

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2013-001945

Charles Christopher
Williams,

Petitioner

v.

The State of South
Carolina,

Respondent.

APPENDIX
VOLUME SEVEN OF ELEVEN

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S.C. Supreme Court

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...please disregard anything that she said that she may be asked to assess concerning the death penalty. Disregard that. That's not appropriate. We're not going there.

ROA p. 2158, ll. 17-21. At that point the following occurred.

Q Let me clarify and go back. We were talking about what you had come to Greenville for. And as a result of coming to Greenville, did you in fact interview the defendant?

A Yes, I did.

Q What was the purpose of you interviewing --

Mr. Nettles: Objection.

The Court: Hold on a second. Solicitor, you may lead her through these questions, please, sir, laying your foundation. You may lead her.

Mr. Ariail: Was the purpose of you interviewing the defendant to provide that information to me in consideration of whether or not --

Mr. Nettles: Objection. And I'm going to --

ROA 2158-59.

Outside the jury, the judge noted that the rest of the question had not yet been asked.

ROA 2159.

Counsel Nettles stated that his objection to the question was that she was now being asked to give an opinion and that she had to be excused. ROA p. 2160, ll. 1-6. He asserted her testimony is already in evidence from the transcript of the interview. ROA p. 2160, ll. 5-6.³

³ Defendant's Exhibit Number 4 in the guilt phase of the trial was the interview of Williams by Dr. Crawford on September 3. See ROA 1771. See also, ROA 1768-1792.

The court stated she was not going to be excused. The court inquired of the basis of counsel's objection and counsel Nettles responded that "it goes beyond what the court's ruling was." ROA p. 2160, ll. 19-20. Judge Nicholson disagreed. ROA p. 2160, l. 21. Counsel further asserted that secondly, she had not been qualified as an expert and was not going to be an expert, yet they were using her as an expert to help get the death penalty and "helped in his decision to seek the death penalty." ROA p. 2160, l. 22 - p. 2161, l. 7.

Solicitor Ariail then declared that he withdrew the question. ROA p. 2161, l. 10.

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Counsel Nettles then demanded another curative instruction. ROA p. 2161, l. 15. The court advised counsel to write the instruction. Counsel Nettles then asserted that at the Anderson hearing, it was discussed that if Dr. Crawford was called it would be for a "confined purpose." ROA p. 2162, l. 1. Counsel complained that the defense had a problem because it would appear to the jury that counsel was a liar because he had previously told them he wanted them to hear everything. ROA p. 2162, ll. 10-15. He requested a mistrial asserting that no curative instruction could take care of it.

Counsel stated that Dr. Crawford had talked about the contract she has to work with solicitors. He said she was asked her purpose in coming to Greenville and she answered it and it was ruled out of order. He felt the solicitor then reversed the same question. ROA 2162-63.

The trial court stated, though, that the State had withdrawn the question and it was never completed. ROA p. 2163, ll. 2-6.

Counsel asserted it could not be cleaned up and it was overwhelming. He requested for the court to strike her testimony would blame the Appellant and his lawyers. ROA 2163. The trial court denied the motion for a mistrial. ROA p. 2163, l. 22.

The defense next presented a proposed cautionary instruction. ROA 2163-64.

After a recess, the trial judge noted that from the outset of the trial, the State had stated that Dr. Crawford was not going to be offered as an expert and that if they were attempting now to offer her as an expert "it would be inherently unfair to the defense at this time; therefore I'm going to limit you, not ask her opinions, to give any opinions whatsoever based upon her being an expert." ROA p. 2165, ll. 6-9. The court stated that she would be offered as a lay person and limited to SCRE Rule 701, which would be generally limited to their perceptions of what occurred. ROA p. 2165, ll. 10-18.

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Solicitor Ariail declared she would be treated as if she was an investigation officer who took the confession. ROA p. 2165, ll. 19-22. The court re-confirmed that they were not going into any opinions she may have as to why he reacted certain ways. "She can described his demeanor, do anything a police officer would do during an interrogation. ROA 2166.

The court opined that he felt the defense was "correct in that some of the questions tend to get in her opinion through the back door so to speak" and stated he was sustaining some of their objections. ROA 2166.

Solicitor Ariail disagreed with the assessment. However, he revealed his intent in-camera. He stated he intended to show why she was up here since the defense injected that into the trial by argument and suggestion to the jury. He stated he wanted them to know "the real reason." ROA p. 2166, ll. 20-25. Next, he wanted to ask her if she did not interview and take a recorded statement from the defendant. Next, he would seek to read his responses to what she asked him through the rights and introductory part, which already contains that she is a forensic psychiatrist, worked with SLED and the Solicitor. He said all the things he previously asked

were on the cover sheet of the defense's previously introduced Exhibit 4. Further, he stated he would ask her what Williams demeanor was during the conversation. ROA p. 2167, ll. 15-17.

The trial court stated he had no problems with that presentation. He noted the introduced defense exhibit revealed she worked SLED, that they had a situation and was told what happened and that she was asked to see if she could talk with him to try to determine his state of mind to try to get an idea what was going through his head when it happened. ROA 2167-68.

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However, Judge Nicholson stated as far as helping him evaluate the death penalty or make an assessment as to whether you wanted to ask for the death penalty, "we are not going there." ROA p. 2168, ll. 8-11.

As to the second curative instruction, Judge Nicholson confirmed that it would be not to consider anything she says as coming from an expert, because she hasn't been qualified as an expert, and if she does, to disregard it. ROA p. 2168, ll. 15-25.

The court next gave to they jury the following curative instruction:

THE COURT:

Mr. Foreman, members of the jury, I told you this in the first phase of the trial. I'm going to tell you again. Whenever one of the attorneys makes an objection, they're merely telling the court that they do not think that's admissible under the rules of evidence or the rules of court. And it's my job to decide whether it's admissible or not admissible. I ask you to leave the courtroom so I can comment on the facts, because I'm not at liberty to comment on the facts when the jury is present.

I'm the one that asked you to leave the courtroom so I can be free with what I say to the attorneys and the questions I ask the attorneys. The attorneys are not trying to hide anything, they just have an opinion it's not admissible, and that's their job. You are not to consider anything for or

against either one of the attorneys when they make objections as to the rules of evidence. That's the procedure we are going through, and that's the reason I've been running you in and out of the courtroom, so I would be free, not that the attorneys are hiding anything. You understand?

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All right. Now, normally opinions are not given in a courtroom. However, opinions may be given in a courtroom by lay persons when they're based on the perceptions of a witness, such as, if someone is staggering and you smell alcohol on their breath, you have an opinion they're intoxicated, that's a lay opinion that may be admissible in a courtroom; or if it's going to be helpful for the jury to understand and does not require special skill, experience, or training.

An expert may give his opinion if they qualify when there's a scientifically, technical, or other specialized knowledge required for the jury to understand the question.

Now, in this particular case this witness has not been qualified as an expert. In order for an expert to give an opinion, they have to be qualified. And the court has to find that they're qualified. This witness has not been qualified as an expert and I'm going to tell you, you must disregard any suggestion either in the solicitor's questions or any answer that this witness has given that Mrs. Crawford was asked, has formulated, or given an opinion of any kind in this case. She's going to be treated as a lay witness, not an expert.

ROA p. 2169, l. 19 - p. 2171, l. 12.

Dr. Crawford then testified consistent with the instruction and without objection by the defense. In summary, she referred to defense Exhibit 4, the transcript of her interview with the Appellant. She noted that it took place at the law enforcement center with law enforcement

present, but no one else. She then read through a series of questions, without objection, in the September 3, 2003 interview, including the previously noted portions about being a forensic psychiatrist working with SLED and the solicitor and being told of the situation, trying to get an idea as to what was going in his head when it happened. ROA 2172-73.

Dr. Crawford testified the interview was recorded and lasted about 2½ hours. ROA 2175. She stated the contents of the interview transcript were accurate. She concluded the direct examination by declaring "he was calm, pleasant, cooperative, not tremendously expressive, but was calm and coherent and cooperative." ROA p. 2176, ll. 1-2.

On cross-examination, the defense developed that she was not his treating physician, that he still spoke with her even though he could have had a lawyer, and went through graphic detail about the crime without encouragement. ROA 2177-78.

On cross-examination, the defense developed that Dr. Crawford asked him questions about his family and that he told her his parents got divorced when he was ten, that he became angry at that time with his father, and was raised by his mother who was an alcoholic. ROA 2179-80. She confirmed that she had spoken with his father and mother, talked with Williams about school and attention deficit disorder. In addition, she spoke with his sister, Maureen, who verified his mother's alcoholism and lack of parental support or supervision. ROA 2182. She stated she went to Williams' mother's house with law enforcement the night of the interview and question her while they searched the house. ROA 2183. She said while Williams asserted he drank some, there was no information that he used drugs. ROA 2183.

She said Chris told her they met at the Bi-Lo, became friends and started dating. She described him telling her that he thought she had an abortion and that he wrote a journal after the

break-up to record his feeling. ROA 2184. He advised her of a suicide attempt o his mother's medication as an unsuccessful attempt to get Maranda's attention. She said he had branded himself and planned to kill himself different times. ROA 2185. He told her he had sleep problems before the break-up and had racing thoughts. ROA 2185. She said he had been keeping lists about supplies he would buy and list their prices to distract himself and had thought about moving into the woods. ROA 2186.

She denied that he told her he had "racing thoughts" the time of the incident and that they had gotten better. ROA 2186-87.

The April 6, 2005 Post-Verdict Motions Hearing

On April 6, 2005, hearings were held concerning Williams motions after his February death sentence. As to this issue, defense counsel Nettles claimed he was entitled to a new sentence based upon the solicitor's stipulation that they would not call Dr. Crawford as an expert at trial but only as a fact witness. ROA 2861, *April 6, 2005 Tr.p.* 20. He asserted that twice during their penalty phase examination, the state violated its rules and the court's order and that a mistrial should have been declared. *ROA 2861, April 6, 2005 Tr.p.* 20.

Solicitor Ariail noted that the defense in the guilt phase had already put in evidence that Dr. Crawford was a SLED psychiatrist. He reminded th court that when he put in testimony that she came to assist them was when the defense got upset during the trial. *ROA 2862, April 6, 2005 Tr.p.* 21. He stated that Dr. Crawford never gave an opinion during his questioning. *Id.*

Counsel Mauldin responded that the transcript will reflect the nature of the question regarding the solicitor's question about the decision. *ROA 2863, April 6, 2005 Tr.p.* 22.

Judge Nicholson denied the motion. *ROA 2863, April 6, 2005 Tr.p.* 22, l. 8.

In the appeal before the South Carolina Supreme Court, the Court addressed the testimony of Dr. Crawford in the following manner:

IV. Dr. Crawford's Testimony

Appellant argues the trial judge erred in refusing to declare a mistrial because Dr. Crawford's testimony impermissibly bolstered and vouched for the solicitor's decision to seek the death penalty.[FN 8] We disagree.

Footnote 8 : [The question of whether the trial judge committed an abuse of discretion in denying Appellant's mistrial motion is preserved for our review. Appellant objected to Dr. Crawford's testimony before it was given and renewed this objection both during and after her testimony. Appellant moved for mistrial on these grounds, and the trial judge denied the motion. Appellant then sought to introduce a curative instruction, which the trial judge accepted. Under these circumstances, the trial judge's denial of the mistrial motion is properly preserved for appellate review. *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct.App.2004) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.") (quoting JEAN HOFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2d ed. 2002)).]

We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness. Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury.

Dr. Crawford was introduced to give fact testimony regarding her observation of Appellant's mental state within hours of Victim's murder. We have long held that a lay witness may testify as to a defendant's mental state. *See State v. Rimert*, 315 S.C. 527, 446 S.E.2d 400 (1994), cert. denied, 513 U.S. 1080, 115 S.Ct. 730, 130 L.Ed.2d 634 (1995) (where the State relied on lay testimony to establish defendant's sanity); *State v. Smith*, 298 S.C. 205, 379 S.E.2d 287 (1989) (holding that where defendant presents expert testimony regarding his insanity, the State may introduce lay testimony in rebuttal).

We recognize that while a witness of Dr. Crawford's professional expertise may in many cases be called upon to deliver expert testimony, the solicitor was not bound to call her in that capacity so long as her testimony was limited to lay matters. The solicitor was justified in asking Dr. Crawford to observe Appellant's mental state subsequent to his arrest and in calling upon her to testify regarding her observations. Appellant had been duly informed of his rights under Miranda, and spoke with Dr. Crawford voluntarily. Dr. Crawford's testimony was reasonably limited to her factual observations over the course of the interview. In our view, Dr. Crawford was called as a lay witness to give lay testimony. There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford.

Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction. Therefore, we find no error in the trial judge's denial of Appellant's motion for mistrial.

M. & Y.
*State v. Williams, supra.*⁴

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331

⁴Respondent acknowledges that there was a concurring opinion on this issue by Justice Pleicones who opined that the issue was not preserved for appellate review on whether a mistrial should have been declared based upon the Solicitor's questioning of Dr. Crawford.

S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). Under *Strickland* and its progeny, Williams must demonstrate that, but for counsel's failures to investigate and present evidence of his post-traumatic stress disorder, there is a "reasonable probability" that a jury would not have sentenced him to death. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." "To assess that probability, we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation." *Porter v. McCollum*, --- U.S. ---, 130 S.Ct. 447, 453-54, ---L.Ed.2d --- (2009) (per curiam) (internal quotation marks and brackets omitted).

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The Applicant has failed to show 6th Amendment deficient performance concerning Dr. Crawford's testimony. First, the South Carolina Supreme Court concluded that: **"We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness.** Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury..." As the Supreme Court recognized, Dr. Crawford was introduced to give fact testimony regarding her observation of Williams' mental state within hours of murder. The Court stated that "We have long held that a lay witness may testify as to a defendant's mental state." In his allegation, he claims that Dr. Crawford should not have been able to testify - but the appellate court's decision removes the claim impediment by recognizing that such testimony was authorized and appropriate.

Second, he challenges the comment by Dr. Crawford that she would help get treatment for Williams. The Applicant does not state what the particular objection should have been to this testimony. On direct examination, Dr. Crawford read from her earlier interview with Williams:

A. ... There are things that I need to make sure you understand, is I'm not your doctor. Okay? **If we talk and I feel like you need treatment, I'm going to refer you to somebody.** And my guess is there's a good likelihood of that because you know from what I understand about your past, this is a very unusual circumstance here?

ROA p. 2173 (emphasis added). The record reveals that defense counsel Nettles brought out on cross-examination the following:

Q. Let's talk for a little bit about just a second ago I think one of the things you and the solicitor talked about was that in the front page you all talked about there you thought that if he - you weren't his treating physician?

A. Right.

Q. But if you thought he needed something, that you would refer him to somebody?

A. Yes.

Q. An you, in fact, placed him on suicide watch, is that right?

A. I didn't place him on suicide watch. That would not be my capacity.

ROA 2176. But see ROA P 2723. (In camera testimony concerning suicide watch referral and placement).

The Petitioner has failed to show what issue should have been presented concerning this testimony. The record reveals that an initial statement was found to have been voluntarily made after his constitutional rights were freely and voluntarily waived after a Jackson v. Denno hearing. ROA 1466-68. See ROA 1439-1465. During an earlier hearing on January 26, 2005, a hearing was held on the admissibility of four statements made by Petitioner. ROA 2652-2807.

During the hearing evidence was presented concerning the statement and questioning between the Applicant and Dr. Crawford. ROA 2681 - 2756.

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The defense motion to suppress was based upon a number of assertions. First, the defense, through counsel Coyle asserted that under *Estelle v. Smith*, 451 U.S. 454 (1981) a different set of Miranda warnings was required for a psychiatrist to evaluate an arrested defendant. She asserted that the defendant had to be made aware that evidence would be used against him and was being obtained may be used against him in obtaining the death penalty. ROA 2808. Counsel asserted that Dr. Crawford's Miranda warnings were deficient because she said it "might" come up, not that it would be used against him. ROA 2810, 2816. She asserted that this challenge was based upon the Fifth Amendment.

Counsel Coyle also asserted that there was a Sixth Amendment violation because the state tried to circumvent the right to counsel. ROA 2821. He asserted, based upon testimony of Dr. Frierson and Dr. Halleck, that a psychiatrist lawyers must be notified and be present at a psychiatric evaluation, which was not done here. ROA 2821. However, the defense conceded that they had no cases which interpreted the American Academy of Psychiatry and the Law Ethical standards' "access to or availability of counsel" requirement. ROA 2822-23. Counsel complained, citing *Estelle* that the Williams statement to Dr. Crawford occurred before counsel could be appointed and consulted.

Counsel Coyle further asserted that under SCRE Rule 403 it should not be admissible. ROA 2825. She contended that Dr. Crawford would be offering evidence about Williams character which is a lay opinion based upon a woman that does not know him and only talked to him for a couple of hours. ROA 2826. She said as far as whether the statement could be admitted

they were relying upon the constitution, but as far as Dr. Crawford testifying, they were relying on Rule 403. ROA 2826.

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Solicitor Ariail confirmed that Dr. Crawford was going to be offered to testify as an agent of the state. ROA 2827, l. 8-9. Under Rule 403, the defense that the evidence was not reliable because of the manner she elicited it and used suggestion and led him to believe she was helping him when she was not helping him and a lot of the information that she gave was not true because she did not follow up on it. Further, the defense argued the evidence would be cumulative to the police statements. The defense contended that Dr. Crawford did not add anything to the equation and threatens to confuse the issue.

Under the Fourth Amendment, counsel Coyle contend that Dr. Crawford's medical background and training in psychiatry is a powerful tool to get into the applicant's mind and under the state constitution right to privacy, a defendant has a right to control his own mind and be free from government interference. She claimed the action of the interview by Dr. Crawford violated the right to privacy and federal due process where it was done without a warrant and without court supervision into the defendant's mind to extract information that the police could not get so a doctor was brought in. She complained that the Crawford statement was different than the police statement because it covered his sex life, his childhood, whether he abuses animals and covers his remorse. ROA 2830. Particularly, she pointed out the initial statement where Williams stated that he went into the store not knowing whether he was going to shot the victim to Dr. Crawford's statement where he stated it was premeditated and had been planned for weeks in advance. ROA 2831-32. She concluded that under the 4th Amendment it was unwarranted medical intrusion without a waiver and court order.

Solicitor Ariail argued that the purpose in calling Dr. Crawford to the interview was to look at the applicant's state of mind to determine whether or not to seek the death penalty as the primary purpose and second, if they sought the death penalty, to discover any evidence of mitigation. He declared that at the time of the interview, he had not made a decision to seek the death penalty. ROA 2833. Solicitor Ariail stated that DR. Crawford did advise Williams specifically that anything they talked about may come up in court to the judge and jury at sentencing. He claimed that there was nothing hidden from him and he was advised about this potential.

M & Jo
At the outset of the trial proceedings on February 7, 2005, Judge Nicholson entered an oral order denying the motion to suppress Dr. Crawford's testimony. In particular, he asserted that *Estelle v. Smith* was distinguishable because Miranda warnings were given in Williams and Estelle involved a court-ordered examination. He concluded that Dr. Crawford gave Miranda rights and that the warnings were sufficient.

Respondent submits that the Applicant has failed to show deficient performance under *Strickland*. Respondent submits that the September 3, 2003 statement by Charles Williams upon questioning by Dr. Crawford was freely and voluntarily given after being advised and waiving appropriate constitutional rights under *Miranda v. Arizona*. The Applicant has failed to show any deficient performance that was outside of the reasonable performance of defense counsel. His assertion to the contrary is without merit.

In his second specification of ineffective assistance, Williams claims counsel erred by waiving an objection concerning allowing Dr. Crawford to testify since it lead to confusion. As stated above, Dr. Crawford was an actual witness and questioner on a statement the Applicant

made on September 3, 2003. As stated by the Supreme Court she remained a competent witness to testify about the circumstances of the statement by Williams. The Applicant's characterization notwithstanding, the testimony of a witness-questioner was not inadmissible, as the Supreme Court reconized in concluding: **"We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness.** Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury . . ." The Petitioner cannot succeed in his burden of proof on this defeated claim. He has failed to show either deficient performance or prejudice - particularly in light of the contrary conclusions of the Supreme Court rejecting the underlying assertion

In his third specification of ineffective assistance, he claims that counsel was deficient in failing to move for a mistrial based upon Dr. Crawford's cumulative testimony and failing to effectively object to the curative instructions. This is a blatant attempt to relitigate what the Supreme Court has already decided against the Applicant. It derives from Justice Pleicones concurring opinion in Williams. However, the majority concluded that :

We recognize that while a witness of Dr. Crawford's professional expertise may in many cases be called upon to deliver expert testimony, the solicitor was not bound to call her in that capacity so long as her testimony was limited to lay matters. The solicitor was justified in asking Dr. Crawford to observe Appellant's mental state subsequent to his arrest and in calling upon her to testify regarding her observations. Appellant had been duly informed of his rights under Miranda, and spoke with Dr. Crawford voluntarily. Dr. Crawford's testimony was reasonably limited to her factual observations over the course of the interview. In our view, Dr. Crawford was called as a lay witness to give lay testimony. There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford.

Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction. Therefore, we find no error in the trial judge's denial of Appellant's motion for mistrial.

State v. Williams, supra.

Respondent submits that deficient performance and prejudice under *Strickland* cannot be shown in light of the majority analysis and conclusions. The specification should be denied.

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§ 28
In his fourth specification of ineffective assistance of counsel, he claims that the counsel failed to present **unspecified** available evidence in mitigation regarding the difficulties between mother and father and other mitigating evidence about Williams troubled childhood, teenage and adult years. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Pursuant to SCRCR, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what evidence the Applicant now claims existed at the time of trial that should have been used.

The record reveals the multi-state defense team in the penalty phase focused on development of the family background and mental background of Williams - beginning with John Mauldin's opening statement in the penalty phase. ROA 2122-2130. Particularly, he emphasis that Williams had accepted responsibility for his actions and no excuse for what he did, but noted the defense would present evidence about "the presence of a mental illness, . . . the lack of family support or family support systems and how the combination of those two things

combined to create a very very horrible and difficult situation." ROA 2131. Supporting this argument assertion was the actual presentation of evidence in mitigation.

The Defense Mitigation

In addition to the guilt phase evidence presented, the defense team presented a series of witnesses.⁵ First, counsel Nettles called **Dwight Williams, the Applicant's father.** ROA 2208.

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⁵Counsel Nettles developed some testimony in mitigation in his cross-examination of Dr. Crawford. She testified that Williams told her that his parents got divorced when he was 10 years old and that he was raised by his mother with her various step-fathers. ROA 2178-79. She further stated that Williams was angry with his father about the divorce because he had broken up the family. ROA 2173. She said he felt like he was an "evil child" after the divorce. He told Dr. Crawford that his mother married twice and that his relationship with them was not generally good. She was told that his mother was an alcoholic for 30 years and intoxicated much of the time he was a child. ROA 2180. She stated that she had spoken with Williams mother and father. ROA 2181. She stated that he had reported that he had flunked the first grade and ADD (attention deficit disorder) may have been discussed, but he never received medicine for it and nobody followed through. His sister Maureen verified that his mother was an alcoholic and claimed that his mother provided Williams "virtually no support" and "very little supervision." ROA 2182. The sister had told Dr. Crawford that she offered to have Williams live with her because she was worried about the lack of adequate supervision and support. ROA 2182. Dr. Crawford stated that she visited the mother's house the night of the incident. She also stated that no one told her about Williams did not tell her about Williams using drugs and he only stated that he drank some. ROA 2183. She stated that Williams told her that he met Maranda at the Bi-LO and that they became friends and quickly started dating. She said he told her that he thought that Maranda had an abortion.

He described to her a journal that he wrote to record his feelings about ending their relationship and described a suicide attempt and that he had overdosed on his mother's medication to try to get Maranda's attention. ROA 2185. Williams told her he became angry when she did not respond to the suicide attempt and branded his arm with an "M". ROA 2185. He told Dr. Crawford that at different times planned to kill himself, had experienced decreased sleep months before the break-up and had racing thoughts at times. ROA 2182-83. She stated that Williams kept long lists about

Mr. Williams was a multi-instrumental (13) band master in the Army. He stated that Daisy Huckaby Williams was Applicant's mother though they later divorced when Applicant was 8 years old. ROA 2210. He stated the divorce affected Applicant. He stated that there were disturbances within the home - "weren't physical arguments, but more or less verbal arguments" and he felt it was best to separate to keep the child from continued arguments. ROA 2210-11. He admitted that there may have been violence in the home with bruising someone and breaking objects. He stated it was not a healthy place for kids. He stated that the separation affected Applicant because it bothered him because he no longer had him as a friend. He stated that Applicant did not have friends and was real quiet, subdued and kept to himself. ROA 2212. While was the best decision for the father, it was not the best situation for the Applicant. ROA 2213. He said his son was left with his wife and his older daughter Maureen had already left for college. He stated that the situation alone with his mother was not the best for Applicant because his mother had a habit of drinking heavily. ROA 2214. Dwight Williams described his own life after the separation as "crashed and burned" because he went through a period of despair without anyplace to go and lived in his car for about a month. ROA 2214. Although he began a relationship with a woman, he stated that he developed depression. Id. He began treatment with visits at Greer Mental Health and then checked into Patrick Harris Mental Health facility for two weeks for situational depression. ROA 2215. He stated he was placed on antidepressants - Doxepin. However, he later sought treatment at Charters Hospital. ROA 2215-16. He stated that he needed to have friends around to help him through his depression. He stated that as far as he supplies that he would buy and he would distract himself by listing them and their prices. She clarified that the distraction was not to be moving into the woods, but making the lists. ROA 2186.

knew he was his son's best friend. ROA 2217. He said that he reached out to him, but not as well as he should have for fear of getting into trouble and locked up by "character assassination" because of what his son had been told which was not true. ROA 2217.

Williams stated that the last time he spoke to his son he was agitated about something and had scattered speech. ROA 2218, l. 1-4. Although he did not go by Applicant's current house, Dwight stated he tried to keep in touch with him once every two weeks. However, Dwight stated he thought of his own situation more than about his son and should have seen him more. He stated that Applicant's depression was similar to his own, but he had friends to help him handle it. He felt Applicant was reserved and did not reach out to anyone. He stated that Applicant was a good kid, despite being "stone-faced." ROA 2219.

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Ann Wilson, an elementary school teacher at Taylors Elementary School, testified that she taught Williams in 1990 when he was in the first grade. ROA 2220-21. She found him to be very weak academically and not ready for second grade. She made a request within three months of school for him to be in remedial classes. [Exhibit 25]. She based this request upon her conclusions that he had a very short attention span and his immaturity. ROA 2222. He was in her regular class, but also attended extra remedial reading and math classes in an EIA program. Concerning her school reports, she stated that he was easily distracted by noise, had to be refocused with teacher prompts to process, unable to maintain attention, had difficulty staying on task, easily distracted, restless, impulsive, blames others for mistakes, moody and inconsistent in his behavior. ROA 2224-26. As a result of her evaluation, Williams was referred to a school psychologist, Janice Hawkins. ROA 2227-29. He was then referred to "special education" classes. Wilson stated that she spoke with the Applicant's mother and she found her to be

negative and not wanting her son retained in the first grade. However, Wilson recommended that he repeat the first grade . ROA 2232.

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Rebecca Owens testified that she knew Williams because his mother worked for her in her beauty salon for six years. ROA 2234-35. She described Williams as a wonderful child who would come to the salon when he was between 9 and 13 years old. ROA2236. She also described her visits to the home and found Williams was always sent to his room. She described an occasion when Daisy (his mother) had moved in with Hans. She described Han as an older man who was a German ambassador. On one occasion, Daisy had started drinking heavily and Williams would call her and state that his mother was "going crazy." Owens would go to the home and she saw Daisy hit Williams in the face and cuss at him when he was talking on the telephone with his sister Maureen before he was sent to his room. ROA2237-38. On another occasion, his mother was again drinking heavily and started having "fits and disorientation." Owens found her at the top of the stairs naked screaming for an ambulance. ROA 2238.

Owens stated that Daisy's relationship with Hans was volatile and that she was abusive towards him. She recalled one time when Daisy came to work and appeared very beaten up. However, Daisy told her she had beaten herself up with a telephone and called the police and had Hans thrown into jail. ROA 2239-40. She stated that Applicant did not have any friends and was not allowed outside to play. ROA 2240. She stated that she knew the victim, Maranda, because she was her waitress at a restaurant where she went. ROA 2240.

Professor Margorie Hammock, a clinical social worker testified as a expert in sociology. ROA 2241-42. She stated that she did a biopsychologic-social assessment of Williams ROA 2243. She stated that she had interviewed Williams, his father, his mother, two teachers,

his cousins - Alfred and Ernestine, and paternal grandmother Mary Snipes. ROA 2246. In addition, she stated that she reviewed educational records, medical records, and psychiatric history of family members, employment records and Army records of Mr. Williams. ROA 2247. She also consulted with Dr. Rob Richards, Dr. Seymour Halleck, and Dr. Eric Elbogan. ROA 2247. At trial she used visual aids, including a family tree (genogram). [Exhibit 28]. She initially described the family tree. ROA 2248-49. She described mother Daisy as born in Germany with an unknown father and raised by her grandparents. However, she was also abandoned by her mother and faced consternation in the family because of her mixed background. She had married at 16, but the marriage was unsuccessful and included a great deal of violence. She leaves her husband, but he assumes responsibility for raising their two children.

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She described Williams father, Dwight, as being raised by his mother after his parents separated at an early age. There had been conflict between his mother and father, who was in the Army. Dwight saw little of his father. He was taught to think negative of his father who he had only seen a few times after the separation. ROA 2250. Like his father, he joined the Army and graduating from high school. He had a serious stuttering problem and was unsure of himself, but did well in the service and started a band which aided relations between the U.S. and Germany. ROA 2251.

Professor Hammock stated that Dwight met Daisy when he was playing in an rhythm and blues band at a club. She became pregnant with Maureen after a short courtship and eventually marry. After Maureen was born they move to the U.S. Eleven years later, the Applicant is born. Prior to the move, the years in Germany were harmonious and Daisy was a good mother. After the U.S. move and Dwight's discharge, things changed due to an increase in drinking and the

use of marijuana. They fought about their lives. Dwight sought a degree and work on his masters, but Daisy wanted him to spend the time with her and also make more money leading to the substance abuse and fighting. ROA 2253. In 1982 when Williams was born they were living in Greenville. They were violent toward each other prior to the birth nad it was a cuple of days before Dwight was allowed to see his child. ROA 2253.

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Professor Hammock stated that Daisy ignored Williams's human development "red flag"needs as a special needs child. ROA 2255. She did not respond to the recommendations for help and resources from the teachers and other professionals. As a result, Hammock concluded that Williams withdrew and stopped trying to be a part of the environment where he could continue to grow. She stated he did not develop the skills he needed to feel comfortable in society and be able to interact. There was a great deal of violence in his home (shown by police reports) and challenges to his ability to interact with other children and learn academically. ROA 2256. This created a withdrawal from other children and his growth and development were not attended to by his mother . In reviewing the records, she saw numerous recommendation from school personnel that were not followed up with his identified needs. She also saw the numerous changes in his schools - three elementary and two middle schools contributed to the inability to get his needs. ROA 2258. He was perceived by his teachers with a need for special education and problems in testings which showed a disparity between what he appeared to know and what he could demonstrate. He was found to isolate himself and unable to play by the fifth grade.

Professor Hammock found members of Williams family had the existence of mental health issues. ROA 2259-60. [Exhibit 29]. Particularly his father had a history of hospitalizations

with suicidal and homicidal feelings with diagnosis of major depressive episodes - severe and need to be assessed for bipolar and alcohol dependence. ROA 2261.

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Professor Hammock concluded that Daisy also had contact with mental health facilities due to threats of suicides with 7 referrals to facilities. These involved overdoses of medicine, depression, anxiety, panic and alcohol abuse. This resulted in a series of medicine including Wellbutrin, Xanax, Trofranil and Valium. ROA 2262. She found that Williams uncle also had numerous admissions for Suicidal and homicidal threats towards family. ROA 2262. Maureen, his sister also had a history of suicidal feelings and diagnosed with depression and insomnia, but she had not been hospitalized. The grandmother Mary Snipes also had been known to facilities and had "bad nerves" and was considered unstable and threatening. ROA 2263.

Professor Hammock concluded that the Applicant had never sought treatment or help for his mental health issues. ROA 2264, 1. 21-24.

Retired Mauldin police officer James Tollison testified concerning the domestic violence calls in 1997 concerning Daisy and Hans Seifert. ROA 2264-65. He stated that he was called to the scene and Hans would come to the department and request help because he spoke a little German. Tollison described the various events of one accusing the other of attacking them. He stated that there was a time that that he was concerned about the safety of them when Hans made an allegation when they were separated - one living on one floor and the other on the other floor and she was alleged to have stolen his equipment and clothes and changed the locks. Tollison stated that he found an a gun missing from its holster. He desibed her to be very erratic and violent and not a credible person. ROA 2268. She had also made allegations against the police department and Tollison claiming that Hans had paid off the police department. He

estimated that the police were called out to the residence in 1997 at least 10 to 12 times. ROA 2269. On cross-examination, Tollison stated that he had no knowledge that there was any complaint that Ms. Huckaby (Daisy) was abusing or neglecting Charles Christopher Williams. ROA 2268.

Dr. Eric Elbogen, an assistant professor at Duke University with a Ph.D. in clinical forensic psychology, testified as an expert in the field of violence risk assessment. ROA 2274. He testified that he examined Applicant for two hours. He concluded that there is an extremely low risk that Williams will kill a correctional officer while serving a life sentence in prison. ROA 2281. His only risk factor of the six factors he considers is based upon Williams low age at the time of the offense. ROA 2281. His risk is lowered because there were no instances the 18 months he has been in the detention center, no instances of engaging in any serious violence previously, and the fact that he would be getting treatment for his mental illness while in prison and monitoring of his symptoms. ROA 2282. He further opined that the risk would decrease as he aged. Id. Concerning whether he would be likely to commit a serious crime against another inmate, Dr. Elbogen opined it would be "extremely low" for similar reasons. ROA 2282-2283. He also opined that if he had seen Williams prior to the murder, saw and read his journal, knew about the suicide attempt, interviewed him and knew he had a shotgun in his closet, he would have him committed (admitted) instantly to a locked mental health facility. ROA 2283-84. His assessment was introduced as Exhibit 31.

On cross-examination, Dr. Elbogen acknowledged that a failure by Williams to take his medicine to some extent would increase the probability of violence. ROA 2288. He admitted that

he was not saying that there was no risk of violence because he does not have a crystal ball. ROA 2289.

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James Aiken, a former warden in the South Carolina correctional system and commissioner of corrections in Indiana and the Virgin Islands testified as an expert regarding the assessment of the defendant and prison security. ROA 2297. He testified about Williams prison adaptability as he asserts he would have done upon entry into the department of corrections. He opined that "Williams can be safely confined in a prison system for the remainder of his life without causing an undue risk of harm to staff, inmates, nor the community." ROA 2301. On cross-examination, Mr. Aiken confirmed that this could be true of any person, regardless of their degree of violence, but that he would not say that about every inmate he had evaluated. ROA 2301-02. He pointed out that corrections could tie them down in a bed, give them electric shocks and kill them if necessary to control them. ROA 2302.

Dr. Seymour Halleck, a forensic psychiatrist, testified as an expert in forensic psychiatry. ROA 2304. He stated that he interviewed Williams for four hours. He claimed to have reviewed a significant amount of material including his journal, the reports of officers McNamara and Silvaggio, a report from the Greenville police department, mitigation notes from the defense, statement of the defendant, his prior incidents including the paint ball incident and his first assault on Miss Williams, his detention records, his school records, his hospital records concerning his suicide attempt, read all the witness reports of observers of the attack on Miss Williams and police reports. ROA 2306-07.

Dr. Halleck opined that Williams childhood was very chaotic and that there was a great deal of violence between his mother and father. ROA 2307. He noted that things got worse in his

family history when his father left the home. Although he had problems with his father and the father would frequently beat his mother, he opined that the Applicant was fond of his father and felt loss when his father left the home. ROA 2307. He found the relationship with his mother was ambivalent, although she was close to him trying to run his life when he tried hard for her not to do so. Dr. Halleck found some strange matters in their relationship noting that she let Williams sleep with her until he was 14 years old, touching his genitals as well as his sister. ROA 2307. It took his sister to object strongly before it was stopped. Id.

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He noted that Williams also did not like his parents involvement in dishonest ventures trying to have him participate, including his mother feigning injuries to sue various establishments. ROA 2308. Dr. Halleck also concluded that Williams had trouble with an uncle who asked Applicant to fondle his genitals and to put toothpicks in his uncle's urethra which he did several times. Id.

Dr. Halleck opined that Williams had a great deal of trouble in school at the beginning and placed in special classes. He stated that he was considered to have attention deficit hyperactivity disorder. ROA 2308. He stated that medication was recommended for him, but did not happen. However, he noted that in 1993, some new testing indicated that he could function in a regular classroom with special attention. However, he never did well in school and dropped out at age 18 when he was in the ninth grade. ROA 2309.

According to Dr. Halleck, Williams was a highly disturbed and sick young man during the months leading up to the crime. ROA 2309. He opined that Williams had two diagnosis - major depressive episode and obsessive compulsive disorder. ROA 2309. He considered the major depressive disorder to be "the most serious depressive disorder diagnosis we have in the

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manual," meaning that he was practically dysfunctional. ROA 2309. He stated that this would place him with a need for medication and a high risk of killing himself. ROA 2310. He pointed out the symptoms of sad feelings, withdrawn from people, not interested in pleasurable things, and not able to enjoy pleasurable things - antionia/ponia." agitation, inability to think clearly and inability to concentrate, feelings of guilt or worthlessness and suicidal ideation. ROA 2311. Concerning the obsessive compulsive disorder, he found that Williams was obsessed with Maranda by thoughts and images. ROA 2311. He found him to be almost delusional concerning his thought that Maranda had aborted their child. He found the obsessions so bizarre, so unfounded, and so violent that they approached being psychotic delusions. ROA 2313.

Dr. Halleck opined that these diagnosis made each worse and contributed to a powerful sense of hopelessness which was a factor in the act. In 2003. ROA 2313. Based upon this sense of helplessness and hopelessness, he had to do something to escape from the suffering that he was experiencing. ROA 2313. He stated that according to records he had taken 40 or 50 pills including a potentially lethal antidepressant in an apparent suicide attempt which led to his hospitalization although he was not kept on June 13. However, he was back again on June 15. ROA 2315. Dr. Halleck opined that the releases was highly inappropriate. ROA 2315. He states he would have civilly committed Williams with his information. ROA 2316-17. Similarly, he would have committed Williams on September 2, the day before the murder, had he read the journal, been aware of the suicide attempt and aware that a shotgun was in the closet because he was dangerous to himself and others. ROA 2317.

On cross-examination, Dr. Halleck opined that his opinion is that his capacity to conform his behavior was somewhat impaired - not that he could not conform his conduct to the

requirement of the law. ROA 2318-19. He stated that his opinion on the death penalty was that he opposed it. ROA 2319.

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Maureen Bangcuyo, the Applicant's sister was the final mitigation witness. ROA 2328. She stated that when Williams was born that she was excited about having a baby in the house because it would be a positive thing. ROA 2329. She said he was always special. She stated at that time things needed changing because she had to endure seeing her mother beaten by her biological father - Dwight. ROA 2331. She stated that they were constantly fighting and that she was beaten. She described alcohol every night and drugs. Maureen said that she was not allowed to do anything or date. She recalled when she went to college that Williams would come and stay over the summer and she described him as smart. ROA 2332. Months before the divorce, she stated that her mother constantly called and described being beaten. ROA 2333. She described calls from Williams about it being worse since she left for school. ROA 2333. She said her mother and Williams lived in a shelter after the divorce because Dwight stopped making payments on the home. She said that Dwight set fire to all their clothes and belongings. ROA 2334. She said she became concerned about that Applicant she tried to take care of him in Fall of 1997. ROA 2336-37. However, because of her own workload and his needs, Williams went back to his mother in Greenville. ROA 2336.

Maureen stated that she had been diagnosed with a mental illness and had thoughts about killing herself, but takes medications. She stated that she was married to a wonderful man. She stated that his family is supportive and love Williams. ROA 2337. She stated that when she was treating herself, she kept a journal when she was 13 about her own thoughts. She described how

her faith had help. She said that she had gone to see Williams after his suicide attempt and asked him to go back to Columbia with her family. ROA 2339.

Maureen also described a second time when he came to live with her in Atlanta. ROA 2340. She described her father breaking appointments to visit him. She said that she wanted him out of that environment and get away from Daisy and have a chance to fulfill his dreams. ROA 2341. She stated that she was unable the second time to dedicate the time to Williams. ROA 2341. She was looking for a job while she was 7 months pregnant and that Williams needed to return and complete his obligation for PTI from the assault-paintball incident. ROA 2342.

Maureen stated that there were a lot of good things about her brother. ROA 2342. She said that he was a dedicated brother who would come and see her whenever he was available. She described him being dedicated to his sister, cleaning her car, the house and starting to cook dinner. She stated that they talked on the telephone almost every day about Daisy and Dwight. ROA 2343. However, he does not know her second son because he was born October 29, 2003. ROA 2343.

She described how she had to tell her son about why the Applicant is not around. ROA 2344. She stated that Williams was a good son who did not drink or get into fights. ROA 2344. She recalled him as a child running through sprinklers, She stated that his present look of appearing vacant was programmed from his father about how they could not show emotion and not allowed to express themselves. ROA 2345.

She stated that the happiest time in her life was when they went to Myrtle Beach with Williams before she started nursing school. ROA 2345. She described Williams being stung by jellyfish, going to the Pavilion and having a wonderful time. ROA 2346.

She stated that she met Mandy one time and felt that he loved her and her daughter, Callista. ROA 2346.

When asked how many people loved Williams, she stated that she did unconditionally. ROA 2347. She only sees the millions of good things he had done in his life and that he is warmhearted. She described him once on his own going to the grocery when he visited in Columbia to get ingredients to make brownies after he accidentally ate a tray of brownies of her roommate, thinking that they were his sisters. ROA 2347. She described him volunteering at her animal clinic job.

She also read a letter she had written on behalf of her family expressing sympathy to the victim's family and expression of love for her brother and a hope that violence in the home is stopped. ROA 2350-51.

Respondent submits that the evidence of thorough mitigation case reveals that the defense team was not deficient in its representation under Strickland v. Washington. However, he has failed to assert what evidence in mitigation was not presented that counsel was aware. Pursuant to SCRCP, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what evidence the Applicant now claims existed at the time of trial that should have been used.

5.

In his fifth specification, he claims that counsel was ineffective for arguing that the trial judge had to declare a mistrial and sentence the petitioner to life imprisonment where the jury

revealed its division since defense counsel should have argued the trial judge's distinction between a jury reporting its division on its own, introduced an arbitrary factor into the case as it related to the trial judge's discretion to give an Allen charge rather than declare a mistrial and sentence petitioner to life imprisonment. Respondent submit that this claim is wholly frivolous in light of the decision by the South Carolina Supreme Court in the direct appeal. The Applicant cannot show either deficient performance or prejudice under Strickland v. Washington.

In its opinion, the South Carolina Supreme Court rejected the underlying claim that a life sentence was required and concluded:

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I. Jury's Disclosure of Vote Division

Appellant argues the trial judge erred in declining to sentence him to life imprisonment when the jury, by its written note, revealed it was divided nine to three in favor of death. Appellant contends that under these "unusual circumstances" giving the jury an Allen charge was impractical and coercive against the minority faction of the jury that opposed the death penalty. Ultimately, Appellant argues that once the jury disclosed its numerical division it was incumbent upon the trial judge to declare a mistrial. We disagree.

As a threshold matter, "[n]either the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding." *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999)). "The typical judicial mechanism for encouraging an indecisive jury is the Allen charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors." *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct.App.2004).

We find the trial judge's issuance of an Allen charge was not improper. Initially, we agree with Appellant that it is improper for a trial judge to inquire into the numerical division of a jury. See *State v. Middleton*, 218 S.C. 452, 457, 63 S.E.2d 163, 165 (1951); *Lowenfield*, 484 U.S. at 239-40, 108 S.Ct. 546; *Brasfield v. United States*, 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed. 345 (1926). However, these decisions are inapplicable in the instant case because the jury here voluntarily disclosed its numerical division and requested further instructions on how to proceed. The judge then promptly informed the attorneys of the jurors' numerical division and indicated that he could give an Allen charge. Unlike other

cases, the trial judge did not inquire about the specifics of the jury's impasse. See *United States v. Brokmond*, 959 F.2d 206, 209 (11th Cir.1992) ("Unsolicited disclosure of the jury's division by a juror is not by itself grounds for a mistrial."). Therefore, we hold the trial judge committed no error in not declaring a mistrial and giving an Allen charge after the jury revealed it was divided nine to three in favor of death.

II. S.C.Code Ann. § 16-3-20

Appellant argues that S.C.Code Ann. § 16-3-20 required the trial court to sentence Appellant to a life sentence because the jury could not agree on a sentence after "reasonable deliberation." We disagree.

Section 16-3-20 provides in pertinent part:

If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A). S.C.Code Ann. § 16-3-20(C) (2003). A review of the pertinent statutory language in S.C.Code Ann. § 16-3-20(C) reveals the analysis of this issue is dependent upon an interpretation of "reasonable deliberation." Given the subjective nature of this term, this Court has been reluctant to define as a matter of law what constitutes "reasonable deliberation" sufficient to end the jury's deliberations and impose a life sentence. We note that "reasonable deliberation" is not simply an elapsed-time dependent determination, but rather is an issue "committed to the trial judge's discretion." *Tucker*, 346 S.C. at 489-90, 552 S.E.2d at 715.

Although we have not precisely defined "reasonable deliberation," our previous decisions make clear that here the trial judge did not abuse his discretion in permitting the jury to resume deliberations. In *Tucker*, this Court refused to determine as a matter of law that the jury had engaged in "reasonable deliberation" sufficient to require the trial judge to impose a life sentence. *Id.* at 490, 552 S.E.2d at 716. We found that the jury deliberated for a substantial period of time before informing the judge it was "hopelessly deadlocked," and that the jury took its responsibility seriously, diligently working to reach a verdict. *Id.* at 490, 552 S.E.2d at 715. Under those circumstances, had the "reasonable deliberation" issue been raised to him, the trial judge in his discretion "may or may not have found the jury had engaged in 'reasonable deliberation.'" *Id.* at 490, 552 S.E.2d at 716.

Here, the jury only deliberated about a lengthy capital murder trial for approximately five hours and thirty-five minutes before sending the note to the judge. However, unlike the jury in *Tucker*, this jury did not indicate it was deadlocked, but rather requested additional instructions to resolve their impasse. Cf. *State v. Robinson*, 360 S.C. 187, 193-94, 600 S.E.2d 100, 103 (Ct.App.2004) (concluding mistrial should have been granted after jury indicated it was again deadlocked after receiving Allen charge and that additional deliberation would not break deadlock). Thus, the jury's request was an indication that the jurors had not

given up on reaching a verdict and that they anticipated further deliberations. Accordingly, we hold the trial judge properly permitted the jury to resume its deliberations and S.C.Code Ann. § 16-3-20 did not mandate a sentence of life imprisonment.

State v. Williams, supra.. Further, addressing an arbitrary factor assertion, the Court concluded:

Pursuant to S.C.Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, *or any other arbitrary factor*. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate.

State v. Williams. (emphasis added).

Respondent submits that this ground must be dismissed.

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In his final claim, he contends that counsel was ineffective for failing to argue that certain portions of petitioner's journal should have been excluded under Rule 403, SCRE due to their tendency to confuse the jury, and because their probative value was substantially outweighed by their unduly prejudicial effect. This claim must be dismissed. First, the Applicant does not specify what portions of the journal he is specifically referring. Pursuant to SCRCP, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what evidence the Applicant now claims existed at the time of trial that should have been used.

Alternately, he cannot show deficient performance because counsel objected to the introduction of the journal at trial. At the outset of the trial on February 7, 2005, Judge Nicholson denied the motion to suppress the journal recovered as a result of the interview. ROA p. 6, 11.

10-11. As earlier noted, the complete interview transcript was introduced by the defense in the guilt phase. Defendant's Exhibit 4, ROA, p. 2869-2963 [Court Exhibit 2]. ROA p. 1771, l. 18-20. The allegation must be dismissed.

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed or, in the alternative, that the Court should direct the Applicant to timely serve and file an Amended Application for Post-Conviction Relief specifying all grounds for relief with particularity pursuant to Rule 12(e). Respondents also request this Court to hold a status hearing within thirty (30) days pursuant to Section 17-27-160 and establish a final hearing date.

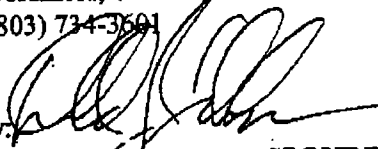
Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

January 13, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

CHARLES CHRISTOPHER)
WILLIAMS, #6018)

C/A No. 2010-CP-23-9792

Applicant,)

vs.)

CERTIFICATE OF SERVICE

THE STATE OF)
SOUTH CAROLINA)

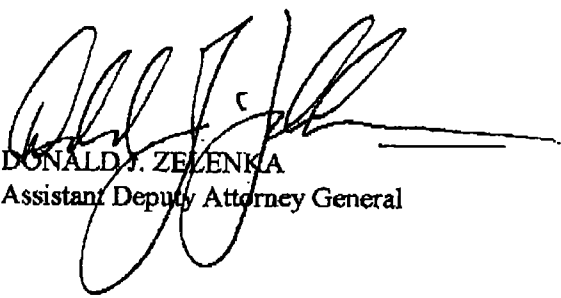
Respondent.)

I, Donald J. Zelenka, hereby certify that I have served the *Return to Application for Post-Conviction Relief* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Derek J. Enderlin, Esquire
Ross and Enderlin, PA
330 E. Coffee Street
Greenville, SC 29601

Richard W. Vieth, Esquire
Henderson Brandt & Vieth, PA
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Spartanburg, SC 29302

This 13th day of January, 2011.


DONALD J. ZELENKA
Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA

County of Greenville

In the Court of Common Pleas
2010-CP-23-9792

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

2011 SEP 30 P 1:47

CHARLES CHRISTOPHER WILLIAMS

ENTERED COMPUTER

V.

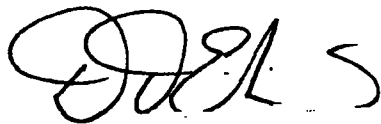
THE STATE OF SOUTH CAROLINA

ADDENDUM TO APPLICATION FOR POST CONVICTION RELIEF

Comes now the Petitioner in the above referenced case and amends his initial application for post conviction relief by adding the following additional grounds and facts in order to supplement the original attachment in the application for post conviction relief under items 9 and 10 in the application. This attachment is only meant to include additional material and in no way is meant to be a substitute for that application or attachment.

Petitioner's counsel has only been able to read the transcript and give a cursory examination of the file. This amendment is meant to give as much notice as possible to potential grounds and facts as is possible at this time, however, the undersigned believes there will be additional grounds and facts raised as the investigation continues and will most likely supplement the application at that time as well.

The undersigned in no way intends to waive any right of the petitioner to include additional grounds for relief as they may become available. Attachment II is hereby added by the undersigned counsel with appropriate verification to be filed as necessary.



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Copy @ counter to atty Enderlin will serve

ATTACHMENT II

(g) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and/or South Carolina Code 16-3-25, and/or the corresponding sections of the South Carolina Constitution, that the death penalty was not appropriate and that the death penalty is used in an arbitrary manner.

(h) Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, for failing to object to statements in the Solicitor's closing argument, including, but not limited to, statements discussing life in prison, statements about the death penalty being extremely limited, injecting his own personal beliefs in the argument, repeatedly referencing the community and the result of the verdict in the community, and allowing improper argument.

(h) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, that the judge's instructions to the jury that their decision was a recommendation violated South Carolina Jurisprudence, as well as the Constitution of South Carolina and the United States.

(i) Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, for failing to conduct adequate voir dire, and/or to exclude certain jurors, and/or to preserve the request to change venue.

(j) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing the argument in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, that the defendant should have the right to plead guilty and still receive a jury trial for sentencing.

(k) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, that the aggravating circumstances should be in the indictment.

(l) Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, for failing to invoke the defendant's right as a foreign national and in investigating the identity of his grandfather.

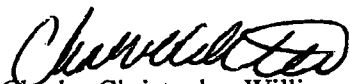
(m) Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, and South Carolina Code Ann. 23-3-400 *et seq*, for failing to ask the judge to make a finding that the defendant did not have to register as a sex offender.

STATE OF SOUTH CAROLINA

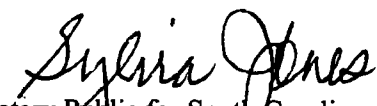
VERIFICATION

COUNTY OF GREENVILLE

I, Charles Christopher Williams, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.


Charles Christopher Williams

Sworn to and subscribed before me
this 27th day of September, 2011.


Notary Public for South Carolina
My Commission Expires 1/24/2011

Capital PCR

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

CHARLES CHRISTOPHER)
WILLIAMS, #6018)

C/A No. 2010-CP-23-9792

Applicant,

vs.

THE STATE OF)
SOUTH CAROLINA)

Respondent.)

RETURN TO AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

ENTERED COMPUTER

FILED - COURT OF COMMON PLEAS
GREENVILLE COUNTY, S.C.
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The Respondent hereby makes a Return to the Amended Application for post-conviction relief dated September 22, 2011 through appointed counsel Derek Enderlin and Richard Vieth. This matter initially came before this Court pursuant to the application for post-conviction relief filed November 30, 2010 through appellate counsel Robert Dudek. On November 14, 2010, a order of the Supreme Court of South Carolina stayed the order of execution of Greenville County death row inmate Charles Christopher Williams to allow him to pursue potential state post-conviction relief. The Order assigned the Honorable G. Edward Welmaker with continuing jurisdiction regardless of assignment and with the authority to schedule such hearings as may be necessary. The Respondent made a Return to the initial application for post-conviction relief on January 13, 2011. At a subsequent status conference on August 31, 2011 the Court set July 16, 2012 as a hearing date. The Applicant made amendments filed September 30, 2011 to the original application. Respondents would note at the outset that they have requested under S.C.

Rule of Civil Procedure, Rule 12(e), greater particularity and specificity with regard to the allegations as amended. This Return to the Amended Application follows:

I.

The Applicant, Charles Christopher Williams, was indicted at the March 23, 2004 term of the Court of General Sessions for Greenville County for murder involving the September 3, 2003 shooting death of Maranda Williams, and possession of a weapon during the commission of a violent crime on Indictment 2004-GS-23-1746 and kidnapping on Indictment 2004-GS-23-1745. The Petitioner was represented by John Mauldin and William Nettles of the South Carolina Bar. He was also represented by Mark MacDougall and Colleen Coyle of Washington, D.C.

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The State gave notice of intent to seek the death penalty on August 30, 2004. Motion hearings were held May 25, 2004, November 1, 2004, December 15, 2004, January 13, 2005, and January 26, 2005. The matter was called to trial February 7, 2005 before the Honorable J.C. "Buddy" Nicholson. The prosecution was represented by Solicitor Robert Ariail and Deputy Solicitor Betty Strom. On February 15, 2005, the jury found the Petitioner guilty of kidnapping, murder, and possession of a firearm during a violent crime. ROA 2069.

On February 17, 2005 the penalty phase began. ROA 2072. On February 18, 2005, the jury was charged to consider the existence of the following aggravating factor:

"Murder was committed while in the commission of kidnapping."

ROA 2399. The jury was also charged to consider the following statutory mitigating circumstances:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.

2. The age or mentality of the defendant at the time of the crime.

ROA 2403. The jury was also charged to consider non-statutory mitigating circumstances:

1. Any testimony regarding the defendant's mental illness is treatable with medication.
2. Any testimony regarding the defendant's adaptability to prison.
3. Any testimony regarding the defendant's future violence in prison.
4. Any testimony the defendant is loved and supported by his sister, Maureen, and her family that have and will continue to encourage, sustain, and assist him in the future.
5. Any other testimony or any other reason or reasons which the jury may consider.

ROA 2404-05.

On February 19, 2005, the jury returned a verdict finding the existence of the statutory aggravating circumstance "murder was committed while in the commission of kidnapping."

ROA 2417. The jury entered a recommendation of a sentence of death. ROA p. 2417, l. 7.

Judge Nicholson then sentenced the Petitioner to death. ROA 2420.

Post-trial motions were filed on February 28, 2005 and heard on April 6, 2005. R. 2842-2867, April 6, 2005 Tr. p. 1-26. The Court denied the motions.

On May 19, 2005, a notice of appeal was filed from the written order denying the post-trial motions. In the appeal, the Petitioner was represented by Robert M. Dudek of the South Carolina Office of Indigent Defense. On February 8, 2010, the South Carolina Supreme Court entered its opinion affirming the judgment of conviction and death sentence. State v. Williams.

386 S.C. 503, 690 S.E.2d 62 (S.C. 2010). The Petitioner made a timely petition for rehearing on February 23, 2010. The petition was denied, with dissent, on March 25, 2010. The remittitur was issued the same date.

On June 23, 2010, the Petitioner, through counsel Dudek, mailed a petition for writ of certiorari in the United States Supreme Court. The petition was docketed on June 29, 2010. On October 4, 2010, certiorari was denied. *Williams v. State of S.C.*, 2010 Westlaw 2629843 (Oct. 4, 2010).

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The Petitioner made a petition for stay to seek an application for post-conviction relief on October 13, 2010. The State responded on October 15, 2010. On November 17, 2010, the South Carolina Supreme Court issued its order in the matter assigning this Court to address Williams's desire to proceed on a PCR action and have counsel appointed and staying the death sentence pending completion of the state PCR proceedings.

The Crime

This case involves the planned murder of Maranda Williams on September 3, 2003 by the Petitioner. The record revealed that Maranda and the Petitioner met as co-employees at the Bi-Lo where they both worked. They initially had a dating relationship that lasted about three months. However, Maranda broke off the relationship. Evidence revealed that he had previously assaulted the victim on July 16, 2003 at the Bi-Lo and had an appointment with a lawyer on September 3.

On September 3, Maranda came to work at the Bi-Lo arriving around 8:15 to begin work at the Deli-Bakery. Shortly before 10 AM, the Petitioner arrived at the store, parked in the fire

lane wearing camouflage clothing, a toboggan knit hat and entered the store carrying a .12 gauge shotgun under his left arm. He was carrying ten rounds with him.

He went to the Deli area and went to the back where Maranda had gone. He proceeded through the area, grabbed her and took her into the deli-office. Two other employees arrived, the store manager and another employee, who attempted to intervene. Instead, Williams pointed the shotgun at them and they left. At that point the store was cleared of all people and the SWAT team arrived and surrounded the store.

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The victim placed a call to 911 from her cell phone and she spoke with an operator and described where in the store they were located. The call lasted a period of time until around noon. Attempts to communicate with the victim and negotiate with the Petitioner were made by the Hostage Negotiator Tony Lee of the Greenville County Sheriff Department to attempt to get Williams to release her for over one and one half hours. As revealed in the recorded call, around noon fearing she was to be killed, the victim attempted to escape. A struggle ensued with Williams and her blouse and apron are torn from her and she runs through the deli. The defendant follows her and shots five times at close range within 5 to 10 feet, striking her three times in the back, severing her spinal cord as revealed on the surveillance video. The SWAT team enters at that point and located the deceased on the floor unable to be revived.

Williams is located immediately in the store and arrested. He is taken to the law enforcement center where he is interviewed and gives a statement admitting the crime.

ATTACHMENTS

Respondent attaches and incorporates herein by reference the following:

1. Final Brief of Appellant.

2. Final Brief of Respondent.
3. Final Reply Brief of Appellant.
4. State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (S.C. 2010).
5. Petition for rehearing, dated February 23, 2010.
6. Letter Order Denying Rehearing, March 25, 2010.
7. Remittitur letter, March 25, 2010.
8. Record on Appeal - 6 volumes.

II.

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On November 30, 2010, the Applicant filed an application for post-conviction relief. The application was received by Respondent on December 14, 2010. The Applicant, through appointed appellate counsel Robert M. Dudek, asserted the following initial grounds for post-conviction relief:

- (A) Trial counsel was ineffective , in derogation of the Sixth Amendment to the United States Constitution, for waiving various objections to the confession given by petitioner to Dr. Pamela Crawford, where Dr. Crawford told petitioner she would help him get treatment as a psychiatrist where she was in reality a law enforcement officer intent on obtaining a damaging confession.
- (B) Trial counsel was ineffective , in derogation of the Sixth Amendment to the United States Constitution, for waiving the objection to Dr. Crawford being allowed to testify before a jury, by agreeing Dr. Crawford could testify but not as an expert, since the trial judge's proposed ruling on the matter was erroneous and it led to great confusion for the jury as Dr. Crawford began what was expert testimony.
- (C) Trial counsel was ineffective , in derogation of the Sixth Amendment to the United States Constitution, for failing to effectively move for a mistrial based on Dr. Crawford's cumulative testimony, and by failing to effectively object to the trial judge's curative instruction that this court found solved any need for a mistrial.

- (D) Trial counsel was ineffective , in derogation of the Sixth Amendment to the United States Constitution, for failing to present available evidence in mitigation regarding the extreme difficulties between petitioner's mother and father and available mitigating evidence about petitioner's extremely troubled childhood, teenage and young adult years.
- (E) Trial counsel was ineffective , in derogation of the Sixth Amendment to the United States Constitution, for arguing that the trial judge had to declare a mistrial and sentence the petitioner to life imprisonment where the jury revealed its division since defense counsel should have argued the trial judge's distinction between a jury reporting its division on its own, introduced an arbitrary factor into the case as it related to the trial judge's discretion to give an Allen charge rather than declare a mistrial and sentence petitioner to life imprisonment.
- (F) Trial counsel was ineffective , in derogation of the Sixth Amendment to the United States Constitution, for failing to argue that certain portions of petitioner's journal should have been excluded under Rule 403, SCRE due to their tendency to confuse the jury, and because their probative value was substantially outweighed by their unduly prejudicial effect.

Application for Post-conviction relief, p. 7.

On September 30, 2011, the Applicant, now through counsel Enderlin and Vieth made the following additional allegations:

- (G) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and/or South Carolina Code 16-3-25, and/or the corresponding sections of the South Carolina Constitution, that the death penalty was not appropriate and that the death penalty is used in an arbitrary manner. **[DP not appropriate and/or used in an arbitrary manner]**.
- (H) Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, for failing to object to statements in the Solicitor's closing argument, including, but not limited to, statements discussing life in prison, statements about the death penalty being extremely limited, injecting his own personal beliefs in the argument, repeatedly referencing the community and the result of the verdict in the community, and allowing improper argument. **[Solicitor's closing argument issues]**

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- (H2) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, that the judge's instructions to the jury that their decision was a recommendation violated South Carolina Jurisprudence, as well as the Constitution of South Carolina and the United States. [**Recommendation Instruction issue**]
 - (I). Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, for failing to conduct adequate voir dire, and/or to exclude certain jurors, and/or to preserve the request to change venue. [**Adequacy of Voir Dire, Exclusion of Jurors and Venue Preservation**].
 - (J). Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing the argument in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, that the defendant should have the right to plead guilty and still receive a jury trial for sentencing. [**Defendant's right to plead guilty and have jury sentencing**].
 - (K). Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, that the aggravating circumstances should be in the indictment. [**Aggravating Factor in indictment issue**]
 - (L). Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, for failing to invoke the defendant's right as a foreign national and in investigating the identity of his grandfather. [**FOREIGN NATIONAL and investigate identity of grandfather**].
 - (M). Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, and South Carolina Code Ann. 23-3-400 et seq, for failing to ask the judge to make a finding that the defendant did not have to register as a sex offender. [**Failure to ask Judge to make finding that he would not have to register as a sex offender**].

III.

Respondent submits that the entire application is without merit.

1,2,&3 - Dr. Crawford Issues.

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In his first three allegations, he contends that trial counsel was ineffective in the manner they dealt with the testimony of Dr. Pamela Crawford. In particular, he contends that trial counsel was deficient when they waived objections to the testimony of the confession given to Dr. Crawford when Dr. Crawford stated she would help get him treatment when she was working for law enforcement at the time "intent on getting a damaging confession", waived an objection by agreeing that Dr. Crawford could testify, but not as an expert since the ruling was erroneous and led to confusion, and failed to move for a mistrial based upon Dr. Crawford's cumulative testimony and/or object to the curative instruction.

The record reveals that evidence from Dr. Pamela Crawford was p-presented in the penalty phase to address and rebut testimony and argument presented in the guilt phase by the defense to suggesting that the sole reason that Dr. Crawford was called by law enforcement was the belief by the police that Williams was mentally ill. To the contrary, as Solicitor Ariail was attempting to show, Dr. Crawford was not called in by law enforcement at all, but the Solicitor requested her assistance for him to assist in interviewing Williams to assist in his preparation of a case. ROA p. 2155-2156. Compare, ROA p. 1768, l. 6 - 1769, l. 24. (Testimony of Michael McNamara that Dr. Crawford had been sent up from SLED); p. 2039, ll. 13-20 (guilt closing by defense on reason why Dr. Crawford was present).¹

¹It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel "opens the door" to that evidence. *State v. Young*, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct.App.2005) *cert. granted*, Jan. 2007; *see also State v. Curtis*, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) ("Given that [defendants] maintained that PPS did not allow pornographic materials or links on the website, it is patent that they opened the door to this line of inquiry."); *State*

How the Issue Was Raised at Trial

At the outset of the trial on February 7, 2005, Judge Nicholson denied the motion to suppress Dr. Crawford's testimony and the journal recovered as a result of the interview. ROA p. 6, ll. 10-11.² As earlier noted, the complete interview transcript was introduced by the defense in the guilt phase. Defendant's Exhibit 4, ROA, p. 2869-2963 [Court Exhibit 2]. ROA p. 1771, l. 18-20.

Prior to the beginning of the penalty phase, counsel Nettles raised the issue of Dr. Crawford. He asserted that if the State is allowed to bring in Dr. Crawford to testify as a

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v. *White*, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (ruling expert could testify that she believed the victim in this case because defendant opened the door by cross-examining expert about other cases in which she did not believe victim); *State v. Dunlap*, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003) (holding defense counsel's opening statement "opened the door to the introduction of evidence rebutting the contention that [defendant] was merely an addict"); *State v. Taylor*, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) ("[B]ecause appellant 'opened the door' about his relationship with his wife, the solicitor was entitled to cross-examine him about the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction.").

Furthermore, an appellant cannot complain of prejudice resulting from admission of evidence to which he opened the door. See *State v. Foster*, 354 S.C. 614, 623, 582 S.E.2d 426, 431 (2003) (noting one who opens the door to evidence cannot complain of its admission); *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) ("Since appellant opened the door to this evidence, he cannot complain of prejudice from its admission."); *State v. Beam*, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct.App.1999) ("Beam cannot complain about the admission of evidence where he opened the door to the evidence."); *State v. Rice*, 375 S.C. 302, 328-329, 652 S.E.2d 409, 422 (S.C.App., 2007) (same).

² The issue concerning Dr. Crawford's potential testimony first developed at the January 13, 2005 pretrial hearing. At the hearing the defense asserted it intended to seek to suppress Williams' confession. Jan. 13, 2005 Tr. 82. Solicitor Ariail stated to the court that he had called Dr. Crawford and asked her to come and interview Williams after the crime. He stated it was taped and that she identified herself as a psychiatrist who works for SLED and gave Miranda. Id. 83.

On January 26, 2005, a motion and suppression hearing was held. During the hearing, testimony was received from Dr. Crawford concerning the circumstances of her interview. R. 2694-2756, Jan. 26, 2005 Tr. 48-109. During the hearing, questions were raised concerning the ethical standards of a psychiatrist participating in an interview of a criminal defendant who had waived his right to counsel. Id. ROA 96-158.

psychiatrist as only a fact witness and saw him, an inference could be left that there was nothing wrong with him. He felt this would mislead the jury. ROA 2103.

Nettles asserted that identifying Crawford as a psychiatrist working with SLED was error because of the inference it would leave the jury that she is an expert. ROA 2104. Solicitor Ariail stated that they merely told the defense that they were not going to call her as an expert and were not going to offer it in the guilt phase. ROA 2104. He said he had no problem qualifying her as an expert.

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The court asked counsel Nettles if he wanted to qualify her and that the Court would make a determination. ROA 2104.

It was noted that the defense in the guilt phase had already put in evidence that she was an a forensic psychiatrist. ROA 2105. It was further noted that during the earlier suppression hearing the court noted that Dr. Crawford was going to be offered as an agent of SLED that took a confession from the accused "and it was clarified that she would be offered as a state agent who took statements from the defendant. ROA 2107.

Counsel Nettles was now concerned about whether she was going to be offered as a psychiatrist. Tr. 2107. He confirmed that it was already in evidence that she was a psychiatrist. He stated his concern was that she would give opinion testimony. He said he thought she was only going to be used as a lay witness and not an expert. ROA 2108.

Judge Nicholson concurred that was his understanding. Counsel Nettles then objected under "the best evidence rule" asserting the transcript is already in evidence. ROA 2108. The court declared she could sit up and read the whole transcript because it was in evidence. Counsel Nettles agreed. ROA p. 2109, ll. 1-6.

Solicitor Ariail then clarified: "I can ask her if she is a psychiatrist and her relationship with the Department of Mental Health and SLED." The court stated he could but not go into education, etc. ROA p. 2109, ll. 19-23.

In the penalty phase of the trial, Dr. Pamela Crawford, a forensic psychiatrist, was called as a fact witness concerning a confession given by the Appellant. In describing her involvement in Williams case, Dr. Crawford stated in her employment with the Department of Mental Health she would do a variety of things, including going on SWAT calls and assisting with negotiations and would be called into a case by a prosecutor to provide assistance. When asked what type of assistance she was requested to provide by the Solicitor's Office on September 3, Dr. Crawford stated:

- A. In this particular case, and again I'm called by various solicitors throughout the State, and I'm only called when it's a case of a very serious nature. And typically it's when a death penalty is considered. And I'm asked to assess...

ROA p. 2152, ll. 10-20. At that point, counsel Nettles objected. ROA p. 2152, ll. 15-16.

Counsel stated that this testimony had been ruled upon repeatedly. He said the State had stated she was going to come in and say "I'm a psychiatrist" and "I'm a fact witness" and now she states "I get brought in on death penalty cases." He claims this gives an impression that she is blessing the case. ROA p. 2153, ll. 8-11. Counsel focused upon the word "assess." ROA p. 2153, l. 17 - p. 2154, l. 7. He claimed that she was about to express an expert opinion that they had been previously advised she would not do and would only be a fact witness. Counsel Nettles stated that now she had self-qualified herself as an expert psychiatrist and that she gets brought in

to help assess and "death is appropriate punishment or its appropriate for them to bring a death penalty in this case." ROA p. 2154, ll. 19-23.

Counsel Nettles clarified his motion was to object to the question and ask for a curative instruction. ROA p. 2155, ll. 10-13.

Judge Nicholson sustained the objection and stated he would give a curative instruction to disregard anything she said about the death penalty." ROA p. 2155, ll. 14-18.

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The court inquired of the prosecution about the guidelines. Solicitor Ariail stated he understood that the court was striking Dr. Crawford's responsive answer as to the purpose she came there. He said he was going into it because the defense had told the jury over and over why she came and the reason they stated was not true. ROA 2155-56. He noted that counsel MacDougall in his closing argument said the reason she came was because they knew something was wrong with the defendant. ROA p. 2156, ll. 3-5. See, ROA p. 2039, ll. 13-20 [MacDougall argument][“understand the role that mental illness play in this from the moment of the crime, within the hour the police knew, they arrest him between 11:45 and noon on September 3rd. About an hour later they've got a psychiatrist in, his confession hasn't been taken. He's being interviewed at the police station, and before anything else happens, let's get a psychiatrist here.”]. The solicitor stated that the defense was factually wrong with their stated reason as to why Dr. Crawford came to interview Williams and that no communication was ever made to her on that basis. He stated that they were entitled to explain that to the jury.

Judge Nicholson stated that he had no problem with that, but that they were going to phrase it “that she came to make a factual determination, investigated the facts for you to make a

determination as to whether *you* were going to seek the death penalty or not, *not her.*" ROA p. 2156, ll. 12-17.

The court **sustained** the objection. ROA 2157. Counsel Nettles asserted that they had not been trying to mislead the jury based upon her initial questions to Williams about potential treatment and that she is not his doctor. ROA 2157.

The court inquired of both the solicitor and the witness who stated they understood. ROA 2157.

At that point, the jury returned and Judge Nicholson gave the following curative instruction:

...please disregard anything that she said that she may be asked to assess concerning the death penalty. Disregard that. That's not appropriate. We're not going there.

ROA p. 2158, ll. 17-21. At that point the following occurred.

Q Let me clarify and go back. We were talking about what you had come to Greenville for. And as a result of coming to Greenville, did you in fact interview the defendant?

A Yes, I did.

Q What was the purpose of you interviewing --

Mr. Nettles: Objection.

The Court: Hold on a second. Solicitor, you may lead her through these questions, please, sir, laying your foundation. You may lead her.

Mr. Ariail: Was the purpose of you interviewing the defendant to provide that information to me in consideration of whether or not --

Mr. Nettles: Objection. And I'm going to - -

ROA 2158-59.

Outside the jury, the judge noted that the rest of the question had not yet been asked.

ROA 2159.

Counsel Nettles stated that his objection to the question was that she was now being asked to give an opinion and that she had to be excused. ROA p. 2160, ll. 1-6. He asserted her testimony is already in evidence from the transcript of the interview. ROA p. 2160, ll. 5-6.³

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The court stated she was not going to be excused. The court inquired of the basis of counsel's objection and counsel Nettles responded that "it goes beyond what the court's ruling was." ROA p. 2160, ll. 19-20. Judge Nicholson disagreed. ROA p. 2160, l. 21. Counsel further asserted that secondly, she had not been qualified as an expert and was not going to be an expert, yet they were using her as an expert to help get the death penalty and "helped in his decision to seek the death penalty." ROA p. 2160, l. 22 - p. 2161, l. 7.

Solicitor Ariail then declared that he withdrew the question. ROA p. 2161, l. 10.

Counsel Nettles then demanded another curative instruction. ROA p. 2161, l. 15. The court advised counsel to write the instruction. Counsel Nettles then asserted that at the Anderson hearing, it was discussed that if Dr. Crawford was called it would be for a "confined purpose." ROA p. 2162, l. 1. Counsel complained that the defense had a problem because it would appear to the jury that counsel was a liar because he had previously told them he wanted them to hear

³ Defendant's Exhibit Number 4 in the guilt phase of the trial was the interview of Williams by Dr. Crawford on September 3. See ROA 1771. See also, ROA 1768-1792.

everything. ROA p. 2162, ll. 10-15. He requested a mistrial asserting that no curative instruction could take care of it.

Counsel stated that Dr. Crawford had talked about the contract she has to work with solicitors. He said she was asked her purpose in coming to Greenville and she answered it and it was ruled out of order. He felt the solicitor then reversed the same question. ROA 2162-63.

The trial court stated, though, that the State had withdrawn the question and it was never completed. ROA p. 2163, ll. 2-6.

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Counsel asserted it could not be cleaned up and it was overwhelming. He requested for the court to strike her testimony would blame the Appellant and his lawyers. ROA 2163. The trial court denied the motion for a mistrial. ROA p. 2163, l. 22.

The defense next presented a proposed cautionary instruction. ROA 2163-64.

After a recess, the trial judge noted that from the outset of the trial, the State had stated that Dr. Crawford was not going to be offered as an expert and that if they were attempting now to offer her as an expert "it would be inherently unfair to the defense at this time; therefore I'm going to limit you, not ask her opinions, to give any opinions whatsoever based upon her being an expert." ROA p. 2165, ll. 6-9. The court stated that she would be offered as a lay person and limited to SCRE Rule 701, which would be generally limited to their perceptions of what occurred. ROA p. 2165, ll. 10-18.

Solicitor Ariail declared she would be treated as if she was an investigation officer who took the confession. ROA p. 2165, ll. 19-22. The court re-confirmed that they were not going into any opinions she may have as to why he reacted certain ways. "She can described his demeanor, do anything a police officer would do during an interrogation. ROA 2166.

The court opined that he felt the defense was "correct in that some of the questions tend to get in her opinion through the back door so to speak" and stated he was sustaining some of their objections. ROA 2166.

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Solicitor Ariail disagreed with the assessment. However, he revealed his intent in-camera. He stated he intended to show why she was up here since the defense injected that into the trial by argument and suggestion to the jury. He stated he wanted them to know "the real reason." ROA p. 2166, ll. 20-25. Next, he wanted to ask her if she did not interview and take a recorded statement from the defendant. Next, he would seek to read his responses to what she asked him through the rights and introductory part, which already contains that she is a forensic psychiatrist, worked with SLED and the Solicitor. He said all the things he previously asked were on the cover sheet of the defense's previously introduced Exhibit 4. Further, he stated he would ask her what Williams demeanor was during the conversation. ROA p. 2167, ll. 15-17.

The trial court stated he had no problems with that presentation. He noted the introduced defense exhibit revealed she worked SLED, that they had a situation and was told what happened and that she was asked to see if she could talk with him to try to determine his state of mind to try to get an idea what was going through his head when it happened. ROA 2167-68.

However, Judge Nicholson stated as far as helping him evaluate the death penalty or make an assessment as to whether you wanted to ask for the death penalty, "we are not going there." ROA p. 2168, ll. 8-11.

As to the second curative instruction, Judge Nicholson confirmed that it would be not to consider anything she says as coming from an expert, because she hasn't been qualified as an expert, and if she does, to disregard it. ROA p. 2168, ll. 15-25.

The court next gave to they jury the following curative instruction:

THE COURT:

Mr. Foreman, members of the jury, I told you this in the first phase of the trial. I'm going to tell you again. Whenever one of the attorneys makes an objection, they're merely telling the court that they do not think that's admissible under the rules of evidence or the rules of court. And it's my job to decide whether it's admissible or not admissible. I ask you to leave the courtroom so I can comment on the facts, because I'm not at liberty to comment on the facts when the jury is present.

I'm the one that asked you to leave the courtroom so I can be free with what I say to the attorneys and the questions I ask the attorneys. The attorneys are not trying to hide anything, they just have an opinion it's not admissible, and that's their job. You are not to consider anything for or against either one of the attorneys when they make objections as to the rules of evidence. That's the procedure we are going through, and that's the reason I've been running you in and out of the courtroom, so I would be free, not that the attorneys are hiding anything. You understand?

All right. Now, normally opinions are not given in a courtroom. However, opinions may be given in a courtroom by lay persons when they're based on the perceptions of a witness, such as, if someone is staggering and you smell alcohol on their breath, you have an opinion they're intoxicated, that's a lay opinion that may be admissible in a courtroom; or if it's going to be helpful for the jury to understand and does not require special skill, experience, or training.

An expert may give his opinion if they qualify when there's a scientifically, technical, or other specialized knowledge required for the jury to understand the question.

