

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

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SEP 14 2015

S.C. Supreme Court

KANDY GILLIARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001425

APPENDIX

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INDEX

INDEX.....	i
TRIAL TRANSCRIPT DATED MAY 29 – JUNE 1, 2001.....	1
APPLICATION FOR POST-CONVICTION RELIEF 2005-CP-10-619	1152
RECONSTRUCTION HEARING DATED MARCH 13, 2015	1158
RECONSTRUCTION HEARING PCR EXHIBIT # 1.....	1205
RECONSTRUCTION HEARING PCR EXHIBIT # 2.....	1209
ORDER OF DISMISSAL (2005-CP-10-0619).....	1215
APPLICATION FOR POST-CONVICTION RELIEF (2012-CP-10-0383).....	1223
AMENDED PARTIAL RETURN AND MOTION TO DISMISS	1239
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED NOVEMBER 21, 2013 ...	1246
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED APRIL 15, 2014	1254
ORDER GRANTING <u>AUSTIN V. STATE</u> APPEAL (2012-CP-10-0383)	1260
ORDER GRANTING STATE’S MOTION TO DISMISS (2012-CP-10-0383)	1264
INDICTMENTS	1270

02:25:32 1 A. No. I --

02:25:32 2 Q. How long have you been doing that?

02:25:32 3 A. Well, I'm an assistant professor. I have

02:25:34 4 been at Irvine for four years, and I am about to be

02:25:38 5 promoted to associate professor. Three years prior

02:25:42 6 to being at Irvine, from 1994 to 1997, I was

02:25:46 7 employed at the University of Colorado at Boulder as

02:25:48 8 an assistant professor of sociology and an adjunct

02:25:54 9 professor of law.

02:25:58 10 Q. And pursuant to your job or your profession

02:26:00 11 as a professor there, do you teach classes to

02:26:04 12 students --

02:26:04 13 A. Correct.

02:26:04 14 Q. -- in this field?

02:26:06 15 A. Correct, both to undergraduates and to

02:26:06 16 graduate students.

02:26:10 17 Q. Can you describe for us a little bit about

02:26:12 18 the type of classes that you teach for the graduates

02:26:14 19 and undergraduates?

02:26:16 20 A. Sure.

02:26:16 21 Every year I teach a very large

02:26:18 22 introductory undergraduate course called

02:26:22 23 Introductory to Criminology Law and Society.

02:26:24 24 I teach two specialized upper-division

02:26:26 25 courses, one called Miscarriages of Justice, which

1002

02:26:30 1 is about how and why innocent people sometimes get 1004
02:26:36 2 wrongfully convicted and what can be done about
02:26:38 3 that.
02:26:38 4 I also teach a specialized upper-division
02:26:40 5 course called Interrogation Confession and the Law,
02:26:46 6 which is about police interrogation, the law,
02:26:48 7 Miranda, confessions, and policy issues related to
02:26:50 8 those topics.
02:26:52 9 And then at the graduate level I teach a
02:26:58 10 seminar every year, typically on some aspect of the
02:26:58 11 criminal justice system, whether it's on police, on
02:27:02 12 miscarriages of justice, or investigation.
02:27:06 13 The undergraduates, many of them want to go
02:27:08 14 on to have law enforcement careers. Some want to go
02:27:12 15 on to be lawyers. Others are undecided. The
02:27:14 16 graduate students are all pursuing a Ph.D., which is
02:27:16 17 a research degree, and either want to become
02:27:20 18 researchers for the Government or private
02:27:22 19 corporations or professors at universities and
02:27:26 20 colleges.
02:27:28 21 Q: So you teach a class to this type of
02:27:30 22 student, and you said that you teach a large seminar
02:27:36 23 which undergraduates would attend, people who have
02:27:38 24 an interest in this field.
02:27:40 25 A. Correct. Correct. One very large

02:27:40 1 undergraduate course, about 400 students; two
02:27:44 2 upper-division courses that are more specialized,
02:27:46 3 have about a hundred students each; and then a
02:27:52 4 graduate seminar every year, which typically has no
02:27:52 5 more than 15 or 20 students.

02:27:54 6 Q. And those are the people that probably are
02:27:56 7 going to go on to the field of researching in this
02:28:00 8 area or have a very specialized interest in this
02:28:02 9 area.

02:28:02 10 A. Correct.

02:28:04 11 Q. And I believe that you indicated that -- I
02:28:08 12 know you spoke earlier about your -- that you had
02:28:10 13 done some formal police interrogation training.
02:28:14 14 Didn't you also indicate that you had had the
02:28:16 15 opportunity to even teach or present some
02:28:22 16 information at a training session for police?

02:28:24 17 A. Correct. Two times in the last year, in
02:28:30 18 2000, once in March and another time in July, I was
02:28:32 19 invited to put on training sessions for police in
02:28:36 20 the area of interrogation and confession. The first
02:28:38 21 time was in Shreveport, Louisiana, in March of 2000,
02:28:44 22 and the second time was in San Antonio, Texas, in
02:28:46 23 July of 2000.

02:28:50 24 In September of 2000 I put on a full-day
02:28:52 25 training seminar in the Republic of Cyprus, near

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02:28:56 1 Greece, and I have also been invited to give 1006
02:28:58 2 lectures to police in China and at the Hayward
02:29:00 3 Police Department in Northern California.
02:29:04 4 Q. So these seminars that you have put on or
02:29:06 5 were asked to speak at, they were given by people
02:29:10 6 who were actually -- or organizations who were
02:29:14 7 actually training the police themselves?
02:29:16 8 A. Correct.
02:29:18 9 Q. And the participants in that program would
02:29:20 10 have been police officers?
02:29:22 11 A. Yes, exclusively police officers,
02:29:24 12 particularly police detectives.
02:29:26 13 Q. And your -- the information that you
02:29:30 14 provided to them, is that similar to the type of
02:29:34 15 stuff that you've indicated that your research has
02:29:36 16 been on and your articles have been on?
02:29:38 17 A. Yes. It's similar to -- obviously when I'm
02:29:42 18 making a presentation to police, I'm more
02:29:46 19 practically oriented than when I'm writing a purely
02:29:48 20 academic article. So I try to emphasize aspects of
02:29:54 21 my research that are most relevant to the work of
02:29:56 22 police officers. So it's similar and overlapping,
02:29:58 23 but a different emphasis.
02:30:02 24 Q. Is it fair to say that it has a lot to do
02:30:04 25 with technique?

02:30:04 1 A. Yes.

02:30:06 2 Q. And that it would have to do with the
02:30:10 3 actual mechanics of statements or interrogation or
02:30:14 4 confessions?

02:30:18 5 A. Yes. When I've given classes to police, I
02:30:18 6 have focused on three areas. The first area is what
02:30:24 7 can we take from the research in the field of
02:30:26 8 psychology that would help them get more confessions
02:30:32 9 in a way that is fair and legal, so how -- how can
02:30:36 10 what we know from psychological research help them
02:30:38 11 to do a better job at getting fair and legal
02:30:42 12 confessions that are truthful.

02:30:46 13 The second area is what do they need to
02:30:48 14 know to avoid using coercive techniques in having
02:30:52 15 their confessions excluded from courtroom
02:30:54 16 proceedings if the judge finds those techniques to
02:30:58 17 be coercive.

02:31:00 18 And then the third area that I cover in the
02:31:04 19 classes I have taught to police are the area of
02:31:06 20 false confessions, what are false confessions, how
02:31:08 21 do we know they occur, what techniques lead innocent
02:31:12 22 people to sometimes make false confessions, what can
02:31:14 23 police do to prevent eliciting false confessions,
02:31:22 24 what do they need to know so they never elicit a
02:31:22 25 false confession from an innocent suspect.

02:31:26 1 So those are the three areas that I cover.

02:31:26 2 All of them have to do with police techniques.

02:31:30 3 Q. And with regard to your involvement with

02:31:32 4 the police and these seminars that you have

02:31:36 5 presented, you have -- you had no problem ethically

02:31:42 6 dealing with the police even though most of what you

02:31:46 7 have researched has to do with police conduct?

02:31:48 8 A. Correct. No. I've done a great deal of

02:31:52 9 research on police. I spent a lot of time with

02:31:54 10 police. I have no ethical concerns in working with

02:31:58 11 the police, correct, or researching the police.

02:32:00 12 Q. With either working with them, researching

02:32:02 13 them, have you ever been contacted by any police

02:32:12 14 agency to look into or assist in any specific

02:32:14 15 statement or interrogation that occurred?

02:32:16 16 A. No. I've been contacted by prosecutors,

02:32:22 17 but never by police departments to evaluate police

02:32:24 18 interrogations or suspects' statements.

02:32:28 19 Q. Would you be opposed to working with

02:32:30 20 police?

02:32:30 21 A. No, not at all. I would welcome the

02:32:32 22 opportunity to work with police.

02:32:36 23 Q. And I believe you had indicated that at one

02:32:40 24 point the Federal Government had contacted you about

02:32:40 25 the Oklahoma bombing case?

02:32:44 1 A. Yes. I was contacted by a high-level
02:32:44 2 prosecutor in Denver. At the time I was working at
02:32:48 3 the University of Colorado in Boulder, and I believe
02:32:54 4 the issue had to do with the juries, and I was asked
02:32:58 5 whether I might be interested in being an expert
02:33:00 6 witness related to a jury issue. And I would have
02:33:00 7 loved to have been an expert witness in that case if
02:33:04 8 I could have been helpful to the prosecution, but
02:33:08 9 since I am not an expert on the jury -- I do teach
02:33:12 10 classes, and give lectures on the jury, but I felt
02:33:14 11 that I am not an actual expert on that topic, I
02:33:18 12 would be doing a disservice to the prosecution.

02:33:18 13 It turned out that one of the leading jury
02:33:20 14 experts in the world happened to be at the
02:33:24 15 University of Colorado in the Psychology Department,
02:33:26 16 and so I referred the -- that federal prosecutor to
02:33:30 17 my colleague in psychology at the University of
02:33:34 18 Colorado, and he became their expert on that issue.

02:33:38 19 Q. Thank you.

02:33:40 20 And I think that -- we know that you were
02:33:44 21 contacted by me, and I'm the attorney that
02:33:48 22 represents Kandi Gilliard. And we know that
02:33:50 23 pursuant to my contacting you, that you were
02:33:54 24 contacted to be -- to evaluate Ms. Gilliard's
02:33:58 25 statement that was given in her case.

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02:34:00

1

A. Correct.

02:34:04

2

Q. And pursuant to your involvement in this

02:34:06

3

case, I want to talk to you about a little bit about

02:34:08

4

your profession and your research and your

02:34:16

5

willingness to be contacted and consulted on cases

02:34:18

6

like this.

02:34:20

7

Would you -- is it fair to say that you are

02:34:26

8

contacted to consult on cases and that you are

02:34:28

9

retained or paid to consult on the cases?

02:34:30

10

A. Correct. I'm often contacted by attorneys,

02:34:38

11

primarily defense attorneys, to consult with them

02:34:40

12

about the police interrogation or interviewing

02:34:44

13

techniques and the statements that were made by

02:34:50

14

their clients and the quality or lack of quality or

02:34:52

15

evidence supporting the confession.

02:34:56

16

Many times attorneys call me on the phone,

02:35:00

17

and that terminates the consultation. Sometimes

02:35:02

18

attorneys send me records, and maybe I'll interview

02:35:08

19

their client or there will be a tape of the

02:35:12

20

interrogation and I will evaluate the case and share

02:35:14

21

my opinion with them and it will be clear that my

02:35:16

22

opinion or my thoughts are not helpful to them and

02:35:20

23

the consultation will end, and sometimes I consult

02:35:22

24

with attorneys. I review materials. I may

02:35:26

25

interview their clients or even interview the

02:35:28 1 interrogators and then go on to testify at pretrial
02:35:34 2 hearings, sometimes at trials before juries, and
02:35:42 3 sometimes, though less frequently, in posttrial
02:35:44 4 proceedings or postconviction proceedings.

02:35:48 5 Q. And pursuant to your consulting -- let's
02:35:52 6 discuss a little bit about your career. You are a
02:35:56 7 professor at UC Irvine, and of course you are paid
02:35:56 8 to do that. You receive a salary for doing that.

02:36:00 9 A. Correct. And there's three aspects to my
02:36:04 10 work as a professor. Research, so I'm supposed to
02:36:06 11 be gathering data, which I do, and then publishing
02:36:08 12 articles about my research, which I do.

02:36:10 13 The second aspect of my job at the
02:36:14 14 university is to teach, and we have already gone
02:36:14 15 over the classes that I teach.

02:36:16 16 And then the third aspect of my job at the
02:36:18 17 university is to do service, service to the
02:36:22 18 department, service to the school in which the
02:36:26 19 department is housed, service to the broader
02:36:28 20 university community, and sometimes even service to
02:36:32 21 institutions and organizations beyond the
02:36:34 22 university.

02:36:38 23 Q. And pursuant to your position, you receive
02:36:40 24 a salary.

02:36:42 25 A. That is correct.

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02:36:44

1

Q. And with -- the other aspect of your

02:36:48

2

professional life is that you do research, and I

02:36:50

3

believe in your resume you indicated that you have

02:36:54

4

received numerous grants to do research.

02:36:58

5

A. Many grants, correct, primarily from

02:37:02

6

universities.

02:37:02

7

Q. Basically equal money to do research.

02:37:06

8

A. That is correct.

02:37:08

9

Q. And so pursuant -- in your professional

02:37:14

10

life you receive a salary as a professor, you

02:37:14

11

receive grant money to continue to do research at

02:37:18

12

the university, and you also have a consulting

02:37:20

13

aspect of your professional life.

02:37:22

14

A. Correct.

02:37:24

15

Q. That's what we were talking about earlier,

02:37:26

16

that you were consulting in this case or you were

02:37:30

17

contacted as a consultant.

02:37:32

18

A. Correct.

02:37:36

19

Q. And pursuant to your role as a consultant,

02:37:36

20

you receive money or are paid, you are retained, to

02:37:38

21

consult.

02:37:40

22

A. Correct.

02:37:42

23

Q. Can you describe to us a little bit about

02:37:50

24

that aspect of your life and let us know a little

02:37:50

25

bit about how you are paid, things of that nature.

02:38:02 1 A. Well, I charge an hourly rate to consult,
02:38:02 2 review documents, review and analyze documents, and
02:38:08 3 when I testify and travel, I sometimes charge a
02:38:10 4 daily rate. So I usually get a retainer up front if
02:38:14 5 it's a privately retained individual. I usually
02:38:18 6 don't get a retainer if it's a public defender
02:38:24 7 organization or a court-appointed attorney, and then
02:38:28 8 at the end of the case I will add up my time and
02:38:30 9 submit a bill to the attorney and usually, but not
02:38:32 10 always, get paid.

02:38:34 11 Q. I understand.

02:38:36 12 And in this case you were retained as a
02:38:38 13 consultant, and I believe the specifics of this case
02:38:40 14 are there is a court order related to your services
02:38:44 15 in this case.

02:38:44 16 A. Correct.

02:38:46 17 Q. You have not received any money up front to
02:38:48 18 consult in this case.

02:38:52 19 A. That is correct.

02:38:56 20 Q. And however, you do intend to, after this
02:38:58 21 case is over, to submit a bill.

02:38:58 22 A. Correct.

02:39:00 23 Q. And I believe you said you hope to get
02:39:02 24 paid.

02:39:04 25 A. Yes.

02:39:06

1

Q. Okay. And with regard to your consulting

02:39:10

2

business, I believe we said earlier that most of the

02:39:14

3

people who contact you regarding your consulting are

02:39:18

4

criminal defense lawyers?

02:39:20

5

A. Correct. I have also been contacted by

02:39:22

6

civil attorneys occasionally.

02:39:26

7

Q. Civil attorneys?

02:39:26

8

A. Correct, and occasionally prosecutors, but

02:39:30

9

primarily defense attorneys who either work for

02:39:32

10

public defender organizations or are appointed to

02:39:38

11

represent people by the state or who represent --

02:39:38

12

represent defendants privately.

02:39:42

13

Q. And let's talk a little bit more about this

02:39:48

14

consulting business.

02:39:48

15

I think you had said before that there have

02:39:52

16

been prosecutors. Also you said at one point the

02:39:56

17

Federal Government or the federal prosecutors have

02:39:58

18

contacted you to consult before.

02:40:00

19

A. Correct, you know, on a --

02:40:02

20

Q. Now --

02:40:04

21

A. On just a few cases. A prosecutor

02:40:08

22

contacted me in Colorado, and I was all set to

02:40:12

23

consult with him, but it turned out that Professor

02:40:16

24

Richard Ofshe of UC Berkeley, with whom I had been

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25

writing articles at the time, had been retained by

02:40:20 1 the defense, so I felt that was a conflict of
02:40:24 2 interest and because of our close research
02:40:24 3 relationship. So I referred that case to another
02:40:28 4 expert.

02:40:30 5 And recently I have been contacted by two
02:40:32 6 prosecutors, one in Washington, D.C., one in Napa,
02:40:38 7 California, both of whom indicated they were going
02:40:42 8 to send me materials and were interested in having
02:40:44 9 me testify. They were both gang cases, if I
02:40:48 10 remember correctly. But I haven't heard back from
02:40:48 11 them. So I don't know if they are going to contact
02:40:52 12 me or they decided not to use me.

02:40:52 13 But those are the instances that I can.
02:40:58 14 recall where I have been contacted by prosecutors in
02:40:58 15 addition to the Oklahoma City bombing case.

02:41:00 16 Q. And in the event that someone contacts you
02:41:06 17 and asks you to review a file, you said earlier that
02:41:10 18 you review it, you review documents, you may talk to
02:41:14 19 the person involved, you may talk to the
02:41:16 20 interrogators involved.

02:41:16 21 A. Correct.

02:41:18 22 Q. You will review -- I guess my question is
02:41:22 23 do you have any specific group of people that you
02:41:24 24 will review this for as opposed to any other --

02:41:28 25 A. No. No. I would --

02:41:30

1

Q. -- in the way you approach this?

02:41:34

2

A. No, I do not. I would be happy to consult

02:41:38

3

with prosecutors. I would be happy to consult with

02:41:40

4

defense attorneys, with civil attorneys. There's no

02:41:46

5

one particular group that I favor or disfavor.

02:41:46

6

When I'm contacted by anybody, the question

02:41:52

7

is can I be helpful to you, and sometimes I have to

02:41:54

8

review materials to arrive at an opinion so that

02:41:56

9

that question could be asked, but as long as I can

02:42:00

10

be helpful to an attorney, whether they work for the

02:42:04

11

police or the prosecutors or a private attorney or a

02:42:08

12

civil attorney, I have no biases in any particular

02:42:10

13

direction.

02:42:12

14

Q. And with regard to your testimony, you've

02:42:16

15

testified in court before?

02:42:18

16

A. Correct.

02:42:20

17

Q. And you've testified a number of times

02:42:22

18

before.

02:42:22

19

A. Correct. I believe I have testified 53 or

02:42:26

20

54 times in 13 states to date in state, federal, and

02:42:32

21

military courts.

02:42:36

22

Q. And there have been occasions that you've

02:42:40

23

been called as a witness that your testimony has not

02:42:42

24

been admitted.

02:42:44

25

A. That is correct. There have been a couple

02:42:44 1 of occasions or actually three that I can think of
02:42:48 2 where the testimony was not -- was not -- the judge
02:42:52 3 decided not to let the testimony in or not let the
02:42:54 4 defense attorney pursue questioning, correct.

02:43:02 5 Q. And with regard to your testimony, is it
02:43:02 6 fair to say that every time you've testified, you've
02:43:04 7 testified on behalf of a defendant as opposed to the
02:43:10 8 state or the police or a prosecutor?

02:43:14 9 A. Correct, except a few of the cases have
02:43:16 10 been civil cases, so I believe I testified on behalf
02:43:18 11 of the plaintiff in those cases. But in all
02:43:22 12 criminal cases I've testified for the defense,
02:43:24 13 correct.

02:43:24 14 Q. Can you describe to us a little bit -- I
02:43:26 15 think we're clear on the fact that you would testify
02:43:30 16 if called by either a prosecutor or the police or
02:43:36 17 whoever, but could you describe to us a little bit
02:43:36 18 about why the only people you've actually testified
02:43:40 19 for are on behalf of either civil plaintiffs --
02:43:44 20 let's just talk about the criminal cases -- criminal
02:43:48 21 defendants?

02:43:52 22 A. Well, I'm rarely contacted by prosecutors.
02:43:52 23 I think that if the prosecution feels they have a
02:44:00 24 strong confession, they don't need to introduce an
02:44:00 25 interrogation or a confession expert before the jury

02:44:06 1 to say they have a strong confession. If the -- in
02:44:06 2 many of the cases I'm contacted by defense attorneys
02:44:10 3 and my opinion is not helpful to them because I see
02:44:14 4 no problems or potential problems with the
02:44:14 5 interrogation or confession, and so I never hear
02:44:18 6 back from them, and I don't testify on their behalf
02:44:20 7 in court. So many of the cases I'm contacted in
02:44:30 8 by defense attorneys I never end up testifying in
02:44:30 9 court because my opinion cannot be helpful to them,
02:44:36 10 but I'm rarely in those cases contacted by
02:44:38 11 prosecutors.

02:44:40 12 Q. When you say your opinion is not helpful,
02:44:40 13 is it fair to say that it's because you don't see
02:44:44 14 any breach of the technique or something like that?
02:44:50 15 Can you elaborate for me?

02:44:52 16 A. Yes.

02:44:52 17 There are three areas primarily in which I
02:44:54 18 testify, issues related to the Miranda warnings,
02:44:58 19 issues related to coercion and voluntariness and
02:45:02 20 which techniques may lead to a coercive confession
02:45:08 21 or involuntary confession, and then third, about the
02:45:08 22 whole phenomena of unreliable or inaccurate or false
02:45:14 23 admissions or confessions. In some cases, in many
02:45:18 24 cases, that I consult with attorneys on, there isn't
02:45:20 25 any Miranda issue or violations. I don't see any

02:45:24 1 coercion or voluntariness issues that I can be
02:45:30 2 helpful with and I don't testify or I can't be
02:45:30 3 helpful on the topic of unreliable or false
02:45:34 4 confessions, and so the attorney would decide not to
02:45:38 5 use me in any pretrial or trial proceeding as a
6 result.

02:45:44 7 Q. Okay. Let me back up a minute.

02:45:46 8 When you are contacted by a defense
02:45:48 9 attorney, it's your understanding that they are
02:45:52 10 presenting you with a case where they believe there
02:45:56 11 has either been Miranda warning violations,
02:45:58 12 coerciveness, something affecting the voluntariness
02:46:04 13 of the statement or the statement or the confession
02:46:06 14 itself. These would be the reasons they would
02:46:06 15 contact you.

