS. Counsel did not call Dr. Bachman as a witness, and only presented Dr. Donna Schwartz-Watts in the penalty phase.

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She opined that Applicant met all of the criteria for FAS known in the medical literature at that time. Specifically, she testified that Applicant had: (1) a history of heavy alcohol ingestion by the mother during pregnancy; (2) failure to thrive as a child; (3) facial dysmorphology as a child; and (4) documented developmental brain dysfunction. She also testified extensively about FAS, the characteristics, developmental problems, and resulting impulsive behavior.[18] The Court concludes that counsel reasonably relied on their expert's representations and diagnosis and that

[18] Rev. Binney also testified to Applicant's developmental problems, school problems, impulsive criminal behavior as a teenager, and his inability to hold a job as an adult. Rev. Binney attributed many of Applicant's lifelong problems to FAS.

their performance was not deficient in this regard. *See Walton v. Angelone*, 321 F.3d 442, 466 (4th Cir. 2003); *Poyner v. Murray*, 964 F.2d 1404 (4th Cir. 1992).

The Court further finds that Applicant has not proved any prejudice from counsels' chosen strategy. Dr. Natalie Novick-Brown's testimony regarding whether Applicant met the criteria for FAS was cumulative to Dr. Schwartz-Watts' and Rev. Binney's trial testimony. In fact, Dr. Novick-Brown, a psychologist, admitted that Dr. Schwartz-Watts informed the jury that Applicant met the criteria for FAS.

Further, Dr. Novick-Brown's testimony that Applicant's behavior on the date of the murder was consistent with FAS is not persuasive. She testified that approximately 50% of persons diagnosed with any fetal alcohol syndrome condition exhibit sexually inappropriate behavior that can range from inappropriate remarks, a brief inappropriate touch, up to sexual assault behavior. However, she did not attempt to relate Applicant's sexual assault of his three-month-old daughter or his thoughts of raping Judy Southern to FAS, and she never opined those actions were the result of FAS. Dr. Bookstein briefly mentions in his report that individuals with FAS often have special difficulties with inappropriate sexual behaviors; however, Dr. Bookstein did not opine that Applicant sexually assaulted his three-month-old daughter or considered raping Mrs. Southern as a result of FASD. Dr. Bookstein also admitted that he did not know anything about the facts of this particular case.

At PCR, Dr. Novick-Brown's opinions were impeached by the facts and evidence in this case, including Applicant's own admissions. The evidence suggests that Applicant's actions on the evening before and the day of the murder were planned and methodical, and not the impulsive result of FAS. Further, her attempt to relate Applicant's overall plan to impulsiveness was cumulative to Dr. Schwartz-Watts' trial testimony. More importantly, Dr. Schwartz-Watts

testified at the PCR hearing that she remained firm in her original conclusion that Applicant entered the victim's home as a result of his sexual sadism.

Dr. Schwartz-Watts also testified at PCR that there was no medical study showing that sexual sadism is linked to FAS. She further testified that the studies cited in Novick-Brown's affidavit were unreliable,[19] and that Dr. Schwartz-Watts would need to see more studies before she would accept a theory that fetal alcohol exposure is a separate risk factor for sexual paraphilias. Dr. Schwartz-Watts is a nationally recognized expert on sexual deviant behaviors and disorders, and the Court finds that her testimony is highly credible on this issue. As a result of all the foregoing, this Court finds Applicant has failed to show deficient performance or resulting prejudice in failing to call Dr. Novick-Brown or any other forensic psychologist at trial.

VI. (4) FAILURE TO PRESENT A STATISTICAL EXPERT

Likewise, counsel was not deficient in failing to identify or call Dr. Fredrick Bookstein, a statistician, at trial in 2003. As stated previously, counsel had a neurologist review Applicant's MRI and PET scans who determined that the results of these tests were normal. The neurologist also reviewed childhood photographs of Applicant and could not determine he had FAS. Counsel had Dr. Schwartz-Watts examine Applicant. Her testimony about her findings, discussed above, was premised on the same diagnostic criteria Dr. Bookstein's findings support, and she opined that Applicant had FAS.