Now, in this particular case this witness has not been qualified as an expert. In order for an expert

to give an opinion, they have to be qualified. And the court has to find that they're qualified. This witness has not been qualified as an expert and I'm going to tell you, you must disregard any suggestion either in the solicitor's questions or any answer that this witness has given that Mrs. Crawford was asked, has formulated, or given an opinion of any kind in this case. She's going to be treated as a lay witness, not an expert.

ROA p. 2169, l. 19 - p. 2171, l. 12.

Dr. Crawford then testified consistent with the instruction and without objection by the defense. In summary, she referred to defense Exhibit 4, the transcript of her interview with the Appellant. She noted that it took place at the law enforcement center with law enforcement present, but no one else. She then read through a series of questions, without objection, in the September 3, 2003 interview, including the previously noted portions about being a forensic psychiatrist working with SLED and the solicitor and being told of the situation, trying to get an idea as to what was going in his head when it happened. ROA 2172-73.

Dr. Crawford testified the interview was recorded and lasted about 2½ hours. ROA 2175. She stated the contents of the interview transcript were accurate. She concluded the direct examination by declaring "he was calm, pleasant, cooperative, not tremendously expressive, but was calm and coherent and cooperative." ROA p. 2176, ll. 1-2.

On cross-examination, the defense developed that she was not his treating physician, that he still spoke with her even though he could have had a lawyer, and went through graphic detail about the crime without encouragement. ROA 2177-78.

On cross-examination, the defense developed that Dr. Crawford asked him questions about his family and that he told her his parents got divorced when he was ten, that he became

angry at that time with his father, and was raised by his mother who was an alcoholic. ROA 2179-80. She confirmed that she had spoken with his father and mother, talked with Williams about school and attention deficit disorder. In addition, she spoke with his sister, Maureen, who verified his mother's alcoholism and lack of parental support or supervision. ROA 2182. She stated she went to Williams' mother's house with law enforcement the night of the interview and question her while they searched the house. ROA 2183. She said while Williams asserted he drank some, there was no information that he used drugs. ROA 2183.

She said Chris told her they met at the Bi-Lo, became friends and started dating. She described him telling her that he thought she had an abortion and that he wrote a journal after the break-up to record his feeling. ROA 2184. He advised her of a suicide attempt o his mother's medication as an unsuccessful attempt to get Maranda's attention. She said he had branded himself and planned to kill himself different times. ROA 2185. He told her he had sleep problems before the break-up and had racing thoughts. ROA 2185. She said he had been keeping lists about supplies he would buy and list their prices to distract himself and had thought about moving into the woods. ROA 2186.

She denied that he told her he had "racing thoughts" the time of the incident and that they had gotten better. ROA 2186-87.

The April 6, 2005 Post-Verdict Motions Hearing

On April 6, 2005, hearings were held concerning Williams motions after his February death sentence. As to this issue, defense counsel Nettles claimed he was entitled to a new sentence based upon the solicitor's stipulation that they would not call Dr. Crawford as an expert at trial but only as a fact witness. ROA 2861, *April 6, 2005 Tr.p.* 20. He asserted that twice

during their penalty phase examination, the state violated its rules and the court's order and that a mistrial should have been declared. *ROA 2861, April 6, 2005 Tr.p. 20.*

Solicitor Ariail noted that the defense in the guilt phase had already put in evidence that Dr. Crawford was a SLED psychiatrist. He reminded the court that when he put in testimony that she came to assist them was when the defense got upset during the trial. *ROA 2862, April 6, 2005 Tr.p. 21.* He stated that Dr. Crawford never gave an opinion during his questioning. *Id.*

Counsel Mauldin responded that the transcript will reflect the nature of the question regarding the solicitor's question about the decision. *ROA 2863, April 6, 2005 Tr.p. 22.*

Judge Nicholson denied the motion. *ROA 2863, April 6, 2005 Tr.p. 22, l. 8.*

In the appeal before the South Carolina Supreme Court, the Court addressed the testimony of Dr. Crawford in the following manner:

IV. Dr. Crawford's Testimony

Appellant argues the trial judge erred in refusing to declare a mistrial because Dr. Crawford's testimony impermissibly bolstered and vouched for the solicitor's decision to seek the death penalty.[FN 8] We disagree.

Footnote 8 : [The question of whether the trial judge committed an abuse of discretion in denying Appellant's mistrial motion is preserved for our review. Appellant objected to Dr. Crawford's testimony before it was given and renewed this objection both during and after her testimony. Appellant moved for mistrial on these grounds, and the trial judge denied the motion. Appellant then sought to introduce a curative instruction, which the trial judge accepted. Under these circumstances, the trial judge's denial of the mistrial motion is properly preserved for appellate review. *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct.App.2004) (" 'There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.' ") (quoting *JEAN HOEFER TOAL ET AL.*,

We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness. Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury.

Dr. Crawford was introduced to give fact testimony regarding her observation of Appellant's mental state within hours of Victim's murder. We have long held that a lay witness may testify as to a defendant's mental state. See *State v. Rimert*, 315 S.C. 527, 446 S.E.2d 400 (1994), cert. denied, 513 U.S. 1080, 115 S.Ct. 730, 130 L.Ed.2d 634 (1995) (where the State relied on lay testimony to establish defendant's sanity); *State v. Smith*, 298 S.C. 205, 379 S.E.2d 287 (1989) (holding that where defendant presents expert testimony regarding his insanity, the State may introduce lay testimony in rebuttal).

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We recognize that while a witness of Dr. Crawford's professional expertise may in many cases be called upon to deliver expert testimony, the solicitor was not bound to call her in that capacity so long as her testimony was limited to lay matters. The solicitor was justified in asking Dr. Crawford to observe Appellant's mental state subsequent to his arrest and in calling upon her to testify regarding her observations. Appellant had been duly informed of his rights under Miranda, and spoke with Dr. Crawford voluntarily. Dr. Crawford's testimony was reasonably limited to her factual observations over the course of the interview. In our view, Dr. Crawford was called as a lay witness to give lay testimony. There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford.

Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction. Therefore, we find no error in the trial judge's denial of Appellant's motion for mistrial.

State v. Williams, supra.⁴

⁴Respondent acknowledges that there was a concurring opinion on this issue by Justice Pleicones who opined that the issue was not preserved for appellate review on whether a mistrial should have been declared based upon the Solicitor's questioning of Dr. Crawford.

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The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). Under *Strickland* and its progeny, Williams must demonstrate that, but for counsel's failures to investigate and present evidence of his post-traumatic stress disorder, there is a "reasonable probability" that a jury would not have sentenced him to death. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." "To assess that probability, we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation." *Porter v. McCollum*, --- U.S. ---, 130 S.Ct. 447, 453-54, ---L.Ed.2d --- (2009) (per curiam) (internal quotation marks and brackets omitted).

The Applicant has failed to show 6th Amendment deficient performance concerning Dr. Crawford's testimony. First, the South Carolina Supreme Court concluded that: "**We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay**

witness. Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury . . ." As the Supreme Court recognized, Dr. Crawford was introduced to give fact testimony regarding her observation of Williams' mental state within hours of murder. The Court stated that "We have long held that a lay witness may testify as to a defendant's mental state." In his allegation, he claims that Dr. Crawford should not have been able to testify - but the appellate court's decision removes the claim impediment by recognizing that such testimony was authorized and appropriate.

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Second, he challenges the comment by Dr. Crawford that she would help get treatment for Williams. The Applicant does not state what the particular objection should have been to this testimony. On direct examination, Dr. Crawford read from her earlier interview with Williams:

- A. . . . There are things that I need to make sure you understand, is I'm not your doctor. Okay? **If we talk and I feel like you need treatment, I'm going to refer you to somebody.** And my guess is there's a good likelihood of that because you know from what I understand about your past, this is a very unusual circumstance here?

ROA p. 2173 (emphasis added). The record reveals that defense counsel Nettles brought out on cross-examination the following:

- Q. Let's talk for a little bit about just a second ago I think one of the things you and the solicitor talked about was that in the front page you all talked about there you thought that if he - you weren't his treating physician?
- A. Right.
- Q. But if you thought he needed something, that you would refer him to somebody?
- A. Yes.
- Q. An you, in fact, placed him on suicide watch, is that right?

A. I didn't place him on suicide watch. That would not be my capacity.

ROA 2176. But see ROA P 2723. (In camera testimony concerning suicide watch referral and placement).

The Petitioner has failed to show what issue should have been presented concerning this testimony. The record reveals that an initial statement was found to have been voluntarily made after his constitutional rights were freely and voluntarily waived after a Jackson v. Denno hearing. ROA 1466-68. See ROA 1439-1465. During an earlier hearing on January 26, 2005, a hearing was held on the admissibility of four statements made by Petitioner. ROA 2652-2807. During the hearing evidence was presented concerning the statement and questioning between the Applicant and Dr. Crawford. ROA 2681- 2756.

The defense motion to suppress was based upon a number of assertions. First, the defense, through counsel Coyle asserted that under *Estelle v. Smith*, 451 U.S. 454 (1981) a different set of Miranda warnings was required for a psychiatrist to evaluate an arrested defendant. She asserted that the defendant had to be made aware that evidence would be used against him and was being obtained may be used against him in obtaining the death penalty. ROA 2808. Counsel asserted that Dr. Crawford's Miranda warnings were deficient because she said it "might" come up, not that it would be used against him. ROA 2810, 2816. She asserted that this challenge was based upon the Fifth Amendment.

Counsel Coyle also asserted that there was a Sixth Amendment violation because the state tried to circumvent the right to counsel. ROA 2821. He asserted, based upon testimony of Dr. Frierson and Dr. Halleck, that a psychiatrist lawyers must be notified and be present at a psychiatric evaluation, which was not done here. ROA 2821. However, the defense conceded that

they had no cases which interpreted the American Academy of Psychiatry and the Law Ethical standards' "access to or availability of counsel" requirement . ROA 2822-23. Counsel complained, citing Estelle that the Williams statement to Dr. Crawford occurred before counsel could be appointed and consulted.

Counsel Coyle further asserted that under SCRE Rule 403 it should not be admissible. ROA 2825. She contended that Dr. Crawford would be offering evidence about Williams character which is a lay opinion based upon a woman that does not know him and only talked to him for a couple of hours. ROA 2826. She said as far as whether the statement could be admitted they were relying upon the constitution, but as far as Dr. Crawford testifying, they were relying on Rule 403. ROA 2826.

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Solicitor Ariail confirmed that Dr. Crawford was going to be offered to testify as an agent of the state. ROA 2827, l. 8-9. Under Rule 403, the defense that the evidence was not reliable because of the manner she elicited it and used suggestion and led him to believe she was helping him when she was not helping him and a lot of the information that she gave was not true because she did not follow up on it. Further, the defense argued the evidence would be cumulative to the police statements .The defense contended that Dr. Crawford did not add anything to the equation and threatens to confuse the issue .

Under the Fourth Amendment, counsel Coyle contend that Dr. Crawford's medical background and training in psychiatry is a powerful tool to get into the applicant's mind and under the state constitution right to privacy, a defendant has a right to control his own mind and be free from government interference. She claimed the action of the interview by Dr. Crawford violated the right to privacy and federal due process where it was done without a warrant and

without court supervision into the defendant's mind to extract information that the police could not get so a doctor was brought in. She complained that the Crawford statement was different than the police statement because it covered his sex life, his childhood, whether he abuses animals and covers his remorse. ROA 2830. Particularly, she pointed out the initial statement where Williams stated that he went into the store not knowing whether he was going to shot the victim to Dr. Crawford's statement where he stated it was premeditated and had been planned for weeks in advance. ROA 2831-32. She concluded that under the 4th Amendment it was unwarranted medical intrusion without a waiver and court order.

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Solicitor Ariail argued that the purpose in calling Dr. Crawford to the interview was to look at the applicant's state of mind to determine whether or not to seek the death penalty as the primary purpose and second, if they sought the death penalty, to discover any evidence of mitigation. He declared that at the time of the interview, he had not made a decision to seek the death penalty. ROA 2833. Solicitor Ariail stated that DR. Crawford did advise Williams specifically that anything they talked about may come up in court to the judge and jury at sentencing. He claimed that there was nothing hidden from him and he was advised about this potential.

At the outset of the trial proceedings on February 7, 2005, Judge Nicholson entered an oral order denying the motion to suppress Dr. Crawford's testimony. In particular, he asserted that *Estelle v. Smith* was distinguishable because Miranda warnings were given in Williams and Estelle involved a court-ordered examination. He concluded that Dr. Crawford gave Miranda rights and that the warnings were sufficient.

Respondent submits that the Applicant has failed to show deficient performance under *Strickland*. Respondent submits that the September 3, 2003 statement by Charles Williams upon questioning by Dr. Crawford was freely and voluntarily given after being advised and waiving appropriate constitutional rights under *Miranda v. Arizona*. The Applicant has failed to show any deficient performance that was outside of the reasonable performance of defense counsel. His assertion to the contrary is without merit.

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In his second specification of ineffective assistance, Williams claims counsel erred by waiving an objection concerning allowing Dr. Crawford to testify since it lead to confusion. As stated above, Dr. Crawford was an actual witness and questioner on a statement the Applicant made on September 3, 2003. As stated by the Supreme Court she remained a competent witness to testify about the circumstances of the statement by Williams. The Applicant's characterization notwithstanding, the testimony of a witness-questioner was not inadmissible, as the Supreme Court recognized in concluding: **"We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness.** Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury . . ." The Petitioner cannot succeed in his burden of proof on this defeated claim. He has failed to show either deficient performance or prejudice - particularly in light of the contrary conclusions of the Supreme Court rejecting the underlying assertion

In his third specification of ineffective assistance, he claims that counsel was deficient in failing to move for a mistrial based upon Dr. Crawford's cumulative testimony and failing to effectively object to the curative instructions. This is a blatant attempt to relitigate what the

Supreme Court has already decided against the Applicant. It derives from Justice Pleicones concurring opinion in Williams. However, the majority concluded that :

We recognize that while a witness of Dr. Crawford's professional expertise may in many cases be called upon to deliver expert testimony, the solicitor was not bound to call her in that capacity so long as her testimony was limited to lay matters. The solicitor was justified in asking Dr. Crawford to observe Appellant's mental state subsequent to his arrest and in calling upon her to testify regarding her observations. Appellant had been duly informed of his rights under Miranda, and spoke with Dr. Crawford voluntarily. Dr. Crawford's testimony was reasonably limited to her factual observations over the course of the interview. In our view, Dr. Crawford was called as a lay witness to give lay testimony. There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford.

Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction. Therefore, we find no error in the trial judge's denial of Appellant's motion for mistrial.

State v. Williams, supra.

Respondent submits that deficient performance and prejudice under *Strickland* cannot be shown in light of the majority analysis and conclusions. The specification should be denied.

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In his fourth specification of ineffective assistance of counsel, he claims that the counsel failed to present **unspecified** available evidence in mitigation regarding the difficulties between mother and father and other mitigating evidence about Williams troubled childhood , teenage and adult years. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Pursuant to SCRCPP, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the

broad claim without a precise statement as to what evidence the Applicant now claims existed at the time of trial that should have been used.

The record reveals the multi-state defense team in the penalty phase focused on development of the family background and mental background of Williams - beginning with John Mauldin's opening statement in the penalty phase. ROA 2122-2130. Particularly, he emphasis that Williams had accepted responsibility for his actions and no excuse for what he did, but noted the defense would present evidence about "the presence of a mental illness, . . . the lack of family support or family support systems and how the combination of those two things combined to create a very very horrible and difficult situation." ROA 2131. Supporting this argument assertion was the actual presentation of evidence in mitigation.

The Defense Mitigation

In addition to the guilt phase evidence presented, the defense team presented a series of witnesses.⁵ First, counsel Nettles called **Dwight Williams, the Applicant's father**. ROA 2208.

⁵Counsel Nettles developed some testimony in mitigation in his cross-examination of **Dr. Crawford**. She testified that Williams told her that his parents got divorced when he was 10 years old and that he was raised by his mother with her various step-fathers. ROA 2178-79. She further stated that Williams was angry with his father about the divorce because he had broken up the family. ROA 2173. She said he felt like he was an "evil child" after the divorce. He told Dr. Crawford that his mother married twice and that his relationship with them was not generally good. She was told that his mother was an alcoholic for 30 years and intoxicated much of the time he was a child. ROA 2180. She stated that she had spoken with Williams mother and father. ROA 2181. She stated that he had reported that he had flunked the first grade and ADD(attention deficit disorder) may have been discussed, but he never received medicine for it and nobody followed through. His sister Maureen verified that his mother was an alcoholic and claimed that his mother provided Williams "virtually no support" and "very little supervision." ROA 2182. The sister had told Dr. Crawford that she offered to have Williams live with her because she was worried about the lack of adequate supervision and support. ROA 2182. Dr. Crawford stated that she visited the mother's house the night of the incident. She also stated that no one told her about Williams did not tell her about Williams using drugs and he only stated that he drank some. ROA 2183. She stated that Williams told her that he met Maranda at the Bi-LO and that they became friends and quickly started dating.

Mr. Williams was a multi-instrumental (13) band master in the Army. He stated that Daisy Huckaby Williams was Applicant's mother though they later divorced when Applicant was 8 years old.. ROA 2210. He stated the divorce affected Applicant. He stated that there were disturbances within the home - "weren't physical arguments, but more or less verbal arguments" and he felt it was best to separate to keep the child from continued arguments . ROA 2210-11. He admitted that there may have been violence in the home with bruising someone and breaking objects. He stated it was not a healthy place for kids. He stated that the separation affected Applicant because it bothered him because he no longer had him as a friend. He stated that Applicant did not have friends and was real quiet, subdued and kept to himself. ROA 2212. While was the best decision for the father, it was not the best situation for the Applicant. ROA 2213. He said his son was left with his wife and his older daughter Maureen had already left for college. He stated that the situation alone with his mother was not the best for Applicant because his mother had a habit of drinking heavily. ROA 2214. Dwight Williams described his own life after the separation as "crashed and burned" because he went through a period of despair without anyplace to go and lived in his car for about a month. ROA 2214. Although he began a relationship with a woman, he stated that he developed depression. Id. He began treatment with

She said he told her that he thought that Maranda had an abortion .

He described to her a journal that he wrote to record his feelings about ending their relationship and described a suicide attempt and that he had overdosed on his mother's medication to try to get Maranda's attention. ROA 2185. Williams told her he became angry when she did not respond to the suicide attempt and branded his arm with an "M". ROA 2185. He told Dr. Crawford that at different times planned to kill himself, had experienced decreased sleep months before the break-up and had racing thoughts at times. ROA 2182-83. She stated that Williams kept long lists about supplies that he would buy and he would distract himself by listing them and their prices. She clarified that the distraction was not to be moving into the woods, but making the lists. ROA 2186.

visits at Greer Mental Health and then checked into Patrick Harris Mental Health facility for two weeks for situational depression. ROA 2215. He stated he was placed on antidepressants - Doxepin. However, he later sought treatment at Charters Hospital. ROA 2215-16. He stated that he needed to have friends around to help him through his depression. He stated that as far as he knew he was his son's best friend. ROA 2217. He said that he reached out to him, but not as well as he should have for fear of getting into trouble and locked up by "character assassination" because of what his son had been told which was not true. ROA 2217.

Williams stated that the last time he spoke to his son he was agitated about something and had scattered speech. ROA 2218, 1. 1-4. Although he did not go by Applicant's current house, Dwight stated he tried to keep in touch with him once every two weeks. However, Dwight stated he thought of his own situation more than about his son and should have seen him more. He stated that Applicant's depression was similar to his own, but he had friends to help him handle it. He felt Applicant was reserved and did not reach out to anyone. He stated that Applicant was a good kid, despite being "stone-faced." ROA 2219.

Ann Wilson, an elementary school teacher at Taylors Elementary School, testified that she taught Williams in 1990 when he was in the first grade. ROA 2220-21. She found him to be very weak academically and not ready for second grade. She made a request within three months of school for him to be in remedial classes. [Exhibit 25]. She based this request upon her conclusions that he had a very short attention span and his immaturity. ROA 2222. He was in her regular class, but also attended extra remedial reading and math classes in an EIA program. Concerning her school reports, she stated that he was easily distracted by noise, had to be refocused with teacher prompts to process, unable to maintain attention, had difficulty staying on

task, easily distracted, restless, impulsive, blames others for mistakes, moody and inconsistent in his behavior. ROA 2224-26. As a result of her evaluation, Williams was referred to a school psychologist, Janice Hawkins. ROA 2227-29. He was then referred to "special education" classes. Wilson stated that she spoke with the Applicant's mother and she found her to be negative and not wanting her son retained in the first grade. However, Wilson recommended that he repeat the first grade. ROA 2232.

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Rebecca Owens testified that she knew Williams because his mother worked for her in her beauty salon for six years. ROA 2234-35. She described Williams as a wonderful child who would come to the salon when he was between 9 and 13 years old. ROA 2236. She also described her visits to the home and found Williams was always sent to his room. She decided an occasion when Daisy (his mother) had moved in with Hans. She described Hans as an older man who was a German ambassador. On one occasion, Daisy had started drinking heavily and Williams would call her and state that his mother was "going crazy." Owens would go to the home and she saw Daisy hit Williams in the face and cuss at him when he was talking on the telephone with his sister Maureen before he was sent to his room. ROA 2237-38. On another occasion, his mother was again drinking heavily and started having "fits and disorientation." Owens found her at the top of the stairs naked screaming for an ambulance. ROA 2238.

Owens stated that Daisy's relationship with Hans was volatile and that she was abusive towards him. She recalled one time when Daisy came to work and appeared very beaten up. However, Daisy told her she had beaten herself up with a telephone and called the police and had Hans thrown into jail. ROA 2239-40. She stated that Applicant did not have any friends and was

not allowed outside to play. ROA 2240. She stated that she knew the victim, Maranda, because she was her waitress at a restaurant where she went. ROA 2240.

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X* Professor Margorie Hammock, a clinical social worker testified as a expert in sociology. ROA 2241-42. She stated that she did a biopsychologic-social assessment of Williams ROA 2243. She stated that she had interviewed Williams, his father, his mother, two teachers, his cousins - Alfred and Ernestine, and paternal grandmother Mary Snipes. ROA 2246. In addition, she stated that she reviewed educational records, medical records, and psychiatric history of family members, employment records and Army records of Mr. Williams. ROA 2247. She also consulted with Dr. Rob Richards, Dr. Seymour Halleck, and Dr. Eric Elbogan. ROA 2247. At trial she used visual aids, including a family tree (genogram). [Exhibit 28]. She initially described the family tree. ROA 2248-49. She described mother Daisy as born in Germany with an unknown father and raised by her grandparents. However, she was also abandoned by her mother and faced consternation in the family because of her mixed background. She had married at 16, but the marriage was unsuccessful and included a great deal of violence. She leaves her husband, but he assumes responsibility for raising their two children.

She described Williams father, Dwight, as being raised by his mother after his parents separated at an early age. There had been conflict between his mother and father, who was in the Army. Dwight saw little of his father. He was taught to think negative of his father who he had only seen a few times after the separation. ROA 2250. Like his father, he joined the Army and graduating from high school. He had a serious stuttering problem and was unsure of himself, but did well in the service and started a band which aided relations between the U.S. and Germany. ROA 2251.

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Professor Hammock stated that Dwight met Daisy when he was playing in an rhythm and blues band at a club. She became pregnant with Maureen after a short courtship and eventually marry. After Maureen was born they move to the U.S. Eleven years later, the Applicant is born. Prior to the move, the years in Germany were harmonious and Daisy was a good mother. After the U.S. move and Dwight's discharge, things changed due to an increase in drinking and the use of marijuana. They fought about their lives. Dwight sought a degree and work on his masters, but Daisy wanted him to spend the time with her and also make more money leading to the substance abuse and fighting. ROA 2253. In 1982 when Williams was born they were living in Greenville. They were violent toward each other prior to the birth and it was a couple of days before Dwight was allowed to see his child. ROA 2253.

Professor Hammock stated that Daisy ignored Williams's human development "red flag" needs as a special needs child. ROA 2255. She did not respond to the recommendations for help and resources from the teachers and other professionals. As a result, Hammock concluded that Williams withdrew and stopped trying to be a part of the environment where he could continue to grow. She stated he did not develop the skills he needed to feel comfortable in society and be able to interact. There was a great deal of violence in his home (shown by police reports) and challenges to his ability to interact with other children and learn academically. ROA 2256. This created a withdrawal from other children and his growth and development were not attended to by his mother. In reviewing the records, she saw numerous recommendation from school personnel that were not followed up with his identified needs. She also saw the numerous changes in his schools - three elementary and two middle schools contributed to the inability to get his needs. ROA 2258. He was perceived by his teachers with a need for special education

and problems in testings which showed a disparity between what he appeared to know and what he could demonstrate. He was found to isolate himself and unable to play by the fifth grade.

Professor Hammock found members of Williams family had the existence of mental health issues. ROA 2259-60. [Exhibit 29]. Particularly his father had a history of hospitalizations with suicidal and homicidal feelings with diagnosis of major depressive episodes - severe and need to be assessed for bipolar and alcohol dependence. ROA 2261.

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Professor Hammock concluded that Daisy also had contact with mental health facilities due to threats of suicides with 7 referrals to facilities. These involved overdoes of medicine, depression, anxiety, panic and alcohol abuse. This resulted in a series of medicine including Wellbutrin, Xanax, Trofranil and Valium. ROA 2262. She found that Williams uncle also had numerous admissions for Suicidal and homicidal threats towards family. ROA 2262. Maureen, his sister also had a history of suicidal feelings and diagnosed with depression and insomnia, but she had not been hospitalized. The grandmother Mary Snipes also had been known to facilities and had "bad nerves" and was considered unstable and threatening. ROA 2263.

Professor Hammock concluded that the Applicant had never sought treatment or help for his mental health issues. ROA 2264, 1. 21-24.

Retired Mauldin police officer James Tollison testified concerning the domestic violence calls in 1997 concerning Daisy and Hans Seifert. ROA 2264-65. He stated that he was called to the scene and Hans would come to the department and request help because he spoke a little German. Tollison described the various events of one accusing the other of attacking them. He stated that there was a time that that he was concerned about the safety of them when Hans made an allegation when they were separated - one living on one floor and the other on the other

floor and she was alleged to have stolen his equipment and clothes and changed the locks. Tollison stated that he found an a gun missing from its holster. He described her to be very erratic and violent and not a credible person. ROA 2268. She had also made allegations against the police department and Tollison claiming that Hans had paid off the police department. He estimated that the police were called out to the residence in 1997 at least 10 to 12 times. ROA 2269. On cross-examination, Tollison stated that he had no knowledge that there was any complaint that Ms. Huckaby (Daisy) was abusing or neglecting Charles Christopher Williams. ROA 2268.

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Dr. Eric Elbogen, an assistant professor at Duke University with a Ph.D. in clinical forensic psychology, testified as an expert in the field of violence risk assessment. ROA 2274. He testified that he examined Applicant for two hours. He concluded that there is an extremely low risk that Williams will kill a correctional officer while serving a life sentence in prison. ROA 2281. His only risk factor of the six factors he considers is based upon Williams low age at the time of the offense. ROA 2281. His risk is lowered because there were no instances the 18 months he has been in the detention center, no instances of engaging in any serious violence previously, and the fact that he would be getting treatment for his mental illness while in prison and monitoring of his symptoms. ROA 2282. He further opined that the risk would decrease as he aged. Id. Concerning whether he would be likely to commit a serious crime against another inmate, Dr. Elbogen opined it would be "extremely low" for similar reasons. ROA 2282-2283. He also opined that if he had seen Williams prior to the murder, saw and read his journal, knew about the suicide attempt, interviewed him and knew he had a shotgun in his closet, he would

have him committed (admitted) instantly to a locked mental health facility. ROA 2283-84. His assessment was introduced as Exhibit 31.

On cross-examination, Dr. Elbogan acknowledged that a failure by Williams to take his medicine to some extent would increase the probability of violence. ROA 2288. He admitted that he was not saying that there was no risk of violence because he does not have a crystal ball. ROA 2289.

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James Aiken, a former warden in the South Carolina correctional system and commissioner of corrections in Indiana and the Virgin Islands testified as an expert regarding the assessment of the defendant and prison security. ROA 2297. He testified about Williams prison adaptability as he asserts he would have done upon entry into the department of corrections. He opined that "Williams can be safely confined in a prison system for the remainder of his life without causing an undue risk of harm to staff, inmates , nor the community." ROA 2301. On cross-examination, Mr. Aiken confirmed that this could be true of any person, regardless of their degree of violence, but that he would not say that about every inmate he had evaluated. ROA 2301-02. He pointed out that corrections could tie them down in a bed, give them electric shocks and kill them if necessary to control them. ROA 2302.

Dr. Seymour Halleck, a forensic psychiatrist, testified as an expert in forensic psychiatry. ROA 2304. He stated that he interviewed Williams for four hours. . He claimed to have reviewed a significant amount of material including his journal, the reports of officers McNamara and Silvaggio, a report from the Greenville police department, mitigation notes from the defense, statement of the defendant, his prior incidents including the paint ball incident and his first assault on Miss Williams, his detention records, his school records, his hospital records

concerning his suicide attempt, read all the witness reports of observers of the attack on Miss Williams and police reports. ROA 2306-07.

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Dr. Halleck opined that Williams childhood was very chaotic and that there was a great deal of violence between his mother and father. ROA 2307. He noted that things got worse in his family history when his father left the home. Although he had problems with his father and the father would frequently beat his mother, he opined that the Applicant was fond of his father and felt loss when his father left the home. ROA 2307. He found the relationship with his mother was ambivalent, although she was close to him trying to run his life when he tried hard for her not to do so. Dr. Halleck found some strange matters in their relationship noting that she let Williams sleep with her until he was 14 years old, touching his genitals as well as his sister. ROA 2307. It took his sister to object strongly before it was stopped. Id.

He noted that Williams also did not like his parents involvement in dishonest ventures trying to have him participate, including his mother feigning injuries to sue various establishments. ROA 2308. Dr. Halleck also concluded that Williams had trouble with an uncle who asked Applicant to fondle his genitals and to put toothpicks in his uncle's urethra which he did several times. Id.

Dr. Halleck opined that Williams had a great deal of trouble in school at the beginning and placed in special classes. He stated that he was considered to have attention deficit hyperactivity disorder. ROA 2308. He stated that medication was recommended for him, but did not happen. However, he noted that in 1993, some new testing indicated that he could function in a regular classroom with special attention. However, he never did well in school and dropped out at age 18 when he was in the ninth grade. ROA 2309.

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According to Dr. Halleck, Williams was a highly disturbed and sick young man during the months leading up to the crime. ROA 2309. He opined that Williams had two diagnosis - major depressive episode and obsessive compulsive disorder. ROA 2309. He considered the major depressive disorder to be "the most serious depressive disorder diagnosis we have in the manual," meaning that he was practically dysfunctional. ROA 2309. He stated that this would place him with a need for medication and a high risk of killing himself. ROA 2310. He pointed out the symptoms of sad feelings, withdrawn from people, not interested in pleasurable things, and not able to enjoy pleasurable things - antionia/phonia." agitation, inability to think clearly and inability to concentrate, feelings of guilt or worthlessness and suicidal ideation. ROA 2311. Concerning the obsessive compulsive disorder, he found that Williams was obsessed with Maranda by thoughts and images. ROA 2311. He found him to be almost delusional concerning his thought that Maranda had aborted their child. He found the obsessions so bizarre, so unfounded, and so violent that they approached being psychotic delusions. ROA 2313.

Dr. Halleck opined that these diagnosis made each worse and contributed to a powerful sense of hopelessness which was a factor in the act. In 2003. ROA 2313. Based upon this sense of helplessness and hopelessness, he had to do something to escape from the suffering that he was experiencing. ROA 2313. He stated that according to records he had taken 40 or 50 pills including a potentially lethal antidepressant in an apparent suicide attempt which led to his hospitalization although he was not kept on June 13. However, he was back again on June 15. ROA 2315. Dr. Halleck opined that the releases was highly inappropriate. ROA 2315. He states he would have civilly committed Williams with his information. ROA 2316-17. Similarly, he would have committed Williams on September 2, the day before the murder, had he read the

journal, been aware of the suicide attempt and aware that a shotgun was in the closet because he was dangerous to himself and others. ROA 2317.

On cross-examination, Dr. Halleck opined that his opinion is that his capacity to conform his behavior was somewhat impaired - not that he could not conform his conduct to the requirement of the law. ROA 2318-19. He stated that his opinion on the death penalty was that he opposed it. ROA 2319.

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Maureen Bangcuyo, the Applicant's sister was the final mitigation witness. ROA 2328. She stated that when Williams was born that she was excited about having a baby in the house because it would be a positive thing. ROA 2329. She said he was always special. She stated at that time things needed changing because she had to endure seeing her mother beaten by her biological father - Dwight. ROA 2331. She stated that they were constantly fighting and that she was beaten. She described alcohol every night and drugs. Maureen said that she was not allowed to do anything or date. She recalled when she went to college that Williams would come and stay over the summer and she described him as mart. ROA 2332. Months before the divorce, she stated that her mother constantly called and described being beaten. ROA 2333. She describe4d calls from Williams about it being worse since she left for school. ROA 2333. She said her mother and Williams lived in a shelter after the divorce because Dwight stopped making payments on the home. She said that Dwight set fire to all their clothes and belongings. ROA 2334. She said she became concerned about that Applicant she tried to take care of him in Fall of 1997. ROA 2336-37. However, because of her own workload and his needs, Williams went back to his mother in Greenville. ROA 2336.

Maureen stated that she had been diagnosed with a mental illness and had thoughts about killing herself, but takes medications. She stated that she was married to a wonderful man. She stated that his family is supportive and love Williams. ROA 2337. She stated that when she was treating herself, she kept a journal when she was 13 about her own thoughts. She described how her faith had help. She said that she had gone to see Williams after his suicide attempt and asked him to go back to Columbia with her family. ROA 2339.

(M 84) Maureen also described a second time when he came to live with her in Atlanta. ROA 2340. She described her father breaking appointments to visit him. She said that she wanted him out of that environment and get away from Daisy and have a chance to fulfill his dreams. ROA 2341. She stated that she was unable the second time to dedicate the time to Williams. ROA 2341. She was looking for a job while she was 7 months pregnant and that Williams needed to return and complete his obligation for PTI from the assault-paintball incident. ROA 2342.

Maureen stated that there were a lot of good things about her brother. ROA 2342. She said that he was a dedicated brother who would come and see her whenever he was available. She described him being dedicated to his sister, cleaning her car, the house and starting to cook dinner. She stated that they talked on the telephone almost every day about Daisy and Dwight. ROA 2343. However, he does not know her second son because he was born October 29, 2003. ROA 2343.

She described how she had to tell her son about why the Applicant is not around. ROA 2344. She stated that Williams was a good son who did not drink or get into fights. ROA 2344. She recalled him as a child running through sprinklers, She stated that his present look of

appearing vacant was programmed from his father about how they could not show emotion and not allowed to express themselves. ROA 2345.

She stated that the happiest time in her life was when they went to Myrtle Beach with Williams before she started nursing school. ROA 2345. She described Williams being stung by jellyfish, going to the Pavilion and having a wonderful time. ROA 2346.

She stated that she met Mandy one time and felt that he loved her and her daughter, Callista. ROA 2346.

When asked how many people loved Williams, she stated that she did unconditionally. ROA 2347. She only sees the millions of good things he had done in his life and that he is warmhearted. She described him once on his own going to the grocery when he visited in Columbia to get ingredients to make brownies after he accidentally ate a tray of brownies of her roommate, thinking that they were his sisters. ROA 2347. She described him volunteering at her animal clinic job.

She also read a letter she had written on behalf of her family expressing sympathy to the victim's family and expression of love for her brother and a hope that violence in the home is stopped. ROA 2350-51.

Respondent submits that the evidence of thorough mitigation case reveals that the defense team was not deficient in its representation under Strickland v. Washington. However, he has failed to assert what evidence in mitigation was not presented that counsel was aware. Pursuant to SCRCPP, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise

statement as to what evidence the Applicant now claims existed at the time of trial that should have been used.

5.

In his fifth specification, he claims that counsel was ineffective for arguing that the trial judge had to declare a mistrial and sentence the petitioner to life imprisonment where the jury revealed its division since defense counsel should have argued the trial judge's distinction between a jury reporting its division on its own, introduced an arbitrary factor into the case as it related to the trial judge's discretion to give an Allen charge rather than declare a mistrial and sentence petitioner to life imprisonment. Respondent submit that this claim is wholly frivolous in light of the decision by the South Carolina Supreme Court in the direct appeal. The Applicant cannot show either deficient performance or prejudice under Strickland v. Washington.

In its opinion, the South Carolina Supreme Court rejected the underlying claim that a life sentence was required and concluded:

I. Jury's Disclosure of Vote Division

Appellant argues the trial judge erred in declining to sentence him to life imprisonment when the jury, by its written note, revealed it was divided nine to three in favor of death. Appellant contends that under these "unusual circumstances" giving the jury an Allen charge was impractical and coercive against the minority faction of the jury that opposed the death penalty. Ultimately, Appellant argues that once the jury disclosed its numerical division it was incumbent upon the trial judge to declare a mistrial. We disagree.

As a threshold matter, "[n]either the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding." *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999)). "The typical judicial mechanism for encouraging an indecisive jury is the Allen charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors." *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct.App.2004).

We find the trial judge's issuance of an Allen charge was not improper. Initially, we agree with Appellant that it is improper for a trial judge to inquire into the numerical division of a jury. See *State v. Middleton*, 218 S.C. 452, 457, 63 S.E.2d 163, 165 (1951); *Lowenfield*, 484 U.S. at 239-40, 108 S.Ct. 546 *Brasfield v. United States*, 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed. 345 (1926). However, these decisions are inapplicable in the instant case because the jury here voluntarily disclosed its numerical division and requested further instructions on how to proceed. The judge then promptly informed the attorneys of the jurors' numerical division and indicated that he could give an Allen charge. Unlike other cases, the trial judge did not inquire about the specifics of the jury's impasse. See *United States v. Brokemon*, 959 F.2d 206, 209 (11th Cir.1992) ("Unsolicited disclosure of the jury's division by a juror is not by itself grounds for a mistrial."). Therefore, we hold the trial judge committed no error in not declaring a mistrial and giving an Allen charge after the jury revealed it was divided nine to three in favor of death.

II. S.C.Code Ann. § 16-3-20

Appellant argues that S.C.Code Ann. § 16-3-20 required the trial court to sentence Appellant to a life sentence because the jury could not agree on a sentence after "reasonable deliberation." We disagree.

Section 16-3-20 provides in pertinent part:

If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A). S.C.Code Ann. § 16-3-20(C) (2003). A review of the pertinent statutory language in S.C.Code Ann. § 16-3-20(C) reveals the analysis of this issue is dependent upon an interpretation of "reasonable deliberation." Given the subjective nature of this term, this Court has been reluctant to define as a matter of law what constitutes "reasonable deliberation" sufficient to end the jury's deliberations and impose a life sentence. We note that "reasonable deliberation" is not simply an elapsed-time dependent determination," but rather is an issue "committed to the trial judge's discretion." *Tucker*, 346 S.C. at 489-90, 552 S.E.2d at 715.

Although we have not precisely defined "reasonable deliberation," our previous decisions make clear that here the trial judge did not abuse his discretion in permitting the jury to resume deliberations. In *Tucker*, this Court refused to determine as a matter of law that the jury had engaged in "reasonable deliberation" sufficient to require the trial judge to impose a life sentence. *Id.* at 490, 552 S.E.2d at 716. We found that the jury deliberated for a substantial period of time before informing the judge it was "hopelessly deadlocked," and that the jury took its responsibility seriously, diligently working to reach a verdict. *Id.* at 490, 552 S.E.2d at 715. Under those circumstances, had the "reasonable deliberation" issue been raised to him, the trial judge in his discretion "may or may not have found the jury had engaged in 'reasonable deliberation.'" *Id.* at 490, 552 S.E.2d at 716.

Here, the jury only deliberated about a lengthy capital murder trial for approximately five hours and thirty-five minutes before sending the note to the judge. However, unlike the jury in Tucker, this jury did not indicate it was deadlocked, but rather requested additional instructions to resolve their impasse. Cf. State v. Robinson, 360 S.C. 187, 193-94, 600 S.E.2d 100, 103 (Ct.App.2004) (concluding mistrial should have been granted after jury indicated it was again deadlocked after receiving Allen charge and that additional deliberation would not break deadlock). Thus, the jury's request was an indication that the jurors had not given up on reaching a verdict and that they anticipated further deliberations. Accordingly, we hold the trial judge properly permitted the jury to resume its deliberations and S.C.Code Ann. § 16-3-20 did not mandate a sentence of life imprisonment.

State v. Williams, supra.. Further, addressing an arbitrary factor assertion, the Court concluded:

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Pursuant to S.C.Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, **or any other arbitrary factor**. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate.

State v. Williams. (emphasis added).

Respondent submits that this ground must be dismissed.

6.

In his sixth allegation (F) , he contends that counsel was ineffective for failing to argue that certain portions of petitioner's journal should have been excluded under Rule 403, SCRE due to their tendency to confuse the jury, and because their probative value was substantially outweighed by their unduly prejudicial effect. This claim must be dismissed. First, the Applicant does not specify what portions of the journal he is specifically referring. Pursuant to SCRCF, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what evidence the Applicant now claims existed at the time of trial that should have been used.

Alternately, he cannot show deficient performance because counsel objected to the introduction of the journal at trial. At the outset of the trial on February 7, 2005, Judge Nicholson denied the motion to suppress the journal recovered as a result of the interview. ROA p. 6, ll. 10-11. As earlier noted, the complete interview transcript was introduced by the defense in the guilt phase. Defendant's Exhibit 4, ROA, p. 2869-2963 [Court Exhibit 2]. ROA p. 1771, l. 18-20. The allegation must be dismissed.

AMENDED ALLEGATIONS [G-M)

7. **IAC Trial and Appellate - Death Penalty not appropriate and/or used in an arbitrary manner.**

(M) In his seventh amended allegation [G], Williams asserts that both trial counsel and appellate counsel was ineffective in failing to preserve (trial and appellate) or brief in the direct appeal, that the death penalty was not appropriate and that the death penalty was used in an arbitrary manner. The Applicant fails to assert facts to support his claim. Respondent agree that this general issue was not specifically raised and or/briefed before the South Carolina Supreme Court. However, in completing its statutory review, the South Carolina Supreme Court held:

PROPORTIONALITY REVIEW

Pursuant to S.C.Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. See, e.g., State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)

State v. Williams, supra.

This claim must be dismissed. First, the Applicant does not specify an underlying legal or factual basis for his claim that the death penalty was not appropriate or applied in an arbitrary

manner, other than his bare conclusory statement. Pursuant to SCRCF, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what evidence or theory that the Applicant now claims existed at the time of trial that should have been used at trial and/or on appeal. Absent further specificity, the claim must be dismissed.

8. IAC Trial Counsel Failed to object to Solicitor's closing argument.

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In his eighth amended allegation (H), Applicant alleges that his trial counsel was deficient in failing to object to a number of assertion made by the Solicitor during his closing argument in the penalty phase of the trial. This broad contention fails to state with adequate specificity what the alleged evidence is that was either not developed or presented in mitigation. This failure to present a clear factual basis in the Application, rather than a broad legal conclusion, prevents the Respondent from adequately responding to the allegation. Pursuant to SCRCF, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous.

He specifies, but does not limit it to the following alleged deficiencies in counsel's failure to object to:

1. statements discussing life in prison,
2. statements about the death penalty being extremely limited,
3. injecting his own personal beliefs in the argument,
4. repeatedly referencing the community and the result of the verdict in the community,

5. allowing improper argument.

Addendum (H).

To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, at 688 (1984). 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. 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.

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Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S., at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); see also Gentry, *supra*, at 7. Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, *supra*, at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

An attorney can avoid activities that appear "distractive from more important duties." Bobby v. Van Hook, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 8). Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See Knowles v. Mirzayance, 556 U. S. ___, ___ (2009) (slip op., at 14-15); Rompilla v. Beard, 545 U. S. 374, 383 (2005); Wiggins v. Smith, 539 U. S. 510, 525 (2003); Strickland, 466 U. S., at 699.

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Although courts may not indulge "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U. S., at 688. Harrington v. Richter, __ U.S. __ (Jan. 19, 2011).

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687. See Harrington v. Richter, __ U.S. __ (Jan. 19, 2011).

Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U. S. __, __ (2010) (slip op., at 14). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the

integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U. S., at 689–690. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. 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 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

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In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 13); Strickland, 466 U. S., at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. *Id.*, at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” *Id.*, at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693. Harrington, *supra*.

Concerning ineffective of counsel claims on the failure to object to a prosecutor’s closing argument, court’s generally have found these failures to be within the “wide range” of reasonable professional assistance for which a strong presumption of sound judgment is due citing Strickland, 466 U.S. 668, 689. This presumption that counsel’s conduct is within this wide range

of reasonable professional assistance is cited in U.S. v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993) with the observation that many lawyers refrain from objecting except for the most egregious statements during opening and closing. This language is even more expansive in U.S. v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991), after observing that counsel's passivity was troubling. Nevertheless, the opinion observed that from a strategic perspective, many trial lawyers refrain from objecting to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality. See also, Clabourne v. Lewis, 64 F.3d 1373, 1383 (9th Cir. 1995) (no error - counsel may have had many reasons for not objecting to the form of question or interrupting during opening or closing).

That an objection would cause undue focus by the jury was another tactical reason recognized in Julius v. Johnson, 840 F.2d 1533, 1538-1539 (11th Cir. 1988). See also the reasons for not objecting recited in Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994). A strategic choice was recognized in Starr v. Lockhart, 23 F.3d 1280, 1293-1294. Failure to object was found not to make the trial fundamentally unfair in Seehan v. Iowa, 72 F.3d 607 (8th Cir. 1995) (en banc). Desiring not to antagonize jury and to appear as "good guys" justified failure to object to prosecution's religiously loaded statements at penalty in Bennett v. Angelone, 92 F.3d 1336, 1349-1350 (4th Cir. 1996). Where the prosecutor's argument had an arguable basis, there was no ineffectiveness for failure to object in Dubria v. Smith, 224 F.3d 995, 1004 (9th Cir. 2000) (en banc). The state court, however, unreasonably applied *Strickland* in finding no ineffectiveness for failure to object to argument on matters for which there was no evidence in Washington v. Hofbauer, 228 F.3d 689 (6th Cir. 2000).

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). To be entitled to relief, Petitioner must show the complained of comments "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). See also Von Dohlen v. State, 360 S.C. 598, 614, 602 S.E.2d 738, 746 (2004).

Plath, Bowman, Burkhardt, and Bryant

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The reason evidence about "good" prison conditions is problematic stems from four South Carolina cases – one that was in existence prior to this case and three that were handed down after Applicant's 2005 trial.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the court *affirmed* a death sentence despite issues related to the State's cross-examination and evidence responsive to a defense presentation "[demonstrating] the permanence and deprivation entailed in life imprisonment". Plath, 281 S.C. at 12, 313 S.E.2d at 626. In doing so, the court rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded that "determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury." Plath, 281 S.C. at 14-15,

313 S.E.2d at 627. However, the Plath court concluded the State's challenged questioning was only proper response to the defense presentation which brought up the subject matter in the first place. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28.

Nearly two decades later, *before* Applicant's trial, the United States Supreme Court issued Kelly v. South Carolina, 534 U.S. 246 (2002), which so broadly defined "future dangerousness" that it effectively ended years of litigation in South Carolina over whether a capital inmate could have the specific charge that a life sentence would be without parole. Indeed, shortly after Kelly, the General Assembly passed a law requiring life without parole to be charged in all death penalty cases. 2002 Act. No. 278 § 1. Regardless, Kelly as a practical matter ensured Applicant at trial would get a charge that his life sentence would be without parole. It was in this new legal setting that Applicant went to trial a mere few months later.

Subsequently, the state supreme court decided Applicant's direct appeal in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (November 28, 2005). There, the appellant contended that the solicitor's questioning was improper about movies, television, and books in prison. The Court found the issue was not preserved, but added a cautionary instruction to both sides:

We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005).

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Subsequent to Bowman, the South Carolina Supreme Court addressed a case where the *solicitor* preemptively called a witness who extensively testified as to the conditions of confinement for a inmate serving life without parole. State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Justice Moore was joined by Justice Waller and wrote the opinion of the Court.⁶ Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Burkhart, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime". Id. Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003).

⁶In fact, even after the 2007 Burkhart decision, death penalty opponents continue to assert that security conditions should be offered by the defense to address jury concerns of violence in prison. See Blume, Johnson and Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L.Rev. 1035 (2008) ("a juror may be worried that the defendant will escape. Here, the testimony of prison officials, or more often, former prison officials concerning security conditions for inmates sentenced to life imprisonment and the success of the applicable security measures in the past may be necessary" citing ABA Guidelines 10.11, commentary & nn. 291, 309-11). Likewise, death penalty opponents also continue to challenge these evidentiary prohibitions from other jurisdictions. See Tanner, "Continuing Threat to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings," 17 Cap. Def. J. 381, 408 (2008) (challenging Virginia's prohibition as violation of the right "to present a complete defense," noting "[q]uestions by jurors also indicate that sentencers want to know more about the specific prison conditions that might affect the defendant's potential for violence in prison.").

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1)". Burkhart, 640 S.E.2d at 454.

In dissent, the Chief Justice, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. The Chief concluded that the issue was fully joined by both sides and used by the defendant to his advantage. 640 S.E.2d at 454-57.

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Subsequent to Burkhart, the South Carolina Supreme Court decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). There, although the solicitor (also Solicitor Bailey in that case) called *no* witness on conditions of confinement, the *defense* called an expert that testified in great detail as to the "dismal conditions of prison life in general", including testimony about the mean guards, the bad food, the uncomfortable furniture, and the incessant noise. Like Bowman, the Court reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject.⁷

A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v.

⁷But see People v. Salcido, 186 P.3d 437, 48 (Cal. 2008)(prosecutor's reference to "leisure time" activities, "such as reading, watching television, writing letters, or communicating with friends or relatives and suggest[ing] those activities also would be available to defendant even in a maximum security prison" was argument in response to defense witness' testimony "concerning the harsh realities of life in prison without the possibility of parole."); State v. Jaynes, 549 S.E.2d 179, 198-199 (N.C. 2001)(prosecutor's "comments reasonably 'served to emphasize the [s]tate's position that the defendant deserved the penalty of death rather than a comfortable life in prison.'").

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Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). Moreover, the State cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987) ("When an accused asserts a constitutional right, it is impermissible for the state to comment upon or argue in favor of guilt or punishment based upon his assertion of that right.") (citation omitted).

A. Life in Prison Comments

In his amended application, the Applicant does not make a specific reference to the portions of the argument, he complains about.⁸ During the Solicitor's penalty phase closing argument, no objections were made by the defense. A review of the argument reveals the following references to prison life:

NOW, MR. AIKEN TESTIFIED TO YOU THAT LIFE IN PRISON WAS SOMETHING THAT THIS MAN COULD ADAPT TO; THAT HE WOULD BE A LOW RISK, ALONG WITH TESTIMONY OF THE PSYCHIATRIST, IF CONFINED IN PRISON. HE COULD ADAPT TO PRISON. BUT THE DEPARTMENT OF CORRECTIONS CAN MAKE ANYBODY, EVEN MR. AIKEN SAID IF THEY DON'T ADAPT, WE'LL KILL THEM. THE POINT WE SHOULD CONSIDER THERE IS NOT WHETHER SOLITARY CONFINEMENT AND THREE GUARDS TO A CELL, LIMITATIONS, AND CAMERAS AND TYING THEM TO BEDS AND THAT SORT OF THING IS WHAT WE'RE TALKING ABOUT. THAT MISSES THE POINT. IT'S NOT WHAT'S THE EASIEST THING WE COULD DO, IT IS WHAT IS THE APPROPRIATE THING TO DO UNDER THE CIRCUMSTANCES OF THIS CASE?

⁸The record reflects at one portion of the Solicitor's argument, defense counsel Nettles requested a bench conference after the Solicitor argued: "the greater extent of culpability, obviously, the more severe the punishment, remember the worst of the worst. That's where we are, the worst of the worst. Life imprisonment is the least of the two punishments the law allows in this case. Does this case deserve the least?" ROA p. 3-12. No objection was made on the record. Id.

WE WILL AGREE THAT THE DEFENDANT COULD ADAPT TO A PRISON, BECAUSE THEY WILL MAKE HIM ADAPT. BUT THAT'S NOT THE ISSUE. BECAUSE, OTHERWISE, WE WOULD NEVER HAVE THE DEATH PENALTY. THERE WOULD BE NO REASON FOR IT. AND THE SOLICITOR (?)⁹ SAYS THERE IS A REASON FOR IT AND THAT IT'S SOMETHING YOU SHOULD CONSIDER IN SHAPING THE PUNISHMENT TO FIT THE EXTENT OF THE CRIME.

ROA 2373, l. 19- p. 2374, l. 13.

Solicitor Ariail also later stated in his argument without objection:

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SO, WHAT IS THE APPROPRIATE SENTENCE TO FIT THIS CRIME AND HOLD HIM RESPONSIBLE? LIFE IN PRISON IS NOT APPROPRIATE. YOU CAN'T PUT HIM IN PRISON FOR LIFE AND EXPECT HIM TO SUFFER. YOU CAN'T DO IT. BECAUSE HE IS NOT GOING TO THINK ABOUT IT EVERY DAY, BECAUSE THERE'S NOT GOING TO BE ANYBODY THERE TO REMIND HIM OF THE DAMAGE THAT'S DONE TO MANDY'S FAMILY OR TO HIS FAMILY. NO ONE IS GOING TO DO THAT. NOBODY IS GOING TO CONSTANTLY REMIND HIM. SO, HE'S NOT GOING TO THINK ABOUT IT.

SURE YOU AND I MAY THINK GOING TO PRISON FOR LIFE IS A SERIOUS SENTENCE, BUT WHAT ABOUT CHRIS WILLIAMS? BEING IN PRISON IS LIKE A SMALL CITY, ALLOW ALL THINGS OF LIFE. PLACES, RESTAURANT, PLACES TO EXERCISE, RECREATION WHEN HE WANTS. DOCTORS, HOSPITAL TAKE CARE OF HIM, CLOTHING PROVIDED, TV. CONTACT WITH FAMILY AND LOVED ONES. HE'LL HAVE FREEDOM OF MOVEMENT, A SOCIAL STRUCTURE. HE'LL PLAY CARDS AND GAMES. GO TO WORK IF HE WANTS, GO TO SCHOOL IF HE WANTS. WATCH BALL GAMES ON TV.

SURE, HE DOESN'T HAVE A CAR AND HIS TRAVEL IS LIMITED, BUT IT'S NOT REALLY MUCH MORE THAN A SERIOUS CHANGE OF ADDRESS. HE WILL HAVE HIS FAMILY TO VISIT HIM. BUT MANDY'S FAMILY WON'T, AND HER DAUGHTER WON'T. THE DEATH PENALTY IS THE APPROPRIATE PUNISHMENT. I WANT YOU TO REMEMBER IN CONSIDERING THAT, THAT A HUMAN BEING, A LIVE, LIVING, BREATHING HUMAN BEING WHO HAD NEVER HARMED A SOUL, WITH A BUBBLY PERSONALITY, A GOOD JOB, WORK ETHIC, A GOOD

⁹It is likely this is a clerical error. Since the solicitor was speaking, this was either misheard or misstated as the "legislature." rather than "solicitor."

AND SWEET PERSON WHO LOVED HER DAUGHTER WAS KILLED.
MURDERED. HE INVADED HER WORK PLACE AND HE TOOK HER LIFE.
HE WENT OVER THERE WITH MALICE, CARRIED ENOUGH
AMMUNITION TO GET THE JOB DONE. AND TO MAKE SURE IF HE
HAD TO, HE COULD KILL OTHERS THAT GOT IN HIS WAY.

ROA 2377, l. 17 - p. 2378, l. 13.¹⁰

Assuming *arguendo*, that either one of these are the challenged portions related to life in prison, he has failed to assert the particular error with the comments. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute - the reasoning in counsel Nettles, Mauldin or MacDougall's failure to object.. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

B. Death Penalty Being Extremely Limited.

¹⁰Although the defense did not object, at the outset of his closing argument, defense counsel Bill Nettles took issue with the Solicitor's comments :

"Did he say restaurants? Did he say Chris Williams is going to a place in prison with restaurants there? Because I didn't hear anything about restaurants. What I did heard about where Chris Williams is going at the end of this trial is a place where its men and he's in a cell by himself. What I heard Jim Aiken talk about was a place where if you don't do what they tell you to do , they'll kill you.

He said restaurants. Restaurants in prison? Do any of you all really believe your tax dollars are paying for restaurants in prison? They're not. Prison is a very serious place. And what you are being asked is to decide between whether Chris Williams dies on God's time or your time ...

ROA p. 2380, l. 14- p. 2381, l. 3

In his second specification, he makes the bare assertion that counsel should have objected to statements that the death penalty was extremely limited.¹¹ The Applicant fails to specify the particular portions or the specific error in the comments. Respondent has reviewed the record and located two portions concerning limited availability of the death penalty:

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LET ME TALK TO YOU A LITTLE BIT ABOUT THAT. I WANT TO PUT IT IN CONTEXT. THE STATE, REPRESENTED BY THE SOLICITOR, CAN IN CERTAIN CIRCUMSTANCES UNDER OUR LAW ASK FOR THE IMPOSITION OF THE DEATH PENALTY. HOWEVER, IT IS ONLY IN LIMITED CIRCUMSTANCES, SPECIFICALLY MURDER CASES, AND ONLY THOSE MURDER CASES IN WHICH IS SPECIFICALLY DEFINED BY OUR STATUTORY LAW BY OUR LEGISLATURE. AND ONLY IN THOSE CASES CAN THE STATE SEEK TO HAVE THE DEATH PENALTY IMPOSED.

SO, THIS IS A LEGAL PROCESS, A LEGAL PENALTY ENACTED BY OUR LEGISLATORS; AND IT IS A FUNCTION OF GOVERNMENT CARRIED OUT BY YOU, THE CITIZENS. AND THAT'S THE WAY THE PROCESS HAS BEEN INITIATED AND CREATED BY OUR STATE LEGISLATURE AND APPROVED BY OUR COURTS. THIS IS A FUNCTION OF YOU AS CITIZENS CARRYING OUT PART OF OUR GOVERNMENT PROCESS. YOU ARE SHAPING A LAWFUL PUNISHMENT TO AN UNLAWFUL ACT. SO, THE RESPONSIBILITY IS GIVEN TO YOU TO DECIDE WHAT THE APPROPRIATE PUNISHMENT IS.

¹¹Deputy Solicitor Strom, in the penalty phase opening, without objection, also discussed the limited nature of when the death penalty could be sought:

Part of that, when the legislature passed the laws, said that the state could not seek the death penalty in every case. We talked a little bit about this. It has to be a murder plus an aggravating circumstance. And I actually went back and looked at the statute. There are 11 aggravating circumstances outlined in the statute. So, if it's a murder and we don't have one of those aggravating circumstances, we can't even seek the death penalty.

So it's a very limited situation. There are **only limited crimes** for which we can even seek the death penalty. And out of those 11 we are going to rely on two. We only have to prove one. We're going to offer to you two different aggravating circumstances for your consideration, your determination.

ROA 2112-2113.

ROA 2366, l. 12- p. 2367, l. 4. A second portion is as follows:

THE LAW LIMITS THE STATE'S RIGHT TO SEEK THE DEATH PENALTY TO A VERY FEW MURDERS. WE SEEK THE DEATH PENALTY IN ONLY A FEW CASES. BUT THE CIRCUMSTANCES WHERE IT'S AVAILABLE ARE FOR MEAN AND EVIL PEOPLE. THE WORST OF THE WORST. CHRISTOPHER WILLIAMS AND THIS MURDER ARE ONE OF THOSE CASES. THE WORST OF THE WORST.

ROA. P. 2371, l. 1-6. ¹²

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As stated, the Applicant has failed to specify the error in the comments - or whether these are the comments he seeks to address in his addendum. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record at this time. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

C. Injecting The Solicitor's Beliefs.

In this specification, he contends that defense counsel was deficient in failing to object to the Solicitor injecting "his personal beliefs" in the argument. This broad contention fails to state

¹²There is another similar portion of his argument :

THEY HAVE SAID EARLIER THE SOLICITOR IS NOT SATISFIED WITH A LIFE SENTENCE. AND I AGREE, I AM NOT. THEY TOLD YOU HE'S GOING TO WANT THE DEATH PENALTY, AND I DO. WHY IS THE DEATH PENALTY THE APPROPRIATE SENTENCE IN THIS CASE? AND THAT IS A FAIR QUESTION FOR YOU TO ASK, ASK OF US, THE STATE OF SOUTH CAROLINA. AND I SUBMIT TO YOU THAT THIS IS THE REASON, IS THAT THERE ARE MEAN AND EVIL PEOPLE WHO LIVE IN THIS WORLD WHO DO NOT DESERVE TO CONTINUE TO LIVE WITH THE REST OF US REGARDLESS OF HOW CONFINED THEY MAY BE.

ROA 2370, l. 16-25.

with adequate specificity what the alleged evidence is that was either not developed or presented in mitigation. This failure to present a clear factual basis in the Amended Application, rather than a broad legal conclusion, prevents the Respondent from adequately responding to the allegation. Pursuant to SCRCP, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what particular comment the Applicant now claims existed at the time of trial that should have been objected.

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D. References to the Community and the Results of the Verdict in the Community.

In his final specification in this allegation he contends that counsel should have objected to comments about "the community." This failure to present a clear factual basis in the Application, rather than a broad legal conclusion, prevents the Respondent from adequately responding to the allegation. Pursuant to SCRCP, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous.

A review of the closing argument¹³ reveals the following comments concerning the community that were not objected to by defense counsel:

**THIS IS ABOUT ACCOUNTABILITY, CULPABILITY .. BECAUSE
WE DON'T JUST BLINK OUR EYES AND FORGET ABOUT THIS**

¹³Comments about "community" were also made in Deputy Solicitor Strom's opening statement in the penalty phase. ROA 2110-2117. See particularly ROA 2112, l. 1-19. ("Because as a member of a jury collectively you become a body that speaks for the community. That's what your job is, to speak for the community. You become one. Individuals who become one and you are the voice of this community").

HORRIBLE CRIME. JUST DOESN'T GO AWAY. THIS IS LONG TERM, NOT JUST ON THIS FAMILY. YOU HEARD FROM – **BUT THE ENTIRE COMMUNITY IS A VICTIM OF THIS CRIME** BECAUSE HE INTENTIONALLY, WILLFULLY, AND MALICIOUSLY; AFTER FULL PLANNING, DESTROYED TWO FAMILIES, THE FRIENDS OF BOTH.

THE GREATER COMMUNITY BECAME A VICTIM AND THIS WAS A BRUTAL MURDER IN A PUBLIC PLACE, IN A PUBLIC PLACE WITH NO CONCERN SHOWED FOR THE SAFETY OF OTHERS. CRIME SHOULD MEET THE PUNISHMENT, SHOULD MEET THE CULPABILITY AND EXTENT OF THE CRIME. THIS IS A CROWDED SHOPPING CENTER, INNOCENT BYSTANDERS ALL OVER.

ROA p. 2373, l. 6-18.

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AND IN CLOSING, LET ME TELL YOU THIS IN CONSIDERING THE PROPER PUNISHMENT. YOU HAVE BEEN ENTRUSTED UNDER OUR SYSTEM AND BY US AS JURORS TO CONSIDER AND **MAKE A DECISION AS REPRESENTATIVES OF THE COMMUNITY TO SPEAK FOR THIS COMMUNITY AS TO WHAT IS THE APPROPRIATE PUNISHMENT.** AND THE APPROPRIATE SENTENCE UNDER THE FACTS OF THIS CASE YOU KNOW THIS CASE AS WELL AS ANYBODY, YOU'VE HEARD EVERYTHING THAT'S BEEN PRESENTED IN THIS COURTROOM -- AND

IT IS YOUR DECISION AND AS YOU SPEAK FOR THIS COMMUNITY, MAKE THAT DECISION, WHATEVER THAT DECISION IS, IT WILL RING LIKE A BELL OUTSIDE OF THIS COURTHOUSE. IT WILL RING LIKE A BELL TO BE HEARD WHILE ALL OF THOSE WHO ARE REASONING AND ALL OF THOSE WHO WANT TO LISTEN.

AND I URGE YOU, ON BEHALF OF THE STATE OF SOUTH CAROLINA THAT THE APPROPRIATE PUNISHMENT UNDER THIS CRIME IS THE DEATH PENALTY. **LET THAT BELL RING SO THIS COMMUNITY WILL KNOW THAT WE WILL NOT TOLERATE CONDUCT OF THIS TYPE WITHOUT THE MAXIMUM PUNISHMENT. THOSE WHO COMMIT THIS TYPE OF CRIME MUST PAY THE ULTIMATE PRICE.**

ROA 2379, l. 18- p. 2380, l. 12.

The South Carolina Supreme Court has held that it was not error for solicitor to argue that the verdict would be a message to the county and state. *State v. Robert South (I)*, 331 S.E.2d 775 (1985). Further, the Court held in *State v. James Cain*, 377 S.E.2d 556 (1988), that it was not

error for solicitor to argue death penalty would send a message that you do not commit murder without paying the price. The Applicant has failed to assert what the alleged error was in this matter.

Nevertheless, for reasons previously stated, this specification should be dismissed,

9. IAC - Recommendation Instruction.

19 In his ninth allegation, Williams contends that trial and appellate counsel erred in either not objecting or briefing a claim that the trial judge erred in his instructions concerning the sentence as a recommendation. At trial, before the sentencing phase began, counsel Mauldin brought up the defense's objection to the use of the term "recommendation." ROA 2085, l. 16-19. Judge Nicholson stated that it was in the form provided by state law and indicated that he would go into it and explain it to the jury that it is not a recommendation, but that the court is obligated to follow. ROA 2085, l. 20-24. While stating that the law should be amended and the word recommendation taken out, it was denied unless that state wanted to consent. Counsel Ariail stated that he did not consent. ROA 2085, l. 2.

In Judge Nicholson's instructions, although the statutory term recommendation was used, the trial court unequivocally stated:

And even though the form says "recommendation," I charge that the Court is obligated to follow that recommendation.

ROA 2399, l. 16-17. No objection was made at trial to any instruction concerning recommendation. ROA 2408, l. 17-20.

Juries are presumed to follow the oath and instruction. "The idea should be conveyed to the jury that its sentencing recommendation will be followed." State v. Bellamy, 359 S.E.2d 63

(1987); State v. Middleton (II), 368 S.E.2d 457 (1988); State v. Plemmons (II), 370 S.E.2d 871 (1988). "Whatever you recommend will be the sentence that will be given to a defendant" is sufficient to satisfy Bellamy. State v. Sims, 405 S.E.2d 377 (1991). Reversible error for trial judge to refuse requested charge that the jury's "recommendation" would be followed. State v. Davis, 411 S.E.2d 220 (1991). Similarly, Respondent submits that the clear language from the instruction in Williams' case "And even though the form says "recommendation," I charge that the Court is obligated to follow that recommendation" was sufficient to convey the proper message to the jury.

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Respondent submits that 6th Amendment prejudice cannot be shown where counsel - in light of the clarifying instruction - complied with state law and the Eighth Amendment in making a timely objection to the use of the term "recommendation." Further, in light of the clarifying instruction and the decisions of the Court in Bellamy and Sims, appellate counsel cannot be deemed deficient in failing to assert the recommendation ground on appeal. His assertions otherwise must be denied.

10. IAC - failing to conduct adequate voir dire, and exclude certain unnamed jurors and request a change of venue.

In his tenth amended allegation (I), Williams makes a broad assertion that trial counsel 1) failed to conduct an adequate voir dire, 2) failed to excluded certain unnamed jurors, and 3) failed to preserve a request for a change of venue. The record reveals that the voir dire of the jurors occurred in the ROA from pages 81- 1436. The defense conducted voir dire on 28 venirepersons of the 81 venirepersons. Id. During the trial, Judge Nicholson advised the counsel to limit voir dire to issues related to §14-7-1020 and State v. Smart. and State v. South. The trial

court stated that counsel had been provided with juror questionnaires consisting of 75 specific questions. ROA 171. He pointed out that from question 64 through the next 9 questions, it dealt specifically with the death penalty and how the juror would classify themselves. Judge Nicholson declared that he intended to limit hypotheticals from the earlier day. He stated since it appeared to him from the prior questioning that the particular juror questionnaire had not been looked at, he would make a blank questionnaire a part of the record. ROA 172. [State [Court] Exhibit 8]. ROA 173.

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Counsel Nettles asserted that under Morgan v. Illinois and State v Powers, both post-Smart cases that he should be allowed to inquire further. ROA 173-175. The trial judge stated that the Applicant could go into his mental health as a general mitigating circumstance, but not specific facts, such as IQ or whether he is bi-polar, but that they would be entitled to broach a subject as to whether or not it was a condition that they would need to consider as a mitigating circumstance. ROA 176. Subsequent to the juror qualifications, defense counsel Mauldin renewed the motions made during voir dire which the court similarly summarily denied. ROA 1474, ll. 8- p. 1475, l.13.

The Applicant makes a general conclusion that counsel failed to conduct an adequate voir dire. "The scope of voir dire and the manner in which it is conducted are generally left to the sound discretion of the trial court." State v. Stanko, 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008). Furthermore, "[i]t is well established that a trial court has broad discretion in conducting the voir dire of the jury and particularly in phrasing the questions to be asked." United States v. Jones, 608 F.2d 1004, 1009 (4th Cir.1979). "To constitute reversible error, a limitation on questioning

must render the trial fundamentally unfair." Stanko, 376 S.C. at 576, 658 S.E.2d at 97; State v. Bixby, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010).¹⁴

In Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the Supreme Court held that a capital defendant was constitutionally entitled to challenge for cause any juror who would automatically vote for death. The Court held:

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We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so.

Function of *voir dire* is to determine specific and real bias, not to develop personality profiles.

Defendant's right to *voir dire* jurors is not a license to forage at will over the private lives of jurors. Trial judge has authority and duty to limit *voir dire* to 14-7-1020. *State v. Ronald Smart (II)*, 299 S.E.2d 686 (1982). (Opinion pointed out that defense asked jurors about their families, careers, church membership, hobbies, sports, favorite movies and television programs, their attitudes towards psychiatric medicine, reactions to defendant's appearance and knowledge of the law, including presumption of innocence prior to instruction by the court). "In the final analysis, what is constitutionally mandated is the selection of a fair and impartial jury. No particular

¹⁴The South Carolina Supreme Court has held hypothetical questions are improper. *State v. Robert South (I)*, 337 S.E.2d 775 (1985). Trial judge has the authority "as well as the duty" to disallow hypothetical questions on *voir dire*. *State v. Raymond Patterson (I)*, 351 S.E.2d 853 (1986). Trial judge did not abuse discretion in refusing to allow defense to *voir dire* jurors on specific mitigating circumstance (no significant prior criminal history of violence) where trial judge did allow defense to ask whether jurors would consider mitigating circumstances as presented by defense and instructed by the court. *State v. David Clayton Hill*, 501 S.E.2d 122 (1998), Same holding: *State v. Ted Benjamin Powers*, 501 S.E.2d 116 (1998).

formula of questions is mandated to achieve this goal. In our justice system, the trial judge has the discretion and the duty to monitor the *voir dire* so as to ensure that the jury selected measures up to the constitutional standard. The judge's ruling in this case, disallowing defense counsel to question jurors about their propensity to go with the majority, did not render the trial 'fundamentally unfair.'" State v. Hill (David Mark), 604 S.E.2d 696 (2004).

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Claims of incompetence may arise out of voir dire B to question or not to question. The broad claim of failure to adequately question jurors will fail where adequate questions are not identified and allegedly improperly seated jurors are not identified. Cummings v. Simmons, 506 F.3d 1211, 1228 (10th Cir. 2007). Particular deference is accorded to the judgment of counsel on voir dire recited Gardner v. Ozmint, 511 F.3d 420, 426 (4th Cir. 2007).

This broad contention concerning adequate voir dire fails to state with adequate specificity what the alleged questions should or could have been asked by counsel. This failure to present a clear factual basis in the Application, rather than a broad legal conclusion, prevents the Respondent from adequately responding to the allegation, particularly in light of the trial judge's limitations. Pursuant to SCRCR, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what questions on voir dire should have been asked.

Also lacking sufficient specificity is his claim that counsel should have excluded certain jurors.¹⁵ The Applicant does not name any of the seated jurors or alternates that he claims counsel

¹⁵Where the defendant struck a juror who he claimed the trial judge did not let him fully question in *voir dire*, the Supreme Court held he was not prejudiced since "in reviewing a challenge to juror qualification, we focus on those jurors who are seated to determine whether a defendant

should have excluded. Absent greater specificity of which jurors this claim is directed, it must be dismissed under Rule 12(e).

In his final claim, he asserts that counsel failed to preserve a request for a change of venue. The record reveals that the trial court, prior to jury selection denied the defense motions made during voir dire. ROA 1474-1475. After the selection of the jury, counsel Mauldin stated that he did not have any objection to the make-up of the selected panel after it was selected in the blind. ROA 1483-84. A motion for change of venue is addressed to the discretion of the court. Defendant bears burden to show prejudicial effect of pre-trial publicity. *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979), *State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980), (defendant has to show actual juror prejudice), *State v. Plath (I)*, 277 S.C. 126, 234 S.E.2d 221 (1981), *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), *State v. Yates (I)*, 280 S.C. 29, 310 S.E.2d 805 (1982), *State v. Robert South*, 285 S.C. 529, 331 S.E.2d 775 (1985), *State v. Owens (II)* 293 S.C. 161, 359 S.E.2d 275 (1987), *State v. Raymond Patterson (V)*, 324 S.C. 5, 482 S.E.2d 760 (1997).

Where the trial judge bases denial of change of venue motion on adequate voir dire his decision will not be disturbed absent extraordinary circumstances. *State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581 (1982), *State v. Koon (I)*, 278 S.C. 528, 298 S.E.2d 769 (1992), *State v. Ricky Caldwell*, 338 S.E.2d 816 (1989), *State v. Patterson (V)*, 324 S.C. 5, 482 S.E.2d 760 (1997).

"Mere exposure to pretrial publicity does not automatically disqualify a prospective juror. When jurors have been exposed to such publicity, a denial of a change of venue is not error

received a fair trial." *State v. Longworth*, 313 S.C. 360, 438 S.E.2d 219 (1993).

where jurors are found to have the ability to lay aside any impressions or opinions and render a verdict based on the evidence presented at trial. It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity." *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1989). Change of venue was not required when 11 seated jurors and 2 alternates were aware of media coverage of the crime. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1989).

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"A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). Moreover, exposure to pretrial publicity does not automatically disqualify a prospective juror. "When jurors have been exposed to such publicity, a denial of a change of venue is not error where jurors are found to have the ability to lay aside any impressions or opinions and render a verdict based on the evidence presented at trial." Put another way, "Where the trial judge bases his ruling on adequate voir dire examination of the jurors, his conclusion that the objectivity of the jury panel has not been polluted with outside influence will not be disturbed absent extraordinary circumstances." "The relevant question is not whether the community remembered the case, but whether the jurors..... had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S.Ct. 2885, 2891, 856 (1984). "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961).¹⁶

¹⁶ The Supreme Court has held that the trial judge did not err in refusing defendant's motion for change of venue when 39 out of a jury pool of 68 had heard something about the case, and 7 of the 12 seated jurors had knowledge of the case. All of the seated jurors with prior knowledge said

The Applicant has failed to show a basis for a change of venue and/or 6th Amendment prejudice. His change of venue claim must be dismissed where he failed in his burden under Strickland.

11. IAC Trial and Appeal - Right to Plead Guilty and Have Jury Sentencing.

In his next allegation (j), Williams makes a allegation that trial counsel was ineffective in failing to preserve and/or appellate counsel was ineffective in failing to brief an issue that the defendant should have the right to plead guilty and still receive a jury trial for sentencing.

Respondents submits that he has failed to show either deficient performance or prejudice under Strickland v. Washington, supra. The allegation must be denied and dismissed.

On a pre-trial motion hearing on November 1, 2004, counsel Mauldin moved to quash the death penalty claiming that should he plead guilty to murder he would be deprived of the opportunity for jury sentencing and further that if he had jury sentencing and could use his guilty plea as evidence of remorse. ROA 2432. There was a discussion between counsel and the Court concerning what the procedures would be like, assuming he pled guilty in light of Ring v. Arizona. ROA 2432-34. The State asserted that that under state court rule, it had the absolute right not to consent to the waiver of a jury trial and guilty plea and asserted it would not consent

they could set it aside, and defendant did not use all of his strikes. "The relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant." *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007).

No change of venue was required when nine seated jurors had heard about the case, but had formed no opinion as to Defendant's guilt. *State v. Tucker (II)*, 324 S.C. 155, 478 S.E.2d 260 (1996).

A change of venue was not required when seven seated jurors stated that they knew something about the case. *State v. Patterson (V)*, 324 S.C. 5, 482 S.E.2d 760 (1997).

A change of venue motion should be based on voir dire, not pre voir dire public opinion surveys. *State v. Louis Truesdale (I)*, 278 S.C. 368, 296 S.E.2d 528 (1982).

to the guilty plea. ROA 2425. What Ariail argued was that Ring did not apply in South Carolina because if the defendant is pleading guilty, he also must make a knowing and intelligent waiver of his right to jury sentencing. ROA 2438-39. If he does that then the state will consent to the entry of a guilty plea, if not then the state does not consent to waiving the jury trial. Further, Solicitor Ariail asserted that this was a hypothetical because Williams has not indicated that he was willing to plead guilty. ROA 2439. The court took the matter under advisement. ROA 2441, l. 16-18.

At the outset of the trial proceedings, counsel Mauldin made a renewed motion concerning the statutory requirement that a defendant had to enter a plea of not guilty in order to have jury sentencing and a companion motion that the indictments in the case had to have the statutory aggravating circumstances included. ROA 7-8. Although acknowledging that the S.C. Supreme Court had rejected the position, Mauldin stated he wanted to clarify his position. He contended that the statutory scheme the required the entry of a not guilty plea violated the 6th and 14th Amendments, relying upon a memorandum submitted to the Court on October 27, 2004. The trial court and counsel agreed to have the memorandum submitted as an exhibit for purposes of the appeal. ROA 9.

During counsel Mauldin's opening statement in the penalty phase, he addressed his reasons for entering a not guilty plea. ROA 2124-2125. He stated that his client had accepted responsibility for the crime. After a bench conference [ROA 2125, l. 11-13], counsel Mauldin stated :

The law is in order for a person accused under this procedure that we've been going through for the past two weeks, in order for that person to have a jury decide the penalty, he has to enter a not guilty plea at the first phase so the jury can first deliberate and then come back. So, that's what I was trying to say. But

you need to know that. That's why we had that first phase of that trial that seemed to -- it was just something came to my mind while you were there deliberating. So, I did want to mention that to you.