02:46:08 16 A. Correct. It may be that the statement is
02:46:08 17 partially unreliable. It may be that they want to
02:46:16 18 explain -- have me explain to a jury how and why
02:46:16 19 certain methods could have led a particular suspect
02:46:20 20 to say or do things that he or she did even if
02:46:24 21 there's no full-fledged confession or there's some
02:46:26 22 question about whether or not a confession was
02:46:28 23 really made, but those are the three areas that I
02:46:30 24 tend to be called to consult and evaluate on.

02:46:34 25 Q. And you indicated that there was some -- I

02:46:38

1 believe you said 500 -- how many cases would you say

02:46:44

2 that you have actually reviewed? 500 to 600 cases?

02:46:44

3 A. Somewhere between 500 and 600, yes.

02:46:48

4 Q. And since you have been consulting, how

02:46:52

5 many would you say that you've reviewed?

02:46:54

6 A. Probably about 200 or 250, probably closer

02:47:00

7 to 250.

02:47:04

8 Q. And so in the 250 cases, some of those

02:47:04

9 cases you determined there were no Miranda

02:47:10

10 violations, there was no coercion, or it wasn't an

02:47:14

11 unreliable confession, and that's the opinion you

02:47:16

12 gave to the person who contacted you.

02:47:18

13 A. Yes, or that there is nothing helpful I

02:47:20

14 could say about any of those topics based on the

02:47:24

15 materials that I had reviewed -- they had given me

02:47:26

16 to review.

02:47:30

17 Q. When you say "helpful," I just want to

02:47:30

18 clarify it. You know that they -- they're

02:47:34

19 contacting you to get your opinion because of the

02:47:36

20 fact that you have specialized knowledge and have

02:47:40

21 done research in this area.

02:47:40

22 A. Correct.

02:47:42

23 Q. And so when you give them an opinion as to

02:47:48

24 these three areas that you've discussed, you are

02:47:56

25 giving them an opinion. It's how they determine how

02:48:00 1 that's helpful of what your opinion is; isn't that
02:48:02 2 true?

02:48:02 3 A. Correct, because -- because I've done so
02:48:06 4 much consultation and testifying in this area, and
02:48:08 5 because sometimes the attorneys are using an
02:48:12 6 interrogation or a confession expert for the first
02:48:16 7 time or haven't litigated many confession cases,
02:48:16 8 they may -- they may seek broader advice about
02:48:20 9 whether I think my opinions could be helpful to them
02:48:24 10 or damaging to them, but it is their decision
02:48:26 11 ultimately to make, correct.

02:48:28 12 Q. And so of the 250 cases that you've
02:48:34 13 reviewed, you said that you -- how many of those or
02:48:36 14 what percentage of those would be considered
02:48:38 15 something where you saw a problem?

02:48:44 16 A. Probably 60 percent of the cases that I
02:48:48 17 review, maybe a little bit more. That would just be
02:48:48 18 a rough guess, a little bit more than half of the
02:48:54 19 cases that are sent to me, which, of course, would
02:48:54 20 only be sent to me if a defense attorney thought
02:48:58 21 that there was a problem in the first place. So I'm
02:49:00 22 sure that the percentage of cases that I see in
02:49:04 23 consulting where there are problems is much higher
02:49:06 24 than the percentage of cases in the general
02:49:10 25 population of interrogations. But that would be my

02:49:12 1 best guess, 60, maybe 65 percent of the cases.

02:49:16 2 There are --

02:49:18 3 Q. And that would be because -- that would be

02:49:18 4 because the people who are sending it to you are

02:49:24 5 familiar with these areas also, and as you said,

02:49:26 6 they are sending it to you because they believe

02:49:28 7 there might be a problem, and they want your

02:49:28 8 opinion.

02:49:30 9 A. Correct. They've prescreened the case,

02:49:32 10 correct.

02:49:36 11 Q. Right. And so of the ones that you've --

02:49:38 12 the cases that you have indicated that there was a

02:49:38 13 problem, you said that you have testified 53 or 54

02:49:42 14 times.

02:49:42 15 A. Correct.

02:49:44 16 Q. And the rest of the cases that you have

02:49:48 17 reviewed, you either said that there was nothing

02:49:48 18 that you saw that was a problem or they just chose

02:49:52 19 not to call you as a witness.

02:49:54 20 A. Correct, or that there was nothing -- there

02:49:56 21 was -- because of the circumstances of the case or

02:49:58 22 the limitations of the materials that I had

02:50:04 23 reviewed, there was really nothing I could say that

02:50:04 24 was helpful to them, correct.

02:50:06 25 Q. And helpful in the sense that there was no

02:50:10 1 Miranda violations, there was no coercion, or it
02:50:12 2 wasn't an unreliable confession.
02:50:14 3 A. Correct, or there was no explanation that I
02:50:16 4 could help the jury with if they sought an
02:50:20 5 explanation of how and why certain things occurred
02:50:24 6 in the interrogation.
02:50:28 7 Q. And with regard to your testimony, I think
02:50:34 8 you said that -- I mean certainly we know that you
02:50:36 9 were contacted by me --
02:50:38 10 A. Yes.
02:50:40 11 Q. -- on Ms. Gilliard's behalf.
02:50:40 12 A. Correct.
02:50:40 13 Q. And that you were asked to review a certain
02:50:42 14 set of facts.
02:50:42 15 A. Correct.
02:50:44 16 Q. And pursuant to that fact, you are here
02:50:48 17 today and we are in the process of doing this
02:50:52 18 deposition.
02:50:52 19 A. Correct.
02:50:54 20 Q. So she would be one of the 250 that you
02:50:56 21 indicated the information that you could provide may
02:51:00 22 be helpful.
02:51:02 23 A. Correct.
02:51:04 24 Q. And she's also one of the 53 or 54 that we
02:51:08 25 have asked you to come and testify.

02:51:12 1 A. Well, I actually didn't include that. I've
02:51:16 2 testified prior to today 53 or 54 times. So I
02:51:18 3 didn't include that in the number. I guess it would
02:51:20 4 go up to 54 or 55 after today.

02:51:24 5 Q. Now, one thing about this particular area,
02:51:28 6 this area that you specialize in, I believe you've
02:51:38 7 indicated that your specialization is in police
02:51:38 8 interrogation and false confessions, miscarriage of
02:51:44 9 justice, police organizations and behavior, coercive
02:51:46 10 persuasion, things of that nature. That's your
02:51:50 11 specialization.

02:51:50 12 A. Correct.

02:51:50 13 Q. And with regard to that particular
02:51:56 14 specialization, the type of information that you
02:51:58 15 have researched that forms the basis of your studies
02:52:02 16 or your science, we'll call it, can you tell us a
02:52:06 17 little bit about where that information comes from?

02:52:12 18 A. Well, in all scientific fields the
02:52:14 19 information comes from the literature. So in this
02:52:16 20 area, which is an applied area of research and
02:52:22 21 criminology and social psychology, the studies go
02:52:28 22 back to 1908. There have been numerous studies in
02:52:28 23 peer-reviewed journals that are published and then
02:52:32 24 disseminated to the scientific or social scientific
02:52:34 25 community. So whenever you begin researching an

02:52:38 1 area, you begin with the research literature and the
02:52:42 2 findings that have been published and the
02:52:44 3 theoretical models and the research questions and
02:52:46 4 general principles, based on all those findings that
02:52:50 5 have been published to date, and then -- and then
02:52:56 6 you try to advance that research literature and the
02:52:58 7 understanding of the particular problem.

02:53:00 8 So I'm familiar with the literature. I
02:53:02 9 have done a great deal of research in the area. I
02:53:04 10 have kept up with the literature. That's where my
02:53:06 11 knowledge of these topics has come from, and when I
02:53:08 12 say I have done a lot of research, it's all the
02:53:14 13 stuff I described earlier, from taking the police
02:53:14 14 training courses, to observing interrogations, to
02:53:16 15 analyzing police files and other documents.

02:53:22 16 Q. And the field itself, there's no
02:53:28 17 quantitative way or scientific experiments that you
02:53:34 18 can accomplish in this field, is there?

02:53:36 19 A. Well, it depends. So yes and no. In terms
02:53:40 20 of quantitative, quantitative just means the ability
02:53:44 21 to count something. We -- if we get access as
02:53:46 22 researchers to interrogations, we can certainly
02:53:50 23 count the number of techniques that are used or how
02:53:54 24 many interrogations were inappropriately done or
02:53:56 25 what percentage of interrogations led to

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02:53:58 1 convictions. That's if we get access. So we can
02:54:02 2 quantify what we see if we do studies of police
02:54:06 3 interrogation.
02:54:08 4 With regard to false confessions, which is
02:54:10 5 only one part of my research on police
02:54:12 6 interrogation, we have not been able to come up with
02:54:14 7 a rate of how many people falsely confess. We don't
02:54:18 8 know if it's one in a hundred, one in a thousand,
02:54:20 9 one in a million. We don't know because we don't
02:54:22 10 have the resources and the access to national police
02:54:26 11 departments to commission a scientific study that
02:54:30 12 would give us that information, just like when
02:54:32 13 somebody goes to vote, you know, we do have the
02:54:34 14 resources and information to know within a margin of
02:54:38 15 error what percentage is going to vote for one
02:54:40 16 candidate versus another candidate because we have
02:54:44 17 the resources and access. We know the crime rate
02:54:46 18 within a certain margin of error, but we don't have
02:54:48 19 that quantitative information for false
02:54:50 20 confessions.
02:54:52 21 With regard to experiments, there are some
02:54:54 22 experiments that are done in this area. The problem
02:54:56 23 is that every university has what's known as a human
02:55:00 24 subjects committee, and before you can do any
02:55:02 25 experimental research, you have to submit an

02:55:06 1 application to the human subjects committee, whose
02:55:08 2 mandate is to make sure that no subjects are harmed
02:55:12 3 by the research. And so they have to approve your
02:55:16 4 research before you can do it, and as a result, we
02:55:22 5 are not allowed to do very much inside an
02:55:26 6 experimental laboratory at a university that would
02:55:28 7 replicate the conditions of interrogation,
02:55:30 8 especially stressful or potentially coercive
02:55:34 9 conditions of interrogation. So we are limited in
02:55:38 10 what we can do to very low-level interaction that
02:55:42 11 does not adequately simulate what occurs in
02:55:48 12 high-pressure interrogations. So there is some
02:55:50 13 experimental research, but it's at a very low level,
02:55:54 14 and it does not always represent what goes on during
02:56:02 15 many high-pressure interrogations.

02:56:04 16 Q. When you refer to high-pressure
02:56:04 17 interrogations, a good bit -- and I know we have
02:56:08 18 discussed this earlier -- but a good bit of your
02:56:10 19 research has to do with the pressure and/or the
02:56:12 20 setting of the interrogation itself.

02:56:14 21 A. Correct. Interrogations occur in police
02:56:16 22 departments, in interrogation rooms. Police are
02:56:20 23 taught and trained to use specialized techniques to
02:56:22 24 bring to bear certain pressures, to move somebody
02:56:26 25 from denial to admission, and I'm focused as a

02:56:30 1 social psychologist on that entire influence or

02:56:32 2 persuasion, sometimes coercive process.

02:56:38 3 Q. And I believe you said that because of the

02:56:40 4 fact that you would not be allowed to put somebody

02:56:44 5 under that type of stressful situation, you cannot

02:56:46 6 then recreate that situation to determine how

02:56:50 7 somebody will react in a study --

02:56:54 8 A. Correct.

02:56:54 9 Q. -- or in an experiment.

02:56:56 10 A. Correct. In many of the cases that I

02:56:56 11 review there is a videotape or an audio tape and a

02:57:02 12 transcript, and if I just tried to recreate through

02:57:04 13 the use of undergraduate students exactly what I

02:57:10 14 observed and read about in that transcript, I would

02:57:10 15 be in violation of university policy as well as

02:57:12 16 federal law. So I typically cannot reconstruct in a

02:57:18 17 laboratory what goes on in many of the high-pressure

02:57:20 18 interrogations that I study.

02:57:22 19 Q. And other people in this field also have

02:57:26 20 the same limitations?

02:57:26 21 A. That is correct. Some people are -- some

02:57:28 22 people are more enthusiastic about conducting

02:57:34 23 experiments despite the limitations, and others are

02:57:36 24 more sceptical given the mismatch between what you

02:57:42 25 can do in a laboratory and what often happens in a

02:57:44 1 police interrogation room.

02:57:46 2 Q. Is it fair to say that the most common

02:57:54 3 approach is that it's not an appropriate thing to

02:57:58 4 try to recreate?

02:57:58 5 A. Correct.

02:58:00 6 Q. The accepted policy?

02:58:02 7 A. Well, correct. I mean universities -- most

02:58:02 8 universities, research universities, take federal

02:58:06 9 money, and pursuant to the legal regulations

02:58:12 10 regulating the federal money, they have to comply

02:58:14 11 with human subjects standards, and they also have

02:58:20 12 their own -- their own internal standards. And so

02:58:22 13 if I wanted to try to replicate the stressful

02:58:26 14 conditions of a high-pressure interrogation, I could

02:58:30 15 certainly put an application in to the university

02:58:32 16 human subjects committee. It would almost certainly

02:58:36 17 be denied.

02:58:38 18 Q. I understand.

02:58:42 19 And I believe that you stated that when we

02:58:48 20 first talked about this that there isn't really a

02:58:50 21 way to give any numbers or any percentage rates or

02:58:56 22 anything like that of how people in any type --

02:58:58 23 imagine you had a situation where you had a sampling

02:59:02 24 of society and a certain percentage of them are

02:59:04 25 going to react one way and a certain percentage of

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02:59:08 1 them are going react another and a certain
02:59:10 2 percentage are going to cave in, if we want to call
02:59:12 3 it that, to coercive practices and a certain
02:59:14 4 percentage aren't. That type of process that can
02:59:20 5 sometimes be applied to other areas of science, can
02:59:22 6 that be applied to this area?

02:59:28 7 A. No, not at least with regard to false
02:59:30 8 confessions, not yet. We don't have the resources
02:59:32 9 or the commitment from police departments across the
02:59:38 10 country to be able to study the phenomena of false
02:59:40 11 confession in a way that would allow us to get a
02:59:44 12 rate, a scientifically valid statistic where we
02:59:48 13 could say one percent or two percent or ten percent
02:59:54 14 of cases involve partially or entirely false
02:59:54 15 statements. Science always and social science
02:59:58 16 always has to make the best of the information that
03:00:00 17 it has. Some sciences, like astronomy and
03:00:04 18 paleontology, for example, cannot do experiments,
03:00:08 19 whereas others, like psychology and biology or -- I
03:00:12 20 should say chemistry, physics, have that
03:00:14 21 opportunity.

03:00:14 22 So each field because of the nature of the
03:00:18 23 problem and the ethical limitations of certain types
03:00:20 24 of research strategies are limited or have different
03:00:24 25 limitations. That doesn't hinder science from going

03:00:26 1 forward. It only means that we have to use the best
03:00:30 2 methods that are suited to the task and be up front
03:00:32 3 and honest about the limitations of what we can
03:00:34 4 study.

03:00:36 5 Q. Okay. I know that some people would say
03:00:40 6 that this material and this research that you do or
03:00:46 7 this area of science that you specialize in is
03:00:48 8 subjective. Can you describe to us what
03:00:52 9 "subjective" is?

03:00:54 10 A. Well, "subjective" means just the assertion
03:00:56 11 of opinion as if there are no commonly accepted
03:01:00 12 principles, no conventional wisdom, no procedures to
03:01:04 13 guarantee that the knowledge that's generated is
03:01:06 14 generalizable across cases. It's certainly true
03:01:14 15 that social science sometimes does not have the
03:01:20 16 level of precision that some sciences do, like
03:01:20 17 chemistry or physics, because of the methods
03:01:24 18 available or the nature of the -- the nature of
03:01:26 19 what's being studied, people, who move and change
03:01:28 20 and are not always straightforward to study. But
03:01:34 21 it's not true that the study of psychology or
03:01:38 22 criminology or how those disciplines study
03:01:42 23 interrogation and confession are subjective. We
03:01:48 24 have the peer review process. We have --

03:01:48 25 Q. Can you describe that?

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03:01:50 1 A. The peer review process means that whenever
03:01:50 2 we submit an article for publication, it has to be
03:01:54 3 reviewed by our peers before it's published for the
03:01:58 4 adequacy of the methods, the originality and
03:02:02 5 innovation of the findings, and if the people who
03:02:06 6 review the article -- my articles are peer
03:02:12 7 reviewed. I serve as a peer reviewer for others.
03:02:14 8 If the people who review the articles find no merit
03:02:16 9 in it or problems with it, they will recommend that
03:02:18 10 it's rejected for publication.
03:02:20 11 So one mechanism in the social science
03:02:24 12 community for finding -- for guaranteeing findings
03:02:28 13 that are more objective or generalizable is to have
03:02:32 14 a peer review process.
03:02:38 15 There's also a training and certification
03:02:38 16 process. People have to go through graduate school,
03:02:44 17 get Ph.D.s, pass exams, work under the tutelage of a
03:02:48 18 professor, write a dissertation that passes muster
03:02:54 19 in accordance with the generally accepted practices
03:02:56 20 of a particular scientific discipline.
03:02:58 21 There's also the process of presenting
03:03:06 22 one's work at professional meetings, which typically
03:03:08 23 happens as your research is in progress, and
03:03:10 24 soliciting informal peer review. There's also what
03:03:14 25 occurs after something is published.

03:03:16 1 So there are -- and there's also methods,
03:03:18 2 methods of social science, whether it's experiments
03:03:22 3 or interviews or documentary analysis or field
03:03:26 4 research. These methods are all regarded as
03:03:30 5 scientific methods. They have strengths,
03:03:34 6 weaknesses. In some contexts they are more
03:03:36 7 appropriate than other contexts, but these methods
03:03:38 8 are taught, as are their limitations, and the most
03:03:46 9 important thing is for a researcher to use the
03:03:46 10 appropriate methods in a professional manner, and if
03:03:48 11 the researcher does that, the findings should not be
03:03:54 12 subjective, although in some areas they may be
03:03:54 13 limited, and if they are, it's incumbent upon the
03:04:02 14 researcher to articulate the limitations of the
03:04:02 15 research.

03:04:02 16 THE VIDEOGRAPHER: We need to change
03:04:04 17 videotapes in about three minutes.

03:04:06 18 MS. GAY: Okay. All right. We'll take a
03:04:08 19 break.

03:04:10 20 THE VIDEOGRAPHER: Okay. We are now going
03:04:12 21 off the record at 3:05.

03:04:14 22 (A recess was taken.)

03:14:38 23 THE VIDEOGRAPHER: We are now going back on
03:14:58 24 the record. The time is 3:15 -- 16. I'm sorry.

03:15:06 25 MS. GAY: Should I begin?

03:15:08 1 THE VIDEOGRAPHER: Yes. Now on the
03:15:10 2 record.
03:15:10 3 BY MS. GAY:
03:15:10 4 Q. Mr. Leo, going back to where we were at, I
03:15:12 5 believe we were discussing that sociology is a
03:15:18 6 science and that it wasn't -- that you don't believe
03:15:22 7 that that's a subjective science, that you do
03:15:22 8 believe that there's some objective criteria,
03:15:26 9 training process, et cetera, that does take it out
03:15:32 10 of the subjective side and put it into more of an
03:15:32 11 objective field.
03:15:36 12 A. Right. It's -- the problem is the term
03:15:38 13 "subjective" is misleading. It creates a certain
03:15:40 14 impression. All sciences involve interpretation,
03:15:46 15 some ambiguities, debate, disagreement, but that
03:15:48 16 doesn't make something subjective. There are
03:15:52 17 procedures in place that are guaranteed to produce
03:15:56 18 valid and reliable findings that can be generalized
03:15:58 19 across settings.
03:16:00 20 Q. And pursuant to your research in this area
03:16:02 21 and your training and exposure, do you believe that
03:16:08 22 findings in this field could be valid?
03:16:10 23 A. Yes.
03:16:12 24 Q. And one of the things I wanted to ask you
03:16:14 25 is back about the number of cases that you've

03:16:18 1 reviewed.

03:16:20 2 Is it fair to say that a large percentage

03:16:20 3 of the cases that you have reviewed have been cases
03:16:24 4 involving murder?

03:16:26 5 A. Yes. I haven't broken it down, but I tend
03:16:30 6 to -- I tend to consult on the most serious cases,
03:16:32 7 either murder or rape or alleged child sexual abuse,
03:16:38 8 or some other felony, serious felony crime. That's
9 correct.

03:16:44 10 Q. And I'm going to take you into a different
03:16:48 11 area now. What I would like to go into is the
03:16:54 12 full -- I believe we have discussed the science that
03:16:54 13 you do and the background information. You have
03:16:58 14 referred a number of times to some police
03:17:02 15 technique. I believe you said your specialization
03:17:06 16 is police interrogation, and what I would like for
03:17:08 17 you to do is describe a little bit about that
03:17:16 18 process, the police techniques and training that
03:17:16 19 you've observed about the interrogation process.

03:17:18 20 A. Well, police are typically trained when
03:17:20 21 they promote from patrol officers to detective in
03:17:26 22 interrogation techniques. These are techniques
03:17:28 23 they're trained to use when they're questioning
03:17:32 24 somebody who is considered a suspect for the purpose
03:17:36 25 of overcoming their anticipated denials and moving

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03:17:38 1 them to make an admission or a full-blown
03:17:42 2 confession, and the techniques have developed in the
03:17:46 3 last 50 years. They are not only taught in training
03:17:50 4 courses, but also in their interrogation training
03:17:54 5 manuals. Some departments rely on in-house
03:17:56 6 materials. Other departments rely on published
03:17:58 7 books. And the idea behind the interrogation is to
03:18:04 8 convince somebody that they're caught, there's no
03:18:06 9 way out, there's all this evidence against them,
03:18:10 10 it's not going to change, and then to offer them
03:18:14 11 some kind of inducement that makes them think that
03:18:14 12 given that there's no way out, they're caught,
03:18:16 13 they're going to get arrested, convicted, they will
03:18:20 14 be much better off if they cooperate with the police
03:18:22 15 officer and make an admission or a confession or
03:18:24 16 just agree to the count that's being presented by
03:18:30 17 the police officers, and all the techniques of
03:18:32 18 interrogation go toward those goals: attacking
03:18:36 19 somebody's alibi; accusing them of committing the
03:18:40 20 crime; cutting off their denials; confronting them
03:18:42 21 with evidence, whether it's real or made up, of the
03:18:48 22 crime; appealing to God or religion or the judge or
03:18:50 23 the jury or portraying a crime in a particular way
03:18:52 24 that makes it seem less culpable, but telling the
03:18:58 25 suspect that if they don't agree to that now in the

03:19:02 1 interrogation room, people are going to see them in
03:19:02 2 the worst possible light.
03:19:02 3 These are all techniques, and there are
03:19:04 4 others that are intended to cause somebody to think
03:19:08 5 I'm not going to be able to escape arrest or
03:19:10 6 conviction given what they have told me. They're
03:19:14 7 not believing my story. No one is going to believe
03:19:18 8 my story. I'd better tell them what they want to
03:19:18 9 hear. In fact, they're telling me I will be better
03:19:20 10 off if I agree with them or tell them what they want
03:19:24 11 to hear and make an admission or a confession.
03:19:26 12 The reason police go to these specialized
03:19:28 13 training schools is because it's very difficult to
03:19:30 14 get somebody to make an admission or a confession.
03:19:36 15 It's never in anybody's self-interest to make an
03:19:38 16 admission or a confession, and so they anticipate
03:19:38 17 the person will deny, whether they are innocent or
03:19:44 18 guilty, they will deny what they are being accused
03:19:46 19 of. And so certain psychological strategies have to
03:19:52 20 be used to get the suspect to perceive their
03:19:54 21 situation differently and come around to wanting to
03:19:58 22 make an admission or a confession, which presumably
03:20:00 23 at the beginning of interrogation nobody wants to
03:20:02 24 do, whether they're innocent or guilty.
03:20:08 25 Q. All right. So let me break down a little

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1 bit about what you said.