Dr. Bookstein is not a radiologist, neurologist, nor neuro-radiologist. He is not licensed to review an MRI, issue an MRI report, or diagnose an individual with FAS. Thus, his testimony about what he saw reviewing an MRI film is not credible. Dr. Bookstein measured the corpus collosum of a 3-D image of Applicant's brain generated by a computer program Dr. Bookstein wrote,

[19] One citation is not a scientific study. Dr. Schwartz-Watts testified that she conducted an extensive search and could not find any studies that replicated what the study in the citation found.

which used MRI films from MUSC, and compared it to measurements of a Seattle study group. However, Dr. Bookstein was engaged in frontier research science at the time of Applicant's trial. During Dr. Bookstein's deposition, Respondent impeached him about a paper that he wrote in 2005 complaining that the medical community would not accept or recognize his pioneering work or research. **Dep. pp. 66-133, Respondent's Deposition Exhibit 2.**[20] Dr. Bookstein admitted that he wrote this paper, and he admitted that his scientific research attempting to demonstrate fetal alcohol damage to the center of the brain—the corpus collosum—through 3-D MRI study and measurement, was not accepted by the fetal alcohol and psychiatric communities until 2005 *and after*, long after Applicant's trial. **Dep. pp. 66-133, Respondent's Deposition Exhibit 2.** He also admitted that, after many diverse rejections of his work, he was only able to get the work published in 2002 in a journal about brain anatomy, not a journal about alcohol damage (**Dep. pp. 106–08**); that this particular work was not replicated until after 2005, at another university (**Dep. p. 108**); and that, prior to 2005, no one was accepting his research team's work except neuro-imaging researchers, not fetal alcohol researchers or psychiatric researchers. **Dep. pp. 121–22.** He likewise admitted he moved into the field of neuro-imaging research to get his work published and read. **Dep. p. 122.**

Further, he did not begin testifying in FAS cases until 2004, because the Center for Disease Control did not publish the standardized criteria for diagnosis of FAS until 2004. He also admitted fetalalcoholexperts.com, of which Dr. Novick-Brown is a member, stated in its own publication that it did not begin the systematic forensic diagnosis of FAS until 2007 and that diagnosis of FAS prior to 2004 was "hit or miss." His methodology employed in this case was not yet accepted, even by

[20] This paper was published in 2006, in the very first issue of a new journal called *Biological Theory*. **Dep. p. 67, ll. 2-15.**

other fetal alcohol research groups. Thus, Applicant has not proven deficient performance or resulting prejudice in failing to call Dr. Bookstein or similar expert as a witness. *Strickland, Id.*

Further, counsel was not deficient in failing to obtain Applicant's personal records to show he suffered from FAS. While counsel did not introduce Applicant's school and medical records, Dr. Schwartz-Watts summarized what was in the records, and she testified that their contents were consistent with FAS. She based much of her opinion on the contents of Applicant's school and medical records, and she related the same to the jury.[21]

Dr. Schwartz-Watts testified Applicant met all of the criteria for FAS, including cognitive deficits based on his school records and psychological testing. Thus, the admission of the records would have been cumulative to evidence actually presented to the sentencing jury. Again, this Court has weighed the totality of the mitigating evidence presented, both at trial and in PCR, against the State's extremely strong case proving Applicant guilty of murder and the statutory aggravating circumstance of burglary, and the Court cannot "conclude that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Likewise, this Court finds that trial counsel was not deficient in not locating and introducing Applicant's mother's records to document that he had FAS. While Applicant introduced voluminous records of his birth mother, only a few mention her drinking while she was a teen. Also, none are contemporary with her pregnancy. The records were self-reports, some made 20 to 25 years after the fact. The records also conflict. Even Dr. Novick-Brown admitted that one of the two best indicators Applicant's mother drank while she was pregnant was the report to

[21] Dr. Schwartz-Watts testified at trial that she reviewed Applicant's school records, that he had many difficulties in learning and paying attention, and that he clearly had documented neuro-developmental problems. She further testified that Applicant suffered from attention deficit disorder (ADD), and that the records show his ADD was resistant to medication, which she opined consistent with FAS. Also, there was no record of any medical illness or anything in his history that would explain his failure to thrive, except FAS. Rev. Binney also informed jurors that Applicant had difficulties in school from the time he enrolled and that Applicant failed to gain any weight as a child.