ROA 2125, l. 17-2126, l.1.

In the sentencing court's final instructions to the jury, he addressed this issue:

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UNDER SOUTH CAROLINA CODE SECTION 16-3-20(B) A DEFENDANT CHARGED WITH MURDER IS REQUIRED TO ENTER A PLEA OF NOT GUILTY IN ORDER TO BE SENTENCED BY A JURY OF HIS PEERS. IF A DEFENDANT PLEADS GUILTY A SENTENCING PROCEEDING MUST BE CONDUCTED BY A JUDGE, NOT A JURY. IN ORDER TO HAVE A JURY DETERMINE WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, OR SENTENCED TO DEATH FOR MURDER AND KIDNAPPING, THE DEFENDANT HAD TO PROCEDURALLY ENTER A PLEA OF NOT GUILTY.

ROA 2394, l. 23- p. 2395, l. 7.

Subsequent to the verdict and sentence, Applicant made a motion to reconsider on February 28, 2005. In the motion, he asserted that the statutory scheme in South Carolina which requires a defendant to enter a not guilty plea was unconstitutional, both federal and state. A motion hearing was held on April 6, 2005 in which this issue was raised. ROA 2844-45. The court denied the motion. ROA p. 2845, l. 11.

Subsequent to the verdict and sentence, Applicant made a motion to reconsider on February 28, 2005. In the motion, he asserted that the statutory scheme in South Carolina which requires a defendant to enter a not guilty plea was unconstitutional, both federal and state. A motion hearing was held on April 6, 2005 in which this issue was raised. ROA 2844-45. The court denied the motion. ROA p. 2845, l. 11.

There is No Right to Plead Guilty in South Carolina.

Underlying his perceived constitutional claim is an assertion that a mere proffer for a guilty plea is sufficient to establish his constitutional claim under either the 6th, 8th or 14th Amendment. Contrary to the suggestion, there is no "right" to enter a guilty plea in South Carolina nor as a matter of federal constitutional law. Plainly then, there is no enforceable right to plead guilty. South Carolina Rule of Criminal Procedure, Rule 14(b) concerning a trial by jury states:

(b) **Waiver. A defendant may waive his right to a trial by jury only with the approval of the solicitor and the trial judge.**

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In State v. Burgin, 255 S.C. 237, 178 S.E.2d 325 (1970), the Supreme Court concluded that the Federal Constitution does not encompass any right to waive a jury trial, relying upon U.S. v. Jackson, 390 U.S. 570 (1968) and Singer v. U.S., 380 U.S. 24 (1965). Citing Singer, the Court stated:

A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury - the very thing the Constitution guarantees him. 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630 (1965).

State v. Burgin, *supra*. ("The defendant was given an impartial trial by jury as guaranteed by the Constitution and was not in any way prejudicial by refusal of the trial judge to try the case without the jury.").

In State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (1999), the South Carolina Court of Appeals held that the trial court was not required to accept an alleged plea agreement between a defendant and the State. As stated therein:

It is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced. State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct.App. 1996) ("Easler I"), aff'd as modified, State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) ("Easler II"). However, an appellant has no constitutional right to plea. *Id.* *An accused has the right to trial by an impartial jury. Conditioning a waiver of this right on the consent of the prosecutor and the trial judge would create no constitutional impediment since the result of their refusal to consent is that the accused is subject to trial by an impartial jury, that to which he is constitutional impediment exists in a trial judge's refusal to accept a defendant's guilty plea since the result of his refusal is that the accused is subject to a trial by an impartial jury, which is a constitutional guarantee.* We find no error.

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State v. Kerr, supra.

This is a matter of state procedure upon which the state supreme court as the drafter and interpreter of state rules and procedures is the final authority. The Petitioner ignores the basic fact that a guilty plea is ultimately a waiver of a right to a jury trial on a criminal charge. The mandates of Rule 14 are necessarily a condition precedent to any guilty plea.

The lessons of Singer, Jackson, Rule 14, Burgin and Kerr are consistent - there is no right in S.C. to enter a guilty plea. Absent any right, the existence of a controversy falls.

There is a mandatory statutory requirement under Section 16-3-20 that when a guilty plea is accepted, the trial judge sentences the Appellant in the sentencing proceeding which thereby requires a knowing and intelligent consent to judge sentencing before a plea can be accepted.

The South Carolina Supreme Court has previously held that the pertinent language of S.C. Code Ann. §16-3-20(B)¹⁷ "[I]f trial by jury has been waived by the defendant and the State,

¹⁷ In its pertinent part, § 16-3-20(B) states:

"When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment

or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge" *requires* sentencing by the trial judge, not a jury, when jury trial has been waived or the defendant has entered a guilty plea, State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982)¹⁸; State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)¹⁹. In both Patterson and Truesdale, the

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or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty- four hours unless waived by the defendant. *If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge.* In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. (*Emphasis added*)

¹⁸ Addressing the guilty plea and jury sentencing ex mero motu, the Court, in Patterson, relying upon Section 16-3-20 concluded:

We hold appellant's guilty plea and sentence must be vacated because a significant inducement for entering the plea was the condition that the jury determine punishment, an impermissible condition under the statutory mandate that the trial judge alone determines punishment when a defendant pleads guilty to murder.

State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 266 (S.C.,1982). The Court sua sponte vacated the conviction and death sentence and remanded for a new trial based upon the statutory violation.

¹⁹ In Truesdale, the Court stated:

"This Court has recently held that section 16-3-20(B), Code of Laws of South Carolina, 1976 (Cum.Supp.1981), requires sentencing by the trial judge, not a jury, when jury trial has been waived or the defendant has entered a guilty plea, State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). We are compelled by that holding to vacate this appellant's plea, for in this case, as in Patterson, the sentencing phase of a capital proceeding was improperly tried to a jury."

State v. Truesdale, 278 S.C. 368, 369, 296 S.E.2d 528, 529 (S.C.,1982).

Court interpreted in *favorem vitae*, that the agreeing to allow a jury sentencing after a guilty plea violated the mandates of the statute and was against legislative policy.

Recently, the Supreme Court addressed in State v. Allen (Quincy), 386 S.C. 93, 101, 687 S.E.2d 21, 25 (S.C.,2009), whether the trial court erred in failing to declare S.C.Code Ann. § 16-3-20 violates the Eight and Fourteenth Amendments to the United States Constitution by denying him the right to plead guilty while maintaining the right to have a jury determine his sentence. He contended the issue he raised was distinguishable from the Sixth Amendment claims repeatedly rejected by the Supreme Court, citing State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005); State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004). Essentially, he claimed, like Williams, that the effect of denying him a jury at the sentencing phase deprives him of the opportunity to present mitigating evidence (i.e., that he accepts his guilt) to a jury of his peers, and therefore violates due process under the Fourteenth Amendment, resulting in cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court rejected that claim finding no constitutional violation. State v. Allen, 386 S.C. 93, 101, 687 S.E.2d 21, 25 (S.C.,2009).

The Court also addressed the guilty plea capital situation in State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005) and State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004). In Downs, the Court rejected the precise claim he is asserted in his petition:

Appellant asserts *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), renders unconstitutional the requirement in S.C.Code Ann. § 16-3-20(B) (2003) that the sentencing proceeding be held before the judge when a defendant pleads guilty to murder. We disagree.

The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there

existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz.Rev.Stat. § 13-703 (C) (2001) (amended 2002); *Ring*, 536 U.S. at 597, 122 S.Ct. at 2437, 153 L.Ed.2d at 569. In South Carolina, conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C.Code Ann. § 16-3-20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).

In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. See, e.g., *Leone v. Indiana*, 797 N.E.2d 743, 749-50 (Ind.2003); *Colwell v. Nevada*, 118 Nev. 807, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill.App.3d 355, 362, 272 Ill.Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), *app. denied*, 204 Ill.2d 663, 275 Ill.Dec. 77, 792 N.E.2d 308 (2003).

State v. Downs, 361 S.C. 141, 146-147, 604 S.E.2d 377, 380 (S.C. 2004).²⁰ The Court also rejected a challenge to the constitutionality of Section 16-3-20(B) for the same reasons in State v. Wood, 362 S.C. 135, 607 S.E.2d 57, 61 (2004) (citing Downs, *supra*).

In Crisp, the Supreme Court of South Carolina Court held, after reconsideration that:

We granted Appellant's motion to argue against the precedent of Downs. At oral argument, Appellant contended his case is factually distinguishable from Downs because, unlike the defendant in that case, Appellant sought a life sentence; he exhibited remorse for his crimes; and he offered a reason for his actions based on his statements to police that he murdered Blackwell and Watson, and tried to murder Gambrell, because he believed they were drug dealers who intended to harm his family.

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²⁰ Only six other states appear to have addressed this issue. See, e.g. and compare, Colwell v. Nevada, 59 P.3d 463 (Nev. 2002); Leone v. Indiana, 797 N.E.2d 743 (Ind.2003); and Illinois v. Altom, 788 N.E.2d 55 (Ill. 2003)(potential capital case) with Louisiana v. Louviere, 833 So.2d 885 (La. 2002); S.D. v. Piper, 709 N.W.2d 783, 803 (S.D. 2006) and S.D. v. Page, 709 N.W.2d 739, 762 (S.D. 2006); and Colorado v. Montour, 157 P.3d 489 (Colo. 2007). This conflict has its genesis in State death penalty statutes that mandate judicial sentencing after the entry of a guilty plea. For those States that have upheld judge-only sentencing after entry of a guilty plea, the reasoning has been founded on the premise that the capital defendant has waived any jury-trial right by virtue of the entry of the guilty plea. Colwell, 59 P.3d at 473 ("We conclude that Ring is not applicable to Colwell's case because, unlike Ring, Colwell pleaded guilty and waived his right to a jury trial."); Leone, 797 N.E.2d at 750 ("With a plea of guilty, Leone forfeits claimed entitlement to certain rights including the right to a jury trial."); and Altom, 788 N.E.2d at 59 ("There is no validity to the complaint that a defendant did not 'know' that he was waiving the right to have the State prove enhancing factors beyond a reasonable doubt, because by pleading guilty the defendant releases the State from proving anything beyond a reasonable doubt. "). For those States overturning death penalty statutes that mandate judicial sentencing after the entry of a guilty plea, the reasoning has been founded on the premise that a capital defendant retains the right to a jury trial for sentencing after entry of a guilty plea and/or that a capital defendant has a right to present the guilty plea to a jury as mitigation. Louviere, 833 So.2d at 894 ("[D]enying a Defendant the choice to plead guilty arguably would impermissibly deprive the Defendant, per the Federal Constitution, of his strategic choice to acknowledge his crime and thereby appear remorseful before his jury."); Piper, 709 N.W.2d at 803 ("[U]nder Ring, a capital sentencing scheme would be unconstitutional if it prevented a Defendant who pleaded guilty from having alleged aggravating circumstances found by a jury."); Montour, 157 P.3d at 489 ("Once a capital Defendant enters a guilty plea, he retains the Sixth Amendment right to jury sentencing on the facts essential to the determination of death eligibility.").

We do not find persuasive Appellant's effort to distinguish his case from *Downs*. The constitutionality of Section 16-3-20(B) does not rest on a defendant's desire for a particular outcome, his sense of remorse, or his rationale for committing a particular crime. Instead, it rests, *inter alia*, on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions. See U.S. Const. amend VI; S.C. Const. art. I, § 14. Accordingly, we adhere to our opinion in *Downs* and reject Appellant's arguments for the reasons expressed in that case. Section 16-3-20(B) is not unconstitutional in light of *Ring, supra*, and a capital defendant may be sentenced only by a judge pursuant to that statute after knowingly and voluntarily waiving his right to a jury trial.

State v. Crisp, 362 S.C. 412, 418-419, 608 S.E.2d 429, 433 (S.C. 2005).

480. Since 1982 and before, the South Carolina death penalty statutory complex has been read to require a knowing waiver of a defendant's right to jury sentencing as well as a jury determination of guilt when an individual enters a guilty plea when the state is seeking a death sentence. See Record in Clerk of South Carolina Supreme Court : State v Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002) (record of guilty plea waivers); State v. Ray, 310 S.C. 431, 427 S.E.2d 171 (1993) (same); State v. Wilson, 306 S.C. 498, 413 S.E.2d 19, 20-21 (1992) (record of guilty plea waivers); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979) (record of guilty plea waivers).

The right to trial by jury, a fundamental right guaranteed by the Sixth Amendment of the federal Constitution, is subject to knowing, intelligent, and voluntary waiver. "[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). A valid waiver of a fundamental constitutional right ordinarily requires "an intentional relinquishment or abandonment of a

known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). As a matter of state law, the jury waiver would exist for both phases.

Applicant implicitly asserts that South Carolina's statutory capital sentencing structure violates his constitutional right to a jury trial under the Sixth Amendment because if he pleads guilty, he cannot be sentenced by a jury. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court determined that Arizona's capital sentencing structure, which "allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," violated the Sixth Amendment. 536 U.S. at 609, 122 S.Ct. at 2443. In so ruling, the U. S. Supreme Court effectively extended its holding in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to capital cases, concluding that "[c]apital defendants, no less than non-capital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Ring, 536 U.S. at 589, 122 S.Ct. at 2432.

In Blakely v. Washington, 542 U.S. 296 (2004), the Court held that : *[N]othing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding.*" Contrary to claim by Petitioner, this does not create a right to enter a guilty plea under the Sixth Amendment right to a jury trial. Instead it merely requires that if a guilty plea is entered, judicial (as opposed to jury) fact-finding for sentencing enhancement factors is authorized only if the defendant stipulates to the facts [in the aggravating circumstances] or consents to judicial fact finding. This is consistent with the South Carolina capital practice because a guilty plea can only be entered with a consent to judicial fact finding -

otherwise the plea cannot be entered under either Patterson and Truesdale. All guilty pleas require this. Otherwise, he receives what the Constitution requires - a jury determination of guilt, as well as sentencing.

Absent legislation to amend Section 16-3-20 there remains no right to jury sentencing in a knowing and voluntary guilty plea where it is also required to include a consent to judicial fact finding under our statute. Until the legislature acts, the statutory complex remains the same. Simply put, the claims do not empower the PCR Court to overturn legislative enactments and create new procedures expressly contrary the legislative mandate and the decisions of the South Carolina Supreme Court. Appellate counsel was not deficient in seeking a claim before the court that had been rejected previously and consistently.

12. IAC - Trial and Appeal - Statutory Aggravators Not In Indictment.

In his 12th amended allegation (k), Williams asserts that trial counsel and appellate counsel were ineffective in not preserving and /or briefing in the appeal an issue of whether it violated the state and federal constitution to seek the death penalty when the statutory aggravating factors were not included in the indictment for murder. As reflected below, this issue was raised at trial and denied, but was abandoned in the direct appeal. In light of the existing decisions of the South Carolina Supreme Court in this area, Respondent submits that deficient performance has not been shown by either trial or appellate counsel and further that 6th Amendment prejudice has not been shown.

Counsel Mauldin further argued that under the decision of Ring v. Arizona, there was a claim that the state was required to list the statutory aggravating factors in the indictment. ROA 9-10. While again recognizing that recent cases had decided against their position, he asserted

that the indictments they received on November 2, 2004 were defective for purposes of seeking the death penalty because the aggravators that they alleged were not within the indictment. ROA 10. He asserted that the aggravators were an element of the offense which separates it from a non-capital homicide case and is defective.

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§83- Solicitor Ariail argued that the law requires a separate and more detailed notice to be given to the defendant rather than an allegation in an indictment. He stated that there is no question that Applicant had notice of the aggravators and what was factually underlying the aggravators. Judge Nicholson denied the request to quash the death penalty notice concerning the failure to list the aggravators. ROA p. 12, l. 5-6.

Subsequent to the verdict and sentence, Applicant made a motion to reconsider on February 28, 2005. A motion hearing was held on April 6, 2005 in which this issue was raised. ROA 2845- 49. In the motion, he asserted that the statutory scheme in South Carolina required the statutory aggravating circumstances to be included in the indictment. ROA 2847, l. 3-14. Counsel Mauldin claimed the face of the indictment was sufficient if the state proceeded with con-capital murder. ROA 2848. However, Mauldin claimed that instead here in seeking the death penalty, the state got an indictment for murder, served notice of seek the death penalty and served notice of evidence in aggravation. ROA 2848. Counsel Mauldin recognized that caselaw was contrary to his position. ROA 2849. The motion was denied. ROA 2849, l. 18. This issue was not raised by appellate counsel in the direct appeal briefing.

Respondents submit that the Applicant is unable to show deficient performance by trial counsel in 2004-2005 because he raised the issue before the court and that it was denied. Respondent further submit that appellate counsel was not deficient and that 6th Amendment

prejudice has not been shown because the same issue has been rejected by the South Carolina Supreme Court before and since the trial and appeal.

A similar issue was addressed in State v. Laney, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (S.C., 2006) In Laney, the court concluded:

III. Subject Matter Jurisdiction

Appellant contends the circuit court lacked subject matter jurisdiction to sentence him to death because the indictments for murder did not allege any aggravating circumstance which exposed him to the death penalty. Appellant asserts the Sixth Amendment of United States Constitution; Ring; Apprendi; and Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), require indictments in state capital murder cases to allege aggravating circumstances. We disagree.

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). Issues related to subject matter jurisdiction may be raised at any time. The indictment is a notice document, and a challenge to the indictment on the ground of insufficiency must be made before the jury is sworn. Id. at 102, 610 S.E.2d at 500.

We note the State, as required by statute, timely notified Appellant of its intention to seek the death penalty and identified the aggravating circumstances and related evidence the State intended to use at trial. See S.C.Code Ann. 16-3-20(B) and 16-3-26 (2003 Supp.2004) (Notice of intention to seek the death penalty must be given at least thirty days prior to trial.).

This Court has recently addressed the issue of whether aggravating circumstances are elements of the offense of murder. In State v. Downs, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-81 (2004), this Court stated:

The [Supreme] Court expressly noted in both Apprendi and Ring that the cases did not involve challenges to state indictments.... More important, the Fourteenth Amendment has not been construed to incorporate the Fifth Amendment's Presentment or Indictment Clause.... State law governs indictments for state-law crimes. Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder. S.C.Code Ann. § 17-19-30 (2003).... The aggravating circumstances listed in S.C.Code Ann. § 16-3-20(C)(a) (2003) are sentencing factors, not elements of murder.

(internal citations omitted). See also State v. Crisp, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005) (under South Carolina law, aggravating circumstances need not be alleged in murder indictment); State v. Wood, 362 S.C. 135, 144, 607

S.E.2d 57, 61 (2004), cert. denied, 545 U.S. 1132, 125 S.Ct. 2942, 162 L.Ed.2d 873 (2005) (same). Accordingly, the trial court had subject matter jurisdiction in Appellant's case.

State v. Laney, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006).

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In applying the [Strickland] test to claims of ineffective assistance of counsel on appeal ..., reviewing courts must accord appellate counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir.1993). see also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989). Indeed, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting Jones, 463 U.S. at 751); see also Smith, 882 F.2d at 899 (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims"). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 120 S.Ct. at 765. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." 'Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir.1986)). Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit, Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc), and we

"must accord [] counsel the presumption that he decided which issues were most likely to afford relief on appeal," *id.* (internal quotation marks omitted). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Gray v. Greer, 800 F.2d 644, 646 (7th Cir.1986), *cited with approval* in Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Lawrence v. Branker, 517 F.3d 700, 709 (C.A.4 (N.C.),2008). ²¹

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#86- Appellate counsel was not deficient in raising this claim in the direct appeal where it had been conclusively and consistently rejected as a matter of state and federal law. His allegations otherwise are without merit.

13. IAC - Ineffective assistance of trial counsel and foreign national issue.

In his thirteenth claim, Williams asserts that counsel was ineffective in apparently failing to investigate the identity of Williams grandfather and invoking rights as a German foreign national. The record before this Court reveals that at no time prior to the filing of this application had Applicant ever indicated or suggested to any state agency that he was a German foreign national. The record reveals that the Applicant's father, Dwight Williams, testified that he was a band director for the U.S. Army in Germany when the Applicant was born to his mother - Daisy

²¹The Supreme Court in Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), recently held that due process of law requires that a defendant receive effective assistance of appellate counsel on his direct appeal. The Court, however, also has held in Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), that appellate counsel has no constitutional duty to raise every nonfrivolous issue on appeal if counsel, as a matter of professional judgment, decides not to raise such issue on appeal. *Id.* at 751-54, 103 S.Ct. 3312-14. The *Barnes* Court reasoned that counsel must be allowed to exercise his reasonable professional judgment in selecting those issues most promising for review and, in this respect, specifically stated that "[a] brief that raises every colorable issue runs the risk of burying good arguments...." *Id.* at 752-53, 103 S.Ct. at 3313. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

Huckaby in Greenville, South Carolina. ROA 2209. Social worker Marjorie Hammock testified about the family history, including his mother's previous marriage in Germany and the fact that his mother was born in Germany to Erica who was a teenage parent and that "her father was unknown." ROA 2249, l. 14-17. Dr. Hammock testified that Daisy was of a mixed background and left the home at an early age to marry Uwe. ROA 2249-50. She stated that Chris Williams was born and grew up in Greenville, South Carolina. ROA 2250, 2253.

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In the prior communications with the Court it has been consistently indicated that Williams is a U.S. citizen and his current counsel are seeking to determine if he has or can acquire dual citizenship in Germany. The problem with the Applicant's current approach and contention that trial counsel should have invoked German consular rights upon his arrest in 2003 is that at all times he remains a United States citizen. If Williams' mother, as counsel states, is a German citizen, Charles Williams would be eligible to become a German citizen. Williams was born on December 11, 1982. According to the website for the German Missions in the United States, children born in wedlock after January 1, 1975 acquire German citizenship if one of the parents was a German citizen at the time of their birth. Further, children born out of wedlock to a German mother after January 1, 1914 also acquire German citizenship. Thus, if it can be established that Williams' mother was a German citizen when he was born, he could establish that he has German citizenship according to that information.

- A. **Williams' potential status as a German citizen does not entitle him to any of the rights of consultation under the Vienna Convention where he was a United States citizen at the time of his arrest.**

As outlined in counsel's earlier letter to the Court, Williams' attempt to be declared a German citizen is part of his effort to become eligible for consultation rights outlined by the Vienna Convention. This effort is fruitless in several respects to support any challenge to his arrest or for suppression of his statements. .

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First, even if Williams is declared a German citizen, he is not subject to any of the protections outlined by the Vienna Convention. This is due to the fact Williams is also a citizen of the United States. Courts in the United States have consistently held that a defendant who holds dual citizenship in the United States and another country are not privy to the consular rights outlined by the Vienna Convention because they are not foreign nationals in the United States. Commonwealth v. Baumhammers, 599 Pa. 1, 63-4, 960 A.2d 59, 97-8 (2008) (rejecting claim of capital defendant that his rights under Vienna Convention on Consular Relations were violated where defendant was Latvian and U.S. dual citizen); Cauthern v. State,²² 145 S.W.3d 571, 628 (Tenn. Crim. App. 2004) (noting the State Department's official position is that a person of dual citizenship may be treated solely as a United States citizen, thus negating any requirement of consular notification under Vienna Convention, in denying claim PCR claim based upon Vienna Convention); See State v. Ahmed, 103 Ohio St.3d 27, 35-6, 813 N.E.2d 637, 651 (2004)(noting it is a recognized fact of international law that a dual national is not entitled to invoke protection or assistance one of the two countries while within the other country in denying relief upon claim by Pakistani-U.S. dual citizen that he was not properly advised of right of consultation under Vienna convention). Note, the United States State Department has

²² Note that the federal habeas corpus action in the Cauthern case was denied in March 2010, and Motion to Amend in habeas denied in May 2010.

maintained this position, and this was the position presented to the International Court of Justice by the United States in the Avena case. The Death Penalty Information Center has also noted this is the United States' position on the issue.²³

Respondent submits that taking judicial notice of U.S. law the Court can find that Williams definitively meets the qualifications for United States citizenship by birth. See U.S. Const. Amend. 14; 8 U.S.C.S. § 1401(a) (2006). He has, through counsel, confirmed he was a U.S. citizen by birth ("jus soli") and implied that he has never made a declaration that he ceased to be a United States citizen. In Judge Parra-Aranguren's opinion also addressed the issue of dual-citizenship, citing Draft Articles on Diplomatic Protection Article 6, which seem to suggest that Williams could only assert rights under the Vienna Convention if his German nationality was his "predominant nationality." See Avena, Separate Opinion of Judge Parra-Aranguren ¶ 13. Because Williams has provided no proof of German citizenship, there is insufficient evidence to find that Williams as a German National, much less that this predominated over his U.S. citizenship at the time of arrest and trial. Even if Williams could now claim his alleged new found German Nationality now entitles him to the rights in the Vienna Convention, the Court would have to conclude it could have been executed no earlier than 2011, the date on which his petition was filed in this Court. This means the declaration was made well after his conviction was finalized, and does not change his United States citizenship at the time of arrest and trial. Because Williams was a United States citizen when he was tried, Article 36(b) of the Vienna Convention did not apply, and consequently, Williams was entitled to no rights under the Vienna Convention for United States and South Carolina authorities to violate.

²³See <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us>

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If Williams is asserting violations of human rights and due process. It appears the human rights claim is in reference to claims made by Mexico and Germany in Avena and Lagrand, respectively, regarding the Vienna Convention's consular notification requirement constituting a human right. Avena, ¶ 12(5); Lagrand ¶ 78. In both cases, the ICJ stated that the human rights issue was "not a matter that th [e] Court need decide." Avena ¶ 124; Lagrand ¶ 78. Napier-El/Bey has provided no other grounds for his human rights claim. The ICJ also addressed the issue of due process and held that the Vienna Convention constituted treaty rights that are distinct from United States constitutional rights, such as due process. Avena ¶ 139. The United States Supreme Court agreed that Avena identified a treaty violation that still required a "substantial showing of a denial of a constitutional right" to qualify for habeas relief. Medellin, 125 S.Ct. at 989. By relying solely on Avena for this ground, Napier-El/Bey has failed to make such a showing.

Williams may also be contending an assertion of ineffective assistance of counsel regarding the counsel's refusal to assert Williams' claim of German citizenship. Under the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984), the petitioner must prove both ineffective assistance (incompetence) and prejudice as a result thereof. Kimmelman v. Morrison, 477 U.S. 365, 381 (1986). To grant relief, therefore, the state court had to find: (1) Williams' lawyer's performance fell below the range of competence demanded of lawyers in criminal cases, Strickland, 466 U.S. at 690; and (2) there is a reasonable probability that, but for the deficient performance by counsel, the ultimate result would have been different, *id.* at 694. Also, a reviewing court need not consider the two prongs of the Strickland analysis in sequential order. Strickland, 466 U.S. at 697. The court need not even address both prongs if the petitioner fails to make a sufficient showing on one. *Id.* When evaluating an ineffective assistance of counsel

claim, a court should first apply whichever prong more quickly disposes of the respective claim. See *id.*

In this case, Williams' claim of ineffective assistance of counsel has no merit. Williams has provided no evidence of how he was prejudiced at trial by not having had an opportunity to contact the German consulate. Counsel is not ineffective simply because the client is unhappy with the results at trial. See Wright v. Angelone, 151 F.3d 151, 161 (4th Cir.1998).

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Further, it is unclear whether the Vienna Convention confers individually enforceable rights that are cognizable in state court. Research indicates no court has granted relief based upon a claim of a Vienna Convention violation. Most courts presented with the question have either declined to decide whether the Vienna Convention creates an individually enforceable right or have ignored the question and resolved the issue relating to the Vienna Convention on harmless error or lack of prejudice grounds.

In State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006), the South Carolina Supreme Court affirmed a trial court's denial of a suppression hearing requested by a foreign national defendant who claimed he was entitled to the hearing under the U.K. Convention. In doing so, the South Carolina Supreme Court analogized the U.K. Convention to the Vienna Convention, and it found no error for the reasons stated by the United States Supreme Court in Sanchez-Llamas v. Oregon, 548 U.S. 331, 126 S.Ct. 2669 (2006) and by the South Carolina Court of Appeals in State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (2002). As noted by counsel in the letter, no legislation has been passed that creates such enforceable rights under the Vienna Convention.

Since at the time of his arrest in 2003, Williams had not revoked his United States citizenship, counsel cannot be deemed deficient or prejudicial in either raising a German

citizenship issue or further investigating the background of Daisy's "unknown" father who was Applicant's grandfather. The Applicant has failed to show 6th Amendment prejudice that there is a reasonable probability that the result in the proceeding would have been different under Strickland. His assertion to the contrary must be dismissed.

14. IAC - Failure to Ask Judge to Make A Finding that He Would Not Have Too Register As A Sex Offender pursuant to S.C. Code Ann. § 23-3-400, et seq.

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p. 92-
The record reveals that Applicant was sentenced to death after the jury found the existence of a statutory aggravating factor for murder on February 19, 2005. No sentence was given for kidnapping the kidnapping conviction consistent with S.C. Code § 16-3-910. (Must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20) or the possession of firearm during commission of a violent crime conviction pursuant to § 16-23-490. ("This five year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for a violent crime"). The Applicant contends in his fourteenth and final amended allegation (m), that trial counsel was deficient in failing to request the court to make a finding that Williams would not have to register as a sex offender under § 23-3-400 et. seq. Respondent submits that he has failed to show either prejudice or deficient performance under Strickland., supra.,

Respondent agrees that § 23-3-430 requires a person register upon convictions of:

(15) kidnapping (Section 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not included a criminal sexual offense or an attempted criminal sexual offense.
§ 23-3-430 (15). The record does not reveal any assertion by either defense counsel requesting the sentencing court to make such a finding.

Nevertheless, Respondent submits that prejudice cannot be shown due to the fact that Applicant was sentenced to death. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the specific allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief, as amended should be dismissed or, in the alternative, that the Court should direct the Applicant to timely serve and file an Second Amended Application for Post-Conviction Relief specifying all grounds for relief with particularity pursuant to Rule 12(e). Respondents also request this Court to hold a status hearing within thirty (30) days pursuant to Section 17-27-160 and establish a final hearing date.

Respectfully submitted,

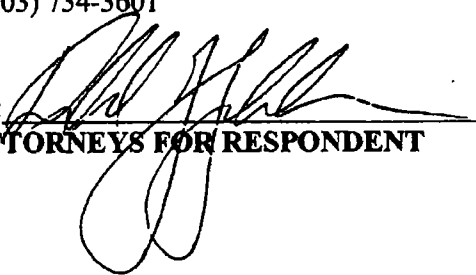
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November 30, 2011

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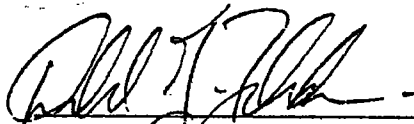
CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Return to Amended Application for Post-Conviction Relief* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

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This 30th day of November, 2011.



DONALD J. ZELENKA
Assistant Deputy Attorney General

FILED-CLERK OF COURT
GREENVILLE CO., S.C.
NOV 1 10 2011

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STATE OF SOUTH CAROLINA

County of Greenville

In the Court of Common Pleas
2010-CP-23-9792

CHARLES CHRISTOPHER WILLIAMS

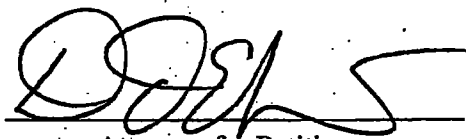
V.

THE STATE OF SOUTH CAROLINA

SECOND ADDENDUM TO APPLICATION FOR POST CONVICTION RELIEF

Comes now the Petitioner in the above referenced case and amends his initial application for post conviction relief by adding the following additional grounds and facts in order to supplement the original attachment in the application for post conviction relief under items 9 and 10 in the application as well as the first addendum to the application for post conviction relief. This attachment is only meant to include additional material and in no way is meant to be a substitute for that application or attachment or second addendum to the application.

The undersigned in no way intends to waive any right of the petitioner to include additional grounds for relief as they may become available. Attachment III is hereby added by the undersigned counsel with appropriate verification to be filed as necessary.



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ATTACHMENT III

(n) Trial counsel was ineffective for failing to investigate and further develop prenatal exposure of alcohol to the defendant and the resulting complications arising out of said exposure. This would include a diagnosis of fetal alcohol syndrome or some other type of Alcohol Related Neurodevelopmental Disorder and testimony and evidence that said exposure was not only powerful mitigation that a jury could have considered to give the defendant life, but it also may have been used to prove the defendant, because of mental disease or defect, lacked sufficient capacity to conform his conduct to the requirements of the law.

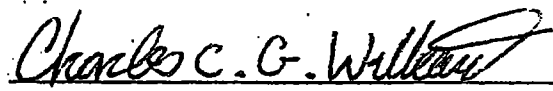
(h) The undersigned also amends his prior addendum regarding part (h) to include both the opening statement and closing argument as containing improper argument as set out in the original addendum.

STATE OF SOUTH CAROLINA

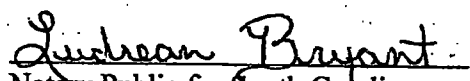
VERIFICATION

COUNTY OF GREENVILLE

I, Charles Christopher Williams, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.


Charles Christopher Williams

Sworn to and subscribed before me
this 25th day of September, 2012.


Notary Public for South Carolina
My Commission Expires May 26, 2020

THE STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
In the Court of Common Pleas

2010-CP-39-0840

ON APPLICATION FOR POST-CONVICTION RELIEF

CHARLES CHRISTOPHER WILLIAMS, #6018 Petitioner,

v.

THE STATE OF SOUTH CAROLINA, ... Respondent.

**BRIEF OF THE FEDERAL REPUBLIC OF GERMANY AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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I. INTEREST OF AMICUS CURIAE

The Federal Republic of Germany ("Germany") respectfully submits this brief as *amicus curiae* in support of granting the application for post-conviction relief.¹ All required procedures have been followed. Rule 213, South Carolina Appellate Court Rules [SCACR].

Charles Christopher Williams, a dual citizen of Germany and the United States, is on death row in South Carolina. Following his arrest, Mr. Williams was unaware of his rights as a German citizen to full consular assistance from the German government. Unfortunately, neither his defense counsel nor the prosecutor investigated his entitlement to this assistance. Mr. Williams suffers from cognitive and social disabilities – the effects of Fetal Alcohol Syndrome – which also were not uncovered and explored as mitigating factors by his defense counsel at trial.

Germany has a constitutional obligation to assist German citizens who face the death penalty in foreign jurisdictions. The German government is opposed to capital punishment and has routinely become involved in cases where its citizens face a death sentence. The international community, including the United States, has recognized a nation's interest in assisting citizens charged with crimes in foreign jurisdictions. Both the United States and Germany are signatories to the Vienna Convention on Consular Affairs, an agreement that ensures access to detained citizens on foreign soil and allows foreign governments to secure legal representation and assistance for their citizens. The United States and Germany have also entered into a bi-lateral agreement reinforcing those rights. Here, respected members of the bar, acting as court-appointed counsel, did not take steps to verify relevant aspects of their client's

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, which was prepared by White & Case LLP on a pro bono basis. Correspondingly, no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation and submission. This brief was shown to defense counsel, Derek Enderlin, to ensure that it contains an accurate representation of the facts.

history, despite strong clues demonstrating his German nationality. Due to this serious lapse, the German government was denied the opportunity to provide consular services to Mr. Williams prior to his trial and sentence. Mr. Williams was, as a result, denied the considerable consular resources afforded by Germany to German nationals facing capital punishment and thus substantially prejudiced at his trial and sentencing hearing.

The Federal Republic of Germany's interest in this case is also animated by the great importance it places on human rights and the principle of equality before the law. Germany has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Convention for the Elimination of All Forms of Racial Discrimination.² Germany is, then, dedicated to ensuring that a fair trial is afforded to its nationals, particularly where those nationals are indigents from disadvantaged groups.

The Federal Republic of Germany is also deeply committed to South Carolina as an economic partner, as demonstrated by an investment of approximately \$13 billion in the state, and annual German purchases of South Carolinian goods valued at several billion dollars. Germany therefore has a keen interest in this and all cases affecting German nationals in South Carolina.

² The European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes the goal of "the maintenance and further realization of human rights and fundamental freedoms." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention for the Protection of Human Rights, or Convention]. Among those fundamental freedoms is the right to a fair trial. *Id.* at Sec. 1, Art. VI. The Convention was later amended to "take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination." *Id.* at Protocol No. 12, Nov. 4, 2000. Similarly, signatories of the International Convention on the Elimination of All Forms of Racial Discrimination agree that "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination." International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966) [hereinafter CERD]. Specifically, states parties to CERD "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee ... equality before the law, notably in the enjoyment of... (a) [the] right to equal treatment before the tribunals and all other organs administering justice." CERD at Art. V.

The Federal Republic of Germany submits this brief to assist the Court by demonstrating the significant effect that German consular assistance would have had on Mr. Williams' trial and sentencing, had it been made available to him.

II. SUMMARY OF ARGUMENT AND STATEMENT OF THE CASE

Charles Christopher Williams is a German national currently sentenced to death in the State of South Carolina. During the preparation and conduct of his trial, sentencing and appellate hearings, Mr. Williams' counsel did not conduct an adequate investigation of Mr. Williams' family history, which would quickly have made apparent his ties to Germany as a citizen by parentage.³ Mr. Williams was therefore deprived of the consular assistance that Germany provides as a matter of longstanding practice and policy to German nationals facing capital punishment. Crucial mitigating factors also were not brought to light at the time of the trial, to Mr. Williams' detriment. As a result, the jury was afforded an incomplete picture of the young man it was sentencing to death, one that did not adequately describe the hardship he has endured and the toxic effects of his mother's alcohol abuse not only on the environment of his upbringing, but also on his physical, cognitive and emotional development. In particular, not until after his conviction and death sentence did his counsel learn that Mr. Williams has Fetal Alcohol Syndrome. A child born with Fetal Alcohol Syndrome can suffer lifelong impairments

³ Specifically, Mr. Williams was born to a mother of German citizenship. Under German law, every descendant of a German is *ex lege* also a German. See, e.g., Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, art. 3, 4, last amended by Article 5 of the Act on the Implementation of Residence- and Asylum-Related Directives of the European Union of Aug. 19, 2007. Even though Mr. Williams only obtained German documents later in his life, he was a German citizen from the moment he was born. See Ex. B, Certificate of German Citizenship.

because of his mother's consumption of alcohol during her pregnancy.⁴ At no time during his trial was the jury made aware of this critical mitigating information.

What is more, it was only during the post-conviction relief stage of his case that Mr. Williams' new counsel began, in line with his duties as Mr. Williams' legal representative, to investigate his status as a German national. That trial counsel missed this issue means the German government did not become aware of Mr. Williams' case until after he had been sentenced to die; Germany was not, then, able to render its usual consular services in aid of his defense. These services would have included, among other things, assessing the quality of Mr. Williams' trial counsel, providing access to financial support for developing key evidence by engaging investigators and experts, and monitoring the progress of the case through the trial and appellate review. In brief, the German government would have harnessed the considerable consular resources at its disposal to assist Mr. Williams' defense, and thus improve his odds of obtaining a fair trial and a just outcome.

III. ARGUMENT

Charles Christopher Williams was born on December 11, 1982 to Dwight Williams, an American, and Daisy Huberth Williams, a German citizen. Record on Appeal pp. 2248, lines 18-24; 2249, line 14. His parents met and married in Germany. His older sister, Maureen, was born in Germany. R. p. 2251, line 24. Mr. Williams' parents later moved to the United States, where he was born. They divorced when Mr. Williams was eight years old. R. p. 2210, lines 5-7.

Mr. Williams' own father acknowledged at trial that the home in which Mr. Williams grew up was not a healthy place for children. R. p. 2211, lines 19-22. Mr. Williams' mother

⁴ According to the National Organization on Fetal Alcohol Syndrome, fetal exposure to alcohol can lead to "physical, mental, behavioral, and/or learning disabilities with possible lifelong implications." National Organization on Fetal Alcohol Syndrome, About NOFAS, <http://www.nofas.org/wp-content/uploads/2012/10/About-NOFAS-2012.pdf>.

was an alcoholic, and had turbulent relationships with Mr. Williams' father and with the man with whom she later lived, Hans Seifert. R. pp. 2180, lines 4-5; 2246-65. Mr. Williams did poorly in school, and reportedly had few friends. R. p. 2212, lines 15-19. He had a short attention span, was easily distracted and was immature for his age. R. pp. 2224-26. An expert at trial testified that Mr. Williams' mother ignored evidence of her son's special needs, and did not respond to recommendations for help and resources from educational professionals. R. pp. 2231-32.

On March 23, 2004, Mr. Williams, who is black, was indicted by the Court of General Sessions for Greenville County for the murder of Maranda Williams, who is white. The State gave notice of intent to seek the death penalty on August 30, 2004. A jury found him guilty of kidnapping, murder, and possession of a firearm during a violent crime and on February 19, 2005, recommended the death penalty. On February 8, 2010, the South Carolina Supreme Court entered its opinion affirming the conviction and death sentence.

Mr. Williams was twenty years old when he committed the acts that set in motion these proceedings. A clinical forensic psychologist who specializes in violence risk-assessment concluded at trial that Mr. Williams poses very little risk of future violence, his greatest risk factor being his youth at the time of the offenses. R. p. 2281, line 22.

A. FAILURE TO NOTIFY THE GERMAN CONSULATE OF MR. WILLIAMS' ARREST WAS INCONSISTENT WITH HIS RIGHT TO A FAIR TRIAL

1. The Failure to Perform Minimal Diligence That Would Have Led to the Discovery of Mr. Williams' German Nationality Constitutes Ineffective Assistance of Counsel

Under well-established United States constitutional law, to show ineffective assistance of counsel, a defendant must demonstrate that counsel performed deficiently and that this deficiency prejudiced the outcome of the defendant's case. Strickland v. Washington, 466 U.S.

668, 687-87, 691-92 (1984); Ard v. Catoe, 642 S.E.2d 590, 596 (S.C. 2007). Defense counsel's performance is deficient when it falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. Prejudice is established in a death penalty case where "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695.

The performance of defense counsel "is deficient if he fails to make a reasonable investigation for possible mitigating evidence." Matthews v. Evatt, 105 F.3d 907, 919 (4th Cir. 1997). See also Wiggins v. Smith, 539 U.S. 510 (2003) (death sentence vacated where trial counsel's mitigation investigation proved wanting). Both the United States Supreme Court and the Supreme Court of South Carolina have indicated that the guidelines provided by the American Bar Association (ABA) regarding defense counsel's performance in death penalty cases should be used to measure "the reasonableness of counsel's conduct." Ard, 642 S.E.2d at 597 n.14 (citing Wiggins, 539 U.S. at 524); American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, reprinted in 31 HOFSTRA L. REV. 913 (2003) ("ABA Guidelines"). Under the ABA Guidelines, "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Id. at 1015. Moreover, "[b]arring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to . . . members of the client's immediate and extended family." Id. at 1019 (Commentary to the ABA Guideline).

With respect to the investigation and development of mitigating factors, the ABA is even more explicit in its supplementary guidelines for defense counsel's performance in death penalty

cases.⁵ American Bar Association, ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, reprinted in 36 HOFSTRA L. REV. 677 (2008) (“ABA Supplementary Guidelines”). Specifically, the ABA directs that the following are “requisite mitigation functions” of defense counsel:

- “The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client’s character, history, record and . . . other factors. The investigation into a client’s life history must survey a broad set of sources and includes, but is not limited to . . . multi-generational family history.”
- “[Defense counsel] must conduct in-person, face-to-face, one-on-one interviews with the client, the client’s family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence of less than death.”
- “It is the duty of the defense team members to aid counsel in the selection and preparation of witnesses who will testify, including but not limited to . . . [t]he client’s family, extending at least three generations back, and those familiar with the client.”

ABA Supplementary Guidelines at 688-91 (emphasis added). Far from being an obscure rule, the requirement that an investigation extend to at least three generations in death penalty cases has been repeatedly cited. See, e.g., Sean D. O’Brien, When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 693, 725 (2008) (citing the ABA’s Supplementary Guidelines and explaining that, in order to perform a competent and thorough mitigation investigation, counsel must conduct a family history search going back at least three generations); State v. Santiago, 305 Conn. 101,

⁵ The ABA expressed its goal for the ABA Supplementary Guidelines, stating that they “will provide useful guidance to judges Following the [Supplementary] Guidelines will help ensure effective assistance of counsel for all persons charged with or convicted of capital crimes.” ABA Supplementary Guidelines at 678.

231-33, 49 A.3d 566, 648-50 (1st Cir. 2012) (citing the ABA Supplementary Guidelines' emphasis on a mitigation investigation that includes a family history search spanning at least three generations). See also Daniel J. Wattendorf & Donald W. Hadley, Family History: The Three-Generation Pedigree, 72 AM. FAM. PHYSICIAN 441, 447 (2005) (stating that it is essential to review the history of three generations of relatives in order to properly diagnose and assess the risks for certain diseases, even common ones).

Case law, the ABA Guidelines, and the ABA Supplementary Guidelines demonstrate that all mitigating circumstances, no matter how remote or minute, can be important in avoiding a death sentence. In this instance, it should have been a straightforward matter for defense counsel to determine, after speaking with the Mr. Williams' mother, that she was foreign-born: Daisy Williams was born, raised and lived until adulthood in Germany, and to this day speaks with a German accent. Any reasonable investigation into Mr. Williams' family history, especially a three-generational investigation, would have readily revealed his German citizenship.

2. Defense Counsel's Failure to Perform Minimal Diligence Deprived Mr. Williams of Consular Assistance Which Is Recognized by the International Community as Vital to Preserving the Right to a Fair Trial

Consular assistance is internationally recognized as both an essential element of due process and as an indispensable guarantee of other due process rights, including the fundamental right to an effective defense. See, e.g., Advisory Opinion OC 16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-Am. Ct. H.R. (Ser. A) No. 16, ¶¶ 122, 137 (Oct. 1, 1999); Eur. Comm'n, Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union, COM (2004) 328 final, ¶ 7 (April 28, 2004).

In cases involving the detention of a foreign citizen, consular notification is the starting point for a defendant to obtain the range of consular services and assistance available. Access to such assistance has been widely recognized as vital to ensuring a fair trial. The universal acceptance of these standards is reflected in the 1963 Vienna Convention on Consular Relations (Convention), signed by the United States and Germany, along with 171 other states. The Convention to a large extent codifies customary international law and thus represents the most basic principles concerning consular functions. UNITED STATES DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS 46 (3d ed. 2010), http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

The Convention recognizes that nations have a strong interest in protecting the rights of their citizens detained in foreign countries. It provides that a country detaining the citizen of a foreign nation must, if the detainee so requests, "without delay, inform the consular post of the [detainee's country]," and that "consular officers shall have the right to visit a national... who is in prison, custody, or detention, to converse and correspond with him and to arrange for his legal representation." United Nations, Vienna Convention on Consular Relations, Art. 36(1)(b) and (c), April 24, 1963.

While these guarantees of course apply to the citizens of states that have signed the Convention, the United States Department of State has recognized that the requirement of consular notification is "a universally accepted, basic practice that should be followed even for nationals of countries not party to the VCCR or other applicable bilateral agreements." The Department of State takes the position that "in all cases . . . the minimum requirements are to inform an arrested or detained foreign national that his or her consular officials may be notified upon request; to notify these consular officials if the national requests; and to permit consular

officials to provide consular assistance if they wish to do so.” UNITED STATES DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS 46 (3d ed. 2010), http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

The United States and Germany have also entered into a bilateral agreement reinforcing these interests. That agreement provides that “if, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national.” Treaty of Friendship, Commerce and Navigation Between the United States of America and the Federal Republic of Germany, Art. III (July 14, 1956).

In the instant case, Mr. Williams was unable to request the assistance to which he is entitled under these treaties. Mr. Williams has multiple cognitive and psychological impairments due to Fetal Alcohol Syndrome, which may well have prevented him from understanding the consequences for him of his and his mother’s German citizenship, and his resulting right to request consular assistance. More significantly, Williams was deprived of consular assistance because his attorneys did not seek to verify Mr. Williams’ foreign nationality, and consequently inform the German consulate of his situation.⁶

The United States Supreme Court has left open, and indeed, in some circumstances, has cited with approval the proposition that international treaties involving consular assistance can be given meaning in the context of ineffective assistance of counsel. See Sanchez-Llamas v. Oregon, 548 U.S. 331, 364 n.3 (2006) (Ginsburg, J., concurring in judgment); Medellin v. Texas, 552 U.S. 491, 537 (2008) (Stevens, J., concurring in judgment). Counsel’s failure to take

⁶ Trial counsel should have been well aware of that Mr. Williams’ mother is a German citizen. In fact, defense expert Marjorie Hammock testified during trial that Mr. Williams’ mother was born in Germany. R. p. 2249, line 14 (responding to defense counsel question regarding Mr. Williams’ family history with “Well, Daisy is from Germany. She was born there.”).

advantage of consular resources is especially glaring where the consulate "would have intervened in the case, assisted with [Defendant's] defense, and provided resources to ensure that [the defendant] received a fair trial and sentencing hearing." Valdez v. Oklahoma, 46 P.3d 703, 710 (Okla. Crim. App. 2002). In light of this, defense counsel has a duty to inquire into the potential foreign citizenship of his client, particularly in capital cases where consular assistance can be indispensable.

Mr. Williams' trial counsel did not do so. Had counsel performed an adequate investigation of its client's background and circumstances, it would have learned that Mr. Williams was a German national entitled to consular assistance. Counsel's unfortunate omission was not only detrimental and almost certainly fatal to Mr. Williams' defense, it was also contrary to the German government's obligation (and that, naturally, of the State) to protect Mr. Williams' right to a fair trial.

B. HAD THE GERMAN GOVERNMENT BEEN NOTIFIED OF MR. WILLIAMS' ARREST AND TRIAL, IT WOULD HAVE PROVIDED FULL CONSULAR ASSISTANCE THAT COULD HAVE CHANGED THE SENTENCING OUTCOME

1. As a Matter of Practice and State Policy, the German Government Assists Its Citizens Facing Capital Punishment in Foreign Jurisdictions

For many decades, German consular officers have been dedicated to providing assistance to German nationals incarcerated outside Germany. Germany monitors particularly closely cases of German nationals facing the death penalty and is committed to assisting German nationals facing capital charges in the United States and elsewhere, including by expending significant consular resources to help them to obtain a fair trial.

German law requires the country's consular authorities to render services to German citizens imprisoned abroad, where those services are deemed necessary for the defense of its

nationals. Article 7 of the German Consular Law provides that "[c]onsular officers shall care for Germans remanded in custody pending trial or serving a prison sentence within their consular district and especially provide them with legal protection if so required by such persons." Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz) [KonsG] [Consular Law], § 7 (Sept. 11, 1974).⁷ Whenever the German government is made aware that one of its citizens is imprisoned in a foreign country, it undertakes in a thorough evaluation of the case and determines what specific services are required in each circumstance. The German government then monitors these cases and provides assistance to the extent possible.

When informed that a German national is imprisoned, the German Consulate General assesses the conditions of imprisonment and prepares a report on the prisoner and the circumstances of his case. The German government establishes regular contact with the prisoner and his counsel and evaluates counsel's competence to handle the case. This ongoing contact and monitoring of the case ensures that trial counsel is providing all necessary services to allow for a thorough and vigorous defense. The German government also tries to connect prisoners with relatives, wherever they may be located, so that they may receive family support. Of great significance for many indigent defendants like Mr. Williams, the German government marshals support for investigators and expert witnesses, when needed.

Germany is categorically opposed to capital punishment. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocols No. 6 and 13 (concerning the abolition of the death penalty). As a member of the European Union, Germany has agreed to that body's Guidelines on the Death Penalty. EU Guidelines on the Death Penalty: Revised and Updated Version, General Affairs Council, June

⁷ A certified translation of the pertinent parts of the Act is attached hereto as Exhibit A.

16, 2008.⁸ On October 10, 2012, Germany's Minister of Foreign Affairs joined his counterparts in several other European countries in signing a call for the abolition of the death penalty.⁹ Cases in which German nationals are facing the death penalty are therefore of special concern to the German government.¹⁰ In these cases, Germany takes steps and devotes resources beyond those available to the average case.

For instance, in LaGrand, a case that has left an indelible mark on international law, the German government demonstrated its commitment to pursuing every available avenue to assist German nationals facing the death penalty, and to securing its right to defend their interests. LaGrand Case (Germany v. United States of America), International Court of Justice (ICJ), 27 June 2001. In LaGrand, the German government became aware of the case of brothers Walter and Karl LaGrand only after they were sentenced to death in Arizona. Germany moved swiftly to intercede on their behalf. High-level officials, including the German Foreign Minister, the Minister of Justice, the German Chancellor, Germany's President and its Ambassador to the United States, made overtures to U.S. federal and state government authorities, seeking a lesser sentence. *Id.* at 478-479. After exhausting all legal recourse in the United States, Germany then pursued a complaint under international law before the ICJ. *Id.*

Consular resources can make a significant difference in the preparation of the defense and the development of mitigation evidence in death penalty cases. In LaGrand, as here, the German government was deprived of the opportunity to access its nationals early in their case,

⁸ See <http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf> (last visited Jan. 24, 2013).

⁹ Joint Call for the Abolition of the Death Penalty, Rome, Oct. 10, 2012, http://www.esteri.it/MAE/EN/Sala Stampa/ArchivioNotizie/Interviste/2012/10/20121010_Appelloopenamorte.htm (last visited Jan. 24, 2013).

¹⁰ See, e.g., A Jailhouse Lawyer's manual: Immigration and Consular Access Supplement, COLUM. HU. RIGHTS L. REV 67 (9th ed. 2011) (Germany has "shown a particular interest in death penalty cases and [has] tried to assist defendants facing the death penalty during appeals in cases in which the police have failed to contact the consulate before trial.").

when consular assistance can have the greatest effect. In Ledezma v. State, 626 N.W.2d 134 (Iowa 2001), the Iowa Supreme Court found trial counsel ineffective, in part because counsel failed to investigate and present potentially exculpatory evidence, and ordered a new trial. The court noted that trial counsel had failed to avail himself of consular assistance:

When representing a foreign national criminal defendant, counsel has a duty to investigate the applicable national and foreign laws. ... [A]ll criminal defense attorneys representing foreign nationals should be aware of the right to consular access ... and should advise their clients of this right. Criminal defense attorneys are not equipped to provide the same services as the local consulate. ... [C]onsular access may very well make the difference to a foreign national, in a way that trial counsel is unable to provide.

Id. at 152 (citations omitted; emphasis added). See also United States ex rel. Madej v. Schomig, 223 F. Supp. 2d 968, 980 (N.D. Ill. 2002) (“[C]onsular functions are particularly significant during penalty proceedings in which courts determine whether capital punishment is applied. Particularly in this case, where trial counsel failed completely to undertake any investigation of the client’s life, character, and background in preparation for the sentencing phase, the participation of the Consulate could possibly have made a difference.”) (citations omitted).

In Mr. Williams’ case (after the discovery of his German citizenship by subsequent counsel) and in others, the German Foreign Ministry has collaborated with Reprieve, a non-profit organization that provides substantial assistance to indigent persons facing the death penalty. Reprieve has extensive experience in capital cases; it can supply both expert legal guidance as well as the considerable investigative legwork that may be required to uncover evidence needed to build a strong defense or mitigation presentation. Reprieve tailors its work to the needs of each case, making its involvement as extensive as required to ensure defendants receive the highest standard of capital representation. In a pre-trial setting, this includes engaging experienced pro bono counsel, seeking out witnesses relevant to both the conviction and sentencing phases of trial and conducting investigations – overseas, where necessary – to gather

mitigation evidence that would otherwise be missing from the defense. Reprieve will also spend hundreds of hours seeking out and retrieving important records to assist defense counsel.

Reprieve has a history of working closely with the German government to secure effective local counsel, and to undertake work that can lead to a German national avoiding execution. According to Reprieve, in at least one case where Reprieve worked with Germany to provide pre-trial assistance to a German national facing a capital charge, the prosecutor opted for a life sentence rather than seek the death penalty. Had Reprieve been notified of Mr. Williams' arrest in a timely manner, Reprieve would have made every effort, in partnership with the German government, to ensure a fair trial and sentence for Mr. Williams.

2. Had the German Government Been Properly Informed of Mr. Williams' Arrest and Trial, It Would Have Provided Him with Essential Assistance

Had the German government been aware of the charges against Mr. Williams, it would have provided him important assistance from trial preparation through sentencing and beyond. With its considerable resources, Germany, in conjunction with Reprieve, would have assisted Mr. Williams in three primary ways. First, the German government would have monitored his appointed counsel's strategy prior to trial and sentencing and, if necessary, assisted Mr. Williams by securing alternative trial counsel for him. Reprieve could have assisted the German government by advising as to what steps competent and effective defense counsel would take at each stage of the case. Second, Germany, in partnership with Reprieve, would have provided serious assistance in the investigation of mitigating factors, including Mr. Williams' mental health and family history. Third, the presence of the German government at critical points prior to and during trial would have led to intangible benefits that may well have been outcome determinative during sentencing.

a. Germany Would Have Provided Framework for Significant Legal Assistance

Had the German government been involved from the outset in Mr. Williams' case, it would have reviewed the qualifications and experience of Mr. Williams' appointed trial counsel and, were it concerned with the competence or diligence of trial counsel, assisted with securing more experienced attorneys to conduct the trial and sentencing hearing. The German government would have constantly monitored the case, frequently consulted with trial counsel, and further intervened where needed. Germany would also have consulted with competent local counsel, and with Reprieve, about what is expected of effective capital-defense attorneys.

In this case, Germany would have focused its efforts on monitoring the performance of trial counsel, specifically in the areas of trial strategy and preparation. This continuous monitoring would have made a material difference to Mr. Williams' case. Notably, Mr. Williams' attorneys did not request from the court additional funds to conduct thorough investigations into his family history and psychological condition. Had Germany been supervising the case, Germany would have been aware of this deficiency, and would have had an opening to review with counsel its strategy, to remind counsel of the standards established under the ABA Guidelines for investigations in capital cases, and, where appropriate, provide consular assistance in securing the means needed to conduct adequate investigations. Perhaps more importantly, Germany's involvement may have preempted this failure in so far as Germany's early contribution to the case's development could have shed light from the start on aspects of Mr. Williams' family and medical history that plainly needed further examination.

Indeed, a significant contribution of Germany's monitoring would have been the early recognition of a specific mitigating factor: Mr. Williams' Fetal Alcohol Syndrome. Fetal Alcohol Spectrum Disorders (FASD) are the result of a mother's consumption of alcohol during

pregnancy; they produce congenital developmental disabilities in the brain and lead to a number of recognizable effects. Natalie Novick Brown, Anthony P. Wartnik, Paul D. Connor, & Richard S. Adler, A Proposed Model Standard for Forensic Assessment of Fetal Alcohol Spectrum Disorders, 38 J. OF PSYCH. & L. 383, 387 (2010) (noting that such seemingly normal attributes, such as “superficially ‘good’ verbal skills,” do not preclude a diagnosis of FASD). Individuals who suffer from FASD, while often appearing outwardly normal, tend to perform poorly in school, demonstrate reduced impulse control, and have difficulty functioning in society. Kathryn Page, The Invisible Havoc of Prenatal Alcohol Damage, J. CENTER FOR FAM. CHILD. & CTS. 1, 10-12 (2002).

Defense counsel is able to identify conditions like FASD when the mitigation investigation “begins with the onset of the [defendant’s] life.” Andrea D. Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 MERCER L. REV. 695 (1990) (cited by ABA Guidelines at 1022 n.211). The ABA guidelines recognize the potential significance of FASD as a mitigating factor, explaining that mitigation begins so early precisely “because many defendants’ problems start with things like fetal alcohol syndrome...” 31 HOFSTRA L. REV. 913, 1022. The ABA recently passed a resolution on FASD in which it noted that individuals suffering the effects of this condition are significantly more likely to commit crimes. Resolution of the American Bar Assoc., Aug. 6-7, 2012. Accordingly, “[c]ourts should also be considering [Fetal Alcohol Syndrome] as a factor in mitigation with juvenile and adult offenders during sentencing, particularly where the death penalty is an option.” Id. The resolution urges criminal attorneys to better understand the effects and symptoms of Fetal Alcohol Syndrome. Id.

Mr. Williams was diagnosed with FASD only after his conviction and sentencing. That diagnosis was based on symptoms that were known to counsel prior to trial. From interviews with Mr. Williams' family members, defense counsel was aware that his mother consumed alcohol during her pregnancy. R. pp. 2180, lines 5-9; 2182, lines 8-9. Despite this knowledge, defense counsel failed to pursue a proper diagnosis, if any at all. Had the German government been involved in Mr. Williams' case at an earlier stage, its oversight would have increased the likelihood that Mr. Williams' condition would have been recognized and formally diagnosed, and that this crucial information would have been presented to the jury during the sentencing phase of his trial. Resolution of the American Bar Assoc., Aug. 6-7, 2012.

b. Germany and Reprieve Would Have Assisted With Investigating Other Potentially Mitigating Factors

Germany was, and is, well placed to provide significant investigative assistance to Mr. Williams. The German government has the institutional capacity to provide ready access to vast information resources, including ancestral records, which would have greatly benefited Mr. Williams' defense. As already noted, the German government routinely partners with Reprieve, a non-profit organization that has a wealth of experience and expertise in conducting investigations that form such an integral part of capital punishment cases.

Prior to his trial, Mr. Williams' appointed counsel did not delve adequately into Mr. Williams' family history. As has been outlined above, the ABA Guidelines require defense counsel in capital cases to investigate, at a minimum, three generations of a defendant's family to find potentially mitigating factors. ABA Supplementary Guidelines at 688-91. This did not happen.

An investigation spanning three generations of Mr. Williams' family encompasses relatives in Germany. Had the German government been involved in Mr. Williams' case from

the start, Germany would have accessed population records and archives to facilitate this research, to present a more complete picture of Mr. Williams' family history. It is instructive to note that, shortly after learning of Mr. Williams' case, the German government contacted authorities in Nuremburg, who were able to locate in a matter of days documents in local archives that were used to prove Mr. Williams' citizenship. See Ex. B, German Citizenship Doc. of Christopher Williams. Germany's administrative infrastructure and the considerable information resources at its disposal could have been deployed to strengthen Mr. Williams' defense, and ultimately assure him a fair trial – had trial counsel pursued this essential avenue.

Germany and Reprieve also could have been instrumental in gathering powerful mitigating evidence, the collection of which may have been onerous for defense counsel, by helping to track down and interview Mr. Williams' relatives, many of whom live out of state or outside the United States. Since becoming involved in his case at the post-conviction relief stage, Reprieve has provided invaluable assistance in investigating Mr. Williams' family history, for example by locating and interviewing his maternal uncle in Germany, a relative who Mr. Williams' trial counsel did not contact during pre-trial preparation. Researching Mr. Williams' family history is particularly important, as evidence has emerged of devastating effects on his maternal family during World War II that provide a context to the domestic violence and dysfunctional home life that Mr. Williams experienced as a youngster.

In addition to assisting with gathering evidence, the German government and Reprieve would have mobilized their experience and skills to more thoroughly investigate Mr. Williams' psychological condition. Given the multiple red flags in Mr. Williams' history – most notably, his mother's known alcoholism, and his struggle with psychosocial difficulties throughout his young life – German authorities would have recommended, and in absence of other available

resources provided access to financial assistance for, additional medical assessments to diagnose Mr. Williams' condition; ensured that trial counsel conducted an MRI to analyze resulting brain damage; and consulted with Fetal Alcohol Syndrome experts – as has recently been done in connection with the present proceeding. This more thorough psychological investigation, had it been performed by trial counsel, would have ensured that the jury weighed critical mitigating evidence prior to making its sentencing decision.

c. Germany's Involvement in Mr. Williams' Case Would Have Had Additional Intangible Benefits Prior to Trial and During Sentencing

In addition to the above, the German government's involvement in Mr. Williams' case could have had more intangible benefits. It may have averted entirely the state's decision to seek capital punishment against a German citizen, and made it less likely that certain improper statements would be freely uttered by prosecutors during their closing arguments.

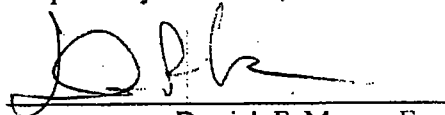
The decision to seek the death penalty lies within the discretion of the South Carolina's state prosecutor. S.C. Code Ann. § 16-3-20. In Mr. Williams' case, this decision was made without full knowledge of highly relevant mitigating circumstances. Germany's early involvement in Mr. Williams' case would have made it more likely that pertinent information about his life history and mental health would have been made known to the prosecutor. On the strength of that evidence, the prosecutor may well have decided, in his discretion, not to seek the death penalty and instead to offer a sentence of life in prison without parole, as being more consonant with the acts of a young man struggling with mental illness than those of a vicious and incorrigible felon. The German government would also have had the opportunity to express publicly in the United States its unwavering opposition to the death penalty, and grave concerns that any German national would be sentenced to death.

More subtly, awareness of the presence of the German government may have affected how prosecutors conducted themselves at trial and sentencing. Specifically, prosecutors made several improper statements to the jury during their closing remarks about the decision to seek the death penalty and the jury's role in rendering that sentence. In one instance, the prosecutor told the jury during the sentencing phase "[you're] not killing anyone, and you're not making a decision that is in any way wrong." R. p. 2367, lines 10-11. Statements designed to minimize a jury's sense of responsibility prior to deciding whether to sentence a defendant to death are impermissible in South Carolina. See State v. Butler, 277 S.C. 543 (1982). The prosecutor also characterized Mr. Williams as "evil" and "[the] worst of the worst." R. p. 2371, lines 4-6.¹⁰ Prosecutors' awareness of Germany's involvement in the case, and the very presence of German officials in the courtroom, may have tempered the State's lapses into impropriety.

IV. CONCLUSION

For the foregoing reasons, *amicus curiae* the Federal Republic of Germany respectfully urges the Court to grant Mr. Williams' application for a new trial.

Respectfully submitted,



Derrick F. Moore, Esq.
Pro Hac Vice, South Carolina (admission pending)

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White & Case LLP
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+ 32 2 239 25 36
Counsel for Amicus Curiae

¹⁰ Notably, Mr. Williams' defense counsel did not object to these statements at the time they were made.

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United States
Counsel for Amicus Curiae

EXHIBIT

A

TRANSLATION CERTIFICATE

I, Anna Diehn, swear that I am a fluent reader of the German and English languages and that I created the attached English translation of the Title and Article 7 of the Law on Consular Officers, Their Functions and Powers, located on pages 1 and 3, respectively, of the original German legislation. To the best of my knowledge and belief, this is a true and accurate translation from German into English.

Dated: 1/17/2013

Anna Diehn
Anna Diehn

Sworn to and subscribed before me on
This 17 day of January, 2013

Mary Helen Perkins
Notary Public

MARY HELEN PERKINS
Notary Public, State of New York
No. 01PE6267086
Qualified in New York County
Commission Expires Aug. 13.2016

Translation (Partial)

Law on Consular Officers, their Functions and Powers (Consular Law)

KonsG

Date: September 11, 1974

Full Citation:

“Consular Law from September 11, 1974 (BGBl. I S. 2317), last amended by Article 20 of the Act of December 17, 2008 (BGBl. I. S 2586).”

Version: Last amended by Article 20 of the Act of December 17, 2008 (2586)

Preamble

The Bundestag has, with the approval of the Bundesrat, adopted the following law:

....

§ 7 Assistance to Prisoners

Consular officers shall care for Germans remanded in custody pending trial or serving a prison sentence within their consular district and especially provide them with legal protection if so required by such persons.

Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz)

KonsG

Ausfertigungsdatum: 11.09.1974

Vollzitat:

"Konsulargesetz vom 11. September 1974 (BGBl. I S. 2317), das zuletzt durch Artikel 20 des Gesetzes vom 17. Dezember 2008 (BGBl. I S. 2586) geändert worden ist"

Stand: Zuletzt geändert durch Art. 20 G v. 17.12.2008 I 2586

Fußnote

(+++ Textnachweis ab: 15.12.1974 +++)

Eingangsformel

Der Bundestag hat mit Zustimmung des Bundesrates das folgende Gesetz beschlossen:

1. Abschnitt Allgemeine Vorschriften

§ 1 Die konsularischen Aufgaben im allgemeinen

Die Konsularbeamten (Berufskonsularbeamte oder Honorarkonsularbeamte) sind berufen,

- bei der Zusammenarbeit zwischen der Bundesrepublik Deutschland und dem Empfangsstaat, namentlich auf den Gebieten außenwirtschaftlicher und entwicklungspolitischer Beziehungen, des Verkehrs, der Kultur und der Rechtspflege mitzuwirken,
- Deutschen sowie inländischen juristischen Personen nach pflichtgemäßem Ermessen Rat und Beistand zu gewähren.

§ 2 Übertragene konsularische Aufgaben

Die Konsularbeamten sind berufen, die Aufgaben und Befugnisse wahrzunehmen, die ihnen durch dieses Gesetz oder andere Rechts- und Verwaltungsvorschriften übertragen werden, insbesondere auf folgenden Gebieten,

- Staatsangehörigkeitsangelegenheiten,
- Paß- und Sichtvermerksangelegenheiten,
- Personenstandsangelegenheiten,
- Mitwirkung bei der Erledigung von Familiensachen, Angelegenheiten der freiwilligen Gerichtsbarkeit und bei Nachlaßangelegenheiten,
- Beurkundungen, Legalisation ausländischer und Echtheitsbestätigung inländischer öffentlicher Urkunden,
- Schiffahrtssachen und Seemannsangelegenheiten,
- Erledigung oder Übermittlung von Rechtshilfeersuchen,
- Zustellungen,
- Überwachung der Einhaltung von Verträgen.

§ 3 Wahrnehmung konsularischer Aufgaben

(1) Für die Wahrnehmung konsularischer Aufgaben gelten die allgemeinen Rechtsvorschriften, soweit dieses Gesetz keine besonderen Regelungen enthält.

(3) Um in den in Absatz 1 genannten Fällen sofort wirksam helfen zu können, sollen die Konsularbeamten eine Liste der in ihrem Konsularbezirk ansässigen Deutschen und anderer Schutzbefohlener sowie ihrer Familienangehörigen erstellen und auf dem laufenden halten.

§ 7 Hilfe für Gefangene

Die Konsularbeamten sollen in ihrem Konsularbezirk deutsche Untersuchungs- und Strafgefangene auf deren Verlangen betreuen und ihnen insbesondere Rechtsschutz vermitteln.

§ 8 Antrag auf Beurkundung der Geburt oder des Todes eines Deutschen

Die Konsularbeamten sind befugt, Anträge auf Beurkundung der Geburt oder des Todes eines Deutschen entgegenzunehmen, wenn sich der Personenstandsfall im Ausland ereignet hat. Der Antrag ist mit den vorgelegten Unterlagen dem nach § 36 Abs. 2 des Personenstandsgesetzes zuständigen Standesamt zu übersenden.

§ 9 Überführung Verstorbener und Nachlaßfürsorge

(1) Sofern andere Möglichkeiten nicht gegeben sind, sollen die Konsularbeamten umgehend die Angehörigen der im Konsularbezirk verstorbenen Deutschen benachrichtigen und bei einer verlangten Überführung der Verstorbenen mitwirken.

(2) Die Konsularbeamten sind berufen, sich der in ihrem Konsularbezirk befindlichen Nachlässe von Deutschen anzunehmen, wenn die Erben unbekannt oder abwesend sind oder aus anderen Gründen ein Bedürfnis für ein amtliches Einschreiten besteht. Sie können dabei insbesondere Siegel anlegen, ein Nachlaßverzeichnis aufnehmen und bewegliche Nachlaßgegenstände, soweit die Umstände es erfordern, in Verwahrung nehmen oder veräußern. Sie können ferner Zahlungen von Nachlaßschuldern entgegennehmen und Mittel aus dem Nachlaß zur Regelung feststehender Nachlaßverbindlichkeiten sowie von Verpflichtungen verwenden, die bei der Fürsorge für den Nachlaß entstanden sind.

(3) Können Erben oder sonstige Berechtigte nicht ermittelt werden, so können Nachlaßgegenstände oder Erlös aus deren Veräußerung an das Gericht des letzten Wohnsitzes des Erblassers im Inland oder - wenn sich ein solcher Wohnsitz nicht feststellen läßt - an das Amtsgericht Schöneberg in Berlin als Nachlaßgericht übergeben werden.

§ 10 Beurkundungen im allgemeinen

(1) Die Konsularbeamten sind befugt, über Tatsachen und Vorgänge, die sie in Ausübung ihres Amtes wahrgenommen haben, Niederschriften oder Vermerke aufzunehmen, insbesondere

1. vor ihnen abgegebene Willenserklärungen und Versicherungen an Eides statt zu beurkunden,
2. Unterschriften, Handzeichen sowie Abschriften zu beglaubigen oder sonstige einfache Zeugnisse (z.B. Lebensbescheinigungen) auszustellen.

(2) Die von einem Konsularbeamten aufgenommenen Urkunden stehen den von einem inländischen Notar aufgenommenen gleich.

(3) Für das Verfahren bei der Beurkundung gelten die Vorschriften des Beurkundungsgesetzes vom 28. August 1969 (Bundesgesetzbl. I S. 1513) mit folgenden Abweichungen:

1. Urkunden können auf Verlangen auch in einer anderen als der deutschen Sprache errichtet werden.
2. Dolmetscher brauchen nicht vereidigt zu werden.
3. Die Abschrift einer nicht beglaubigten Abschrift soll nicht beglaubigt werden.
4. Die Urschrift einer Niederschrift soll den Beteiligten ausgehändigt werden, wenn nicht einer von ihnen amtliche Verwahrung verlangt. In diesem Fall soll die Urschrift dem Amtsgericht Schöneberg in Berlin zur amtlichen Verwahrung übersandt werden. Hat sich einer der Beteiligten der Zwangsvollstreckung unterworfen, so soll die Urschrift der Niederschrift dem Gläubiger ausgehändigt werden, wenn die Beteiligten keine anderweitige Bestimmung getroffen haben und auch keiner von ihnen amtliche Verwahrung verlangt hat.

EXHIBIT

B



Consulate General of the
Federal Republic of Germany
Atlanta

MR. DEREK J. ENDERLIN
PARTNER
ROSS AND ENDERLIN, PA
330 EAST COFFEE STREET
GREENVILLE, SC 29601

ADDRESS:

Consulate General of the
Federal Republic of Germany
Marquis Two Tower, Suite 901
285 Peachtree Center Avenue, NE
Atlanta, GA 30303-1221

INTERNET: www.germany.info/atlanta

TEL + 404-659-4760

FAX + 404-649-1280

From the desk of: Kerstin Haken Flautt

TEL-direct 404-979-6419

rk-s1@atla.diplo.de

Certificate of Citizenship for Charles Christopher Gerard Williams
File no. (please quote in reply): Rk 531 SE Williams
Atlanta, August 23, 2012

Dear Mr. Enderlin,

Attached please find certificate of citizenship for your client Charles Christopher Gerard Williams.

Sincerely

Kerstin Flautt

BUNDESREPUBLIK DEUTSCHLAND



Staatsangehörigkeitsausweis

Vorname(n), Familienname, Geburtsname

Charles Christopher Gerard Williams

geboren am

11. Dezember 1982

in

Greenville, South Carolina

Wohnort

Ridgeville, South Carolina

Ist deutsche(r) Staatsangehörige(r).

Dieser Ausweis gilt bis zum
entfällt

Ort, Datum

Köln, 16. Juli 2012

BUNDESVERWALTUNGSAMT

Az.: III B3-201110280057-F

Im Auftrag


Hachel



**SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT
ROCHESTER, NEW YORK**

I, ALAN L. ROSS, Deputy Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, State of New York, do hereby certify that

Derrick Francis Moore

*was duly admitted to practice as an attorney and counselor at law in all courts of this state by this Court on **March 3, 2010**, and appears in good standing upon the roll of attorneys and counselors, and other records, in this office and has registered with the administrative office of the Courts as required by Judiciary Law §468-a.*

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court, at the City of Rochester, January 14, 2013.



Alan L. Ross

Deputy Clerk of the Court

**VERIFIED APPLICATION FOR ADMISSION *PRO HAC VICE*
IN THE STATE OF SOUTH CAROLINA**

The State of South Carolina

2010-CP-23-09792

County of Greenville - Court of Common Pleas

Plaintiff

Case No.

Court

vs.

Mailing Address of Court: 305 E. North Street

Charles Christopher Williams, #6018

Greenville County Courthouse

Defendant

Greenville, SC 29601

Comes now Derrick F. Moore, applicant herein, and respectfully represents the following:

1. Applicant resides at:

29 W. 76th St., Apt. 2

Street Address

New York

New York

New York

10023

City

County

State

Zip Code

315-794-4714

Telephone

2. Applicant is an attorney and a member of the law firm of (or practices law under the name of)

White & Case LLP

, with offices at, at

1155 Avenue of the Americas

Street Address

New York

New York

New York

10036

City

County

State

Zip Code

212-819-8926

Telephone

212-354-8113

Fax Number

3. Applicant has been retained personally or as a member of the above named law firm by

The Republic of Germany, Amicus Curiae

to provide legal representation in connection with the above case now

pending before the above named court of the State of South Carolina.

4. Since March 3 of 2010, applicant has been, and presently is, a

member in good standing of the bar of the highest court of the District of Columbia or the State of New York

where applicant regularly practices law. Attached is a certificate of good standing.

5. Applicant has been admitted to practice before the following courts: (List all of the following courts

applicant has been admitted to practice before: United States District Courts; United States Circuit Courts of Appeals; the Supreme Court of the United States; and courts of other states or the District of Columbia.)

Court:

Date Admitted:

N/A	N/A

Applicant is presently a member in good standing of the bars of those courts listed above, except as listed below:
(List any court named in the preceding paragraph that applicant is no longer admitted to practice before.)

6. Applicant presently is not subject to any suspension or disbarment proceedings, and has not been formally notified of any complaints pending before a disciplinary agency, except as provided below (give particulars, e.g., jurisdiction, court, date):

7. Applicant never has had any application for admission *pro hac vice* in this or any other jurisdiction denied or any *pro hac vice* admission revoked, except as provided below (give particulars, e.g., date, court, docket number, judge, circumstances; attach a copy of any order of denial or revocation):

8. Applicant never has had any certificate or privilege to appear and practice before any administrative body suspended or revoked, except as provided below (give particulars, e.g., date, administrative body, date of suspension and reinstatement):

9. Local counsel of record associated with applicant in this case is Andrew Savage, of the
Savage law firm, which has offices at:

15 Prioleau Street

Street Address

Charlestown

South Carolina

29401

City

County

State

Zip Code

843-720-7470

Telephone

If applicable list all other firms/attorneys you are associated with in this matter

10. Applicant has previously filed an application to appear *pro hac vice* in the following South Carolina cases (give case name and status of litigation, date of application, local counsel of record in each case, and state whether application is pending or was granted).