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2 First of all, you've described some of the

03:20:18

3 techniques and the process, and before he get there,

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4 I just want you to describe how -- I believe you

03:20:22

5 referred to it as the techniques that have been

03:20:26

6 around for 50 years that have either individualized

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7 training manuals or use published books. Describe a

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8 little bit about how this -- how have you come

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9 across this information. I mean is it -- you

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10 indicated that you were a part of a training

03:20:42

11 program. Was this type of information what was

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12 covered there?

03:20:44

13 A. Well, yes. In all the training seminars

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14 that -- and classes that I have taken, material has

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15 been distributed or advertised, and so -- and I have

03:20:56

16 read all the police interrogation training manuals

03:20:58

17 in the country, which is part of the literature

03:21:00

18 review that I did when I began studying this

03:21:02

19 process. So I have read all these manuals. They go

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20 back to 1942. They -- many of them are still in

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21 press, so anybody could buy them, although only

03:21:14

22 police officers do and libraries. And then at the

03:21:18

23 training sessions there have been handouts, booklets

03:21:22

24 that have been passed out, and I have also studied

03:21:26

25 those. And typically police are provided with one

03:21:28 1 or the other, either materials that have been
03:21:30 2 assembled in in-house training courses or published
03:21:36 3 materials that are part of some school or
03:21:40 4 corporations teaching seminars or classes in this
03:21:40 5 area.

03:21:42 6 Q. I think you referred to the Reid -- Reid
03:21:46 7 program. You said that was a national company that
03:21:48 8 trains police and interrogators throughout this
03:21:52 9 country?

03:21:54 10 A. Correct. John Reid is the second author of
03:22:00 11 the police interrogation training manual by Fred
03:22:02 12 Inbau and John Reid called Police Interrogation and
03:22:06 13 Criminal Confessions. This book, which began in
03:22:14 14 1942, is the bible of all interrogation training in
03:22:14 15 America. All interrogators are either trained from
03:22:14 16 this book and by Reid and Associates or through
03:22:24 17 materials that are derivative of this manual and
03:22:24 18 what Reid and Associates trains. And so John Reid,
03:22:28 19 the second author of that book, formed his own
03:22:32 20 school in 1947, the Reid School of Interrogation,
03:22:34 21 and they go around the country and train public and
03:22:40 22 private police. And so that has become known as the
03:22:42 23 Reid method.

03:22:44 24 Q. And you have read this book, this bible you
03:22:46 25 referred to?

03:22:48 1 A. Correct. It's now -- it's now in its
03:22:52 2 fourth edition, the second version in its fourth
03:22:54 3 edition. The first version had three editions, so I
03:22:56 4 have read all seven editions.

03:22:58 5 Q. Okay. So you have done independent
03:23:02 6 research having to do with the field of criminology
03:23:06 7 and sociology. You have done specific training
03:23:12 8 having to do with police interrogation. You've done
03:23:16 9 specialized training in an actual interrogation
03:23:18 10 class and also have studied the written material and
03:23:22 11 the handouts and the booklets and the book you just
03:23:24 12 referred to to determine how police are trained to
03:23:30 13 do interrogations.

03:23:30 14 A. Correct.

03:23:32 15 Q. Okay. With regard to police
03:23:34 16 interrogations, could you describe -- okay. Let's
03:23:40 17 do it this way.

03:23:44 18 Sorry.

03:23:44 19 If you -- assuming that you have reviewed
03:23:46 20 all this material, what you initially said about the
03:23:54 21 techniques, those techniques that you described are
03:23:54 22 actually written and/or taught in these programs or
03:23:58 23 books related to police interrogation?

03:24:00 24 A. Correct.

03:24:02 25 Q. Okay. And you said that they start with

03:24:10 1 the premise, once again, of the fact that it's
03:24:10 2 against somebody's self-interest to give a statement
03:24:12 3 or confession.

03:24:14 4 A. Correct.

03:24:16 5 Q. And based on the fact that it's against
03:24:18 6 someone's self-interest, I believe your testimony
03:24:20 7 was that you have to overcome that to get to the
03:24:24 8 goal of an actual statement or confession?

03:24:26 9 A. Yes. So use specialized psychological
03:24:30 10 techniques to bring to bear a certain amount of
03:24:36 11 pressure and persuasion on the suspect to cause them
03:24:36 12 to see their situation differently and either want
03:24:42 13 to or feel they have no choice but to give you an
03:24:44 14 admission or a confession to the accusation or
03:24:48 15 allegation that's being made.

03:24:52 16 Q. And I believe you just -- could you go over
03:24:56 17 some of those specific things again? You said
03:25:00 18 attack the alibi, discuss evidence, things of that
03:25:00 19 nature?

03:25:00 20 A. Sure. There are many techniques. The most
03:25:04 21 prominent involve isolating a suspect, convincing
03:25:12 22 them that you, the interrogator, control and
03:25:14 23 dominate the situation; confronting them with the
03:25:18 24 accusation; cutting off their denials; attacking
03:25:22 25 their alibi as implausible or illogical or not

03:25:28 1 supported by other people's accounts or the
03:25:28 2 objective evidence; confronting a suspect with
03:25:30 3 evidence of their guilt, whether it's truthful
03:25:34 4 evidence or false evidence. Police are legally
03:25:36 5 permitted to lie to suspects and tell them they've
03:25:44 6 got their fingerprints or eyewitnesses saw them or
03:25:44 7 there's DNA evidence; making appeals to the suspect,
03:25:52 8 appeals based on morality or religion or doing the
03:25:56 9 right thing or cleansing their conscience, appeals
03:26:00 10 based on this is now your one-and-only opportunity
03:26:04 11 to tell your side of the story, implying that if
03:26:08 12 they don't get it out now, a different version of
03:26:08 13 what occurred less favorable to them will be
03:26:12 14 presented against them in court proceedings or at
03:26:14 15 trial; appealing to how the officer might be able to
03:26:16 16 help them. Sometimes officers say I can only
03:26:22 17 testify favorably for you in court if you say X or
03:26:24 18 Y, or I'm going to go back and talk to my sergeant,
03:26:26 19 and if you don't show remorse, I'm not going to be
03:26:30 20 able to say this or that about you, but if you do
03:26:32 21 admit to this and stop being silent, I will say this
03:26:38 22 instead or what the police officer can say to the
03:26:40 23 prosecutor or might say before a judge or how a
03:26:42 24 judge and jury might react to what the suspect is
03:26:48 25 saying right then and there in the interrogation.

03:26:50 1 Many times interrogators use what are
03:26:52 2 called themes, which are rationalizations or excuses
03:26:56 3 to portray what occurred in a different light and
03:27:00 4 make the suspect think that if he agrees or she
03:27:02 5 agrees to what's being said during the
03:27:04 6 interrogation, she will be -- he or she will be
03:27:10 7 received more favorably by the judge or the jury or
03:27:10 8 the prosecutor. For example, in a murder case the
03:27:16 9 interrogator may say if you don't confess, people
03:27:20 10 will think you are a cold-blooded murderer or
03:27:24 11 first-degree murderer, a monster, a predator, but if
03:27:28 12 you do admit to this, maybe it was an accident.
03:27:30 13 Maybe you shot the person in self-defense. Maybe it
03:27:32 14 was an honest mistake. Or in sexual abuse cases,
03:27:36 15 the interrogator may say if you don't admit to this,
03:27:42 16 people are going to think you raped her, but maybe
03:27:42 17 you were trying to show her love, or maybe it was
03:27:44 18 consensual. Or in theft cases they may say everyone
03:27:46 19 is going to see this as embezzlement, but -- if you
03:27:50 20 continue to deny the crime, but if you admit to
03:27:52 21 this, people will think that you were just borrowing
03:27:54 22 the money because your wife had a lot of medical
03:28:00 23 expenses or you've got a lot of children. I mean
03:28:00 24 you see how this goes.
03:28:02 25 So the use of a theme is portraying the

03:28:06 1 underlying event in a way that appears to excuse or
03:28:12 2 justify or diminish the legal culpability of the
03:28:16 3 suspect, cause him or her to think that they will
03:28:20 4 benefit from agreeing to a sort of watered-down
03:28:22 5 version of what really occurred, a version that may
03:28:28 6 redefine the activity as no longer being a crime.
03:28:28 7 So those are some, not all, some of the
03:28:30 8 most prominent techniques that interrogators are
03:28:34 9 taught to use and we know from research do use in
03:28:38 10 police interrogations.
03:28:42 11 Q. You said taught to use and do use.
03:28:44 12 A. Well --
03:28:44 13 Q. And ultimately -- excuse me?
03:28:48 14 A. I was just going to say that just -- just
03:28:50 15 because the manuals say use this technique or that
03:28:54 16 technique that doesn't necessarily mean they do.
03:28:56 17 That's why researchers go out in the field and
03:29:00 18 observe or through analysis of documents and
03:29:00 19 videotapes observe what police actually do or
03:29:06 20 interview police officers. So some of what they are
03:29:10 21 trained to do they don't use. Some things they're
03:29:10 22 not trained to do, they do use, but most of the
03:29:12 23 techniques, the primary ones, the ones I just
03:29:16 24 mentioned are -- they are both taught and studies
03:29:18 25 show that they do use, especially in serious cases.

03:29:22 1 Q. And you said that their goal is to overcome
03:29:26 2 the initial denial.

03:29:28 3 A. The goal of an interrogation is to move
03:29:32 4 someone from denial to admission, to elicit
03:29:36 5 incriminating statements, ideally a full-blown
03:29:38 6 confession to incriminate the suspect and hand over
03:29:44 7 to the prosecution to charge and convict the
03:29:46 8 suspect. That is the goal of interrogation, moving
03:29:48 9 somebody from denial, which is expected, to
03:29:52 10 admission and eliciting incriminating information or
03:29:56 11 a full-blown confession that they can then hand over
03:30:00 12 to the prosecution.

03:30:00 13 Q. And I want to talk a little bit about this
03:30:08 14 is the technique or what's in the manuals and what's
03:30:10 15 taught at the classes, and certainly is it fair to
03:30:14 16 say that most interrogations in this country have
03:30:20 17 some element of what you've described or most of the
03:30:24 18 ones you have reviewed, I guess. You have reviewed
03:30:32 19 250 statements, 500 to 600 in total. Would it be
03:30:32 20 fair to characterize that most of these 600 or so
03:30:38 21 statements that you have reviewed or cases have some
03:30:40 22 element of these techniques?

03:30:42 23 A. Yes, although the ones that didn't involve
03:30:46 24 a transcribed record or an audio/videotape, one has
03:30:48 25 to reconstruct the record, and if you weren't

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03:30:52 1 present at the interrogation, you can never know 1046
03:30:54 2 with complete certainty what techniques were or were
03:30:56 3 not used.
03:30:58 4 Also, most of the interrogations that I've
03:31:00 5 studied especially since 1994 have been murders or
03:31:04 6 rapes or serious felonies. It may be that where the
03:31:08 7 stakes are lower, in misdemeanor interrogations,
03:31:12 8 many of these techniques are not used because the
03:31:14 9 interrogations are much briefer. But the answer to
03:31:18 10 your question is yes.
03:31:22 11 Q. Okay. Certainly, and I'm going to ask you
03:31:24 12 a question, you have done research. This is your
03:31:28 13 field of expertise. Is it wrong per se for these
03:31:32 14 techniques to be used?
03:31:34 15 A. Oh, absolutely not, no. When I have taught
03:31:40 16 training classes to police, I have endorsed many of
03:31:42 17 the techniques that I just mentioned, and in a
03:31:48 18 democratic society police interrogation is a valid,
03:31:50 19 important, legitimate activity. What I try to do is
03:31:54 20 teach, when I give classes, teach police or when I
03:32:00 21 give lectures to undergraduates or when I talk
03:32:02 22 before legislatures or in public settings or in
03:32:04 23 court, I want to emphasize that what we want is fair
03:32:10 24 and legal confessions that are truthful. What we
03:32:16 25 don't want are coerced or improper interrogation

03:32:20 1 techniques that may result in an involuntary or
03:32:24 2 false or partially false statement. So I think --
03:32:26 3 think we all share the same goals, that as long as
03:32:32 4 the means are not coercive, they're legal, they're
03:32:34 5 fair, as long as the end result is reliable, then
03:32:40 6 that would be a good outcome. And so --

03:32:46 7 Q. In other words --

03:32:46 8 A. -- I see my research -- I see my research
03:32:46 9 as trying to improve the quality of police
03:32:48 10 interrogation and the quality of confession
03:32:54 11 evidence, not as attacking it, not as attacking the
03:32:54 12 enterprise of interrogation.

03:33:00 13 Q. So with regard to interrogation, you just
03:33:04 14 stated that the goal is to get fair and legal
03:33:06 15 confessions that are truthful, that are not
03:33:08 16 involuntary or false.

03:33:10 17 A. Correct.

03:33:10 18 Q. And pursuant to that, that you indicated
03:33:12 19 that these techniques that you have described, which
03:33:22 20 we can go over at a later date, these techniques
03:33:22 21 that you have described are used, and you do believe
03:33:26 22 that they can lead to a fair and legal confession.

03:33:30 23 A. Yes, not -- now, some of them, like the
03:33:34 24 themes that I talked about, some of the themes I
03:33:38 25 think are improper, but other themes are not. It

03:33:40 1 depends on what the message that's being stated and
03:33:46 2 the theme is. Some themes I think imply threats of
03:33:50 3 harsher punishment if you don't cooperate, promises
03:33:54 4 of more lenient treatment if you do. Those are
03:33:58 5 improper, but it depends. So some of the techniques
03:33:58 6 that I have mentioned I think are okay. Some of
03:34:02 7 them are -- it depends on how they are used or what
03:34:06 8 exactly is being communicated when they're used or
03:34:10 9 the context in which they're used.

03:34:12 10 Q. So in the techniques that you described of
03:34:14 11 isolation, control, confrontation, cutting off their
03:34:24 12 alibis or defenses, indicating evidence, real or
03:34:26 13 unreal or actual or fictitious, all of that is --
03:34:32 14 can be used in a way that does lead to a fair and
03:34:36 15 legal confession that would be voluntary.

03:34:40 16 A. Correct, that is true.

03:34:42 17 Q. And with regard to a statement that's
03:34:50 18 considered voluntary, could you describe to me what
03:34:50 19 a voluntary -- in your opinion what a voluntary
03:34:54 20 statement is?

03:34:56 21 A. Well, I tend to focus on the interrogation
03:34:58 22 techniques and whether those techniques are or are
03:35:04 23 not coercive, and if the techniques are coercive,
03:35:06 24 that calls into question the voluntariness of the
03:35:10 25 statement, whether or not the person was making a

03:35:12 1 statement that was of their own free will or whether
03:35:18 2 or not they felt they were threatened or intimidated
03:35:20 3 into making that statement.

03:35:22 4 I think the ultimate way of evaluating this
03:35:30 5 is whether or not the person felt that they had no
03:35:32 6 choice but to comply with the requests or the
03:35:36 7 demands of the interrogator and whether they felt
03:35:40 8 threatened or coerced, and if they did, then it
03:35:44 9 would be regarded as involuntary, and if they did
03:35:46 10 not, then it would be regarded as voluntary. And
03:35:50 11 depending on the record and the level of
03:35:52 12 information, that may be a judgment call to some
03:35:54 13 extent.

03:35:58 14 Q. With regard to the interrogation techniques
03:36:04 15 and the voluntariness, you said once again that the
03:36:10 16 object is to get a fair and legal confession that's
03:36:12 17 truthful.

03:36:14 18 A. Correct.

03:36:16 19 Q. Now, can you describe to us -- you have
03:36:18 20 used this word "coercion" a few times.

03:36:20 21 A. Correct.

03:36:22 22 Q. And the coercion, you keep referring to
03:36:24 23 that and indicating -- using the word "coercion" and
03:36:28 24 "involuntary" in the same setting. Can you
03:36:28 25 describe to us a little bit about coercion and

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03:36:32

1 what -- I believe you called it coercive

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03:36:34

2 techniques? Can you go in some more detail about --

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3 we've got some stuff that's techniques that doesn't

03:36:40

4 seem very friendly, and then there's this beyond --

03:36:44

5 I think you maybe even referred to it as "over the

03:36:50

6 wall" or something like that, that there's -- over

03:36:50

7 the top, where they go beyond what would be

03:36:52

8 considered noncoercive into coercive. Can you

03:36:56

9 describe that for us?

03:37:00

10 A. Well, coercion can be broken down into

03:37:02

11 physical and psychological coercion. In the old

03:37:06

12 days and in other countries physical coercion was

03:37:08

13 not uncommon. Today in the United States it's very

03:37:12

14 rare inside an interrogation that there will be an

03:37:16

15 allegation of physical coercion. Psychological

03:37:16

16 coercion, which -- allegations of which are more

03:37:22

17 common, would involve threatening somebody or

03:37:26

18 promising them leniency or intimidating or scaring

03:37:32

19 them in a way that made them feel like they had to

03:37:36

20 go along with what was being told to them or

03:37:38

21 suggested to them. And when interrogation is

03:37:42

22 coercive, either physically or psychologically, it

03:37:44

23 can cause somebody to make an involuntary statement,

03:37:48

24 a statement that they would not otherwise have

03:37:50

25 given, that is not a product of their free will that

03:37:56 1 they are only doing to avoid the threat of harm to
03:37:58 2 themselves or someone close to them, to -- or to
03:38:04 3 receive the promise of prosecutorial or judicial
03:38:08 4 leniency or to terminate what might be a menacing or
03:38:08 5 threatening or intolerably stressful interrogation,
03:38:12 6 and in those circumstances we talk about an
03:38:18 7 overborne will or an involuntary statement. Most
03:38:18 8 involuntary statements are the result of some kind
03:38:22 9 of psychological coercion.

03:38:32 10 Q. Can you give us some examples of
03:38:34 11 psychological coercion? Is it something -- I think
03:38:38 12 you said threatening somebody and -- just maybe a
03:38:42 13 few more examples of how something could go from
03:38:46 14 noncoercive to coercive, start out the right way,
03:38:52 15 but maybe turn into the wrong way?

03:38:54 16 A. Well, I'll give you an example.

03:38:58 17 Two weeks ago I testified in a case in
03:38:58 18 Northern California where the individual being
03:39:06 19 interrogated was a gang member accused of killing
03:39:10 20 somebody who had been a snitch for the gang, and the
03:39:14 21 interrogation of that gang member involved
03:39:18 22 accusations of evidence which the police had, other
03:39:20 23 people who had identified that person as being
03:39:22 24 involved in the murder, and attempts to persuade the
03:39:26 25 person to make a full confession.

03:39:28 1 The person continued to deny making a
03:39:30 2 confession even though noncoercive techniques had
03:39:32 3 been used. At some point in that interrogation the
03:39:38 4 interrogator told the suspect that if he didn't
03:39:42 5 confess, which he said was in his best interest, he
03:39:46 6 would be seen -- he would be seen as a first-degree
03:39:48 7 murderer, it would be seen as intentional, and he
03:39:52 8 would probably receive the death penalty and never
03:39:52 9 see his newly born child again, but that if he did
03:39:56 10 confess, they would portray it as an accident or a
03:40:04 11 mistake and he would -- he would receive a much
03:40:04 12 lower sentence.

03:40:08 13 Ultimately he did confess to the crime.
03:40:10 14 The judge threw out that confession because the
03:40:12 15 judge made the judgment that that technique of
03:40:16 16 scaring somebody by telling them they would get the
03:40:18 17 death penalty if they didn't confess, but that they
03:40:22 18 would get a much lower sentence if they did, is a
03:40:22 19 classic example of what psychologists as well as
03:40:30 20 legal scholars regard as coercion or psychological
03:40:30 21 coercive method.

03:40:34 22 Q. So that particular example is some form of
03:40:38 23 leniency that he would -- that if he confessed,
03:40:44 24 there would be some form of leniency that would be
03:40:44 25 considered inappropriate.

03:40:50 1 A. Yeah. I think it was a combination of a
03:40:52 2 threat of harsher judicial punishment if you don't
03:40:52 3 cooperate and a promise of judicial leniency,
03:40:56 4 significant judicial leniency, if -- it involved
03:41:00 5 saving his life if he did confess. So it's both a
03:41:02 6 threat and a promise, and that's why it was regarded
03:41:06 7 as coercive and inadmissible.

03:41:08 8 Q. And ultimately determined involuntary.

03:41:10 9 A. By that judge, correct, yes.

03:41:12 10 Q. Right. And so the voluntariness of the
03:41:14 11 statement, in your professional opinion -- I believe
03:41:20 12 you referred to it as being the will of the person
03:41:20 13 being overborne by some psychologically coercive
03:41:28 14 technique.

03:41:30 15 A. Correct. That is the way it's often
03:41:32 16 decided in courts of law, correct.

03:41:36 17 Q. And these psychological techniques, we have
03:41:38 18 established, are actually taught to the police to do
03:41:40 19 as a part of their training.

03:41:42 20 A. Well, they are taught techniques. They
03:41:46 21 are -- they are trained not to use coercive
03:41:50 22 techniques. Sometimes they cross the line or use
03:41:50 23 techniques that they may not think are coercive, but
03:41:54 24 that others do think are coercive. They are not
03:41:56 25 trained to use coercive techniques intentionally

03:42:02 1 because part of their training is to use techniques
03:42:02 2 that they believe are legal and will not result in
03:42:06 3 the exclusion of any confession evidence.

03:42:12 4 Q. And ultimately you said specifically
03:42:16 5 earlier that when you speak to police in your course
03:42:24 6 of -- when you go out there and speak to them, you
03:42:26 7 try to emphasize to them how to use their techniques
03:42:28 8 in a noncoercive manner?

03:42:32 9 A. Correct, how to avoid using any techniques
03:42:34 10 that could be portrayed by a defense attorney in
03:42:38 11 court as psychologically coercive and could
03:42:42 12 therefore lead a judge to rule it coercive, as this
03:42:42 13 judge in Northern California did, for example, and
03:42:46 14 exclude it from evidence at trial, thereby
03:42:48 15 penalizing the police and the prosecution because
03:42:54 16 they had used coercive methods. The hope is that by
03:42:58 17 sensitizing police to the issue of coercion a little
03:43:00 18 bit more, the confessions that they get will stand
03:43:04 19 up in court because they were not obtained through
03:43:04 20 improper methods.

03:43:08 21 Q. Okay. I would like to talk to you just a
03:43:10 22 little bit about how they stand up in court. You
03:43:14 23 have obviously participated in training, met with
03:43:18 24 officers, had a number of exposures to the court
03:43:24 25 system, and in terms of the admissibility, and

03:43:26 1 certainly I'm not asking you to give an opinion as
03:43:28 2 to whether or not anything is admissible, but there
03:43:34 3 are some things that police know about an admissible
03:43:36 4 or a legal statement; right?

03:43:38 5 A. Correct.

03:43:40 6 Q. And pursuant to that fact, some of the -- I
03:43:44 7 would like to have you talk a little bit about
03:43:46 8 Miranda and what your research and your
03:43:50 9 understanding of how the police apply Miranda. I
03:43:56 10 believe you said earlier that was one of the things
03:43:58 11 you review.

03:44:00 12 A. Well, everybody knows of the Miranda
03:44:08 13 warnings, and the police want to create a record
03:44:10 14 that the Miranda warnings were given and received
03:44:12 15 and waived, and the police want to make sure the
03:44:16 16 suspect waives those Miranda rights. So typically
03:44:20 17 the police might play down Miranda. "This is just a
03:44:24 18 bureaucratic format. You know this better than I
03:44:26 19 do. We need you to sign this statement. I can only
03:44:30 20 help you if you agree to talk to me. You don't have
03:44:32 21 to talk to me." And at some point they will
03:44:34 22 typically read the Miranda rights from a pre- -- a
03:44:42 23 prewritten form, and then they will either launch
03:44:46 24 into interrogation, or they will ask the suspect to
03:44:48 25 sign the waiver. I mean they might ask the suspect

03:44:50 1 to sign something. They might launch into it.

03:44:58 2 They -- they typically will have the document to

03:45:02 3 demonstrate that the Miranda warnings preceded the

03:45:06 4 interrogation, they were legally obtained, and the

03:45:06 5 confession will stand up to court, there were no

03:45:10 6 Miranda violations.

03:45:14 7 So that's what they are trained to do.

03:45:16 8 Sometimes they use strategies to soften somebody up

03:45:18 9 before giving Miranda warnings to try to maximize

03:45:20 10 their chances that the suspect really won't pay

03:45:24 11 attention to some of the Miranda warnings,

03:45:26 12 particularly the one about legal counsel, and so

03:45:28 13 that the suspect will just sort of treat this like

03:45:32 14 many of the warnings we see or hear every day, kind

03:45:36 15 of ignore it, sign the form, date the form, and then

03:45:40 16 move on to the interrogation.

03:45:42 17 Q. And these things that you've just

03:45:44 18 described, would you consider that pursuant to your

03:45:52 19 research and experience, what you just described to

03:45:52 20 me, would you consider that coercive or uncoercive,

03:45:58 21 what you've just described? Or maybe that's not the

03:46:00 22 right word. Appropriate or inappropriate --

03:46:02 23 A. Certainly.

03:46:06 24 Q. -- what you've just described to me.

03:46:06 25 A. Certainly the Miranda court has used that

03:46:10 1 language, and other courts in interpreting Miranda
03:46:10 2 have. The technique -- well, what I've described is
03:46:14 3 probably okay. It would be inappropriate to use
03:46:20 4 interrogation techniques to accuse somebody of
03:46:22 5 committing a crime, tell them you have all this
03:46:24 6 evidence against them and then say you can -- I
03:46:26 7 can -- "Now you have to sign your Miranda rights or
03:46:30 8 you can't defend yourself against these charges."

03:46:34 9 The burden, of course, is on the state to
03:46:36 10 prove that the Miranda rights were waived prior to
03:46:42 11 interrogation voluntarily, knowingly, and
03:46:44 12 intelligently. So Miranda is always supposed to
03:46:46 13 precede interrogation. So long as the police do not
03:46:50 14 try to trick or persuade a suspect to waive their
03:46:54 15 Miranda rights, so long as they give them clearly
03:46:58 16 prior to the interrogation, so long as they elicit a
03:47:02 17 knowing, voluntary, and intelligent waiver, and so
03:47:08 18 long as they honor an invocation, the giving of the
03:47:08 19 Miranda rights would presumably be proper.

03:47:12 20 Q. Okay. When you just mentioned a word, the
03:47:14 21 "invocation," explain to me what that means. I
03:47:18 22 know -- I know what it means, but I would like for
03:47:22 23 you to explain it. A person is given the rights,
03:47:22 24 and we can -- you can describe them if you know
03:47:26 25 them. I don't know if you can recite them, but if

03:47:30 1 you need something to read them by, I can provide
03:47:34 2 that. I think you've been provided something. What
03:47:34 3 does it mean to invoke them?
03:47:36 4 A. Well, the standard Miranda rights involve
03:47:40 5 four warnings: telling somebody they have a right
03:47:40 6 to remain silent; that anything they say can be used
03:47:44 7 against them in court; that they have a right to an
03:47:48 8 attorney and if one -- if they cannot afford one,
03:47:48 9 one will be provided to them.
03:47:52 10 Typically the interrogator will then say,
03:47:56 11 "Do you understand these rights?" And then when
03:47:56 12 the suspect says yes, if they say yes, the
03:47:58 13 interrogator will say, "Having these rights in mind,
03:48:04 14 do you wish to speak to me?"
03:48:06 15 If a suspect says, "No, I do not want to
03:48:10 16 speak to you" or "No, I wish to remain silent" or
03:48:12 17 "No, I would like to first have an attorney present
03:48:12 18 and then I will speak to you," that's what's called
03:48:14 19 an invocation. In other words, they are invoking
03:48:18 20 either their right to silence or their right to
03:48:20 21 counsel to terminate or delay the interrogation, and
03:48:24 22 a police officer is duty bound to honor that
03:48:28 23 invocation unless a suspect were to reinitiate
03:48:32 24 contact subsequent to an initiation. Most suspects,
03:48:34 25 however, do not invoke their rights and waive their

03:48:42 1 rights and go on to speak to their interrogators.

03:48:44 2 Q. You say most suspects do?

03:48:46 3 A. Correct, at least according to the
03:48:48 4 research.

03:48:52 5 Q. Certainly those suspects that do in your
03:48:56 6 research have been -- there's pretty clear evidence
03:48:58 7 in the record to establish that that person has been
03:49:04 8 given those rights and had the opportunity to invoke
03:49:04 9 them.

03:49:04 10 A. Correct.

03:49:06 11 Q. So of the 600 or so cases that you have,
03:49:14 12 most, if not all, have had clear indications that
03:49:18 13 those rights were given before they gave the
03:49:20 14 statement?

03:49:22 15 A. Correct. Typically there is a written
03:49:24 16 document that has been signed that has been given
03:49:28 17 before by the date and the timing on the document,
03:49:32 18 or you can see by the videotape or audio tape of the
03:49:36 19 interrogation and the transcript that the reading of
03:49:38 20 the rights precedes the actual interrogation. This
03:49:40 21 is the -- there's rare -- in the cases I have
03:49:46 22 reviewed, there's rarely a Miranda violation.
03:49:48 23 Usually the police are pretty good about documenting
03:49:52 24 it and preventing challenges to the admissibility of
03:49:56 25 the confession based on any Miranda problems.

03:50:00 1 Q. So pursuant to the fact that you still have
03:50:02 2 actually testified in 55 or so cases, reviewed 250
03:50:06 3 of them since you have been a consultant, and of
03:50:12 4 those, about half or so, 60 percent, you believe,
03:50:12 5 were some form of technical coercive situation, your
03:50:20 6 testimony would be that the majority, if not most,
03:50:22 7 if not all, have been Miranda was given, but you
03:50:26 8 still believe that there was a problem that it was
03:50:26 9 either coercive and involuntary or a false
03:50:30 10 confession occurred.

03:50:32 11 A. Yes, except sometimes they come in shades
03:50:34 12 of gray. It might be that there could -- it may be
03:50:40 13 there were some techniques that if they were used,
03:50:42 14 it was improper or could have been coercive. It may
03:50:46 15 be that some part or all of the resulting statements
03:50:50 16 were inaccurate.

03:50:52 17 But yes, in the cases where I see potential
03:50:58 18 problems, and I consult or testify in 60 or 70
03:51:00 19 percent, whatever it is, typically they have to do
03:51:06 20 with coercion and voluntariness issues related to
03:51:06 21 the techniques that were used or alleged or they
03:51:08 22 have to do with reliability issues and allegations
03:51:12 23 of either partially or wholly false statements,
03:51:16 24 typically not Miranda violations.

03:51:20 25 Q. However, you are aware in this country that

03:51:24 1 there still are occasions -- maybe I should ask
03:51:26 2 you.

03:51:26 3 Are you aware of situations in this country
03:51:28 4 where there still are Miranda violations?

03:51:30 5 A. Oh, absolutely, yes. It's typically
03:51:32 6 thought of as a purely legal question, and so even
03:51:36 7 if there is a violation in the cases that I work on,
03:51:40 8 typically I'm not asked to testify about whether or
03:51:42 9 not a violation occurred, although sometimes I do
03:51:44 10 testify about how police are taught Miranda and what
03:51:50 11 strategies they may or may not use to get a suspect
03:51:52 12 to waive Miranda. But yes.

03:51:54 13 Q. Some of those techniques that you referred
03:51:58 14 to have to do with the fact that, I believe you said
03:51:58 15 earlier, downplay them, make it look like it's a
03:52:04 16 formality, bureaucratic formality, things of that
03:52:06 17 nature?

03:52:06 18 A. Yes. And more generally police try to
03:52:10 19 obscure the adversarial relationship between them
03:52:16 20 and the suspects. They try to portray themselves as
03:52:18 21 somebody who just wants to help the suspect, as the
03:52:18 22 suspect's friend. They oftentimes don't let on that
03:52:22 23 the person is a suspect until things start to get
03:52:28 24 thick in the interrogation a long time after the
03:52:30 25 Miranda warnings have been given and waived. So if

03:52:34 1 they lull the suspect into thinking the suspect is
03:52:38 2 not in jeopardy, the suspect is not a suspect, just
03:52:40 3 a witness or somebody that can help the police solve
03:52:46 4 the crime, that the police officer is the suspect's
03:52:50 5 friend or just looking out for the suspect's best
03:52:52 6 interest and wants to help them, the suspect may
03:52:54 7 have an easier time saying "Of course I'll talk to
03:52:56 8 you and cooperate with your investigation."

03:53:00 9 Q. And pursuant to your participation in -- I
03:53:04 10 keep going back to the same point. Pursuant to your
03:53:12 11 participation in the actual training programs, your
03:53:14 12 review of the manuals, your conversations with
03:53:14 13 officers themselves, what you just described about
03:53:20 14 making them -- the suspect their friend, all of
03:53:22 15 those things are things that are actually taught
03:53:24 16 them pursuant to their training.

03:53:28 17 A. Well, training varies, but they are taught
03:53:32 18 to play down the Miranda warnings, treat them as a
03:53:34 19 bureaucratic formality, emphasize that they want to
03:53:36 20 help the suspect out, tell them that they can only
03:53:40 21 get the suspect's version of events if the suspect
03:53:42 22 cooperates. So yes, they are taught or they learn
03:53:50 23 ways to sort of massage the interrogation past the
03:53:56 24 Miranda moment so that the suspect does not
03:53:58 25 terminate the interrogation by requesting silence or

03:54:00 1 counsel.

03:54:02 2 Q. I believe you indicated that the conclusion
03:54:06 3 of Miranda or the goal there would be for the
03:54:10 4 officers to have the suspect legally waive or give
03:54:16 5 up those rights and proceed with a statement or a
03:54:16 6 questioning.

03:54:18 7 A. Correct. So long as the officer gets a
03:54:20 8 legally valid waiver, then it cannot be challenged
03:54:24 9 on Miranda grounds, and that is the goal. If the
03:54:28 10 courts give police more leeway, the police will take
03:54:30 11 it. If they give police less leeway, the police
03:54:32 12 will move back and be more careful about how they
03:54:34 13 elicit Miranda waivers. But that is the goal, to
03:54:38 14 make sure that the suspect waives their Miranda
03:54:42 15 rights in a way that a court would judge as legally
03:54:44 16 valid, and sometimes in their training what will
03:54:46 17 happen is the local district attorney or the
03:54:50 18 training district attorney will come in and spend an
03:54:52 19 afternoon lecturing the police on the law of
03:54:56 20 interrogation so that whatever the police do, they
03:55:00 21 do not violate the law and the evidence from any
03:55:02 22 statements can be presented before a jury at trial.
03:55:06 23 Q. And as you said, the goal would be to get a
03:55:14 24 statement or to get the waiver and preferably to get
03:55:18 25 it in writing.

03:55:20 1 A. Correct. If a waiver was not done in
03:55:22 2 writing, then it could be disputed in court. One of
03:55:24 3 reasons that police read the Miranda rights from a
03:55:28 4 form and have suspects sign and date the form is so
03:55:30 5 there's no challenge to when that Miranda warning
03:55:36 6 was given and whether all the Miranda rights were
03:55:38 7 given in a fair manner.

03:55:42 8 Q. And they are certainly aware that
03:55:48 9 challenges can occur when things like that don't
03:55:48 10 happen.

03:55:48 11 A. Correct. And the story that typically is
03:55:50 12 told in their training is that if you recite the
03:55:50 13 warnings from memory and when you go to court and
03:55:54 14 are questioned by a defense attorney who asks you on
03:55:58 15 the stand to recite the warnings from memory and you
03:55:58 16 choke and you forget one or two, then the defense
03:56:00 17 attorney will draw the inference that you did the
03:56:04 18 same thing during the interrogation because you
03:56:06 19 can't -- you don't remember what they -- what the
03:56:10 20 warnings are. So they use -- they tend to use forms
03:56:10 21 to read the rights from and forms to have --
03:56:14 22 typically the suspect will initial the form by every
03:56:18 23 right. They will initial that they understand.
03:56:20 24 They will initial that they wish to waive the
03:56:24 25 rights, and then they will sign at the bottom of the

03:56:24 1 form.

03:56:28 2 Q. And with regard to the second process that
03:56:34 3 you discussed with this, you said that -- we have
03:56:34 4 discussed a number of interrogation techniques.
03:56:38 5 Could you describe to me the difference between
03:56:42 6 interrogation and interviewing?

03:56:44 7 A. Well, they are very different activities.
03:56:46 8 Interviewing is something you do of witnesses or
03:56:48 9 victims or potential suspects. It's typically
03:56:54 10 nonaccusatorial. You don't dominate or control the
03:56:56 11 person you are interviewing. You let them do most
03:56:58 12 of the talking, so you're not supposed to have
03:57:02 13 leading questions. You're supposed to ask questions
03:57:04 14 that are general, open-ended. The purpose is to
03:57:08 15 gather broad information that's helpful to the
03:57:08 16 investigation.

03:57:12 17 By contrast, an interrogation --

03:57:14 18 Q. Let me ask you one question.

03:57:16 19 In a -- in an interview, what would be
03:57:18 20 considered an interview, which I assume you are
03:57:20 21 basing this information on your participation in
03:57:24 22 their training programs and reviewing the manual, is
03:57:26 23 there any need to give Miranda?

03:57:28 24 A. No, not in an interview. An interview does
03:57:32 25 not legally require that Miranda warnings be given.

03:57:32 1 An interrogation, the suspect is under arrest or not
03:57:38 2 free to leave. If the questions --
03:57:40 3 Q. Okay. Back up.
03:57:42 4 When you say "not free to leave," could you
03:57:44 5 describe a little bit more about what "not free to
03:57:46 6 leave" is?
03:57:50 7 A. Well, if somebody is told that they cannot
03:57:54 8 leave, then they are not free to leave. They could
03:57:56 9 be -- if a police officer comes to your house and
03:57:58 10 questions you and they say "You're not free to
03:58:00 11 leave. You're not leaving until I'm done with the
03:58:04 12 questions," then in effect you are being detained at
03:58:06 13 your own house.
03:58:06 14 Conversely, you could go to a police
03:58:10 15 station, and the first thing a police officer could
03:58:10 16 say to you is "Anytime you want to walk out this
03:58:14 17 door, you're free to do so," and you would be free
03:58:16 18 to leave. So being free to leave can be independent
03:58:18 19 of the location of the questioning, and people who
03:58:24 20 are not free to leave or who are under arrest and
03:58:30 21 thereby by definition not free to leave and who are
03:58:32 22 being asked questions that seek to elicit
03:58:34 23 incriminating information are by definition being
03:58:40 24 interrogated. And if somebody is being
03:58:42 25 interrogated, unlike if they are being interviewed,

03:58:42 1 their Miranda rights are required by law, and
03:58:46 2 interrogation, unlike interviewing, involves
03:58:50 3 accusatorial questioning, specialized techniques
03:58:54 4 that they're taught. The interrogator tends to
03:58:56 5 dominate or control the interaction. The questions
03:59:00 6 or techniques are by their very nature persuasive
03:59:04 7 and manipulative. The purpose is not to ask
03:59:06 8 open-ended questions, not to get general
03:59:08 9 information, but to, as I said earlier, move the
03:59:14 10 suspect from denial to admission. The suspect keeps
03:59:18 11 saying "I didn't do it. I didn't do it. I didn't
03:59:20 12 do it." The purpose isn't to say "Okay. Tell me
03:59:20 13 what you did."

03:59:22 14 The purpose of the interrogation, unlike an
03:59:24 15 interview, is to get the suspect to stop saying they
03:59:26 16 didn't do it and to admit to what the person -- what
03:59:28 17 the interrogator believes really happened. The
03:59:30 18 purpose of an interrogation is to elicit
03:59:36 19 incriminating statements that can be used to convict
03:59:38 20 a suspect by moving them from denial to admission.

03:59:40 21 So interviewing and interrogation involve
03:59:44 22 different people, witnesses, victims, potential
03:59:48 23 suspects as opposed to declared suspects. Different
03:59:50 24 regulations. Miranda is required in one setting,
03:59:54 25 not in another. Different techniques and different

03:59:58 1 goals.

03:59:58 2 Q. I believe you stated that in an

04:00:00 3 interrogation the purpose is to elicit information

04:00:04 4 that can be used against them?

04:00:08 5 A. Correct, information that incriminates them

04:00:08 6 that can be used to show their guilt at a trial or

04:00:14 7 in some subsequent prosecution. You are not

04:00:16 8 supposed to interrogate anybody you think may be

04:00:20 9 innocent. You only interrogate people whom you

04:00:22 10 believe are guilty, and therefore, the purpose of

04:00:24 11 the interrogation is to prove their guilt. It's not

04:00:30 12 to figure out whether they are guilty. It's to

04:00:32 13 prove their guilt because you, the detective,

04:00:34 14 believe they are guilty, and that's the precondition

04:00:36 15 for interrogation.

04:00:40 16 Q. In other words, it would be your opinion or

04:00:40 17 your knowledge in this area from your research and

04:00:44 18 your participation in this process, the review of

04:00:50 19 the written material, the research, the books, that

04:00:50 20 the only time interrogation techniques would be used

04:00:56 21 would be if the detective or the interrogator

04:01:00 22 believed that the party was guilty and was trying to

04:01:04 23 move them to a state where they were providing

04:01:08 24 incriminating information.

04:01:10 25 A. Correct. It sometimes -- you know, they

04:01:12 1 may be interviewing somebody and then realize that
04:01:16 2 at the beginning of that interview that the person
04:01:18 3 really is a suspect. But you don't interrogate
04:01:20 4 witnesses. You don't interrogate victims. You only
04:01:22 5 interrogate suspects when you're certain or
04:01:28 6 reasonably certain of their guilt.

04:01:32 7 Q. And in the event they were witnesses or
04:01:34 8 victims, it would be your opinion or your
04:01:34 9 understanding, pursuant to your extensive
04:01:38 10 involvement, that they would interview at that point
04:01:42 11 as opposed to interrogate.

04:01:44 12 A. Correct. That would be the protocol, to
04:01:46 13 interview them, not --

04:01:46 14 Q. And an interview would be nonaccusatory.

04:01:52 15 A. Typically interviews are nonaccusatorial.
04:01:52 16 They don't involve accusations of committing or
04:01:56 17 doing anything. The purpose is general
04:01:56 18 investigation to acquire information that aids and
04:01:58 19 assists the police in their broader criminal
04:02:04 20 investigation.

04:02:08 21 THE REPORTER: Could I have a break for
04:02:08 22 just a moment, please?

04:02:10 23 MS. GAY: Sure.

04:02:10 24 THE VIDEOGRAPHER: We are now going off the
04:02:12 25 record. The time is 4:03.

04:02:38 1 (A recess was taken.)

04:07:36 2 THE VIDEOGRAPHER: This is the start of

04:07:38 3 tape number two. We are now going back on the

04:07:44 4 record. The time is 4:08. We are now on the

04:07:44 5 record.

6 BY MS. GAY:

04:07:48 7 Q. Mr. Leo, there's just one other question

04:07:48 8 that I want to ask you, and I take it back to

04:07:50 9 Miranda for just a second.

04:07:54 10 If -- you indicated that if a person --

04:07:56 11 if -- invokes Miranda, they can do that by saying

04:08:02 12 that they want to remain silent, that they want to

04:08:06 13 have an attorney present or to consult with an

04:08:08 14 attorney before they speak to the police; right?

04:08:08 15 A. Correct.

04:08:10 16 Q. And then the third one was that they -- at

04:08:14 17 any point they could terminate the statement?

04:08:20 18 A. Correct. So one could terminate -- one

04:08:20 19 could terminate the interrogation at the reading of

04:08:22 20 the Miranda rights or subsequent to that one could

04:08:28 21 specify because one wished to remained silent or one

04:08:32 22 wished for counsel or for no reason, one simply

04:08:34 23 wished not to continue speaking to the police.