11. Applicant agrees to comply with the applicable statutes, laws and rules of the State of South Carolina and will familiarize him/herself with and comply with the South Carolina Rules of Professional Conduct. Applicant consents to the jurisdiction of the South Carolina courts and Commission on Lawyer Conduct.

12. Applicant respectfully requests to be admitted to practice in the above named court for this case only.

DATED this 24 day of January, 2013.


APPLICANT

VERIFICATION

STATE OF New York

COUNTY OF New York

I, Dennis F. Moore, do hereby swear or affirm under penalty of perjury that I am the applicant in the above styled matter; that I have read the foregoing application and know the contents thereof; and that the contents are true of my own knowledge, except as to those matters stated on information and belief, and that as to those matters I believe them to be true.

[Signature]
APPLICANT/AFFIANT

Subscribed and sworn to before me this 24 day of January, 2013.

[Signature]

Notary Public for the State of New York

My Commission Expires: Sept. 4, 2015

SARA YOSHINO
Notary Public, State of New York
No. 01YO6173835
Qualified in New York County
Commission Expires Sept. 4, 2015

LOCAL COUNSEL CONSENT

I hereby consent, as local counsel of record, to the association of applicant in this cause pursuant to Rules Governing Admission *Pro Hac Vice* to the South Carolina Bar.

DATED this 24 day of JANUARY, 2013.

[Signature]
LOCAL COUNSEL OF RECORD

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this application upon the South Carolina Supreme Court by mail addressed to: South Carolina Supreme Court Office of Bar Admissions, PO Box 11330, Columbia, SC 29211, accompanied by payment of the \$250 filing fee payable to the South Carolina Supreme Court on this 24 day of January, 2013.

[Signature]
APPLICANT/AFFIANT

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSHER
2013 JAN 25 A 9:59

IN THE COURT OF COMMON PLEAS

2010-CP-23-09792

JANUARY 28, 2013

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

THE HONORABLE G. EDWARD WELMAKER, JUDGE

DONALD ZELENKA, ESQUIRE
AL SIMMON, ESQUIRE
ATTORNEY FOR THE DEFENDANT.

3175

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NO	DESCRIPTION	ID	EV
	(NONE)		

1 January 28, 2013

2 (WHEREUPON, court convened with all parties
3 present and the following proceedings were had.)
4 (WHEREUPON, Plaintiff Exhibit Numbers 1 through 23
5 were marked and admitted into evidence.)

6 THE COURT: All right. Gentlemen, are you
7 ready to proceed?

8 MR. ENDERLIN: Yes, Your Honor. Your Honor,
9 I would like to note a couple of preliminary matters.
10 To my left, your right, the Consul of the Consulate
11 General Gerrit Morking is here with us. He'll be
12 sitting with us some throughout this and people from
13 his office will be here, as well.

14 THE COURT: Excuse me, what was your name
15 again?

16 MR. MORKING: Gerrit Morking.

17 THE COURT: Okay.

18 MR. ENDERLIN: I also wanted to note before
19 anything else, I submitted a pre-trial brief to you a
20 week or so ago. One of the arguments we made was about
21 the comment of restaurants and prison. Specifically, I
22 want to mention that because I left out the law
23 wherever the Solicitor used restaurants and prisons, so
24 that's not, it's not a huge deal, Judge, but I just
25 wanted to make sure. Somehow I missed that in the

1 transcript. It's pretty important to change that or
2 submit that. It's pretty clear from the transcript. I
3 assume you've had a chance to read our pre-trial brief.
4 I can go into more detail with you of what we expect to
5 do today, but at the same time, if you want to move
6 forward with the testimony, we can do that, as well.

7 THE COURT: Well, I've read it. I'll be glad
8 to hear whatever you feel like you need to say to
9 amplify it or explain it. But I've read it.

10 MR. ENDERLIN: All right.

11 THE COURT: Highlighted it and marked it, so
12 ...

13 MR. ENDERLIN: You know, Your Honor, I think
14 obviously our main points in the pre-trial brief -- we
15 have some other points, as well -- but our main points
16 in the pre-trial brief were that there was an improper
17 argument and, also, just to amplify the arbitrariness
18 of the death penalty in this situation.

19 And in looking at that, I've had problems over the
20 weeks, and this is part of what can be the insidious
21 nature of the death penalty, is what the Supreme Court
22 noted in the case of *Inman*, which is that there seems
23 to be winner take all attitude in death penalty cases.
24 And they specifically noted this solicitor didn't use
25 plural when they were talking about a solicitor. They

1 used the specific singular, this solicitor. And I
2 wanted to read that to you. Specifically, they say,
3 furthermore, we are deeply concerned that the
4 solicitor's behavior represents a pattern of misconduct
5 that continues to undermine our State's system of
6 justice. Specifically, this Court is concerned with
7 the win at all cost attitude that appears to permeate
8 the solicitor's office. And then we have this same
9 solicitor in his opening and closing, we think,
10 diverging from the Supreme Court's explicit
11 instructions, which is to stay within the record, and
12 to only focus on the circumstances of the crime and the
13 characteristics of the Defendant. And I think part of
14 this problem, too, is that then, and we all know this
15 as trial lawyers, because we don't like to object
16 during closing arguments and opening statements. I was
17 told in law school that it was rude, but I certainly
18 think there's a hesitancy just in general here. And at
19 the same time we demand these trial lawyers and the
20 Trial Judges in the heat of battle, at the spur of the
21 moment, and quite often when the solicitor's speaking
22 ten or fifteen feet away, right in front of the jury,
23 towards the jury, not towards us, we expect to hear
24 these exact comments, analyze them, in a split second
25 make a determination whether it's double meaning or

1 whether it's insinuating something else. Determine
2 whether there's a legal basis for an objection, then
3 decide whether that objection's likely to succeed, then
4 weigh whether the likeliness to succeed over-weighs the
5 potential of losing credibility in front of a jury by
6 objecting and then not succeeding. Then the weight of
7 potential reinforcement of that statement to the jury,
8 and then to determine whether it helps us or not,
9 whether it may be strategically advisable not to
10 object. And we do all of this in a split second. At
11 the same time we listen to the next line of the
12 solicitor's opening or closing for any objectionable
13 material. And we're supposed to do that on the spur of
14 the moment.

15 And then here we are, twelve years later, and the
16 client comes back and has to ask the attorneys what he
17 was thinking twelve years ago about things. And I
18 think the problem is we're putting all the burden on
19 these attorneys in that split second when the Solicitor
20 has weeks, if not months, if not years, to simply
21 follow the Supreme Court's direction, which is to stay
22 within the record and talk about the circumstance of
23 the crime and the characteristics of the Defendant.

24 Your Honor, the other obvious thing that we really
25 want to talk about is Fetal Alcohol Syndrome. And I

1 know we've submitted an enormous amount of material,
2 Your Honor, and it's a complicated matter. And I don't
3 think any of us went to law school to delve into the
4 regions of neurological studies of the brain. But,
5 unfortunately, here we are. And I know -- I have a
6 feeling the State is going to talk about, well, they
7 brought up mental illness and that's similar. And I
8 think the thing we want to point out before we start
9 with Fetal Alcohol Syndrome is, my co-counsel put it
10 best, that the difference between organic brain damage
11 and mental illness is that mental illness is
12 subjective. Brain damage is objective. What he was,
13 mental illness is like soft tissue injury. People can
14 disagree on the diagnosis. You can't see it. On the
15 other hand, organic brain damage, you can see it. It's
16 like a broken bone. It's there. It's not on a
17 subjective basis. And I think this case highlights
18 that point, because the solicitor made a good point in
19 his closing argument that -- he noted that the two
20 experts they had disagreed on the diagnosis of mental
21 illness in this case, showing the subjective nature of
22 it.

23 We're going to talk a lot about neurological
24 issues. I think we will show that we are just now at
25 the tip of the iceberg of what we know about the brain.

1 We all know, people who've had Alzheimer's and all of a
2 sudden they're in an old folks home making
3 inappropriate comments, maybe even advances to people.
4 We know people who have had a stroke and for some
5 reason their brain makes them do different things. I
6 was watching a program a long time ago and this young
7 man got in a car wreck. And after the car wreck, when
8 he saw his father, he did not recognize him to the
9 point to where he got violent. And he got violent with
10 his father. But they noticed over time that if he went
11 outside and called the father from a portable phone and
12 called the father inside the house, he would recognize
13 him and he could talk to him, and he could get past the
14 violence. And they worked through this over months and
15 years of time.

16 Now, the program couldn't exactly explain what
17 went on there, why the car wreck did this to him. But
18 what it does show is, like we know and think in our own
19 life, is that the brain is a very complicated piece of
20 machinery and when there's damage to it, you can't
21 necessarily explain everything that happened, but we
22 know it makes a difference and it can cause people to
23 act inappropriately. And that's what we're going to
24 talk about a lot.

25 Your Honor, if there are any questions during the

1 trial we will certainly be willing to answer it. I
2 think we're ready to go forward right now. I think Mr.
3 Vieth is going to call the first witness.

4 THE COURT: Yes, sir, Mr. Vieth. You may
5 call your first witness.

6 MR. VIETH: May it please the Court. We call
7 Jan Vogelsane.

8 THE CLERK: Ms. Vogelsane, you do solemnly
9 swear that the testimony you are about to give in this
10 case will be the truth, the whole truth and nothing but
11 the truth, so help you God?

12 THE WITNESS: I do.

13 THE CLERK: Thank you. You may be seated.
14 Please state your full name for the record, and spell
15 it.

16 THE WITNESS: It's Jan, J-A-N,
17 Vogelsane, V, as in Victor, O-G-E-L-S-A-N-E.

18 JAN VOGELSANE,

19 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

20 MR. VIETH: May it please the Court.

21 DIRECT EXAMINATION

22 BY MR. VIETH:

23 Q. Jan, thanks for being here first of all. You live
24 in Greenville. Is that right?

25 A. Yes.

Q. And what do you do in Greenville as an occupation?

1 A. I have a private practice. I diagnose and treat
2 mental, emotional and behavioral disorders. I conduct
3 biopsychosocial assessments for the courts in various
4 types of cases. And I give educational presentations.

5 Q. And do you hold any degrees in that regard?

6 A. I have a Master's Degree in Social Work from the
7 University of South Carolina. I have an undergraduate
8 degree in Psychology from Pepperdine.

9 Q. Okay. You're a clinical social worker?

10 A. Yes.

11 Q. And you've also gotten involved -- well, let me
12 ask you this. You're certified now in social work;
13 right?

14 A. I'm Board Certified. I'm licensed by the State of
15 South Carolina.

16 Q. Okay. And have you been published in any
17 articles?

18 A. I have had a book published called *The Witness*
19 *Stand*. It was a guide for clinical social workers to
20 prepare them for the various types of cases they may
21 face as clinical social workers when they are called to
22 court.

23 Q. Have you held any appointments in South Carolina?

24 A. I have. I was appointed by Governor Campbell to
25 the Crime Victims Advisory Board. And I served on that

1 Board for approximately eight years.

2 Q. Now, when you say you're licensed to diagnose and
3 treat mental disorders, give us a little feedback on
4 what that means? You treat it by doing what?

5 A. Well, in my private practice, typically a client
6 is referred to you, they come for various reasons. It
7 may be depression. It may be anxiety. It could be
8 trauma, the whole panoply of problems that you find in
9 the diagnostic and statistical manual for mental
10 disorders. And so I talk with them. I do
11 biopsychosocial assessments on them and their families.
12 I gather as much information as I possibly can. I'm
13 trained in multi-disciplinary approach, which means
14 that if I think they need to be referred for test --
15 psychological testing, I will make that referral. I
16 will talk with that psychologist. We will go over the
17 results and share information. If it appears to me
18 that there condition is such that they need to be
19 evaluated for medication, I will refer them to a
20 psychiatrist. And, again, in a multi-disciplinary
21 approach, I will talk to that doctor, share information
22 and we will work together to make sure that the client
23 is getting the best type of pharmacological treatment
24 that they can get. And then, added to that, is a piece
25 of social work training that is broader and more

1 comprehensive than the other two. And they consult
2 with us in terms of education, culture, age, gender,
3 socioeconomic level, all the many life experiences, the
4 environment. And so we put those three pieces together
5 to come to the best possible conclusion and then plan
6 treatment. In the case of the court, the information
7 is gathered in the biopsychosocial assessment to assist
8 the court in the disposition of their case.

9 Q. And that being, like, it could be family law, it
10 could be criminal courts, civil courts? I guess all
11 dynamics of the courtroom?

12 A. Yes.

13 Q. Okay. And you've testified as an expert in that
14 field, have you not?

15 A. Yes, I have.

16 Q. Both state and federal courts?

17 A. Yes.

18 Q. And in this case, you were not retained or hired,
19 however you look at it, in this case, in that capacity
20 of your expertise. Is that fair to say? You weren't
21 in this to do a biopsychosocial investigation?

22 A. That's correct.

23 Q. You've done that plenty of times in death penalty
24 cases?

25 A. Yes.

1 Q. And without going through any specific numbers, do
2 you have a clue of how many death penalty cases you've
3 potentially worked on throughout the country?

4 A. I've worked on approximately -- I would say
5 somewhere around a hundred over twenty-five years.
6 I've testified in around sixty to sixty-five.

7 Q. And the ones that you have testified in, you would
8 do it as what they call mitigation expert. Is that
9 right?

10 A. Clinical social work expert.

11 Q. Right. And the point of that is to bring before
12 the jury, I suppose, everything from birth or pre-birth
13 to the point in time the Defendant stands before a jury
14 looking at a potential sentence of life or death. Is
15 that fair to say?

16 A. That's correct. It's using the clinical social
17 work training, especially where you have clinical
18 skills to tell the life story of the Defendant,
19 anything that might have impacted on him.

20 Q. Okay. But in this -- and when did you start,
21 let's put it that way. When did you start your death
22 penalty work, what decade or year?

23 A. I think the first case was around 1989, the Dodie
24 Allen case. And it was here in Greenville.

25 Q. Okay. Now, this case you were brought on board

1 in, I guess, 2003. Do you have any notes to recollect
2 that one way or the other?

3 A. I believe that's correct. I think we first
4 started talking about the case in 2003.

5 Q. The trial was in 2005.

6 A. Right. My invoices reflect work that I was
7 reimbursed for starting early in 2004.

8 Q. Okay. And what was your primary role, Jan, in
9 this case?

10 A. It was basically as the mitigation investigator.

11 Q. How does that role differ from a testifying
12 expert?

13 A. Well, I still have clinical skills that I can't
14 forget that I have. This role is more locating family
15 members and non-family members, conducting all the
16 initial interviews with them, forming a relationship
17 with them, visiting with the Defendant and getting to
18 know the Defendant, gathering information about the
19 history. It is visiting the community where the
20 Defendant grew up. It is asking family members to sign
21 releases and gathering as many documents as you can
22 possibly obtain that either support or do not support
23 the information you're gathering from the family and
24 from others. It includes being aware of studies and
25 literature that might be applicable to what you are

1 learning. It includes consulting with other experts.

2 And at some point, talking with attorneys about the
3 appropriate experts to bring onto the case. I don't
4 have the legal aspect of investigation that most
5 mitigation investigators have. But I've only done this
6 at Mr. Mauldin's office where it was not necessary for
7 me to have that legal training. And by legal training,
8 I don't mean going to law school. I mean as these laws
9 apply to death penalty work.

10 Q. Okay. The investigator does not usually testify
11 in person; correct?

12 A. The mitigation investigator should not ever
13 testify.

14 Q. And that's because you're gaining some information
15 that's good or bad and anything can be disclosed on the
16 witness stand. Is that correct?

17 A. Correct.

18 Q. So you're bringing the information that you
19 obtained as an investigator to basically the attorneys
20 to show them what you've gathered through your
21 investigation?

22 A. That's correct.

23 Q. And was this the first time you had done that in
24 your practice? Was this the first time you were an
25 investigator?

1 A. I believe this was my first case. If not, it
2 would have been one of the first couple that I did this
3 way.

4 Q. Okay. And did you say, and maybe I missed you,
5 did you say that you only did investigative work for
6 Mr. Mauldin?

7 A. I've never done it anywhere else for anyone else,
8 except out of this office here.

9 Q. Okay. Is that a personal reason why you don't do
10 investigation, is that a preference you have?

11 A. I think of myself as the clinical social work
12 expert. I wanted the opportunity to act as the
13 investigator. I am called upon in most cases to direct
14 the investigators to a significant degree in what they
15 gather and the information I need to be able to get on
16 the witness stand and tell the story. And I am called
17 upon in training to answer many of their questions.
18 And so I wanted the opportunity to have that experience
19 from that point of view. Many of the tasks and
20 activities, especially in the beginning, are
21 overlapping. I just happened to have the mental health
22 and clinical background. I would add to that that
23 there are many mitigation investigators who do not have
24 -- most do not have a mental health background. And
25 most just wear that hat alone. They do not get on the

1 witness stand.

2 Q. Right. And their role is extremely important. It
3 brings the information to the lawyers?

4 A. Yes. That's how the information about the family
5 and the family history gets to the lawyers.

6 Q. Okay. Of course, in this case, I assume you
7 learned in your investigation that Chris Williams, a
8 lot of his family was from Germany?

9 A. That's correct.

10 Q. And part of what you do, I guess early on, is a
11 preliminary, what you call a family tree. Is that
12 right?

13 A. Yes.

14 Q. Okay. It's got a different name, Geno ---

15 A. Genogram.

16 Q. Genogram. But it's a family tree; right?

17 A. Yes.

18 Q. And we have marked this already, Jan, as
19 Plaintiff's Exhibit 1. I'd ask if you would --

20 MR. VIETH: And, Your Honor, we've marked all
21 these Exhibits without objection, we're going to be
22 putting them in.

23 THE COURT: All right. All Exhibits used
24 will then be admitted without objection?

25 MR. VIETH: Yes, sir.

1 MR. ZELENKA: I'm not sure ---

2 THE COURT: Those that are already marked
3 then? Did you object to some?

4 MR. ZELENKA: Well, I'm not sure what you all
5 marked. There are a couple of affidavits that I've got
6 ---

7 THE COURT: Well, you object if ---

8 MR. ZELENKA: We don't have any objection to
9 those we understand are coming in through Ms.
10 Vogelsane.

11 THE COURT: All right.

12 Q. So referring to Plaintiff's Exhibit 1, Jan, this
13 shows a preliminary family tree with Chris in the
14 bottom right corner. Is that right?

15 A. Yes.

16 Q. And if you follow that tree up, it gets to Dwight
17 as the father and Daisy as the mother. Is that
18 correct?

19 A. Yes.

20 Q. And it shows the mother on the left side of that
21 tree being born in 1948?

22 A. Yes.

23 Q. Okay. Now, when you take that family tree of
24 Daisy further up into her parents and grandparents,
25 there apparently is listed a Norman Bruno Brown, an

1 Otto, a Walter, Mary, Fred, Erika, Hilda, These, it
2 looks like, Margarete These and Otto These. Does that
3 look right on that chart?

4 A. Yes.

5 Q. Okay. And did you get to talk to any of those
6 people above Daisy's name?

7 A. No.

8 Q. Was there any reason that you know of why you
9 didn't get to talk to any of those people?

10 A. Well, the -- interviewing them would have required
11 going to Germany. And I believe originally I had
12 thought to California. It turned out, I believe, to be
13 one of the Dakotas.

14 Q. And I believe that was the mother that moved to
15 Idaho at some point?

16 A. Yes.

17 Q. So typically if you were having a good scenario
18 that you would want, how many generations would you
19 like to talk to if they were alive?

20 A. I try to do four or five generations at least. I
21 think the requirement may be three. But most of my
22 family trees go four or five generations. And I've
23 even had more than that.

24 Q. And on the right side, under Dwight, you had
25 basically him and his family being basically in the

1 Greenville area. Correct?

2 A. Yes.

3 Q. And that was easy for you to contact and talk to
4 them?

5 A. Yes.

6 Q. Correct?

7 A. Yes.

8 Q. Was this the only county that you did your
9 investigation in, as you recall? Did you go to Florida
10 to see A.C. Williams or did you go anywhere besides
11 Greenville?

12 A. I remember us talking about me going to Florida.
13 I do not remember going to Florida, but I do believe I
14 interviewed Mr. A.C. Williams by telephone, if I recall
15 correctly. And I noticed in one of my invoices that I
16 had gone to Columbia. But I think that was to
17 interview another expert, and my invoice didn't
18 indicate which expert that was. Other than that, I
19 don't recall travel anywhere else outside of Greenville
20 County.

21 Q. And when you say preliminary tree, this is
22 something that you learned early-on in your
23 investigation?

24 A. Yes. This is sort of a work in progress. It's an
25 evolving visual aid that ultimately will be used in

1 court. And you add people as you find out about them.

2 Q. And do you recall -- I know it's been a long time
3 ago. Do you recall whether any discussions were made
4 between you and your Defense team -- and by the way the
5 Defense team was John Mauldin, Bill Nettles, you. And
6 who was your social worker, do you remember?

7 A. Marjorie Hammock was the social worker expert.

8 And then there were two investigators out of Mr.
9 Mauldin's office that assisted in locating some of the
10 people and doing some background checks, that sort of
11 thing.

12 Q. Okay. Do you recall any discussions about getting
13 funding to send you to Germany?

14 A. I recall it being mentioned two or three times
15 when I raised it between myself and Mr. Mauldin. And I
16 pretty much knew the answer up front, and knew that
17 that was not going to happen and it did not happen.
18 But I did raise it.

19 Q. So you felt you needed to go?

20 A. Yes.

21 Q. Okay. Now, when you say you felt you knew the
22 answer, what did you feel that answer would be?

23 A. That the budget would not allow for me to go to
24 Germany.

25 Q. Did you know that because of Chris being born to a

1 German National that he was, in fact, a dual citizen?

2 A. I did not know that.

3 Q. Okay. Have you ever heard of the group Reprieve?

4 A. I had not. I have now, but I had not at the time,
5 no.

6 Q. Okay. And you know now that Reprieve is a
7 European group that helps people that have this kind of
8 problem with indigent Defendants?

9 A. Yes.

10 Q. I'm going to show you Plaintiff's Exhibit 2 and
11 ask at the top of that does that indicate Reprieve?

12 A. It does.

13 Q. Okay. And just scanning at it without making any
14 references to it, does it appear to be an investigation
15 done by the group Reprieve, relative to this PCR case?

16 A. It does.

17 Q. Okay. Do you know whether that -- well, I take it
18 from your question a minute ago that you didn't know
19 what Reprieve -- several years ago, that is not
20 something that was discussed as an option, you going to
21 Germany?

22 A. No, that's correct.

23 Q. Okay. And, also, Plaintiff's Exhibit 2-A, I ask
24 you if you can take a look at that affidavit and --
25 from Linda Mroz, who indicates in that affidavit that

1 she is what?

2 A. That she's a mitigation investigator in Idaho.

3 Q. Okay. And did she give some summary in her
4 affidavit as to Chris Williams' family related to this
5 PCR case?

6 A. Yes.

7 Q. And was any discussion made about getting someone
8 in Idaho, other than you, to talk to anyone -- to
9 Erika, who was in Idaho?

10 A. I don't recall there being a discussion of that.

11 MR. VIETH: You want me to hand those up,
12 Judge?

13 MR. ZELENKA: Your Honor, we don't have any
14 objection to either of those documents. From what we
15 understand it's a limited purpose, but they're being
16 introduced which are sources that could have been used
17 or can be used in an investigation outside of the local
18 area. We do not -- we object to the substance of the
19 information in those documents as being hearsay. We
20 understand it's not being introduced for the truth of
21 the matter asserted.

22 MR. VIETH: That's correct, Your Honor.

23 THE COURT: All right. Your objection is
24 noted.

25 Q. All right. So, Jan, so at this point in time in

1 the investigation, we weren't going to go to Germany.
2 We had no funding that you knew of to go to Germany and
3 no efforts were made to contact that left side of the
4 family tree?

5 A. That's correct.

6 Q. But what you did in your investigation, though,
7 among other things, was to get school records, mental
8 health records, any records you could find related to
9 Chris Williams?

10 A. Yes.

11 Q. And let me show you a couple of these. In that
12 regard, I'm going to give you Plaintiff's Exhibit 3.
13 And I ask if you will just take a quick look at that
14 and tell us if that's part of a first grade report?

15 A. Yes.

16 Q. Okay. And on that report does it say Chris is
17 ready for a good year in first grade next year?

18 A. It does.

19 Q. So obviously part of your report to the lawyers
20 was that he failed the first grade, had to repeat it?

21 A. Yes.

22 Q. And Plaintiff's Exhibit 4 -- I don't know how to
23 handle this. Put them there for a minute. Plaintiff's
24 Exhibit 4, this is a psychological evaluation; is that
25 correct?

1 A. Yes.

2 Q. And that psychological evaluation of Chris, can
3 you tell us the date he was evaluated?

4 A. September the 25th, 1990.

5 Q. And his date of birth, right below that?

6 A. December 11th, 1982.

7 Q. Okay. Now, this came from Taylors Elementary
8 School in Greenville County?

9 A. Yes.

10 Q. Okay. And it says top right, grade 1 repeating.
11 And then it says first evaluation. Is that correct?

12 A. Yes.

13 Q. And just reading briefly with me, Jan, the
14 background information, Chris is currently repeating
15 the first grade at Taylors Elementary School. Chris's
16 teacher reports that he is very distractable in the
17 classroom has difficulty attending to complete task.
18 She has, that he exhibits high level energy and has
19 difficulty staying seated at times. That's part of the
20 report; isn't it?

21 A. Yes.

22 Q. And, of course, it goes on to make
23 recommendations. And directing your attention over to
24 page three, if you would, where it says discussion and
25 recommendations. In the last sentence in that first

1 paragraph, a relative weakness was noted on a sub-test
2 requiring extended attention to visual motor tasks. In
3 the middle of the next paragraph, there was a
4 significant discrepancy noted between Christopher's
5 ability level and achievement in the area of word
6 attack skills. Do you see that?

7 A. Yes.

8 Q. And then the last sentence in that paragraph, at
9 this time Chris is demonstrating significant
10 discrepancy between aptitude and achievement in the
11 area of basic reading skills and listening and
12 comprehension. Correct?

13 A. Yes.

14 Q. Go down to a short paragraph that says personality
15 screening testing indicated tendencies towards
16 impulsivity with suggestion of tension and feelings of
17 inadequacy in peer relationships. Do you see that?

18 A. Yes.

19 Q. Are these things that you could have noticed in
20 Chris when you saw him as a twenty-year-old? Did you
21 see impulsivity? Did you see any of those things of
22 your own knowledge in what you did?

23 A. No.

24 Q. Do you know that he, when he went to -- in that
25 time frame was he referred to a learning disability?

1 Do you remember that?

2 A. He was ---

3 Q. Go to the last page there, I'm sorry. Go to page
4 five, recommendation, test results indicates that Chris
5 meets the criteria for special education as a learning
6 disability student at this time.

7 A. Yes.

8 Q. Okay. Now, in Plaintiff's Exhibit 5, Christie
9 Pediatric Group. What are they, do you remember?

10 A. They were a pediatric group.

11 Q. Okay. In Greenville?

12 A. In Greenville, yeah.

13 Q. All right. Directing -- that's the only copy I've
14 got so I've got to stand over you. Dr. Shaw, Harold
15 Shaw, at the back of it, does he talk anything about
16 Chris' eyes or any -- if you would look at maybe that
17 second paragraph. Does he talk about -- if you would
18 just read that if you can?

19 A. Do you want me to read it out loud?

20 Q. Yes. Just read that?

21 A. On examination today Christopher fixed and
22 followed well with either eye. Cycloplegic refraction
23 measured plus fifty OU. He good optically elicited
24 responses. Motility testing revealed orthophoria in
25 primary position, which broke into exotropia in up-

1 gaze. He had prominent bilateral inferior oblique over
2 action. His examination was otherwise normal.

3 Q. Okay. All right. Now, one other school record, I
4 think. Going to Plaintiff's Exhibit 6, this will be
5 the second grade. And do you recognize that being a
6 second grade report?

7 A. Yes.

8 Q. Okay. And just the highlighted portions there,
9 read what they say there?

10 A. Reading recognition four point one. Due to
11 Chris's disability he is not working up to his ability
12 in the classroom. Due to his learning disabilities,
13 Chris is easily distracted in the regular classroom.

14 Q. All right. Now, we've got, and I'm not going to
15 go through them, Jan, but these are -- well, I'll let
16 you not open them up, I'm not going to take the Court's
17 time on them, but is this a package of the
18 investigation you did regarding school records?

19 A. Yes.

20 Q. Okay. And what I've introduced without objection
21 are just parts of what all are in these records. Is
22 that true?

23 A. Yes.

24 Q. Now, in addition to getting the school records,
25 you talked with family members as part of your

1 investigation. In that regard, did you have a
2 conversation with Dwight Williams?

3 A. Yes.

4 Q. Who is Dwight Williams?

5 A. He's the father of Chris Williams.

6 Q. He's the father of Chris?

7 A. Yes.

8 Q. Okay. I want to show you Plaintiff's Exhibit 7
9 and ask you to take a minute and review your notes
10 there and see if you remember that note of March 18,
11 2004?

12 A. Yes.

13 Q. Okay. And what is that, Jan?

14 A. These are interview notes from my interview with
15 Mr. Williams, Chris's father.

16 Q. Okay. And this data was March 18th of 2004. Is
17 that right?

18 A. Yes. And going down to the third paragraph, Mr.
19 Williams began ... Read that for us, please?

20 A. Mr. Williams began by talking about his wife's
21 drinking problem. He states that his wife, Daisy,
22 drank during her pregnancy with Chris.

23 Q. I also want to show you Plaintiff's Exhibit 8. Is
24 that part of the notes that you took?

25 A. Yes.

1 Q. Okay. And what does number two say?

2 A. Chris was born to a mother who smoked and drank
3 during her pregnancy.

4 Q. And, of course, there's more things on it, but
5 relative to what I'm asking that's on your report. Did
6 you also have an occasion to talk to Maureen, his
7 sister?

8 A. Yes.

9 Q. All right. And this is from your files on an
10 interview with Maureen. It's not dated. But if you
11 could look at it and look down to the fourth paragraph.
12 Daisy drank everything and smoked during her pregnancy.
13 Do you see that?

14 A. Yes.

15 Q. That would be your notes. So that's from Maureen,
16 your interview with her?

17 A. Yes.

18 Q. Okay. So at this point we know we've got some
19 school issues and we know that we have some drinking by
20 the mother through the pregnancy?

21 A. Yes.

22 Q. And then as part of your collaboration with the
23 Defense team, do you customarily make what is known to
24 you, a preliminary accumulation of harmful risk
25 factors, that's Plaintiff's Exhibit 10?

1 A. Yes.

2 Q. All right. Let's go over that a little bit, Jan.

3 Does that look like your work product?

4 A. It is.

5 Q. Okay. Mother abandoned by her mother, father

6 unknown. And this is preliminary; correct?

7 A. Yes.

8 Q. Okay. Father abandoned by his father, mother

9 abandoned her first two children. Mother drank and

10 smoked throughout the pregnancy. And then it goes to

11 other risk factors you're going through, that the

12 parents were violent and drank, smoked pot, fought

13 daily, early learning problems, early exposure to guns,

14 violence and threat of harm. Parents failed to

15 socialize Chris or seek intervention for him.

16 Basically, it's one, two, three, four, five, six,

17 seven, eight, nine, ten, eleven, twelve -- it looks

18 like twenty-three preliminary risk factors through your

19 investigation?

20 A. Yes.

21 Q. Deeply affected by divorce, developmental delays,

22 everything that you've -- you don't make this stuff up;

23 right?

24 A. This is all from information I had learned during

25 the initial investigation, during approximately the

1 first three months.

2 Q. Okay. And then -- you tell me how it works. Do
3 you take this to Mr. Mauldin and Mr. Nettles and you
4 sit down and talk about it or how does that work?

5 A. Well, generally, I try to put something like this
6 together, along with some, what appear at that time to
7 be overriding themes. And I try to have that prepared
8 before one of the meetings so that everyone on the team
9 is aware of what we're discovering. And by everyone,
10 I mean, the attorneys and anybody else that is involved
11 with the case that has been invited to the meeting.

12 And so I go over those. I go over the themes that
13 appear at that time to be developing. In the beginning
14 of a case, everything is on the table. You don't want
15 to rule anything in or out too quickly, too soon. But
16 these are the pieces of information from interviews and
17 from records that I had gathered to that point that I
18 was then going to distribute and discuss at the next
19 team meeting, which I think occurred at some point
20 right after that was created.

21 Q. Okay. And with that is, I guess what you referred
22 to a minute ago as a theme, Plaintiff's Exhibit 11?

23 A. Yes.

24 Q. Alcohol and drug use by parents, family violence,
25 mental illness in the family, sexualized environment,

1 sexual abuse, parental corruption, disassociation,
2 developmental delays regarding relationships, emotions,
3 learning disabilities?

4 A. That's correct. And I think those were probably
5 generated at the same time.

6 Q. Okay. So you're not making the call, you're just
7 saying here's what we've got?

8 A. Right. Those are not diagnoses. This is just
9 information I've gathered from the interviews and from
10 whatever records I've received up to that point.

11 Q. Okay. So at this point we have the drinking
12 through the pregnancy, as given to John, to Mr. Mauldin
13 and Mr. Nettles, along with other potential factors.
14 And then through the process, I guess, of going to get
15 ready for trial, you start eliminating risk factors?

16 A. Yes. Well, I don't know about eliminating risk
17 factors. Again, it's an evolving process. And
18 depending on the documents that come in, depending on
19 additional interviews, some things move to the
20 forefront and some things, I won't say they move to the
21 back. But a lot of it depends on the kind of support
22 you have for what you're learning and what you're
23 providing to the attorneys.

24 Q. Okay. Did you have records for Daisy that showed
25 that she had alcoholic problems even after this case

1 was -- even after this incident took place at the Bi-Lo
2 grocery store?

3 A. I did.

4 Q. No question in your mind from your own knowledge,
5 from the records you got, plus the interviews you had,
6 that Daisy was an alcoholic?

7 A. Correct.

8 Q. And to your knowledge, nothing was ever done, or
9 was it, during these meetings to rule out the fact that
10 she drank during the pregnancy, as to how it might
11 impact Chris Williams?

12 A. Can you repeat that question?

13 Q. Sure. And it was complicated. Based on the
14 information that you'd gathered thus far, was there
15 anything to say, well, at least we know he doesn't have
16 Fetal Alcohol Syndrome?

17 A. No.

18 Q. Okay. That was still a risk factor on paper?

19 A. Yes.

20 Q. Then in 2004, August of 2004, there was a
21 neuropsychological evaluation done, I believe, by Dr.
22 Evans, or a psychological evaluation done by Dr. Evans.

23

24 A. It's a neuropsych battery that he does.

25 Q. And I'm showing you Plaintiff's Exhibit 12. And

1 once again, I'm going to need to stand over with you a
2 little bit, but that's Exhibit 12, I think, that's in
3 evidence. Can you look at that and tell if that's a
4 summary of your notes after talking to Dr. Evans?

5 A. Yes.

6 Q. Okay. Let me just have it for a minute.

7 A. I think there were two different pages.

8 Q. Yeah. Two pages?

9 A. Yes.

10 Q. And I'm going to go over this because I don't have
11 a copy with me, okay? But it says Dr. Evans stated
12 from his notes that Chris had an average I.Q., but
13 there was a split by fifteen points between verbal and
14 performance parts.

15 A. Yes.

16 Q. Okay. Dr. Evans found that while Chris had a math
17 disability, his listening comprehension is normal, even
18 though school records show a listening comprehension
19 problem?

20 A. Yes.

21 Q. On the neuropsych portion of the test, the
22 Halstead, Chris scored a point three on the impairment
23 index, indicating mild brain damage?

24 A. Yes.

25 Q. Okay. And he said this could account for the I.Q.

1 split between verbal and performance?

2 A. Yes.

3 Q. That's brain damage?

4 A. Yes.

5 Q. Okay. There was an indication of impairment in
6 the parietal cortical area with low decreased coherence
7 which could account for his disability in Arithmetic.

8 He has an indentation in the head in this area where he
9 was hit with a hammer at the age of four or five.

10 Those area your notes as his report?

11 A. Yes.

12 Q. There is some evidence of frontal lobe damage with
13 rigid thought and some impulsivity. He responded
14 impulsively to test questions. That's your notes?

15 A. Yes.

16 Q. In Dr. Evans' opinion, there is a psychiatric
17 personality component to Chris' behavior. He theorizes
18 that Chris was depressed prior to the crime and one
19 could argue for psychotic depression. And he gives
20 other comments. Frontal impairment could contribute to
21 the mild brain damage, combined with a psychotic
22 depression. The report's in here, so it is what it is.
23 But those are things that I read that's in this report?

24 A. Yes.

25 Q. Okay. And then are these your notes? Are those

1 handwritten notes that's also part of Plaintiff's

2 Exhibit 12?

3 A. These look like my notes, yes.

4 Q. And are those the notes from the conversation with
5 Dr. Evans? Take your time to look through them.

6 A. I believe these are the notes that I took during
7 my discussion with him on the phone, yes.

8 Q. Okay.

9 A. I mean, it looks like it is completely related to
10 this.

11 Q. You would write it down and then prepare a
12 memorandum?

13 A. Right. Some of these I think are repeat thoughts.

14 Q. Do we have the same thing twice?

15 A. There's just some repeats, but I think this is --
16 yeah. That one's eight -- see, here's another date, so
17 I don't know if these are mixed in or ---

18 Q. This date was 8/2/04.

19 A. Is this the date?

20 Q. Well, your typed document says August 25, but I
21 assume you could take the notes and then type it up a
22 week or two later.

23 A. Well, they are all my notes.

24 Q. They're your notes.

25 A. Based on discussions with Dr. Evans.

1 Q. Okay. That's all I need to know. And so then on
2 one specific page that -- let's see, the top of the
3 page has something like -- can you read your writing
4 there, what that says at the top of the page?

5 A. Perceptual organization index. I think that would
6 be the name of one of the tests Dr. Evans did.

7 Q. Okay. On the page that has that on it at the top,
8 it says down here, took longer with left hand. These
9 are tests he's doing; right? Where he's having the
10 right and the left hand and does the testing to see if
11 he can do certain acts; right?

12 A. Yes.

13 Q. And it says, took longer with left hand. Three
14 trials to catch on, as though no corpus callosum?

15 A. Yes.

16 Q. That's what that says; right?

17 A. Yes.

18 Q. Okay. And do you know what that would mean?

19 A. I have an idea about what that means because that
20 is the part that runs down the middle of the brain.
21 And he's sort of saying it's not operating or
22 functioning properly in the transfer of information
23 from one side to the other.

24 Q. Right. Now, in fairness, if I could see that just
25 one more time, please. In fairness to what I expect on

1 cross to some degree, it says at the bottom here, Dr.

2 Evans did not recommend an MRI or CT or EEG?

3 A. Correct.

4 Q. Okay. And without his input, we don't know why he
5 didn't recommend it. That's just what your notes
6 reflect?

7 A. Correct.

8 Q. Okay. But he does say that he's got brain damage
9 and that it was as if there was no corpus callosum?

10 A. Yes.

11 Q. In some of the testing?

12 A. Yes.

13 Q. Now, at or about the same time frame, you were
14 getting Dr. Richards, who is a psychiatrist, Dr. Robert
15 Richards, to also look at it?

16 A. That's correct.

17 Q. And I believe Dr. Richards actually testified at
18 the trial?

19 A. Yes.

20 Q. And Dr. Richards testified that he was bipolar and
21 that was the thrust of the trial itself, that he was
22 bipolar; correct?

23 A. Yes.

24 Q. With some secondary impulsivity or something of
25 that nature?

1 A. Correct.

2 Q. Okay. Now, when he saw Chris -- let me show you
3 Plaintiff's Exhibit 13 and ask you to take a second and
4 review that to see if you can recall that being an
5 email from you to John Mauldin, August 25, 2004? It
6 says, Re: Evans' findings. Take your time and read
7 that.

8 A. Okay.

9 Q. Okay. Now, in that email you're sending to John
10 and John's response says confirmed by phone. Is it
11 fair to say that in this email it reflects that Rob
12 Richards, who did testify, wanted to get an MRI done
13 immediately?

14 A. Yes.

15 Q. He said he would order an -- and basically he said
16 he got real excited about some condition of brain
17 deterioration he knows about and wanted to see the
18 QEEG. I think -- basically, I'm just going to read
19 this email in the record. In the meantime, I had a
20 call from Rob Richards who, in his enthusiasm, I think
21 I remembered that was what it was like. He asked me
22 about brain damage. I told him we had a little. He
23 asked what and I told him little parietal to frontal.
24 Then he got real excited about some condition of brain
25 deterioration he knows about and wanted to see the

1 QEEG. I told him, whoa, down boy. And while we would
2 be very interested in his theory, he has to wait a
3 minute. He said he would order an MRI immediately.
4 But I cooled his jets and he wants the birth records to
5 get the circumference of Chris' head at birth and his
6 school testing. I told him I would get that to him if
7 you approved. This is John. He wants it for weekend
8 reading. There's nothing harmful in there that I can
9 see. I know you want him to go to the introductory
10 meeting with an open mind, but I don't think the school
11 and birth can hurt. And then you have other things in
12 there that's not related. So you had, I guess, in the
13 same month basically, you had Jim Evans giving his
14 eval, brain damage, frontal lobe brain damage. It
15 appeared as if there's no corpus callosum, and says, I
16 don't think we need an MRI. Then you have Mr. Richards
17 -- Dr. Richards saying, let's get one right away. So
18 you just had a conflict and I guess the two didn't know
19 the others were talking. Is that fair to say?
20 A. At that point I think that would be correct.
21 Q. Okay. And then there was not an MRI done actually
22 until -- the results really weren't known until the
23 weekend prior to voir dire in the death penalty case,
24 before a jury started being interviewed. Did you know
25 that?

1 A. I did not recall that until you and I talked about
2 it.

3 Q. Okay. They were still getting the results from
4 Dr. Griesemer the week before the trial, which was in
5 February of 2005?

6 A. And I think I told you I don't remember Dr.
7 Griesemer.

8 Q. Right. Okay. So if you know, is it fair to say
9 that at some point in time through this trial, Evans
10 didn't know what Richards was saying, Richards didn't
11 know what Evans was saying and Griesemer didn't know
12 what either one of them were saying?

13 A. That is correct.

14 Q. Now, and finally in your expertise -- shift and
15 channel from investigator -- if there was organic brain
16 damage, if there's something you could see on a
17 picture, to a jury -- and you've been in jury trials a
18 lot -- would you think that a jury would be more
19 impressed to see if there is an actual, visible brain
20 damage as opposed to someone talking about the brain or
21 mental illness?

22 MR. ZELENKA: Your Honor, I object. It calls
23 for speculation beyond her area of expertise.

24 THE COURT: I sustain the objection.

25 MR. VIETH: Your Honor, she can treat

1 disorders, mental disorders, she's been in trials.

2 THE COURT: But, I mean, she's going to
3 testify to what juries would do? Maybe you can ---

4 MR. VIETH: Well, let me ask it as her
5 without a jury. I mean, it's almost ---

6 THE COURT: What was your question? What
7 would a jury think about an MRI report rather than
8 verbal testimony?

9 MR. VIETH: The argument, Judge, is clearly
10 one that I brought up months ago or weeks ago, was that
11 when I deal in plaintiff's work and deal with an
12 insurance company's lawyer, they're going to be more
13 willing to settle a case if they see a broken bone,
14 than if they say, my neck hurts. And it's because one
15 you can see, the other you can't. So my analogy is the
16 same. If you can see brain damage, can visibly see it,
17 would it mean -- could it mean more to a jury than if
18 you just talked about schizophrenia or bipolar, you
19 don't know anything about these. And that's the
20 analogy I'm making with it.

21 THE COURT: Well, maybe you can rephrase your
22 question. If she has ---

23 Q. Well, I can just phrase it this way. Have you
24 seen organic brain damage, have you seen pictures of
25 the brain damage?

1 A. Yes.

2 Q. Is that indicative to you that something is wrong
3 with the brain?

4 A. Yes.

5 Q. Okay.

6 MR. VIETH: That's all I have, Your Honor.

7 Wait. Hold on a second.

8 Q. Jan, my last question, regarding AC on the family
9 tree, you said you thought you talked to him on the
10 phone. We just couldn't find any records of it. Do
11 you know whether you talked to him or not?

12 A. I thought I saw a note somewhere where I did talk
13 to him. I know we had talked about me going to
14 Florida. I don't believe I did that. But I thought I
15 saw a note somewhere where I spoke with him.

16 Q. Okay.

17 MR. VIETH: All right. I think that's all,
18 Judge. Thank you. Answer any questions Mr. Zelenka
19 may have.

20 **CROSS-EXAMINATION**

21 **BY MR. ZELENKA:**

22 Q. Ms. Vogelsane, as I understand your testimony,
23 this was probably the first case that you appeared
24 primarily as a mitigation investigator?

25 A. I believe it was the first one. It was no more

1 than the second one.

2 Q. And one thing you said on direct examination was
3 interesting, at the outset, you said a mitigation
4 investigator should never testify at the trial. Is
5 that correct?

6 A. That's correct.

7 Q. And why did you say that?

8 A. Because the mitigation investigator is actually
9 part of the legal team. They have access to
10 interviews, information, records, that strategically
11 sometimes the team decides that they are not going to
12 use or do not want to have as part of their
13 presentation of the case. And so they are acting in a
14 completely different role from expert witnesses and
15 others.

16 Q. Okay. Well, it struck me, and maybe I
17 misunderstood the context of your answer, that the
18 concern you had was that you would know some
19 information that was not given to the actual experts
20 who testified, like the social worker who actually
21 testified. Did I misunderstand your answer?

22 A. Well, the only example I can give you that I can
23 just recall off the top of my head is a situation, for
24 example, where motions have been made and a Judge has
25 ruled that certain documents cannot come in. Yet, as

1 the investigator, you know about those documents. And
2 so because it has been ruled that they can't come in,
3 those are not -- you know, they're just part of the --
4 what the legal team has access to.

5 Q. As a mitigation investigator and with your
6 background in social work, what was your
7 interrelationship with Dr. Hammock who ended up being
8 the testifying expert social worker in this case?

9 A. Dr. Hammock is a colleague that I have known for
10 many, many years. She does the same thing that I do
11 when I act as an expert. She is a clinical social
12 worker. She has testified in a number of death penalty
13 cases. And so at some point when she was asked to be
14 the testifying clinical social worker, at that point,
15 with Mr. Mauldin's permission, she was provided with
16 certain documents. The typical kinds of documents that
17 we usually give the person who's going to tell the
18 story of the Defendant's life. I consulted with her.
19 I talked to her about the history right up until the
20 time she testified and was prepped by Mr. Mauldin.

21 Q. Were you present in Court when she testified?

22 A. I believe I was, yes.

23 Q. Okay. And with these materials that you provided
24 to her, did those include the documents and memos that
25 have been introduced today with respect to your own

1 documentation?

2 A. I would say that most of it was given to her. We
3 typically do not share the attorney work product memos
4 that are just between me and the attorneys. But the
5 way that I get that information to the expert is
6 through consultation, through the expert taking notes.
7 Taking the expert around to meet the family members.
8 Any number of other ways. Going through the documents
9 with them, you know, they read the documents, they ask
10 questions. So I think I saw a list today of the things
11 that were given to experts this morning on a CD I had.
12 And she was given the usual typical types of medical,
13 mental health, psychiatric, those kinds of records.

14 Q. Was she given the information that you have about
15 your themes in writing?

16 A. I don't recall if she was given that in writing.
17 But those are typically turned into a visual aid. So,
18 if the accumulation of risk factors was turned into a
19 visual aid, she would have gotten that.

20 Q. Did you have a discussion with her about the fact
21 that the mother, Daisy, was a German citizen?

22 A. I don't recall having a discussion. I think I
23 told her that she was born in Germany, yeah.

24 Q. Okay. Did you have a discussion with her about
25 the fact, as you determined, that she was an alcoholic?

1 A. I told her that I had learned from the father and
2 from the daughter that she drank during her pregnancy
3 with Chris, not from her, but from the two family
4 members.

5 Q. And do you specifically recall telling that to the
6 social worker?

7 A. Well, I don't remember a specific date. I don't
8 remember a specific conversation, but these are the
9 kind of things that, of course, I would share with the
10 social work expert.

11 Q. And why would you think it would be important, in
12 your role as the mitigation investigator, to get that
13 type of information about a mother's drinking during
14 pregnancy to the social worker who testified?

15 A. It's one of the criterium of Fetal Alcohol
16 Syndrome. And no matter what the information you're
17 gathering, a mother who is reported to drink or who has
18 or has not said that she did drink, is always important
19 information.

20 Q. And in 2004 or 2005, general medical practice
21 warned women against drinking alcohol during pregnancy.
22 This wasn't shocking and new developments at that
23 particular time; wasn't it?

24 A. Correct. That's correct.

25 Q. And in your role as a social worker, had you been

1 in a reverse situation, that is clearly information
2 that you would have wanted to know in preparing your
3 own bio-social psychological assessment. Isn't that
4 correct?

5 A. Yes.

6 Q. So that struck you as important in 2004 and 2005?

7 A. Yes.

8 Q. And it would have been important for you to give
9 and discuss that information with the attorneys, also.
10 Isn't that correct?

11 A. Yes.

12 Q. Other than Ms. Hammock, and both the attorneys
13 involved in the case, did you have discussions with any
14 of the other expert witnesses about the information you
15 had gathered concerning the pregnancy issue?

16 A. I am confident that I did, only because, while,
17 again, I did not document it, while, again, I can't
18 give you the specific dates or times, but before I meet
19 with Dr. Evans, before I meet with Dr. Richards, both
20 of whom I've worked with before, I always share the
21 most -- what I consider the most important factors
22 about the client's history.

23 Q. And did you consider that to be one of the most
24 important factors, the alcoholism ---

25 A. I do, yes.

1 Q. --- within that family?

2 A. Yes, I do.

3 Q. Okay. So at the time in 2004 to 2005, what
4 knowledge did you have concerning what we then called
5 Fetal Alcohol Syndrome? Is that something -- symptoms
6 criteria something that you were aware of at that time?

7

8 A. Yes, I was.

9 Q. And how did you become aware of it in 2004 and
10 2005?

11 A. Well, I've been aware of it since the late
12 seventies. My first job out of graduate school was in
13 South Central L.A., and a significant number of the
14 families that I worked with had children with
15 developmental delays from mom's drinking or drug use.
16 So this was a subject we learned about in school, in
17 our training, in our internships. And so from that
18 point, I was certainly aware of what it was, the kind
19 of developmental problems you might see. I would never
20 have considered it an area of expertise. With
21 continuing education, I became certified in alcohol and
22 drug use, in which it was included. I studied under
23 Dr. Evan Copeland, Development Disorders and got
24 special certification. And so I would say along the
25 way of my career, I've been aware of the importance of

1 maternal alcohol consumption.

2 Q. Did you learn about some of the symptoms with the
3 children of individuals in that setting in your
4 practice at that time?

5 A. Yes.

6 Q. To be aware of and to look for?

7 A. Yes.

8 Q. Or if they were, in fact, clients?

9 A. Yes.

10 Q. And when you had that information as a clinical
11 social worker, what steps would you generally take?

12 A. The reports of others who were witnesses.
13 However, they need to be reliable witnesses. Anything
14 I find in documents. A discussion with the mother as
15 to whether or not she drank during the pregnancy. The
16 details of the drinking and the amount and how
17 frequently. And then, of course, there's looking at
18 information, of behaviors, either through school
19 records or medical records that are consistent with
20 Fetal Alcohol Syndrome.

21 Q. And that would be learning disabilities ---

22 A. Learning disabilities, ---

23 Q. Impulsivity?

24 A. Impulsivity. It can be facial features but that's
25 very difficult to determine sometimes later on.

1 Looking for things such as ADHD. So there are three or
2 four criteria that are neurological, physical, nervous
3 system, those kinds of things.

4 Q. And while you were developing the information in
5 Mr. Williams' case, were you sensitive to those
6 particular areas and seek to highlight those areas to
7 the social worker, the other experts on the Defense
8 team?

9 A. Yes.

10 Q. When you interviewed Mr. Dwight Williams, your
11 report suggests that that happened on March 18th, 2004.
12 That's almost eleven months before the trial. How did
13 you make the interrogation -- interrogation may be a
14 strong word. But how did you ask those questions of
15 Mr. Williams to seek that information? And why did you
16 ask those questions of him at that stage?

17 A. Substance abuse has so frequently been a common
18 denominator in these cases. And it's almost
19 perfunctory for me to have that question on the table.
20 I can't tell you specifically what I said to him or how
21 I asked him. But generally with lay witnesses, whether
22 they are family or non-family, I just simply say, did
23 you ever see the mother consume alcohol while she was
24 pregnant? Were you around? Did you see her when she
25 was pregnant? Did you ever see her consume alcohol?

1 Q. Okay.

2 A. And then I try to get detail as to how frequently,
3 how much, how often were you, you know, were you
4 present, that sort of thing.

5 Q. Okay. And the memo that was introduced from March
6 18th, 2004, which is Plaintiff's Exhibit 7, it doesn't
7 have that type of detailed information in it; does it?

8 A. I don't remember which one you're talking about.

9 MR. ZELENKA: Your Honor, may I approach and
10 show her?

11 THE COURT: You may.

12 Q. I would ask you to refer to Plaintiff's Exhibit 7.
13 Does it include that type of information concerning the
14 pregnancy?

15 A. No, it does not.

16 Q. Prior to the trial, the hearing today, did you
17 have any notes, personal notes, that you could review
18 to see if there was further information provided to you
19 by Dwight Williams on that time period?

20 A. I reviewed my final, briefly, I don't know, maybe
21 six or eight months ago. And then I had a few things,
22 a few files that I had on a CD and I did review those.

23 Q. Okay. Did they include additional information
24 from Mr. Williams during that interview about the
25 extent of the drinking?

1 A. No, they did not.

2 Q. Okay. Do you recall any specific discussion you
3 had with him, which may not have been in the notes,
4 concerning the type of drinking that she was doing at
5 the time of the pregnancy, as represented to you by Mr.
6 Williams? Either in that interview or other
7 interviews?

8 A. Mr. Williams was not able to provide any detail.

9 Q. Okay. What does that mean? He didn't know or he
10 didn't respond?

11 A. He was only able to say that he had seen her
12 drinking when she was pregnant with Chris. I was not
13 able to get from him how frequently, how much, the
14 typical kinds of things you ask.

15 Q. Let's jump to Daisy herself. Did you have
16 interviews with Daisy?

17 A. I did.

18 Q. Okay. Did you ask Daisy about whether she drank
19 during the pregnancy?

20 A. Yes.

21 Q. And what was her response to you?

22 A. No.

23 Q. She said, no?

24 A. Yes.

25 Q. Did you challenge her on that based upon what

1 additional information you'd received from other
2 individuals?

3 A. Because I'm aware of how sensitive this is for a
4 mother and that there is often shame and embarrassment,
5 I have an approach that I use to try and get mothers to
6 be comfortable opening up and talking to me about their
7 drinking during the pregnancy. And I was not able to
8 get any information.

9 Q. At some time during your investigative process in
10 this case, you became aware of collateral information
11 that she did suffer from alcohol problems. Isn't that
12 correct?

13 A. Yes.

14 Q. With that information, did you attempt to confront
15 her about when her drinking began?

16 A. I don't remember if I specifically sat down with
17 those records and showed them to her. When I asked her
18 to sign releases, she knew that I would be getting
19 those records. And so she was aware that I had that
20 information. I don't remember specifically saying,
21 what about this date when you were in the hospital? It
22 would be typical of me to do that. I just don't
23 specifically remember doing it. But still I was not
24 able to get any information from her about when she was
25 pregnant with Chris.

1 Q. With respect to the daughter, Maureen, you
2 interviewed her a number of occasions. Isn't that
3 correct?

4 A. Yes.

5 Q. And in addition to asking her about the family
6 dynamics that she experience as the older sister of the
7 Defendant, did you make inquiry of her specifically
8 about the drinking and her mother's drinking during the
9 pregnancy?

10 A. Yes.

11 Q. What do you recall Maureen telling you about her
12 recollection of the events around the time of the
13 Defendant's birth?

14 A. Just that she was older and she clearly remembers
15 her mother being pregnant. She remembers her mother
16 drinking. She witnessed her mother drinking. And that
17 she witnessed the many times that her father beat her
18 mother during the pregnancy with Chris.

19 Q. Was she able to describe, now as an adult, what
20 she understood her mother was drinking, the amount of
21 the drinking during pregnancy?

22 A. No.

23 Q. Did you share that information with Dr. Hammock
24 and Dr. Evans and the other experts involved in the
25 case?

1 A. All of that information would have been shared
2 with other experts.

3 Q. Now, in 2004, 2005, approximately how many capital
4 cases have you been involved in? I feel like I've
5 known you my entire life from these things.

6 A. I think so. In 2004, forty, forty-five.

7 Q. And do you recall if the Fetal Alcohol Syndrome
8 issue was involved in any of those other cases you did?

9 A. Yes. I cannot recall a specific case. I was
10 trying to remember. But I have had cases where it was
11 an issue.

12 Q. Okay. And when it was an issue, with your
13 understanding, your expertise as a clinical social
14 worker, what, if anything, did you do about referrals
15 and the like to specialists on that issue?

16 A. Are you talking about out of my private practice
17 or my ---

18 Q. I guess I blended that question together. So I'll
19 just say, in your practice as a clinical social worker,
20 what do you generally do when information about that is
21 brought to your attention about one of your clients as
22 the birthed individual?

23 A. I usually would refer them to a neuropsychologist
24 for a battery of neuropsych tests. And then based on
25 those findings, you know, if I could find an expert in

1 that area or in developmental disorders in the area,
2 suggest that they see them. If medication is needed, I
3 would recommend them to a psychiatrist. I would
4 normally send people to programs and services that
5 address those needs. But I frankly don't recall any
6 for people that are older. The most effective programs
7 and services are when it's identified before the age of
8 six. So I doubt that that would have been an issue.

9 Q. Okay. Well, here, am I correct in saying that the
10 Defendant was referred to a neuropsychologist, Dr.
11 James Evans, who ran a battery on the Defendant. Isn't
12 that correct?

13 A. Yes.

14 Q. There were psychiatrists involved in the Defense
15 in this case, including Dr. Sy Halleck. Is that
16 correct?

17 A. Correct.

18 Q. And was Dr. Halleck provided the information
19 concerning the mother drinking?

20 A. I actually had forgotten about Sy. Yes, he was.
21 I remember a conversation in the conference room here
22 with him about that.

23 Q. And Sy Halleck testified in mitigation in this
24 case. Isn't that correct?

25 A. Yes.

1 Q. With respect to the learning disability
2 information, you shared that with all these
3 individuals, including Dr. Halleck. Isn't that
4 correct?

5 A. I don't specifically recall discussing the
6 learning disability with him. But the accumulation of
7 risk factors and the things that I had been developing,
8 I would have reviewed with everybody that I talked to.

9 Q. What's been introduced in the record as your
10 themes, contain the word preliminaries. In reviewing
11 your records, was that your final report of risk
12 assessment or were there additional ones that you
13 prepared?

14 A. I don't think it was the final report. I didn't
15 have, on the CD I was telling you about, the final
16 visual aids that were used, but often the accumulation
17 of risk factors is used in testimony. I don't recall
18 if, in prepping Ms. Hammock, Mr. Mauldin used that
19 visual aid or not. I don't know if it was presented in
20 Court. But there is usually a final draft of that.

21 Q. Okay.

22 A. And there's not usually a final draft of themes
23 that is used. The themes can change over time. So
24 when I look at that, it looks like the same themes we
25 discussed and were concerned with from beginning to

1 end.

2 Q. From beginning to end, you still have the theme,
3 the mother drank ---

4 A. Can I see it again? I believe ---

5 Q. --- during the pregnancy?

6 A. I believe so.

7 MR. ZELENKA: The Court's indulgence. Thank
8 you.

9 A. Those themes remained the same throughout for the
10 purposes of discussion and decision-making.

11 Q. And the harmless risk factors were the same, they
12 didn't change, particularly with respect to mother
13 abandoned by her mother, father unknown. Father
14 abandoned by his father. Mother abandoned her first
15 two children, mother drank and smoked during pregnancy.
16 Those were -- there wasn't any change in what you
17 understood to be the focus of this Defendant's social
18 history?

19 A. I don't recall there being any changes.

20 Q. Okay. Parents were violent and drank, smoked pot,
21 fought daily. That was, that was an underlying theme
22 throughout that, as being an expert in social work, you
23 thought was important to get that information to the
24 ultimate experts, correct?

25 A. Yes.

1 Q. Now, in the hundred or so cases you've been
2 involved in, in capital Defense work, you were aware at
3 that time that you could rely or request any additional
4 assistance from the lawyers that you thought was
5 necessary to come up with your ultimate conclusions.
6 Isn't that correct?

7 A. Yes.

8 Q. In what way, if any, did either Mr. Nettles or Mr.
9 Mauldin prevent you from completing what you thought
10 was the necessary and appropriate task as the
11 mitigation investigator in this case?

12 A. I don't recall them preventing me from doing those
13 things. In terms of -- if we're talking about getting
14 an investigator in Idaho, I don't even remember us
15 discussing that.

16 Q. Okay. But you did have a discussion about
17 Germany?

18 A. Yes.

19 Q. And why do you remember that discussion?

20 A. Because it is a discussion that has come up
21 frequently in cases with Mr. Mauldin when travel is
22 required to an unusual place. And in fairness, I think
23 the only place I've ever been approved to go in any
24 cases in Greenville County was to New York one time.
25 So we kind of laugh about it. Oh, yeah, right.

1 They're going to send you to Germany. So I just
2 remember it because it was that type of conversation.
3 And I brought it up at least once or twice more
4 throughout, when am I going to get to go to Germany?

5 Q. I've been waiting for the same answer. With
6 respect to that, why did you think it was necessary or
7 was it necessary that you go to Germany?

8 A. Well, for two reasons. It left the maternal side
9 of the family as a big question mark in terms of
10 developing what we typically try to develop across
11 generations, gathering information, interviewing family
12 members on both sides of the family. But given what I
13 was learning about mental illness on the father's side,
14 based on my observations of Chris' mother, based on
15 some information I had been able to gather about her
16 abandoning two children, which I thought was
17 significant information, the fact that she had been
18 abandoned by her mother and raised by her grandparents,
19 I knew nothing about any of these people. And that was
20 a huge gap. And I've had other cases send me out of
21 the country to gather that kind of information, and
22 certainly to other places in the country. Because it
23 is considered important. So it's something I always
24 kind of push for, whether I get it or not.

25 Q. And in some of the psychosocial assessments that

1 I've seen done, some by you, some by others, that
2 information is frequently reflected in the genogram
3 that's done about their existence or those individuals'
4 existence of mental and emotional illnesses. Or
5 physical illnesses that those individuals had, cause of
6 death, things like that. Is that correct?

7 A. Yes. It is a way, not only of sort of showing
8 who's who in the family, but it also is a way of
9 demonstrating patterns that run in the families. And
10 as you mentioned medical, you would be -- you know,
11 doctors are looking at heart attacks and strokes. And
12 we know that there are certain mental, emotional and
13 behavioral conditions that run in families, as well.
14 And so we're looking for those patterns so we can
15 demonstrate them. And that would included mental
16 illness.

17 Q. But isn't it true that you did have a -- already
18 have a pattern of mental illness on Daisy's side of the
19 family reflected through Daisy, herself?

20 A. Daisy alone?

21 Q. Uh-huh (affirmative).

22 A. Well, I wouldn't call that a pattern. Typically,
23 we're looking for more than one person across the
24 generations.

25 Q. Okay. So the Defendant and Daisy?

1 A. Yes.

2 Q. They both suffered from alcohol abuse, based upon
3 your information?

4 A. Yes.

5 Q. And out of that alcohol abuse there were
6 impulsivity and emotional problems reflected. Isn't
7 that correct?

8 A. Yes.

9 Q. Okay.

10 MR. ZELENKA: Court's indulgence, please.

11 Q. So if I understand, going back to Germany, and
12 going back to the genogram, it's your practice, your
13 checklist practice, essentially, to try to get that
14 information, preferably five generations, but at least
15 three generations; correct?

16 A. Yes.

17 Q. And you couldn't do that in this case or you were
18 unable to do it to some extent, because you didn't
19 travel to Germany. Is that correct?

20 A. And do the -- and conduct the interviews with the
21 family in Germany.

22 Q. Okay. Yet, you've also testified that you
23 conducted interviews without traveling to Idaho;
24 correct?

25 A. Yes.

1 Q. What prevented you from making contact with
2 individuals in Germany at the time of 2003 to 2005,
3 when the trial occurred?

4 A. I don't remember, and it is something that should
5 have been done. It certainly would not have been an
6 oversight because I would have been aware that that's
7 something I should do. And I do not know why I did not
8 do that.

9 Q. So you don't know if you lacked contacts in that
10 family unit, or whatever reason. Is that what you're
11 saying?

12 A. Of whoever was in Idaho at that time, I can't
13 remember who or how many were there, but ...

14 Q. Okay. Let me ask the next question. So if you do
15 go to Germany, who would you have talked to?

16 A. Well, in ---

17 Q. If that would have been provided? I'm sorry.

18 A. First of all, I wouldn't have gone to Germany
19 until either I or the people in Mr. Mauldin's office
20 had been able to identify people there and make sure
21 there were people there to be contacted and seen. And
22 the same with Idaho.

23 Q. Okay. And you were unable to identify any of
24 those individuals, as I understand your testimony;
25 correct?

1 A. Well, I think they were on the family tree. I
2 don't recall the efforts that were made. I knew from
3 family members that Daisy had two children. I don't
4 remember where they were, if they were in Germany. Her
5 husband, I think, was. My major concern, I think, was
6 her husband, the two other children.

7 Q. Her husband, just so I'm correct on this, meaning
8 Daisy's first husband? Is that who you're referring
9 to?

10 A. There were four or five and I'm not sure. I can't
11 remember.

12 Q. Okay. Now, in your reports to Defense counsel,
13 you noted that Dr. James Evans, the neuropsychologist
14 who had done the neuropsychological battery had
15 concluded that there were symptoms of -- or at least
16 some evidence of frontal lobe damage reflected in the
17 test data he had done. Is that correct?

18 A. Yes.

19 Q. And the frontal lobe part of the brain, as you
20 understand it, is the area of the brain that controls
21 or has an effect on judgment, impulsivity and the like;
22 correct?

23 A. Yes.

24 Q. That is an organic factor; correct?

25 A. Yes.

1 Q. And that is some evidence that Mr. Williams, at
2 the time, at least as reflected in those reports, did
3 have some organic problem; correct?

4 A. Yes.

5 Q. The cause of that organic problem is always
6 unknown unless there is direct damage done to that part
7 of the brain; correct?

8 A. Yes.

9 Q. There were theories on what causes it, be it Fetal
10 Alcohol, head trauma at some time in the youth,
11 sometimes just a birth problem?

12 A. Birth complications.

13 Q. Nobody really can specifically point to those
14 factors absent a direct correlation with injury?

15 MR. VIETH: Your Honor, I'm going to object
16 to that question. I'm not sure she's qualified to
17 answer that question.

18 THE COURT: All right. I'm not sure that
19 that question is answerable as it was phrased anyhow.
20 Would you rephrase your question, Mr. Zelenka, and
21 maybe I can rule upon the question.

22 MR. ZELENKA: I think it would be better for
23 me, in light of that, to withdraw the question.

24 THE COURT: All right, sir.

25 Q. The factors that cause organic brain problems,

1 based upon your knowledge and area of expertise, can
2 arise in multiple situations. Isn't that correct?

3 A. That's been my experience from what I have learned
4 from people who are experts in those areas.

5 Q. Okay. Now, in your investigation, as you stated,
6 you sought to acquire all the school records of the
7 Defendant. Is that correct?

8 A. Yes.

9 Q. And did you feel like you recovered all of the
10 school records of the Defendant?

11 A. I believe I did.

12 Q. Okay. And you got a release for all mental health
13 records of the Defendant. Did you acquire those?

14 A. I don't recall mental health records.

15 Q. Okay. But did you attempt to see if any existed?

16 A. Well, of course, I asked, you know, have you ever
17 been treated for anything? I would have gotten
18 releases signed. I just don't remember that there had
19 been any treatment. I may be wrong about that. I just
20 don't recall.

21 Q. Okay. And did you attempt to acquire the medical
22 and mental health records for both of his parents?

23 A. Yes.

24 Q. Did you attempt to acquire the medical and mental
25 health records of Maureen?

1 A. Yes.

2 Q. And why did you do those things?

3 A. I felt that there was a -- there were very clear
4 indications of mental illness in Chris' family. I also
5 had records of his uncle with whom he had spent time as
6 a child. And those records indicated things about the
7 father and uncle that I thought were significant. I
8 was able to observe the mother's behavior, and then I
9 had the medical records of her. And I don't actually
10 remember the records on the sister, if I can retract
11 that. I don't remember records on her. But, again, it
12 was clear to me that there was something wrong and
13 tragic when she took her own life later, which is
14 confirmation for me that, in fact, there was something
15 wrong. So my focus was more on mental illness in the
16 family. But at the same time any impact of Fetal
17 Alcohol was still important to me if I could get the
18 mother to talk about drinking, if I could get her to
19 share that, if I could confirm some of the other things
20 that we had from the school records and from Dr. Evans'
21 reports. Some of the signs and symptoms of his
22 behavior. The fact that there was mental illness did
23 not eliminate, for me, the possibility that there still
24 might be Fetal Alcohol problems.

25 Q. Okay. Did you get the birth records of the

1 Defendant?

2 A. I don't recall. I know I tried. And I know I was
3 trying to get them, even up until kind of late. There
4 was a problem at Greenville Memorial Hospital. I think
5 there were some notes along the way about efforts to
6 get his birth records. But I do not remember if I
7 ultimately ever had them or not. I know I thought they
8 were very important because of this possibility of
9 Fetal Alcohol. So I certainly thought they were
10 important to have.

11 Q. Okay. When you sat through the trial, and Fetal
12 Alcohol Syndrome at the time, in 2004, 2005, the trial
13 in 2005, was not specifically discussed on the record,
14 were you surprised, based upon the conversations that
15 you had had with the Defense team and the experts?

16 A. No, I wasn't surprised. Well, in the end, you
17 provide the lawyers with the information and what you
18 have. And they call the shots on what they believe is
19 important in terms of their experts, in terms of the
20 testimony. They do the prepping. They decide what the
21 focus, strategically, of the case is going to be. So
22 all I can do is give them what I've got. And then I
23 may suggest what I think, but I don't make that
24 decision in the end.

25 Q. Do you recall being reticent at all about your

1 suggestions on the importance, if any, of mother's
2 drinking during pregnancy?

3 A. Reticent?

4 Q. Yeah. Did you hold back?

5 A. Not just because of that. I felt like Fetal
6 Alcohol, in this case, was a bit of a mixed picture.
7 One of the challenges you have is to distinguish,
8 differentiate, between signs and symptoms and
9 behaviors. And there was a significant amount of
10 information to support Fetal Alcohol Syndrome. At the
11 same time that the schools were evaluating Chris, there
12 was a tremendous amount of conflict and violence in the
13 home. I will admit that it confused me that the school
14 diagnosed him LD and took it back, basically. That
15 confused me. They took him out of resource. That
16 confused me. Dr. Evans not recommending brain scans
17 confused me. When I looked at what was required or
18 what I -- not looked at, but what I just sort of knew
19 was required, my -- one of the things you need to have
20 are reliable resources with reliable information
21 sources. My father, in this case, was very unstable
22 and my sister, in this case, was very unstable. I
23 believed them. I believed that Daisy drank during her
24 pregnancy. But I was concerned with instability of
25 those two people. There were just back and forth

1 things that concerned me. But, again, I'm not an
2 expert in FAS. All I could do is take everything I had
3 and say, this is what I've got, to the attorneys and
4 the experts. And then that strategic part about what
5 to use in the end had to be their decision. I wasn't
6 minimizing it, but I will admit that there were some
7 things that, you know, not being an expert in that
8 area, I was very unsure about that just did not seem
9 real clear to me.

10 Q. Were you aware of the opinions that Dr. Rob
11 Richards and Dr. Sy Halleck were going to give on the
12 Defendant?

13 A. Yes.

14 Q. Okay. As a clinical social worker with some
15 understanding of the diagnostic and statistics manual,
16 were you confident that there was evidence and
17 information that you had developed in your
18 investigation that supported what they were finding?

19 A. In terms of mental illness, yes.

20 Q. Okay. It was pointed out on direct examination
21 the memorandum that reflected your conversations and
22 communications with Dr. Evans. And I believe your
23 report was dated August 25th, 2004. If I read the
24 notes correctly or at least my sense of what the notes
25 said, it had a date 9/7/2004 on some of those notes

1 that you were asked to review. It appears you have
2 multiple conversations with Dr. Evans. Is that
3 correct?

4 A. That is typically true, yes.

5 Q. Okay. And in your written report it reflected
6 that some of the neuropsychological testing -- well, it
7 wasn't necessarily in your written report. But it
8 reflect that he had left-hand problems. Is that
9 correct? On assessing information?

10 A. I don't remember which one it was in. I remember
11 seeing it in my handwritten notes, but I'll take your
12 word for it.

13 Q. Okay. And as a clinical social worker, with
14 understanding of the areas of mental health, how did
15 you assess that information or why did you think it was
16 important enough to take note of?

17 A. Well, I find, with Dr. Evans, I have to try and
18 get him to give me practical, everyday examples,
19 because he's a pointy-headed professor. And so I
20 usually try to ask him questions that will help me
21 understand. If I understood that correctly, one of the
22 motor impairments with FAS is the use of the hand in
23 drawing, so I would have thought that was important.

24 Q. So at the time, you were kind of focused on the
25 FAS area, you were looking for what you understood to

1 be symptoms of FAS and include those in your report?

2 A. Yes.

3 Q. Isn't that correct?

4 A. Yes.

5 Q. Do you know why there was a delay in the MRI being
6 done? Do you have any personal knowledge of it?

7 A. I have no idea. I don't remember.

8 Q. But you were aware in -- you had done work with
9 John Mauldin before; hadn't you?

10 A. Yes.

11 Q. And you're aware that Mr. Mauldin's practice is
12 almost pro forma, he'll request an MRI pretty quick.
13 Isn't that true?

14 A. And in the cases where I've worked with him, I
15 walk through his door saying, get an MRI before I ever
16 even seen the Defendant. It's just from experience, so
17 many Defendants have brain damage from actual injury
18 and accidents where they were never treated, never
19 taken to a hospital, had a concussion and just nothing
20 ever happened. And there's never been any kind of scan
21 done. So it's almost become, not a joke, but just a
22 perfunctory thing to say, let's just go ahead and get
23 brain scans and rule it out.

24 Q. And ultimately, an MRI was done in this. Isn't
25 that correct?

1 A. I believe so.

2 Q. Okay. About how often did you meet with Dr.

3 Hammock?

4 A. A lot. I don't remember specifically how many
5 times. Many of our discussions were by phone. She's
6 in Columbia. But she came up. I remember hours in Mr.
7 Mauldin's office, sitting, going over records, going
8 over the information. I remember spending a good bit
9 of time with her talking about the case before Mr.
10 Mauldin prepped her. I don't know specifically how
11 long, but it was -- I spent a lot of time with her.

12 Q. And you're satisfied that she understood, at the
13 time of the testimony, what you had determined to be
14 reasonable themes involving Chris Williams' life? Is
15 that correct?

16 A. Yes.

17 MR. ZELENKA: The Court's indulgence.

18 THE COURT: Yes, sir.

19 MR. ZELENKA: Your Honor, I have no further
20 questions.

21 Thank you.

22 THE COURT: Any redirect?

23 MR. VIETH: Yes, sir.

24 **REDIRECT EXAMINATION**

25 **BY MR. VIETH:**

1 Q. Jan, briefly, I think, but it may not ... On the
2 preliminary accumulation of risk factors, the twenty-
3 something that we wrote down, that you wrote down that
4 you did, certainly the far majority of these things,
5 witnessed mother's sexual behavior with other men,
6 early exposure to guns and violence, threat of harm,
7 abnormal attachment to females, by far, the greater
8 part of this list has nothing to do with organic brain
9 damage; does it?

10 A. I believe that's correct. Do you want me to
11 glance real quick? I don't recall most of it having to
12 do with organic brain damage.

13 Q. Well, the point is, the one that does deal with
14 organic brain damage is the mother drank during the
15 pregnancy? There may be other things on that list, but
16 ---

17 A. Right. For the most part, that's the most
18 important one to do with ---

19 Q. For the most part, there's no question that the
20 brain damage issue is drinking during the pregnancy.
21 And the rest of these are what you would almost look at
22 in a lot of death penalty cases, for mitigation. When
23 you're trying to tell the jury why you shouldn't put
24 someone to death, you're trying to find any port in the
25 storm that helps your argument that the mother was

1 cruel or he'd kill cats and hang them at night or
2 something. I mean, you're looking for anything to show
3 something. But, when it gets down to the rubber
4 meeting the road, the one glaring thing on this harmful
5 risk factor is the mother drank and smoked throughout
6 the pregnancy; correct?

7 A. Yes.

8 Q. I mean, by far, if you're going to rule out one of
9 these things, you're going to rule out that the mother
10 drank during the pregnancy and there was no Fetal
11 Alcohol Syndrome, as opposed to ruling out deeply
12 affected divorce?

13 A. Yes.

14 Q. Okay. And that just wasn't done; was it?

15 A. No.

16 Q. There was never anyone that ruled out FAS in this
17 case?

18 A. No.

19 Q. And as a matter of fact, I think you've helped in
20 the examination with the Attorney General, in that one
21 of the big things that would help you would have been
22 to gone to Germany to be able to corroborate Maureen
23 and Dwight on the drinking by the mother?

24 A. Yes.

25 Q. I mean, there's pitting what Daisy didn't tell

1 you. And you're saying, well, I can understand that
2 because mothers are sometimes sensitive to that issue.
3 And, therefore, I take that, not with all sincerity and
4 truthfulness, but by the same token, I have some
5 problems with Maureen and Dwight in what I observed
6 with them. So I was conflicted a bit?

7 A. Yes.

8 Q. Okay. If you had gone to Germany, you may have
9 found a wealth of information about her drinking or to
10 talk to Erika in Idaho, the mother?

11 A. Right. To learn about her other two children.

12 Q. Right. So that solidifies a reason to go to
13 Germany or any other place because you might have this
14 conflict resolved easier?

15 A. Correct.

16 Q. But you would have more information than you had?

17 A. Yes.

18 Q. Okay. But what you did have was evidence -- let
19 me put it this way. I assume you have death penalty
20 cases or trials where drinking during pregnancy was
21 never brought up?

22 A. Yes.

23 Q. I mean, there's some people that don't drink?

24 A. That's correct.

25 Q. So when a husband or a daughter or sister of Chris

1 says, Mom drank during pregnancy, that's not the answer
2 to an inquiry where you say, did your mother drink
3 during pregnancy? That's them saying, like your report
4 said, the first thing Dwight told me was mom drank
5 during the pregnancy?