04:08:38 24 Q. Now, is it your understanding, pursuant to

04:08:40 25 your involvement with training and all the things

04:08:42 1 that they are taught, that a suspect has a right to
04:08:46 2 terminate an interview?
04:08:50 3 A. Absolutely. In an interrogation,
04:08:50 4 absolutely.
04:08:52 5 Q. Excuse me. An interrogation?
04:08:52 6 A. Correct.
04:08:54 7 Q. So the suspect has a right to terminate it
04:08:56 8 at any point.
04:08:56 9 A. Correct.
04:08:58 10 Q. And would it be -- what is your opinion or
04:09:00 11 your knowledge of -- you're in the middle of an
04:09:04 12 interrogation and someone -- is it possible for
04:09:06 13 someone then to invoke the Miranda warnings or to
04:09:12 14 say they want to remain silent from that point, ask
04:09:16 15 for an attorney at this point?
04:09:16 16 A. Yes.
04:09:18 17 Q. Or say "I want to stop this interview"?
04:09:18 18 A. It certainly is possible, and sometimes it
04:09:20 19 does happen, yes.
04:09:22 20 Q. And what would be the protocol or procedure
04:09:26 21 that the police should follow at that point, based
04:09:30 22 on your involvement?
04:09:30 23 A. Well, if somebody says explicitly "I wish
04:09:36 24 to stop answering any questions" or "I want to
04:09:38 25 remain silent" or "I want to go back to my cell or

04:09:44 1 leave the interrogation room" or "I want to talk to
04:09:46 2 a lawyer and I'll talk to you then," the proper
04:09:48 3 procedure would be for the police officer then to
04:09:52 4 say, "Okay, I can't talk to you anymore, and we're
04:09:56 5 terminating this interrogation," and then to lead
04:09:58 6 the person, if they're in custody, back to their
04:10:00 7 cell, or if not, to release them from the police
04:10:02 8 interrogation environment.

04:10:06 9 Q. If you say -- we have already determined
04:10:10 10 that in an interrogation they are not free to leave.

04:10:12 11 A. Okay.

04:10:14 12 Q. I think you said release them. If they are
04:10:16 13 not free to leave, what would you think would have
04:10:18 14 occurred at that point if a person had invoked one
04:10:20 15 of those rights and asked to have the statement
04:10:28 16 stopped or an attorney present or to remain silent?
04:10:28 17 What would normally occur at that point?

04:10:30 18 A. They would be taken back to their cell if
04:10:32 19 they're under arrest or they have been in jail.

04:10:38 20 Q. How about if they are not under arrest yet?

04:10:44 21 A. Well, then they would be arrested, yeah.

04:10:46 22 Q. But the statement -- the interrogation
04:10:46 23 process would end.

04:10:50 24 A. If the person clearly wishes to end it,
04:10:54 25 requests an attorney, says they want to end it, the

04:10:58 1 proper and legal protocol is for the officer to
04:11:02 2 honor that invocation and to terminate the
04:11:06 3 interrogation and either let the person go or return
04:11:08 4 them to their place of custody.

04:11:14 5 Q. So now we're going to go back to where we
04:11:14 6 were before.

04:11:16 7 When you were talking about the specific
04:11:22 8 techniques and that we were discussing the
04:11:24 9 difference between an interview and an
04:11:28 10 interrogation, and what I want to do at this point
04:11:36 11 is obviously -- you are here for a reason. I
04:11:36 12 contacted you on behalf of Ms. Gilliard, and you had
04:11:38 13 an opportunity to review her case.

04:11:42 14 A. Correct, or the materials that you sent me
04:11:48 15 on her case. I reviewed the materials that you sent
04:11:48 16 me in her case, correct.

04:11:52 17 Q. And the materials that I sent you in the
04:11:52 18 case, that was written material?

04:11:54 19 A. Correct.

04:12:00 20 Q. And what did some of that stuff -- was it
04:12:04 21 the police reports, things of that nature?

04:12:06 22 A. Yes, police reports, witness statements,
04:12:10 23 medical information.

04:12:16 24 Q. Did you have an opportunity -- obviously we
04:12:18 25 know in this case there's a statement that was made

04:12:20 1 by Ms. Gilliard. Did you have an occasion to review
04:12:22 2 that written statement?
04:12:24 3 A. Yes.
04:12:26 4 Q. Did you have an occasion to review -- how
04:12:28 5 many of those statements were there?
04:12:30 6 A. Well, I believe there were two, one on
04:12:32 7 January 9 and one on January 5.
04:12:38 8 Q. And pursuant to the -- your review, did you
04:12:42 9 have an occasion to review any advisement of
04:12:44 10 constitutional right forms?
04:12:52 11 A. Yes, I do have an advisement of
04:12:52 12 constitutional rights form or I believe two that I
04:12:56 13 reviewed, yes.
04:13:00 14 Q. You have two, one for the 5th and one for
04:13:02 15 the 9th?
04:13:02 16 A. I believe so, yes.
04:13:06 17 Q. And I understand.
04:13:06 18 With regard to her particular
04:13:08 19 circumstances, you reviewed a police report, a
04:13:12 20 witness statement, medical information, two written
04:13:12 21 statements of Ms. Gilliard. Did you have an
04:13:16 22 occasion to speak with her?
04:13:18 23 A. Yes. I also interviewed telephonically
04:13:22 24 Ms. Gilliard. I believe that this was sometime in
04:13:28 25 April. I believe it was April 6.

04:13:34 1 Q. And pursuant to that April 6th telephonic
04:13:36 2 interview, did you record that?

04:13:40 3 A. Yes. I recorded it as I do all my
04:13:40 4 interviews, and I then submitted that tape to you.

04:13:44 5 Q. And did you have an occasion pursuant to
04:13:50 6 your preparation of today to review that tape?

04:13:52 7 A. Actually, not the tape, but the
04:13:54 8 transcription of the taped interview, correct.

04:14:00 9 Q. And pursuant to your review of that
04:14:02 10 material and in light of your background and the
04:14:04 11 type of information that you -- what you researched,
04:14:12 12 what your professional consultation is about, did
04:14:12 13 you have an occasion to look specifically at the
04:14:16 14 type of things that you referred to before, the
04:14:18 15 police interrogation in her case?

04:14:22 16 A. Yes.

04:14:28 17 Q. Could you tell us a little bit about the
04:14:32 18 type of things that you observed specifically with
04:14:34 19 regard to Ms. Gilliard's case?

04:14:40 20 A. Well, there was apparently a lengthy
04:14:46 21 interrogation or a period of detention during which
04:14:48 22 she was interrogated. I believe that she was picked
04:14:52 23 up around 11:30, and her signed statement is around
04:15:02 24 7:30 in the morning. There is --

04:15:04 25 Q. Okay. Let's go back a little bit.

04:15:04 1 You said that she was -- it was a lengthy
04:15:06 2 interrogation. Let's just do it this way. Did you
04:15:10 3 have occasion to determine whether or not this
04:15:12 4 particular situation was, in your opinion, an
04:15:16 5 interview or an interrogation?

04:15:20 6 A. In my opinion, based on what I reviewed,
04:15:22 7 this would be an interrogation. She was clearly a
04:15:30 8 suspect. They thought she was involved. It appears
04:15:30 9 from her account that many interrogation techniques
04:15:34 10 were used, and so I would classify it as not as an
04:15:36 11 interview of a victim or a witness, but as an
04:15:40 12 interrogation of a suspect.

04:15:46 13 Q. Okay. When you -- in the course of your
04:15:46 14 communication with Ms. Gilliard, did she indicate to
04:15:48 15 you whether anything was said to her about whether
04:15:52 16 it was an interview or an interrogation or what
04:15:54 17 her -- whether she was a suspect?

04:16:00 18 A. Well, she indicated that she was told that
04:16:02 19 she was just a witness during the questioning
04:16:08 20 session, and maybe from that she inferred that she
04:16:12 21 was not being interrogated.

04:16:16 22 Q. So in your investigation of it and your
04:16:20 23 interview with her, she was -- she has indicated
04:16:22 24 that she thought she was a witness?

04:16:24 25 A. That's what she told me, correct.

04:16:28 1 Q. Did she tell you if anybody told her that?

04:16:30 2 A. Yeah, that she was told by the detectives

04:16:32 3 that she was just a witness and they were

04:16:38 4 questioning her involvement in this as a witness,

04:16:38 5 leading her to think that she was not going to be

04:16:42 6 punished for what she said because she was not a

04:16:46 7 suspect.

04:16:48 8 Q. And based on what we had said before, I

04:16:52 9 believe you said that an interview is what generally

04:16:52 10 is used for somebody who would be considered a

04:16:58 11 witness.

04:16:58 12 A. Correct.

04:17:00 13 Q. And in an interview can you describe to us

04:17:02 14 again the type of -- what would have occurred if she

04:17:06 15 had in fact been just interviewed?

04:17:10 16 A. Well, presumably it would have occurred

04:17:14 17 during normal hours. There wouldn't have been the

04:17:16 18 rush to have it so late at night. Presumably it

04:17:20 19 wouldn't have been so long, and her account

04:17:26 20 presumably would have been that it was more friendly

04:17:28 21 questioning, it was more general, open-ended

04:17:30 22 questioning, it wasn't accusatorial, there were no

04:17:32 23 interrogation techniques, that they just wanted to

04:17:38 24 find out what she knew and then she went home. That

04:17:38 25 would have been more consistent with an interview as

04:17:44 1 against what she describes, which is clearly an
04:17:46 2 interrogation, even though one of the techniques of
04:17:46 3 the interrogation, if her account is accurate, was
04:17:50 4 to lead her to believe that she was just a witness
04:17:52 5 in this crime, not that -- or if she cooperated with
04:17:58 6 the police, she would just be seen as a witness, not
04:18:00 7 somebody who was involved in committing a crime.

04:18:04 8 Q. So you said that pursuant to your knowledge
04:18:08 9 of how they are trained to do interviews, that would
04:18:10 10 be what would normally be done with somebody who was
04:18:12 11 called a witness.

04:18:12 12 A. Correct.

04:18:16 13 Q. Versus a suspect.

04:18:16 14 A. Correct.

04:18:18 15 Q. And during an interview of a witness, you
04:18:20 16 said that, I believe, that they would not have tried
04:18:22 17 to elicit incriminating information?

04:18:26 18 A. Correct. The purpose of an interview is
04:18:30 19 not to elicit incriminating information because the
04:18:32 20 person you are interviewing is not involved in the
04:18:32 21 crime. So it's to get general, preliminary,
04:18:40 22 sometimes more than preliminary information. It may
04:18:42 23 be the suspect -- the person who is a witness at
04:18:46 24 time one becomes a suspect at time two or as a
04:18:48 25 potential suspect. But the purpose of interviews is

04:18:50 1 not to get incriminating information. They would
04:18:52 2 not have sought to incriminate her if they were
04:18:58 3 interviewing her.

04:18:58 4 Q. I want to give you an example. You have
04:19:00 5 two different statements of Ms. Gilliard. One of
04:19:04 6 them is given on the 5th, and one is given on the
04:19:06 7 9th. Pursuant to your understanding of your
04:19:08 8 conversation with her or your review of the file,
04:19:14 9 would the statement on the 5th be more consistent
04:19:14 10 with an interview or an interrogation?

04:19:16 11 A. I believe it's more consistent with an
04:19:18 12 interview than an interrogation.

04:19:22 13 Q. And that would be because why?

04:19:24 14 A. Well, if you -- if you look at the last
04:19:30 15 page, although this was not taped, so we don't know
04:19:34 16 exactly what occurred, it appears that they are
04:19:34 17 asking some very general questions as part of a
04:19:40 18 general investigation. It doesn't appear that they
04:19:42 19 are seeking to elicit incriminating information. We
04:19:44 20 can't tell from the statement the tone of their
04:19:48 21 questioning or the manner of their questioning, but
04:19:50 22 it appears at this point that they do not regard her
04:19:54 23 as a suspect or at least that they are not treating
04:19:54 24 her as a suspect although their failure to record
04:19:58 25 the questioning session leaves open what exactly

04:20:02 1 occurred and how exactly they treated her. But
04:20:06 2 based on this document, it appears at this point she
04:20:08 3 either is or -- is being treated as a witness or
04:20:10 4 someone who can be helpful to the investigation, not
04:20:12 5 as a suspect or a primary suspect in the commission
04:20:16 6 of a crime.

04:20:20 7 Q. And with regard to the statement on the
04:20:20 8 9th, I would like for you to go into some more
04:20:26 9 detail about your understanding and what you've been
04:20:28 10 told in the process of reviewing this particular
04:20:30 11 case.

04:20:30 12 We have determined that it's your opinion
04:20:38 13 that this was more like an interrogation. I believe
04:20:44 14 you said factors or facts that would make you
04:20:44 15 believe that this was in fact police interrogation.
04:20:48 16 One of them would be -- where did this occur in her
04:20:50 17 rendition of these facts to you?

04:20:54 18 A. It occurred in her rendition of the facts
04:20:56 19 at the police station, inside an interrogation room.

04:21:00 20 Q. Okay. And tell me a little bit more about
04:21:04 21 what she said about it.

04:21:06 22 A. Well, I believe she was picked up at 11:30
04:21:08 23 and taken to a police station. She describes being
04:21:16 24 asked a number of questions, being told that she was
04:21:18 25 involved in this, being told to confess, being

04:21:22 1 confronted with evidence, I believe fingerprint
04:21:24 2 evidence of her participation in the event. She
04:21:30 3 describes requesting an attorney and not being given
04:21:32 4 one.
04:21:32 5 She describes not having her Miranda rights
04:21:38 6 read until the end, not at the beginning of the
04:21:44 7 interrogation. As I mentioned, she describes being
04:21:46 8 told that she was a witness. She also described
04:21:46 9 being told that if she cooperated and admitted her
04:21:48 10 involvement in this, she would just get six months'
04:21:52 11 probation, that she would not go to prison. She
04:21:54 12 describes one officer being very friendly to her and
04:21:56 13 very sympathetic, another officer being very mean,
04:22:02 14 yelling at her.
04:22:04 15 She also describes that at one point in the
04:22:10 16 questioning session she was led to believe that if
04:22:10 17 she did not confess to her involvement and the
04:22:16 18 codefendant's involvement, that the codefendant
04:22:18 19 would be able to hurt her children.
04:22:20 20 So there are a number of things that she
04:22:22 21 described in my interview to her, but if her
04:22:26 22 description is accurate, it's more consistent with
04:22:28 23 an interrogation, not an interview, and so is her
04:22:32 24 statements, since, after all, this is a signed
04:22:34 25 statement incriminating her, and there are --

04:22:40 1 there's a signed waiver. Although it's not timed,
04:22:42 2 there's a signed waiver that the Miranda rights were
04:22:44 3 given and waived. It's not -- it's not the policy
04:22:54 4 of police to have suspects -- have people sign
04:22:58 5 waivers for interviews. You don't read somebody
04:23:02 6 their Miranda rights during an interview. You don't
04:23:04 7 solicit a signed waiver during an interview.

04:23:06 8 In all of those, the fact that
04:23:08 9 interrogation techniques were used, according to
04:23:10 10 her, that it was a lengthy questioning session, that
04:23:14 11 it was at a particular time, that a signed statement
04:23:18 12 came out of it incriminating her, that there were
04:23:20 13 signed, but not timed, Miranda rights, all that is
04:23:24 14 consistent with an interrogation, not an interview.

04:23:28 15 Q. And pursuant to the fact that this would be
04:23:30 16 consistent with an interrogation, some of those
04:23:32 17 techniques that we took an hour or so or more to go
04:23:36 18 over would be evidence in her rendition of these
04:23:40 19 facts to you.

04:23:40 20 A. That is correct.

04:23:44 21 Q. And the techniques -- now, certainly I
04:23:46 22 understand and I know that you're going or basing
04:23:50 23 your testimony at this point on what you've read in
04:23:54 24 the paperwork and what you've actually been told by
04:23:58 25 Ms. Gilliard by telephonic interview.

04:24:00 1 A. Correct.

04:24:00 2 Q. And you haven't had any opportunity to talk

04:24:02 3 to the police officers or the detectives or the

04:24:06 4 interrogators in this case that were involved with

04:24:08 5 Ms. Gilliard.

04:24:10 6 A. Correct.

04:24:10 7 Q. And so I believe you keep referring to the

04:24:14 8 phrase "assuming" or "if what she has said is true,"

04:24:22 9 these are your conclusions.

04:24:22 10 A. Correct.

04:24:22 11 Q. Or your opinions.

04:24:22 12 A. Correct.

04:24:22 13 Q. And I believe you said that we know that

04:24:26 14 she was detained. She was in a police station.

04:24:28 15 A. Correct.

04:24:30 16 Q. And did she indicate to you -- you said

04:24:36 17 that she indicated she was a witness, but you said

04:24:36 18 that in light of the fact that it was, in your

04:24:44 19 opinion, interrogation, do you believe now that she

04:24:44 20 would have been free to leave?

04:24:46 21 A. Not based on her description. What she

04:24:50 22 describes is the situation where she had to

04:24:52 23 cooperate with them or she would -- she would be

04:24:56 24 arrested, not that she could leave at will. That's

04:25:00 25 not consistent with her description. So no,

04:25:04 1 according to her description, she was not free to
04:25:04 2 leave.

04:25:08 3 Q. And pursuant to her description, did she
04:25:10 4 ever indicate to you that anybody verbally advised
04:25:12 5 her of Miranda?

04:25:14 6 A. Only at the conclusion of the questioning.
04:25:18 7 She said she was not advised at the beginning. She
04:25:20 8 said that she did request an attorney at or near the
04:25:22 9 beginning.

04:25:24 10 Q. I didn't hear you. Can you say that a
04:25:24 11 little louder? I'm sorry.

04:25:26 12 A. Yeah. She said that she was not read any
04:25:28 13 Miranda rights at the beginning of the
04:25:32 14 interrogation, but rather at the end, I believe
04:25:34 15 seven or eight hours later.

04:25:36 16 She also says that she had requested an
04:25:38 17 attorney either at the beginning or very near the
04:25:42 18 beginning of the interrogation, and that request was
04:25:44 19 not honored.

04:25:50 20 Q. When you reviewed the material that was
04:25:52 21 provided by me, some of the police reports and
04:25:58 22 information, not Ms. Gilliard's information, but
04:26:00 23 some of the other material in this case, were you
04:26:02 24 able to see anything in those materials that
04:26:06 25 indicated that there was a verbal Miranda given to

04:26:08 1 Ms. Gilliard in the materials you reviewed?

04:26:10 2 A. Not that I recall, no, other than --

04:26:16 3 Q. And I think that -- I didn't hear you.

04:26:18 4 A. Other than -- other than, according to her,

04:26:20 5 at the very end of the interrogation, after it

04:26:22 6 had -- she had given -- she had signed a statement

04:26:26 7 and it had concluded.

04:26:30 8 Q. We're referring to the statement on January

04:26:30 9 9, and I asked you if one of the things that you had

04:26:34 10 reviewed was the advice of constitutional rights.

04:26:36 11 A. Correct.

04:26:38 12 Q. And this particular form in our area as you

04:26:44 13 can see what is used or was used to show or to

04:26:50 14 indicate that the detective or the interrogator had

04:26:56 15 actually covered Ms. Gilliard's constitutional

04:26:56 16 rights with her.

04:26:56 17 A. Correct.

04:26:58 18 Q. And pursuant to that, do you see that she's

04:27:04 19 got her personal information there, some, I believe

04:27:06 20 initials, one through five?

04:27:08 21 A. Correct.

04:27:10 22 Q. As well as her name?

04:27:10 23 A. Correct.

04:27:12 24 Q. And it's dated 1-9-00?

04:27:14 25 A. Correct.

04:27:16 1 Q. Is there a time on that form?

04:27:20 2 A. Not that I see, no.

04:27:22 3 Q. Was there any indication in any of the

04:27:24 4 records that I provided to you that there was an

04:27:28 5 actual time listed as to what -- at what point she

04:27:30 6 signed this form?

04:27:32 7 A. Not that I recall, no, other than her --

04:27:34 8 other than her description that she signed the form

04:27:38 9 at the conclusion of the interrogation around 7:30

04:27:42 10 or so in the morning.

04:27:46 11 Q. And you're getting that 7:30 in the morning

04:27:48 12 or 7:00 or so in the morning from the time on the

04:27:52 13 written statement --

04:27:52 14 A. Yes.

04:27:52 15 Q. -- also?

04:27:52 16 A. Yes. She didn't have a specific

04:27:56 17 recollection of the exact time when she signed the

04:28:00 18 Miranda statement, but she said -- she said these

04:28:02 19 Miranda rights were given to her only at the very

04:28:04 20 end of the interrogation.

04:28:06 21 Q. And pursuant to everything that we have

04:28:10 22 discussed up to this point, and we went extensively

04:28:12 23 into Miranda, tell us a little bit about why the

04:28:20 24 police as a technique have people initial the

04:28:24 25 forms.

04:28:28 1 A. Well, they have people sign and initial the
04:28:28 2 forms so that they can give this to the prosecution.
04:28:30 3 and have the prosecution demonstrate before the
04:28:34 4 judge that the Miranda rights were waived
04:28:36 5 voluntarily, knowingly, and intelligently. There
04:28:40 6 would be no stronger evidence of that than having a
04:28:42 7 form signed and initialed by the -- by the person
04:28:50 8 who is being interrogated. It's to make sure --
04:28:52 9 it's to make sure that every statement stands up in
04:28:54 10 court.

04:28:54 11 Q. And I believe you kept referring to a
04:28:54 12 legally admissible statement. That's one of the
04:28:56 13 things we talked about before, that they are trained
04:29:00 14 to try to create -- their goal is to have a legally
04:29:06 15 admissible statement?

04:29:06 16 A. Correct. Correct. It looks very bad.
04:29:08 17 It's very unprofessional if the police don't carry
04:29:12 18 out their legal responsibilities with regard to
04:29:14 19 Miranda correctly, and that results in some evidence
04:29:16 20 getting excluded from a jury at trial because of the
04:29:20 21 police's mistakes or unprofessional behavior. And
04:29:24 22 so they are taught in their training not to make any
04:29:28 23 mistakes, not to be unprofessional, not to do or say
04:29:34 24 anything that's illegal or improper that would lead
04:29:34 25 a judge to say "I'm not letting the confession in

1086

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04:29:38 1 because you, the detective, screwed up."

04:29:40 2 Q. Okay. And with regard to this particular

04:29:44 3 statement, and I mean we have established that you

04:29:46 4 researched this stuff, that you know -- you have

04:29:48 5 interrogated or you have discussed it with officers

04:29:50 6 and training people, what is your impression of the

04:29:56 7 fact that there is no time on this statement?

04:30:02 8 A. Well, my impression is that this was sloppy

04:30:04 9 and possibly suspect, that there's no good reason

04:30:08 10 why they -- why this should be blank. They should

04:30:16 11 have -- in my experience, this rarely happens. Most

04:30:16 12 police know to cross their t's and dot their i's on

04:30:20 13 these forms. So it's just sloppy police work. I

04:30:26 14 don't know whether or not they gave the warnings at

04:30:30 15 the beginning or at the end. Her account is they

04:30:32 16 gave them at the end. The absence of a notation on

04:30:36 17 the time is certainly consistent with her account,

04:30:40 18 but my opinion is just that it was just sloppy.