6 A. Yes.

7 Q. Okay. That has some sound of credibility to it;
8 doesn't it?

9 A. It has some, yes.

10 Q. Okay. Enough to go in and say, we should rule
11 this thing out?

12 A. Yes.

13 Q. Okay. And on Dr. Evans, again, I guess you're a
14 little bit conflicted, or Mr. Nettles or Mr. Mauldin,
15 because you had Richards saying get me an MRI
16 immediately. And Evans saying, I don't think we need
17 an MRI. Both of them in August of '05. So why would -
18 - to your point, why didn't you get an MRI in '04? Do
19 you know?

20 A. I don't know why.

21 Q. You would have done it?

22 A. Oh, yes, automatically.

23 Q. Yeah. You said you walk in the door right away
24 and say, let's get one?

25 A. Automatic.

1 Q. And they were scrounging to get that done a week
2 before trial?

3 A. Yes.

4 Q. All right. But you never told Dr. Evans -- or at
5 least I've never seen the note, Dr. Evans, how about
6 checking this guy out for Fetal Alcohol Syndrome and
7 make sure we rule it out before we go further. There's
8 nothing like that in ---

9 A. I don't recall saying that to him. I would have
10 told him that I had information that the -- that she
11 had been drinking during the pregnancy, but not
12 anything definite.

13 Q. And you wouldn't stop with his report. You have
14 to go get some other testing for Fetal Alcohol, too;
15 right? An MRI could help on corpus callosum?

16 A. Yes, sir.

17 Q. Okay.

18 MR. VIETH: Just give me one second, Judge.
19 I might be finished with her.

20 Q. The information -- you testified with me on
21 direct, you never talked to Griesemer, period?

22 A. No.

23 Q. You didn't ---

24 A. I don't remember him at all.

25 Q. So he wouldn't have gotten any information from

1 you on anything?

2 A. Not from me.

3 MR. VIETH: That's all I have.

4 Q. Thank you.

5 THE COURT: Thank you, ma'am. You may step
6 down. Any objection to the witness being excused?

7 MR. VIETH: That's what I was just asking
8 him.

9 MR. ZELENKA: No objection from the state,
10 Your Honor.

11 THE COURT: Thank you, ma'am, you may be
12 excused.

13 THE WITNESS: Thank you.

14 THE COURT: I think this is a good time for a
15 lunch break. The other witness is coming in at two,
16 two-fifteen?

17 MR. VIETH: Well, Bill Nettles is next and
18 he's next, so ...

19 THE COURT: Okay.

20 MR. VIETH: And then John Mauldin's my last
21 one, and he's at the courthouse all of the time, so
22 everybody's ---

23 THE COURT: Okay. That's the next two for
24 today?

25 MR. VIETH: That'll be it for today, yes,

1 sir.

2 THE COURT: All right. Let's see if we can
3 be ready to start back about two o'clock?

4 MR. VIETH: Sounds good.

5 THE COURT: Okay. We'll be at ease until
6 then.

7 (WHEREUPON, the court stood at recess for a lunch
8 break.)

9 MR. ENDERLIN: Your Honor, I forgot to ask in
10 the beginning, can we take his handcuffs off in case he
11 needs to write, wants a drink of water or something?

12 THE COURT: I'll leave that up to the
13 security people. Whatever they say. We'll certainly
14 take some time -- if they say, no, based on security
15 here -- if he needs to write something, you let me know
16 and we'll take the time for him to write out what he
17 needs.

18 MR. ENDERLIN: All right. So then he cannot
19 write during -- I just want to make that on the record.

20 THE COURT: He cannot write?

21 MR. ENDERLIN: Well, he can't with, he can't,
22 he's handcuffed at the waist.

23 THE COURT: Yeah, but I mean, can't -- he
24 can't sit his hands on the desk?

25 CORRECTIONS OFFICER: I said I can take the

1 handcuffs off and leave the belly chains on. He still
2 could write with the handcuffs off.

3 MR. ENDERLIN: I mean, I'm looking at them.
4 I don't see how he can write.

5 CORRECTIONS OFFICER: We can take the
6 handcuffs off.

7 MR. ENDERLIN: We can try.

8 THE COURT: Everything fine now?

9 MR. ENDERLIN: I think so, Your Honor.

10 THE COURT: All right. You may call your
11 next witness.

12 MR. VIETH: We're going to call Bill Nettles.

13 THE COURT: All right.

14 THE CLERK: Mr. Nettles, you do solemnly
15 swear or affirm that the testimony you're about to give
16 in this case be the truth, the whole truth and nothing
17 but the truth, so help you God?

18 THE WITNESS: Yes.

19 THE CLERK: Thank you. You may be seated.
20 Please state your full name for the record.

21 THE WITNESS: William N. Nettles.

22 MR. VIETH: Please the Court?

23 THE COURT: Yes, sir.

24 **WILLIAM N. NETTLES,**

25 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

1 **DIRECT EXAMINATION**

2 **BY MR. VIETH:**

3 Q. You're, of course, Bill Nettles and current U.S.
4 Attorney. Is that right?

5 A. That's correct.

6 Q. And when did you become United States Attorney for
7 South Carolina?

8 A. Two and a half years ago.

9 Q. Okay. Prior to that were you in private practice?

10 A. I was.

11 Q. And how long were you in private practice?

12 A. About ten years, I guess.

13 Q. Okay. So that would have been after you ---

14 A. Right. I was a Public Defender for three years,
15 and then I -- well, I guess I was from '92 to like '95,
16 about '95 I was at the Public Defender's office. And
17 from '95 until I got this job, I was in private
18 practice.

19 Q. Okay. And where were you the Public Defender?

20 A. Richland County. I wasn't the Public Defender. I
21 was a Public Defender.

22 Q. Okay. And from Public Defender then you went in
23 private practice?

24 A. Went into private practice.

25 Q. And about ten years after that you became a U.S.

1 Attorney?

2 A. Yes.

3 Q. As a Public Defender or in private practice, you
4 were involved in criminal cases, as well as civil
5 cases? You had a general ---

6 A. Yes. I had a general practice in criminal and
7 civil.

8 Q. And in that regard was any of your work in death
9 penalty work?

10 A. Yes.

11 Q. Okay. And have you done more than this death
12 penalty case?

13 A. Oh, yeah.

14 Q. Any idea of how many?

15 A. I mean, I don't know how many I was involved in.
16 But I mean, I think I've tried five or six of them?

17 Q. Actually, to a trial?

18 A. To the jury, correct.

19 Q. Was this your last one before coming U.S. Attorney
20 or was there one after it?

21 A. It might have been. If it wasn't my last one, it
22 was about my last one.

23 Q. Do you recall how you became involved in this
24 case?

25 A. I believe I was contacted by the Public Defender,

- 1 John Mauldin.
- 2 Q. Okay. To serve as his assistant?
- 3 A. Assistant, right. If I remember.
- 4 Q. And at that time you were living in Columbia?
- 5 A. I was living in Columbia.
- 6 Q. So you would drive up here as needed for meetings
- 7 and so forth?
- 8 A. Right. And some of them I did on the telephone.
- 9 And, I mean, I lived up here during the trial.
- 10 Q. Oh, you did?
- 11 A. Well, I mean ---
- 12 Q. Oh, for the trial?
- 13 A. For the trial, right.
- 14 Q. All right. So you were likely appointed some time
- 15 in 2003. I know you don't have the notes with you ---
- 16 A. I don't, right.
- 17 Q. --- but that's about when this started? Okay.
- 18 And what was your role in the case, Bill?
- 19 A. I was second chair.
- 20 Q. All right. I'm want to go through kind of three
- 21 areas with you, one being pre-trial work dealing with
- 22 the mitigation side.
- 23 A. Right.
- 24 Q. Briefly, through some funding issues, if you had
- 25 any recollection about funding for investigators. And

1 then a couple of comments about the trial itself?

2 A. Sure.

3 Q. Jan Vogelsane testified throughout the morning as
4 her role as your mitigation investigator. Do you
5 remember her doing this?

6 A. I do.

7 Q. Okay. And during her investigation, she indicated
8 that Daisy, the birth mother, drank throughout the
9 pregnancy and basically throughout her adult life. Do
10 you remember that type conversation?

11 A. I mean, I don't have an independent memory of it,
12 no.

13 Q. Okay. I'm going to show you what's already been
14 in evidence, Plaintiff's Exhibit 10. That is a risk
15 assessment or risk summary that Ms. Vogelsane prepared
16 for the Defense team; okay?

17 A. Okay.

18 Q. And on one of the areas, the fourth one, mother
19 drank and smoked throughout pregnancy?

20 A. Throughout pregnancy, right.

21 Q. Okay. So would this be something in the generic
22 way you do death penalty cases that you would get from
23 your mitigation investigator and then you start ruling
24 things in or out?

25 A. Right. I mean, my take on it is the investigator

1 brings you information, right. And, I mean, obviously,
2 based on what they -- that's a fair assessment. Based
3 on what they bring you, you begin to rule in or rule
4 out potential issues.

5 Q. Okay. And there was a list of some twenty-odd
6 things, some of which deal with things like deeply
7 affected by divorce?

8 A. Right.

9 Q. Some things may get -- father abandoned by his
10 father. But the mother drank and smoked throughout the
11 pregnancy would give some indication to you, if you
12 were thinking about it, what? What comes to mind if
13 you were thinking about drinking during pregnancy?

14 A. Well, now, Fetal Alcohol Syndrome.

15 Q. Okay.

16 A. Well, I mean, Fetal Alcohol Syndrome and it also
17 shows a certain sort of global -- I mean, it's not a
18 good idea to do that. I think it shows a certain
19 global view that the mother may have had about the
20 significance of her pregnancy.

21 Q. All right. And, of course, even during the trial
22 itself, and I know you don't remember this, but in the
23 transcript of the trial with Pam Crawford -- do you
24 remember Pam Crawford?

25 A. Oh, yeah.

1 Q. You cross-examined Pam?

2 A. Oh, yeah.

3 Q. And one of the comments by Pam Crawford in her
4 talking on page 2180 of that transcript, your question,
5 his mother was an alcoholic for thirty years? And her
6 answer was, yes. Pam Crawford testified for the State;
7 correct?

8 A. Right. Right.

9 Q. She's indicating that her own investigation, what
10 she had found out, as the State's witness, was that his
11 mother was an alcoholic for thirty years?

12 A. Right.

13 Q. He was only twenty years of age when this crime
14 was committed?

15 A. Right. Yes, I mean, I take your word for it. I
16 mean, I don't know how old he was. Did that hurt?

17 Q. Yeah, very much.

18 A. Okay.

19 Q. And, also, another line, page 2182 of the
20 transcript, question, and whenever you talked to
21 Maureen, his sister, she verified it was an unstable --
22 answer, yes, she did. Question, she verified that the
23 mother was an alcoholic? Answer was, yes.

24 A. Yeah.

25 Q. Okay. So these are questions you asked the

1 State's witness from the transcript for what reason?

2 To see if she was an alcoholic?

3 A. Well, yeah. I mean, I mean, right. I would
4 suspect that the -- at the time the primary purpose was
5 to show that it was a less than idea childhood.

6 Q. Okay. Of course, by now we're in the trial,
7 obviously?

8 A. Right. Right.

9 Q. And there was not going to be any evidence put up
10 of Fetal Alcohol Syndrome or spectrum disorder, but you
11 still elicited that information?

12 A. Right.

13 Q. Now, you are familiar, even though none of us
14 memorize the American Bar Association Guidelines for
15 Performance of Defense Counsel in Death Penalty Cases?

16 A. Right.

17 Q. The one from February 2003 has been marked already
18 as an exhibit, Exhibit 14. I'm going to read you a
19 couple of those sections related to what we're talking
20 about. One being Guideline 10.7 where it says, because
21 the sentencer in a capital case must consider
22 mitigation, anything in the life of the Defendant,
23 which may mitigate against the appropriateness of a
24 death penalty for the Defendant, penalty phase
25 preparation requires extensive and generally

1 unparalleled investigation into the personal and family
2 history. In the case of a client this begins with the
3 moment of conception. Counsel needs to explore medical
4 history, including hospitalizations, mental and
5 physical illness or injury, alcohol and drug abuse,
6 prenatal and birth trauma, malnutrition, development
7 delays and neurological damage. That would be
8 something that anyone would be looking for; correct?

9 A. Right.

10 Q. And then while it's mentioned, I think Fetal
11 Alcohol, three times, one of the other ones is
12 Guideline 10.11, which states that --

13 MR. VIETH: Let me interrupt you just a
14 second. Have y'all got a band-aid, by any chance? I'm
15 bleeding on this book.

16 (WHEREUPON, Off-the-record discussions were held.)

17 MR. VIETH: I'm sorry, Judge.

18 Q. Going back to the ABA Guidelines. For example,
19 expert testimony may explain the permanent neurological
20 damage caused by Fetal Alcohol Syndrome or childhood
21 abuse. So the Guidelines reference Fetal Alcohol and
22 the in-depth investigation that needs to be done;
23 correct?

24 A. Correct, yeah.

25 Q. Now, with regards to the birth mother drinking

1 during the pregnancy, do you recall, after looking at
2 the risk factors that I showed you, whether or not
3 there was ever any discussion about the term Fetal
4 Alcohol Syndrome?

5 A. I don't remember one.

6 Q. Okay. When you look at the risk factors and you
7 start eliminating things, do you remember, if at all,
8 whether drinking by the mother during pregnancy rang
9 any kind of bell whatsoever?

10 A. For me?

11 Q. Uh-huh (affirmative)?

12 A. Other than showing a -- yeah, I mean -- I mean, no
13 correlation between that and Fetal Alcohol Syndrome.
14 There was a correlation between that and showing that
15 it was a less than idea childhood.

16 Q. Okay.

17 A. Do you see what I'm saying? In other words, I
18 mean, the bell that that rang to me was, was that it
19 said a little bit about the type of environment that
20 the child was brought into.

21 Q. Okay. And in fairness did you know or think about
22 FAS?

23 A. I mean, I don't know. I mean, I mean, I know
24 about it. It's not that -- I don't mean to be flippant
25 about it. I know what FAS is now, Fetal Alcohol

1 Syndrome is now.

2 Q. Now, you're talking 2013?

3 A. Right. Right. Right. And I probably knew about
4 it at some point before today. In other words, I
5 didn't find out -- my understanding of Fetal Alcohol
6 Syndrome, I mean, didn't come about as a result of this
7 post conviction relief. I mean, you know, it's a
8 concept that I have, at some point, become familiar
9 with. I can say that at the time that this case up, I
10 don't -- I can tell you that I have no memory of the
11 issue being raised and rejected. And more importantly,
12 as I'm sure our good friend Mr. Mauldin will tell you,
13 he has got a very, what I consider to be, extensive
14 checklist that we would go over. And, you know, he was
15 very regimented about, about, you know, going through
16 the checklist, ruling things in, ruling -- every
17 meeting. Ruling things in, ruling -- you know, even if
18 we'd ruled something out in a previous meeting, going
19 back he would say, okay, now, I know we ruled this out.
20 He'd say, I know we've ruled this out before, but do we
21 have any information that allows us to rule this back
22 in. And I don't ever recall Fetal Alcohol Syndrome
23 being discussed in correlation with the list that we
24 followed, which I think was a really good idea, or in
25 any other context during the course of meetings in

1 preparation for trial.

2 Q. All right. And it may shorten my exam of you on
3 what you're saying.

4 A. Let's do that.

5 Q. What you're saying is, what I'm hearing you saying
6 is that you didn't think of it. You didn't rule it in
7 or rule it out because it was never ---

8 A. No.

9 Q. --- in your mind?

10 A. No.

11 Q. Is that what I'm hearing?

12 A. Yeah. Let me answer your question. I have -- I
13 don't ever recall Fetal Alcohol Syndrome being ruled in
14 or ruled out.

15 Q. Okay. All right. Now, dealing with the expert
16 testimony that you had or that you retained to look at
17 Chris Williams, there is a report that Jan got from Dr.
18 Evans, Jim Evans. I don't know if you independently
19 remember that?

20 A. I mean, I remember Dr. Evans. I remember his
21 report. I remember.

22 Q. Okay. His report has already been marked in
23 evidence as Plaintiff's Exhibit 12. And any of the
24 comments that are in Plaintiff's Exhibit 12 from Jan,
25 regarding notes that she took from Dr. Evans, about

- 1 I.Q. and some frontal lobe damage and mild brain
2 damage, those things that she wrote down and provided,
3 I'm sure, to the Defense team, also had a note from her
4 handwritten notes, which is what this is. It says, in
5 effect, three trials to catch on as though no corpus
6 callosum. Now, would corpus callosum mean a thing to
7 you?
- 8 A. No.
- 9 Q. Okay. Didn't then, doesn't now; does it?
- 10 A. No.
- 11 Q. All right. I understand.
- 12 A. No, no, no. Really, I mean, I have no idea what
13 that means.
- 14 Q. And so this report by Evans, where he's saying
15 there's mild brain damage, frontal lobe damage and the
16 corpus callosum appeared like there was none, was just
17 an examination you had, for what it's worth, category?
18 I mean, Jim Evans didn't testify?
- 19 A. Okay.
- 20 Q. Right? He didn't get on the stand?
- 21 A. Okay.
- 22 Q. You had the report?
- 23 A. Right.
- 24 Q. You had indications there may be brain damage?
- 25 A. Okay.

- 1 Q. You now know drinking by a birth mother could
2 cause organic brain damage right now?
- 3 A. I do. I'm aware of that.
- 4 Q. Connecting those dots never happened?
- 5 A. No.
- 6 Q. Dr. Richards -- again, Richards, who actually
7 testified at trial ---
- 8 A. That's the guy we put up in the first phase?
- 9 Q. Yes, sir, correct.
- 10 A. Okay.
- 11 Q. And he testified he was bipolar.
- 12 A. Okay.
- 13 Q. Dr. Richards had an interesting -- well, I better
14 not -- just retract the interesting. Don't worry
15 about it. Plaintiff's Exhibit 13 is a memo from Jan
16 Vogelsane concerning Dr. Richards. And that memo, if
17 you read it, says that he wants an MRI immediately;
18 doesn't it?
- 19 A. Right.
- 20 Q. And he said he got excited about what he saw. He
21 wanted an MRI immediately. And Jan's saying, I told
22 him to hold back, pull back.
- 23 A. Correct. Right.
- 24 Q. Do you remember any of this?
- 25 A. I mean, I don't doubt that email. I mean, I don't

1 have any independent memory of it.

2 Q. Sure. But you don't know why she would say whoa;
3 right?

4 A. No, no, no.

5 Q. But there wasn't an MRI done until like a week or
6 so before trial; right?

7 A. I mean, I don't -- I mean, the date that the MRI
8 was done -- if there was an MRI done, I don't know if
9 it was a week before trial. I won't dispute whatever
10 date you say the MRI was done.

11 Q. I'll show you.

12 A. Okay. I'm not going to dispute it.

13 Q. Let me get this band-aid on. All right. And
14 you've already mentioned this checklist that John has,
15 that he puts everything on a checklist?

16 A. Right.

17 Q. And then if he finds something new during the
18 meetings, he'll write it in the margin and that type
19 stuff; right?

20 A. I guess.

21 Q. Okay. So I think we've beat this horse enough.
22 It was just never, ever brought up, to your knowledge,
23 of FAS?

24 A. Right. It wasn't ever brought up. It wasn't
25 discussed. It wasn't ruled in, it wasn't ruled out.

1 Q. With the neurological examination that was done by
2 Dr. Griesemer, did you know him?

3 A. Is it Griesemer?

4 Q. Griesemer? Did you know him?

5 A. I mean, I don't know him know him. I know he's an
6 expert.

7 Q. Okay. On the reports that we show, and I'm going
8 to ask you to just -- on Plaintiff's Exhibit 15, on his
9 report, how about looking over to the place that I
10 think I've highlighted. Let me see, Bill. And just
11 read under -- that's page four of five, neurological
12 examination. Just the part that's highlighted there.

13 A. Cranial nerve examination revealed normal visual
14 fields by confrontation and finger counting. Eye
15 movement was full with smooth pursuit and normal
16 saccades. There was, however, fine eye gaze nystagmus
17 with movement of the eyes to the left. Pupils were
18 briskly and symmetrically reactive to light.

19 Q. Okay. So in our DUI practice that we've had in
20 private practice ---

21 A. Right.

22 Q. --- like nystagmus was a movement of the eye;
23 right?

24 A. Right. Right.

25 Q. And he found some in that?

1 A. Right.

2 Q. Again, it wouldn't have any meaning in your case,
3 but that's in his report?

4 A. That is in his report.

5 Q. Now, going into that period of time, Plaintiff's
6 Exhibit 16 is an email -- a series of emails. If you
7 will start -- basically, if you look at the bottom
8 that's David Griesemer, right, or Griesemer, Monday,
9 January 31st? Start at the bottom of the page?

10 A. Oh. Yes.

11 Q. So this is Monday January 31st, 2005. The trial
12 began January -- I mean February 7th, I think.

13 A. Okay.

14 Q. So the week before you got an email that says, any
15 thoughts?

16 A. Right.

17 Q. Okay. From Griesemer, to you. Sorry to be slow
18 in getting back to you. I'm in the process of
19 finishing my Atkins Examination Report on Daryl Atkins.
20 It's sort of ironic, isn't it? They head back to court
21 on Monday. As soon as I've finished, I'll get back to
22 you on Williams.

23 A. Right.

24 Q. And that was Wednesday, February 2?

25 A. Right.

- 1 Q. Okay. And then on ---
- 2 A. Tuesday, February 2nd, which is weird; isn't it?
- 3 Q. Well, Wednesday, February ---
- 4 A. Oh, no. I got back in touch with him on that day.
- 5
- 6 Q. Okay. From Bill to John. See below. I emailed
- 7 him and told him we start a trial on Monday and asked
- 8 him if he had any hunches?
- 9 A. Right.
- 10 Q. So you're looking for tumors or something to see
- 11 if there's anything on the brain?
- 12 A. Well, I mean, yeah. I mean, among other things.
- 13 I guess what I meant by that email was any hunches? In
- 14 other words, you know, I mean, if he looked at it and
- 15 said, there's absolutely nothing there, then we needed
- 16 to go ahead and rule it out. But if he said, there
- 17 might be something there, we probably need to start
- 18 taking a look at it.
- 19 Q. Okay. On the next page -- do you have a February
- 20 5th?
- 21 A. Right.
- 22 Q. From Griesemer to you?
- 23 A. Right.
- 24 Q. Where he says attached is my report.
- 25 A. Right.

1 Q. Several medical issues to follow up on. And some
2 very, very subtle neurological findings of uncertain
3 significance.

4 A. Right.

5 Q. Sorry for the delay.

6 A. Right.

7 Q. Well, whatever that was, obviously, you're two
8 days before trial, there wasn't any follow-up on what
9 those very subtle neurologic findings were or anything
10 else; was there?

11 A. Well, I mean, I assume you've got all the email.
12 So, I mean, what I can say from that is, assuming this
13 is all the email, is there were no more email follow-
14 ups. I don't know whether ---

15 Q. There should be one more page.

16 A. Oh, okay.

17 Q. Let me see if there's one more attached to it.

18 Yeah.

19 A. All right.

20 Q. Okay. Your follow-up then to your team, John and
21 McDougal and so forth, I just talked to the
22 neurologist. He said that he would happily testify to
23 the tests he ran, the findings he found, more specific
24 that his testing show that Chris may be bipolar. That
25 if Chris were brought to him, he would send him to a

1 psychologist to confirm. He said, this is significant
2 for us because we can show both medical and physio --
3 the psychological diagnosis of Chris include bipolar;
4 correct?

5 A. Right. So, I guess what that -- right. So --
6 right. So I guess I called him after he -- it appears,
7 based on this, that he responded to us on the 5th and I
8 called him sometime after twelve-oh-four on the 5th.
9 And then I documented that to the Defense team in this
10 email. Yeah.

11 Q. Right. Okay. And he was then saying, in effect,
12 you ought to send him to get an evaluation; right? He
13 thinks you should get him to a psychologist, I believe
14 is what you're saying. That if Chris were brought to
15 him, he would send him to a psychologist to confirm?

16 A. Right.

17 Q. Okay. When, in fact, he had already been to a
18 psychologist; right, months earlier?

19 A. Right.

20 Q. So correct me if I'm wrong, but did you have three
21 experts, Dr. Richards, Dr. Evans, Dr. Griesemer, giving
22 evaluations without anyone knowing what the other one
23 was doing?

24 A. I don't know whether that's true or not.

25 Q. Okay. But if he had known about a psychological

1 report, he would have had Dr. Evans'?

2 A. You would have to ask him. I mean, I really don't
3 know. If you're asking me whether the three of them
4 knew or were -- knew, I just don't know. I can't sit
5 here today and tell you that I know that the three of
6 them were conducting this in isolation. I don't know
7 what the flow of information was between the three of
8 them?

9 Q. Do you know why, with Dr. Evans and Dr. Richards
10 being involved in August of '04, why the evaluation and
11 MRI was in January of '05? I mean, was there any ---

12 A. Was there a strategic reason?

13 Q. Yeah.

14 A. No.

15 Q. Did anyone just say, hey, we need to get it done
16 or did someone say, you'd better get it done? Or did
17 you just do it that late in the game?

18 A. I don't know.

19 Q. Okay. You don't remember?

20 A. I don't. I mean, I don't know what the impetus
21 was for getting him to do it.

22 Q. You don't know what the impetus was?

23 A. Right. I mean, I don't know whether somebody
24 looked at it and said we ought to do it or whether we
25 just thought of it or -- I don't know.

1 Q. Okay. But like Jan testified earlier, the first
2 thing she does when she knocks on John's door is say,
3 get an MRI. But that was the only MRI you were aware
4 of; wasn't it?

5 A. Right.

6 Q. The one right before trial?

7 A. Right.

8 Q. Now, going briefly into the funding issue, do you
9 have any recollection of how funding was handled to
10 send the mitigation investigator to see any of the
11 family tree of Daisy or Chris Williams? Did y'all
12 discuss sending her to Germany or Idaho, or do you
13 know?

14 A. I mean, I don't have an independent memory of
15 that. I mean, I don't ... Yeah.

16 Q. Were you aware that he was a German citizen by
17 virtue of being born to Daisy, who is ---

18 A. I may have, yeah. I mean, I knew she -- I mean,
19 when you talk to her it's pretty obvious.

20 Q. Sir?

21 A. When you talk to her it's pretty obvious. Yes, I
22 knew she had -- was from Germany.

23 Q. Let me ask you why -- you say you talked to her.
24 Do you have any personal knowledge of when you saw
25 Daisy, that she may be -- have a drinking problem?

1 A. The team was concerned that the added stress -- I
2 mean, I didn't know what her status was prior to trial.
3 But the -- how every many weeks we were in trial,
4 whether it was two weeks or three weeks or whatever it
5 was, we did have concern that that stress related to
6 that trial -- I mean, she wasn't -- would certainly --
7 I mean, I didn't know what her sobriety state was. But
8 that the trial could certainly trigger that. And we
9 were concerned about her sobriety as a -- her sobriety.
10 I mean, I didn't spend -- let me say this. I didn't
11 spend any real time with her beforehand. But during
12 trial it became obvious that we may have some issues
13 with sobriety, yeah.

14 Q. So essentially what Pam Crawford told you would
15 not have been a surprise to you?

16 A. No.

17 Q. She had drank for thirty years?

18 A. No.

19 Q. In that she was a German National from Germany,
20 did you know that you could get assistance from the
21 German Consulate or from Germany to help in the
22 investigation of this case?

23 A. No.

24 Q. Was that subject matter ever brought up, to your
25 knowledge?

- 1 A. Not to my knowledge, no.
- 2 Q. And have you ever heard of a group called
- 3 Reprieve?
- 4 A. No.
- 5 Q. Okay. So Jan was basically, and Mike Vann -- I
- 6 think his name is Gerald Vann here in Greenville was an
- 7 investigator. Those were your two investigators;
- 8 right?
- 9 A. I remember Jan. Mike, I suppose, yeah.
- 10 Q. And you don't recall whether any mention was --
- 11 talked about in the meetings about funding Jan to go
- 12 see the family history ---
- 13 A. I don't remember that.
- 14 Q. --- of Daisy?
- 15 A. No.
- 16 Q. Okay. Nor did you try to get assistance from
- 17 Germany to help in ---
- 18 A. Right.
- 19 Q. And Daisy's mother living in Idaho, no one
- 20 recommended anybody go to Idaho to talk to her?
- 21 A. No.
- 22 Q. All right. And then in the trial itself, the main
- 23 -- well, I won't say main. One of the issues in the
- 24 trial is the closing argument that was made by Mr.
- 25 Ariail.

1 A. He talked about they have restaurants in prison.

2 Q. Yes, sir. Yes, sir. You know where I'm going?

3 A. How could you not?

4 Q. All right. His closing argument was -- I'm going
5 to read about thirteen lines of this from page 2378,
6 line 1, sure, you and I may think going to prison for
7 life is a serious sentence, but what about Chris
8 Williams? Being in prison is like a small city.
9 Allows all things of life, places -- restaurants,
10 places to exercise, recreation when he wants, doctors,
11 hospital care, take care of him, clothing provided, TV,
12 contact with family and loved ones. He'll have freedom
13 of movement. A social structure. He'll play cards and
14 games. Go to work if he wants. Go to school if he
15 wants. Watch ball games on TV. Sure, he doesn't have
16 a car and his travel is limited, but it's not really
17 much more than a serious change of address. He will
18 have his family to visit him. But Mandy's family won't
19 and her daughter won't. Did you find those comments to
20 have anything to do with the character of the
21 Defendant?

22 A. No.

23 Q. Did you find that argument have anything to do
24 with the nature of the crime?

25 A. No.

- 1 Q. Did you object to that argument?
- 2 A. No.
- 3 Q. Okay. Was there a reason that you did not object?
- 4 A. Yeah.
- 5 Q. Okay. What was it?
- 6 A. I just thought it was so ridiculous, I'd rather
7 mock him in mine.
- 8 Q. All right. Let me ask you this. Were you also
9 familiar with a case you handled with *Burkhart*?
- 10 A. Yes.
- 11 Q. Okay. And that case was reversed on these issues;
12 wasn't it?
- 13 A. Similar issues, yeah.
- 14 Q. Okay. And you and I talked on the phone a few
15 days ---
- 16 A. Well, it wasn't the exact same issues, yeah. But
17 it was -- I see what you're saying. There were issues
18 -- some issues in common.
- 19 Q. And when you and I talked -- and I mean, if I say
20 something that isn't true, tell me. Did you say that
21 in that case prison adaptability was not addressed?
- 22 A. Well, in *Burkhart*, you mean?
- 23 Q. Right?
- 24 A. In *Burkhart*, the State in their case in chief,
25 sought to introduce evidence that prison was easy. And

1 we had not introduced any -- at that point, in other
2 words, they didn't try to do it in rebuttal. They
3 tried to do it in their case in chief. And so it
4 wasn't in rebuttal to anything that we had put up.

5 Q. Correct. And that's what you mentioned to me on
6 the phone?

7 A. Right. Right.

8 Q. And you said, unlike this case, where you had Jim
9 Abrams testify to prison adaptability?

10 A. Right. I mean, I think about something -- you
11 know, if it were a law school exam, that should have
12 been objected to; okay. The statement that Bob said,
13 that should have been objected to.

14 Q. Right. Did you also say that one of the issues
15 beside mocking him and saying -- the first thing you
16 said when you stood up ---

17 A. The first I said when I got up was -- and I
18 remember the jury laughed about it. It was just so
19 ridiculous.

20 Q. And I think you said you saw them snickering when
21 Mr. Ariail said that?

22 A. Yeah. It was ridiculous that he said that. It
23 was ridiculous. It was irresponsible and it was
24 ridiculous, for him to say that.

25 Q. And do you feel that because you put in prison

1 adaptability evidence, that you had somewhat opened the
2 door for that?

3 A. I mean, that's not why I didn't object to it. The
4 reason I didn't object to it was because I thought it
5 would be more powerful -- I mean, I guess if I were a
6 smarter person, maybe. But at the time when I was
7 sitting at the table, the reason I didn't object was
8 because I thought it was so ridiculous, I decided I
9 would rather mock him. I thought it was irresponsible.
10 It was clearly irresponsible. It wasn't true. It
11 wasn't founded in fact. And I felt that I could mock
12 him.

13 Q. All right. You knew or know for sure that this is
14 reversible error, those kind of ---

15 A. I mean, since y'all have discussed it with me.

16 Q. Since ---

17 A. Yeah. Yeah.

18 Q. But in the heat of battle, you thought was to mock
19 him instead of objecting?

20 A. To mock him because what he said was so
21 irresponsible.

22 Q. And ask for a mistrial?

23 A. Yeah. Yeah.

24 Q. Okay. Prior to the trial itself, you and Mr.
25 Mauldin had a focus group report done for Chris

1 Williams by Jeff Bloom?

2 A. Correct.

3 Q. Do you remember that?

4 A. Right.

5 Q. Let me show you Plaintiff's Exhibit 17. Does that
6 look like the report?

7 A. Yeah. Sure.

8 Q. Okay. And directing your attention on that. Now,
9 that was looking for focus group and, also, just words
10 of wisdom; correct?

11 A. Correct.

12 Q. Okay. So on page ten of that report, how about
13 reading (b) prisons, what was Jeff's recommendations?

14 A. Even the pro-life juror will want to know that the
15 Defendant is going to be in a hard place.

16 Q. Okay. But let's go ahead and let's take it down
17 to the fourth paragraph. Just read that for me.

18 A. Okay. Get your prison adjustment witness to
19 testify how other inmates are tough on those convicted
20 of killing a child. Jurors want to know that life is
21 going to be tough for Clint as part of his punishment
22 for what he's done. But be alert to this. I am seeing
23 more and more solicitors are [use] easy prison
24 conditions at sentencing, especially in cross-
25 examination of our correctional officers and our prison

1 expert witness. The solicitor asks about things that
2 make prison sound like Club Med; air conditioning,
3 library, dining halls, contact visitation rooms with
4 snacks, outdoor recreation. Have your objections
5 prepared for this and object before the juror can hear
6 the solicitor's complete cross-examination question to
7 your witnesses. And be prepared to compete and --
8 before he completes such arguments in closing.

9 Q. Okay. So their recommendation or his
10 recommendation on the focus group, among other things
11 in this ten-page document, is to object to anything
12 about a Club Med type facility?

13 A. Correct.

14 Q. And that's exactly what Bob Ariail did; isn't it?

15 A. Right.

16 MR. VIETH: Give me one second, Your Honor.

17 Q. I'm sure you haven't read your closing arguments
18 back in that time, but briefly, let's put it on the
19 record, what you remember of it. There was a lot of
20 things Mr. Ariail brought out in his closing argument
21 dealing with juries -- or you're not the one making the
22 call, I'm the one that's deciding whether it should be
23 a death penalty. You're not the one putting him to
24 death, those kind of things. There was no objections
25 to those?

1 A. Right.

2 Q. Was there any strategy to that or just let it go?

3 A. No.

4 Q. So all those arguments, it wasn't a strategy to
5 say I'm going to mock him or anything like that. It
6 just wasn't objected to?

7 A. (No verbal response.)

8 Q. I'm just saying, when he gets up and says, it's
9 not enjoyable for me to ask for you to impose the death
10 penalty. We will agree that the Defendant could adapt
11 to prison because they'll make him adapt, but that's
12 not the issue. There was no objections to those.
13 There wasn't any kind of strategy; was there?

14 A. No,.

15 Q. It just didn't get objected to?

16 A. Right.

17 Q. From the transcript, 2370, they have said earlier
18 the Solicitor's not satisfied with a life sentence.
19 And I agree, I am not. They've told you he's going to
20 want the death penalty. And I do. These are just
21 parts of the closing argument. Now, let's talk a
22 little bit about the fact that this is obviously a
23 difficult decision.

24 MR. ZELENKA: Your Honor, I've got a copy of
25 the transcript if -- and I do want to deliver that to

1 the witness so he can review what you're ---

2 A. I mean, if -- look, let me tell you something;

3 okay? If the transcript says I didn't object, I didn't

4 object. Okay? And if, you know, if Bob said something

5 that smarter people now say I should have objected to,

6 I should have objected. Okay. I mean, I objected to

7 everything in that closing argument that I thought was

8 objectionable.

9 Q. Okay. Fair enough. Fair enough. Answer any

10 questions. I'm done.

11 **CROSS-EXAMINATION**

12 **BY MR. ZELENKA:**

13 Q. Mr. Nettles, ---

14 A. How you doing?

15 Q. --- you testified that you were involved in a

16 number of death penalty cases both before and after you

17 represented Mr. Williams in this case. Is that

18 correct?

19 A. I know I was involved in a number before. I can't

20 exactly -- I can't remember whether this was -- you

21 said before and after. I know I was involved with a

22 number before. I can't remember whether this was my

23 last one or not. I mean, if it wasn't the last one, it

24 was close to my last one.

25 Q. Okay. And you not only did trial work, but you

1 were also involved in representing individuals in death
2 penalty State post conviction relief cases?

3 A. I've done two or three of those.

4 Q. Okay. Involving introduction and admissibility of
5 social historians?

6 A. Right.

7 Q. Mental health issues?

8 A. Right.

9 Q. Organic brain problems?

10 A. Right.

11 Q. Your representation of Mr. Williams wasn't your
12 first time to be exposed to those types of issues at
13 all; was it?

14 A. No. No.

15 Q. And is it correct that in your preparation and
16 investigation of the case, you understood you had an
17 obligation to review the materials that the mitigation
18 investigator provided to the Defense team?

19 A. Correct.

20 Q. Do you recall whether you did that at the time?

21 A. Yes.

22 Q. And do you recall whether you had contact with Jan
23 Vogelsane, who was the mitigation investigator, about
24 her findings and conclusions?

25 A. I had contact with Jan. I believe Jan was present

1 at some of the team meetings. So, yes, I had contact
2 with her.

3 Q. There's been evidence presented by your memorandum
4 and her testimony about her discussion with family
5 members that the Defendant's mother drank during the
6 pregnancy. Did I understand your testimony directly
7 that at this time you have no independent recollection
8 of those materials and that being discussed?

9 A. No. No.

10 Q. Okay.

11 A. I'm sorry if I was unclear. Let me make it clear.
12 What I meant to say was, I don't remember exactly what
13 I said, but let's clear about it right now, was that
14 the subject of Fetal Alcohol Syndrome did not come up.
15 I don't remember the subject of Fetal Alcohol Syndrome
16 coming up.

17 Q. Okay.

18 A. And so the subject of her drinking did.

19 Q. Okay. Did the subject of her drinking during
20 pregnancy come up?

21 A. I mean, I believe the report that he showed me,
22 you know, that Mr. Vieth showed me, that it did.

23 Q. So ---

24 A. And I'm sorry if I confused you.

25 Q. No, you didn't. And in fact that ---

1 A. But what I'm saying is, in other words, there was
2 never a meeting where we said, do we want to chase down
3 Fetal Alcohol Syndrome. That term, that phrase, I
4 don't ever recall being mentioned.

5 Q. Okay. But at the time in 2004 and 2005, were you
6 aware that the mother's drinking during pregnancy was
7 considered a medical risk?

8 A. I knew it was considered a risk, yes. Now, I
9 can't tell you that at the time I was preparing for
10 this, that the mother's risk -- I knew it was a risk.
11 I mean, and clearly, I think, it shows reckless
12 behavior; okay? And it shows type of environment you
13 probably don't want your child raised in. But I can't
14 say that at the time that this took place, the time
15 that we were preparing for this trial, that I knew
16 there was a correlation between her drinking and Fetal
17 Alcohol Syndrome. In other words, I'm not disputing
18 the fact that she drank while she was pregnant with
19 Chris came up. But I will dispute that the discussion
20 about whether that drinking would lead to the concept
21 of Fetal Alcohol Syndrome, that never came up.

22 Q. In the meetings that you had had with the Defense
23 team, did those meetings involve Dr. Jim Evans?

24 A. I don't think that -- I don't have a memory of Dr.
25 Evans ever attending a meeting. I would suspect that

1 probably what happened was, at the meeting, Dr. Evans'
2 report would be discussed.

3 Q. Okay.

4 A. Now, John may have a different memory on that, but
5 I don't remember Dr. Evans ever attending a meeting.

6 As a matter of fact, I don't have a memory of any
7 expert ever attending a meeting.

8 Q. Okay. With respect to 2003 and your understanding
9 of the ABA Guidelines at that particular time and
10 through the trial in 2005, ---

11 A. Right.

12 Q. --- what was your understanding of the Guidelines?

13 A. Well, I mean, I understood they existed. I
14 understood that they were very important. I understood
15 that they were the -- they should be followed.

16 Q. Okay. Did you have a copy? Did you read the
17 Guidelines?

18 A. I'm sure I read them. I'm sure -- I mean, I'm
19 sure -- yeah, I'm sure I ...

20 Q. And you acknowledge that in the Guidelines as they
21 pointed out on direct, there is a reference to pre-
22 natal problems and Fetal Alcohol Syndrome?

23 A. Right.

24 Q. With respect to the decisions on how to present
25 the, what I -- we'll call the mental health experts.

1 A. Right.

2 Q. Dr. Richards, Margarete Hammock, Dr. Al Bogan and
3 Dr. Sy Halleck, were you involved in those decisions in
4 deciding the breadth of the testimony to be presented
5 through them?

6 A. I was involved, yeah.

7 Q. Were you involved in discussions about the
8 potential mental health information, diagnoses,
9 conclusions that they would be presenting?

10 A. I was involved, yes.

11 Q. Did you concur in the decision to call Dr.
12 Richards in the penalty -- in the guilt phase of the
13 trial?

14 A. The first phase, yes.

15 Q. And why did you choose to call him in that phase
16 of the trial?

17 A. I felt -- I mean, I think -- well, I mean, this my
18 opinion. I believe it became the -- ultimately the
19 collective wisdom of the group that it was a good idea
20 for us to begin to have a discussion about the fact
21 that we felt that there were psychological issues that
22 were going to be relevant. And I felt that it was
23 probably a good idea to start to introduce the jury to
24 it so it didn't seem like we were bringing up
25 psychological issues only in the second phase of the

1 case, almost like in desperation. And, you know, the
2 psychological issues, I felt, were particularly
3 relevant in light of the fact of the type of
4 questioning that Pam Crawford chose to engage in.

5 Q. The type of questioning she chose to introduce,
6 the questioning that she had of your client?

7 A. Right.

8 Q. That's what you're talking about?

9 A. Right.

10 Q. And you utilized some of that questioning to
11 present the information about the mother drinking also.
12 Isn't that correct?

13 A. Well, I mean, I would rather not -- we tried
14 everything we could to keep that out. But given the
15 fact that it came in, I felt the best we could do is
16 utilize the ---

17 Q. To keep that out, meaning all of Dr. Crawford's
18 testimony?

19 A. I thought what Dr. Crawford did was unethical and
20 unconscionable.

21 Q. And that was the position you took throughout the
22 trial?

23 A. Right. Right. Right. Right.

24 Q. With respect to the additional decision as far as
25 how to present that mental health information with your

1 experts, do you recall whether they were specifically
2 aware of the information that the mother had been
3 drinking during pregnancy and the discussions that were
4 had with her then during the ---

5 A. In other words, are you asking me do I have
6 independent knowledge that the experts that we had
7 retained were apprised of the fact that the mother had
8 -- I don't have any independent -- you'd have to ask
9 them, I guess.

10 Q. Okay.

11 A. I can tell you this, though. I mean, I can't
12 imagine that's anything that we would have hidden from
13 them.

14 Q. Okay. And why is that?

15 A. Because it's bad to drink when you're pregnant.

16 Q. And that would have been considered important
17 information to you, the Defense team?

18 A. I think that it was something that we brought up.
19 It was something that was in the statements. We
20 certainly didn't run from it.

21 Q. In the issue concerning the MRI, do you recall at
22 this time why the MRI wasn't done earlier in the
23 investigation of this case?

24 A. No.

25 Q. Did you have an understanding that the MRI was

1 going to be done earlier on, and it just hadn't been
2 done?

3 A. No.

4 Q. Was there a decision made, to your knowledge, by
5 the Defense team not to have done that MRI earlier
6 before some of the initial investigative work had been
7 completed?

8 A. Let me make sure I understand your question. If
9 your question is, had the MRI been brought up prior and
10 we just made the conscious decision not to pursue it?

11 Q. Yes?

12 A. The answer to that would be no.

13 Q. Okay. And the reason I asked that question is
14 there's information that Dr. Evans did not suggest for
15 an MRI or CT Scan to be done in 2004, for some reason.

16 A. Okay.

17 Q. Did you inquire of Dr. Evans in your investigation
18 and presentation, why he didn't think an MRI should be
19 done or did not recommend for an MRI to be done?

20 A. I don't have a memory of asking that.

21 Q. Now, you testified that you had knowledge that the
22 mother was German or had a German background?

23 A. She clearly has a German accent.

24 Q. In your investigation of the case, did you ever
25 consider to investigate whether, because of that

1 parental background, that your Defendant might have
2 some dual citizenship advantage?

3 A. I did not.

4 Q. Okay. And why not?

5 A. I just didn't think of it. I mean, I didn't -- it
6 didn't occur to me that it would extend to the child.

7 Q. With respect to investigating the family
8 background in Germany, did you or do you recall having
9 any discussions with Ms. Vogelsane concerning her
10 travel or potential travel to Germany to meet and
11 discuss with individuals over there about the family
12 background?

13 A. No.

14 Q. You did not have those discussions or you don't --
15 -

16 A. I don't have a memory of us having a discussion
17 about sending anyone to Germany to investigate
18 anything.

19 Q. And if I understood your direct testimony
20 correctly, you had never heard of an organization, at
21 least through 2005, called Reprieve?

22 A. I mean, no. I mean, no, no.

23 Q. Okay. Do you know --

24 A. I mean, I don't know that I know who they are now,
25 but I don't know. No.

1 Q. Concerning one of your -- the prior case that you
2 spoke about, the State versus Burkhart, the Troy
3 Burkhart case, I believe, out of Anderson County.

4 A. Right.

5 Q. You were involved in that trial?

6 A. Yes.

7 Q. Okay. And you noted or acknowledged that a very
8 similar issue was the issue that the South Carolina
9 Supreme Court was involved in one of the reasons it
10 vacated that penalty phase; correct?

11 A. Right.

12 Q. Yet at the time you tried the case in 2005, isn't
13 it correct that the Burkhart decision wasn't yet out.
14 It hadn't come out for another two years?

15 A. I'll defer to you on that.

16 Q. So that was a 2007 decision.

17 A. Was it?

18 Q. Of the South Carolina Supreme Court.

19 A. I'll defer to you on that.

20 Q. Okay. And an earlier decisions they kind of
21 relied upon was *State versus Marion Bowman*. That was
22 another decision which occurred after this trial?

23 A. I'll defer to you on that.

24 Q. So at that time of the trial, you couldn't have
25 relied necessarily upon either *Burkhart* -- a decision,

1 in making an objection, even though you considered it
2 improper argument at the time; correct?

3 A. Right. Right. I mean, I certainly couldn't have
4 cited -- I couldn't have cited the case because the
5 case hadn't been reported yet. But the proposition, I
6 disagree with.

7 Q. Okay.

8 A. Not the holding, you understand, but the
9 proposition in the holding.

10 Q. I understand. You acknowledge that you did do or
11 would have objected at trial if you considered the
12 information prejudicial to your client?

13 A. Well, I mean, the information was prejudicial to
14 my client. There's no doubt about that. I felt that
15 it was so improper and so irresponsible that by mocking
16 him that it would begin to undermine his credibility.

17 Q. Okay.

18 A. His, being Ariail's.

19 Q. right. And that's not a position you're just
20 taking here today on this witness stand. You've had
21 that feeling from the time of the trial?

22 A. When I was sitting at the table over there, that's
23 what I thought.

24 Q. Right. And you did do objections during the
25 closing argument?

1 A. I don't have any independent memory of it. It
2 wouldn't surprise me.

3 Q. Now, as part of the Defense team, were there, if
4 you recall, other mental health experts that were
5 consulted? There's a reference in one of the materials
6 to Dr. Follingstaad. Do you know if she did any work
7 on this case?

8 A. I mean, if there's reference to her, I mean, I
9 would think somebody would have documented whatever she
10 did.

11 Q. Okay. Were there -- other than Marjorie Hammond,
12 Dr. Eric Elbogen, Sy Halleck, Dr. Griesemer, and Dr.
13 Rob Richards, was that essentially the mental health
14 team that was presented in this case and working on the
15 Defense?

16 A. You know, I mean, all those names sound -- I mean,
17 I associate all those names with this case. I can't
18 sit here today -- I mean, if you were to ask me cold to
19 name the experts that were in the case, I don't think I
20 could have done it. But I will not -- I mean,
21 obviously I think the record supports that all those
22 witnesses testified.

23 Q. Okay.

24 A. All those experts testified.

25 Q. In the mitigation case, the father, Dwight, was

1 called as a witness about some of the family
2 background. The sister ---
3 A. Maureen.
4 Q. --- Maureen was also called?
5 A. Right.
6 Q. But the mother was not called. The mother, who is
7 alleged, at least through some of the testimony, to
8 have been drinking during the time of the pregnancy ---
9 A. The government didn't call her either; did they?
10 Q. No. Why was she not called in the Defense about
11 the family background that she had in Germany?
12 A. Well, because we had concerns about her
13 willingness to tell the truth.
14 Q. Her willingness to tell the truth?
15 A. To tell the truth.
16 Q. Okay. So as a matter of strategy, based upon
17 those concerns, you chose to ---
18 A. We just felt -- she was here. We knew who she
19 was. We talked to her. And we felt the best thing to
20 do is not call her.
21 Q. Okay. As a result of not calling her ---
22 A. But, I will point out, I mean, she was here. It
23 was clear who she was and clearly the State could have
24 called her, as well. I mean, she was present. It was
25 obvious who she was. It was obvious it was his mother.

1 Q. Okay. As a result of her not being called, do you
2 have a recollection of what type of information the
3 jury may not have heard that you could have otherwise
4 presented through her?

5 A. No. I don't have an independent memory of it. I
6 mean, if you've got something you want -- I can
7 probably ...

8 Q. Did you participate in the mock trial that Jeff
9 Bloom did?

10 A. Yes.

11 Q. Is that the first time you'd done one of those, if
12 you can recall, with Mr. Bloom?

13 A. I know that I did -- I don't know the chronology
14 of things, but I know that I've done more than one.
15 I've used Jeff Bloom and I've used other people.

16 Q. Okay. Well, just in light of it being in the
17 record, explain the process of the mock trial, ---

18 A. Right.

19 Q. --- how it occurred ---

20 A. Right.

21 Q. --- that allowed Mr. Bloom to assimilate that
22 information?

23 A. Right. I can't remember exactly where we did it,
24 but we did not do it in Greenville County because we
25 had worries about -- I don't know where we did it.

1 But, anyway, we took steps to make sure that there were
2 not potential jurors for, you know -- in other words,
3 we didn't want someone to have been in the mock trial
4 and then get called for jury. And I can't remember how
5 we did it or where we did it. A lot of times, we would
6 do it in a similar county that was not going to be a
7 part of the jury. And what we did was we would bring
8 in a number of people. And we would essentially assign
9 one lawyer to be the prosecution and another lawyer to
10 be the Defense. And we would do -- you wouldn't do
11 witnesses, but you would have -- each side got an
12 amount of time to lay out their case. So you had, you
13 know, somebody representing the prosecution would get
14 up and do what their -- you know, what we understood
15 basically the discovery was going to be in the State's
16 case. As for the Defense, we'd get up and do it. And
17 then there would be some polling at the end of that,
18 you know, just sort of talk to them about what they
19 felt about it. Then the Defense would get up and give
20 their thing, then you would watch them deliberate. And
21 you'd have them ask questions so you would know what
22 questions they were going to have. And then you let
23 them deliberate. And then you do -- and then you -- we
24 did the same thing on the *Plath* case.

25 Q. And so it wasn't actual witnesses being presented?

- 1 A. No.
- 2 Q. Family members?
- 3 A. No.
- 4 Q. Experts?
- 5 A. No. You know, you would say -- you might say,
6 we'll have an expert, Dr. So and So, who will say the
7 following. But it was done in a narrative fashion, I
8 guess is what I'm trying to get at.
- 9 Q. All right. And then Mr. Bloom, who is a very
10 experienced capital litigation lawyer out of Columbia -
11 --
- 12 A. Right. Right. Right.
- 13 Q. --- assimilates that information, digests it with
14 his own expertise and provided you that in a report?
- 15 A. Right.
- 16 Q. Is that correct?
- 17 A. Right.
- 18 Q. And I assume you reviewed the report along with
19 Mr. Mauldin?
- 20 A. Yes.
- 21 Q. And decided to accept or reject whatever
22 suggestions he had and the jury had as to how you would
23 handle the case?
- 24 A. Right. It was a part of the information you used
25 to decide.

1 Q. And they pointed out, the Petitioner's counsel
2 pointed out to you, as a portion of that recommendation
3 concerning limitations and objections in, what I would
4 call, the Holiday Inn type of arguments ---

5 A. Right. That's right.

6 Q. --- that were occurring somewhat frequently in
7 capital cases during that time period?

8 A. They apparently recorded in a report to Jeff that
9 they were.

10 Q. Okay. And, again, even with that information, you
11 chose to, I guess, to try to make a mockery of the
12 statements within your own closing argument?

13 A. Right.

14 Q. Okay. When the case was presented, there was an
15 issue concerning the journal that was introduced by the
16 Defendant. Do you recall that?

17 A. Yeah. I haven't thought about it in a long time.
18 I knew that there was a journal.

19 Q. Okay. You were aware of the journal before its
20 introduction at the time of the trial?

21 A. Oh, yeah, yeah, right, right. All I'm saying is I
22 haven't thought about that whole issue of the journal
23 since the trial. But, yes, there was a journal and I
24 recognize it.

25 Q. And the journal had a lot of information in it.

1 Isn't that correct?

2 A. I mean, I couldn't, as I sit here today, remember
3 any of it. But I remember there was a journal and I
4 remember we felt that it was significant.

5 Q. Did you consider having certain parts of the
6 journal redacted at the time of the trial?

7 A. I mean, if we did, we would have probably done
8 that pre-trial. And, maybe we did. I don't know.

9 MR. ZELENKA: Court's indulgence.

10 Q. What was the role of the folks from Aiken Gump on
11 this case?

12 A. They were lawyers on the case with us.

13 Q. They were brought in at your request?

14 A. Bart McDougal and I are friends. And Bart has
15 expressed some desire to be involved in capital cases.
16 And for all those reasons, I thought this was a good
17 one.

18 Q. Okay. And Mr. McDougal took an active role in the
19 case?

20 A. Took an active role.

21 Q. Took witnesses?

22 A. Yes.

23 Q. Typically took the forensic psychiatrist, Seymour
24 Halleck?

25 A. Right.

1 Q. And did that presentation. Is that correct?

2 A. Right.

3 Q. Were you satisfied with the presentation that he
4 had done? Was it consistent with the Defense's theory
5 as you saw it in the case?

6 A. Yes.

7 Q. Okay.

8 MR. ZELENKA: I have no further questions.

9 Thank you, Mr. Nettles.

10 THE COURT: Any redirect?

11 MR. VIETH: Just a real brief follow-up.

12 **REDIRECT EXAMINATION**

13 **BY MR. VIETH:**

14 Q. Bill, regarding the comment that you put in Dr.
15 Richards, the testimony in the guilt phase.

16 A. I would prefer to call it the trial phase.

17 Q. The trial phase. Not guilt phase.

18 A. Sometimes it is, sometimes it isn't.

19 Q. If you'd had a diagnosis of guilty but mentally
20 ill, you would have wanted that in that phase; wouldn't
21 you?

22 A. Oh, yeah.

23 Q. Wouldn't you?

24 A. Oh, yeah.

25 Q. And if you had a picture of an organic brain

1 damage, if you'd had actually a picture of the brain
2 that was damaged, you would have wanted to put that in
3 if you had it; wouldn't you?

4 A. I don't know if we would have wanted to do it in
5 the first phase, but we'd have definitely done it ---

6 Q. Okay.

7 A. We'd have definitely done it during the trial.

8 Q. Okay. But you didn't have that in this case?

9 A. No.

10 Q. I want to make sure that -- oh, and one other
11 quick thing, we had talked in your office some time ago
12 and do you remember a comment you said, there was just
13 something about Mr. Williams I just couldn't get my
14 hand around?

15 A. Right.

16 Q. What do you mean by that?

17 A. I mean, you know, I mean, I've done a lot of these
18 cases where you can, you know, you can tell them, you
19 tell the jury, this is what's wrong. You know, I mean,
20 you know, and you can draw the correlation between a
21 diagnosis and what happened, you know. And it
22 certainly doesn't excuse it, but it helps to provide,
23 you know, an understanding of how it happened. You
24 know, this is actually the second case that Mr. Zelenka
25 and I have had fairly recently where, just literally,

1 you know, there was just something that wasn't right.
2 And, you know, we just couldn't -- you know, I just
3 couldn't exactly -- you know, we struggled -- we knew
4 things weren't right and we certainly knew things
5 weren't right. And that's a very colloquial term. But
6 that, you know, I've done a fair number of case where,
7 you know, you can pinpoint, you know, the diagnosis.
8 You can pinpoint both organic, you know, or that -- and
9 say because of this happening, it helps explain.
10 Because of this condition, it helps explain why this
11 event happened. We just couldn't get -- I don't know
12 if we could ever really get to that on this case.

13 Q. And, lastly, I meant to introduce this through you
14 a while ago. Plaintiff's Exhibit 24, Affidavit of Dr.
15 David Griesemer. That's the one you used for the MRI;
16 correct?

17 A. Yeah.

18 Q. Yeah. Okay.

19 (WHEREUPON, Plaintiff Exhibit Number 24 was marked
20 and admitted into evidence.)

21 MR. VIETH: Your Honor, I think instead of
22 having Mr. Nettles read it, I can publish it just as
23 well or I can have him publish it or I can just hand it
24 up to the Court.

25 THE COURT: I'll be glad to read this,

1 without objection, the Affidavit of Dr. Griesemer?

2 MR. VIETH: Let you read it, is that what you
3 said?

4 THE COURT: Yeah. I can -- how long is the
5 affidavit?

6 MR. ZELENKA: We talked about this. I don't
7 have any objection to ---

8 MR. VIETH: Your Honor, I'll need to just put
9 it in the record, if I can.

10 THE COURT: You can read it into the record,
11 if that's better.

12 MR. VIETH: Okay.

13 THE COURT: That way I can listen to it and I
14 can read it later.

15 MR. VIETH: It's very short. It's the
16 affidavit of Dr. David Griesemer, who personally
17 appeared before me affirms and states the following: I
18 am a neurologist presently working at Tufts Medical
19 Center in Boston. From 1993 through 2010, I was
20 employed full-time at the Medical University of South
21 Carolina in Charleston. I interviewed and evaluated
22 Charles Christopher Williams for two hours on January
23 27, 2005, at the request of Mr. Williams' attorneys, and
24 I wrote the attached report. It is now my practice to
25 date when the report is drafted as well as when the

1 examination is performed, but I did not date this final
2 report and cannot say when it was delivered to the
3 attorneys. I do not recall whether I talked to either
4 of Mr. Williams' attorneys or anyone else on the Defense
5 team about the findings of my examination. I have no
6 independent recollection of the evaluation of Mr.
7 Williams, but I have reviewed my report and subsequent
8 neuropsychological testing done by Dr. Jim Evans.

9 In review of my report, I immediately noted that
10 the evaluation was based exclusively upon interview and
11 examination of Mr. Williams. And that no medical,
12 educational or judicial records were made available for
13 review. I reported this fact on page four of my report.
14 In quotes, no school-based psychoeducational test
15 results or court ordered psychological assessments were
16 available for review, end quote. I also noted it on
17 page five of my report, quote, these above opinions are
18 based upon limited information presently available.
19 Should there be additional data, particularly that which
20 addresses educational, psychological or adaptive
21 capabilities, which alter my opinions, I will supplement
22 this report, end quote. I also noted on page five of my
23 report that Mr. Williams should be evaluated for high
24 blood pressure and a scalp condition. And, end quote,
25 more importantly, given subtle but likely stable

1 neurologic abnormalities, including slight asymmetry of
2 eye movements and balance, a formal neuropsychiatric
3 evaluation may be helpful.

4 I have since reviewed additional information from
5 the Defense team, including notes from Jan Vogelsane
6 regarding performance on neuropsychological testing, a
7 brief history of school performance, and a new history
8 that Mr. Williams' mother drank alcohol throughout her
9 pregnancy with him. If this additional information had
10 been made available to me, I would have structured my
11 report and my recommendations differently. The
12 information that was available to me at the time of the
13 evaluation was certainly less information than I
14 normally have when completing a patient evaluation. To
15 begin with, I was unaware that there were
16 neuropsychological testing results available for review.
17 I was also unaware that Mr. Williams suffered from a
18 head injury. I was also unaware that his mother
19 consumed alcohol during her pregnancy or that Mr.
20 Williams had poor performance in school.

21 Despite this lack of history, I did note that he
22 had delayed recall and difficulty with frontal lobe
23 flexibility. These are indicative of cognitive
24 problems. Were I to have seen neuropsychological test
25 results that I did not see, characterized by a fifteen

1 point spread between verbal I.Q. and performance I.Q.,
2 and by evidence of frontal lobe difficulty and rigidity,
3 I would have expressed greater concerns about Mr.
4 Williams' neurological function.

5 Particularly important would have been the results
6 of the Wisconsin Card Sorting Test. During this test,
7 the rules change as the patient progresses through the
8 test and part of the evaluation is whether the subject
9 has the ability to detect changes in the rules. Mr.
10 Williams took eighteen trials to understand the very
11 first rule. This poor performance placed him in the
12 bottom three percent of test-takers.

13 The mother's drinking is a significant piece of
14 history. If this were made known to me, I would have
15 certainly informed the team to investigate Fetal Alcohol
16 Syndrome or to at least rule out Fetal Alcohol effects.
17 I have never testified as an expert on Fetal Alcohol
18 Syndrome and I was not aware of the CDC Guidelines
19 regarding FAS until speaking to Mr. Enderlin. While I
20 have patients with FAS that I follow for neurological
21 issues, I would not consider myself an expert in FAS.

22 Furthermore, regardless of the FAS diagnosis, had I
23 been given the neuropsychological testing information as
24 well as other relevant data, I would have noted
25 compelling evidence of problems with judgment and

1 cognitive functioning that may -- that might be
2 significant in understanding his actions.

3 Signed by David Griesemer before a Notary on
4 September 27th, 2012.

5 Now, with that is the report that we refer to in
6 this case admitted into evidence as Plaintiff's Exhibit
7 24.

8 (WHEREUPON, Plaintiff Exhibit Number 24 was
9 admitted into evidence.)

10 MR. ENDERLIN: I don't have any other
11 questions of Mr. Nettles. Thank you, Your Honor.

12 THE COURT: All right. Thank you, Mr.
13 Nettles, you ---

14 MR. ZELENKA: Your Honor, I've just have a
15 couple of follow-up questions.

16 THE COURT: All right. Briefly.

17 **RECROSS-EXAMINATION**

18 **BY MR. ZELENKA:**

19 Q. Mr. Vieth asked you about an issue of guilty but
20 mentally ill. Did you inquire of your experts,
21 particularly Dr. Richards and Dr. Sy Halleck, whether
22 the Defendant, based upon their understanding of the
23 circumstances around that September date, met the South
24 Carolina definition for guilty but mentally ill?

25 A. I don't have -- I don't have any memory of that.

1 Q. Do you recall that Sy Halleck testified that he did
2 not meet that definition?

3 A. I don't. I mean, if that's what his testimony
4 says, that's what his testimony says.

5 Q. And that Dr. Richards was not saying that he could
6 not conform his requirement, his conduct and
7 requirements of law on September 3rd?

8 A. If that's what his testimony said, I don't
9 disagree.

10 MR. ZELENKA: No further questions.

11 MR. VIETH: That's all, Your Honor.

12 THE COURT: All right. Thank you. You may
13 step down.

14 THE WITNESS: Thank's Judge.

15 MR. ZELENKA: We have no objection to Mr.
16 Nettles being excused.

17 THE COURT: Thank you, Mr. Nettles. We're
18 going to take a short break before we call our next
19 witness.

20 MR. ZELENKA: Yeah. John is the last witness.

21 THE COURT: All right. Let's take about a
22 ten-minute break.

23 (WHEREUPON, the court stood at recess for a short
24 break.)

25 THE COURT: All right, Madam Clerk, swear the

1 witness.

2 THE CLERK: Mr. Mauldin, place your left hand
3 on the Bible and raise your right hand.

4 You do solemnly swear or affirm that the testimony
5 you're about to give in this case will be the truth, the
6 whole truth and nothing but the truth, so help you God?

7 THE WITNESS: I do.

8 THE CLERK: Thank you. You may be seated.
9 Please state your full name for the record.

10 THE WITNESS: John Ingles Mauldin.

11 JOHN INGLES MAULDIN,

12 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

13 DIRECT EXAMINATION

14 BY MR. VIETH:

15 Q. John, good afternoon.

16 A. Hello.

17 Q. I'm sure there's a lot of people in this courthouse
18 has asked me to put you under oath today.

19 A. Well, I suspect they're lined up out in the hall to
20 question me, too.

21 Q. John, you're employed with the Greenville County
22 Public Defender's Office in what capacity?

23 A. I'm the Thirteenth Circuit Public Defender.

24 Q. And you've been the head Public Defender for
25 Greenville when they made the consolidation of both --

- 1 you're head of both since when?
- 2 A. Yes, sir.
- 3 Q. That's Pickens and Greenville County?
- 4 A. Pickens and Greenville make up the Thirteenth
- 5 Circuit. Prior to my appointment in 2008 to that
- 6 position, I was the Chief Public Defender for Greenville
- 7 County.
- 8 Q. John, how long have you been practicing law?
- 9 A. Since 1974.
- 10 Q. And how long have you been generally doing criminal
- 11 Defense work?
- 12 A. Since -- I began as an Assistant Public Defender
- 13 for a couple of years. I was in private law practice
- 14 for sixteen years and criminal Defense probably was
- 15 about fifty percent of my practice then. And in '92, I
- 16 took over the Public Defender Office in Greenville and
- 17 have been exclusive criminal Defense since then.
- 18 Q. Okay. So you're going into your twenty-first year
- 19 as a Public Defender?
- 20 A. Yes, sir.
- 21 Q. Serving in that capacity, John, you've handled many
- 22 death penalty cases. Is that fair to say?
- 23 A. I have.
- 24 Q. Okay. Any rough idea how many you've handled?
- 25 A. Probably, probably close to a dozen trials to

1 verdict, I would think. Probably two, maybe three times
2 that many, with death notice that some other resolution,
3 either a plea or a trial for non-capital ended up
4 resolving. But I think probably I've had close to a
5 dozen trials to verdict involving sentencing proceedings
6 under the statute of South Carolina.

7 Q. Okay. Were all of those death penalty cases as a
8 Public Defender or was some of that while you were in
9 private practice?

10 A. I had two or three of those cases when Pete Partee
11 was the Public Defender. I represented or I would serve
12 as second chair with Mr. Partee, two or three times.
13 One case, and this goes way back, but Mr. Partee had had
14 a heart attack and I was appointed to replace him as
15 lead counsel. That was back in the early eighties.

16 Q. Okay. So it's obvious to say you've got as much
17 experience as anybody in this County with death penalty
18 work?

19 A. I suspect that's fair to say.

20 Q. Sure. And how do you organize a team when you are
21 told that there's going to be a death penalty case and
22 Public Defender is involved. What is your routine?

23 A. Well, I think that where you begin is there are
24 certain primary team members, lead counsel and co-
25 counsel, fact investigator, mitigation investigator,

1 would probably be the core group that would exist in
2 every capital case. And then secondarily, you go
3 through, depending upon the needs of the individual
4 case, who you're going to align as a team member.

5 Q. Now, in the case of Chris Williams that we're here
6 about today, or this week, did you happen to look at
7 records to see when you got involved in this case? Do
8 you have them?

9 A. Yeah, I do. The date of the offense, according to
10 the cover of the file that we would have opened, was
11 September the 3rd of '03. We were appointed on
12 September the 4th of '03. And I believe the first --
13 that was likely late that afternoon, I suspect, and the
14 first contact visit with the client would have been
15 either the evening of the 4th or the day of the 5th of
16 September.

17 Q. Of 2003?

18 A. Yeah.

19 Q. And the case was tried, I believe, in February of
20 2005?

21 A. That's right.

22 Q. Do you feel like you had ample time to prepare for
23 this case for trial?

24 A. Well, I would always want to not go forward. I
25 don't recall this case, feeling like we had not had

1 sufficient time in Chris' case to go forward. We always
2 would -- I suspect the record would support and perhaps
3 doesn't, but we would always attempt to avoid trials in
4 capital cases. But I can't say that this case was
5 called too early. I don't recall that being the problem
6 here.

7 Q. Sure. Now, in the early stages, you had, in this
8 case anyway, you had Jan Vogelsane as your mitigation
9 investigator?

10 A. That's right.

11 Q. I believe she testified earlier that that was her
12 first case as an investigator. And you don't probably
13 know the answer, but I'm telling you that's what she
14 said.

15 A. Okay. And I don't -- I actually do not recall
16 that. She certainly would know that.

17 Q. Right. And as a mitigation investigator, she's
18 basically a fact-finding person for mental health
19 records, family tree, genealogy, everything that goes
20 into mitigation. Is that right?

21 A. That's right.

22 Q. You have another investigator, either out of your
23 office, someone that's looking at the facts of the
24 crime; right?

25 A. That's right. And I think in this case we had Mr.

1 Ravan, Gerald Ravan, as I recall.

2 Q. And how did you get Mr. Nettles involved?

3 A. I don't recall there being any specific case-
4 sensitive issue that led me to request that Bill join as
5 the second chair. I knew Bill well at that point. I
6 knew him to be an excellent lawyer. I knew that this
7 case, at least early on, appeared to involve some pretty
8 complex issues. So I wanted to make sure that I got a
9 very good lawyer as second chair and I think I did. I
10 can't recall how early-on it was. I think the clerk's
11 file would have the date that the second chair was
12 actually appointed. But I would have communicated with
13 Bill my interest in him participating in the case some
14 time prior to that.

15 Q. Okay. So you got to make the call as to who you
16 wanted as second chair?

17 A. Yes, he was my choice.

18 Q. Now, going into Jan's work product, I'm going to
19 show you a couple of things that have been pre-marked
20 and introduced. One is Plaintiff's Exhibit 1. John, it
21 shows the preliminary family tree, as it's called. Do
22 you recognize -- can you look at that say, yeah, that
23 looks right?

24 A. That's what it appears to be. I would certainly --
25 the -- I can't absolutely say that I've seen this. But

1 I certainly would have suspected that I would have seen
2 it. It would have been the type of document we would
3 have reviewed and talked about and determined what we
4 were going to do.

5 Q. Okay. And when you have a family tree like this,
6 in any family history, what is your protocol? How far
7 back do you try to go?

8 A. I would attempt to see at least the grandparents of
9 the client, I think, would be the general approach that
10 I would take in almost every case. I can't -- don't
11 have a specific recollection. This case was almost --
12 well, eight or nine years ago now. I can't say exactly
13 what I was thinking, but my general approach would be
14 that I would want parents of the client and their
15 parents to be part of our review.

16 Q. Okay. And that would be your mitigation
17 investigator meeting with them, talking to them, getting
18 records and so forth?

19 A. To the extent possible, that's right.

20 Q. Okay. And while we're on that subject matter,
21 let's just jump to that right now. You knew that Daisy
22 was from Germany?

23 A. Yes, sir.

24 Q. Okay. And you knew then that her family was from
25 Germany?

1 A. That's right.

2 Q. Was there ever any discussion with Jan and your
3 Defense team about funding Jan go to Germany to meet
4 with the grandparents or anybody else?

5 A. I never recall that being discussed.

6 Q. Okay. Did you ever discuss getting any other
7 assistance from Germany, either through the Consulate or
8 just a phone call to somebody to see if they could get
9 any mitigation investigator to do any homework over
10 there?

11 A. I don't have any record -- I remember specifically
12 that Daisy was from Germany and that Chris' father had
13 met her during his service, military service. But I
14 cannot recall a discussion among the team members
15 regarding investigation in Germany. I don't recall a
16 funding issue coming up. I don't recall Jan suggesting
17 that she needed to go to Germany. I don't recall
18 specifically family members from Germany. So I just
19 simply don't have a recollection of that discussion. So
20 I'm not real sure why it wasn't discussed, but I don't
21 recall it.

22 Q. Okay. And then Daisy's mother had gone to Idaho.
23 There was no indication of sending Jan to talk to her
24 either. Is that ---

25 A. No, I don't recall a funding request or travel to

1 Idaho.

2 Q. Had you ever heard of the group, Reprieve?

3 A. Pardon me?

4 Q. Did you ever hear of a non-profit group, Reprieve,
5 that helps in mitigation investigation?

6 A. Have I now heard of them?

7 Q. Now have you?

8 A. I have heard of them, but can't give a definition
9 of their -- of what they do.

10 Q. Okay. Didn't know at the time?

11 A. I cannot, I cannot recall when I first heard of
12 them, but I think it's -- it is likely to have been
13 since Chris Williams' trial.

14 Q. Okay. Did you notify the German Consulate of Chris
15 Williams' arrest?

16 A. No.

17 Q. Did that ever enter your mind to do that?

18 A. No, it did not. That did not enter my mind.

19 Q. Okay. You say that funding was never addressed.
20 Could it have been addressed and you laughed it off as,
21 it's not going to happen?

22 A. Let me preface with this comment. If -- I would
23 trust whatever Jan says in this case. She's an
24 extraordinary investigator. And I really feel like
25 whatever -- if she has already answered that question,

1 then I think she would have been telling the truth. And
2 that's probably not proper for me to say, but I'll just
3 tell you, I trust her.

4 Q. All right. Go ahead.

5 A. I don't -- if Jan Vogelsane or any other member of
6 the team sitting around the conference table had said, I
7 think we need to have someone either go to Germany or
8 connect up with someone in Germany to provide us with
9 information, I would not have laughed it off at all.
10 Laughing it off doesn't have a place around the table
11 that's that important. So I don't believe we discussed
12 it. If we discussed it, I don't recall the discussion.

13 Q. All right. Did you think the fact that because
14 Chris was born to Daisy, who was German, that he would
15 have dual citizenship?

16 A. My -- I'm no -- I don't even know what area that
17 is. What is it -- I don't know how to even describe
18 that area. But I clearly am no expert in it. Chris was
19 born in Greenville. And it did not connect with me that
20 I, therefore, needed to go to the birth of the parents
21 to determine the appropriateness of bringing in the
22 Consulate. That did not cross my mind. So had Chris
23 been born in Germany, I think I probably would have
24 initially thought of that. But because my client was
25 not born out of the United States, I simply did not

1 investigate nor did it ring a bell for me.

2 Q. I understand. I'm showing you Plaintiff's Exhibit
3 19, which is a part of the ABA Guidelines, which you're
4 familiar with. I know none of us memorize them, but
5 you're familiar with the Guidelines; right?

6 A. I am familiar with them.

7 Q. All right.

8 A. To some extent I'm familiar with them.

9 Q. I understand. And looking at Guideline 10.6,
10 additional obligations of counsel requesting a foreign
11 national, Section A says, counsel at every stage of the
12 case should make appropriate efforts to determine
13 whether any foreign country might consider the client to
14 be one of its nationals. Unless the predecessor counsel
15 has already done so, counsel representing a foreign
16 national should immediately advise the client of his or
17 her right to communicate with a relevant consular office
18 and obtain the consent of the client to contact the
19 consular office. After obtaining consent, counsel
20 should immediately contact the client's consular office
21 and inform it of the client's detention or arrest.
22 Counsel who is unable to obtain consent should exercise
23 his or her best professional judgment under the
24 circumstances. That Guideline, while it's there, wasn't
25 something you were familiar with?

1 A. It had been propounded on in February of 2003, so
2 it was in existence at the time of this case.

3 Q. Correct.

4 A. Yes, sir.

5 Q. All right. Getting into the investigation area,
6 Jan -- earlier this morning we introduced through
7 Plaintiff's Exhibit 10, preliminary accumulation of risk
8 factors.

9 A. All right.

10 Q. Okay. Was that something that is not only done in
11 Chris Williams' case, but in all your death penalty
12 cases that you look for?

13 A. Jan -- I have worked with Jan a number of times
14 since this case. And she does have a pattern of
15 creating risk factor lists. If Jan testified that this
16 was provided to me ---

17 Q. Uh-huh (affirmative).

18 A. --- then I certainly would not dispute that.

19 Q. Okay. And in that preliminary accumulation of
20 harmful risk factors is, on number four, mother drank
21 and smoked throughout pregnancy; correct?

22 A. Yes, that's what it says.

23 Q. Okay. So early on, through her investigation from
24 Maureen and talking to Dwight and other records, she
25 came up with this list that included, hey, mom drank

1 during the pregnancy?

2 A. The only thing I would say, Mr. Vieth, is that that
3 list is not dated. So I can't confirm that it was early
4 on. I can -- if she says she gave that to me during the
5 preparation of this case, then she gave it to me.

6 Q. Well, it says preliminary accumulation. It would
7 seem to me to be early on.

8 A. Yes. It seems like it would have been.

9 Q. And she said there was no final list that she made,
10 it was just this list.

11 A. Well, if it says preliminary, it surely would seem
12 to have been early on, but I can't -- because it doesn't
13 have a date, I can't confirm when that would have been
14 the subject of our ...

15 Q. And so that's -- what does drinking during
16 pregnancy by the birth mother mean to you?

17 A. Well, as it has developed it certainly is, what I
18 would describe, as a red flag regarding the potential
19 for Fetal Alcohol Syndrome. But if that statement were
20 not on that list, and I read that list, I wouldn't think
21 of Fetal Alcohol Syndrome. But because it is on the
22 list, I will say, at least now, I will say that clearly
23 it's a red flag for Fetal Alcohol Syndrome.

24 Q. Okay. Now, it's not because you're involved in
25 this PCR case you're saying now; are you?

1 A. What I'm saying is that as the concept or as the
2 medical data has become more and more available, and
3 Fetal Alcohol Syndrome has become a much more common
4 inquiry, that sentence on that list of risk factors, if
5 I read it in my office today, a red flag of Fetal
6 Alcohol Syndrome would pop up to me. But I know more
7 about that concept now than I did eight or nine years
8 ago.

9 Q. Okay. But it's been around for a long time?

10 A. Oh, yeah. It was present. It was present and, in
11 fact, I don't recall even how long before it was
12 involved in the standards, publication standards, which
13 was '03, and it certainly existed well before that. I'm
14 just saying that my own personal experience with it
15 would be it would clearly be a red flag for me today.
16 And I honestly cannot say why it wasn't a red flag for
17 me eight years ago. I cannot explain that.