04:30:46 19 Q. I understand. And certainly her account to

04:30:50 20 you on the phone was that she didn't receive any

04:30:54 21 verbal warnings before the interrogation started and

04:30:58 22 that ultimately she was asked to sign this form at

04:31:02 23 the end and that this was the first time that she

04:31:04 24 was advised of these rights.

04:31:06 25 A. Correct.

04:31:08 1 Q. That's her rendition.

04:31:08 2 A. Correct.

04:31:10 3 Q. And I think we've covered that.

04:31:12 4 Now, with regard to the actual

04:31:16 5 interrogation itself, you indicated that there were

04:31:18 6 a few things that you thought were techniques, and

04:31:20 7 what I would ask -- we know from -- before from the

04:31:24 8 testimony that some of the techniques that you've

04:31:28 9 described are not bad techniques. They are

04:31:28 10 techniques. They are not necessarily coercive in

04:31:32 11 themselves. So you've described some things to us

04:31:36 12 about Ms. Gilliard's version of the facts that

04:31:38 13 include techniques.

04:31:42 14 MR. DU TREMBLE: Is there a question in

04:31:42 15 there?

04:31:44 16 MS. GAY: Yes.

04:31:46 17 MR. DU TREMBLE: Ask it.

04:31:46 18 BY MS. GAY:

04:31:46 19 Q. Could you please describe some of the

04:31:48 20 techniques that you think became coercive.

04:31:52 21 A. Well, certainly if the police denied her

04:31:56 22 right to an attorney if she requested one, I would

04:32:00 23 consider that coercive. If she was told that she

04:32:06 24 would just get six months' probation if she

04:32:06 25 cooperated and provided a statement and admitted to

04:32:10 1 being present and participating in the robbery and
04:32:12 2 murder, but she would get a harsher punishment if
04:32:18 3 she did not, then I would regard that as coercive as
04:32:20 4 well. If she was threatened by being led to believe
04:32:26 5 or told that if she didn't confess, B.J. would hurt
04:32:32 6 her children, that kind of a threat would also be
04:32:34 7 regarded as coercive. And if she was led to believe
04:32:38 8 that she would be treated like a suspect and
04:32:40 9 convicted if she didn't participate -- I mean didn't
04:32:44 10 cooperate with the police during the interrogation,
04:32:50 11 but would only be treated as a witness, therefore
04:32:52 12 implying that she wouldn't be punished if she did
04:32:54 13 cooperate, I would also regard that as coercive.

04:32:58 14 Q. So all of these interrogation techniques
04:33:06 15 that you have described, the good ones and the bad
04:33:08 16 ones, or the noncoercive ones as well as the
04:33:12 17 coercive ones, would be to obtain the goal of a
04:33:14 18 statement in this case.

04:33:14 19 A. Well, that is why interrogation techniques
04:33:22 20 are used, and so if her -- if -- the techniques that
04:33:24 21 she describes, if they were used, yes, the purpose
04:33:26 22 of those techniques or any techniques that were used
04:33:28 23 would be to get her to make incriminating statements
04:33:36 24 to help the detectives with their goal of convicting
04:33:36 25 her.

04:33:36 1 Q. And that's what they got in this case, was
04:33:40 2 a statement that's very incriminating that they hope
04:33:44 3 to use as a goal to try to convict her in this
04:33:46 4 case.

04:33:48 5 A. That is correct.

04:33:50 6 Q. And pursuant to your -- what you've
04:33:54 7 reviewed in this case and your -- your questioning
04:34:00 8 of her, what is your position or your interpretation
04:34:02 9 of these coercive techniques? What do you think --
04:34:06 10 I know you have said that -- you've discussed
04:34:08 11 voluntariness before about different -- this area.
04:34:12 12 What would be your impression as to the
04:34:14 13 voluntariness of this statement based on what
04:34:18 14 Ms. Gilliard has told you occurred?

04:34:20 15 MR. DU TREMBLE: Objection to the form of
04:34:20 16 the question.

04:34:22 17 BY MS. GAY:

04:34:22 18 Q. Based on your review and in your expert
04:34:26 19 opinion in this case, could you give us an opinion
04:34:28 20 as to what you believe the consequences of these
04:34:32 21 coercive techniques were?

04:34:34 22 A. Well, based on Ms. Gilliard's description
04:34:38 23 or according to her description, these techniques
04:34:42 24 could have overborne her will. They could have
04:34:46 25 caused her to give an involuntary or a series of

04:34:48 1 involuntary statements which might have been
04:34:54 2 inaccurate. These are the kinds of techniques if
04:34:56 3 used or when used that can cause people to feel like
04:35:00 4 they have no choice but to comply, that is, to feel
04:35:04 5 coerced, to give involuntary statements and
04:35:06 6 sometimes to make inaccurate or even false
04:35:08 7 statements.

04:35:10 8 Q. And pursuant to your conversations with
04:35:14 9 Ms. Gilliard, did she indicate to you whether or not
04:35:16 10 she freely, voluntarily, and willfully gave this
04:35:20 11 statement?

04:35:20 12 A. That was not her account, no. She -- she
04:35:24 13 described being coerced, feeling like she had no
04:35:28 14 choice, feeling scared, threatened, exhausted. She
04:35:34 15 did not describe feeling as if she gave a voluntary
04:35:38 16 statement or voluntarily complied with the
04:35:40 17 interrogation.

04:35:42 18 Q. I believe you said something about
04:35:46 19 exhausted. Some of the things that she said, did
04:35:46 20 she talk to you about being able to go to the
04:35:50 21 bathroom?

04:35:54 22 A. I don't recall specifically what she said
04:35:56 23 about being able to go to the bathroom. I would
04:35:58 24 have to review the transcript of the interview.

04:36:02 25 Q. How about food? Do you recall whether or

04:36:06 1 not she said that they provided her with any food?

04:36:08 2 A. My recollection is that they did not

04:36:10 3 provide her with any food.

04:36:14 4 Q. And did -- in some of those things, I think

04:36:18 5 you referred to it as them having total control.

04:36:24 6 Would that be one of the techniques that was used in

04:36:26 7 this case?

04:36:26 8 A. That would be consistent with her

04:36:28 9 description, yes, that she felt they were in control

04:36:32 10 of the entire questioning session, not her.

04:36:36 11 Q. Would that also be something that may be

04:36:38 12 reflective of coercion?

04:36:40 13 A. It can be, yes, depending on whether the

04:36:44 14 suspect feels they have no opportunity to assert

04:36:46 15 their will and if they feel like the only reason

04:36:52 16 they're saying what they're saying is because

04:36:52 17 they're too intimidated or scared to do otherwise.

04:36:58 18 Q. And is it your opinion in this case that

04:37:00 19 that was the fact, that she did not feel that she

04:37:02 20 could assert her will?

04:37:06 21 A. If her description of what occurred is

04:37:06 22 accurate, then yes, that would be my opinion.

04:37:10 23 Q. What are the personal facts that you know

04:37:14 24 about Ms. Gilliard?

04:37:14 25 A. Well, I believe she's -- she's a young

04:37:18 1 adult, 21 years old, that she is not very well
04:37:24 2 educated, she's not very sophisticated, and if I
04:37:26 3 remember correctly, she has a low or relatively low
04:37:34 4 IQ or low-level intellectual or cognitive
04:37:36 5 functioning. She is also, I believe, a minority, if
04:37:40 6 I remember correctly.

04:37:44 7 Q. How about -- and I think you have mentioned
04:37:44 8 she has children?

04:37:46 9 A. Yes, I believe she has two small children.

04:37:50 10 Q. Would any of the personal factors that
04:37:52 11 you've just described to me go into or play into
04:37:58 12 your analysis -- be relevant, is I guess my
04:38:02 13 question, to your analysis of whether or not her
04:38:04 14 will was overborne by these two detectives who
04:38:08 15 interrogated her?

04:38:08 16 A. Well, as a general matter, we know that
04:38:10 17 people who are younger are more easily intimidated
04:38:12 18 by police, and it would be easier for police to
04:38:16 19 overbear the will of somebody who is younger. As a
04:38:18 20 general matter, we also know that people with low
04:38:22 21 I.Q.s tend to be more suggestible and more compliant
04:38:26 22 and therefore more in the average case willing to go
04:38:32 23 along with what's being suggested to them or
04:38:34 24 commanded to them. So those factors could be
04:38:40 25 relevant to a determination of voluntariness, yes.

04:38:46 1 Q. And in this case do you believe that
04:38:48 2 they're relevant?

04:38:52 3 A. Well, based on her description, yes, I do
04:38:52 4 believe that if her description is accurate, they
04:38:54 5 would be relevant.

04:38:58 6 Q. Did you -- did she indicate to you any
04:39:02 7 themes? That was one thing that you referred to
04:39:04 8 that you said can sometimes get coercive. Did she
04:39:10 9 in her factual account of this incident to you, did
04:39:10 10 she indicate to you any themes?

04:39:14 11 A. Well, one -- if one -- the discussion of
04:39:20 12 "If you" -- "you would just be seen as a witness if
04:39:26 13 you tell me what happened, but if you don't, you'll
04:39:26 14 be seen as somebody" -- "a criminal, somebody who
04:39:32 15 committed in crime," that could be seen as a very
04:39:32 16 bad example of a theme that there are two choices, a
04:39:36 17 good choice, a bad choice, that the person's
04:39:38 18 involvement in the act can either be portrayed in a
04:39:44 19 benign way that will not result in punishment, will
04:39:44 20 leave her free to leave at the end. Witnesses, after
04:39:48 21 all, are not guilty of anything. "Or you will be
04:39:50 22 seen as a suspect, perhaps a prime suspect, who is
04:39:56 23 involved in this robbery and murder, a very serious
04:40:00 24 crime that could lead to very serious punishment."

04:40:02 25 So that -- if that was used, that would be

04:40:04 1 an example, an extreme example, of a theme, trying
04:40:08 2 to get the suspect to admit to their participation
04:40:12 3 in the underlying act by creating a framing of it
04:40:16 4 that either excuses or justifies or mitigates the
04:40:18 5 person's culpability.

04:40:24 6 Q. And you indicated that pursuant to her
04:40:28 7 rendition and in light of the framework of a theme,
04:40:32 8 that you would think that that would be a coercive
04:40:34 9 or noncoercive theme?

04:40:36 10 A. Well, I think that would definitely be a
04:40:40 11 coercive theme because there's a clear communication
04:40:44 12 that if you comply and give the police a statement,
04:40:48 13 you're going to get no punishment. So it's a
04:40:48 14 promise. It's an implicit promise or suggestion of
04:40:54 15 prosecutorial leniency, and the suggestion that you
04:40:56 16 will be treated as a suspect and convicted if you
04:40:58 17 don't cooperate with the police and give them a
04:41:02 18 statement is an implicit threat of punishment, and
04:41:04 19 that is a classic example of what's regarded -- of
04:41:10 20 psychological coercion. So if that theme were used,
04:41:10 21 my opinion would be that it was a psychologically
04:41:12 22 coercive theme.

04:41:14 23 Q. And pursuant to her rendition of the facts,
04:41:18 24 that's what happened.

04:41:20 25 A. That is her rendition of the facts,

04:41:20 1 correct.

04:41:22 2 Q. And certainly everything that you have here

04:41:24 3 to say is based on her rendition of the facts.

04:41:26 4 A. Correct.

04:41:34 5 MS. GAY: Can I have just a minute to

04:41:36 6 review before I wrap up?

04:41:40 7 THE VIDEOGRAPHER: Would you like to go off

04:41:42 8 the video record for just a minute?

04:41:44 9 MS. GAY: Just a minute.

04:41:46 10 (Pause in proceedings.)

04:42:00 11 MS. GAY: I'm ready.

04:42:00 12 THE VIDEOGRAPHER: Okay.

04:42:02 13 MS. GAY: Tell me when.

() 04:42:04 14 THE VIDEOGRAPHER: You're still on.

04:42:04 15 BY MS. GAY:

04:42:06 16 Q. Mr. Leo, you in this area and the research

04:42:12 17 that you do and the opinion that you have given us

04:42:14 18 here today, you're primarily discussing the

04:42:16 19 voluntariness of Ms. Gilliard's statement.

04:42:20 20 A. That's correct. That's what we have been

04:42:20 21 discussing primarily.

04:42:22 22 Q. Pursuant to that, you have reviewed the

04:42:24 23 facts and circumstances of the taking and the making

04:42:24 24 of the statement?

04:42:30 25 A. Yes, insofar as it's reflected in the

04:42:32 1 materials that were provided to me and my interview
04:42:34 2 with Ms. Gilliard, correct.

04:42:36 3 Q. And the characterization of that statement,
04:42:40 4 in your opinion, would be that it was involuntary.

04:42:40 5 A. Based on her description, yes, if -- her --
04:42:46 6 she describes an account of interrogation that is
04:42:48 7 definitely, in my opinion, involuntary.

04:42:52 8 Q. And pursuant to that, you believe that
04:42:54 9 her -- the pressure, the fear, things that you've
04:43:00 10 described, would have put so much pressure on her
04:43:04 11 that her will would have been overborne?

04:43:06 12 A. Based on her description to me, if that is
04:43:10 13 an accurate description, yes, I do believe those
04:43:12 14 techniques could and likely did overbear her will.

04:43:18 15 Q. And when we say "overbear her will," that's
04:43:20 16 sort of a term of art. What does that mean in
04:43:22 17 regular people terms?

04:43:22 18 A. That somebody is either so worn down or
04:43:28 19 scared by the interrogation techniques that are
04:43:34 20 being used and the interrogation environment, that
04:43:34 21 they will do and say whatever the police want them
04:43:40 22 to just to put an end to it and get out of there,
04:43:40 23 that they do not really have the ability to assert
04:43:46 24 their resistance any longer or assert their will,
04:43:50 25 that they have become almost like a piece of clay,

04:43:52 1 and that would be the extreme example, that they
04:43:54 2 really feel they have no freedom. That's why we
04:43:56 3 talk about a voluntary confession, a confession
04:44:02 4 that's made freely and knowingly, but as against an
04:44:04 5 involuntary confession, one where the person no
04:44:06 6 longer feels they are free to choose or free to do
04:44:08 7 as they wish. That would be --

04:44:10 8 Q. And a person that would be in that state of
04:44:12 9 overborne will or what you called them, like clay,
04:44:16 10 has it been your experience that they always give
04:44:20 11 completely inaccurate or false statements?

04:44:24 12 A. No, no. If somebody is coerced, they may
04:44:32 13 give a completely true statement. They may give a
04:44:32 14 partially true, partially false statement, or they
04:44:36 15 may give an entirely false statement. It just
04:44:40 16 depends. The problem with--

04:44:40 17 Q. But what you're saying here today --

04:44:42 18 A. The problem with coercion is -- in terms of
04:44:50 19 reliability is that if the person is not guilty or
04:44:52 20 they are not guilty of what they are being accused
04:44:54 21 of, coercive techniques increase the risk that they
04:44:58 22 will give partially or wholly inaccurate
04:45:02 23 statements. It doesn't necessarily mean that the
04:45:06 24 statements are inaccurate. It only increases the
04:45:06 25 risk that if the person is innocent of the

1098

04:45:12 1 allegation or innocent of what they are being 1100
04:45:14 2 accused of, that they may give a wholly or partially
04:45:18 3 false statement.
04:45:20 4 Q. And you said that pursuant to your
04:45:20 5 involvement in this field, I believe you described
04:45:22 6 it as a desire to create a process wherein fair and
04:45:26 7 legally admissible statements are the product or the
04:45:32 8 result.
04:45:32 9 A. Correct, and reliable ones too, correct.
04:45:36 10 Q. So it's your position and involvement in
04:45:38 11 this field, and I believe you said you talk to
04:45:42 12 people and you do participate in the training
04:45:46 13 programs, that you want -- I think you said you want
04:45:48 14 for people to have fair and legally admissible
04:45:52 15 statements.
04:45:52 16 A. Correct. I think that's in society's best
04:45:54 17 interest, yes.
04:45:58 18 Q. Right. And in this particular case,
04:45:58 19 because you have come here today and you said that
04:46:02 20 you believed that there may have been coercion in
04:46:04 21 this statement, that is not inconsistent with your
04:46:08 22 desire that it's in society's best interest to have
04:46:10 23 fair and legally admissible statements.
04:46:12 24 A. Correct.
04:46:14 25 Q. And so your purpose coming here today to

04:46:20 1 talk on Ms. Gilliard's behalf and to tell us about
04:46:20 2 the type of things that you see as coercive in her
04:46:24 3 version of the facts is to -- well, why are you
04:46:28 4 here?

04:46:28 5 A. Well, presumably my expert knowledge in
04:46:32 6 this area can aid and assist the trier of fact that
04:46:38 7 there's some knowledge that I possess and can be
04:46:42 8 helpful in the legal decisions that have to be made
04:46:44 9 by a judge and a jury, and that's my understanding
04:46:48 10 of why I would be here. And the area that I study,
04:46:52 11 though common in the criminal justice system, is
04:46:54 12 beyond common knowledge. Most people do not know
04:46:56 13 about police interrogation training or police
04:47:02 14 interrogation techniques or the potential impact of
04:47:02 15 certain techniques in particular.

04:47:08 16 Q. So ultimately what you are here to discuss
04:47:12 17 is the voluntariness and provide information to the
04:47:14 18 trier of fact that you believe should -- would be
04:47:18 19 helpful to them in determining if the statement was
04:47:22 20 actually voluntarily given or is voluntary.

04:47:24 21 A. Correct. That's my understanding.

04:47:26 22 MS. GAY: I have no further questions.

04:47:32 23 MR. DU TREMBLE: Do you need a break before
04:47:34 24 I begin?

04:47:34 25 THE WITNESS: No. I think I'm okay. Thank

04:47:38 1 you for asking. I appreciate that.

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EXAMINATION

4 BY MR. DU TREMBLE:

04:47:38 5 Q. I'm Dale DuTremble. I'm with the Ninth

04:47:40 6 Circuit Solicitor's Office, and I have had an

04:47:44 7 opportunity to read some of your work, and I got an

04:47:44 8 opportunity to read some of your prior testimony,

04:47:48 9 and the basis of my questions will primarily come

04:47:54 10 from previous testimony that you have given.

04:47:54 11 A. Okay.

04:47:56 12 Q. In my opinion, you have been quite candid

04:48:00 13 and forthcoming with your description of what you do

04:48:04 14 for a living, what you study, what the strengths and

04:48:06 15 weaknesses are in your particular field, and I want

04:48:08 16 to be asking you some questions on some things you

04:48:10 17 have already said while under oath.

04:48:12 18 I am also going to be asking you some

04:48:14 19 questions on what you talked about here today. One

04:48:16 20 of the questions that you talked about here today or

04:48:16 21 that you indicated that you are a social

04:48:24 22 psychologist; is that correct?

04:48:26 23 A. Correct. I do research in the area of

04:48:30 24 social psychology. I teach classes in the area of

04:48:34 25 social psychology. I'm recognized in that

04:48:34 1 community, correct.

04:48:36 2 Q. And my question for you, sir, is do you

04:48:38 3 possess a degree in psychology.

04:48:40 4 A. No, I do not.

04:48:42 5 Q. You are not a clinical psychologist and you

04:48:48 6 are not a forensic psychologist.

04:48:48 7 A. That's correct. I'm not a clinical

04:48:50 8 psychologist. I don't know exactly what you mean by

04:48:52 9 forensic psychologist. Some people use the term

10 forensic psychologist as psychologists who do

04:49:02 11 research that's applicable to legal proceedings and

04:49:04 12 sometimes testify in court. If that were your

04:49:06 13 definition of a forensic psychologist, then I would

04:49:08 14 say I am a forensic psychologist. I received an

04:49:12 15 award from the Society of Forensic Psychology. But

04:49:16 16 if you have a different definition of forensic

04:49:20 17 psychologist, then I may not be a forensic

18 psychologist.

04:49:20 19 Q. I think my question really is do you

04:49:22 20 possess a degree in psychology, and the answer is

04:49:26 21 no.

04:49:26 22 A. Correct.

04:49:30 23 Q. Ms. Gay has asked you several questions

04:49:32 24 concerning the 500 or 600 cases that you have

04:49:36 25 reviewed since 1994 in your observation and your

04:49:42 1 analysis, and my question to you, sir, is isn't it
04:49:46 2 true that in those 500 to 600 cases that you spoke
04:49:54 3 of, not all of them were analyzed by you for
04:49:54 4 purposes of determining whether or not they
04:49:56 5 contained false confessions?

04:49:58 6 A. Correct, correct, yes, although I was
04:50:00 7 also --

04:50:02 8 MS. GAY: I can't hear.

04:50:04 9 THE WITNESS: Correct. I was also
04:50:04 10 including cases I had studied prior to 1994 as
04:50:08 11 well. But yes, that is correct.

04:50:12 12 BY MR. DU TREMBLE:

04:50:14 13 Q. And I believe you testified that part of
04:50:18 14 your mission at the university as a professor is a
04:50:22 15 three-part mission. One concerns research, one
04:50:28 16 concerns teaching, and one concerns service both to
04:50:30 17 the university and outside of the university
04:50:32 18 community; is that correct?

04:50:34 19 A. That is correct, although many professors
04:50:38 20 do not do service outside the university, but when
04:50:40 21 we do service outside the university, we are
04:50:42 22 credited for it, and it counts as our service -- for
04:50:46 23 our service obligation. So that is correct.

04:50:48 24 Q. Now, is your consulting work considered
04:50:50 25 service outside the community?

04:50:52 1 A. No, no, because I'm being paid for my
04:50:56 2 consulting work. There have been a few cases that I
04:51:02 3 have worked on pro bono, and in those cases I do
04:51:02 4 inform the university of this as a service
04:51:06 5 activity. So for the few cases that I do pro bono,
04:51:08 6 I do consider that, as does my university, service,
04:51:16 7 but the vast majority are paid consultations, and
04:51:16 8 they are not service.

04:51:18 9 Q. All right. So when you get paid, you keep
04:51:20 10 the money. It does not go back to the university.

04:51:22 11 A. That is correct.

04:51:22 12 Q. And you charge on an hourly basis, and what
04:51:26 13 is that hourly rate, sir?

04:51:28 14 A. \$250 an hour.

04:51:30 15 Q. And do you have an estimate of how many
04:51:32 16 hours you have in this case right now?

04:51:34 17 A. Well, I have not added them up, but I would
04:51:40 18 estimate anywhere between 15 and 30. I do not
04:51:42 19 know. It might even be lower than that, but I have
04:51:46 20 a lot of paper, and I have spent a lot of time
04:51:46 21 reviewing these documents and consulting with
04:51:50 22 Ms. Gay.

04:51:52 23 Q. Okay. And you have also indicated you have
04:51:54 24 testified 53 or 54 times in court. Can you tell me,
04:51:58 25 please, sir, how many times you have testified in

04:52:00 1 court in front of a jury in which a criminal
04:52:06 2 defendant was facing a possible prosecution?

04:52:10 3 A. Yes. Of -- of those 54 times, I believe
04:52:16 4 about 25 times have been before juries at trial. I
04:52:20 5 believe 23 or so have been suppression hearings
04:52:24 6 pretrial, and about five or six have been
04:52:26 7 postconviction proceedings. So approximately 25
04:52:28 8 times before a jury.

04:52:30 9 Q. I believe you testified on three occasions
04:52:34 10 you have not been allowed to testify in various
04:52:36 11 courts.

04:52:36 12 A. That is correct.

04:52:40 13 Q. Now, I believe you testified, not today,
04:52:44 14 but in a previous proceeding, and I guess to be
04:52:46 15 fair, I should tell you that I have a transcript
04:52:48 16 here in the Stephanie Traum case, which I believe
04:52:50 17 was a court-martial proceeding.

04:52:52 18 A. Correct.

04:52:52 19 Q. Do you recall that case?

04:52:54 20 A. Yes. It was in September of 1999, so it
04:52:58 21 may -- it may be --

04:52:58 22 Q. That's correct.

04:53:02 23 A. I haven't read that transcript, reread the
04:53:02 24 transcript, so it's almost two years ago, but I do
04:53:06 25 recall the case.

04:53:08 1 Q. And in that particular case, sir, you
04:53:10 2 testified that you can never take a defendant's word
04:53:10 3 that a confession is false, that you have to look at
04:53:18 4 the totality of the case. Is that still a fair
04:53:20 5 statement today, sir?

04:53:22 6 A. Oh, absolutely, yes. If someone says their
04:53:24 7 confession is true or false, that's not the end of
04:53:26 8 the matter. One has to look at the extrinsic
04:53:32 9 evidence that fails to or doesn't fail to
04:53:34 10 corroborate that as well as whether they possess
04:53:36 11 guilty knowledge. So yes, someone's mere assertion
04:53:42 12 needs to be treated like a hypothesis and tested
04:53:44 13 against the evidence, not taken on face value.

04:53:48 14 Q. Okay. And it's also true that -- I believe
04:53:52 15 you have already testified today that police
04:53:52 16 interrogators typically don't use force and
04:53:56 17 intimidation. They don't break out the rubber hoses
04:54:00 18 and they don't break out the thumb screws.

04:54:02 19 A. That is correct. Those are no longer
04:54:04 20 common in America. They have not been common for a
04:54:04 21 very long time.

04:54:06 22 Q. And I believe you testified in the Traum
04:54:10 23 case that your research that you have conducted over
04:54:14 24 many years have shown that confessions are -- false
04:54:16 25 confessions, I should say, are in fact rare and that

04:54:18 1 the normal confession is a true confession. Would
04:54:22 2 that still be the case today?
04:54:22 3 A. Yeah, that would be true. I would say they
04:54:28 4 are exceptional. They're not the rule. The norm is
04:54:30 5 a partially true or an entirely true statement or no
04:54:34 6 statement at all. We don't know how rare they are,
04:54:34 7 but they are not the norm. The norm is not a false
04:54:40 8 confession, that is correct, purely false
04:54:40 9 confession.
04:54:42 10 Q. A false confession would be the exception
04:54:44 11 rather than the norm.
04:54:46 12 A. That's correct. Sometimes statements have
04:54:46 13 a mix of truth and falsehood, but yes.
04:54:50 14 Q. And it's also true that there's no
04:54:54 15 generally accepted theory in the scientific
04:54:56 16 community as to how often false confessions occur.
04:55:00 17 A. Well, yeah. We do not have a reliable
04:55:04 18 estimate for the reasons that I articulated on
04:55:08 19 direct of how often they occur. We cannot say they
04:55:08 20 occur one in ten, one in a hundred, one in a
04:55:12 21 thousand. At present we simply don't have the tools
04:55:16 22 to develop a scientifically valid estimate.
04:55:18 23 Q. Okay. And I believe you earlier or at
04:55:24 24 least in the Traum case testified that it's really
04:55:26 25 much harder for the police to get a false confession

04:55:30 1 than a true confession; is that correct?

04:55:34 2 A. It should be, that's correct. Keeping

04:55:34 3 all --

04:55:36 4 Q. That's because --

04:55:38 5 A. Keeping all other things constant, it

04:55:40 6 should take more pressure on the average person to

04:55:44 7 get them to admit they did something falsely than if

04:55:48 8 they are guilty to get them to admit they did

04:55:50 9 something truthfully.

04:55:50 10 Q. A guilty person should give it more readily

04:55:54 11 than the truly innocent person; correct?

04:55:56 12 A. Yes. It doesn't always happen, but they

04:55:58 13 should, depending on the background of the person,

04:56:00 14 but yes. If all things are equal, if you have two

04:56:02 15 identical situations, one innocent and one guilty,

04:56:06 16 it should be easier to get the guilty person to

04:56:08 17 break before getting the innocent person to break.

04:56:10 18 Q. Okay. In an area that Ms. Gay didn't go

04:56:14 19 into that I want to go into with you is isn't it

04:56:16 20 true that once you finally -- once a police

04:56:18 21 interrogator finally gets a suspect to say "I did

04:56:22 22 it," then you as a researcher want to focus on what

04:56:26 23 you call the postadmission narrative to determine

04:56:28 24 whether or not that confession is really reliable?

04:56:30 25 A. If -- that's correct. If -- if the goal is

04:56:34 1 to assess the reliability, one wants to focus on the
04:56:36 2 postadmission narrative and what that tells you
04:56:40 3 about the suspect's independent knowledge of the
04:56:42 4 crime facts and whether that postadmission narrative
04:56:46 5 fits the crime facts and what we know about the
04:56:48 6 crime facts and leads to corroboration is in fact
04:56:50 7 corroborated by extrinsic evidence, correct.

04:56:54 8 Q. And that narrative is nothing more than the
04:56:58 9 suspect telling the police the story of how they say
04:57:00 10 the crime occurred.

04:57:02 11 A. That is correct.

04:57:04 12 Q. Correct?

04:57:04 13 A. That is correct. That's --

04:57:06 14 Q. So what you want -- and then what you want
04:57:10 15 the police to do is to either take that statement
04:57:14 16 and corroborate it in some fashion or take that
04:57:14 17 statement and compare it with the facts of the crime
04:57:16 18 to see whether or not there is sufficient indication
04:57:20 19 that the person really knows what they're talking
04:57:22 20 about.

04:57:24 21 A. Yes. I mean that's correct. Sometimes I
04:57:26 22 am asked to do that in consultations or I testify
04:57:28 23 about it. Sometimes I do it only for my own
04:57:30 24 research purposes. But if the issue is is this a
04:57:34 25 reliable or likely reliable statement, then yes, I

04:57:40 1 want to evaluate that postadmission narrative to see
04:57:42 2 whether it demonstrates independent knowledge of
04:57:44 3 details you would only expect the true perpetrator
04:57:46 4 to know, whether it leads to new or missing
04:57:48 5 evidence, whether the person can explain a
04:57:52 6 anomalies, whether it's corroborated by extrinsic
04:57:56 7 evidence, all of which would be consistent with
04:58:00 8 reliability, just as conversely if the person was
04:58:02 9 only feeding back what they were told, had no
04:58:04 10 independent knowledge, could not lead police to the
04:58:08 11 murder weapon, their fingerprints or other bodily
04:58:10 12 evidence didn't match the evidence at the crime
04:58:12 13 scene, all of that would be consistent with
04:58:14 14 unreliability.

04:58:16 15 Q. And you have had an occasion -- you have
04:58:20 16 had more than enough time, I'm sure, to look at
04:58:22 17 Ms. Gilliard's confession in this case, have you
04:58:24 18 not?

04:58:26 19 A. I have looked at her statement. I was not
04:58:32 20 told to evaluate the postadmission narrative. My
04:58:32 21 understanding is that that was not within the scope
04:58:34 22 of my consultation here as sometimes it is and
04:58:36 23 sometimes it's not.

04:58:38 24 Q. Well, since you have read it, you are
04:58:42 25 familiar with the contents, are you not?

04:58:44 1 A. Yes, yes, I am familiar with the contents
04:58:46 2 of her -- generally familiar with the contents of
04:58:48 3 her two statements, correct.
04:58:52 4 Q. And speaking primarily of the actual
04:58:54 5 confession, which would be the January 9th document,
04:59:00 6 are you aware, sir, that she provided the first
04:59:02 7 confession in this case of all the suspects?
04:59:06 8 A. You mean in time, that this statement is
04:59:10 9 the first -- the first statement elicited from the
04:59:10 10 suspects?
04:59:12 11 Q. Yes, sir, in time.
04:59:14 12 A. Yes. If I remember correctly, there's only
04:59:20 13 one other suspect and that this statement precedes
04:59:22 14 his statement. Is that correct? Is that what you
04:59:24 15 are asking me?
04:59:24 16 Q. That's correct.
04:59:26 17 A. Okay.
04:59:26 18 Q. And you are, of course, aware that in her
04:59:30 19 statement, her confession, of January 9 that
04:59:36 20 Ms. Gilliard tells the investigators that the
04:59:38 21 perpetrator of the crime, her codefendant, wore a
04:59:40 22 gorilla mask when the crime was committed, do you
23 not?
04:59:44 24 A. Yes, I do recall that statement in her
04:59:48 25 account about a mask, yes.

04:59:50 1 Q. Okay. And since a gorilla mask was not
04:59:52 2 found at the scene of the crime by the
04:59:54 3 investigators, would you agree that that is one of
04:59:58 4 the facts that only a perpetrator, a participant in
05:00:00 5 the crime, would know?

05:00:04 6 A. I think I'm a little confused by your
05:00:10 7 question. The gorilla mask was not found at the
05:00:10 8 crime scene.

05:00:12 9 Q. Was not.

05:00:12 10 A. Okay. So where was the gorilla mask
05:00:16 11 found?

05:00:18 12 Q. The gorilla mask was found in the closet of
05:00:22 13 Ms. Gilliard after the crime had taken place, and
05:00:24 14 the police are now in possession of the gorilla
05:00:28 15 mask.

05:00:28 16 A. Okay. Okay. If one could independently
05:00:30 17 establish that a gorilla mask were used,
05:00:32 18 independently of her account, in the crime and then
05:00:38 19 that gorilla mask were found in her possession,
05:00:38 20 let's say if the victim had lived and said a gorilla
05:00:44 21 mask was used and could identify that mask and that
05:00:46 22 fit the description of the gorilla mask found at her
05:00:50 23 place, then that would be consistent with a reliable
05:00:52 24 statement unless it was such a common gorilla mask
05:00:54 25 that lots of people had them in their closets. But

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05:00:58 1 there has to be some independent evidence.

05:01:00 2 Q. Do you all do that out in California?

05:01:02 3 A. No. Yeah, only on Halloween; right?

05:01:06 4 No, I'm not trying to make light of what

05:01:08 5 you're saying. I am only trying to carry the

05:01:10 6 analysis forward.

05:01:10 7 Q. Sure. Well, let me ask you this. Have you

05:01:12 8 had occasion to look at the codefendant's statement?

05:01:18 9 A. Yes, I briefly looked at the codefendant's

05:01:18 10 statement, I believe two or three weeks ago. I

05:01:24 11 would have to -- I would have to find it and

05:01:26 12 rereview it to recall the details, but the answer is

05:01:28 13 yes.

05:01:28 14 Q. Well, do you recall that he corroborates

05:01:30 15 the fact that a mask was worn during the commission

05:01:32 16 of this murder?

05:01:32 17 A. Yes, I do.

05:01:34 18 Q. And doesn't that go toward the reliability

05:01:36 19 of the statement given by Ms. Gilliard concerning

05:01:40 20 the use of a mask in this murder case?

05:01:42 21 A. Well, it at least goes to -- if his account

05:01:44 22 is accurate, it goes to the fact that she was

05:01:52 23 present there during the commission of the crime.

05:01:56 24 It doesn't corroborate exactly what occurred during

05:01:56 25 the crime.

05:01:58 1 Q. Well, you are familiar -- well, I won't ask
05:02:02 2 you that legal question, even though you do have a
05:02:04 3 law degree.
05:02:04 4 But you also have indicated that not only
05:02:08 5 should the physical evidence be corroborated
05:02:10 6 postadmission, but also by medical evidence;
05:02:14 7 correct?
05:02:16 8 A. If there is medical evidence, yes.
05:02:16 9 Q. And you have read the coroner's report;
05:02:22 10 correct?
05:02:24 11 A. Yes, I believe I did look at that. That is
12 correct.
05:02:26 13 Q. And you are familiar with the fact that
05:02:28 14 Ms. Gilliard told the police that she participated
05:02:28 15 in this crime by placing a black plastic trash bag
05:02:32 16 over the victim's face, are you not?
05:02:34 17 A. I'm aware that that is in the statement
05:02:36 18 that she provided to them, yes.
05:02:40 19 Q. And you are also aware that she alleges and
05:02:44 20 the codefendant agrees that he placed a white
05:02:46 21 electrical cord around the victim's neck and used
05:02:48 22 that to strangle her; correct?
05:02:50 23 A. Correct.
05:02:52 24 Q. And you are familiar with the coroner's
05:02:54 25 report that indicates that the cause of death was

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05:02:56 1 caused by asphyxia from strangulation; correct?

05:03:00 2 A. Correct.

05:03:00 3 Q. And do not these details of the crime given

05:03:04 4 by the perpetrators go toward the reliability of

05:03:06 5 that statement given by Ms. Gilliard?

05:03:10 6 A. Yes, they -- they -- they are consistent

05:03:16 7 with her being present during -- during that

05:03:18 8 commission of the that crime, correct.

05:03:20 9 Q. All right. Are you aware that in both her

05:03:26 10 statement of January 5 and in January 9 she

05:03:28 11 indicates that she took a bottle of prescription

05:03:32 12 medication to the victim at the scene of the crime?

05:03:36 13 A. I did not remember that fact, but I don't

05:03:38 14 doubt that if you say it's in the confession.

05:03:42 15 THE VIDEOGRAPHER: There's three minutes

05:03:42 16 left of the tape.

05:03:44 17 BY MR. DU TREMBLE:

18 Q. Are you also aware --

05:03:46 19 MS. GAY: Wait. He said something.

05:03:48 20 What, sir?

05:03:48 21 THE VIDEOGRAPHER: There's three minutes

05:03:48 22 left on this tape. Would you like to switch?

05:03:50 23 MR. DU TREMBLE: Go ahead and change the

05:03:52 24 tape.

05:03:52 25 THE VIDEOGRAPHER: Okay.

05:03:54 1 We are now going off the record. The time
05:03:56 2 is 5:04.
05:03:58 3 (A recess was taken.)
05:08:12 4 THE VIDEOGRAPHER: We are now going back on
05:08:28 5 the record. The time is 5:09. We are now on the
05:08:28 6 record.
05:08:28 7 BY MR. DU TREMBLE:
05:08:30 8 Q. Thank you. Professor when we changed the
05:08:32 9 tape, I was -- I had asked you whether or not you
05:08:36 10 were aware that Ms. Gilliard had indicated in both
05:08:40 11 of her statements, both the statement of January 5
05:08:42 12 and January 9, that she had taken a bottle of
05:08:46 13 prescription medication to the victim, and have you
05:08:48 14 had an opportunity to review that statement to
05:08:50 15 determine whether or not you knew that?
05:08:50 16 A. Oh, yeah. I see at the beginning of the
05:08:54 17 January 9th statement that she does mention that she
05:08:56 18 took some antibiotics to the victim for her cold.
05:09:00 19 Is that what you are referring to?
05:09:02 20 Q. Yes, sir.
05:09:02 21 A. Okay.
05:09:04 22 Q. And are you also aware that the police
05:09:06 23 found that bottle of prescription medication at the
05:09:12 24 scene of the crime?
05:09:12 25 A. Yes.

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05:09:12 1 Q. And are you aware that the codefendant,
05:09:16 2 B.J. Johnson, indicates that during the course of
05:09:16 3 the murder he also saw the prescription medication
05:09:20 4 sitting on a desk at the scene of the crime?
05:09:20 5 A. I don't recall that specifically from his
05:09:24 6 account, but I don't doubt that if that's your
05:09:26 7 representation, it is accurate.
05:09:28 8 Q. Would that be the kind of corroborating
05:09:30 9 evidence that you would be looking for in the
05:09:32 10 postconfession narrative to determine reliability of
05:09:34 11 the statements given by Ms. Gilliard?
05:09:36 12 A. Yes, but again, I think it would
05:09:38 13 corroborate her presence at the crime scene more
05:09:44 14 than what exactly happened at the crime scene,
05:09:44 15 correct.
05:09:44 16 Q. Okay. And are you also aware that when she
05:09:48 17 testified that she placed the black plastic trash
05:09:52 18 bag over the victim's face, that her fingerprints
05:09:56 19 were found on that black plastic trash bag?
05:10:00 20 A. Yes, I am aware of that.
05:10:00 21 Q. Is that the kind of scientific evidence
05:10:02 22 that you would looking for from the police to
05:10:02 23 corroborate her statement?
05:10:04 24 A. That is the kind of evidence that I would
05:10:06 25 be looking for in assessing reliability, correct.

05:10:08 1 Q. Does that lead you to believe that that
05:10:10 2 statement given to her concerning the use of the
05:10:14 3 black trash bag with the corroborating fingerprints
05:10:16 4 is more reliable than not?
05:10:20 5 A. Yes, yes, that that is consistent with
05:10:22 6 being present at the crime scene and handling the
05:10:24 7 bag, and if that bag was involved in the murder,
05:10:26 8 then that would be consistent with being involved in
05:10:30 9 the murder.
05:10:30 10 Q. Thank you.
05:10:32 11 Now, we briefly -- you briefly talked about
05:10:34 12 the Reid method a little bit, and you testified it
05:10:38 13 is designed to move the suspects from denial to
05:10:44 14 basically a confession.
05:10:44 15 A. Correct.
05:10:44 16 Q. Is that correct?
05:10:46 17 And I believe you previously testified in
05:10:50 18 the Traum case that police need that kind of
05:10:54 19 methodology because guilty people need to be given
05:11:00 20 moral excuses or psychological justifications to be
05:11:02 21 made to confess to a crime because it's not
05:11:06 22 somebody's natural tendency just to confess to a
05:11:06 23 cold-blooded murder, is it?
05:11:08 24 A. Correct. It typically takes some level of
05:11:10 25 pressure or persuasion to get somebody to make such

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05:11:14 1 a confession. That is correct.

05:11:16 2 Q. And a person's natural impulse when

05:11:18 3 confronted or accused of such a terrible crime is to
05:11:22 4 lie about it, isn't it?

05:11:26 5 A. If they are guilty, yes, or to deny it,
05:11:26 6 yes.

05:11:28 7 Q. And guilty people often try to minimize
05:11:28 8 their involvement or to paint themselves in the best
05:11:30 9 light when confronted with such an accusation, don't
05:11:34 10 they?

05:11:34 11 A. Well, yes, but it's more common for a
05:11:38 12 guilty person to deny it than to, say, minimize
05:11:40 13 their involvement. If you move them to admission
05:11:44 14 and they give it up and they start confessing,
05:11:46 15 usually they don't minimize at that point unless
05:11:52 16 it's being suggested to them to minimize. But yes,
05:11:52 17 it is typically for the guilty person to deny the
05:11:56 18 accusation when confronted during an interrogation.

05:12:02 19 Q. And you would agree that the Reid method is
05:12:04 20 a very good method for what it sets out to do, which
05:12:06 21 is to train people to get confessions from guilty
05:12:10 22 people.

05:12:12 23 A. I would agree that the Reid method is very
05:12:16 24 effective at training police how to get confessions
05:12:20 25 from people, yes, and --

05:12:22 1 Q. So when we get a confession from someone
05:12:24 2 who is truly guilty, the Reid method has done its
05:12:28 3 job and it has worked; correct?

05:12:28 4 A. That is correct. Some of the Reid themes
05:12:32 5 have been considered coercive, but I don't mean to
05:12:38 6 paint a broad brush over the entire Reid method. So
05:12:42 7 my problem with the Reid method is with some of the
05:12:46 8 themes which are coercive, but by no means is the
05:12:48 9 entire method coercive. And yes, the Reid method is
05:12:50 10 very often effective at getting people who are
05:12:52 11 deemed guilty to make statements or confessions.

05:12:56 12 Q. And although you have worked in this field
05:12:58 13 for many years, you yourself have never conducted an
05:13:02 14 actual interrogation, have you?

05:13:02 15 A. That is correct.

05:13:04 16 Q. And you are not a police officer.

05:13:04 17 A. That is correct.

05:13:06 18 Q. So what you get to do is you get to observe
05:13:12 19 police officers doing their job, you get to read
05:13:14 20 about police officers doing their job, and you get
05:13:16 21 to read about the methodology that they're trained
05:13:18 22 in, but you don't get to do one yourself.

05:13:22 23 A. Correct.

05:13:22 24 Q. And isn't it also true that the tactics
05:13:26 25 that an interrogator might use does not necessarily

05:13:28 1 affect the guilty person and an innocent person in
05:13:30 2 the same way?
05:13:30 3 A. That is correct. That is correct. A
05:13:34 4 guilty person is more likely to bend because they
05:13:40 5 know that if the police is referring to evidence
05:13:40 6 that actually exists, that it looks like they're
05:13:46 7 going to be caught, and there's -- it should be
05:13:52 8 easier for them to just give in and make the
05:13:52 9 confession, other things being equal, whereas an
05:13:54 10 innocent person first thinks there's a mistake. At
05:13:56 11 some point they may become shocked. They may come
05:14:00 12 to doubt their memory. They may wonder why the
05:14:02 13 police are accusing them like this. The process by
05:14:04 14 which you get a confession -- the psychological
05:14:06 15 reasoning of an innocent person who makes a false
05:14:08 16 confession is very different than the psychological
05:14:10 17 reasoning of guilty person who makes a true
05:14:12 18 confession.
05:14:14 19 Q. So when a guilty person makes a true
05:14:14 20 confession, it might be because the police have come
05:14:18 21 in and said, "Look, we know you were there because
05:14:20 22 we got your fingerprints on the bag that we found at
05:14:22 23 the scene of the crime"; correct?
05:14:24 24 A. Correct, and the person feels like the
05:14:26 25 evidence -- that the evidence shows they're caught

05:14:28 1 and they might as well give it up. That's correct.

05:14:32 2 Q. So it would take more pressure to get an

05:14:36 3 innocent person to confess than it would to get a

05:14:36 4 guilty person to confess, generally.