18 Q. Okay. But of the risk factors that -- I went
19 through this with Jan. When you talked about one of the
20 risk factors, for example, deeply affected by divorce?

21 A. Uh-huh (affirmative).

22 Q. Witnessed parents' threats to kill each other?

23 A. Uh-huh (affirmative).

24 Q. None of those are organic brain problems; are they?

25 A. Not the two you just mentioned, that's right.

1 That's right.

2 Q. Those are mitigation factors that we all look for
3 to try to eliminate or use to show a jury why someone
4 should live and not die?

5 A. That's right. I agree with that.

6 Q. Okay. All right. But the one that is organic, the
7 one that has indication of brain damage, is Fetal
8 Alcohol Syndrome?

9 A. All right.

10 Q. Birth mother drinking during pregnancy?

11 A. Right. That is an organic brain damage issue.
12 It's a flag regarding the potential for organic brain
13 damage, that's right. Now, I don't know what else is on
14 that list, whether there are others or not, but the ones
15 you just read, you're right. How an individual would
16 take a divorce or how an individual would be affected by
17 violence in the home are more of a psychological abuse
18 situation. Drinking during pregnancy actually is a
19 cause for a physical condition. And it's organic --
20 it's an organic brain damage problem.

21 Q. All right. And if you had that picture of organic
22 brain damage, would you want -- what would you want?

23 A. I will say that kind of in my approach to any case,
24 one of the things that I would want to be conscious of
25 is brain damage. And I certainly would want that. And

1 if you're asking me if that's something that I would
2 think would be a good thing for the Defense of a capital
3 case to have in their case, the answer is yes.

4 Q. Okay. And you put in, for example, in the trial of
5 Chris Williams, you put in Dr. Richards in the trial
6 stage of the case?

7 A. That's right.

8 Q. So if you'd had organic brain damage with pictures
9 and so forth, potentially evidence of guilty but
10 mentally ill because of that, you would have put it in
11 the same place, in the trial phase?

12 A. If I had that, I would have put it in at that
13 point.

14 Q. Okay. Now, part of ---

15 A. For the reason that we called Dr. Richards in the
16 first place.

17 Q. Right.

18 A. It would have been a logical connection to present
19 that testimony at guilt phase, as well as the bipolar
20 testimony.

21 Q. In the lead-up to the trial, when you had the risk
22 factor of drinking during pregnancy, you had school
23 records that have been introduced that show he had to
24 repeat the first grade, that he had a learning
25 disability, that he dropped out in the ninth grade,

1 these issues have been introduced. And you probably
2 don't remember the records, since you ---

3 A. And I don't, I don't have a recollection of those
4 specific records.

5 Q. All right. And you have interview notes from Jan
6 that -- Plaintiff's Exhibit 7 that's already entered
7 into evidence from Jan, March of '04, when she
8 interviewed Dwight Williams. Mr. Williams began by
9 talking about his wife's drinking problem, state's his
10 wife, Daisy, drank during the pregnancy with Chris.
11 This is Jan's notes.

12 A. Yes, and again, if Jan said she provided those to
13 me, then I would believe her.

14 Q. Right. Then a couple or few months after that you
15 decided to get Dr. Evans involved to do a neuropsych
16 eval; correct?

17 A. Uh-huh (affirmative).

18 Q. And based on that evaluation -- I'm just going to
19 share with you, Mr. Mauldin, on Plaintiff's Exhibit 12,
20 to John Mauldin, confidential, from Jan, August 25, '04,
21 this has been introduced into evidence already. It's
22 showing that Dr. Evans stated from his notes that Chris
23 had an average I.Q., but there was a split of fifteen
24 points between verbal and performance part tests. That
25 on the neuropsych portion of the test, the Halstead,

1 Chris scored eight point three on the impairment index,
2 indicating mild brain damage. That there was an
3 indication of impairment of the parietal cortical area
4 with low decreased coherence, which could account for
5 his disability in arithmetic. There's some evidence of
6 frontal lobe damage with rigid thought and some
7 impulsivity. He responded impulsively to test
8 questions. And the last sentence of it says, Dr. Evans
9 did not recommend an MRI, a CT, or an EEG. Okay.
10 That's her notes; okay?

11 A. Uh-huh (affirmative.)

12 Q. All right. And then behind her notes are her
13 handwritten notes that she took; okay? So my question
14 is did Dr. Evans' report indicate that there was mild
15 brain damage?

16 A. The memorandum that actually -- and what I think
17 this is, is it's Jan's report. It's a memorandum from
18 Jan to me summarizing a discussion that Jan had had with
19 Dr. Evans. So I don't think it's proper to say it's Dr.
20 Evans' report. It's more -- it's a memorandum that Jan
21 created from her meeting with the doctor.

22 Q. Correct.

23 A. And in that memorandum she says that the neuropsych
24 portion of the test, that there was some indication of
25 mild brain damage.

1 Q. Right. Okay. Now, in her reports, these are her
2 handwritten notes that she took and testified to
3 earlier. There's a comment in here that said, took
4 longer with left hand -- these are tests he's doing.
5 Three trials to catch on as though no corpus callosum.
6 All right? Would that have any meaning to you, corpus
7 callosum?

8 A. It wouldn't, you know, it wouldn't necessarily
9 have, unless somebody told me what that meant.

10 Q. Correct.

11 A. In other words, that particular phrase wouldn't
12 necessarily mean to me any particular physiological
13 reference.

14 Q. All right. So based on what you heard from Dr.
15 Evans through Jan's notes, I guess you're saying you
16 never talked to Dr. Evans personally about it?

17 A. I can't specifically recall in Chris Williams'
18 case, but I ordinarily, when I refer a case to Jim
19 Evans, and he does his neuropsych evaluation down at the
20 detention center, he will call me and we'll have a
21 telephone conversation about what the initial indicators
22 to him are. And the purpose being that those indicators
23 are what then would lead me to take the next step. For
24 example, you say -- I'm actually surprised to see that
25 he said, no MRI. I'm really actually surprised to see

1 that in that report. But if he called and said, I don't
2 think you need to take an MRI, then I would -- I
3 probably wouldn't. But, you know, I might go ahead and
4 do it anyway. But ordinarily, the communication is
5 between me and Dr. Evans. I can't say whether we had
6 such a phone call in Chris' case or not, but that
7 memorandum would substitute for that contact, so I would
8 use what was in that memorandum to fill in that space.

9 Q. All right. And you don't have any knowledge
10 whether everything he says would be inconsistent with
11 FAS finding?

12 A. I have no idea. I don't know, I don't know whether
13 I saw the handwritten part. If she says she gave me
14 that memorandum, then I certainly would acknowledge it.
15 But I don't know if I ever saw the part about the left
16 hand, so I can't say. I just can't say what I saw.

17 Q. Okay. But you knew though, through communication,
18 that he had some mild brain damage?

19 A. Yes. It appears from her memorandum that I would
20 have been on notice about that.

21 Q. And Plaintiff's Exhibit 13, which is in evidence,
22 I'm going to let you take a minute or two to read that.
23 This is from you to Jan in response to her email to you
24 of August 25, 2004, regarding what says, Evans' finding.
25 And then it talks about Dr. Richards.

1 A. All right.

2 Q. Now, referring to that email that's already been
3 introduced into evidence, Dr. Richards apparently is
4 taking a completely different view than Dr. Evans on the
5 MRI?

6 A. That's what it appears.

7 Q. All right. She's saying, whoa, boy, I've got to
8 hold you back. You're wanting to do things. She's
9 saying, slow down, something like that. What are you
10 reading in that?

11 A. What I see is that Jan was communicating with Rob
12 Richards and Rob was encouraging an MRI. And Jan was
13 telling Rob to slow down, is what I see here.

14 Q. And what does Rob, in her email, what does he
15 wanting besides an MRI?

16 A. Apparently, you know, the -- he wanted to determine
17 if there are -- and I'll let the exhibit speak for
18 itself.

19 Q. Sure. Right.

20 A. But it looks like -- and, again, this is a
21 conversation between Jan and Dr. Richards. And it
22 appears that Dr. Richards became enthusiastic regarding
23 the subject of brain damage, potential brain damage, and
24 suggest a QEEG and an MRI, so forth. And that Jan took
25 it upon herself, apparently, to slow him down and say

1 wait a minute, you know, we don't need to go there at
2 this point. And she said toward the end of the email,
3 it says, what do you think? There's nothing harmful in
4 there that I can see. And then I shared that I had
5 confirmed that by phone with her. So when I got this, I
6 would have called Jan and Jan would have described it
7 over the phone, and I would have said, confirmed by
8 phone.

9 Q. Okay. And another thing that he was looking for
10 was -- let's see here. He said that he would order an
11 MRI immediately, but I cooled -- he cooled his jets. He
12 wants the birth records to get the circumference of
13 Chris' head at birth and the school testing. That was
14 in there too?

15 A. Uh-huh (affirmative).

16 Q. Do you know why?

17 A. Well, I think you're probably going to have to ask
18 either Dr. Richards or Jan that. I can only, I can only
19 relate to the contents in the documents. But it seems
20 to me there was an encouragement for us to have some
21 testing done that we had not done at that point.

22 Q. Okay.

23 A. That's the bottom -- seems like the bottom line.

24 Q. Right. So in August of 2004, you're having the
25 report from Jan regarding Dr. Evans and you're having

1 the email August 26th regarding Rob Richards?

2 A. Yeah. Those were pretty close together, yeah.

3 Q. A day. Okay?

4 A. Okay. Yeah.

5 Q. And so one's saying MRI and one's saying hold off

6 on MRI. And ultimately an MRI was done about a week

7 before trial with Dr. Griesemer?

8 A. Right. Right. Right.

9 Q. Okay. So at that point in time, Richards, I guess,

10 didn't know what Jim was doing. Jim didn't know what

11 Richards was doing. I mean, is that ---

12 A. I think that -- I don't know that Jim Evans'

13 findings had been particularly provided to Rob Richards.

14 I can't say that they were or were not. I would think

15 clearly that Dr. Evans or Dr. Richards could answer that

16 either way. But what Jan would have been telling either

17 or the other about the other one's findings, I mean, I

18 would certainly seem like that conversation was being

19 had, but I cannot say. Jan may not have been.

20 Q. Right. But you have Jim Evans saying brain damage,

21 and you're having Richards saying he asked me about

22 brain damage; okay?

23 A. Okay.

24 Q. And was there -- do you recall a reason that the

25 MRI was done in January before the trial started?

1 A. The ---

2 Q. Let me show you Plaintiff's Exhibit 20 to help you
3 out on that. If you can identify that, but that's not
4 in evidence.

5 A. Okay.

6 Q. Yeah, what is that document?

7 A. All right. I see what it is.

8 Q. Okay. What is it?

9 A. This is an email that I sent to Symmes Culbertson
10 and ---

11 Q. You can read it.

12 A. Well, it says that -- the quote is from me to
13 Symmes. I understand you're going to call your contacts
14 orthopaedic and neurology to determine if they can get
15 us a quick MRI. We've got the funding in the bank to
16 cover the cost. This is obviously a hot potato, so let
17 me know by email. Thanks.

18 Q. Okay.

19 A. That was January 5th, 2005.

20 Q. Right. And the trial started, I think, February
21 7th, and there's already notes in evidence, I'm not
22 going to go get, to show that they were taking to Dr.
23 Griesemer about his findings Sunday before trial started
24 on Monday.

25 A. Right.

1 Q. Do you have any recollection sitting there knowing
2 why the MRI was done when it was a hot potato?

3 A. I mean, is the question why it was not done earlier
4 or is the question why we did it so late or either?

5 Q. It sounds like the same to me. You pick one.

6 A. I feel -- you know, I would just say, quite
7 candidly, I feel like to proceed in a capital case
8 without ever having done the first MRI on any client,
9 whether you suspect brain damage or not, it's just
10 wrong. And at some point, and I don't know exactly when
11 that point was, but at some point I must have said to
12 myself, you know, we don't have an MRI in this file.
13 And, obviously, I attempted to correct that, even at
14 that late a time. Looking back, you know, in August,
15 Jim Evans had said not to get one. You know, he said
16 there seemed to be mild brain damage. But he also said
17 not to get an MRI, which is just -- I don't understand
18 why I didn't think that was a contradiction. So I'm
19 perplexed that why in August I didn't ask for an MRI
20 right then. But I don't have an explanation for it. I
21 know in January I obviously had a hot potato and I was
22 trying to do something about it.

23 Q. Okay. And there's an affidavit in from Dr.
24 Griesemer about what information was given to him for
25 the MRI and that speaks for itself. But do you recall

1 whether you had any particular conversation with him or
2 was that Bill Nettles?

3 A. The effort to get a quick MRI, the exhibit you
4 showed me just a moment ago with Mr. Culbertson, did not
5 work. And at some point at or about that time, during
6 January of '05, I would say that Mr. Nettles either had
7 a connection with this doctor or volunteered to get that
8 done. And I can't say I passed it to him. I just think
9 that's what happened. And after that, Bill and the
10 doctor were the ones working on that.

11 Q. And with the MRI report, was there much you could
12 do with that report before trial started?

13 A. Very little. And I don't think we did anything
14 with it other than receive it and find that it was --
15 that there certainly was no confirmation, at least from
16 my point of view in reviewing it, and I haven't looked
17 at it at least recently, of any brain tumor or brain
18 injury that was showing on the MRI that Dr. Griesemer
19 reviewed.

20 Q. Which is what he would probably be looking for with
21 the information given; right? Just to see if there's
22 tumors and things like that?

23 A. Right. And, again, I can't -- I wasn't privy to
24 the conversation between him and Mr. Nettles. But I'm
25 assuming that that's what he was looking for. And he

1 said he -- I think -- I don't remember if he said it was
2 negative or what. But ...

3 Q. Well, the report's in there. It said there was
4 some minor neurological, and he'd recommend going to a
5 psychologist or something like that. And that was done
6 much earlier with Dr. Evans?

7 A. Uh-huh (affirmative).

8 Q. Your checklist, which everybody that worked with
9 you knows about, I'll ask if you can identify that as
10 being one of your checklists. And tell us what a
11 checklist is. We've all dealt with you.

12 A. This is one of the checklists that was created in
13 Chris Williams' case. If you look on the last page, it
14 has Williams dash three. And what that means is it's
15 the third of an unknown number of checklists in any
16 particular case, in a chronological count. Some cases
17 may have ten. Some cases may have thirty. Just depends
18 on how often that we meet and how often I modify the
19 checklist.

20 Q. Okay. What exhibit number is that on there?

21 A. It's Exhibit Number 18.

22 Q. Number 18. All right. In looking at Exhibit 18,
23 that's the third list. Would that mean like a third
24 meeting of the team necessarily?

25 A. Not necessarily. The way I use this, I have

1 essentially a primary list of things that are on every
2 checklist. It's where the cases begin. And I might,
3 when I go through that, I will fill in, for example,
4 potential expert team members, potential investigators
5 that I want to call to see if they're interested,
6 potential second chair, who the Judge is, whether
7 there's a scheduling order. All of that starts out very
8 early. And then each time I would go in and amend the
9 list in any significant way, I would change the number
10 and save the document. So it doesn't mean we had three
11 meetings. It simply means that three times that
12 document had been significantly amended at that stage of
13 the case.

14 Q. Got you. All right. And is the handwriting in the
15 right column, is that yours?

16 A. No.

17 Q. Okay. Rules of evidence for penalty. Do you know
18 who did that?

19 A. No. I don't know whose that is.

20 Q. Okay. So that's not your handwriting?

21 A. No.

22 Q. Who else would write on your checklist?

23 A. (No verbal response.)

24 Q. It doesn't matter.

25 A. Yeah. Well, and the way it's used, the way it's

1 used, when we come in for a team meeting, each person at
2 the table would get a copy of this and this would
3 include me, the co-counsel, Jan Vogelsane would have
4 been at team meetings, Gerald Ravan would have been at
5 team meetings. We might have added a team member at
6 that point who would also be present. And I would pass
7 out these and they would all be clean copies at that
8 point. And whose notes those are on the side of that
9 particular one, I can't identify.

10 Q. Okay. Well, it's not important except at least
11 through that addition, brain damage was still on the
12 charts; right?

13 A. Yes.

14 Q. Number three, brain damage. Okay. And I believe
15 you told us in a meeting we had with you some time ago,
16 if FAS, Fetal Alcohol syndrom and spectrum disorder,
17 anything like that had been mentioned, and wasn't on
18 your typed part, you probably would have written it in
19 the margin?

20 A. I would, I would -- if we had discussed Fetal
21 Alcohol Syndrome on my copy of the checklist, I would
22 have made a note of that. And then amended the
23 checklist to include our course of action on that
24 particular topic.

25 Q. Okay. And you were in here when Mr. Nettles

1 testified? I think you heard ---

2 A. I was in and out a couple of times, but heard most
3 of it.

4 Q. And he said basically it just never was brought up.
5 He doesn't remember FAS ever being brought up. Is that
6 fair to say?

7 A. I think it is fair to say, as extraordinary as that
8 seems, and I have no explanation for that, if it had
9 been brought up, it would have gotten -- my pattern is
10 to address it, either we got it or we don't got it or
11 can't find it or what do we need for it or we did
12 something and it was negative, or something. So the
13 absence of any notes from me is an unexplained absence.
14 Because, clearly, I had been shown the memo from Jan
15 that said that she drank during the pregnancy. Now, she
16 didn't say Fetal Alcohol Syndrome in the memo, but she
17 did say, drank during pregnancy. So I can't explain why
18 there was no discussion or follow-up on that. But
19 apparently, there was not.

20 Q. Okay. Switching the channel here a minute. In the
21 proposed jury instruction -- I just want to introduce
22 this to you on the kidnaping issue, Plaintiff's 21. Is
23 that your request dealing with the kidnaping? And can
24 you elaborate a little bit on it, what was going on at
25 that time?

1 A. This -- first of all, it's Exhibit Number 21. That
2 is not my signature on that line.
3 Q. Okay.
4 A. So that -- I'm going to have to assume that's Bill
5 Nettles signature.
6 Q. Or anyone below there?
7 A. On this one right here. You've got four counsel
8 listed, but that's not my signature.
9 Q. This was in reference to the kidnaping charge that
10 you wanted; isn't it, as an aggravator?
11 A. Right.
12 Q. And so is that the charge that y'all handed up?
13 A. I'm going to say it was. It's marked as a Court's
14 Exhibit 13 ---
15 Q. Right. Right.
16 A. --- on the face of the document. So it apparently
17 did go in the record as a request from us.
18 Q. Okay.
19 A. And the reason I'm hesitate to comment on it is
20 because I did not create that. But as lead counsel, I
21 certainly would have been acknowledging it or confirming
22 that it was proposed.
23 Q. Okay. Bill's the lawyer in the closing arguments,
24 so is he the one you deferred to objecting during the
25 closing arguments?

1 A. That's true. Are you talking about objections to
2 the State's argument?

3 Q. Right.

4 A. It would have been Bill's responsibility?

5 Q. Okay. All right.

6 A. Because he was going to make ours. He was going to
7 make our closing.

8 Q. Okay. On the issue of kidnaping, when he was
9 convicted of kidnaping, and this is something that
10 probably was never close to your mind, he would have to
11 go on the sex registry because of kidnaping. Was there
12 ever any argument whatsoever that he shouldn't have to
13 register as a sex offender?

14 A. No. No, I know -- I don't recall that being
15 discussed.

16 MR. VIETH: Give me one second, Judge.

17 Thank you, Mr. Mauldin. Answer any questions Mr.
18 Zelenka has.

19 **CROSS-EXAMINATION**

20 **BY MR. ZELENKA:**

21 Q. Mr. Mauldin, in your representation of your client,
22 was your role as the lead counsel to basically be the
23 clearinghouse for all information to the experts and
24 otherwise?

25 A. I think that's fair.

1 Q. And was it your practice in 2003 through 2005, when
2 you receive material from your mitigation investigator
3 to provide that to the other members of the Defense
4 team, including the retained experts? Or was it not
5 your practice?

6 A. I can't say if -- and this may -- let me just
7 respond and then you can tell me if that was responsive.
8 If we're in a team meeting and there are four or five of
9 the core team members, and say, Jan Vogelsane, as the
10 mitigation investigator, provided us with a report of
11 some sort, a work product report or a summary of a phone
12 call or something, that -- I would not think that that
13 would necessarily go beyond the people in the room. It
14 would not be then subsequently provided to another
15 expert. So the answer is, if I received reports from
16 one of the team members, those reports do not
17 necessarily go beyond that line. They don't necessarily
18 -- they're not necessarily relayed to another person
19 playing a different role in the case.

20 Q. Okay. Reference was made to the memoranda, emails
21 and notes of Jan Vogelsane concerning Dr. Jim Evans
22 testing?

23 A. Right.

24 Q. What was the purpose of having Dr. Evans evaluate
25 your client?

1 A. I can't recall the specific initiative in this
2 particular case. But I will tell you my general pattern
3 for the use of Jim Evans or that type of expert in an
4 capital case, I believe that while he is not one of the
5 four core team members, an analysis, a
6 neuropsychological analysis of any client, what that
7 analysis does is it gives us clues as directions to go
8 that may discover meaningful information. Without that
9 type of early analysis from such a person as Jim, the
10 team members are essentially being called upon to guess
11 what they think might work. And that's not allowed. So
12 he kind of provides a little bit of a roadmap, if you
13 will, from a neuropsychological standpoint that would
14 lead the team to the next point. And I think that's
15 what we were doing with using him in this case. That's
16 what I've done with Jim a number of times over the
17 years.

18 Q. Now, Dr. Jim Evans, he's a neuropsychologist;
19 correct?

20 A. Well ---

21 Q. Or is he?

22 A. I can't -- I don't have anything in my hand right
23 now that could tell you what degrees he has, but that's
24 the type of work he does.

25 Q. He does neuropsychological testing?

- 1 A. Right.
- 2 Q. Uses a quantitative EEG in some of his assessments?
- 3 A. Uh-huh (affirmative).
- 4 Q. And the purpose of those assessments is to
- 5 determine evidence indicia of brain damage. Is that
- 6 correct?
- 7 A. Of brain damage, and I would say other areas of
- 8 psychological response to stimulus that he uses during
- 9 his testing. I'm not -- I'm certainly not an expert in
- 10 his area so I can't say what it's restricted to.
- 11 Q. Okay.
- 12 A. But clearly what you say is included.
- 13 Q. Okay. And the information that you saw from Jan
- 14 Vogelsane was that Dr. Evans found frontal lobe damage
- 15 and other mild brain damage. Isn't that correct?
- 16 A. Well, whatever that memo says is what it says.
- 17 Q. Okay. And with that information of brain damage,
- 18 Dr. Jim Evans was not called in the guilt phase or the
- 19 penalty phase of the trial to testify about his findings
- 20 and conclusions about brain damage; correct?
- 21 A. He was not called.
- 22 Q. Yet the Defense team had that information?
- 23 A. We had what was in that memorandum. It indicates
- 24 that it was given to me. So, yes.
- 25 Q. And you had retained Jim Evans as some function of

1 the Defense team at that particular time; correct?

2 A. Yes, with somewhat of a caveat, if I may?

3 Q. Please, sir.

4 A. You know, Jim's -- retaining Jim Evans in this case
5 is similar to other cases where we've used him where --
6 there was never any really ultimate intention of using
7 him as a testifying witness. We're not saying we're not
8 going to, but what -- that's not the purpose of his
9 involvement. His purpose is to give us essentially, as
10 I mentioned, a roadmap of areas to go with other
11 potential expert witnesses. An example would be if Jim
12 indicated that a person had -- was responding to his
13 analysis that would indicate a neurological, organic
14 damage of a certain type, in his opinion, then we then
15 would get a neurologist to do an MRI and see if that
16 physical evidence showed on the film. In other words,
17 he describes a condition that he thinks we'll find if we
18 do an MRI. We do an MRI and it's confirmed. It's kind
19 of a two-step process. So there was never any
20 intention, initially, to call Jim Evans as a testifying
21 witness. His purpose was to give us the route to take
22 to attempt to develop Chris Williams' case.

23 Q. And then he gave you information about brain
24 damage?

25 A. Right.

1 Q. You still didn't intend to call him as a witness.

2 Is that correct?

3 A. That's -- we did not. We did not intend to nor did
4 we.

5 Q. Okay. Now, there has been a theory that I have
6 seen in some cases, and explain whether that was
7 applicable in this situation, where a psychologist does
8 a neuropsychological examination, does not recommend an
9 MRI because the evidence of the neuropsych testing is of
10 such a level that the evidence of an MRI may defeat the
11 claim of brain damage. Are you saying whether or not
12 that was done, a strategy done in this case?

13 A. That was not considered. In fact, I would just
14 say, if I understood that hypothetical correctly, I
15 think that's inappropriate. And so I would not have --
16 I certainly would not have done that by any means in an
17 intentional way.

18 Q. Okay. And that wasn't the indications you
19 understood that you were getting from Dr. Evans?

20 A. Would you repeat that again, please?

21 Q. The indication you're getting from Dr. Evans was
22 not to -- don't do an MRI because it may defeat this ---

23 A. Absolutely, no. No. I think that's inappropriate
24 conduct on the expert or the lawyer. So I would have
25 rejected that as a tactic or a strategy or whatever.

1 But I will also equally tell you, I cannot explain why I
2 could have read that memo and not had an MRI within the
3 next thirty days. I don't understand that, so I don't
4 get that.

5 Q. Okay. And I think you told me when we met back in
6 September, that it's essentially your practice to do an
7 MRI up front, early times of representation, just to
8 clear the way as to what that information is?

9 A. That's right. That's correct.

10 Q. And you indicated to me that you couldn't explain
11 at all, at that time, based upon what you'd reviewed,
12 and you'd met with current counsel prior to that, you
13 couldn't explain why it just wasn't ever done?

14 A. I can't explain it to either side.

15 Q. And since that meeting, you haven't come up with
16 any explanation why it wasn't done yet; have you?

17 A. No.

18 Q. Yet once it was done prior to the trial, you didn't
19 utilize it as far as direct testimony in the case. Is
20 that correct?

21 A. That's right.

22 Q. Are you saying you didn't provide the results of
23 the MRI to Dr. Halleck, Dr. Richards and even Dr.
24 Elbogen for their understanding, for their assistance in
25 their testimony, Dr. Griesemer's report?

1 A. Okay. Let me make sure I understand you. Are you
2 asking me if those three doctors that you've named, who
3 were participants at various stages of the case, were
4 shown the report on the MRI?

5 Q. Or apprised of its results?

6 A. I do not recall them being shown that report.

7 Q. How about being apprised of the results?

8 A. I do not recall them being apprised of the results.

9 And I will say, quite honestly now, Dr. Richards who was
10 -- Dr. Halleck and I think it was Elbogen, they did not
11 testify during the trial of the case. They testified,
12 if I'm not mistaken and perhaps I'm wrong, perhaps I'm
13 incorrect -- but were they trial witnesses or were they
14 the hearing witnesses?

15 Q. Penalty phase.

16 A. They were penalty phase, okay. Then, I am not
17 aware of any MRI results, findings, either being
18 provided to them or told to them. I do not recall that
19 occurring.

20 Q. In jumping to Dr. Richards, in Plaintiff's Exhibit
21 13 that you were shown, the memorandum from Jan about
22 the Evans report?

23 A. This is the memorandum regarding her conversation
24 with Dr. ---

25 Q. No, let me show you Plaintiff's Exhibit 13.

1 A. Yeah. Okay. This is an email that she sent to me.

2 And that email was sent to me, according to the time, it
3 was 6:42 P.M., the evening of Wednesday, August 25th.

4 Q. 2004?

5 A. Right. And my email back to her was at 9:23 A.M.
6 the next day. So probably the morning of the next day
7 is when I would have had a conversation with Jan about
8 what she said in that email. And just sent -- confirmed
9 by phone.

10 Q. Okay. And in that email Dr. Richards is seeking
11 out the birth records and the school records; correct?

12 A. Yes.

13 Q. And did Ms. Vogelsane state that she didn't think
14 there was anything in that material that hurt y'all?

15 A. I'm not real sure.

16 Q. Okay. All right. Let me just point out.

17 A. Yep. Yep.

18 Q. I told them that our plan for now is just incident
19 reports and so forth, but he really wants school and
20 birth. What do you think? There is nothing harmful in
21 there that I can see.

22 A. Okay. Yeah. And where she says there's nothing
23 harmful in there that I can see, so your question to me
24 is what?

25 Q. My question to you is, she was asking you,

1 essentially, the way I read that, should I give Dr.

2 Richards the birth records and the school records,

3 August 2004?

4 A. Right. And I agree with that, that conclusion.

5 And, again, I would hope that maybe Jan could say what

6 she meant. I can only read what she said and tell you

7 what I think that meant. What she was doing, it appears

8 she was suggesting that we not give him those records.

9 That there's nothing harmful in there that I can see --

10 well, now, I follow up. I want to follow up. The next

11 sentence says, I know you want him to do an introductory

12 meeting with an open mind, but I don't think the school

13 and birth can hurt. That -- perhaps I misunderstood

14 that. I perhaps drew an incorrect conclusion from her.

15 Q. Okay. So it appears a couple of things from this

16 memorandum; that y'all had the birth records ---

17 A. Oh, yeah.

18 Q. --- of the Defendant at that time?

19 A. Right.

20 Q. And that your doctor wanted to look at the birth

21 records and the circumference of the child's head at

22 birth; correct?

23 A. That appears to be the case.

24 Q. And in 2004, 2005, were you aware of a relationship

25 between the size of the head and Fetal Alcohol Syndrome?

1 A. Well, I was certainly was aware of the
2 correlation.

3 Q. Or 2004 on this one?

4 A. I can't describe it medically, but I was aware of
5 that correlation.

6 Q. So did that suggest to you that at least one of
7 your experts was considering -- there is a psychologist,
8 I believe? Psychiatrist?

9 A. Psychiatrist.

10 Q. Dr. Richards?

11 A. Right.

12 Q. --- some symptoms, some review concerning Fetal
13 Alcohol Syndrome?

14 A. You know, I wish I could say that I connected that,
15 but I did not. I just -- and I really don't have an
16 explanation for why I was missing those kinds of
17 indicators. But I -- apparently, looking back, I was.

18 Q. And in Plaintiff's Exhibit 10, the confidential
19 attorney work product, the preliminary accumulation of
20 harmful risk factors, there are multiple indicia here
21 suggesting a possibility for Fetal Alcohol Syndrome. Is
22 that not correct?

23 A. Let me look. The fourth ---

24 Q. Please review the whole thing.

25 A. Yeah, the fourth one down is pretty clear and

1 direct.

2 Q. Right.

3 A. All right. And you're asking did I look at the
4 others to see if there are others that ... I see
5 developmental delays is on there, if that's -- is that
6 what you're asking me? If they're ---

7 Q. Uh-huh (affirmative).

8 A. Yeah.

9 Q. Developmental delays, early learning problems?

10 A. Right.

11 Q. Mother drank and smoked during pregnancy. Parents
12 were violent and drank, smoked pot daily.

13 A. I don't see that.

14 Q. Here.

15 A. Parents were violent and drank, smoked pot and
16 fought daily. I wouldn't necessarily have thought that
17 was an indicator.

18 Q. Okay.

19 A. But in terms of the indicator to the client
20 himself, the developmental delays, the learning
21 problems, were the type of information that does
22 correlate with the potential Fetal Alcohol.

23 Q. And when you, as a Defense lawyer are looking at
24 indicia for mitigation and those factors of Fetal
25 Alcohol Syndrome, that's just a manner to get to the

1 existence of brain damage. Isn't that correct?

2 A. That's correct.

3 Q. But, in fact, what you're looking for -- you're not
4 looking for Fetal Alcohol Syndrome. What you're looking
5 for is the existence of an organic brain damage that
6 Fetal Alcohol spectrum disorder syndrome are symptoms
7 that brain damage exists; correct?

8 A. And I'm no expert. I think that what you've
9 describe is kind of the way I understand it, but I can't
10 say absolutely one way or the other, because I'm just
11 not an expert on that.

12 Q. Well, what you're trying to give to the jury in a
13 capital case is that the Defendant suffers from brain
14 damage?

15 A. That certainly would be something that you'd want,
16 yes. That's something that ---

17 Q. Right. And the organicity of it may have come from
18 Fetal Alcohol; correct?

19 A. Yes.

20 Q. But the organicity of it may have come from another
21 risk factor that was here, which was the father beating
22 the mother, being violent towards her during pregnancy,
23 which can also have an affect on the fetal brain? Is
24 that not also correct?

25 A. I can't -- I don't know. I don't think I can

- 1 answer that without being completely speculative. I
2 apologize.
3 Q. Okay.
4 A. And maybe I didn't understand the question.
5 Q. Well, let me ask it a more simple way.
6 A. Good. That's a good idea.
7 Q. Physical damage to the brain, based upon your
8 understanding, by beating, by some sort of head trauma,
9 can cause brain damage; correct?
10 A. Uh-huh (affirmative.) I agree with that.
11 Q. And a father or a person beating a pregnant woman
12 who has a fetus can cause brain damage?
13 A. I think that would probably be a sound assumption.
14 But, again, you know, I'm kind of going out on a limb
15 there.
16 Q. And you were investigating, as part of your
17 checklist, number four on your checklist, was brain
18 damage?
19 A. Right.
20 Q. The organicity of it, not necessarily specified in
21 this document, but it's something you were looking for?
22 A. Yeah. And can I see that for just a moment?
23 Q. Uh-huh (affirmative.)
24 A. I believe -- I would say, Mr. Zelenka, that the
25 first three are going to be on the very -- the first

1 checklist before we know the first fact of the case. In
2 other words, those are the kind of things that we have
3 kind of out there that we want to make sure we ---

4 Q. Okay. I believe when you showed me, when I met
5 with you, your checklist, you said this is my form and
6 these are on my form right from the start?

7 A. Right.

8 Q. Is that what you're saying?

9 A. All right. Let me describe it this way. If you go
10 into the checklist in any case, you're going to have
11 certain -- the existence of certain entries to begin
12 with. When I'm appointed on a case, I will open that
13 checklist under that client's name. And if there's
14 something that I know just simply doesn't exist, I'll go
15 in and delete it off the very first one. So brain
16 damage, that number, whatever it is, three or four,
17 would have been on the very first checklist before I had
18 the first meeting with the client or any expert.

19 Q. Okay.

20 A. Yes.

21 Q. You noted that this was Williams three?

22 A. Right. Right.

23 Q. Do you have a recollection as to how many Williams'
24 checklists there were that you prepared?

25 A. I would imagine in this case, and this is an

1 educated guess, probably twenty.

2 Q. Okay.

3 A. Over the period of the case, we probably had
4 fifteen or twenty edited versions of that that would
5 have been chronological as the case continued to
6 progress.

7 Q. And when this issue about Fetal Alcohol Syndrome
8 came up, both by the Defense and myself in discussing it
9 with you, did you review your checklists and seek to
10 determine if Fetal Alcohol existed on any of the
11 checklists you could locate?

12 A. I could not locate it.

13 Q. You could not locate ...

14 A. I could not locate that entry on any checklist.

15 Q. Okay. So you looked at a number of checklists
16 seeking out that entry and you could not find it. Is
17 that what you're saying?

18 A. I will answer it this way. I would suspect that
19 Chris Williams' file would contain fifteen to twenty
20 checklists. I don't recall going one, and then two, and
21 then three. But I did skim through the checklists to
22 look for Fetal Alcohol Syndrome and I could find it
23 nowhere. I also looked in the hard file where these
24 things are kept, to see if I had written it in in pencil
25 or pen like that -- those notes there are, although

1 that's not my handwriting, ---

2 Q. Exhibit -- uh-huh (affirmative.)

3 A. --- but similar to that. And I could not find
4 Fetal Alcohol Syndrome on any checklist, either typed or
5 handwritten.

6 Q Okay. You were aware at the time the case was
7 tried in 2005, that the Defendant's mother -- or there
8 were reports that the Defendant's mother had drank
9 during pregnancy. Is that not correct?

10 A. Are ---

11 Q. And I'm asking you a question. I'm not trying to
12 put words in your mouth.

13 A. Yeah.

14 Q. Were you aware of reports in your files that
15 indicated that the mother drank during pregnancy with
16 your client?

17 A. I will say that I have been shown evidence through
18 these exhibits that I had been made aware of that. So
19 if that answers -- I'm trying -- I don't have an
20 independent recollection of being aware of that. And
21 the reason that I answer it that way is because I am
22 dumbfounded about why a certain course of action did not
23 occur. I'm just -- it is unexplainable to me. But I
24 will say that these exhibits demonstrate that I had been
25 made aware of that.

1 Q. Okay. Well, let me follow what you suggest. There
2 were other steps that you would have done if the word
3 Fetal Alcohol Syndrome was in one of your documents?
4 Back in 2005, if it was in a document that you had and
5 if it was on your checklist, what would have been your
6 next step?

7 A. Well, I think a natural course would be to bring in
8 a neurologist and tell him that, in fact, we have
9 anecdotal or factual or evidentiary information that we
10 suspect Fetal Alcohol Syndrome. And whatever testing
11 needed to be done neurologically needed to be done to
12 determine whether that actually existed. Does that
13 answer -- that would have been, I think, the first step
14 I would have taken.

15 Q. Okay. Did you retain a neurologist in this case?

16 A. Well, we had funding for a neurological exam.
17 That's what my email to Mr. Culbertson -- we had funding
18 for an MRI, which would have been part of what a
19 neurologist would have been doing for us, I would think.
20 I would have asked that that be done.

21 Q. Okay.

22 A. So, so, I cannot -- the absence from the beginning
23 of the case in September of '03 until January of '05,
24 the absence of taking steps to determine the findings of
25 an MRI are just -- I don't have anything in my file that

1 explains that to me.

2 Q. Okay. And now you're suggesting it's even more
3 confusing to you since you had indications back in 2004
4 that the mother drank during the pregnancy, if I
5 understand you correctly?

6 A. Well, you know, I've been shown exhibits that
7 demonstrate that I was on notice of some sort. I just
8 don't have an explanation for why the MRI or some
9 follow-up neurologically did not occur before January of
10 '05.

11 Q. Okay. Do you know if you ever gave the birth
12 records to Dr. Richards concerning his request to
13 determine the circumference of the head at that time or
14 ...

15 A. I cannot say with clarity whether those records
16 were given or not. I don't know whether Dr. Richards is
17 a participant in this particular litigation. He would
18 know what I gave him. He would know whether or not --
19 subsequent to that email, we then provided him with
20 additional information. He did testify in the case. So
21 I would have thought he would have had that type of
22 information.

23 Q. Your closing argument issue, did I understand your
24 testimony on direct correctly that because Mr. Nettles
25 was going to do the final closing in the penalty phase,

1 it was solely his responsibility to object? Or did I
2 misunderstand?

3 A. Well, I think you added the word solely there.

4 Q. Well, I added it because I wasn't sure.

5 A. Okay.

6 Q. So that's why I wanted a clarification.

7 A. Well, then let me -- as you're aware, the closing
8 order in capital cases, the State closes first and then
9 State closes -- or Defense closes last. Bill was going
10 to do -- Bill Nettles was going to do the closing for
11 the Defendant. It would have been Bill's responsibility
12 to make objections to the State's argument. Now, when
13 you add the word solely, I think I have to explain that
14 a moment. I believe if I'm sitting at the table and an
15 horrific comment that is just absolutely untrue or just
16 blatantly improper, then I think the Judge would allow
17 any counsel to stand and object. So let me make sure
18 that that's the case.

19 Q. Okay.

20 A. In this situation, some of the things I've heard
21 that Mr. Nettles was asked about, I would not want to
22 stand and object when another person was going to be
23 making the argument, because he might not even want that
24 objected to. If you follow that. In other words, I
25 don't know -- it may feed directly into what he's --

1 some of the points he was making, even though it might
2 be questionable from a legal appropriateness standpoint.
3 It still might be something this lawyer would pass on
4 the objecting to, because he has an idea about what he's
5 going to say. So Mr. Nettles had the primary
6 responsibility. If I, as counsel for Mr. Williams, had
7 heard an argument that I thought was grotesquely
8 inappropriate under anybody's law, then I think it would
9 have my responsibility, as well, to object to it. And I
10 know that was a long and rambling answer, but that is
11 how I would have conducted that part of the trial.

12 Q. Okay. You participated, I assume, in the -- what
13 I'll call the Jeff Bloom mock trial situation. Is that
14 correct?

15 A. Yeah. And I only vaguely recall it, the specifics
16 of it, but I would have been a participant in that.

17 Q. And after the mock trial, you received
18 recommendations from Mr. Bloom on factors on how to try
19 the case. Is that correct?

20 A. He would have done that. That's right.

21 Q. And did you rely upon that information in how you
22 geared your Defense in making whatever strategic
23 decisions you intended to do in ---

24 A. If I could see that, ---

25 Q. Sure.

1 A. --- I might be able to make a little clearer
2 answer. I will say, while you're searching for it, Mr.
3 Zelenka, that the ordinary course would be that the
4 report from the person conducting the session is made,
5 and then we, as a team, would gather, and it would be a
6 part of our meeting regarding how to -- whether or not
7 there were specific recommendations or just general
8 observations or whatever.

9 Q. Okay. Let me show you Plaintiff's Exhibit 17,
10 which is the January 20th, 2005 report of the January
11 15th, 2005 focus group. And add to your response as you
12 deem fit.

13 A. Yeah. This was conducted less than a month before
14 the trial. So the amount of -- I mean, you say did you
15 rely on it? I mean, the amount of reliance would have
16 certainly depended upon the time we had available to
17 rely on it. But in general, we would take these
18 observations and make a determination, for example,
19 whether our theme or theory of the case was palatable,
20 whether certain types of information were so
21 inflammatory as to not present them, that's the kind of
22 thing that I would have been looking for, more than
23 general observations or opinions.

24 Q. Okay. What was your theme of the case at that
25 time?

1 A. You know, certainly, we had -- and, again, I'm
2 going back and recalling or attempting to recall
3 something that occurred a number of years ago, and had
4 some cases between then and now, but Chris' basic
5 inability to deal with his breakup with the victim, his
6 inability to come to grips with that, and his -- mix
7 that with the bipolar condition, led to a rather
8 explosive incident. Now, the trial transcript would
9 perhaps lead to a clearer picture of what our theory
10 was. But that was generally an overriding theme in the
11 case.

12 Q. Okay. And with that theme in the case did you
13 investigate whether, in fact, your client had satisfied
14 terms of insanity as we know it in South Carolina of
15 guilty but mentally ill?

16 A. Did we make a determination of whether he would fit
17 in either of those two categories?

18 Q. Did you investigate it and upon investigation make
19 a determination?

20 A. Well, we listened to what the psychiatrist had to
21 say to us. And, you know, if the psychiatrist had told
22 us that he felt that Chris, because of his mental
23 condition, was unable to conform his conduct to the
24 requirements of the law, then certainly that would have
25 led to a different presentation than what we made.

1 Q. And your two experts came to a determination that
2 he didn't lack the capacity to conform. Isn't that
3 correct?

4 A. Had it been otherwise, I think we would have
5 approached it differently, yes, sir.

6 Q. Okay. One of those was Dr. Richards, who was a
7 local doctor you retained?

8 A. Yes.

9 Q. And the other was Dr. Seymour Halleck who's
10 considered one of the national experts on mental health
11 and mental illness.

12 A. Right.

13 Q. Isn't that correct?

14 A. That's right.

15 Q. And he specifically determined that it didn't meet
16 that level on that day, on September 3rd. Isn't that
17 correct?

18 A. Well, I'll answer it this way. I do not recall any
19 psychiatric participant in this case on our team saying
20 otherwise. Had they, we would have made a presentation
21 in that regard.

22 Q. Okay.

23 A. So whatever the record shows that they testified
24 to, that's what they concluded.

25 Q. Okay.

1 MR. ZELENSKA: Court's indulgence.

2 Q. Let me show you a guide, it's actually my copy of
3 Plaintiff's 11, Ms. Vogelsane's themes, and ask you if
4 you had the same themes during your trial that Ms.
5 Vogelsane had in her preliminary ...

6 A. Is the question is this document in my file? Is
7 that what you're asking?

8 Q. No, no. My question to you is, were your themes
9 for the trial ---

10 A. Oh.

11 Q. --- of mental health -- or the mitigation phase
12 similar to the theme that she had?

13 A. Okay.

14 Q. Or did you rule out some of these things, to be
15 more specific? Rule in, rule out?

16 A. Okay. While I do not recall actually seeing this
17 document, I think that those are generally pretty
18 consistent with what I would have formulated.

19 Q. Okay. And that formulation that you're talking
20 about is a formulation that occurred at the end of the
21 investigating period. Is that correct? Not just the
22 beginning, at the end?

23 A. Throughout the entire process, is, I think, would
24 be a fair way to describe it.

25 Q. Okay.

1 MR. ZELENA: Court's indulgence.

2 Q. Let me just ask one area that I neglected to bring
3 up. At the time you represented Mr. Williams, did he
4 ever indicate to you that he was a German citizen, in
5 addition to being born in the United States?

6 A. Did Chris ever indicate that to me?

7 Q. Yes?

8 A. No.

9 Q. Okay.

10 A. And let me ---

11 Q. Go ahead.

12 A. Let me say I do not recall. You know, again, the
13 time -- if he says he did, then I can't deny that. I
14 don't recall that subject being brought up between my
15 client and I.

16 Q. So if you don't recall it being brought up, based
17 upon your understanding of the law, consular obligations
18 back then, because in 2005, it was kind of a big thing
19 going on in a lot of the litigation.

20 A. Right.

21 Q. Mexico, Italy, other places, in the capital
22 litigation area?

23 A. Right.

24 Q. Did you have any indication that caused you to
25 think you needed to contact the German Consulate or that

1 the police department was neglectful in whatever its
2 obligations were at that time to contact anyone?

3 A. I may have been totally neglectful in that regard.
4 But I simply did not connect that dot -- those dots. I
5 recall Chris having been born in Greenville to a mother
6 from Germany. I recall that. But I just did not --
7 that did not light a fuse. And so I did not make a
8 conscious decision one way or the other on that. I just
9 did not pick up on it.

10 Q. Did you ever speak or meet with the Defendant's
11 father?

12 A. Dwight?

13 Q. Uh-huh (affirmative.)

14 A. Yes.

15 Q. Okay. And you were aware he was a military man, a
16 United States Citizen; correct?

17 A. Yes. Yes.

18 Q. Did he ever indicate to you that Chris had, may
19 have or may want to have dual citizenship?

20 A. I don't recall that subject being broached at all
21 by me with anybody.

22 Q. Okay. With Ms. Vogelsane's understanding of the
23 German background of the mother's side, you indicated
24 that in your genograms you like it to go back, what I
25 would say, the way I count, two generations?

1 A. That's generally what I would expect the social
2 mitigation investigator to attempt to do.

3 Q. Okay. When you mean attempt to do, what are you
4 expecting that genogram information to include?

5 A. The -- I don't do the mitigation investigation
6 personally. I rely upon a team member to bring that
7 information to me. And perhaps that's somewhat
8 neglectful on my part to just give such blanket
9 authority. But I try to get people who are good at this
10 work to try to bring to me the information. If Jan
11 presented, and I think Mr. Vieth showed me a handwritten
12 family tree, if she presented something to me, then I
13 would have then, therefore, expected that she was
14 conducting the appropriate level of mitigation work as
15 to those people identified on that genogram.

16 Q. Do you recall the testimony of Marjorie Hammock?

17 A. You know, I can't say as -- I recall her being a
18 witness. I recall -- in fact, I think I conducted her
19 questioning; did I not?

20 Q. Do you recall the social history, the genogram,
21 that she presented?

22 A. I do not recall it. But I think I was the one
23 asking the questions of her, I believe.

24 Q. Okay.

25 A. And I just don't have a recollection of it.

1 Q. Okay. And this genogram, it reflects the
2 grandparents side of Daisy. Is that not correct?
3 Names, and the like?

4 A. Right. It has, like in Daisy's situation, it has
5 Erika listed as what would appear to be the mother. And
6 then it has a question mark and a name written out,
7 which apparently was written out later, I guess. I
8 didn't -- yeah.

9 Q. Okay. How much more information on that social
10 history, I think that's going back to my original
11 question. We have the genogram. But what did you
12 expect the genogram to have into it additionally to the
13 names of the people?

14 A. Well, what I'm saying is, is when the social
15 history investigator shows me a document like this, what
16 I then assume is that she is conducting the necessary
17 background information as to each person on here. The
18 names are useless. So I'm assuming that there's
19 something going on as to the people that are identified
20 on this document.

21 Q. Okay.

22 A. That she's just not writing names and then going
23 somewhere else without conducting some sort of
24 investigation as to people that are listed. Does that
25 answer the question?

1 Q. And you knew she hadn't gone to Germany?

2 A. Well, she didn't ask me for money to go to Germany.

3 And I never remember seeing anything for Germany, so,

4 yeah.

5 Q. Okay. And you knew that part of the social

6 history, essentially at the time you went to trial, had

7 some gaps; correct?

8 A. Yes, sir. Yes, sir.

9 Q. Yet you still presented the social history, as you
10 understood it, through Dr. Hammock?

11 A. That's right.

12 Q. Okay.

13 MR. ZELENKA: I have no further questions.

14 Thank you, Your Honor.

15 THE COURT: Any redirect?

16 MR. VIETH: Less than a couple of minutes,

17 Judge. Briefly.

18 **REDIRECT EXAMINATION**

19 **BY MR. VIETH:**

20 Q. John, in regards to birth records, we just couldn't
21 find any. Do you have any independent recollection if
22 you had the birth records?

23 A. I don't have an independent recollection of it. I
24 would think that Jan would certainly know whether or not
25 she was able to obtain birth records.

1 Q. Yeah. We just didn't ever see any to give to Dr.
2 Richards or anybody. So I didn't know if you remembered
3 them specifically ---

4 A. No. I wouldn't have a recollection of it and I've
5 made no attempt prior to this hearing to make a
6 determination about that.

7 Q. Now, with regards to these ABA Guidelines we talked
8 about, the obligation of counsel representing foreign
9 nationals that we went through. And his comment did
10 Chris Williams tell you that he was a dual citizen or
11 whatnot. You wouldn't expect a twenty-year-old looking
12 at murder to come up and say, hey, Mr. Mauldin, I'm from
13 Germany. I mean, that's the furthest thing from
14 anybody's mind; isn't it? That's your obligation?

15 A. Yeah. Yeah. I need to -- I would think that I
16 would need to ask the question to get that response from
17 any client. I mean, now, I don't know, maybe a client
18 would be, you know, astute enough to say, hey, I have
19 dual citizenship. But that would have been a surprise
20 to me had a client said such a thing.

21 Q. And one last question on this drinking during
22 pregnancy. Did you ever go to any of the experts and
23 say, look, we've got this drinking by birth mother. Can
24 you tell me what the problem would be?

25 A. It's a somewhat perplexing issue in this matter

1 from a -- I've seen the exhibits where Jan apparently
2 listed it on her risk factors. Jan listed it in the
3 information from the conversation with Jim Evans, the
4 memorandum she sent me. And what could possibly have
5 lead me to not conduct some sort of follow-up is just
6 beyond my -- I don't have an explanation for it. I just
7 don't know.

8 Q. And even in the trial ---

9 A. I surely didn't do it intentionally. I will assure
10 you, I did not do that intentionally. I think that
11 would be horrible.

12 Q. And even in the trial, in the transcript, Pam
13 Crawford being crossed by Mr. Nettles on page 2180 of
14 the transcript, even Pam Crawford answered his question,
15 his mother was an alcoholic for thirty years? And her
16 answer was, yes. And that was their witness saying
17 that, right? The evidence was on both sides. Everybody
18 knew it. Whether you looked into it or not is not the
19 issue. It's just a question. It's just that it was
20 known. It wasn't a hidden thing. It was even brought
21 out in the trial itself?

22 A. Well, the thing that further makes it unexplainable
23 is that after I was appointed to represent Chris and
24 while we were representing him, there were occasions
25 when Daisy would come to the office. And, you know, it

1 was pretty obvious that she had a horrible alcohol
2 problem. I mean, I'm no doctor, but she was seriously
3 connected with an alcohol problem. And why in the world
4 I didn't, with these memos being provided me, why didn't
5 I further take the course of action that I described to
6 Mr. Zelenka about a neurological evaluation as to that
7 specific issue, I just -- I don't know. I can't explain
8 that.

9 MR. ZELENKA: That's all I have.

10 Thank you, John.

11 THE COURT: Thank you, Mr. Mauldin. You may
12 step down.

13 MR. VIETH: Your Honor, that's all we have for
14 today.

15 MR. ENDERLIN: One or two quick housekeeping
16 matters.

17 MR. MAULDIN: May I be excused?

18 MR. ZELENKA: No objection.

19 THE COURT: Without objection you may be
20 excused.

21 MR. MAULDIN: Thank you.

22 THE COURT: All right. Mr. Enderlin?

23 MR. ENDERLIN: We're just marking two more
24 exhibits, Your Honor, so I think we can go off the
25 record.

1 (WHEREUPON, Plaintiff Exhibit Numbers 25 and 26
2 were marked and admitted into evidence.)

3 **January 29, 2013**

4 (WHEREUPON, Court convened with all parties present
5 and the following proceedings were had.)

6 THE COURT: All right. Are you ready to
7 proceed, gentlemen?

8 MR. ENDERLIN: Yes, Your Honor.

9 THE COURT: Do we need to have a
10 teleconference first or is it going to be testimony by
11 way of telephone?

12 MR. ENDERLIN: Yes, Your Honor. We're ready,
13 Your Honor.

14 Your Honor, I'd also like to note for the record
15 before we start, the Consul General, Mr. Christopher
16 Sander, is here with us today seated to Chris Williams'
17 left.

18 THE COURT: Who is this witness going to be?

19 MR. ENDERLIN: Bob Dudek, D-U-D-E-K.

20 THE CLERK: Hi Bob. This is Jan White again
21 at Greenville County Clerk of Court Office. Do I need
22 to swear him in?

23 THE COURT: Put him on speaker.

24 THE CLERK: Okay. I'm going to put you on
25 speaker. Are you there? Bob?

1 THE WITNESS: Yeah, I'm here.

2 THE CLERK: Okay. Very good. Raise your
3 right hand, please.

4 THE WITNESS: Okay.

5 THE CLERK: You do solemnly swear or affirm
6 that the testimony you're about to give in this case
7 will be the truth, the whole truth and nothing but the
8 truth, so help you God?

9 THE WITNESS: I do.

10 THE CLERK: Thank you. Please state your name
11 for the record.

12 THE WITNESS: Robert M. Dudek.

13 THE CLERK: Thank you.

14 ROBERT M. DUDEK,

15 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

16 DIRECT EXAMINATION

17 BY MR. ENDERLIN:

18 Q. Hey Bob, it's Derek Enderlin. Can you hear me
19 okay?

20 A. Yes, I can, Derek.

21 Q. And, Bob, you were the appellate attorney that
22 represented Chris Williams at the Supreme Court on his
23 direct appeal?

24 A. That's correct.

1 Q. All right. There were a couple of items we
2 alleged, ineffective assistance of appellate counsel,
3 that I just wanted to ask you about. Number one, we
4 alleged that there was error not to appeal the issue
5 that you should have the aggravator in the indictment.
6 Do you know what I'm speaking about?

7 A. Yes, I do.

8 Q. And can you tell us why you may or may not have
9 included that?

10 A. Derek, I honestly don't remember the sequence, but
11 I know that, you know, I've never had any luck on that
12 issue in our State Supreme Court. They've never showed
13 any interest in that issue. I know it's been raised
14 other places nationally. As far as I know, nobody's
15 succeeded, but our short answer is our court's never
16 shown an interest in that issue and I assume that's why
17 I didn't raise it, although, you know, that a long time
18 ago. That was, you know, whatever, five or six years
19 ago.

20 Q. Okay. And would you agree with me then that
21 essentially that issue is not, at this moment, preserved
22 for federal appeal?

23 MR. ZELENKA: Object. It calls for
24 speculation.

25 MR. ENDERLIN: Well, I'll let the record stand

1 for that, Your Honor.

2 THE COURT: I overrule your objection.

3 Q. The second issue that they raised at trial level
4 was that you ought to be able to plead guilty and still
5 get a jury trial. Are you familiar with that issue?

6 A. Yes, I am.

7 Q. And, as a matter of fact, I believe that issue has
8 been raised a number of times in front of the Supreme
9 Court, as well?

10 A. It has.

11 Q. And did you argue that issue at appeal?

12 A. Not in Christopher Williams, no. It was not one of
13 the three issues that I raised.

14 Q. Okay. And with any of these issues, if potentially
15 he has relief down the line, was there any strategic
16 reason not to argue those issues?

17 A. Well, I mean, I certainly, if I thought an issue
18 was going to be a winning issue, I would have raised it.
19 You know, I can't have a strategic reason for not
20 raising an issue that's a winner. But because I didn't,
21 because, you know, I didn't raise an issue, whatever
22 issue, I mean, I can only conclude that, you know, I
23 didn't find it meritorious. But, I mean, here, you
24 know, we have a jury trial; correct?

25 Q. That's right.

1 A. Yeah. No, you know, I just don't remember off the
2 top of my head, you know, how the issue got raised as
3 far as his offer to plead guilty. I think I'm mixing
4 this case up. I remember talking with John Mauldin and
5 apparently there was actually a time put on for the jury
6 to come back with a verdict or the Judge was going to
7 have to declare a mistrial and sentence him to life.
8 But frankly, not to get off track, I don't remember, you
9 know, the offer to plead guilty and a record being made.
10 But I've certainly lost, on that very issue, my fair
11 share of times. It's really the same answer as the
12 first one. Our Court's really never showed any interest
13 in that. And the best I can figure out, you know, you
14 can waive your right to jury sentencing just like you
15 waive any other right.
16 Q. Bob, I think we've talked about this before. And
17 essentially, I mean, again, correct me if I'm wrong, but
18 what you've said is that if there's an issue out there
19 and you didn't raise it and later on it turns out to be
20 meritorious, obviously, that's a problem or an error.
21 Is that wrong? Is that what you have told me before?
22 A. Well, I mean, if I'm understanding your question,
23 Derek, I mean, you know, if I did not raise a winning
24 issue, I mean, the -- you know, I mean, obviously the
25 client or anybody would be, in my humble opinion, you

1 know, entitled to relief. If, in retrospect, I made a
2 mistake and did not raise an issue that the client would
3 prevail on, certainly, you know, I mean, I obviously
4 would want in that situation to be held ineffective and
5 the client not to suffer from my mistake. But as far as
6 the indictment and the motion for jury sentencing after
7 a guilty plea, I mean, I always liked that issue, but
8 the Court's shown no interest in it.

9 Q. And when you say the Court, you mean the South
10 Carolina Supreme Court?

11 A. Yes. When I say the Supreme Court, I mean our
12 Supreme Court here in South Carolina.

13 Q. I think the last issue I've got for you is did you
14 challenge the South Carolina Supreme Court's
15 proportionality system or just tell us what you did
16 about that?

17 A. I did not raise proportionality. Again, I won't
18 really say my answer -- I don't know how many times I've
19 raised it in death penalty cases, at least a couple.
20 And I mean, I have never, on cases that I thought were
21 marginally death penalty cases, and I've never had any
22 success. As far as I know, and I might be wrong, I
23 don't think I am. I don't think our Supreme Court has
24 ever, under its statutory proportionality review, found
25 a death sentence proportionate -- I mean,

1 disproportionate. Is your question broad or are you
2 asking me about challenging the whole system? What do
3 you mean by that?

4 Q. I kind of think that answers my question. I was
5 just talking about Chris' case. But you can certainly
6 expound as much as you want.

7 A. Okay. Again, I did not raise it. And, you know, I
8 can only assume if I thought we would have won on that,
9 I would have raised it.

10 Q. Okay. Thank you. Please answer any questions from
11 Mr. Zelenka.

12 **CROSS-EXAMINATION**

13 **BY MR. ZELENKA:**

14 Q. Good morning, Bob.

15 A. Good morning, Don.

16 Q. Let me ask a few questions about your background.
17 When did you pass the South Carolina Bar?

18 A. When did I what now?

19 Q. Pass the South Carolina Bar?

20 A. In -- I took it on my birthday, which was one of
21 the days, July 29th, 1984. And I passed the Bar
22 whenever the results came out.

23 Q. Okay. Briefly describe your employment background.

24 A. Okay. I've been an Appellate Defender since 1990,
25 I guess, going on twenty-two, twenty-three years of

1 that. Prior to going to law school in 1980, I was a
2 VISTA Volunteer in Alaska, and I did some work with
3 civil legal services and continued that for a few years
4 after I came back to South Carolina and went to law
5 school. And then I would have been an Appellate
6 Defender since 1990. I don't know, maybe fifteen years
7 ago, I became the Deputy Chief for capital appeals. And
8 I guess about two years ago or maybe two and a half, was
9 named Acting Chief Appellate Defender, and then Chief
10 Appellate Defender, which I've been for, I don't know, a
11 year and a half or maybe a little longer.

12 Q. Okay. In your role as an Appellate Defender,
13 approximately how many murder appeal briefs have you
14 handled, both capital and non-capital?

15 A. Oh, Lordy. I, geez -- I don't know. And this is
16 round about number, say if -- and this is a quick guess;
17 okay, a wild guess. But if I did a hundred appeals a
18 year, which I've probably done more than, for twenty-two
19 years, that would be about, say, two thousand two
20 hundred, I guess, appeals. I don't know. So the vast
21 majority of those would have been murder cases. I guess
22 for about the last fifteen years, Joey Savitz was the
23 Chief, and he, at that time created a capital unit which
24 consisted of him and me doing all death penalty or
25 murder cases with -- some of them were -- there too many

1 and others went. But I don't know. For the last
2 fifteen years the vast majority of my stuff has been
3 murders or capital.

4 Q. Okay.

5 A. I hope that helps. I don't know.

6 Q. Okay. And that includes both the death penalty and
7 post conviction relief appeals?

8 A. That also includes death penalty post conviction
9 appeals, yes.

10 Q. And under South Carolina practice, since the
11 decision of *State versus Torrence*, what do you perceive
12 your role in formulating the particular issues to be
13 raised in a direct appeal?

14 A. Well, I mean, of course, *Torrence* did away with *in*
15 *favorem vitae*, which in capital cases was obviously our
16 plain error. So, I mean, you know, capital appeals have
17 gone on now to be much like any other appeal. It is
18 that there has to be a contemporaneous objection or a
19 proper motion ruled upon by the Court for an issue to be
20 preserved. So, you know, I just, I keep a running --
21 when I do an appeal, I keep a running yellow sheet of
22 all the testimony of each witness and I have a separate
23 legal pad where I put down all of the objections. If I
24 think something looks interesting by way of an objection
25 and ruling, I'll usually put a yellow line through the

1 objection. And then, you know, when I'm finished with
2 the entire transcript, I go back, do my research, kick
3 it around with some of the other attorneys in the office
4 and decide which issues I'm going to brief. Hopefully,
5 with, you know, a chance that the issues I raise are
6 going to be, you know, all meritorious and that at least
7 one has a chance to win.

8 Q. Okay. And in this case, in your final brief of May
9 13th, 2008, you raise, in a twenty-five page brief,
10 approximately three -- not approximately. You raise
11 three issues.

12 A. I have it right here in front of me. That's
13 correct. Three issues and the conclusion was on page
14 twenty-five.

15 Q. And what were those issues you chose to raise
16 before the South Carolina Supreme Court in Mr. Williams'
17 case?

18 A. The first one was that the Court erred by refusing
19 to sentence Chris Williams to life in prison when the
20 jury revealed it was split nine to three in favor of
21 death after hours of deliberation. Since the
22 alternative of an Allen charge was impractical and going
23 to be a course of against the minority opposing death,
24 under these unusual circumstances in South Carolina,
25 Code Section 16-3-20 provided for a life sentence where

1 the jury cannot agree on a sentence after reasonable
2 deliberation. The second issue also dealt with that the
3 Court erred, in the alternative, by refusing to give
4 appellate's proposed *Allen* charge when the jury revealed
5 it was split nine to three in favor of the death
6 penalty, where the Judge's instruction concluded with
7 language telling the jury, the Court hoped they would
8 arrive at a verdict. This instruction was coercive
9 towards the minority. Whereas, appellate's instruction
10 told the jury not to do violence to their individual
11 judgments to reach a verdict. And concluded by
12 correctly stating that, quote, no juror should surrender
13 their honest conviction for mere purpose of returning a
14 unanimous verdict. And the last issue regarded Dr. Pam
15 Crawford. And that was the Court erred by refusing to
16 declare a mistrial after Dr. Pamela Crawford testified.
17 She consulted with various solicitors and this
18 solicitor, again, returned to the topic of Dr.
19 Crawford's, quote, assessment, unquote, of the case
20 after the Judge ruled. It was an improper topic for
21 testimony. The solicitor impermissibly had Dr. Crawford
22 vouch for and bolster the solicitor's decision to seek
23 the death penalty, while at the same time making the
24 Defense appear to be hiding relevant evidence from the
25 jury. The damage could not be cured and a mistrial

1 should have been declared. Those were the three issues.

2

3 Q. And were those the only three issues that you
4 considered preserved for review by the South Carolina
5 Supreme Court?

6 A. Don, I don't know that. I mean, I only can make an
7 assumption that there were other preserved issues. I
8 mean, probably almost every appeal I've ever handled --
9 I can't say every one, but most of them, there have been
10 preserved issues that I didn't argue because I didn't
11 think they were going anywhere. You know, I'm just
12 assuming this case is probably no different.

13 Q. Okay. Do you have the trial record in front of
14 you?

15 A. No, I'm sorry, I do not.

16 Q. Okay. Let me go through it like this then. If I
17 can lead you through what I consider is some record
18 information. One of the issues raised is that appellate
19 counsel was ineffective for failing to raise the issue
20 concerning the Judge's instruction utilizing the word
21 recommendation. And at trial before the penalty phase
22 began, Counsel Mauldin brought up the Defense's use to
23 the recommendation that the record of the transcript,
24 page 2085, Judge Nicholson had stated that that was in
25 the form provided by state law and indicated he would go

1 into it and explain it to the jury, that it is not a
2 recommendation, but that the Court is obligated to
3 follow that information. That's of record, page 2085.
4 And while stating that the Judge felt the law should be
5 amended and the word recommendation taken out, Mr.
6 Mauldin's motion was denied unless the State wanted to
7 consent, which it did not. In Judge Nicholson's
8 instructions, he utilized a particular phrase, and I
9 quote from the record at page 2399, lines 16 through 17,
10 and even though the form says recommendation, I charge
11 that the Court is obligated to follow that
12 recommendation. At that particular time, no objection
13 was made at trial to the instruction that was given.
14 And now let me ask the question. In doing your
15 assessment of appropriate issues to raise on appeal, is
16 it your practice to raise every issue that you consider
17 to be a preserved issue in a direct appeal?
18 A. No. Again, I mean, I don't -- I think that in the
19 vast majority of appeals that I've done there are
20 preserved issues that I don't raise because I don't
21 think they're going to be winning issues. I mean, in
22 Justice Toal's book on appellate practice, as you well
23 know, Don, you know, she says really most cases have no
24 more than four issues. And most with less than that. I
25 mean, sometimes, frankly in death penalty cases, I try

1 and err on the side of caution at times and raise things
2 that I might not otherwise raise, even if I thought they
3 were, you know, marginally preserved. Where if I
4 thought I had an error of preservation problem in a
5 regular case, I wouldn't raise it. So, no, I don't
6 raise every preserved issue. I think I would be run out
7 of this job very quickly if I did. On the
8 recommendation one, I mean, if the, you know, if the
9 Judge made it clear and the other part of his
10 instruction as a whole, in about every death penalty
11 that I've had, that this is not a recommendation.
12 Whatever verdict you come back with, death or life,
13 that's going to be the verdict and that's going to be
14 the sentence that I'm going to impose. You know, if
15 that was made clear to the jury, I would only think
16 that's why I didn't raise it. If you're getting the
17 preservation, if John Mauldin or whoever raised and
18 requested a jury instruction, I think under *Alexander*
19 *Santee Johnson*, once you request a jury instruction, you
20 don't have to object to the Judge's refusal to give it
21 after the charge is given. So certainly if, you know,
22 John or whoever, Bill Nettles, whoever was the attorney
23 requesting it, if they made it clear they wanted certain
24 language and the Judge refused to give it, I don't think
25 they have to repeat and object to the charge. But I

1 obviously didn't raise it and I would think the reason
2 was because the Judge made clear elsewhere that a
3 recommendation didn't mean a recommendation.

4 Q. And when you prepared the brief prior to 2005, you
5 were, no doubt, aware of the decisions of the South
6 Carolina Supreme Court in *State versus Lee Grant Bellamy*
7 and *State versus Mitchell Simms*, that basically
8 indicated that the use of the term recommendation should
9 be explained to require the jury to follow that
10 particular decision; weren't you, at the time?

11 A. Right. I mean, that's been my understanding of *Lee*
12 *Grant Bellamy* I guess was Dan Stacey's. *Mitchell Simms*
13 was Joey Savitz. But I mean, I know the issue had been
14 raised before as to a challenge on the recommendation.
15 And my understanding of the law, hopefully correctly, is
16 that as long as the jury was made known that their
17 sentence would be binding, that that solved any problem.

18 Q. With respect to the aggravating factor and the
19 indictment issue, in this case the aggravating factors
20 involved kidnaping. And the language of kidnaping was
21 not within a murder indictment that was submitted to the
22 Grand Jury and formed a basis for the conviction for
23 murder in this particular case. At the trial, the issue
24 was raised and it was denied by the Court, as well as
25 motions to reconsider.

1 MR. ZELENKA: For the Court's information,
2 that's laid out through eighty-one, I believe, through
3 eighty-five of the return to the amended application
4 that we raised.

5 Q. Had you ever raised a claim that the aggravating
6 circumstance should be set forth in the indictment, if
7 you recall?

8 A. I mean, again, I've, you know, I've lost on that
9 issue in the past. I don't remember which case or cases
10 specifically. I mean, after *Ring*, R-I-N-G, and *Apprendi*
11 came out, there was a lot of excitement, I guess,
12 nationally about raising these issues and what it meant
13 and the aggravators having to be in the indictment. And
14 I guess what I've seen since is it's pretty much, you
15 know, raised or limited to the facts of, I guess, *Ring*
16 *v. Arizona*, that as long as the jury found the
17 aggravating circumstances beyond a reasonable doubt,
18 that solved any problem. And that the aggravators do
19 not need to be in the indictment.

20 Q. Mr. Dudek, did you handle the appeal of *State v.*
21 *Downs*?

22 A. Yes, I did.

23 Q. Okay. Did you raise that same issue in *State v.*
24 *Downs*?

25 A. I believe that I did. Yes, that might have been

1 one of the cases I lost on.

2 Q. Okay. The *Downs* decision was decided in 2004,
3 before this case was tried?

4 A. If it was decided in 2004, it was decided well
5 before this case. Because the date of my final brief is
6 May 13, 2008.

7 Q. Okay. So you would have had that information, that
8 knowledge and that experience when you prepared the
9 particular issues in this Defendant's case. Is that
10 right?

11 A. That's correct.

12 Q. Okay. Similarly, let me ask you about the claim
13 presented here today, they raised the Defendant's right
14 to plead guilty and still have jury sentencing for
15 trial. Again, that issue evolves out of, as I
16 understand the last response from the United States
17 Supreme Court decisions in *Apprendi* and *Ring versus*
18 *Arizona*; am I correct?

19 A. I guess so. I think that's correct, that that's
20 sort of where -- I don't know if this issue was swirling
21 around for a long time and even before *Ring* and
22 *Apprendi*, but obviously the argument is that pleading
23 guilty and acceptance of responsibility is the strongest
24 mitigating evidence that you can have. And by denying
25 the Defendant the right to plead guilty, you're taking

1 away from him his right to present powerful mitigating
2 evidence to the jury. And, again, I mean, I know I had
3 it in *Quincy Allen*. And there in Greenville was brought
4 up by his -- by the Defense lawyers in *Jerry Buck Inman*.
5 So the issue's been around, I don't know if even before
6 *Ring* and *Apprendi*. But, again, I think our Supreme
7 Court, again the South Carolina Supreme Court, has
8 always just kind of held that waiving your right to jury
9 sentencing is like waiving any other constitutional
10 right. And I've never been able to get beyond that.

11 Q. And, again, at the time that you prepared this
12 Defendant's case, you had handled that same issue from
13 the guilty plea conviction in *State versus Downs* that
14 was decided in 2004; correct?

15 A. Right. *Downs*, if it was 2004, I remember it was
16 before Judge Manning. That would have been, again,
17 four, four maybe five years, before the opinion in this
18 case came out.

19 Q. Now, were you involved in the case of *State versus*
20 *Denisona Crisp*?

21 A. No, I believe Jeff Bloom did that, if I remember
22 right. But I had no involvement in *Crisp*.

23 Q. Okay. But the same issue was denied in *Crisp*?

24 A. That's my recollection, yes.

25 Q. Okay. In this case, however, the Defendant ended

1 up not waiving his jury trial and, in fact, had a jury
2 trial on the guilt phase and jury sentencing. Was this
3 issue preserved for consideration in a direct appeal or
4 was that a factor as to whether or not you would raise
5 that issue on appeal?

6 A. That, I honestly don't remember. I would think
7 that the issue would be preserved. I mean, I guess the
8 heart of your question is, do you waive it by going
9 forth with a jury trial. And I would think the answer
10 to that would be no. I mean, I know what the issue --
11 it's raised about every way possible, even as by -- you
12 know, that it was a conditional plea when the guy pled
13 guilty and, therefore, invalid. I don't remember --
14 this is about whatever it is now, five years ago, but I
15 would not think that I would have been scared off the
16 issue by error of preservation.

17 Q. Okay. So even though the State might be raising
18 that it's not preserved, that didn't affect your
19 decision in not raising it. As I understand it, your
20 decision to not raising it was it had not been a
21 successful claim previously before the Court in cases
22 like *Downs*, *Crisp* and others. Is that correct?

23 A. Right. I don't have an exact recollection. But
24 like I say, I know that our Supreme Court has not shown
25 any interest in the issue and it's been raised to them

1 various ways, by allowing the Defendant to plead, it was
2 a conditional plea, and just, as I said, the real
3 argument being that you were denying the Defendant his
4 right to put, you know, mitigating evidence before the
5 jury and that, you know, under *Tom Skipper versus South*
6 *Carolina*, and, you know, those lines of cases, *Lockett*
7 *v. Ohio*, the Defendant has the right to put forth
8 anything before the jury that might be mitigating
9 evidence and this violated his right to put before the
10 jury that he pled guilty, that he accepted
11 responsibility and was remorseful for, you know, his
12 crimes. You know, some Judges sense, I guess -- it's
13 hard to articulate. I want to say the way around the
14 issue, but Judges have offered to, you know, to the
15 Defense, I will tell the jury that your client could not
16 plead guilty and get jury sentencing. So there's --
17 they've unfortunately found some ways to take air out of
18 the balloon of what I thought was once a very good
19 issue. But, again, I've never won on it, and I've
20 raised it several times.

21 Q. Okay. Let me move on to another issue. You had
22 mentioned at the outset the *Torrence* decision and the
23 requirement that appellate review in a capital case is
24 limited to issues that are actually preserved, raised
25 and decided by the Trial Court. In this appeal, they're

1 raising a claim that counsel was ineffective in not
2 briefing the death penalty was not an appropriate -- was
3 not appropriate, and that the death penalty is used in
4 an arbitrary manner. Do you have a recollection as to
5 the precise manner that that issue was raised before the
6 Trial Court at the time of the trial in February 2005?

7 A. No, I do not.

8 Q. But needless to say, had that issue been raised at
9 the time of the trial, you would have been limited as an
10 appellate lawyer to the precise record and the precise
11 motions that were presented at the time of that
12 particular trial. Isn't that correct?

13 A. Well, that's correct, with one caveat. Because I
14 was thinking as you were asking that question, there
15 have been a couple of cases out of our Supreme Court in
16 which they have reversed since *Torrence* where there was
17 no objection. And one of them had to do with the Trial
18 Judge telling the Defendant, as I recall, if he had jury
19 sentencing, something like a juror or jurors may be
20 anti- death penalty and get on the jury or lie to get on
21 the jury so they could impose a life sentence. And I
22 remember our Court, in, I believe it was two cases,
23 reversed on a guilty plea. But generally in a death
24 penalty case, like any other appeal now, the issue has
25 to be squarely raised to the Trial Court in fairness to

1 the Trial Judge to give him or her a chance to rule on
2 it. And, yeah, I mean, the issue has to be fairly
3 raised and ruled on by the Trial Court for it to be a
4 viable issue. But in the interest of completeness, you
5 know, I wanted to put that in. There have been a couple
6 of cases where they have reversed without an objection.

7 Q. And I think those cases, if my memory is correct,
8 is *State versus Denisona Crisp* and *State versus Freddie*
9 *Owens*. Does that seem right?

10 A. That does seem exactly right to me.

11 Q. Okay. And I guess my question may not have been as
12 precise as it needed to be. What I'm asking is, if this
13 broad claim that the death penalty was not appropriate
14 and that the death penalty is used in an arbitrary
15 manner, are you, as an appellate attorney, authorized to
16 go out and seek to raise new and different claims as to
17 whether the death penalty was appropriate or used in an
18 arbitrary manner? Or are you constricted to the claims
19 that were actually raised and presented and decided by
20 the Trial Judge?

21 A. Well, I cannot, cannot add to the record on
22 something like that. The research or whatever would
23 have to be done at the trial level and the record made.
24 And then I would be limited to that record. I mean, the
25 only time we ever get to add to the records in a case of

1 -- a real case of after discovered evidence. And
2 certainly your question doesn't go to that.

3 MR. ZELENKA: I believe that's all the
4 questions I have. But let me speak with co-counsel Al
5 Simmon first before I yield.

6 Thank you, Mr. Dudek.

7 THE WITNESS: Thank you.

8 MR. ZELENKA: No further questions.

9 **REDIRECT EXAMINATION**

10 **BY MR. ENDERLIN:**

11 Q. Hey, Bob, can I follow-up just real quick?

12 A. Of course, sure.

13 Q. At one time you said a hundred briefs a year. Is
14 that still the case? Or a hundred cases a year, I
15 think?

16 A. No, I would hope not. Because as you might know,
17 we, a few years back, were able to get out of doing most
18 -- the vast majority of guilty pleas. And all
19 successive post conviction relief cases and all time
20 barred by statute of limitations PCRs. So I don't know,
21 an estimate would be we've probably gone from about
22 eleven hundred appeals to about eight hundred fifty. We
23 presently have, you know, nine attorneys. So I would
24 think at one point I was certainly doing probably well
25 over a hundred appeals. And I'm not doing as many as a

1 hundred now. So that was an estimate, trying to average
2 something out over twenty-two years under changing
3 circumstances. So that was the best I could do to
4 answer that question.

5 Q. Okay. Well, so is it close to a hundred then if
6 you have ... Go ahead.

7 A. I don't know. We have nine attorneys. It may well
8 be close to a hundred, or maybe for some of the
9 attorneys, a little above. Because as Chief, you know,
10 the Chief, you have extensive administrative duties.
11 But, anyway, I do the capital and the murder cases are
12 longer and we've tried to assign cases around here over
13 the years. I now assign them all myself. But before
14 that, we tried to keep the numbers of transcript pages
15 roughly even. We had eight attorneys here and at one
16 time as many as ten, over the years, over twenty-two
17 going on twenty-three years, we've had eight to ten
18 attorneys. We have nine. So probably most attorneys
19 here are handling about a hundred appeals, possibly
20 more.

21 Q. All right. And so -- and I'm just trying to make
22 sure I understand what you're saying. So if you try to
23 keep the transcript pages even amongst attorneys, you
24 take your fair share of the case load? Is that what
25 you're saying, as well?

1 A. I definitely try to take my fair share of the case
2 load. But it's going to be less cases than the other
3 attorneys here, just because I have the Chief's
4 responsibility. Now, here in this case, 2008, you know,
5 I wasn't the Chief. So I mean, I definitely had a --
6 I've still got a full case load, but I had absolutely a
7 full case load of murder and death penalty cases. And,
8 I assume in 2008, again, that was all that I was doing.
9 Because Joey Savitz and -- we had started up this
10 capital unit, which consisted of only two of us. And
11 that was me and that was him.

12 Q. Okay. All right. Let's talk about 2008 because,
13 again, I think maybe I'm confused. Are you saying that
14 you had all murder and capital cases and you also had a
15 hundred cases a year in 2008?

16 A. Again, my memory is in 2008 that we were doing only
17 murder and capital cases. I mean, I can't, I can't give
18 you that that number was right at a hundred. It was a
19 substantial case load, I can tell you that. But I can't
20 go back -- I can't put my hand on, in 2008, how many
21 appeals I handled. It was a lot of them.

22 Q. Okay. Let me ask you this. Are you familiar with
23 the ABA Guidelines on caseload standards?

24 A. Yeah, somewhat. And obviously, you know, that was
25 taken up in the Spangenberg report.

- 1 Q. Okay.
- 2 A. Which you're well aware of.
- 3 Q. And so they recommend, I think, twenty-five
- 4 appellate cases a year for an attorney?
- 5 A. That is correct. That's my understanding. And
- 6 that was what they put in their report.
- 7 Q. Okay. And so it sounds like to me, and those
- 8 twenty-five cases generally are not necessarily all
- 9 murder and capital cases; right?
- 10 A. Oh, certainly not. I mean, we do -- no -- I mean,
- 11 all kinds of General Session crimes.
- 12 Q. Well, then maybe I need to go back because I'm
- 13 confused. I thought you were saying essentially in 2008
- 14 you did nothing but murder and capital?
- 15 A. Oh, yeah, I mean, as far as the capital unit, which
- 16 was two of us, I think that in 2008 that's all that we
- 17 were doing. I thought your case went to office-wide?
- 18 Q. No, I'm sorry.
- 19 A. Okay.
- 20 Q. So let's talk about you in 2008?
- 21 A. All right.
- 22 Q. You're doing nothing but murder and capital cases;
- 23 right?
- 24 A. That's my memory, is that in 2008 the capital unit
- 25 had been started.

1 Q. Okay. And you're still doing close to a hundred
2 cases a year?

3 A. I would guess I probably am.

4 Q. Okay.

5 A. Now, they're not all death and -- death and murder
6 anymore because I simply could not do this job and do
7 only those. So I do other kind of cases now.

8 Q. Right. Because now you're the administrator. Back
9 in 2008 ---

10 A. I was not.

11 Q. All right. And you're thinking close to a hundred
12 cases a year?

13 A. I would think so.

14 Q. And the ABA Guidelines, when they talk about
15 twenty-five cases a year, they're talking about usually
16 normal appeals, they're not talking about just murder.
17 They're talking about your typical grand larceny maybe
18 or car theft or just about anything. They're not
19 talking all murder and capital cases?

20 A. Yeah. I think that's correct. They're talking all
21 kinds of appeals. Now, you know, and some I don't have
22 a total understanding of that because I know in some
23 states they do the direct appeal and the PCR together.
24 But however you want to, you know, slice the bread, I
25 mean, the caseload here is crushing. You know, always

1 has been.

2 Q. I think that's what Spangenberg said. You're
3 referring to Bob Spangenberg who does studies on Public
4 Defender work, and he actually said in his report the
5 caseload was crushing. Isn't that right?

6 A. I don't know if he used that word, but that
7 definitely was the import of his report; that we, you
8 know, we just needed more lawyers. We're always working
9 on getting more lawyers. But, yeah, I think he probably
10 did use the word crushing caseload.

11 Q. Because, I mean, if you're thinking almost a
12 hundred cases a year, and obviously you've got oral
13 arguments to prepare for, as well. You've got to read
14 the transcript, as well. And the transcript in this
15 case is like three thousand pages long. You're talking
16 about putting out a brief close to every other day?

17 A. I don't know. I don't think now I'm putting out a
18 brief every other day. There certainly was probably a
19 time here where, you know, we were doing a couple of
20 briefs or so, you know, a week. It was a lot. I mean,
21 it's a lot of work.

22 Q. All right. What about 2008, very likely a couple
23 of briefs a week, maybe more?

24 A. Well, if we did four a month -- I'm sorry, no.
25 Eight cases a month over ten months would be eighty, so

1 eighty-eight, ninety-six. Yeah, ninety-six cases a
2 year, that would be right at about a hundred. So yeah,
3 probably two cases a week is in the ballpark.
4 Q. Okay.

5 MR. ENDERLIN: I don't have any other
6 questions.

7 Thank you, Bob.

8 THE WITNESS: Thank you.

9 THE COURT: Thank you very much.

10 MR. DUDEK: Thank you, Judge.

11 THE COURT: We'll close our connection.

12 THE CLERK: Thank you.

13 MR. DUDEK: Thank you much.

14 MR. ENDERLIN: We're ready to call our next
15 witness.

16 THE COURT: Okay. You may call your next
17 witness.

18 MR. ENDERLIN: Your Honor, we would call Daisy
19 Huckaby to the stand.

20 THE CLERK: Ms. Huckaby, please place your
21 left hand on the Bible and raise your right hand.

22 You do solemnly swear or affirm that the testimony
23 you're about to give in this case will be the truth, the
24 whole truth and nothing but the truth, so help you God?

25 THE WITNESS: Yes, I do.

1 THE CLERK: Thank you. Please have a seat.

2 Please state your full name for the record and spell it.

3 THE WITNESS: My full name is Daisy Margaret
4 Elizabeth Huckaby.

5 THE CLERK: Would you spell it, please.

6 THE WITNESS: D-A-I-S-Y H-U-C-K-A-B-Y.

7 THE CLERK: Thank you.

8 THE WITNESS: You're welcome.

9 DAISY HUCKABY,

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MR. ENDERLIN:

13 Q. Daisy, you're the mother of Chris Williams?

14 A. This is correct.

15 Q. And where were you born?

16 A. I was born in Germany.

17 Q. All right. You're still a German citizen?

18 A. Yes, I am.

19 Q. Okay. And you can tell us if you want real quick,
20 do you remember what year it was you came over here?

21 A. This is a hard question. I can answer this
22 correctly if I tell you I came over here the year Elvis
23 died, would be probably, what, '78 or something?

24 Q. Okay. The late seventies? That's how you remember
25 it, it was the year that Elvis died?

1 A. Yes.

2 Q. Okay. We talked a little bit about your history,
3 and obviously, you've heard some of the stuff in Court.
4 Tell us about your history and the culture in Germany
5 about drinking?

6 A. Okay. To be honest I think I was drunk the first
7 time at the age of six. My grandpa had made homemade
8 wine for Christmas, and as children we were allowed to
9 have us a nice glass of wine on Christmas.

10 Q. All right.

11 A. I didn't know what a hangover was, but I know it
12 now.

13 Q. And did anybody ever -- was it a pretty normal
14 occurrence in the family that y'all drank? Was it ---

15 A. Yes, of course.

16 Q. And was that part of the culture, as well?

17 A. Yes.

18 Q. And did you think there was anything wrong with
19 drinking during pregnancy?

20 A. No.

21 Q. All right. Did anybody ever tell you there was
22 anything wrong?

23 A. Not ever.

24 Q. And what about smoking, as well?

25 A. Excuse me. I'm so sorry. Yes, I did cut down

1 smoking tremendously when I was expecting my babies.

2 Q. All right. And why was that?

3 A. Because I was told that if you smoke, the babies
4 would be born smaller than they supposed to be and I
5 wanted my babies to be born healthy.

6 Q. Okay. But they didn't tell you anything about
7 drinking during ---

8 A. I never heard of that, ever.

9 Q. And did you ever hide the fact that you had drank
10 during your pregnancy?

11 A. No.

12 Q. And how much would you say you would drink?

13 A. A lot.

14 Q. Well, give me a figure. I think once before we
15 talked about -- do you remember how much every night?

16 A. Okay. Needless to say, I worked all day and when I
17 got home, I had to take care of the children and the
18 house and then it was happy hour for me. And I probably
19 would have four or five glasses of wine, sometimes more.

20 Q. All right. And I think we talked to you about a
21 particular bottle that y'all used to get? Or a type of
22 wine, do you remember that?

23 (WHEREUPON, Plaintiff Exhibit Number 27 was marked
24 and admitted into evidence.)

25 Q. Do you remember me asking you about -- or I think

1 initially the investigators asked you about what did you
2 drink?
3 A. You mean what kind of wine?
4 Q. Yeah?
5 A. I don't -- it could have been Carlo Rossi, some
6 kind of burgundy.
7 Q. Okay. Do you remember -- and I'm going to hand you
8 what has been marked as Plaintiff's Exhibit Number 27.
9 Do you remember me showing you a picture of that or
10 talking about that?
11 A. Yes.
12 Q. Okay. And can you identify that?
13 A. It's the wine I used to drink.
14 Q. All right. And I'll just describe it. It's a
15 bottle of Carlo Rossi?
16 A. Yes.
17 Q. It's one and a half liters. I think on your
18 affidavit it said one point seven-five liters. But I'm
19 not asking you to remember the exact liters, but does
20 that sound about right?
21 A. Yes.
22 Q. And how much do you remember -- how often do you
23 remember getting one of these bottles?
24 A. Oh, my goodness. Probably every other day, maybe.
25 Maybe every two days.

- 1 Q. And was that when you were married to Dwight?
- 2 A. Yes.
- 3 Q. And you were pregnant with Chris?
- 4 A. Yes.
- 5 Q. Okay. But he had some, as well?
- 6 A. Yes.
- 7 Q. Okay. And did you potentially drink more on the
- 8 weekends?
- 9 A. Yes.
- 10 Q. Now, did Jan ever ask you or talk to you about your
- 11 drinking?
- 12 A. No.
- 13 Q. Did she never mention it at all?
- 14 A. No.
- 15 Q. Was it something you would have hidden from her?
- 16 A. No, sir.
- 17 Q. I know you said something the first time I ever
- 18 asked you about drinking or anything that y'all had an
- 19 expression about wine. Do you remember that?
- 20 A. Expression, what do you mean by ---
- 21 Q. That wine is good for the blood?
- 22 A. Yes. I heard that all my life, that you're not
- 23 supposed to drink water because water was for animals,
- 24 so we drink wine and beer.
- 25 Q. All right. And it wasn't like you were stumbling

1 around drunk every night that we're talking about?

2 A. Not every night, but there was sometimes I was
3 stumbling around drunk.

4 Q. Okay. But when you were pregnant, we're talking
5 about, you weren't ---

6 A. On the weekend I sometimes went overboard.

7 Q. Okay.

8 A. But I tell you one thing, if I had known, and I
9 swear on my babies, that I was going to harm my babies
10 by drinking, I would have never consumed one single
11 drop.

12 Q. Okay. And was this something you would have been
13 ashamed of at all if Jan would have asked you about it?

14 A. No, of course, not. If she would have asked me, I
15 would have told her like I'm telling you now.

16 Q. All right. I think the first time our
17 investigators asked you about it, you immediately told
18 them. Is that your recollection?

19 A. Yes.

20 Q. And when was the first time you heard about Fetal
21 Alcohol Syndrome?

22 A. When I was in your office.

23 Q. In whose office?

24 A. Your office.

25 Q. In my office?

- 1 A. Yes, sir.
- 2 Q. And had you ever heard the phrase before then?
- 3 A. Not ever in my entire life.
- 4 Q. Okay. And I had to explain the phrase to you?
- 5 A. Yes, sir.
- 6 Q. Okay. You mentioned real quick your children. How
- 7 many children do you have?
- 8 A. In all, four.
- 9 Q. All right. And so there's -- I'm just going to go
- 10 through them. Well, give me the first child's name?
- 11 A. Uwe.
- 12 Q. And that's U-W-E?
- 13 A. Yes, sir.
- 14 Q. What's his last name?
- 15 A. Scheller.
- 16 Q. And then -- you had five pregnancies though; right?
- 17 A. No.
- 18 Q. So I thought there Uwe, Sylvia, Peter ---
- 19 A. No, sir. Uwe and Sylvia, Maureen and Christopher.
- 20 Q. Okay. You didn't have an infant, I thought, that
- 21 passed away early-on?
- 22 A. No. That was my daughter. My daughter had an
- 23 infant pass away at the age of seven months.
- 24 Q. Okay. I'm sorry. And then -- okay. So you said
- 25 Uwe, if I'm pronouncing that right, U-W-E Scheller, that

- 1 was back in Germany?
- 2 A. Yes.
- 3 Q. And then there was also Sylvia?
- 4 A. Yes.
- 5 Q. And then Maureen?
- 6 A. Yes.
- 7 Q. And then Chris was the youngest; is that right?
- 8 A. Yes.
- 9 Q. And I hate to bring up this subject, but Maureen
- 10 passed away last year?
- 11 A. Yes.
- 12 Q. And, as a matter of fact, she committed suicide?
- 13 A. (Witness crying).
- 14 Q. I'm sorry to bring that up. I'm sorry about that.
- 15 Let's move on. So I'll ask you real quick, too, if you
- 16 remember this -- and you're not a big person. Were you
- 17 any bigger when you were pregnant with Chris?
- 18 A. No. I was probably maybe ten, fifteen pounds
- 19 lighter.
- 20 Q. Okay. And I hate to ask you this, but how much do
- 21 you think you weighed when you were pregnant with Chris?
- 22 A. Oh, I mean, I mean, do you mean before or ---
- 23 Q. You can give us both.
- 24 A. Well, when I first got pregnant, I probably weighed
- 25 about maybe a hundred and twelve or fourteen pounds.

1 Q. Okay. And then after the pregnancy or during the
2 pregnancy, the height?

3 A. The height, one sixty-eight.

4 Q. Okay. And how tall are you?

5 A. Five seven.

6 MR. ENDERLIN: Just a second, Your Honor.

7 I think that's all I have. Please answer any
8 questions Mr. Zelenka has.

9 **CROSS-EXAMINATION**

10 **BY MR. ZELENKA:**

11 Q. Ms. Huckaby, I have a few questions. How often did
12 you meet with Jan Vogelsane?

13 A. To be honest, I really can't recall. Maybe once a
14 week, maybe sometimes twice a week. I really don't
15 remember.

16 Q. Okay. Once a week, twice a week throughout the
17 time -- after your son was arrested?

18 A. Yes.

19 Q. Once she became part of the Defense team?

20 A. Sir?

21 Q. Once she became part of the Defense team?

22 A. Yes.

23 Q. Okay. And in those discussions did you give her
24 information about your family in Germany?

25 A. Yes.

1 Q. Did you give her information on where they were
2 located?

3 A. Yeah. I'm pretty sure. She wanted to know where I
4 was born and raised. And, yes, I told her everything
5 she wanted to know about me and my family, I told her.

6 Q. Okay. The cities you were raised in?

7 A. Yes, sir.

8 Q. Did you give her information, as much as you could,
9 about the contacts of the individuals within Germany
10 that she could contact?

11 A. Yes.

12 Q. Did you have telephone, addresses or anything to --
13 or telephone or physical addresses in Germany?

14 A. Well, there may have been some times that she asked
15 me for telephone numbers and addresses. And if she did,
16 I gave her all the information she wanted from me.

17 Q. Okay. Did you meet with the lawyers in the case?

18 A. Yes.

19 Q. Did you provide them similar information about your
20 background in Germany?

21 A. Well, you speaking of Mr. Mauldin or Mr. Nettles?

22 Q. Either Mr. Mauldin or Mr. Nettles?

23 A. No. Mr. Mauldin asked me very little questions in
24 the beginning when we first met. But Mr. Nettles, I
25 have never really had actual contact with him as far as

1 a verbal conversation.

2 Q. Okay.

3 A. And Ms. Vogelsane was the one that really got -- I
4 mean, she was like, I would say almost like my friend
5 because we met so often and she wanted to know all about
6 me and my son and my marriage.

7 Q. Okay. And you provided her photographs of the
8 family?

9 A. Yes, sir, I did.

10 Q. What was your working relationship with Ms.
11 Vogelsane?

12 A. What do you mean by working relationship?

13 Q. Well, did you try to keep things from her ---

14 A. No, no, no, no, no, no, no. Anything she wanted to
15 know about me, Chris and my -- Christopher's father, I
16 would tell her everything she wanted to know.

17 Q. Okay. Now you seem pretty clear in your
18 statements, having also been here in Court, that Ms.
19 Vogelsane never asked you about drinking. Is that
20 correct?

21 A. No. Ms. Vogelsane never asked me about drinking.
22 But I volunteered information to her and told her that
23 everybody in Europe is drinking and we just had a big
24 laugh about it. And I told her that even in Russia, you
25 can go to the vending machine and instead of getting a

1 Coke, you get you a bottle of vodka.

2 Q. Okay. Is it clear in your mind that Ms. Vogelsane
3 never asked you about that drinking ---

4 A. During pregnancy, no.

5 Q. --- while Chris -- you were pregnant?

6 A. It's very absolutely clear in my mind.

7 Q. Okay. You didn't testify at your son's trial?

8 A. No, sir.

9 Q. You told Ms. Vogelsane about your family background
10 in Germany; correct?

11 A. Yes.

12 Q. The difficulties that you had growing up in
13 Germany; correct?

14 A. Yes.

15 Q. So they had that information?

16 A. Yes.

17 Q. Did it concern you that that information that you
18 had given to the Defense team was not used through you
19 as a witness to talk about that on your son's behalf?

20 A. I don't understand this question.

21 Q. Okay. I can ask it much more precisely. Were you
22 upset that you didn't testify in your son's trial?

23 A. I was highly upset.

24 Q. Okay. And why was that?

25 A. Because I thought I was given the opportunity to

1 speak my part. I have heard so many bad things on my
2 son's behalf and nobody give me the opportunity to speak
3 about something that I thought I had the right to.

4 Q. Okay. Well, if you would have had that opportunity
5 to speak on your son's behalf about his background,
6 about his family, what would you have wanted to tell the
7 Judge at the time?

8 A. I would have wanted to tell the Judge that
9 Christopher is not the ordinary hoodlum murderer. That
10 Christopher just got caught in a situation and something
11 went wrong with him and I don't know what. For
12 Christopher was a well behaved, smart, bright,
13 intelligent person. To this day every month that I
14 speak to him, I see him in prison, they say he's not the
15 ordinary prisoner. That's what I would have said. And
16 I'm glad I got a chance to say this today.

17 Q. Okay. And did you tell the lawyers that that was
18 the type of information you wanted to say on the witness
19 stand?

20 A. No, I didn't tell anybody. I mean, nobody asked me
21 why I couldn't testify and so, therefore, I didn't ask
22 no questions.

23 Q. Okay. During your weekly meetings with Ms.
24 Vogelsane, what did you talk about?

25 A. We talked about the marriage with Christopher's

1 daddy and me. We talked about his sister. We talked
2 about Chris from the minute he was born. And that was
3 about it.

4 Q. Okay. It sounds like there were a lot of meetings?

5 A. Yes. But I have to be very honest with you, I do
6 not know how many times a week I saw Ms. Vogelsane. I,
7 you know, it's been, what, ten years ago?

8 Q. Okay.

9 MR. ZELENKA: I think that's all the questions
10 I have, Your Honor.

11 THE COURT: Any redirect?

12 MR. ZELENKA: Hold on one second. I'm sorry.

13 THE COURT: Okay.

14 MR. ZELENKA: I apologize. No further
15 questions.

16 THE COURT: Anything in redirect?

17 MR. ENDERLIN: Nothing else. You can go ahead
18 and get down.

19 THE WITNESS: Okay.

20 THE COURT: All right. Thank you very much.
21 You may step down.

22 THE WITNESS: You're welcome.

23 MR. ENDERLIN: We'd call Dwight Williams to
24 the stand.

25 THE CLERK: Mr. Williams, place your left hand

1 on the Bible and raise your right hand.

2 You do solemnly swear or affirm that the testimony
3 you're about to give in this case will be the truth, the
4 whole truth and nothing but the truth, so help you God?

5 THE WITNESS: I do.

6 THE CLERK: Thank you. You may be seated.
7 Please state your full name for the record.

8 THE WITNESS: Dwight Charles Williams.

9 DWIGHT CHARLES WILLIAMS,

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MR. ENDERLIN:

13 Q. Mr. Williams, you're the father of Chris Williams.

14 Is that right?

15 A. Yes, I am.

16 Q. And you were still married to Daisy Huckaby when
17 Chris was born. Is that correct?

18 A. Yes.

19 Q. And so you were around during the time, obviously?

20 A. Yes.

21 Q. I know there's been talk about you being overseas
22 in the Army. But you were there the whole time during
23 the pregnancy?

24 A. Yes.

25 Q. And let me ask you about your and Daisy's habits

1 during the pregnancy. Did Daisy and you drink during
2 the pregnancy?

3 A. Yes, we did.

4 Q. And when I say drink, I obviously mean alcohol. If
5 you could describe what it was?

6 A. Well, we drank the Petri wine. It was burgundy, a
7 burgundy Petri? wine.

8 Q. And I think you call it Petri? wine.

9 A. Carlo Rossi.

10 Q. And do you want to describe Petri wine? I think
11 it's an old title for an old ---

12 A. Yeah. They may have changed the name of it, but
13 what mostly I drank was the Carlo Rossi Petri Burgundy
14 Wine.

15 Q. Okay.

16 A. They come in the small, like, pot-belly bottles.

17 Q. All right. And I'm handing you or showing you
18 Exhibit 27. Does that look like what you described to
19 me and the investigator?

20 A. Yes, it is.

21 Q. That's one and a half liters. Does that sound
22 right?

23 A. Yes. Correct.

24 Q. How often would you get one of those bottles?

25 A. We tried to have wine in the house every day. So I

1 would say, like, maybe once or twice a day. Not twice a
2 day, but once every other day we would buy some wine.

3 Q. Okay. And was it sometimes more often?

4 A. Yeah. When we got low. It could be like on the
5 weekends when we would expect to have friends over or
6 something like that, because we did have a lot of
7 friends who would come over, so we would try to make
8 sure that we had enough.

9 Q. All right. And you heard Daisy say, I think she
10 said something like four glasses a night, was that about
11 ---

12 A. I would say somewhere around that. It was like a -
13 - we considered it like occasionally, like occasionally,
14 you know, customarily drinking in the evening, you know,
15 like if you would come we would drink wine and that kind
16 of thing. Yes.

17 Q. And, again, I don't want to put words in your
18 mouth, but that's one and a half liters.

19 A. Yeah.

20 Q. How many glasses do you think were in that bottle?

21 A. Well, we would share the bottle and there would be,
22 I would say at least three to four glasses of wine each,
23 you know.

24 Q. All right, sir. So you think there were six to
25 eight glasses in that bottle?

1 A. Approximately eight glasses of wine per bottle.

2 Q. And Ms. Vogelsane, did she ever ask you about
3 Daisy's drinking?

4 A. Yes, she did ask me that.

5 Q. And what did you say? What did you tell her?

6 A. I told her, you know, what I knew. In other words,
7 that there was always like some alcohol consumed as long
8 as I, you know, Daisy and I were together.

9 Q. All right.

10 A. And there was hardly no times -- like it was just a
11 way of life, seems like, you know, that we had done
12 that, you know.

13 Q. Yeah. Do you ever remember the attorneys asking
14 you about that?

15 A. I don't have any -- I vaguely remember attorneys
16 asking me -- the one -- I remember Jan, I mean, giving
17 her information about the drinking. But I don't really
18 think the attorneys asked me much about that, no.

19 Q. Is this something you would have shared with them
20 if they would have asked you?

21 A. Yeah, I would have shared it.

22 Q. There was talk about A.C. Who is A.C.?

23 A. A.C. is my father.

24 Q. And did he pass away?

25 A. Yes, he did.

- 1 Q. What year did he pass away?
- 2 A. Somewhere around I think like 2000.
- 3 Q. 2000?
- 4 A. Yeah, the year 2000, this past 2000.
- 5 Q. What do you mean about this past -- are you talking
- 6 about twelve years ago?
- 7 A. Uh-huh (affirmative).
- 8 Q. So he was not alive when Chris went to trial or
- 9 before that?
- 10 A. Yeah. He was alive for a while, but he lived in
- 11 Florida.
- 12 Q. All right. Actually, when did he died? I'm sorry.
- 13 That's what I was asking.
- 14 A. Like the year 2000.
- 15 Q. Okay. And when did this go to trial?
- 16 A. 2003 -- no, 2004.
- 17 Q. 2005, about?
- 18 A. Right.
- 19 Q. Does that sound about right?
- 20 A. Right.
- 21 Q. But you just told me he was alive during the trial?
- 22 A. No, I'm sorry. My father wasn't. My father's been
- 23 dead. He was dead.
- 24 Q. Okay. And this is A.C.?
- 25 A. Yes.

1 Q. Okay. I thought we had records that he died in
2 2007?

3 A. Really, I am totally ---

4 Q. You were separated ---

5 A. Yeah.

6 Q. I mean you were not in contact with him?

7 A. No, I haven't been in a lot of contact with my
8 father. My father had -- he was in the Air Force and so
9 he got stationed -- he and my mother had divorced, so he
10 went to Florida. And so I didn't have a lot of contact
11 with him.

12 Q. Okay. So he may have died in 2007?

13 A. Yeah. He may have, yeah.

14 Q. I think that's all the questions I have for you.
15 Please answer any thing Mr. Zelenka may have.

16 **CROSS-EXAMINATION**

17 **BY MR. ZELENKA:**

18 Q. Mr. Williams, when Ms. Vogelsane asked you the
19 questions about your former wife's drinking, Daisy, did
20 she ask how much Daisy drank during the pregnancy?

21 A. Yes. She had asked.

22 Q. And what information did you tell her at that time?

23 A. Well, the same thing, that Daisy and I did our
24 share of drinking together, you know, and while we were
25 -- when we first met, throughout the whole marriage, and

1 during the pregnancy also. We had constantly had wine
2 or alcohol in the home. That was every day, along with,
3 you know, cigarettes. And that was just a way of
4 lifestyle, you know, that was something that we did. We
5 had no idea that -- the really implications or problems
6 of having drank that much. We never did think anything
7 about it.

8 Q. Okay. And as I understand your testimony, her
9 level of drinking didn't change during the time that she
10 was pregnant with Chris. You were still maintaining the
11 same level of drinking that you had throughout that
12 time?

13 A. Yes. Alcohol was constantly around, yes.

14 Q. When you were asked about the drinking, did you
15 have any interaction with Daisy about the discussions
16 that were going on with Ms. Vogelsane about your son's
17 case?

18 A. No. Because Daisy and I were separated. And, you
19 know, she was on one side of town and I was on the
20 other. So whatever questions Jan asked me, I would just
21 consider they was directed towards me. I knew she had
22 been talking to Daisy, but she didn't let on that she
23 was asking her any questions. So my information is
24 consistent.

25 Q. And with those -- let me just ask it this way. Did

1 Ms. Vogelsane ask you more than once about your wife's
2 drinking or was it just a one-time?

3 A. Pretty much. I think there was like once or twice
4 I had a meeting with Ms. Vogelsane. She came out to
5 witness me -- visit me, and then she -- then I went over
6 to her office and -- there may have been one or two,
7 about three interviews, maybe, during the whole time.

8 Q. Okay. And basically each of those interviews,
9 again, asking you about Daisy's drinking or was it ---

10 A. If it had come up in the conversation, yeah, then
11 that would have been one of the topics she had asked me
12 about.

13 Q. Okay. You testified at the trial on your son's
14 behalf?

15 A. No -- yes, I did. Maureen and I were the only ones
16 that testified.

17 Q. Okay. What type of preparation with the Defense
18 attorneys did you have before you got up on the witness
19 stand?

20 A. I personally didn't get a lot of prep from the
21 attorneys. I would have been delighted to have given
22 more, but sometime I guess what I was able to give them,
23 they may have considered that it wouldn't have been
24 useful to the case.

25 Q. Okay. When you met with the attorneys was Ms.

1 Vogelsane present? If you can recall?

2 A. I don't think -- there may have been one time when
3 I got to speak with Jan and John Mauldin in their office
4 over there. One time, I think it was. They asked me
5 some questions. But just to nail it down exactly, I
6 couldn't.

7 Q. Okay. Again, what were those questions about when
8 you were over at the office?

9 A. Well, at that time, they were more or less telling
10 me -- briefing me on what questions they were going to
11 ask me, you know. And so, you know, that was basically
12 it. But I don't think -- Jan didn't bring up anything
13 about, you know, how to answer, you know, just to tell
14 the truth, you know, and that's what I did.

15 Q. Okay. All right.

16 MR. ZELENKA: No further questions.

17 THE COURT: Any redirect?

18 MR. ENDERLIN: One quick thing, Judge.

19 THE COURT: Yes, sir.

20 **REDIRECT EXAMINATION**

21 **BY MR. ENDERLIN:**

22 Q. The picture of the wine bottle ---

23 A. Uh-huh (affirmative).

24 Q. --- Exhibit 27, I don't remember exactly, but the
25 investigators told me something like you either went

1 with them and pointed out the bottle or you went to the
2 grocery store and pointed out, and described it. How
3 did that happen?

4 A. Well, the investigators came up to the house in
5 Asheville. And this was the only time. And there's a
6 slight discrepancy because one bottle is smaller than
7 the other. There's two sizes to that bottle, to that
8 type of wine.

9 Q. Right.

10 A. I just know, just by looking at it, which one we
11 used all the time. The bigger bottle was probably like
12 purchased on the weekends. And the smaller bottle was
13 purchased throughout the weekdays?

14 Q. Right. In the picture, Exhibit 27, is the smaller
15 bottle; right?

16 A. Yes.

17 Q. The one point five liter?

18 A. Yes.

19 Q. I'm just asking how did we get that picture? I
20 just can't remember.

21 A. I don't remember either. I believe one of the
22 investigators said that they were going to go the store
23 and take some pictures. And then I would verify what
24 size it was. But I haven't seen, I haven't seen a
25 bottle of Petri wine in, oh, it's been a while.

1 Q. Yeah. Well, so, I'm just asking, ---

2 A. Yeah.

3 Q. --- but that was something you would have done with

4 Ms. Vogelsane, too?

5 A. Yeah.

6 Q. If she would have said, will you go to the grocery

7 store and figure out which one?

8 A. Of course. Yeah. I would have done that with her.

9 Yeah.

10 Q. All right. Thank you.

11 MR. ENDERLIN: That's all I have, Your Honor.

12 THE COURT: Thank you. You may step down, Mr.

13 Williams.

14 MR. ENDERLIN: That's all we have for

15 witnesses, Your Honor. We do have some things we'd like

16 to talk about.

17 THE COURT: All right. Gentlemen, what do we

18 need to talk about, scheduling and otherwise?

19 MR. ENDERLIN: Well, Your Honor, one thing,

20 Mr. Williams is here obviously, and he's wanted to be

21 here. As a matter of fact, I don't know if you noticed,

22 we had clothes for him to wear and he's been happy about

23 being here and looking as good as possible. And we

24 understand that for security they didn't want him to

25 wear civilian clothes and I understand that this isn't a

1 jury trial. I only point that out to say that he has
2 been an integral part of this, and wanted to be here and
3 wanted to make sure you understood he took it seriously.
4 He wanted to do everything he could.

5 At the same time, and this is largely because of
6 another death penalty case in this county, they put him
7 in solitary confinement. When I say solitary
8 confinement, it's a small little cell about the size of
9 a holding cell. And which essentially means there's no
10 reading material -- and he can correct me if I'm wrong -
11 - no radio, no TV, essentially no outside contact, shut
12 off from the world, no window or anything else. And the
13 thought of him going back to solitary confinement while
14 here and being there again until tomorrow morning is
15 something that he's not looking forward to. And I
16 understand. If you remember, I don't know if you ever
17 heard, John McCain at one point in time said something
18 to the effect that the beatings with physical torture
19 were not near as bad as the solitary confinement. And
20 as Chris described to me a little while ago, when you
21 sit back there in that room, you don't know if you've
22 been there five minutes or two hours or two days and you
23 start going stir crazy.

24 I assume you do not have the power to move him out
25 of solitary confinement. If you do, I would certainly

1 ask. But I'm assuming you don't. At the same time, I
2 would like him to be here, but I think he does not want
3 to endure that for the next four days. I understand.
4 And at the same time, I'm mindful of the fact that our
5 witnesses that are going to testify, the only remaining
6 witnesses that are going to testify all day Wednesday
7 and Thursday probably, may be very more willing to talk
8 about brain damage and the problems without Mr. Williams
9 being here. So I do not have a problem with him going
10 back to Lieber. He does so reluctantly. But at the
11 same time, I do not want him in solitary confinement for
12 four days. I think that's a cruel thing to do. And
13 would like for you to consider allowing him to waive his
14 appearance.

15 THE COURT: He's not intending to testify?

16 MR. ENDERLIN: He's not intending to testify.

17 THE COURT: Does the State have any problem
18 with that?

19 MR. ZELENKA: At this stage, the State does
20 not intend to call Mr. Williams, so we have no objection
21 to him not being present during the hearing.

22 THE COURT: If anything's changed from either
23 side and we do need him, then we'll make efforts to get
24 him here.

25 MR. ENDERLIN: Your Honor, I can say I think

1 I've done that twice before, done this twice before, and
2 have never has the Defendant said, okay, I want to come
3 back and testify. I don't see that happening.

4 THE COURT: Okay. All right. I certainly
5 will -- by consent will allow him to go back to his
6 facility at Lieber.

7 Mr. Williams, you understand you certainly have a
8 right to be here if you want to. It's your choice and
9 your attorneys, and in consultation with them, you will
10 not be here for the ---

11 MR. WILLIAMS: Oh, I understand.

12 THE COURT: All right, sir. I grant your
13 motion.

14 MR. ENDERLIN: Thank you, Your Honor.

15 THE COURT: Anything else we need?

16 MR. ENDERLIN: I want to look through some
17 exhibits and stuff, but I don't think we need you, Your
18 Honor.

19 THE COURT: Okay.

20 MR. ZELENKA: Judge, we did find Defense
21 Exhibit 28, the family tree that ---

22 THE COURT: Are we going to use that one for
23 this exhibit or are we going have ---

24 MR. ZELENKA: We just ask the Court to take
25 judicial notice of it, in light of, I believe it's

1 Exhibit 1, Plaintiff's 1, which was a preliminary
2 exhibit made by a different witness.

3 THE COURT: I'll certainly take judicial
4 notice. I'll look at those before they go back. All
5 right. I'll be around here for a while if y'all need me
6 for anything. Ms. Hanks can stay a while longer, too,
7 if you need to put anything on the record. Your
8 witnesses going to be here at nine o'clock in the
9 morning, nine-thirty?

10 MR. ENDERLIN: Yes, Your Honor.

11 MR. ZELENKA: We're starting at nine?

12 THE COURT: Nine o'clock suit everybody to
13 start tomorrow?

14 MR. ENDERLIN: Certainly.

15 MR. ZELENKA: Certainly.

16 THE COURT: We'll be ready to go at nine
17 o'clock.

18 (WHEREUPON, the court stood at recess for the
19 evening)

20 (WHEREUPON, Plaintiff Exhibit Numbers 28, 29 and 30
21 were marked for identification.)

22 **January 30, 2013**

23 (WHEREUPON, Court convened with all parties present
24 and the following proceedings were had.)

25 THE COURT: Are you ready to proceed, Mr.

1 Enderlin?

2 MR. ENDERLIN: Yes, Your Honor.

3 THE COURT: Okay. Call your first witness.

4 MR. ENDERLIN: Your Honor, before that, if I
5 could, real quick, we have two additional lawyers with
6 us from the Consulate today. Sven Clausnitzer and Kira
7 Falter.

8 Your Honor, we call Dr. Paul Connor.

9 THE CLERK: Mr. Connor, please place your left
10 hand on the Bible and raise your right hand.

11 You do solemnly swear or affirm that the testimony
12 you're about to give in this case will be the truth, the
13 whole truth and nothing but the truth, so help you God?

14 THE WITNESS: I do.

15 THE CLERK: Thank you. Please be seated.
16 State your full name for the record.

17 THE WITNESS: Paul, middle initial D, for
18 David, Connor, C-O-N-N-O-R.

19 PAUL DAVID CONNOR,

20 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MR. ENDERLIN:

23 Q. Dr. Connor, I'm going to hand you what's
24 Plaintiff's Exhibit 28. Is that your CV?

25 A. Yes.

1 MR. ENDERLIN: I think that's already been
2 admitted into evidence, Your Honor.

3 MR. ZELENKA: No objection.

4 THE COURT: All right. Without objection,
5 Exhibit 28 is admitted into evidence.

6 (WHEREUPON, Plaintiff Exhibit Number 28 was
7 admitted into evidence.)

8 Q. Tell us a little bit about your educational
9 background?

10 A. I received my undergraduate degree, bachelor's
11 degree, from the University of Washington in Psychology.
12 Went to Brigham Young University for my Ph.D. program in
13 clinical psychology, specializing in neuropsychology.
14 As part of my psychology, clinical psychology program,
15 you have a one-year internship, which I served at Henry
16 Ford Health System in Detroit, Michigan. Once I
17 received my Ph.D., I went back to the University of
18 Washington where I was a post-doctoral fellow at the
19 Fetal Alcohol and drug unit, part of the department of
20 psychiatry and behavioral sciences for several years.

21 Q. And so have you pretty much done Fetal Alcohol
22 Syndrome work since school?

23 A. Yes. Actually since '95, I've been involved in the
24 Fetal Alcohol world.

25 Q. And so have you specialized in that pretty much or

1 other areas, as well?

2 A. Clinical neuropsychology in general and
3 specializing also within Fetal Alcohol Spectrum
4 Disorders.

5 Q. And I'll let the CV speak for itself, but you've
6 held a number of faculty positions, as well. And
7 there's a number of publications. You're also licensed
8 to practice in Washington State. Is that correct?

9 A. That's correct.

10 Q. You're also a member of a number of professional
11 organizations, as well. And then in talking with you it
12 seems like, as well, that you've done quite a bit of
13 research. Can you talk about that?

14 A. Yeah. Beginning in 1995 when I came for my post-
15 doctoral fellowship, I've been involved in research on
16 different aspects of Fetal Alcohol Spectrum Disorders,
17 neuropsychological aspects, neuroimaging work, mental
18 health evaluation for individuals that have been
19 diagnosed with Fetal Alcohol Spectrum Disorders. As
20 well as a study that was on-going, and which actually
21 brought me to the University, which was of -- it was a
22 study in which women were interviewed while they were
23 pregnant, back in the seventies, and asked about their
24 drinking habits. And then these individuals were
25 followed. It was originally going to be for thirty-six

1 months. And I was brought in when they were twenty-one
2 years old to do the neuropsychological aspects of their
3 functioning. So that research ---

4 Q. The mother's function or ---

5 A. The children's. The children that were exposed to
6 varying amounts of alcohol.

7 Q. Right.

8 A. And so I was brought in for that study. And also
9 as a co-investigator on a number of other studies within
10 that same unit. And a principal investigator on ---

11 Q. And that was what year?

12 A. That was in 1995 when I came to ---

13 Q. All right. But you've continued to do research
14 such as that ---

15 A. Yes.

16 Q. --- and other stuff since then?

17 A. Oh, since then for sure. I was full-time doing
18 research until about 2007, at which point I cut back on
19 that and started my private practice more fully.

20 Q. All right. Was that pretty much research only in
21 Fetal Alcohol Syndrome?

22 A. Yes.

23 Q. And when I say Fetal Alcohol Syndrome, I probably
24 should use the term Fetal Alcohol Syndrome Spectrum
25 Disorder. Is that correct?

1 A. Yeah. Thanks for catching that.

2 Q. All right. And so as part of that clinical work,
3 again, I ask you if you had published articles. And can
4 you tell me about that? You've published a number of
5 articles. I think a lot of them are on Fetal Alcohol
6 Spectrum Disorder and it's effects?

7 A. Yes, I have. I believe it's about seventeen peer
8 reviewed journal articles where I was at least a co-
9 author on.

10 Q. Okay. And who got you to the University of
11 Washington?

12 A. The person that ran the Fetal Alcohol drug unit at
13 the time. Her name is Anne Streissguth. She's a
14 psychologist. She was one of the -- we call her the
15 Godmother of Fetal Alcohol basically. She was involved
16 with the initial study in 1973 I did that identified
17 individuals with Fetal Alcohol Syndrome. And was asked
18 to do psychological evaluations of these, I believe,
19 eight children at the time. And became so interested in
20 it that she immediately started up this study that I got
21 involved in initially of interviewing women while they
22 were pregnant, following them along. So she's been at
23 the forefront of Fetal Alcohol research since the early
24 seventies.

25 Q. And your name and her name seem to be published all

1 over the place. Is that fair?

2 A. Yes. I mean, she was the head of the units and I
3 was one of her co-investigators on a number of those
4 grants.

5 Q. And I think I've showed this to you before, but
6 there's actually a South Carolina publication included
7 in the appendix that we sent to the Court beforehand.
8 It was entitled South Carolina Fetal Alcohol Spectrum
9 Disorders Strategic Plan for Fiscal Years 2011 to 2013.
10 And on page seventy-four, our appendix, page two of the
11 publication of South Carolina, they mention that Fetal
12 Alcohol Spectrum Disorder is a serious national problem.
13 And go into some detail. And then also that researchers
14 at the University of Washington estimate thirty-five
15 percent of individuals with FASD have been in jail or
16 prison. And more than half of the individuals diagnosed
17 with FASD have been in trouble with the law. Do you
18 remember me showing you that?

19 A. Yes. I remember that.

20 Q. And were you part of that study or were you part of
21 the team?

22 A. Yes. This was a study that was being done for --
23 being funded by the CDC back in about '94 to '96. That
24 was the second from the bottom on the time line here, is
25 the study that that was published in.

1 Q. Okay. And you're also part of the team Fetal

2 Alcohol -- FASD experts. Is that correct?

3 A. That's correct.

4 Q. Can you tell us a little bit about that?

5 A. We're a group of clinicians and friends and
6 practitioners that specialize in Fetal Alcohol. Myself
7 and Dr. Brown, we're both post-doctoral fellows with Dr.
8 Streissguth. And we understand that one of the
9 important aspects of diagnosis for Fetal Alcohol
10 Spectrum Disorders is that it's a multi-disciplinary
11 approach. You need to have multiple different
12 perspectives in order to make an informed diagnosis. So
13 we came together because we each have the skill set to
14 bring a piece of that to the table. Myself, I'm usually
15 asked to go in to do an assessment at the beginning when
16 we first get a call in. Because one of the important
17 aspects about Fetal Alcohol Spectrum Disorders is that
18 you need to be able to document their deficits and a
19 pattern of deficits that we can talk about in a little
20 bit. And if they're not there, you really can't go to
21 the diagnosis itself. So I go in as a first step in the
22 process. If the testing is looking consistent, then the
23 steps continue on to bringing in Dr. Adler for a
24 diagnosis, et cetera.

25 Q. Okay. And so let me stop you a little bit. The

1 CDC manual on FAS kind of talks about multi-disciplinary
2 teams. Is that correct?

3 A. Yes.

4 Q. And so is that what y'all consider yourself, that
5 you have to have different people do different parts of
6 the assessment?

7 A. Yes. In the clinical world, the gold standard is a
8 multi-disciplinary approach. And we're trying to
9 replicate that in a forensic setting.

10 Q. All right.

11 MR. ENDERLIN: Your Honor, at this time, I'd
12 like to enter Dr. Connor as an expert in clinical
13 neuropsychology and specifically as an expert in Fetal
14 Alcohol Spectrum Disorders.

15 THE COURT: Any voir dire or any objection?

16 MR. ENDERLIN: No objection, Your Honor.

17 THE COURT: Without objection, he'll be
18 considered an expert.

19 Q. All right. So we talked a little bit about, and I
20 think we'll talk about this more with each individual
21 team member, what they do. Can you talk a little bit
22 about just a history of Fetal Alcohol Spectrum Disorder.
23 If you want to go to your slides.

24 A. It actually begins before this slide. It began --
25 formally, Fetal Alcohol Spectrum Disorders were

1 identified in 1968 in France by a pediatrician who
2 identified these children of alcoholic mothers who had
3 specific facial features. And, unfortunately, that
4 paper was only published in French, so it didn't get
5 disseminated very much. So in 1973, at the University
6 of Washington, a group of practitioners, clinicians,
7 including Dr. Streissguth, who we talked about, were
8 also seeing these children of alcoholic women. And they
9 all had these specific facial features and those were
10 the facial features that eventually came to be used for
11 the diagnosis of the term Fetal Alcohol Syndrome. So
12 that was in 1973.

13 Q. And when you say the facial features, those are
14 listed in the CDC?

15 A. They're listed in the CDC. In the original days of
16 Fetal Alcohol Syndrome, they looked at a lot of facial
17 features. Over the years, that has been distilled down
18 to three primary facial features, small eyes, the
19 opening of the eyes tends to be small. A very thin
20 upper lip, and smooth filter, which is the ridges
21 between your nose and your lip. Those are the three
22 core features now.

23 Q. Have you actually worked with the CDC or have you
24 done anything for them or with them on anything?

25 A. Yes. I have been -- I was involved in the one

1 study that I was on secondary disabilities that you had
2 kind of cited in the South Carolina paper. I've also
3 been asked down for hearings for a joint task force
4 between CDC and various forms of the Institute of Health
5 in working towards building diagnostic criteria for
6 various of the Fetal Alcohol Spectrum Disorders. So
7 I've been involved in those processes, too.

8 Q. Okay. And that's kind of part of your expertise
9 with assessments and figuring out what kind of criteria
10 you're going to use to document this?

11 A. Yes.

12 Q. And when I keep saying CDC, I'm referring to
13 obviously the Center for Disease Control and Prevention.
14 And in our appendix we have that as Exhibit 11. Now,
15 the CDC Manual there, is that the only manual you use
16 for diagnosing and talking about Fetal Alcohol Spectrum
17 Disorder?

18 A. No. And, in fact, it's a relative newcomer to the
19 field. In 1996, the Institute of Medicine published a
20 book on diagnosis for Fetal Alcohol Spectrum Disorders.
21 It wasn't called FASD at the time. That didn't come
22 until 2000, but ---

23 Q. So is the CDC a little bit more conservative?

24 A. It is a more stringent method. So let me just give
25 you a for-instance. In the Institute of Medicine, when

1 it talks about neuropsychological or cognitive
2 impairments, it talks about a complex pattern of
3 cognitive impairments that are not consistent with --
4 only with other sorts of other conditions. Some wording
5 to that effect, I'm paraphrasing, versus in the CDC, it
6 specifies you need to have deficits in IQ or multiple
7 areas of deficits in these general domains. And it sets
8 a cut point for those. And I've got a slide for that in
9 a little while.

10 Q. Okay. And I'm going to show you the -- Fetal
11 Alcohol Syndrome Manual. Is that what you're talking
12 about when you say the Institute Manual ---

13 A. Yes.

14 Q. --- on Fetal Alcohol Syndrome?

15 A. Yeah. New version but, yeah, same thing.

16 MR. ENDERLIN: Do you have any objection to
17 that?

18 MR. ZELENKA: Objection to what?

19 MR. ENDERLIN: To enter into evidence?

20 MR. ZELENKA: No, I don't have any objection.

21 (WHEREUPON, Plaintiff Exhibit Numbers 31 was marked
22 and admitted into evidence.)

23 MR. ENDERLIN: All right. And that is now
24 Exhibit 31.

25 Q. I think I kind of skipped around from your slides

1 and stuff, too. We were talking about history.

2 A. Right.

3 Q. So you were talking about the history of the
4 seventies and then the next thing on your slide, talk
5 about 1981?

6 A. 1981 was the first Surgeon General warning about
7 alcohol use during pregnancy where it essentially said,
8 if you're pregnant, don't use alcohol. It's known to
9 cause problems.

10 Q. All right. And that would have been -- you did an
11 assessment on Chris Williams in this case; right?

12 A. I did.

13 Q. And that would have been a year before he was born,
14 I guess?

15 A. I believe that's right, yes.

16 Q. And then what do you have below that?

17 A. So with the Surgeon General's warning, that sparked
18 a lot of more public interest in FASD at the time or FAS
19 at the time. And so there were a number of public
20 service announcements that were going out and things
21 like that, which culminated in 1988 with the liquor
22 labeling act. So nowadays -- it's federal. So nowadays
23 if you buy a bottle of beer or a bottle of wine, there's
24 a sticker, a warning label on that.

25 Q. That says don't drink when pregnant?

1 A. Yes. Reiterating the Surgeon General's warnings
2 and things like that. So that was in '88. In 1996,
3 with the institute of medicine what they -- previous to
4 the institute of medicine, there were really two main
5 diagnoses. There was Fetal Alcohol Syndrome where you
6 have all the facial features. And then there was
7 something called Fetal Alcohol effects, FAE, which was,
8 there are some facial features, there may be no facial
9 features. It was a very broad category. So the IOM
10 wanted to narrow that down into different groups. So
11 the IOM created five diagnoses, one of them is full FAS
12 with confirmed exposure. The second one is FAS without
13 confirmed exposure, because in research they found that
14 to get those three facial features they've never found
15 it from any other cause, other than alcohol. So in that
16 rare case, they could make a diagnosis without actually
17 knowing for sure about exposure history. The next one
18 is alcohol related birth defects, which are actually --
19 let me skip that for a moment. The next one is Partial
20 Fetal Alcohol Syndrome, where there are some physical
21 features, not the full gambit of the facial features or
22 not growth deficiencies. Then there's alcohol related
23 neurodevelopmental disorder, in which there really are
24 no physical features. The facial features are facial
25 normal, usually growth is normal. However, in all of

1 those case, the same neuropsychological, same CNS
2 impairments are present. So there's really no -- and
3 most research is supporting on this, that there's really
4 no difference between FAS, PFAS and ARND when it comes
5 to the cognitive impacts. The last category is alcohol
6 related birth defects, ARBD. And that one is one where
7 it is just looking for related physical anomalies,
8 skeletal anomalies, heart defects, liver anomalies,
9 things like that that are often associated with Fetal
10 Alcohol.

11 Q. When you said IOM, you're talking about the
12 Institute of Medicine?

13 A. That's correct.

14 Q. And when you're talking about all those
15 classifications, that's what's contained in what I've
16 marked as Plaintiff's Exhibit 31?

17 A. That's correct.

18 Q. And so, and they -- the Congress mandated and
19 ordered them, or whatever, to do that. Is that correct?

20 A. That's correct.

21 Q. All right. And I guess this is a good time, too,
22 to talk about Congress also mandated CDC essentially to
23 start doing that, as well. Is that correct?

24 A. That's correct, yes, more refinement.

25 Q. All right. Has CDC finished that job?

1 A. No. They did publish Guidelines for the diagnosis
2 of FAS. They're still in the process on Guidelines for
3 ARND.

4 Q. So would it be fair if I said that y'all used sort
5 of a combination of IOM and CDC when you're evaluating
6 ---

7 A. Yes.

8 Q. All right. And that's what we have on the slides,
9 too, 1996 to 2004. Is there anything else you want to
10 say about that?

11 A. No.

12 Q. So when we talk about Fetal Alcohol Syndrome, tell
13 us why you put that -- this next slide in there? I'm
14 going to read the slide right quick. Alcohol freely
15 passes from the mother's blood into the fetus?

16 A. Well, the placenta offers no protection from
17 alcohol. Alcohol will pass straight through the
18 placenta into the fetus' blood system. Within a couple
19 of minutes, the blood alcohol level is equilibrated
20 between the mom and the fetus. So like we think about a
21 blood/brain barrier that blocks out some chemicals from
22 getting into the brain. And the placenta does do that
23 to some extent, but it doesn't do that with alcohol. So
24 alcohol freely crosses into the fetus.

25 Q. Okay. And so when we talk about the brain, I think

1 I skipped over this part.

2 A. Uh-huh (affirmative).

3 Q. What all parts of the brain does Fetal Alcohol
4 Syndrome or spectrum disorder, FASD, affect?

5 A. It can affect parts all parts of the brain. One of
6 the aspects, and just to finish off on this idea, the
7 fetus is getting the same levels of alcohol that the
8 mother is getting, but the fetus doesn't have a liver.
9 It can't process it out. So it's maintaining the
10 concentration of blood alcohol much longer than the
11 mother is. The mother can process it out through her
12 liver, through sweat, through breathing, things like
13 that, but the fetus can't. So it's essentially bathing,
14 swimming in alcohol this entire time until it's fully
15 processed out of the mother. And the issue with alcohol
16 is that it's what's called teratogens. It is a chemical
17 that will kill cells. You put alcohol into a Petri dish
18 with a nerve cell, it will kill that cell. There are a
19 number of teratogens. Formaldehyde is one of the most
20 famous teratogens from the fifty/sixties that children
21 that were exposed to that in utero had limb deformities,
22 things like that. That's a teratogen. Alcohol is also
23 a teratogen.

24 Q. How do you define a teratogen.

25 A. A teratogen is a substance that will directly kill

1 cell tissue.

2 Q. So it's a poison?

3 A. It's essentially a poison, yes.

4 Q. Okay. Is there a difference between like alcohol
5 as a teratogen and cocaine or other substances?

6 A. Well, cocaine has never been officially listed as a
7 teratogen. And they have an official list of all the
8 items that are teratogens, things like toluene, xylene,
9 some of these complex industrial chemicals are
10 teratogenics. But cocaine is not one of them. Neither
11 is marijuana.

12 Q. Okay. And so the big issue is that alcohol is
13 specifically killing cells?

14 A. Yes. And it has its effects. It can be directly
15 the alcohol itself will kill a cell. But also, as the
16 liver is processing the alcohol, it breaks it down. And
17 the first chemical that it breaks it down to is acid
18 halide. And that, in and of itself, is also a
19 teratogen. So even as the liver is processing alcohol
20 out, the chemicals that it's creating in eliminating the
21 alcohol are themselves a cause of death to the cells.

22 Q. Okay. And so not only is it a teratogen, again,
23 even some of the chemicals is still going in, all going
24 in to the fetus and the fetus can't get rid of it. The
25 fetus doesn't have a liver. So it's essentially just

1 swimming around in all these poisons?

2 A. Yeah.

3 Q. So what's -- tell us the next thing?

4 A. Well, alcohol -- with the -- when a woman drinks,
5 the blood flow through the placenta into the fetus also
6 diminishes to some extent. The blood vessels do tend to
7 -- it's a constrictor, a basic constrictor. And so what
8 you can see are some indirect effects of alcohol, of
9 heavy alcohol use through hypoxia, which is basically a
10 cutting off or limiting of oxygen to the fetus. So it's
11 not getting as much oxygen as it needs. So you can see
12 some effects because of this hypoxia. Also ---

13 Q. Are you saying that it's partly because they're
14 drinking at the time, but it's also partly because
15 they've been drinking for ten years?

16 A. Well, it's -- I believe it's mostly as they're
17 drinking at the time that it tends to constrict the
18 blood vessels. I'm not as sure on that. If you want to
19 clarify on it, the medical doctor, Dr. Adler, might be
20 able to give you some more detail on that.

21 Q. Okay. And so the problem is that it's restricting
22 it during the pregnancy?

23 A. Yes.

24 Q. All right. And again this slide is titled
25 teratogenic effects of pre-natal alcohol exposure,

1 you're talking about hypoxia from impaired

2 placental/fetal blood flow; is that right?

3 A. Right.

4 Q. All right. What's the next one?

5 A. The next one is when nerve -- alcohol can impact

6 the cells in the brain -- and I focus on the brain

7 because that's my area -- at a lot of different stages.

8 It can affect when that cell is first developed. It can

9 kill that cell. So it doesn't get created. It can also

10 impact during, what we call, cell proliferation, which

11 is once you have the cell that will eventually be for X

12 task or going to X place, it has to replicate itself.

13 And so it can impact that so it doesn't replicate itself

14 appropriately. What I'm showing here is that once the

15 cells are replicating, they usually start kind of at the

16 central part of the brain and then they move to the part

17 of the brain that they need to be at the end for a fully

18 functioning brain. And so it impacts, alcohol impacts

19 that whole migration process. So one of the first

20 autopsy studies that was done of children that had died

21 after birth, was they found what are called

22 heterotopias, which are clumps of gray matter in the

23 middle of white matter, right where it's not supposed to

24 be. And so that's something that we see extremely

25 commonly.

1 Q. Do you want to find gray matter or white matter?

2 A. Gray matter are -- this is where the cell bodies of
3 neurons are. So this is where kind of the actual
4 processing goes on, the thinking goes on. The white
5 matter are -- they're the telephone lines or the
6 electrical lines. These are the connections between
7 different parts, so how they wire up to talk from this
8 part to that part, those are the white matter.

9 Q. So in very general terms, the white part does
10 thinking, the gray part does more connecting other white
11 parts together?

12 A. Other way around.

13 Q. Okay. Sorry.

14 A. The gray part does thinking, white part connects,
15 yeah.

16 Q. And so the point is that when they do these studies
17 there were either gray parts or white parts, gray parts
18 I think you said, in totally the wrong place. Is that
19 right?

20 A. That's correct.

21 Q. So the migration that you're talking about is
22 alcohol not only kills the cell, it also stops it from
23 the cells moving to the appropriate place they're
24 supposed to be?

25 A. Yeah. That's right.

1 Q. And then keep going.

2 A. The last one is -- it impacts this process that's
3 called apoptosis. So basically when we're developing,
4 our brain is developing, we're creating a whole lot more
5 cells and a whole lot more connections between cells
6 than we actually need in order to be efficient machines,
7 essentially. And so there's a process called apoptosis
8 or pruning where those connections or those not-needed
9 cells are killed off. They need to go away. And
10 alcohol actually can stop that whole process of
11 apoptosis, also. So instead of, in a normally
12 developing brain you have a cell that's here, that needs
13 to talk to the part of the brain that's directly across
14 from it over here, it has a connection that goes to
15 that. But in the non-normally developing brain, you may
16 have that connection but also a connection that goes up
17 this part of the brain where it's not supposed to be.
18 It doesn't make sense for it to connect there. So you
19 get essentially kind of a short-circuiting of the
20 system. It's sending information to a place that
21 doesn't know how to deal with it so it breaks down.

22 Q. So it not only kills them, it prevents migration,
23 but then this last part, the apoptosis essentially stops
24 the developing brain from doing what it's supposed to be
25 doing, which is moving some brain cells on, killing some

1 brain cells, essentially, in the pattern of a healthy
2 process occurring?

3 A. Yeah. In order to become more efficient.

4 Q. You have some cells that were supposed to go away
5 in the normal process, but they're still hanging around?

6 A. Yes, absolutely, yeah.

7 Q. Okay. And you've switched to the next slide, which
8 looks like a page that says, alcoholism. What did you
9 want to say about that?

10 A. One of the issues that needs to be dealt with when
11 it come to Fetal Alcohol Spectrum Disorders is to know
12 that alcohol really does cause cell death. And we don't
13 do that in humans, that's unethical. So they've done
14 that research in animals. And in animals you can
15 control everything, including how much alcohol is given
16 to the rat fetus, in this case. And when they do that,
17 they do find death of cells related to alcohol exposure.
18 In fact, in one study that was done, a dose of alcohol
19 twelve hours earlier, then they section the brain of the
20 rat fetus and what you're looking for are black dots.
21 Black dots means dead cells. And in this case, this is
22 -- on one angle of that slide you see all of these black
23 dots around the front part of the mouse fetus at the
24 time. And it shows here on this slide, right in this
25 kind of frontal edge, which is the part of the rat fetus

1 that eventually turns into or develops into the brain.

2 And so these cells are dead cells.

3 Q. Okay. And it's kind of hard to see, but it was

4 looking a lot clearer on the computer. But essentially

5 you have black dots kind of all over the place on slide

6 D. And then on slide E, which is just another angle;

7 right? Am I correct?

8 A. Yeah.

9 Q. Which is just a different angle. It's showing all
10 of those dead cells sort of up front. I'm pointing to

11 sort of the bottom of the cells. Is that about right,

12 where all those black arrows are pointing?

13 A. Right. Those relate to the black arrows that are

14 up here. So even though there are dead cells all the

15 way through, they're congregating in this frontal pool

16 area. So you can see that here in the frontal pool on

17 the mouse. And so it's preferentially maybe, those

18 regions are even much more sensitive to the impact of

19 the alcohol.

20 Q. The front part of the ---

21 A. That front part of the mouse fetus which becomes
22 brain tissues.

23 Q. And then it's kind of part of the same part that's

24 developing with the facial features that has at least

25 some connection; is that right?

1 A. Yes.

2 Q. I think we're going to talk about that later.

3 A. Yeah.

4 Q. Okay.

5 A. Now, one of the issues about Fetal Alcohol Syndrome
6 is that the facial features get laid down during a very
7 short window during pregnancy. Typically, it's about
8 the sixth to the eighth week of pregnancy. And so
9 drinking during that ---

10 Q. All right. When you say facial features, we're
11 talking about, again, the philtrum, the eyes ---

12 A. And the lip.

13 Q. And the small lip?

14 A. Yeah. Sorry. So those are during that very tight
15 window or period. In fact, if you look at this picture
16 of this drawing, the top pictures are a six to seven
17 week old fetus. But you notice it's got this large
18 cavity basically where the nose, the nose comes in, the
19 mouth, that sort of thing. So, for example, cleft lip
20 and pallet, if you have those sorts of anomalies, it's
21 usually because something went wrong during that --
22 those two weeks or so of pregnancy.

23 Q. All right. And let me make sure I understand.

24 What you're showing us right now, which is pictures of
25 the fetus -- and I can't even read what's on top, the

1 small print -- but those are normal pictures of a fetus.

2 Is that correct?

3 A. Yes.

4 Q. Okay. And the one on the top right they're

5 referred to as sort of a -- well, what would like maybe

6 a misshaped mouth or whatever?

7 A. Right.

8 Q. That's normal. But the whole point is, is during

9 this six to eight period, a very small window, that's
10 when this development is happening?

11 A. Right. Because if you look at the next slide, the
12 next face, which is basically one week later, that's all
13 closed up. And so now you've got a nose. Now you've
14 got a philtrum coming in and a lip. So during that very
15 tight window, alcohol during that tight window, will
16 cause the facial features.

17 Q. Okay.

18 A. But the issue at hand is that the brain is
19 developing all the way through pregnancy. And so
20 alcohol at any time during the pregnancy can have an
21 impact on the brain. Just like we talked about the
22 different stages where alcohol can have an impact, when
23 the cell's being created, when it's repopulating itself,
24 when it's moving, when it's spreading and pruning,
25 that's all at different times during pregnancy. And so

1 alcohol during any of those times can impact the brain
2 structure and in that way, also, impact to the function
3 of the brain. That's why we typically see a lot of
4 variability in functioning in people with Fetal Alcohol.
5 There's a lot of variability because timing does matter
6 for some of these.

7 Q. All right. And you've switched back to a slide.
8 And I think it's impossible to read, for me at least
9 over here, but it essentially shows the entire gestation
10 period in that top line which is blue and then green at
11 the end ---

12 A. Is the central nervous system.

13 Q. Which is the brain essentially?

14 A. Yes.

15 Q. So the whole point of that slide is the brain is
16 developing this entire time, although the facial
17 features at some time can be malformed or whatever
18 because of Fetal Alcohol Spectrum Disorder are only that
19 six to eight week period?

20 A. Right. Here's the main window for the eyes, main
21 window for the pallet and, yeah, those are the two major
22 areas there.

23 Q. Okay. And then the next slide you've got is the
24 prevalence of FASD. Can you talk about that?

25 A. Yeah. Well, you know, one of the issues is Fetal

1 Alcohol Spectrum Disorder is something that's just so
2 rare that it's, you know, not all that -- you won't see
3 it very often. And so there have been a number of
4 studies in different locations that have looked to see,
5 you know, is -- are we finding Fetal Alcohol Spectrum
6 Disorders in these orders. One of them was the Seattle
7 study that I was involved with that began in the
8 seventies and has continued on into the -- the
9 offspring's a thirty-five year old, I think was our
10 latest evaluation of them. And in that group -- and
11 these are women that were not necessarily risk drinking
12 behaviors. They were social drinking, fairly, you know,
13 middle class women. And yet we're still seeing
14 essentially once percent rate of Fetal Alcohol Spectrum
15 Disorders, either FAS or ARND, Partial Fetal Alcohol
16 Syndrome, those sorts of diagnoses.

17 Q. In Seattle?

18 A. In Seattle.

19 Q. And those numbers appear to be higher in Russia and
20 South Africa?

21 A. They do. And those numbers in Russia and South
22 Africa are only for FAS. Those with the facial
23 features. And research tells us that for every one
24 person with FAS, we typically will see at least two
25 people with ARND or one of the other FASD spectrum

1 disorders because of that tight time window for the
2 physical features.

3 Q. And when you say only FAS, you mean Fetal Alcohol
4 Syndrome? Essentially, that means the full blown facial
5 features, all the facial features?

6 A. Yeah. They had all the facial features to get that
7 diagnosis.

8 Q. Is that to suggest that FAS is anymore potentially
9 damaging or serious than the other conditions or
10 anything else?

11 A. No.

12 Q. And I think one of the publications actually says
13 that, that they -- and which one is it; do you remember?

14 A. There have been a number and it's not just our
15 group. The San Diego Group has talked about essentially
16 there's no difference between FAS and FAE, as we were
17 calling it back then. The only difference are these
18 physical signs and a number of different groups around
19 the country essentially said exactly the same thing in
20 their research. They found the same issues. There's no
21 difference. In fact, in some ways those with FAE or
22 ARND or Partial Fetal Alcohol Syndrom can have worse
23 outcomes that we can talk about a little bit later. But
24 because they're not necessarily recognized, they don't
25 have outward signs like, let's say, a person with Downs

1 Syndrome. You see that person and you recognize that
2 there's something wrong.

3 Q. So generally somebody with full-blown FAS, if you
4 look at them, most people would say it looks like
5 something might be wrong with them?

6 A. Quite frequently, yes.

7 Q. What's the significance of your child psychiatrist?

8 A. Yeah. This was also studied at the University of
9 Washington where they were -- they went into the
10 inpatient child psychiatry unit. So this is inpatient
11 child psychiatry. And they found in that group there
12 was a five percent rate of FAS and ARND. So they tend
13 to -- people with Fetal Alcohol Spectrum Disorders tend
14 to congregate in mental health settings. They have much
15 more -- many more mental health problems than might be
16 expected. And so we were seeing it there. We also were
17 seeing it in the justice system. There's one study that
18 was done in Canada, British Columbia, and it was a
19 rarified study from the perspective of these were
20 individuals that were within the prison system,
21 juveniles, who were referred into the psychiatric unit
22 in the prison. So it's somewhat self-selected in, but
23 they were finding rates of about twenty-three percent of
24 FAS and ARND, some very high rates.

25 Q. So twenty-three times as the general population?

1 A. Essentially, yes.

2 Q. And I think you've got some other stats to show
3 about that? Well, actually the next slide is titled IQ
4 distributions in the primary disabilities sample. And
5 so tell us what that shows us?

6 A. Well, one of the original myths about Fetal Alcohol
7 Spectrum Disorders was that pretty much anybody that had
8 FAS was mentally retarded. And though it is true that
9 IQ is impacted by pre-natal alcohol exposure, it's
10 really the minority. In fact, overall, it's maybe
11 twenty percent of the people with Fetal Alcohol Spectrum
12 Disorders have IQs in the mentally retarded range. And
13 when you get away from the full FAS, it's even lower
14 rates than that. In fact, you know, the IQ scores are
15 lower, so the group, FAS group, which are the red bars,
16 they have an IQ of about eighty. Those with FAE, as we
17 called it back in the day, had IQs that were around
18 ninety. And the normal IQ is about one hundred. So
19 it's a little bit lower. But the other thing to keep in
20 mind is that there is incredible range. I've had
21 individuals that I've tested that had IQs in the
22 thirties, forties, profoundly mentally retarded. I've
23 also had individuals that I've tested that had IQs in
24 the hundred and thirties, which is in the very superior
25 range. So the variability of IQ is incredible in Fetal

1 Alcohol. It does impact it, but you can't look at IQ as
2 a predictor of whether this person has been impacted by
3 the Fetal Alcohol, especially the full scale IQ.

4 Q. All right. And is an IQ test something that you
5 give?

6 A. Yeah. I have a bit of a love/hate relationship
7 with an IQ test. Yes, I give it routinely. I often am
8 not as concerned about the full scale score. I'm more
9 concerned about the domains because one thing that we do
10 see and we'll talk more about it, is that in Fetal
11 Alcohol, we see a lot of splits, where we see very good
12 performance in one area and very bad performance in
13 another area or relatively much worse. So these splits
14 are something that is very interesting for us and we'll
15 get to that.

16 Q. All right. And so overall, what does IQ to you
17 help -- mean with the Fetal Alcohol Spectrum Disorders?

18 A. Well, in general, IQ is a -- an IQ test is a
19 screening test. It looks at a number of different areas
20 of skill. It doesn't look at the whole gambit of
21 skills, especially when it comes to neuropsychological
22 functioning. But it gives you an overall general idea
23 of this is kind of how the person can do at their best.

24 Q. Do you consider it the most important test, an
25 important test, tell us?

1 A. From the perspective of looking at the domains as
2 far as looking for splits, it can be an important test.
3 The full-scale IQ, I don't consider it to be all that
4 important, personally.

5 Q. And why is that?

6 A. From the perspective of Fetal Alcohol, because
7 oftentimes people with Fetal Alcohol are not doing
8 nearly as well as you'd expect based off of the IQ. And
9 if all you're giving is an IQ, you tend to overestimate
10 their abilities.

11 Q. And an IQ test is done in a structured environment
12 on paper; right?

13 A. Yeah. All I mean all of my neuropsych testing are
14 in that kind of a laboratory like setting where it's a
15 controlled environment.

16 Q. But we've also talked about Chris evidently does
17 very well at spelling?

18 A. He does.

19 Q. But would you consider that as part of his -- just
20 because he's a good speller does that mean he doesn't
21 have adaptive problems, cognitive problems?

22 A. Oh, absolutely not. He's got an area of very good
23 skill. It's an area. That doesn't mean that he doesn't
24 have impairments, and very significant impairments in a
25 number of other areas.

1 Q. And I think we're going to talk about that.

2 A. Another thing that we characteristically see in
3 Fetal Alcohol is that, like I said, they tend to do more
4 poorly than you expect based off of their IQ. So this
5 was a study done back in the nineties.

6 Q. And this is a blue screen with two boxes, the one
7 on the left FAS and one the right FAE?

8 A. Yes.

9 Q. All right. Go ahead. I'm sorry.

10 A. And so what they did was they basically plotted IQ,
11 which is this first dot here, and then put the dotted
12 line, which is basically, that's his score. So this is
13 -- when all else is considered equal, if you have a
14 person that you give these tests too, they'll do
15 essentially the same across the board. If they're, you
16 know, average IQ, we expect pretty much average
17 performance in most other areas. We don't see that in
18 Fetal Alcohol, especially when it comes to academically,
19 they tend to do a little bit worse in reading and
20 spelling oftentimes, and especially in arithmetic.
21 Arithmetic is a much more complicated, abstract skill.
22 So they tend to have much more difficulties with that.
23 The same thing is true in those with the FAE. Their IQ
24 scores may be slightly higher, but the same pattern of
25 they're doing more poorly than you expect, especially in

1 math. The last group here are adaptive functioning. So
2 this is how a person can manage his life, day-to-day
3 basis in the real world, no structure around them,
4 things like that. You know, being able to hold a job.
5 Being able to take in what people are saying to you and
6 actually use that information appropriately. Being able
7 to interact appropriately with people. Being able to
8 read social cues. Being able to cope with things that
9 go on. If something happens to them on this day, can
10 they work around it and manage around it. Those are
11 things that happen that are measured with adaptive
12 behavior, the task. And in this case the individuals
13 with the FAS were performing much, much worse than you
14 expect. Again, if they've got an IQ in about the
15 average range, we expect their adaptive abilities to be
16 about average. So they're doing much worse. Exactly
17 the same pattern as the individuals with FAE. In fact,
18 in both of these cases, they're essentially functioning
19 at a level of somebody who's mentally retarded, even
20 though their IQ is in the average range. Their day-to-
21 day functioning is so impaired.

22 Q. So when you talk about that, let's talk about -- in
23 a case called Atkins, they talk about -- and I guess
24 this is one of the typical definitions of mental
25 retardation, and you can tell me probably better than I

1 can, that your IQ is lower, that your adaptive functions
2 are lower. Is that right? And then I think it has to
3 be there before you're eighteen; right?

4 A. That's correct.

5 Q. Did I get all of that right? So the dots on the
6 right you're saying are that second part of the mental
7 retardation test, the adaptive functioning?

8 A. Yeah. It's one of the prongs, yeah.

9 Q. Okay. And just to make sure I understand, so that
10 dash line at the top of both of those boxes, you would
11 expect the diamonds to be pretty much all the way across
12 that dash line if the person did not have Fetal Alcohol
13 or if they were normal, let's say? Does that make any
14 sense?

15 A. That's correct, yes.

16 Q. I mean, they may be a little bit up and down, but
17 they wouldn't be just looking like a sort of downhill
18 slope?

19 A. That's correct. And at the same time if it's a
20 person that I'm seeing that has mental retardation, I
21 expect them all to be about the same, but down more in
22 this level.

23 Q. Oh, okay. So if -- right. So if they were
24 mentally retarded all the diamonds would be below
25 seventy all the way across?

1 A. For the most part, yes.

2 Q. Okay. All right. And just for the record, again,
3 this is a slide that says alcohol chicks fail detour
4 learning test?

5 A. Again, we refer back to animal literature to help
6 us to understand structure and behavior because you can
7 control the environment more. So this was a study that
8 was done back in the late eighties. And what they did
9 was they had a series of chicks that they exposed to
10 alcohol in the egg, before they were hatched. When they
11 hatched, they were developed -- after that, they were
12 grown normally. And they devised this test in which
13 what you do is you put the chick into a room here with a
14 window. And on the other side of the window is a bowl
15 of food. Obviously, the goal is to try and get to the
16 food. So you stick a normal chick in that hasn't been
17 exposed to alcohol. And it will see the food. It will
18 run towards the food and it will bonk its beak on the
19 window. It may do this a few times but then eventually
20 it figures out that that's not an appropriate -- it's
21 not going to work. So it tries something else. And it
22 starts looking around and it finds a doorway here. Goes
23 out the door, finds the food. Eats the food. You stick
24 the chick back in and very quickly it will learn to go
25 out the door and go to the food. You take the chick

1 away, put it back in a number of days, weeks later,
2 maybe a little bit of relearning needs to happen. But
3 it will pretty quickly figure out you go out the door,
4 find the food. Compare that to the chick that was
5 exposed to alcohol.

6 Q. In the egg?

7 A. In the egg, yes. It sees the food. It runs
8 towards the food. It bonks its beak on the window. It
9 picks itself up. It sees the food, runs towards the
10 food, bonks its beak on the window. It keeps doing this
11 over and over again. This is what neuropsychologists
12 call perseverating. It's doing the same thing over and
13 over again, even though it's not working for you; okay?
14 It eventually may find this door and go out and get the
15 food. But you take the chick and you put it back in, it
16 starts bonking its beak on the window. It's not
17 learning from its mistakes. You come back a couple of
18 days, a couple of weeks later, you stick it in, it still
19 hasn't remembered that. It's still not learned from its
20 mistakes. It has to go through the entire process again
21 of bonking its beak. So this is an example of what we
22 see in individuals with Fetal Alcohol quite frequently.
23 Q. And I understand it's a simple example, but it's
24 just to illustrate that they don't learn from their
25 mistakes. Is that what you're saying?

1 A. They have a very difficult time learning from their
2 mistakes, yes. Very difficult.

3 Q. All right. And now you switch to secondary
4 disabilities. Tell us about that slide.

5 A. Well, what we were talking about as far as the
6 facial features and as far as kind of how the brain is
7 developing and the neuropsych, those are all what we
8 call primary disabilities, these are the direct impacts
9 from alcohol on the brain and how it impacts a person's
10 functioning cognitively. There are also what we call
11 secondary disabilities. And these are things that --
12 they're not born with these problems. It's just because
13 of the problems that they have on the primary deficits
14 or how they process information, things like that, they
15 develop difficulties in these other areas. So these are
16 things like troubles with school. These are
17 difficulties with trouble with the law. And when I talk
18 about troubles at school, we're talking suspensions,
19 expulsions, repeating big troubles with the school.
20 Not, you know, a number of detentions sort of thing. So
21 these are all secondary disabilities. There's also the
22 large bar on the left, which are mental health
23 disabilities. We find that people with Fetal Alcohol,
24 almost ninety-five percent of them, have some form of
25 mental health problem, as well.

1 Q. All right. Are you talking about Fetal Alcohol
2 Syndrome or what?

3 A. This is across the entire spectrum, both FAS,
4 Partial FAS, ARND, the entire spectrum. About ninety-
5 five percent of them have troubles with mental health
6 problems. And Dr. Adler, I believe, is going to talk
7 more in detail about the types of mental health problems
8 that you typically will see. And then one of those
9 aspects is, and you touched on it earlier, was trouble
10 with the law. This was part of the South Carolina brief
11 that you cited. That overall, this is the entire age
12 range, from years age six up to age fifty-one, that we
13 were interviewing these people, over forty percent of
14 them had had some sort of trouble with the law.
15 Obviously, it's a very rare occurrence for the youngest
16 ones to have had any troubles with the law. So in more
17 adolescent and adult populations the rates are much
18 higher.

19 Q. And so tell us now, when you say -- what are these
20 studies from?

21 A. This was a study that was done that was sponsored
22 by the CDC at the University of Washington where we were
23 interviewing caretakers of people that had been
24 diagnosed with FAS and FAE, as they were diagnosed at
25 the time, FAE.

1 Q. Are you aware of any studies that suggests people
2 with FASD don't have higher significant problems with
3 mental health or trouble with the law or anything else?

4 A. No.

5 Q. There are some studies out of Germany where they're
6 not seeing as many troubles in some other areas, but
7 that's partially because of the system in Germany, where
8 they're getting a lot more services up front. And so
9 there's a lot more support system built into the German
10 Health Care System. So we're not seeing as many of
11 these secondary disabilities as we see here in the
12 States.

13 Q. Okay. How about going to your next slide. Impact
14 of pre-natal exposures. Actually, let me go back. You
15 mentioned Germany. Is that part of the overall thing,
16 too, one of the reasons why people with FAS begin, the
17 ones that you look at, you can kind of see, hey, that
18 person doesn't seem to be quite normal. Is that one of
19 the reasons sometimes they don't have as much trouble
20 with the law and other areas, because they get quicker,
21 earlier services?

22 A. That's correct. Absolutely. And there are -- we
23 have other charts that we created at that same time
24 where we were seeing that troubles with all of these
25 areas were much higher, except for mental health, were

1 higher in those that didn't have the physical facial
2 features. They had more troubles with school. They had
3 more troubles with confinements, more troubles with the
4 law. All of these areas that they were having more
5 troubles with. And it was becoming -- they're not being
6 recognized as why they're having troubles with this.
7 And so there's that mismatch.

8 Q. Okay. What's the next slide there? And this is
9 the impact of pre-natal exposures. And, I believe,
10 again, in the FAS Manual, which I think was Exhibit 31,
11 there's a table 2.1, which shows the same thing, impact
12 of pre-natal exposure. And it may be hard to read up
13 there. But tell us what that shows?

14 A. Well, basically across the top we've got different
15 types of chemicals that they can be exposed to pre-
16 natally. Alcohol, methyl mercury. I saw a big scare
17 about tuna and not eating tuna while you're pregnant,
18 things like that. Ionizing radiation, think Chernobyl.
19 PCBs, lead exposure, opioids, marijuana and tobacco.
20 And then these are all different kinds of outcomes.
21 Neuropathology, gross damage to the brain, all the way
22 down, you know, IQ, ADHD type symptoms, developmental
23 delays, motor problems, sensory problems and withdrawal
24 symptoms when they're born. If it's a plus, it means
25 that there's been research that has documented that,

1 yes, this is something that's associated with alcohol.

2 We see these problems with exposure to that substance.

3 If it's a minus, it means that they have found that it
4 doesn't have an impact on these areas. A question mark
5 means that it's equivocal, they're not able to say one
6 way or the other. And if it's blank, it means that it
7 hasn't been studied yet.

8 Q. All right. And so the significance is what?

9 A. Well, the significance is that alcohol impacts all
10 of these areas. Whereas, these other types of exposures
11 don't. I mean, one that you think of, radiation
12 poisoning, that seems like it would be just a horrible
13 thing. Yes, it has significant impacts on
14 morphological, structural things, but they haven't found
15 or haven't looked for troubles in some of these more
16 cognitive areas. And opioids and marijuana, they
17 haven't found the impacts. Not on the slide is cocaine.
18 Cocaine is not identified as a teratogen. And I know
19 back in the eighties there was a lot of attention on
20 crack babies and cocaine, that it had these impacts.
21 The problem that was found after they started doing more
22 research, was that oftentimes when they could control
23 for alcohol use during the pregnancy, they found that
24 the alcohol was what was actually contributing most to
25 the later impacts. The cocaine was not. So when you

1 controlled for that, we found that the cocaine wasn't
2 causing these problems. It was really the alcohol that
3 was causing these problems.

4 Q. So essentially what you're saying, I think
5 marijuana is up there, as well?

6 A. Yes.

7 Q. Twenty years ago we were all worried about -- and I
8 think we're still worried about, obviously it can't be a
9 good thing -- that crack babies were going to be a
10 menace to society, they would come out addicted and
11 everything else, and they would all have terrible brain
12 problems, as well. And you're saying that slide
13 essentially says that alcohol is far more damaging than
14 cocaine?

15 A. Essentially, yes.

16 Q. And then the slide, apparently, definitely shows
17 that with marijuana, that only the reduced IQs is a
18 question mark, and attention deficit, developmental
19 delays, and neo-natal withdraw, also a question mark?

20 A. Right.

21 Q. The rest are all negative?

22 A. Yes.

23 Q. Do you want to talk about anything about that? Is
24 that, again, just the overall nature that alcohol
25 affects the entire brain?

1 A. Yeah. It's that we've -- you know, the research
2 over the years, and it's not the research that I've been
3 doing, but that others have been doing, have found that
4 overall alcohol seems the most -- one of the most
5 damaging of the chemicals that can be ingested during
6 pregnancy.

7 Q. Let's talk about it affecting the overall brain.
8 So when we I say the overall brain, I'm talking just the
9 big stuff, the gray matter, white matter, what else
10 would you consider the big parts?

11 A. Well, there's different regions of the brain.
12 There's the frontal lobes, temporal -- the frontal lobes
13 are kind of involved in planning, problem solving,
14 interpreting social cues, things like that. Temporal
15 lobe is involved in memory, learning new things,
16 remembering things, parietal lobe, back in here, are
17 involved a lot in sensory, being able to take
18 information in from the environment. Occipital, which
19 is in the back, is oriented towards vision, being able
20 to see and interpret what we're seeing.

21 Q. And what else, what about neurons, synapses?

22 A. Yeah. I mean, basically the outer crust of the
23 brain, which is the gray matter, that's where all the
24 cell bodies themselves are. And then the white matter,
25 projections are all the telephone lines, if you will.

1 And where those telephone lines end, where it wants to
2 connect, send its message, as it were, to the next cell
3 body, that's the synapse. And so there's a chemical,
4 usually chemical, process in which the signal is
5 repeated on in order to potentiate or continue that
6 process. And that allows for the coordination of
7 different parts of the brain. Because it's sending
8 information to different regions. It gets those regions
9 involved in the process of whatever it is that the
10 person is trying to do at the time, reading the
11 newspaper in the morning, things like that. Which
12 brings up memories about when I was a kid this happened.
13 So that brings up some temporal lobe sort of things.
14 And so it becomes an integrative process.

15 Q. Is that similar to -- we hear all the time that you
16 only use ten percent of the brain. Is that true?

17 A. No. We probably never use all parts of our brain
18 at once at the exact same time. But you can't
19 compartmentalize that, you know, if you're doing X
20 tasks, it's only this part of the brain that's being
21 active because it's got to interact with things. You're
22 reading the newspaper. Your occipital lobe is going on.
23 Also, your parietal lobe is involved with the visual
24 association areas. Your temporal lobe is involved
25 because, oh, yeah, I'm remembering this sort of

1 information. Your olfactory system can come on line if
2 you have a memory that's sparked by the newsprint smell.
3 Frontal lobes for, gosh, how would I have done this
4 thing different that is reported in the news. All of
5 these networks are pulled on line when you're just
6 reading an article on the newspaper.

7 Q. All the parts and then all the connectors that ---

8 A. Yes.

9 Q. --- that the neurons, which I think they say there
10 are a hundred million neurons.

11 A. Somewhere around ---

12 Q. I guess no one's counted them obviously. And then
13 how many synapses?

14 A. I think they're numbering in about the trillions as
15 far as different connections.

16 Q. So all these parts, all these neurons, all these
17 synapses are affected by Fetal Alcohol Spectrum
18 Disorder?

19 A. Yes.

20 Q. Are there any other conditions that we see on a
21 daily basis that affect the overall brain that we would
22 be familiar with?

23 A. There are some conditions, let's say, in
24 Alzheimer's it's not necessarily overall brain but there
25 are damaging processes that are going on with it, these

1 neurofibrillary tangles and the plaques, and like
2 plaques that develop in different areas of the brain as
3 the disease progresses. So it becomes an overall sort
4 of issue. Also ---

5 Q. Speaking of Alzheimer's, does that kind of explain
6 why they may have long-term memories but not short-term
7 memories? They may seem -- it seems like sometimes that
8 they seem perfect one day and not the next.

9 Unfortunately, I've had some personal experience with
10 it. Sometimes they do inappropriate things, especially
11 inappropriate maybe sexually or making remarks and stuff
12 like that. Is that all because a part of the
13 connections, the part of the whole brain -- or what all
14 is that?

15 A. Yeah. That's part of the dementia process that can
16 occur, is that these different areas of the brain or the
17 connections between them are becoming impacted by the
18 disease. And so they become more disinhibited. They
19 have more troubles remembering, you know, who they saw
20 last night at the dinner, but can remember who hit the
21 home room in the 1935 World Series.

22 Q. All right. And now compare that with like, say, a
23 stroke? What is more often likely to happen with a
24 stroke?

25 A. I mean, unless it's a very massive stroke, you see

1 more focal sorts of impairments. So you see -- if you
2 have a stroke that hits this one particular area of the
3 brain you will see problems with memory. If it has
4 something in the arteries that are down here. If you
5 have a problem with arteries that are close to the
6 front, you may see more problems with problem solving or
7 being able to manage multiple pieces of information at
8 once. It tends to be a bit more of a focal, we call it,
9 process.

10 Q. So if it's in the back, I think you said,
11 occipital, could they have problems with vision?

12 A. Yes. There's actually one form of disease that
13 happens oftentimes from strokes back there where they're
14 essentially blind, cortically blind. But other parts of
15 the brain kind of kick in. They don't recognize that
16 it's there, but they can actually move around the
17 environment without running into things. It's Anton's
18 Syndrome. It's very rare, but that's been seen.

19 Q. All right. Anything else you want to say about
20 that?

21 A. (Negative nod.)

22 Q. And then you've got what is a neuropsychological
23 assessment. And I think we're moving along to what you
24 usually doing in your practice. So did you see Chris
25 Williams?

1 A. I did.

2 Q. And how long did you spend with him?

3 A. I spent approximately about six hours or so with
4 him in May.

5 Q. All right. And tell us what you did as you go
6 through the slide?

7 A. The neuropsychological assessment is not designed
8 to measure damage to the brain, per se. That's really
9 more of a medical condition. We look at the functioning
10 and we comment on the function or dysfunction of the
11 brain. That could be related to something that is
12 purely, truly a neurological damage to the brain. So,
13 for example, some of the early work in neuropsychology
14 that we learned a lot about were studies on people that
15 have had very focal damages. So one case is a gentlemen
16 named Phineas Gage who was working on the railroad
17 tamping down dynamite when the dynamite exploded and the
18 tamping rod went right up in front of his eye and
19 through his head. I don't believe he even lost
20 consciousness. He had an eight-foot tamping rod in his
21 head. Essentially, what he had was a frontal lobotomy.
22 And he, after that, started having a number of
23 behavioral issues as well as some cognitive issues. And
24 so they were able to study that and see how those relate
25 to this area of the brain that's damaged. So that's

1 where a lot of neuropsychology started out as far as
2 learning those sorts of things.

3 Q. So that's obviously damage?

4 A. Yes.

5 Q. Can you compare that to, say, brain dysfunction,
6 what ---

7 A. Well, brain dysfunction is more of a general
8 concept. It's this person has deficits in his memory
9 functioning. But if you know that this person has had a
10 stroke or has had a temporal lobectomy, you know that
11 that dysfunction is, more likely than not, related to
12 the damage to his temporal lobe. So that's the
13 connection.

14 Q. Right. And I think one of the things y'all
15 explained too -- I don't know if you did, but I know Dr.
16 Adler uses nystagmus.

17 A. Yes.

18 Q. And that, I guess, would be more sometimes a
19 dysfunction, because as we know in the legal field,
20 police officers use that to see if you're impaired?

21 A. That is correct. They're what are called soft
22 neurologic signs.

23 Q. So the whole point of dysfunction is I guess it
24 might go away?

25 A. It could go away. If it's a temporary thing, pure

1 intoxication, you can have cognitive problems. But once
2 they clear, become sober, you may see changes, you would
3 see that improve. You can see this with some
4 biochemical issues, B-12 deficiencies, thyroid
5 deficiencies, you can see cognitive problems. But once
6 you square that away, their cognitive functioning can
7 improve. So those sorts of that, you know, you don't
8 know at that moment whether it's something that's a
9 permanent damage to the brain or if it's something that
10 could be transient.

11 Q. So you started looking at dysfunction?

12 A. Yes.

13 Q. Things that are happening -- well, you tell me.

14 A. Yeah. Things that are happening in their ability
15 to take these tests, like memory tests or problem
16 solving tests, that we'll talk a little bit more about
17 as we go through the actual -- Mr. Williams' actual
18 performance on those. So we do these sorts of tests to
19 identify where the person's strengths and weaknesses
20 are, their patterns of deficit, and then look to see how
21 that relates to the known information about potential
22 brain damages that have occurred in their lives.

23 Q. Okay.

24 A. And it should be noted that FASD by definition is a
25 brain damage. It results in brain damage. So once FASD

1 has been established, we know that the linkage, at least
2 to a great extent, that linkage of the cognitive
3 dysfunction that I am seeing is related to a brain
4 damage situation.

5 Q. So in other words, you start looking for
6 dysfunctions. But when the rest of the team and
7 everybody else adds in, then you get to, yes, this is
8 FASD, this is brain damage?

9 A. Yes. That's where Dr. Adler makes that step.

10 Q. And I may have jumped over you there. So you also
11 have ---

12 A. Yes, sir.

13 Q. You usually learn from cases of specific -- you
14 were talking about Phineas Gage. Is there anything else
15 you wanted to say about the temporal lobe?

16 A. Well, yeah. There was another case called HM.
17 They finally released his name because he passed away
18 not too long ago, and I can never remember it. But he
19 had what are called intractable seizures. He would have
20 seizures that could not be controlled. It's not that he
21 was having seizures all of the time. It was just that
22 they couldn't -- he couldn't not have them. They tried
23 medications. It didn't work. So they eventually did
24 what -- a temporal lobectomy. They cut out part of his,
25 part of his temporal lobes. That stopped the seizures.

1 Unfortunately, it meant that also he couldn't learn new
2 things. He was not able to put down new memories. That
3 changed as he aged. I mean, he had this temporal
4 lobectomy earlier in his life and he died very recently.
5 Where he could eventually kind of work around things.
6 So if he knew about some event that happened in 1929,
7 there's a new event that's kind of somewhat related, he
8 could link those together and sort of remember it. But
9 new memories, he was never able to lay down.

10 Q. So that's just another example of the focal part,
11 the visual parts of the brain damage?

12 A. Yeah. And like I said, those were all focal damage
13 after the brain has developed normally.

14 Q. Right.

15 A. It's working fine. Something happens, they're
16 suddenly not doing so good anymore. With Fetal Alcohol,
17 the damage is occurring at the time of development. So
18 the brain is never working properly when the alcohol is
19 damaging it. So the impacts tend to be broader, tend be
20 much more variable that way, because of that.

21 Q. And it's from front to back connections,
22 everything?

23 A. Uh-huh (affirmative).

24 Q. Because I think the second thing we had there is
25 executive function. When you say executive function,

1 what do you mean?

2 A. Executive functioning is planning, problem solving,
3 learning from your mistakes. Being given something that
4 you have to figure out how to make it work. How to do
5 it in such a way that you can get the job done and do it
6 as well as possible. And so that's kind of -- it's this
7 large process of being able to take in information, see
8 what you've done wrong, try and rework it, adapt and
9 cope in order to solve things.

10 Q. And that's particularly the frontal lobe?

11 A. It's most commonly associated with the frontal
12 lobe. But also connections between the frontal lobes
13 also is another big area. White matter things is a very
14 large aspect for these conditions, as well.

15 Q. And it's essentially bringing all the information
16 from the brain and putting it together and making an
17 appropriate decision?

18 A. Yes.

19 Q. And the next slide you have is the role of
20 neuropsychology in the diagnosis of FASD.

21 A. Yeah. Like I'd said before, the process for the
22 FASD experts is that we want to first establish if there
23 are cognitive deficits. So I go in early-on in the
24 process. Partially, if it looks -- if I do the testing
25 and there's really no impact, we can shut down the

1 process right away. It saves money doing it that way.

2 Q. How often, let me ask, does that happen with y'all?

3 A. Maybe twenty to thirty percent of the time. I go
4 in. I do testing. And I'm not seeing it as being
5 consistent with FASD.

6 Q. All right. And do y'all get called in just, I
7 mean, all the time or usually I assume somebody suspects
8 something?

9 A. Usually, somebody suspects something and the
10 attorney will call us or one of the members of the team,
11 will call us. Most of the time they know about exposure
12 history. Some of the time, it's just extremely strongly
13 suspected. And that's part of the process of the
14 diagnosis, is getting it confirmed. But, yes, it's --
15 they call us because there's something that's -- they
16 see that there's something not quite right.

17 Q. And are you usually the first person called?

18 A. We have a process for intake where Dr. Brown
19 actually kind of does an intake of the case, gets a feel
20 for, you know, what the circumstances of the case are.
21 And what sorts of resources are needed. Sometimes, in
22 my area, there may be a local neuropsychologist that's
23 already been doing testing. So I don't need to go out
24 and do more testing. I can consult with them, the
25 neuropsychologist.

1 Q. But at the same time before it even gets to you,
2 sometimes Dr. Brown may have kicked to someone, as well?

3 A. Yes. That's true.

4 Q. Okay. So anyway let's go back to -- you identified
5 ---

6 A. Yes. So that's one of the primary aspects of my
7 evaluation is, look for those strengths and weaknesses.
8 I want to see, is that something that's consistent with
9 what I expect for FASD based off of the research that
10 we've know for many years and based off of the CDC
11 criteria, the diagnostic criteria for FASDs. One of the
12 issues about the neuropsychological testing is that,
13 though the tests are very sensitive to FASD, it's not
14 that they're specific to it. So if you've got this test
15 where they're doing badly on it, it doesn't mean that
16 person has FASD. There can be other things that can
17 cause that same sort of deficits. If they had a gunshot
18 wound to their left temporal lobe, they may have memory
19 problems. There's a lot of different things. So one of
20 the other aspects is to look at a time line from the
21 perspective, usually from my perspective of academic
22 performance, school testing, previous psychological
23 testing, to show that this is something that's been
24 going on for a number of years, not just something that
25 started two years ago when he had a blow to the head.

1 So in that way we're looking -- I'm at least identifying
2 that there are these potential other things that could
3 be contributing to it.

4 Q. That's what you mean by competing etiologies?

5 A. Etiologies, yeah. Other possible causes.

6 Q. So you're looking at a number of things. You're
7 trying to eliminate other possibilities and everything
8 else; right?

9 A. And raise them as issues so that when Dr. Adler,
10 the medical doctor comes in, he or she can take that
11 into account when making the diagnosis. I'm sure that
12 he'll talk more about this. But a person that has had a
13 head injury at the age of sixteen, they won't have
14 facial features consistent with FASD. So if you see the
15 facial features consistent with FASD, even when they've
16 had a blow to the head, there's something else going on.
17 This FASD is probably going -- has been there and maybe
18 the current head injury is an additive factor, but there
19 was still FASD before that. So those are things that
20 Dr. Adler will finally kind of -- in his differential
21 diagnosis that's the part of it.

22 Q. All right. And so you also do this and did this
23 with Chris, I assume?

24 A. That's correct.

25 Q. And so that goes into the rendered opinion of the

1 FASAD, FASD based on the CDC Guidelines and then
2 referring to Dr. Adler; right?

3 A. Yes.

4 Q. Anything else you want to tell me?

5 A. No. No.

6 Q. Okay. The neuropsychological assessment for FASD
7 is next. So tell us about this. So now we're at --
8 this is what you did for Chris or on Chris, whatever.
9 And this is what you do when you're trying to test
10 people for FASD; is that correct?

11 A. Yes. I use this grouping of tests in FASD cases
12 because these tests have been shown in research to be
13 sensitive to the impacts of pre-natal alcohol exposure,
14 especially in an adult population. And so I choose
15 these tests, or if the exact test is not available,
16 clinically I choose a test that's very similar in the
17 style of how the test is done. And I've kind of pulled
18 together these tests. These area all standard clinical
19 tests that are used by neuropsychologist around the
20 country. And it's just -- I know that these skills are
21 ones that we see as being sensitive in a lot of Fetal
22 Alcohol cases. So I pulled these together for that.

23 Q. All right. So if you asked most
24 neuropsychologists, they would recognize all these
25 tests?

1 A. Yes.

2 Q. Okay. And do you want to go through them and talk
3 about them? Or are we going to do that with ---

4 A. We'll kind of do that as we go through. But
5 basically they're broken out into what we call domains
6 or areas of functioning. The first one is IQ. A global
7 area of functioning, a summary estimate of kind of the
8 maximum possible that a person can do. And that is
9 always by -- usually by the Wechsler Adult Intelligence
10 Scale or the Wechsler Scales, a very commonly -- we look
11 at achievement, academic, math, reading, writing,
12 spelling and arithmetic. We look at different aspects
13 of memory, both verbal, can the person learn and
14 remember a list of information. But also visuospatial,
15 can they look at something, a complex thing, and be able
16 to recreate it appropriately, organize their thoughts so
17 that they can recreate it.

18 Q. Do you mean a diagram or a picture?

19 A. A diagram or picture.

20 Q. Yeah.

21 A. And then be able to remember that over time. So
22 that's -- the Rey Complex Figure is one of those sorts
23 of tests. We look at attention because attention is one
24 of the most commonly diagnosed, co-diagnoses in children
25 or the first diagnosis that they get before they end up

1 with an FAS diagnosis, so it's extremely common. So we
2 look at attention. We do that with a very long and very
3 boring test, to see if they can focus and stay focused
4 for long periods of time. It's a CPT, Continuous
5 Performance Test. Motor coordination, which maybe from
6 the perspective of the forensic setting, isn't kind of
7 here nor there. But it's something that the research
8 has shown that about a third of people with Fetal
9 Alcohol have motor coordination deficits. So we need to
10 look at that domain also. Executive functions, this is
11 somewhere where I spend a lot of time focusing because
12 this is sort of how the person is able to apply what
13 they know to solving problems in their lives in this
14 structured setting. And there's basically two different
15 levels of executive functioning that I look at. One of
16 them are these ones where there's a lot of structure,
17 even though you have to solve a problem, you know the
18 rules. Okay. I want you to tell me all the words that
19 begin with the letter Q, but I don't want to use proper
20 names, so you can't use Quinn. I don't want you to use
21 names of places. I don't want you to repeat the word
22 with different endings. Those are some -- so I'm giving
23 you all these rules on how to structure yourself. Go
24 for it. Versus -- so those are higher structured tests.
25 Versus lower structured tests. Okay. Here's a problem,

1 figure it out. And you let them go. They have to
2 figure out the rules themselves, lower structure tests.
3 So I look at both of those aspects of it. I also look
4 at adaptive skills. So how does a person do this -- do
5 in the real world when there's no structure around them.
6 And part of that is through interviews that are done of
7 people that know the individual well. In this case, it
8 was his father, Dwight. I also look at other aspects,
9 it's auditory comprehension and the emotional social
10 understanding. These are tests that are laboratory
11 tests that are looking at aspects of adaptive
12 functioning. So auditory comprehension test is looking
13 at a person's receptive communication abilities. The
14 social cognition test is looking at the person's
15 emotional understanding, being able to recognize,
16 understand emotional things that are going on with what
17 they see, what they hear. And that's a form of social
18 interaction. So those are ways of looking at laboratory
19 versions of these final interviews that are kind of in
20 the real world, as it were. So that's my battery that I
21 use.

22 Q. Okay. And you've got CDC Guidelines on the next?

23 A. Yeah. I think I mentioned earlier that the
24 Institute of Medicine, which lays out all of the
25 different diagnoses, when it came to cognitive

1 functioning, was somewhat non-specific. It was a little
2 bit fuzzier. And I, instead, opted for the CDC's
3 Guidelines, which are much more restrictive, much more
4 concise and clear, that you need to have either an IQ
5 that's two standard deviations below the mean, that
6 means an IQ in the mentally retarded range. And/or, or
7 deficits of at least one standard deviation, mildly
8 impaired range, in at least three domains of
9 functioning. So these domains can be memory, attention,
10 problem solving. They can be differences between
11 things, a discrepancy on an IQ test, for example, things
12 like that. So those are the things that are within the
13 domains that are laid out by the Centers for Disease
14 Control in their diagnostic scheme.

15 Q. All right. So for you, with your testing, you use
16 the CDC criteria as they put it out for testing and
17 stuff, the basis? The CDC criteria, from what you just
18 explained, correct me if I'm wrong, essentially if you
19 are FAS under the CDC Guidelines, you aren't mentally
20 retarded?

21 A. No.

22 Q. So you're below two deviations? Well, I mean ---

23 A. It's an either/or. You don't have to have an IQ
24 that's below two standard deviations. You have to have
25 either mental retardation or deficits in these three

1 domains.

2 Q. Okay.

3 A. You don't have to have both. You don't have to
4 have the IQ.

5 Q. All right. And so those three domains are what you
6 do with the testing and everything else. You do the IQ
7 as well; right?

8 A. Yes.

9 Q. Anything else? And those criteria partly are on
10 page twenty in that CDC pamphlet, which is page forty in
11 our appendix. And that's just a list of essentially all
12 the criteria you look at. And that's what you're
13 talking about?

14 A. In that aspect of it. The CDC criteria go into
15 physical characteristics that Dr. Adler deals with. I'm
16 looking at the one aspect, which is CNS dysfunction, the
17 functional deficits.

18 Q. You're only looking at -- I should have looked that
19 up.

20 A. I can't remember what letter it is right now.

21 Q. So central nervous system abnormalities, in Roman
22 Number III, functional, performance substantially below
23 that expected for individual's age, schooling and
24 circumstances, as evidenced by ... That's what you're
25 looking at?

1 A. Uh-huh (affirmative).

2 Q. So you're looking at a small part, but it's mainly
3 the CNS part?

4 A. Right. And we've kind of touched along on these
5 issues all the way along of kind of the expectations
6 that I have going in. With a person with Fetal Alcohol
7 Spectrum Disorders, I'm not going to expect them to have
8 an IQ that's below seventy. It's rare. Twenty percent
9 in the whole population. If they've got Partial FAS or
10 ARND, less than ten percent. So it's not going to be
11 something you'll commonly see. What I do typically see
12 is patchiness, it's variability. They do good here.
13 They do bad here and it's up and down, so this spiky
14 pattern on -- when you look across the tests. I will
15 typically see academic deficits greater than you expect
16 based off of their IQ, especially in math. We saw that
17 from the research earlier. I will typically see social
18 and adaptive functioning deficits. Again, worse than we
19 expect based off of their IQ. And these executive
20 function deficits, I will expect to see. Usually, it's
21 more on these lower structure tests. So these are the
22 things that I'm looking for. Is this what I'm seeing
23 when I see this person and do the testing on them.

24 Q. And the big ones are the split in IQ?

25 A. Split in IQ is one of those, yes.

1 Q. Essentially, patchiness, the up and down?

2 A. Yeah.

3 Q. And also those adaptive functioning tests?

4 A. Yes.

5 Q. All right.

6 MR. ENDERLIN: Judge, did you want to take a
7 break or anything? I wouldn't mind taking a break right
8 now.

9 THE COURT: If you need a break, we'll take a
10 break. Let's take about a ten-minute break.

11 MR. ENDERLIN: I'm sorry.

12 (WHEREUPON, the court stood at recess for a short
13 break.)

14 THE COURT: Yes, sir. You may continue.

15 MR. ENDERLIN: Thank you, Your Honor.

16 Q. Okay, Dr. Connor, we're now on a slide that says
17 effort testing. Tell us what that represents?

18 A. Yes. As part of the evaluation that I do, and
19 especially in forensic settings, we need to know that a
20 person is working hard while I'm doing the test. And
21 part of that is through my observation of him, how he
22 approaches tasks. But also we want to look at that
23 specifically through tests. And so we give a series of
24 measures or tasks that are designed to determine kind of
25 what the level of effort that the person is putting out

1 on tests.

2 Q. How hard they try?

3 A. Yeah. How hard they're trying?

4 Q. And if they're malingering?

5 A. Yeah. That's one way that it's described, yes.

6 Q. All right. And so what were the results of your
7 tests?

8 A. On every test that I gave, some of these test were
9 embedded within a test that I was giving. Others are
10 stand-alone. And no matter how the effort measures were
11 given, he was working extremely hard on them. He was
12 getting pretty much everything right when I was giving
13 him these test. And he was putting out quite a lot of
14 effort them, too.

15 Q. So correct me if I'm wrong. Essentially over the
16 six hours you're putting in some easy questions and
17 expecting the answers. And if he doesn't, then you see
18 some red flags that he's probably not trying?

19 A. It raises red flags, yes.

20 Q. And so, for example, it looks like trial one and
21 trial two he got forty-nine out of fifty and fifty out
22 of fifty?

23 A. That's correct.

24 Q. So he got ninety-nine out of a hundred. And I
25 guess the point being, too, if he was trying to act

1 crazy or whatever, you might see far lower scores. You
2 would expect to see far lower scores?

3 A. Yeah. If the person was intentionally not trying
4 to work hard, trying to, you know, sandbag the testing,
5 we would see the scores much lower.

6 Q. So you got good effort overall on your testing?

7 A. Yes.

8 Q. And the next slide, intellectual testing. And this
9 part of the IQ from what I understand. Is that right?

10 A. That's correct.

11 Q. All right. Can you describe it for us again?

12 A. So the top half of the slide are the different sub-
13 test that are administered. There are ten sub-tests in
14 the IQ test in the Wechsler. And from -- and they are
15 reported as what are called scales scores, which is a
16 mean of ten. So an average score would be a ten.

17 There's a range or standard deviation of three. So
18 anything between thirteen and seventeen is considered
19 broadly within the normal range. There's a variation in
20 there, but that's kind of what it does. Those scores
21 all get used in order to calculate these domain scores.

22 Q. You're talking about the bottom there?

23 A. The bottom section down here. The verbal
24 comprehension, which are actually made up of these
25 three, which are very language oriented, defining words,

1 telling me how things are alike, how are shoes and socks
2 alike, things like that. And also information trivia
3 test. Trivial history sort of thing. Then there's
4 perceptual reasoning, which is a non-verbal skill, which
5 is looking at visual organization and construction,
6 being able to look at a picture and replicate that using
7 different items. Being able to kind of figure out rules
8 of tasks, a non-verbal reasoning sort of a skill. And
9 being able to identify kind of how -- again how you
10 would build a puzzle based off of a complete puzzle and
11 a bunch of pieces. Which pieces would I need in order
12 to make this work right. So it's visuospatial skills.
13 So that's perceptual reasoning. Working memory is a
14 task. A digit scan, which is I'll give you a series of
15 numbers, repeat them back to me in multiple different
16 orders. And a math, where I give you verbal math.
17 What's five plus five or story problems actually for a
18 lot of these. And then the last group are processing
19 speed, which is basically how quickly you can perform
20 something. Visual scanning, being able to look at
21 something and make matches quickly. Or translate
22 information very quickly.
23 Q. All right. Because usually when we say IQ,
24 everybody thinks seventy, a hundred, a hundred and
25 thirty. So tell us what all those numbers are.

1 A. Yeah. Well, when people think IQ, they usually
2 think of a full-scale IQ. And a full-scale IQ has a
3 mean of one hundred. So that's the average score in a
4 range or a standard deviation of fifteen, okay? So if
5 you have a score that's ninety-nine in this case, that
6 is within the average range, okay? But that's a full-
7 scale IQ and that score is made up of all of the other
8 scores that are in the test. So it uses -- and I don't
9 know the specific calculation, we look it up in the
10 charts in the manual, but it uses a weighted
11 distribution of these scores. And it uses that in order
12 to create them. In a number of cases, especially in
13 FASD, you see very large splits between different
14 skills. In this case, verbal skills being very high, in
15 the superior range, versus his other areas, which were
16 in the average or low average range. So these large
17 splits mean that you can't really use that full-scale IQ
18 and have it be a reliable measure of his IQ, of his
19 overall IQ, because you have these two different scores.
20 And you get an average of something that's vastly
21 different. You're not really describing either of them
22 very well. So that's where full-scale IQ can become
23 somewhat misleading. And that's part of that love hate
24 relationship that I described earlier.
25 Q. And so again when you see a split between part of

1 these IQs that is a red flag or ...

2 A. It's a very large red flag that there could be
3 something neurological going on with this individual.
4 We don't see this usually.

5 Q. All right. Are there any splits that are
6 specifically significant considering FASD or ...

7 A. No. It's more of a non-specific thing. We can see
8 it in significant cases of learning disabilities. We
9 can see it in other neurological conditions. It's not
10 something that's like, this is the FAS split, sort of
11 thing. And we don't see that.

12 Q. And so, for example, we're looking at the verbal
13 comprehension, which is one eighteen. And processing
14 speed, which is eighty-four. And it's my understanding
15 verbal comprehension is, what does this word mean,
16 similar to that?

17 A. Uh-huh (affirmative).

18 Q. And processing speed would be -- how would you
19 describe that to me?

20 A. The processing speed is just how quickly you can
21 see something, figure out what you're looking at, and
22 then make a response. So in this case with the symbol
23 search, it's looking for matching symbols. You have an
24 array. You have to find the ones that match. So you
25 have to do this as quickly as you can. That's really

1 the big key of it. It's a fairly simple task otherwise.

2 Q. Okay. And so again, and I think you're going to
3 talk about this more in detail later. But is part of
4 the problem that he may have a ninety-nine IQ, which
5 would be the full-scale, but he can't use that IQ
6 because of the processing speed. Would that be
7 consistent?

8 A. The processing speed and a number of other areas,
9 too. So we get into that with all of the other -- with
10 a number of the other domains of functioning, like
11 executive functioning, being able to apply it to solving
12 problems, things like that.

13 Q. Okay. And I think again, I think I've already
14 asked you about this before. But part of this, for
15 example, is that he may be a very good speller. That
16 doesn't necessarily correlate to how well he handles
17 social situations or how he understand society? Is that
18 a fair statement?

19 A. That's a fair statement.

20 Q. Okay. Anything else you want to say?

21 A. No. Just to, you know, reiterate that there was a
22 very large split. He did have things that he was doing
23 extremely well on. And I'm not surprised by that.

24 Again, his variability is consistent with what I expect
25 to see in Fetal Alcohol.

1 Q. Right. Explain this chart? And this is
2 neuropsychological testing?

3 A. Yeah.

4 Q. Explain that chart.

5 A. So I do this six-ish hours of test with the
6 individual. And it helped me especially to be able to
7 kind of look at everything all in one place. So I can
8 look at the different domains of functioning, kind of
9 see strengths, weaknesses.

10 Q. And so the bottom is the thirty tests; is that
11 correct?

12 A. Yeah. The bottom are all the test scores. There
13 are other test scores but these are the ones that I
14 always will put onto this chart. And then I look at
15 other aspects that are kind of nuances, rather than
16 larger scores. So those are all the scores. Across the
17 top are the different domains of functioning that you
18 can have. IQ, academics, we kind of went through that
19 when we were talking about the list of testing. One
20 thing about psychology and neuropsychology tests is that
21 we have a bunch of different scores. We have an IQ type
22 of score which has a mean of a hundred. We have a T
23 score, which has a mean of fifty. We have a scale
24 score, which has a mean of ten, all types of scores. So
25 it tends to be a little bit confusing something to look

1 at these different scales and kind of in your mind do
2 the mental calculation of, is that the same as the other
3 one.

4 Q. Right.

5 A. So what I do on this is I actually do that
6 calculation up front. And I do a straight conversion
7 from the individual scores, the T scores or the IQ
8 scores to a Z score, is what it's called. A Z score has
9 a mean zero. So if you have a score that's zero, it
10 means you're right on the average at a range of one, or
11 a standard deviation of one. It's a straight
12 conversion. There's no changing the normative data or
13 anything like that.

14 Q. Almost like a percentage, so to speak?

15 A. Almost. Percentiles and percentages are a little
16 bit of a weirder beast because they're not a direct one-
17 to-one change. If you go up one percentile it doesn't
18 necessarily mean it's a change of one unit. That's the
19 way that percentiles work. T scores and Z scores, yes.
20 If you change by one unit, it doesn't matter what system
21 you're in. It's one unit.

22 Q. So essentially, though, you construct this chart to
23 compare all the test scores. But obviously different
24 tests use different scoring numbers and everything else.
25 So you have to average them out, mean them out, which --

1 -

2 A. I wouldn't even say average or mean them out. I
3 just straight convert them.

4 Q. Convert them. All right. Just like if you had a
5 stock and you were comparing it to the Dow Jones, and
6 Dow Jones may be ten thousand one day. Just because
7 your stock is not ten thousand per share, you compare it
8 to actual percentage values, whatever. You're
9 converting a number to make them all on the same graph
10 so you can compare them with each other; is that
11 correct?

12 A. Okay. Yeah. I'm not great at the stock market,
13 but, yeah, the way you described it.

14 Q. All right. So anyway, so it's helpful for you to
15 put this up on the chart so you can see where he is, and
16 specifically talk about the standard deviations in those
17 lines?

18 A. Right. Well, I guess one more kind of background
19 about this is that psychology tests can be a little bit
20 variable as far as what's good and what's bad.
21 Sometimes a high score is good. Sometimes a high score
22 -- a low score is good. It can go either way. It
23 depends on the test. That's part of our training, is to
24 know which tests go where. But to kind of help us see
25 it better, I flip over the ones that high scores is bad

1 and I move that to a low score is bad. So it's all
2 again, basically if you're seeing something that's down
3 below that red line, it's an impaired function. So it's
4 a straight flip. Again, it doesn't change the norms.

5 Q. And the red line is ...

6 A. Is the cut-off point for considering for deficit.
7 So if it's at minus two, that's an IQ. That's the
8 standard convention for mental retardation, is two
9 standard deviations below the mean. It's also the CDC's
10 convention for its aspects of the diagnosis. And then
11 minus one standard deviation, which is basically if you
12 get before that cut-off, you're at least within the
13 mildly impaired range. Again, standard
14 neuropsychological interpretation as well as what's used
15 by the CDC.

16 Q. Right. And so the CDC says for IQ it's got to be
17 two standard deviations. That's why the red line starts
18 at negative two and goes up to negative one standard
19 deviation. So essentially, all those numbers show you
20 in relation to the standard deviation above and below
21 the norm where you are for that particular test?

22 A. Yes.

23 Q. And so what strikes you as significant about this
24 chart?

25 A. Well, you know, one of the things that strikes me

1 right off the top is that when you just look at it, not
2 paying attention to the actual items, you see a lot of
3 up and down, a lot of variability, peaks and valleys.
4 He does good in some things. He does poorly in some
5 things. As I look through each of the domains, I see in
6 some of these domains some very significant information.
7 Other domains where a person is doing well, where Chris
8 is doing well. So first, we've already talked about the
9 IQ. There's this large split, which is a significant
10 issue. Academically, he's got spelling, which is
11 extremely good. He got higher than his IQ might
12 suggest. Reading, which is quite good. Reading -- word
13 pronunciation, which is quite good. But his reading
14 comprehension wasn't as good. It was in the low average
15 range, much weaker than I might expect based off of his
16 ability to pronounce words and read words. And even
17 more ---

18 Q. Are you saying he can read, but he doesn't quite
19 understand what he's reading?

20 A. As well. Yeah. He has more difficulties with
21 that.

22 Q. And generally, Chris reads a lot, would you say?

23 A. His report to me was that he tended to read quite a
24 bit, yes.

25 Q. Okay. And would that also inflate the IQ

1 potentially?

2 A. If you do a lot of reading of big words and looking
3 them up and seeing what they mean, if you don't know,
4 and you're able to remember that information, sure, it
5 can be helpful for it, for kind of inflating ---

6 Q. As well as spelling things?

7 A. The spelling, certainly, it's a practice skill. If
8 you use a computer with spell check on it -- my spelling
9 skills have gone down, though, because of that, so I'm
10 not using it as much. The other aspect that I'm seeing
11 that's much more -- that's very significant is the
12 arithmetic. He's actually functioning within the
13 impaired range on that. Much lower than I expect.

14 Q. You may have already said this, but how many
15 domains are you looking at according to the CDC
16 criteria?

17 A. Usually, there's about ten domains or so that I'm
18 looking at when I create this chart, ten different
19 domains. And I'm looking to see if there are at least
20 three that are in deficits.

21 Q. If there are at least three?

22 A. Yes.

23 Q. And how many did you find?

24 A. Eight.

25 Q. Eight. So you need three, you found eight out of

1 ten?

2 A. Yes. Out of ten. Actually, I've got eleven up
3 there. The suggestibility is one that I hadn't added
4 into it.

5 Q. So you've added ---

6 A. It's done by Dr. Brown, so ...

7 Q. --- suggestibility because that's another factor
8 we're going to talk about?

9 A. It's another factor that Dr. Brown added in.

10 Q. Okay. So do you want to go through each domain or
11 do you want go more and tell about the ---

12 A. Well, kind of -- by domain, we're looking at math
13 is an area of deficit, what I expect for Fetal Alcohol.
14 That tends to be the lowest score.

15 Q. So a deficit in math is consistent with an FASD
16 diagnosis?

17 A. Yes. And he was having troubles with fractions and
18 with multiplication and division. He was having
19 difficulties with that.

20 Q. Okay.

21 A. Memory, his verbal memory was quite good. He was
22 able to learn new things verbally and hold on to it.
23 But visuospatial, so being able to see something, one to
24 copy it, to organize yourself, he was in the severely
25 impaired range. He was severely impaired in his ability

1 to organize information. And he couldn't hold onto it
2 well. In fact, when I came back to the same figure
3 three minutes later, he'd forgotten half of the details.
4 I came back to it thirty minutes later, he lost more
5 than half of the details. So he was not able to hold
6 onto that information and he couldn't organize what he
7 was seeing. He couldn't kind of create a game plan on
8 how to solve that problem.

9 Q. All right. That's the visuospatial?

10 A. That's the visuospatial aspect of memory.

11 Q. It's three deviations below the norm; is that
12 right?

13 A. Yeah. Yes.

14 Q. And how bad is that, I mean, what percentage are we
15 talking about?

16 A. We're looking at the percentiles that are below the
17 first percentile. So not -- over ninety-nine percent of
18 the population does better than he did on this test.

19 Q. Right. And so when you talk about visuospatial,
20 what is that?

21 A. Like I said, visuospatial is being able to take in
22 information in your environment. And it's not just
23 copying a picture. It's also seeing what's going on
24 around you. Being able to identify things that you need
25 to pay attention to and being able to keep track of that

1 as things change. And organize your thoughts on how
2 you're going to react to things if things change. So
3 it's that taking in the environment and kind of helping
4 you create a game plan.

5 Q. Taking in all the factors around you, visually,
6 everything, hearing-wise, too?

7 A. Well, yeah. I mean, that's adding extra layers of
8 -- into the executive functioning in daily living where
9 you're adding in the hearing and the smell sometimes and
10 things like that. I'm talking, with the visuospatial,
11 I'm talking purely what he's seeing in his environment.

12 Q. Okay. But it's also not only seeing it, it's being
13 able to process it and figure out what it means and what
14 to do about it; right?

15 A. Yes. The testing looks at all those things.

16 Q. So he's particularly bad at that?

17 A. Right. Attention testing. So we do this long test
18 to look at a person's ability to focus and maintain
19 attention over longer periods of time. And what we were
20 seeing was, that although he wasn't being overly
21 impulsive on the test, he wasn't doing -- responding
22 when he wasn't supposed to, he was not responding to
23 things when he was supposed to. He was failing to
24 maintain his attention. And this got worse as the test
25 got longer and over time. And so we had a really hard

1 time maintaining his focus. Gets distracted by other
2 things, things like that.

3 Q. And, again, is that consistent with FASD?

4 A. Very consistent with FASD. Processing speed,
5 areas, let's say in the IQ test we're showing that there
6 were some weaknesses. In more language based processing
7 speed tests, he was doing actually fairly well. But
8 that fits with, he's got a strength in these language-
9 based skills, in reading skills. Executive functions,
10 again, these high-structure versus these low-structures,
11 he was doing much more poorly in low-structure tests.

12 Q. Before you go there.

13 A. Yeah, yeah.

14 Q. So is part of the processing -- well, not the
15 processing speed, but the verbal function, is that part
16 of the reason why, too, he appears normal, if you talk
17 to him you wouldn't suspect that he had FASD or anything
18 else?

19 A. Very much so. This is -- when I've seen these
20 types of individuals in clinical cases, these are the
21 ones that are the most frustrating or are most
22 frustrated because they're not getting recognized. They
23 can pass easily. And so when you speak with a person
24 that has very good vocabulary, speaks well for
25 themselves, things like that, you expect that they can

- 1 do things well everywhere else. And these individuals
2 can't. They can talk the game. They can't do the game.
3 And so that's something that we see very commonly in
4 Fetal Alcohol cases where you've got that masking.
5 Q. So essentially he's masking?
6 A. Yeah.
7 Q. Sorry. What were you saying?
8 A. It's a masking of the deficits.
9 Q. So he's masking. He walks ---
10 A. Talks the talk.
11 Q. But doesn't walk the walk, essentially?
12 A. Right.
13 Q. I mean, he looks good. But in reality when you
14 start digging deep or your put him in stress and
15 everything else, he falls apart. He can't put it
16 together?
17 A. Right.
18 Q. And what were you --
19 A. Actually, stepping back a little bit myself, motor
20 coordination, we talked a little bit about kind of the
21 point of the motor coordination, he was doing fairly
22 well. But on the testing I did notice that he was doing
23 what are called mirror movements. So this is --
24 normally, if you have somebody do something with just
25 the one hand, let's say the left, it's just the left

1 hand that's doing it. Rarely, what you'll see is when a
2 person is doing it with their left hand that you've
3 asked them to do, you'll also see them doing exactly the
4 same with their right hand and it's called mirroring.
5 And this is one of -- and Dr. Adler can get into this
6 much more because he's got a number -- he's also seen a
7 number of these in his evaluations, are neurologic soft
8 signs. They're not specific to any sort of condition
9 necessarily, but they are something that's indicating
10 that there's something not right in the neurological
11 system and needs to be investigated further. And so I
12 was seeing that in the motor, even though his motor
13 performance itself was actually pretty good.

14 Q. So it's not a criteria or a domain or anything like
15 that, but it's something that sends up red flags?
16 Again, it's consistent with the diagnosis. Am I saying
17 that right?

18 A. Yes. It sends up red flags that there's something
19 neurological going on. And we know, you know, from the
20 final diagnosis that FASD is present and so it's raising
21 a lot more concerns about the neurological ---

22 Q. Is this a part of the left-right connection?

23 A. Yeah. It's part of the communication between the
24 two sides of the brain.

25 Q. We have two sides of the brain and they're

1 connected by the corpus callosum. But then also they're
2 connected other ways and they're working with each
3 other. And that shows potential problems with the
4 connection. Is that right?

5 A. Yes.

6 Q. And so what we're talking about motor -- did you
7 finish that?

8 A. Yeah. Yeah, we had. Then executive functioning.

9 Q. All right. And the executive functioning, again,
10 describe that just real quickly again.

11 A. Planning, problem solving, being able to come up
12 with new ideas in order to get to a goal.

13 Q. Putting all of this stuff together, is that also --
14 -

15 A. Yeah. Yeah. It's taking a lot of these other
16 things. You need to be able to remember information to
17 be able to do an executive function skill. You need to
18 be able to pay attention to it long enough to get it
19 done.

20 Q. And the high structure and the low structure,
21 again?

22 A. It's the amount of, I guess you could say, support
23 that's given in preparing for the test, in doing the
24 test. How many rules are you getting so that you know
25 kind of what you can and can't do with it and kind of

- 1 the -- a game plan.
- 2 Q. So the high structure has a lot of rules. The low
- 3 structure has less rules?
- 4 A. You're given a game plan for it, yeah.
- 5 Q. An overall, just do this?
- 6 A. An overall -- yeah. Versus the low structure you
- 7 don't get that game plan.
- 8 Q. If we compared that to life, an IQ test again,
- 9 would be high structure, I assume?
- 10 A. It would be much higher structure.
- 11 Q. And then life would be ---
- 12 A. Closer to the low structure executive functioning
- 13 sort of thing.
- 14 Q. Because there aren't normal situations that you
- 15 know exactly what you have to do on a day-to-day basis -
- 16 --
- 17 A. Right. Especially when it's something that's new
- 18 where you haven't experienced before, yeah. Now, you
- 19 also notice that he does have this one score that's
- 20 extremely high, which usually means he did really,
- 21 really good.
- 22 Q. Yeah.
- 23 A. Which he did. And this is a score that's called
- 24 perseverative responses. So this is, does a person use
- 25 the same idea over and over again? Which can be good if

1 you're getting it right, stick with it.

2 Q. Right.

3 A. It can be bad if you're getting it wrong and you
4 keep trying the same thing over and over again. In his
5 case, he didn't get stuck on an idea. He tried
6 something else, and tried something else, and tried
7 something else and just kept on trying a lot of
8 different things. That's why his actual scores down
9 here of non-perseverative arrows is actually right on
10 the cusp on being impaired. He was making a lot of
11 mistakes, but he wasn't trying the same thing. Also,
12 what we found on the testing was, and it's not reflected
13 in the chart, was on a couple of occasions he
14 spontaneously changed a rule that he was doing well on.
15 So he's getting it right for a while. He's doing good.
16 He's choosing the right possible solution. And then
17 sudden, for some reason, he quits using that strategy,
18 tries something else. And that's something that in the
19 research that we were doing we found almost never in
20 control subjects. In fact, we didn't find it in our
21 control subjects. But we found it happening very
22 frequently in those with FAS and FAE. So it's something
23 that isn't necessarily specific to FAS again, but it's
24 kind of -- it's a pathic mnemonic sort of sign. If it's
25 there, there's a problem. If it's not there, it doesn't

1 tell you much.

2 Q. It's consistent -- and, again, so essentially he's
3 just changing his answer whether he got the answer right
4 or right. He just changes his answer all the time?

5 A. Uh-huh (affirmative). Yeah. And that fits in with
6 some of the things within the suggestibility that we can
7 talk about. And also, he was very inefficient in being
8 able to figure out a rule. It took him a long time to
9 figure out how to solve the problem the first time
10 through. And the cruelty about these tests are that
11 sometimes rules change for no apparent reason. It took
12 him a very long time in order to figure out the rule in
13 the first case.

14 Q. One was the Wisconsin Sorting Test and I mention
15 that specifically because Dr. Evans, I think, did that,
16 as well?

17 A. That's correct.

18 Q. And so is that like one of the ones that you ---

19 A. That is one of the ones.

20 Q. --- use that particular show a problem or were
21 there others?

22 A. Yeah. That one is certainly one that in particular
23 shows a problem, and it did on both mine and Dr. Evans'
24 testing. And even looking at the trials, the first
25 category, so this is how long it takes him to figure out

1 the first rule. When Dr. Evans did it, it took I
2 believe about eighteen trials. When I did it, same test
3 multiple years later, it took him forty-one trials. So
4 he was having a lot of troubles. He wasn't benefitting
5 from, you know, several years ago he'd seen this test
6 before. He was still having great difficulties being
7 able to figure out the rules.

8 Q. And can you describe the test?

9 A. In general, you have a number of cards that come up
10 and you're supposed to match them with a series of
11 different cards based on a characteristic of the items
12 on the cards. And you have to figure those out. And
13 they're not told how to match those cards. And
14 periodically, things change. And what used to work
15 doesn't work anymore and it goes on like that is sort of
16 how the test works.

17 Q. And so is part of the problem that he keeps
18 changing or can't change or what is his particular
19 problem with that test?

20 A. It's that he kind of keeps changing. He doesn't
21 get -- he isn't able to focus in on one idea very well.
22 When he does focus in on it, he loses track of it and
23 then has to start all over. And has difficulties being
24 able to then adjust when the rules change on him. Once
25 he does get it, if the rules change, he has a hard time

1 figuring out how to go about the next way and starts

2 casting at straws for the next try.

3 Q. And, again, is that just kind of the combination
4 showing that -- or one small part showing this executive
5 functioning problem?

6 A. Yes.

7 Q. And why is that?

8 A. Because it's showing a lot of inefficiency in his
9 ability to take in what he's seeing, to learn from the
10 feedback that's given. Because you're told if you're
11 right or wrong after you match a card. Take that
12 feedback, learn from the mistakes that he made on those
13 and then apply it to try and figure out how I can make
14 it right the next time. And he was having very great
15 difficulties being able to do that. And other testing
16 was picking up on that, too, as far as he was very
17 inefficient at solving problems. And not able to solve
18 them quickly and facilely.

19 Q. And are there any other tests you want to point
20 out?

21 A. Well, one of them, like I said, was the tower test,
22 which is the other test that we're in deficit there,
23 which were another non-language based test, just like
24 the Wisconsin.

25 Q. Can you point that one out?

1 A. Yeah, sorry. It's, Tower, Tower, Tower, these guys
2 right here.

3 Q. Okay.

4 A. And really what were in deficit here were timing
5 issues. He was going slowly, very slowly and it was
6 taking a long time between each move on this task, it's
7 a tower-building test where you have to move the pieces
8 around in certain ways in order to match up a picture.
9 He was having a lot of trouble doing that quickly. He
10 got seven out of the nine possible ways. But when he
11 was doing them, it took him a lot longer than it should.
12 By contrast, the tasks that he was doing really well on
13 over here, those are all verbal tests. It's a, what we
14 call proverbs test, you know, the grass is always
15 greener on the other side of the fence, things like
16 that, he could do relatively well. It goes along with
17 language-based skills that he does have.

18 Q. All right.

19 A. The next group are the suggestibility. This is
20 some testing that was done by Dr. Brown and she'll
21 probably be able to focus on this more. But the point
22 of this test, it's a memory test where you're given a
23 story and then you're asked a series of questions about
24 the story. Some of these questions are leading
25 questions, meaning they've got nothing to do with what

1 was in the actual content of the story. So the test is
2 designed to see how often does this person -- is this
3 person led? Can they react to these leading questions -
4 --

5 Q. Will they change their answers?

6 A. Well, we're not even into changing answers yet.

7 This is, will the person say that it was a dog or a cat
8 when there was no dog or a cat involved.

9 Q. Okay.

10 A. Then you basically say, you made some mistakes. We
11 need to fix this. So you go back through the same
12 questions. This is where you look to see if they change
13 their story, change the answers. And so that's
14 essentially what the suggestibility test, the Gudjonsson
15 Suggestibility Test does.

16 Q. So it shows you he's very suggestive?

17 A. Yes, it does.

18 Q. And you called that the Gudjonsson, I believe, G-U-
19 D-E ---

20 A. No. G-U-D-J-O-N-S-S-E-N. I can't exactly remember
21 the spelling unfortunately.

22 Q. Okay. And, like you said, Dr. Brown' is going to
23 talk more about that if I understand?

24 A. Uh-huh (affirmative).

25 Q. She's the one that gave the test; right?

1 A. But this is also something that kind of leads in,
2 again, these adaptive functioning abilities. Their
3 ability, especially on social interaction, their ability
4 to kind of be their own person, say what's on their mind
5 and not be swayed by peer influence, things like that.
6 So it factors into that, too.

7 Q. And to not being able to figure out social cues
8 from other people and figure out where all of that fits
9 in?

10 A. Right. Right.

11 Q. And, again, all consistent with FASD?

12 A. Yes.

13 Q. And so -- because it looks like he's at least two
14 deviations below on those. But far more than two
15 deviations on the low structure. And, again, that's all
16 consistent with FASD?

17 A. Yes, it is.

18 Q. And if that was normal population, we would kind of
19 expect these dots to be all close to one line.

20 A. Hovering around the green.

21 Q. What's that?

22 A. Hovering around the green line, yes.

23 Q. Hovering around the green line. Essentially, you
24 know, not all on the green line ---

25 A. Yeah.

1 Q. --- but pretty much. Not all wildly up and down
2 like this and not significantly -- when you're talking
3 again three deviations below, that's pretty
4 statistically small?

5 A. Yes.

6 Q. All right. And, again, that low structure is --
7 when there aren't a lot of rules, he can't figure out
8 what to do. Is that right?

9 A. Uh-huh (affirmative). That's correct.

10 Q. Is there anything else now with the low structure?
11 I just don't remember about being able to ---

12 A. Not with the low structure -- oh, with the
13 behavioral testing?

14 Q. --- understand social norms or understand what
15 you're supposed to do in society or anything like that?

16 A. Yeah. I've got those mixed into the adaptive
17 function section.

18 Q. Okay.

19 A. So the adaptive functioning section is both the
20 Vineland interview that was done of Dwight, but also a
21 couple of the tests, the auditory comprehension test and
22 the social cognition test, which is looking at emotional
23 cues. Because they're both looking at similar aspects
24 of adaptive functioning and we can see that he was
25 showing deficits in communication skills as well as on

1 the actual laboratory test that I gave, and the
2 socialization skills and on the actual laboratory test
3 that I gave. So we were seeing that they were impaired
4 functioning.

5 Q. All right. So now these adaptive functionings, are
6 those pretty close or the exact test that you would give
7 in a mental retardation test for that second prong?

8 A. Yes.

9 Q. Okay. That's right. This is of the bigger ---

10 A. Yeah. This is showing ---

11 Q. So, again, when we go -- like South Carolina's
12 definition is below seventy IQ, problems in adaptive
13 functioning before eighteen. And so this is essentially
14 the second prong of that test; right?

15 A. This is one of those tests that is usually cited as
16 this is an acceptable test for measuring adaptive
17 functioning, yes. This is ---

18 Q. And so tell us more. You've obviously broken that
19 chart -- this is the end of that chart. It's called
20 adaptive functioning?

21 A. Right.

22 Q. You've broken it out.

23 A. And so this is of the Vineland interview. And so
24 you've got the three domains, the communications skills

25 ---

1 Q. When you say Vineland interview, you're talking
2 about a specific test that's a long interview with the
3 person to give an idea of how they do stuff?

4 A. Right. It's a structured interview and the
5 questions are asked, can this person do it independently
6 all the time, they've mastered it? That's the best
7 possible score. A middle score is that they sometimes
8 can do it independently, but usually need some sort of
9 support. And the lowest score is that they've never
10 been able to do this independently. They always need
11 some sort of support. They can never do it at all sort
12 of thing. So based off of those basically, say zero one
13 two or yes, no, sometimes, these get coded. So the
14 interviewee is not saying, oh, he was functioning like
15 he was a six-year-old or anything like that. They're
16 saying, could he do this? Yes, no, sometimes. That
17 sort of thing.

18 Q. So you try to make it so that they don't know and
19 they can't try to fool the test. Is that what you're
20 saying?

21 A. That's one of the ideas. But also it's taking out
22 a lot of the over-interpretation ---

23 Q. The subjective nature of it?

24 A. Yeah. We're saying, could he do it?

25 Q. Could he tie his shoes?

1 A. Yes. Those sorts of things. So it's very
2 structured that way. And then from that the
3 calculations get made. So within the communication he
4 had the greatest difficulties with receptive
5 communication, his ability to take in what he's hearing
6 and respond to it appropriately.

7 Q. And that sounds weird because his verbal
8 performance on the IQ is fairly high?

9 A. Right. And, you know, even here, his expressive
10 communication seemed to be low, also. There's the
11 difference in -- one of the things that I noticed on the
12 testing, and when I was observing him, is that he would
13 use very big, multi-syllabic, complex words. But
14 sometimes they wouldn't be the correct word for the
15 situation. Other times, yes. I mean, he had some words
16 that I had to go look up later. I said, yep, that's a
17 word. That's right.

18 Q. Yeah.

19 A. But he was also having time when he would just use
20 things incorrectly.

21 Q. He would use a big word, but it was the wrong word
22 that he used. It didn't make any sense?

23 A. Yes. It didn't make sense in that context.

24 Q. All right.

25 A. So it was still -- and so the interview was picking

1 up on his difficulties being able to actually apply his
2 very, you know, very bright language-based skills. He
3 knows information. He can't apply that information is
4 what this is looking at.

5 Q. All right.

6 A. Daily living skills, especially with respect to
7 like community skills, which are being able to hold down
8 a job appropriately, being able to apply for jobs
9 appropriately, different things like that kind of within
10 the community, his interactions in the community. And
11 then socialization is a lot having to do with
12 relationships. Being able to interact appropriately.
13 Being able to withstand suggestibility. Being able to
14 pick up on verbal and non-verbal cues. If a person is
15 looking angry at you, do you still kind of go, hey,
16 buddy, how's it going? Life's great. This is terrific.
17 Versus do you get the clue of, ahhh, something not
18 right, let's give him a little bit of space. Picking
19 up on those cues.

20 Q. And so -- and those are all, except for maybe one,
21 one and a half standard deviations below at least;
22 right?

23 A. At least. Yes.

24 Q. And, again, if we go back to like the mental
25 retardation adaptive functioning standard, is one below

1 deviation for that standard or two or is there a
2 standard?

3 A. It's -- I think the standard is more that they're
4 showing significant impairments in adaptive functioning.
5 But usually you expect to see an IQ test and an adaptive
6 functioning score to be roughly similar ---

7 Q. Right.

8 A. --- on an individual. Any individual, whether they
9 be mentally retarded or normal functioning.

10 Q. And so have you tested mentally retarded people?
11 Do you deal with them on a regular basis?

12 A. Yes, I do. I do evaluations ---

13 Q. Have you ever had somebody that was below seventy
14 IQ that didn't also have the adaptive functioning below
15 the grade that you're looking for?

16 A. I have not. Typically, I see them having
17 essentially the same. If they're in very structured
18 settings, there could be some artificial inflation
19 because they don't have to do this alone. It's
20 programmed in, you know, at six o'clock the bell rings,
21 they go wash their face. So that takes away some of the
22 adaptive functioning measurement.

23 Q. Yeah.

24 A. But, no, I typically will see them function
25 basically at least at about the same level.

1 Q. All right. So the next line is cross-validation of
2 adaptive functioning results. And the last slide
3 specifically was the Vineland test given to his father?

4 A. Right.

5 Q. And the obvious thing is, well, hey, come on,
6 that's his father. How do we know that's reliable? So
7 how do we know that's reliable?

8 A. Yeah. I mean, there's multiple ways of doing that.
9 And one of them is to give ability type tests in the
10 testing session that look at some of the similar ideas.
11 And we've touched on this as far as the communication
12 skills and as far as the social inferences and emotional
13 reading skills. And so I administer those tests to see
14 are they fairly consistent. And so with the receptive
15 communication, which is closest to that nab auditory or
16 receptive communication test, they're both impaired.
17 He's having significant troubles with that. Same thing
18 with the socialization, interpersonal relationships. He
19 was showing deficits as reported by father and he was
20 still showing deficits as found on the testing that was
21 done during my session with him. That he wasn't able to
22 pick up on the social cues and emotional cues.

23 Q. All right. And so what you're looking at is the
24 ability tests validate the violence. And the whole
25 point is, is that they, again, are below --- one

1 standard deviation below?

2 A. At least.

3 Q. Even the confirmations are at least one standard.

4 And, again, is that consistent with FASD?

5 A. Yes. If I saw something that was -- where they did
6 extremely well on my laboratory tests, but did very
7 poorly on the adaptive, the Vineland test, it raises
8 more concerns for sure. And I wasn't getting any
9 concerns out of this because they were consistent from
10 my perspective. They were both impaired.

11 Q. Right.

12 A. Also, from a historical perspective about his
13 adaptive functioning, this was a questionnaire that was
14 given to his teacher when he was in first grade.

15 Q. Right. And so you're showing a slide that says
16 factor, Anne Wilson, first grade teacher. And this was
17 the same teacher, I believe, that testified at the
18 sentencing phase. But anyway, so you've got a slide up
19 there now that has impulsivity, disorganized. Go
20 through that and tell us what you find significant?

21 A. Well, it's a long -- and Dr. Brown actually kind of
22 spearheads on this sort of -- this task. But to look at
23 it, this was a long questionnaire. It's not just these
24 questions. It's multiple other ones. These were the
25 ones that she responded that, yes, this is a problem for

1 him. And these are items that typically we see as being
2 problematic in Fetal Alcohol Spectrum Disorders. But
3 they also have an implication on a person's executive
4 functioning, how they can plan and problem solve. And
5 on their adaptive skills, how they can manage
6 situations. Like the difficulty learning from
7 experience. We saw that with the chicks. They had a
8 hard time doing that. She was commenting that in first
9 grade he was having difficulties with those.

10 Q. So, again, this is an independent source. You give
11 this questionnaire, she doesn't check off he's terrible
12 at everything. What you saw was she checked off the
13 stuff that was consistent with FASD?

14 A. Yes.

15 Q. And when you got EF up there, that's executive
16 functioning problems. That's what EF stands for?

17 A. Yes.

18 Q. And so is there anything inconsistent with what you
19 saw there?

20 A. No.

21 Q. Again, you're just kind of trying to validate what
22 you've already seen; right?

23 A. Yes.

24 Q. Anything else on that slide?

25 A. No.

1 Q. Okay. The next slide says consistency of
2 neuropsychological testing with FASD?

3 A. So with the research that we know about FASD over
4 these years. So we wanted to look at some of those
5 issues. Remember, we talked about splits being very
6 common. There's a split between verbal and non-verbal
7 and other skills. And this little base rate is -- this
8 is the percentage of the norm sample. So from the WAIS
9 when they were making the WAIS test, this is a
10 percentage of those people that did -- that had a split
11 that's that big. It's only three percent of them had a
12 split that was that big. And only two percent with
13 respect to processing speed. So it was extremely rare
14 to see this sort of a difference in performance across
15 tasks. So that's consistent with FASD.

16 Q. Okay. So the split in his IQ was consistent?

17 A. Uh-huh (affirmative).

18 Q. And you're looking at, well, three percent usually.
19 And if we're thinking about that, one of the charts in
20 the beginning where you had one percent of Seattle
21 subjects having FAS, you know, you're talking a similar
22 number there, as well. I'm sure there are a number of
23 reasons that you could have a split in your IQ?

24 A. Yes.

25 Q. All right. And now you've gone to downward slope

1 and sever adaptive deficits. And on the left is that
2 blue chart that you showed before. Tell us again what
3 that chart represented and where it came from?

4 A. This came from the study that was done in 1996.
5 And it found that the individuals in the study were
6 doing more poorly than you expect, based off of their
7 IQ, in academic performances, especially math and
8 adaptive functioning.

9 Q. And, again, what we expected was we expected all of
10 those diamonds on the dashed line at about ninety; is
11 that right?

12 A. All else being equal, if this person was normally
13 constituted, we'd expect them to be about there, yes.

14 Q. About there, maybe up from that a little bit?

15 A. Right.

16 Q. Instead, they're all kind of going at a downhill
17 slope?

18 A. Right.

19 Q. And then what is on the right?

20 A. On the right are Chris' scores on those same tests.
21 So we've got the IQ, and then we've got spelling. Yes,
22 which was very high. But we've got math that's falling
23 below expectations, based off of the IQ, especially
24 math. And then adaptive functionings, same Vineland
25 test where we're seeing exactly the same pattern of

1 impairments, significantly below expectations.

2 Q. So Chris' pattern looks the same. It's consistent
3 with FASD that the IQ may be there, but the adaptive
4 functioning, the ability to use that IQ is not there?

5 A. Yes.

6 Q. Is that a good ---

7 A. Yeah.

8 Q. All right.

9 A. And then based off of his schooling. So the
10 history of his school performance or school
11 participation, he repeated kindergarten. He repeated --
12 I'm sorry.

13 Q. And you're looking at the slide that's, again, a
14 series of effective executive function deficits on Chris
15 Williams' school. And it just lists his grades and ---

16 A. Right.

17 Q. And you look at this because, again, you're just
18 trying to see if it's consistent?

19 A. Right.

20 Q. If he's Valedictorian, there's a problem?

21 A. Right.

22 Q. Okay.

23 A. So he repeats kindergarten. He repeats first
24 grade. He was put into special education resource room
25 in first grade. Special education service placement is

1 extremely common in Fetal Alcohol Spectrum Disorder
2 individuals. He had an evaluation in third grade for
3 learning disability and possible ADHD. He got staffed
4 out of special education in the fourth grade, which also
5 is, unfortunately, not uncommon to see.

6 Q. Now, why is that?

7 A. He apparently -- I can't remember the specifics of
8 it ---

9 Q. Not why he got staffed out. Why is not uncommon?

10 A. Because if they get the extra support in class, a
11 lot of extra assistance, they can improve. With all
12 these extra people around them they can improve. And
13 sometimes they get to the point where they're doing too
14 good for the special ed with all their services. Then
15 you move them out and things fall apart again. They
16 lose that support.

17 Q. Is that consistent with having the IQ, but not
18 being able to organize and use that IQ, somebody comes
19 and help, you use it and then you get booted out. Is
20 that consistent?

21 A. Yes. And then finally he repeated eighth grade
22 also. And dropped out in the ninth grade. Leaving
23 school, dropping out of school is another of those
24 secondary disabilities that we see extremely commonly in
25 Fetal Alcohol Spectrum Disorders.

1 Q. And then you move to problems that went far beyond
2 learning disabilities? But again this is just going by
3 to that teacher's slide; right?

4 A. Right.

5 Q. And then -- all right.

6 A. Another thing that we're expecting to see for
7 consistency is that kind of downward slope between
8 higher structure, lower structure, no structure. So on
9 the left is higher structure executive functions.
10 Middle are his lower structure executive functions where
11 he's showing more levels of impairment. There's the
12 line of one, which is there. And then adaptive
13 functioning, which is even below that. So we're seeing
14 that step-wise. As you go further away from structure
15 he has -- he's much more problematic in his ability to
16 organize himself and apply what he does know
17 appropriately and correctly and accurately.

18 Q. Right.

19 A. The other thing, and we mentioned it at the
20 beginning, and I commented on it when we first saw the
21 chart is the variability. These peaks and valleys. He
22 does good here. He does lousy here. All those valleys,
23 all those things, are extremely consistent with Fetal
24 Alcohol. If I had a person that had just a temporal
25 lobe injury, I expect just to see, in this one

1 particular area. I don't see that. I see it in a lot
2 of areas with the Fetal Alcohol and with Chris.

3 Q. And this slide, again, is variability. And again,
4 that whole point is it's just way up and down all across
5 the board?

6 A. Yeah. There had been an EEG that was done with
7 Chris back in 2005, I believe, or 2004. It was before
8 the trial, I guess. And that was analyzed fairly
9 recently, and Dr. Adler can talk to you much more about
10 the details what QEEG is and how it's obtained and some
11 of the more medical sides of it. But the outcome of
12 that report was that it was commenting on abnormal
13 electrical activity in a number of different regions of
14 the brain. So I've got those listed on these next two
15 slides. The frontal lobes, the singular gyrus, temporal
16 lobes, a couple of others, occipital lobes. And on the
17 right are the tasks where -- that are usually associated
18 with the frontal lobes where Chris was doing poorly.
19 And it's a very complete overlap between those. We see
20 ---

21 Q. Totally consistent?

22 A. It's very consistent with that. So with the
23 frontal lobe problems we expect to see executive
24 function problems. We see executive function problems.
25 Visuospatial organization, being able to organize your

1 thoughts, get them straightened out, another type of
2 executive function. Significant troubles with that.
3 Socialization skills, communication skills, especially
4 expressive, saying appropriately. And math, being able
5 to process math. Same thing with the singular gyrus,
6 which is involved in kind of focusing your attention,
7 making you stay on task, things like that. He was
8 showing deficits in those abilities of being able to
9 maintain his attention.

10 Q. What's the singular gyrus, what is that?

11 A. Singular gyrus is a gyrus that's right on top of
12 the corpus callosum. So you'll see pictures of the
13 brain a little later. But the corpus callosum is this
14 white pathway. The first gyrus above it is called the
15 singular gyrus, singular cortex. And so, like I said,
16 it's very much involved in guided attention. So I
17 needed to focus on this. I need to not pay attention to
18 that, sorts of things. Temporal lobes, very much
19 involved with memory. We see with Chris that he had
20 troubles with visuospatial learning and memory.
21 Troubles with receptive communication and auditory
22 interpretation of social cues. Somebody says something
23 in an angry way; does he say, oh, they're happy, things
24 like that.

25 Q. And so, again, this is his ability to pick up on

1 social cues?

2 A. Yes.

3 Q. To figure out what's appropriate in situations?

4 A. Right. A couple of other areas where there were
5 comments about deviant electrical activity. The
6 parietal lobe, back here, which tends to be -- back
7 here, which tends to be sensory input, being able to
8 integrate the senses that you're getting. So visual, we
9 see the item, we feel it, things like that. You know,
10 touching and vision. So those sorts of skills that he
11 was showing deficits in. And the occipital lobe, which
12 is visual processing, taking visual information into the
13 system.

14 Q. And then you switch to a slide that's in summary.
15 And, again, talk about what you expected to see in the
16 domains?

17 A. Right. Well, like I said, we need to see at least
18 three domains that are in deficit per the CDC
19 Guidelines. We found eight domains that were in deficit
20 here, including the visuospatial construction
21 organization, visuospatial memory. Attention, focusing
22 and maintaining attention. The executive functions, the
23 lower structure executive functions especially.
24 Suggestibility, having troubles sticking to his guns, as
25 it were. Troubles with communication, both on other

1 person's observation and report from the Vineland and
2 from direct testing. Daily living skills, holding jobs,
3 things like that. And the social functioning, again,
4 both by other report and by lab testing. Overall,
5 that's a severe amount, a significant amounts of areas
6 of deficit. It's a severe functional impairment that
7 way.

8 Q. Of the eleven that you gave, there were only three
9 he didn't -- he did okay?

10 A. Yeah. He had deficits in all but three of the
11 domains, basically. And that's consistent with the
12 diagnosis from the DSM of cognitive disorder NOS, a
13 broad spectrum of deficits of cognitive impairments,
14 usually associated with some sort of underlying
15 neurological damage, brain damage. And the pattern in
16 the Brecht was very consistent with FAS, with what we
17 know about FAS from the literature and from the
18 diagnostic criteria.

19 Q. And you can't diagnose him with FAS?

20 A. I won't diagnose him with FAS, no.

21 Q. Or any of the other Fetal Alcohol Spectrum
22 Disorders?

23 A. Certainly not in these settings, I wouldn't do
24 that, no. That's a medical diagnosis.

25 Q. And FAS is not in the DSM; right?

1 A. No, it's not.

2 Q. It's a medical diagnosis and that's where Dr. Adler
3 comes in; right?

4 A. Yes.

5 Q. But based on a reasonable degree of medical or
6 psychological certainty was everything consistent in
7 your testing consistent with FASD deficits that you were
8 looking for?

9 A. Yes.

10 Q. Is there any other way to say that that you think
11 is ---

12 A. I found nothing that was inconsistent with FASD.
13 And I also -- he was showing the same pattern of
14 deficits across a lot of ages. He had an IQ test when
15 he was, I think, about seven or so and he showed the
16 same split. Also, Dr. Evans had done some testing?

17 Q. Right. Yeah. And I'm going to get there. Real
18 quick. That's okay. But based on a reasonable degree
19 of medical or psychological certainty, too, is there
20 anything else out there that all of this testing could
21 be consistent with besides Fetal Alcohol Spectrum
22 Disorder?

23 A. I didn't see anything in his report, in the
24 interview with him or the records that I was reviewing
25 that indicated another possible cause of this. He did

1 report a blow to the head when he was somewhere around
2 four or five. I don't think I ever saw any medical
3 records about that. And his report was he never lost
4 consciousness. He started screaming right afterwards.
5 So I don't -- the severity of that ---

6 Q. Well, even if he had a blow to the head, I assume
7 that would be sort of a specific to one area usually?

8 A. Potentially, it's specific to one area. It depends
9 on the extent of the head injury. They can be fairly
10 generalized.

11 Q. So asking you that same question based on a
12 reasonable degree of medical or psychological certainty,
13 would anything -- is there anything else out there that
14 you know that would explain all these impairments, all
15 these problems that he's dealing with?

16 A. No.

17 Q. Anything else you want to say about that?

18 A. (Negative nod).

19 Q. Now, you were going to go to the next slide. And
20 this current testing is consistent with past testing.
21 What does that show us?

22 A. So Dr. Evans did some testing in 2004 prior to the
23 initial trial.

24 Q. And that's Dr. Jim Evans.

25 A. Jim Evans.

1 Q. I know that Mr. Mauldin talked about that. So that
2 should be in the record. And you looked at that. And
3 what did you do?

4 A. So what I did was I took my chart and then I
5 plotted the scores that Dr. Evans had obtained from his
6 testing onto that same chart. So mine are still the
7 blue diamonds and lines. His are these dark squares.
8 And what you can see is that there's almost a complete
9 overlap in what he was finding in 2004, prior to the
10 trial, and what I was finding on a neuropsych testing
11 currently. IQ split, just the same. Good reading, bad
12 arithmetic. In fact, those are exactly the same scores.

13 Q. And you don't have -- and for the record, his are
14 the red squares. Yours are the blue line. You don't
15 have red squares above every test. Why is that?

16 A. Because he didn't administer all of the same tests
17 that I did.

18 Q. Okay. You administered the ---

19 A. And I didn't administer all of the tests that he
20 gave. There are a lot of tests that measure similar
21 sorts of things. So, for example, attention -- yeah,
22 here it is. Attention. I give one test, the CPT. He
23 gave another test called the IDA. They're measuring
24 similar things. They're looking for a person's ability
25 to focus their attention, which he was okay at being

1 able to just initially focus it. But his stamina and
2 his vigilance, meaning staying on task, were in the
3 impaired range, just like I found on my testing with the
4 CPT omissions. Similar sorts of issues with
5 visuospatial skills. He was finding deficits there. He
6 found more deficits in the processing speed than I did,
7 at least in one task that was very -- there. But he
8 also found the same sort of pattern. He did relatively
9 well in these higher structured tasks. He had much more
10 difficulties with the Wisconsin Card Sorting Test, the
11 problem solving test. But again, he was casting at
12 straws, trying all different kinds of things but not
13 getting them right. So the pattern of testing is almost
14 a perfect overlay between the testing done in 2004 and
15 the testing done now in 2012. In fact, you know,
16 counting up the domains of deficit, Dr. Evans would have
17 five domains that had deficits in them. Still clearly
18 above and beyond the criteria for the CDC.
19 Unfortunately, to the best of my knowledge, I don't
20 believe he was ever told about his motor histories.

21 MR. ZELENKA: Object. Calls for speculation.

22 THE COURT: Sustained.

23 Q. All right. So there were a couple of them that
24 appear to be a little bit different than your testing
25 and what could explain that?

1 A. One that was the most different was on his Trails
2 A, which is basically a connect the dot sort of test.
3 You go from number one to two, two to three, three to
4 four, throughout that. Same test probably that was
5 given back then as now. It's an old variable test.

6 Q. And when you say same, do you mean probably exactly
7 the same test?

8 A. Most likely exactly the same test, yes. It is a
9 very standard test that we give.

10 Q. All right.

11 A. And he did do much more poorly. He did it much
12 more slowly before. It was separated by a number of
13 years, of course. There could be some issues of
14 practice. He's seen it before, maybe he's a little bit
15 more attuned to it. Also, you know, there's also issues
16 that we see in Fetal Alcohol where there's variability
17 from one day to the next. I talk with parents all the
18 time and they talk about how today, he was able to get
19 it. He got it fine. This was perfect. Yesterday, he
20 had no clue what it was. Tomorrow, he has no clue
21 again. It comes and goes. It's variability isn't just
22 a cross test. It's within the test, across time.

23 Q. And is that similar in other brain problems,
24 damage, symptoms?

25 A. I don't recall seeing that very often in other