05:14:38 5 A. Generally speaking, all things being equal,

05:14:40 6 the answer is yes.

05:14:44 7 Q. Okay. So when an interrogator is using the

05:14:44 8 Reid method or any other method, for that matter,

05:14:46 9 they're more likely to succeed in convincing a

05:14:50 10 guilty person to confess because an innocent person

05:14:52 11 is going to resist because they know in their heart

05:14:56 12 of hearts that they didn't do it; correct?

05:14:58 13 A. Yes. It should be easier to convince a

05:15:02 14 guilty person than an innocent person. It also

05:15:06 15 depends on whether the person they are interrogating

05:15:10 16 is innocent or guilty. If 99.9 percent of the

05:15:10 17 people they interrogate are guilty, you'll have a

05:15:12 18 small number of false confessions. If half the

05:15:16 19 people are innocent and half the people are guilty,

05:15:18 20 it may be that you get more guilty people to give

05:15:20 21 truthful statements, but also a higher number of

05:15:24 22 false confessions than you would expect because --

05:15:26 23 so it depends. But the answer to your question is

05:15:30 24 yes.

05:15:36 25 Q. What I was asking was because of the nature

05:15:38 1 of the beast and the nature of the science, we can't
05:15:44 2 tell how many times that might happen, meaning we
05:15:46 3 don't know how many times we get a false confession
05:15:48 4 versus how many times we get a truthful confession.

05:15:52 5 A. That is correct. As I mentioned earlier,
05:15:52 6 because we don't have the resources and the
05:15:54 7 commitment from police departments, we can't do
05:15:56 8 surveys that would give us a scientifically valid
05:16:02 9 estimate of how often false confessions occur,
05:16:02 10 correct.

05:16:04 11 Q. You would agree with me, would you not,
05:16:04 12 professor, that guilt is a very strong incentive for
05:16:06 13 somebody to confess?

05:16:10 14 A. Well, it can be in some cases. It's not in
05:16:12 15 many cases. If -- I mean if you mean guilt in the
05:16:16 16 sense that the person feels guilty that they
05:16:18 17 committed the crime, certainly --

05:16:20 18 Q. Yes.

05:16:20 19 A. -- that can be -- that can be a motivation
05:16:22 20 to confess either on one's own or as a result of the
05:16:28 21 police officer's ability to successfully exploit
05:16:30 22 that guilt. That is correct. It can be a motivator
05:16:34 23 to make someone confess.

05:16:36 24 Q. So what we're looking for in the
05:16:42 25 postadmission narrative that we have been talking

05:16:44 1 about is corroborating evidence of what the suspect
05:16:48 2 has told the police, and based upon what we have
05:16:50 3 discussed here today, you would agree with me, would
05:16:56 4 you not, that there are sufficient indicia of
05:16:58 5 reliability to those factors we've talked about
05:17:04 6 today to lead you to conclude that there is
05:17:06 7 reliability in the statement given by Ms. Gilliard;
05:17:06 8 correct?
05:17:06 9 A. Well, based on what you've told me, I would
05:17:08 10 agree that --
05:17:10 11 MS. GAY: Can you speak up? I can't hear
05:17:12 12 you.
05:17:14 13 THE WITNESS: Yes. I'm sorry.
05:17:16 14 Based on what you have told me, I would
05:17:16 15 agree that the evidence shows that she was present
05:17:20 16 or at least it's consistent with the statement that
05:17:24 17 she was present at the crime scene. I'm not sure
05:17:26 18 that the evidence you have referred to corroborates
05:17:30 19 exactly what she did or did not do other than touch
05:17:34 20 that bag at the crime scene. So I would just make a
05:17:36 21 finer distinction in terms of your question.
05:17:40 22 BY MR. DU TREMBLE:
05:17:40 23 Q. You would make a fine distinction about her
05:17:42 24 taking the keys from the lady's pocket, unlocking
05:17:46 25 the cash draw and stealing \$1,200?

05:17:52 1 A. Well, what are you basing that on? That
05:17:54 2 the keys were found in her possession as was the
05:17:56 3 cash? Is that what you're asking?
05:17:58 4 Q. No, sir. In her statement she testifies
05:18:02 5 that she takes her hands, goes to the lady's pocket
05:18:04 6 to remove the keys, unlocks the cash drawer and
05:18:08 7 takes the money. That's a pretty good indicia of
05:18:10 8 reliability, isn't it?
05:18:14 9 A. Well, I think her subsequent account is
05:18:16 10 that the money -- she didn't get the money out of
05:18:24 11 her pocket. It was in a cabinet, if I recall
05:18:26 12 correctly.
05:18:26 13 Q. Yes, sir.
05:18:34 14 A. There's a question about what exactly she
05:18:34 15 told the officers and what they wrote, and I know
05:18:34 16 she disputes that some of what's written here is not
05:18:38 17 what she told them, that they portray her in a worse
05:18:42 18 light than what she actually said occurred.
05:18:44 19 Q. Do you see in her own handwriting at the
05:18:46 20 end of her statement on the very last page, I
05:18:50 21 believe it is, an indication of how much money she
05:18:50 22 says she takes in her own handwriting?
05:18:54 23 A. Yes, correct, \$1,200.
05:19:00 24 Q. All right. So if she says \$1,200 is taken
05:19:02 25 and the police investigation revealed \$1,200 is

05:19:02 1 taken, that's a pretty strong indication that she is
05:19:06 2 involved in a robbery, isn't it?
05:19:10 3 A. That's correct, unless the money was really
05:19:12 4 taken by the other codefendant and she's just
05:19:16 5 reporting what she knew was taken or she's just
05:19:18 6 going along with what's being alleged. But yes, I
05:19:20 7 think that is consistent with \$1,200 being taken.
05:19:24 8 Q. Okay. So in many occasions if you are able
05:19:26 9 to corroborate the postconfession narrative, that in
05:19:34 10 and of itself will basically seal a suspect's fate,
05:19:34 11 won't it?
05:19:36 12 A. It can, yeah, that's correct, and if you
05:19:38 13 can corroborate the postadmission narrative, it's
05:19:40 14 consistent with reliability. Of course, you have to
05:19:44 15 look at the facts of a particular case. The
05:19:48 16 complicated thing here is that the evidence you
05:19:50 17 refer to is consistent with her being present at the
05:19:52 18 scene. If she was the only person present at the
05:19:54 19 scene, they would be more consistent with her
05:19:54 20 committing the crime. From what you've referred to,
05:20:00 21 I don't know if she did or did not commit the crime
05:20:02 22 that's being alleged. I just -- it's consistent
05:20:06 23 with her being there.
05:20:08 24 Q. That's a function for the jury, is it not?
05:20:10 25 A. That is correct. I do -- I do make those

05:20:14 1 kinds of assessments in my research, but in terms of
05:20:16 2 a court of law, it's not the appropriate role of the
05:20:22 3 expert witness to tell the jury whether or not the
05:20:26 4 person is innocent or guilty of the crime.

05:20:34 5 Q. And would you agree with me, sir, that the
05:20:36 6 only time that you can testify that a confession is
05:20:44 7 false is if you are able to prove, one, that the
05:20:48 8 crime did not occur at all, or two, that the
05:20:54 9 defendant is exonerated by scientific evidence, or
05:20:54 10 three, the true perpetrator comes forward and claims
05:20:58 11 sole responsibility for the crime?

05:21:00 12 A. Yes. There's a fourth one where it's
05:21:06 13 physically impossible for someone to have committed
05:21:06 14 the crime.

05:21:06 15 Those are the four ways in which you can
05:21:08 16 prove a confession is absolutely false. Absent one
05:21:12 17 of those four criteria being present in a case, even
05:21:16 18 if I think it's a false confession, I cannot prove
05:21:18 19 it a hundred percent. I would have to say it's my
05:21:22 20 opinion that this is a highly probable false
05:21:24 21 confession and then articulate the reasons why.

05:21:26 22 But you are correct. I do identify those
05:21:32 23 three criteria plus the fourth one I mentioned as
05:21:34 24 the only way of proving to near certainty or total
05:21:36 25 certainty that a confession is false.

05:21:40 1 Q. Well, sir, did you find any evidence in
05:21:42 2 your perusal of those documents that you have that
05:21:46 3 this murder did not occur?

05:21:46 4 A. I did not.

05:21:50 5 Q. Did you find any evidence that this lady
05:21:52 6 has been exonerated by scientific evidence?

05:21:54 7 A. No, I did not.

05:21:56 8 Q. Did you find any evidence that the true
05:21:58 9 perpetrator has come forward and claimed sole
05:22:00 10 responsibility for this murder?

05:22:02 11 A. No.

05:22:04 12 Q. Did you find any evidence that it was
05:22:04 13 physically impossible for Ms. Gilliard to have
05:22:06 14 committed this murder?

05:22:08 15 A. No.

05:22:10 16 Q. Therefore, you cannot say that she has
05:22:12 17 provided a false confession, can you?

05:22:16 18 A. That's correct. I cannot say that this is
05:22:18 19 a false confession, and I was not asked to say or
05:22:22 20 evaluate whether or not it was a false confession.
05:22:24 21 As I mentioned before, my understanding is -- and
05:22:28 22 actually, I think as I was asked at the end on
05:22:30 23 direct -- was to evaluate the techniques and the
05:22:32 24 process that may have led this to be a voluntary or
05:22:34 25 involuntary statement.

05:22:36 1 Q. I believe you also told me when we were
05:22:38 2 talking that although you were not retained to
05:22:42 3 actually render such an opinion, you often do so for
05:22:46 4 your own use, and you are able to do so easily
05:22:46 5 because you have the confession in front of you and
05:22:50 6 you have the supporting documentation concerning the
05:22:52 7 crime, so you're probably subconsciously doing that
05:22:56 8 every time you read one, are you not, sir?

05:22:58 9 A. That may be the case. It's also the case
05:23:00 10 that in my research -- I don't know if you can see.
05:23:04 11 I have maybe two inches of materials, which is --
05:23:06 12 you know, it takes a while to get through this, but
05:23:08 13 many of the cases that I have evaluated the likely
05:23:14 14 reliability of the statement from research purposes.
05:23:20 15 I have had far more material to do so, and I suspect
05:23:22 16 that your files on this case are much larger than
05:23:22 17 mine.

05:23:24 18 Q. Not necessarily.

05:23:28 19 Let me ask you this, sir. Based upon
05:23:32 20 the -- one of the first questions that I asked you,
05:23:34 21 that isn't it true that you can never take a
05:23:38 22 defendant's word that her confession is false,
05:23:40 23 you have to look at the totality of the
05:23:44 24 circumstances, isn't it true that the only
05:23:44 25 opinion that you have expressed here today has come

05:23:48 1 solely from that defendant?

05:23:50 2 A. That is correct, and so -- well, first of

05:23:52 3 all, I don't think I have expressed the opinion that

05:23:54 4 this is a false or true confession. But yes, the

05:23:56 5 opinions that I have expressed, I have tried to be

05:24:00 6 very careful to qualify and say that if this -- if

05:24:02 7 the account she gives is true, then my opinion is X.

05:24:06 8 Q. Okay. And I appreciate that. But when you

05:24:12 9 look at the names of the officers that appear at the

05:24:16 10 bottom of her statement, can you tell us, sir, what

05:24:22 11 efforts you have made in an effort to determine the

05:24:28 12 totality of the case what efforts have you made to

05:24:32 13 contact these police officers and talk to them?

05:24:38 14 A. Well, usually I ask the attorney to make a

05:24:38 15 request that I be permitted to interview the

05:24:40 16 interrogating officers. It's my usual policy. I

05:24:46 17 don't recall if I did it here specifically. I

05:24:48 18 assume that I did, but I may not have. And usually

05:24:52 19 the request is denied, although in the -- I was

05:24:58 20 going to say in the Traum case I think it was not

05:24:58 21 denied, but I don't recall actually specifically

05:25:00 22 there.

05:25:02 23 So if I did not make that request of

05:25:04 24 defense counsel, it would have been unusual, but

05:25:08 25 usually I do that.

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05:25:10 1 Q. Well, you indicated that because the police
05:25:12 2 didn't write down the time of the reading of the
05:25:16 3 Miranda warnings, that was sloppy police work.
05:25:18 4 Would it be fair to say maybe this was some sloppy
05:25:22 5 expert work by you not talking to these cops?
05:25:26 6 A. Well, let me say -- let me say before
05:25:28 7 answering that question, just to finish my answer to
05:25:30 8 the previous question, in many of the interrogations
05:25:36 9 there are -- that I study, that I review for
05:25:38 10 consulting purposes there are tape-recordings or
05:25:42 11 audio recordings, so there's a transcript, and
05:25:42 12 there's no need for me to interview the officers to
05:25:50 13 try to reconstruct the record.
05:25:52 14 Now, in terms of my practice as an expert
05:25:54 15 or a consultant or an expert witness, I would say
05:25:58 16 that if I did not make that request, that I was at
05:26:02 17 fault and I should have made that request. If you
05:26:06 18 want to characterize that as sloppy, you're free to
05:26:08 19 do so, but the consequence is far less serious than
05:26:12 20 the consequence of failing to document the timing of
05:26:16 21 a Miranda waiver because Miranda is dictated by law,
05:26:20 22 and Miranda could result in the exclusion of
05:26:22 23 potentially very serious evidence. So what I do
05:26:26 24 when I consult on a case or testify is really not as
05:26:32 25 serious or legally important as what the police do.

05:26:36 1 And so if we both made mistakes, as you are
05:26:36 2 suggesting, I would say that their mistake is far
05:26:40 3 more consequential than mine.

05:26:42 4 Q. But you would agree that since you have
05:26:44 5 been hired and you are going to be paid for
05:26:48 6 rendering your expert opinion and having previously
05:26:50 7 testified under oath that you have to look at the
05:26:56 8 totality of the circumstances, the totality of the
05:27:00 9 case, before you can render an expert opinion, it's
05:27:00 10 pretty clear that you need to talk to both sides
05:27:02 11 before you give any kind of opinion, isn't it?

05:27:06 12 A. No, I don't think that's necessarily true
05:27:08 13 if you qualify what the opinion is about. I mean,
05:27:12 14 first of all, if there's a record of the
05:27:14 15 interrogation, there's no need to talk to both
05:27:16 16 sides. And secondly, if the question is always
05:27:22 17 "Dr. Leo, I'm only going to ask you what the
05:27:24 18 implications are if the defendant's version is
05:27:28 19 correct," then the opinion only applies to a
05:27:32 20 hypothetical -- to -- it only applies if the
05:27:32 21 defendant's version is correct.

05:27:34 22 So I would say the answer to your question
05:27:38 23 is no. And also I would also say that in many
05:27:40 24 cases, you know, I can only deal with what the
05:27:42 25 attorneys give me. You know, I am limited to what I

05:27:44 1 am provided with. I am not in the position of a
05:27:46 2 judge or a prosecutor of having easy access to
05:27:50 3 everything I want.

05:27:52 4 Q. Well, professor, I can appreciate the fact
05:27:56 5 that you're hamstrung by what you are provided with
05:28:00 6 to review, but it's pretty easy to pick up the
05:28:02 7 telephone. Since you are familiar with police, I'm
05:28:06 8 sure you have many cops who are your friends, you
05:28:10 9 have many prosecutors whom you can talk to, and you
05:28:14 10 got access to a telephone. You certainly never
05:28:16 11 picked up the telephone and called me, have you?

05:28:18 12 A. No. I did not call you, and I don't think
05:28:20 13 that any purpose would have been served by me
05:28:22 14 calling you. I can see why you are suggesting a
05:28:26 15 purpose would have been served if the police
05:28:26 16 officers who interrogated this case had described to
05:28:30 17 me what occurred during the interrogation. If --
05:28:34 18 usually it's my policy to ask the attorney to make
05:28:36 19 the request rather than make it directly, and
05:28:38 20 usually the request is turned down. But speaking to
05:28:40 21 a prosecutor I don't think would have -- would have
05:28:44 22 affected my evaluation of the documents in the
05:28:44 23 case.

05:28:46 24 Q. Well, professor, isn't it true that what
05:28:48 25 you are basically telling this jury, and this tape

05:28:52 1 is going to be played to the jury, is you are only
05:28:54 2 giving them half a loaf. You're giving them the
05:28:56 3 half a loaf from the defendant's version only, and
05:29:00 4 you're not giving an opinion rendered upon the
05:29:04 5 totality of the case, which is what you previously
05:29:06 6 testified you need to be able to do; isn't that
05:29:12 7 true?

05:29:12 8 A. Well, I'm not sure what you're referring to
05:29:14 9 when you say I previously testified the totality of
05:29:16 10 the case is what you need to do. Obviously the more
05:29:20 11 information you have, the more informed judgment one
05:29:20 12 can make, whether it's an expert witness, a
05:29:24 13 prosecutor, or a jury.

05:29:28 14 The -- I did review testimony at a
05:29:32 15 preliminary hearing by one of the officers, and I
05:29:34 16 believe there were police reports and notes made by
05:29:36 17 other officers, but I do believe -- I would agree
05:29:40 18 with you that it is better to have more information
05:29:42 19 than less information when making these kinds of
05:29:44 20 decisions, and I would also agree with you, as you
05:29:48 21 said earlier, that I am not in the position of the
05:29:52 22 jury. All I can do is give an opinion of the
05:29:52 23 materials that I evaluated. It's not my position to
05:29:58 24 make the same fateful decisions that a jury makes.

05:30:04 25 Q. I would agree with that. And I think you

05:30:06 1 have been very careful in giving your opinion today
05:30:08 2 to avoid trying to do that, because as I understand
05:30:14 3 your testimony, the only thing that you can tell
05:30:18 4 this jury is that if everything that Kandi Gilliard
05:30:20 5 told you on the phone is true, then in your opinion
05:30:24 6 it could have overborne her will to be interrogated
05:30:32 7 in that fashion, and it might have resulted in an
05:30:32 8 inaccurate statement; is that correct?

05:30:34 9 A. That is correct. It could be that if part
05:30:38 10 of what she said is true, the real bad parts, that
05:30:38 11 also could have and likely did overbear her will or
05:30:42 12 could have led to some inaccurate statements. But
05:30:44 13 yes, with some modification, I would agree with your
05:30:46 14 statement.

05:30:48 15 Q. But you cannot say definitely to a
05:30:50 16 reasonable degree of scientific certainty that even
05:30:52 17 if everything Kandi Gilliard told you was true, it
05:30:58 18 did overbear her will and it did result in an
05:31:00 19 inaccurate confession, can you?

05:31:02 20 A. No, I cannot say that. I can say that if
05:31:06 21 what she said is true, that definitely those
05:31:08 22 techniques were coercive to a scientific degree of
05:31:10 23 certainty. I cannot say whether if what she said is
05:31:12 24 true those coercive techniques did automatically
05:31:16 25 overbear her will, although it would be my belief

05:31:18 1 that they likely did, nor can I say that if her
05:31:20 2 account is true to a scientific degree of certainty,
05:31:24 3 her statements are inaccurate, although if what she
05:31:28 4 said has occurred is true, it calls into question
05:31:34 5 whether or not some of what's written in her
05:31:34 6 statement is accurate.

05:31:34 7 Q. Okay. That's fair enough.

05:31:36 8 You indicated that in your statement you
05:31:40 9 had reason to believe that this young woman has a
05:31:44 10 low IQ, and can you tell me where you got that
05:31:48 11 information from?

05:31:48 12 A. I believe I got it through a conversation
05:31:50 13 with defense counsel.

05:31:52 14 Q. Have you seen any medical evidence of that,
05:31:54 15 sir?

05:31:56 16 A. No, I have not, not that I recall,
05:31:58 17 unless -- unless it's in the materials that were
05:32:00 18 provided to me that I do not recall. But my
05:32:02 19 recollection is I have not seen any medical
05:32:04 20 evidence, and I think I said in my direct
05:32:08 21 examination that it was my understanding that she
05:32:08 22 had a low IQ and low cognitive function.

05:32:12 23 Q. And how low would that be, sir, from your
05:32:14 24 understanding?

05:32:16 25 A. My understanding, which may be incorrect,

05:32:18 1 would be not mentally retarded, but just above
05:32:24 2 mentally retarded, maybe in the 75 to 85 range of
05:32:28 3 IQ, something like that, someone who goes through
05:32:30 4 life kind of dull and not very bright but isn't
05:32:34 5 clinically mentally retarded according to the
05:32:36 6 cutoff, which is a 70 IQ.

05:32:38 7 Q. Were you also advised by the defense
05:32:42 8 counsel that the codefendant, Mr. Johnson, is
05:32:46 9 mentally retarded and only has a full IQ of 66?

05:32:50 10 A. I was -- I do recall -- if I was, I don't
05:32:52 11 recall that specifically, but I do recall being
05:32:54 12 advised that the codefendant had a history of mental
05:32:58 13 problems and was mentally disordered.

05:33:06 14 Q. I'm about finished here, professor, so --
05:33:12 15 As I understand your testimony today, if
05:33:14 16 and only if what Ms. Gilliard told you on the
05:33:20 17 telephone is true, then you can say as an expert
05:33:28 18 that if those facts are true, the interrogation
05:33:34 19 tactics of the police could have overborne her will,
05:33:42 20 might have caused an inaccurate statement, but only
05:33:42 21 if what she says is true.

05:33:46 22 A. I think that, you know, you're asking a
05:33:48 23 similar question to what you asked before, and I
05:33:54 24 would just modify in similar ways that if what she
05:33:54 25 said is true or partially true, the worst parts are

05:33:58 1 true, then in my opinion, there's no question those
05:34:00 2 techniques were coercive and that they could but I
05:34:04 3 would say likely overbore her will and could have
05:34:06 4 led to inaccurate statements.

05:34:08 5 So I think with those modifications I would
05:34:14 6 agree with your question. I certainly understand
05:34:16 7 your asking me that question, sort of reducing
05:34:22 8 everything I have said to that one question, but at
05:34:24 9 the same time I don't control the questions that I
05:34:26 10 am asked, and we've been here, you know -- I don't
05:34:28 11 know -- three and a half hours, so certainly we
05:34:30 12 have covered a lot of ground.

05:34:32 13 Q. You bet we have, and I guess the bottom
05:34:36 14 line is even with all your credentials and all your
05:34:38 15 training and all your experience, the bottom line is
05:34:44 16 even as an expert, you can't tell the jury, who's
05:34:44 17 going to listen to this tape, that this woman gave a
05:34:48 18 false confession.

05:34:48 19 A. No, I can't tell -- I can't tell the jury
05:34:52 20 that. I can tell the jury, though, that if the
05:34:54 21 officers had tape-recorded and memorialized that
05:34:56 22 interrogation, then they would have the evidence
05:34:58 23 before them to make a more informed judgment about
05:35:02 24 whether her version of what occurred is accurate or
05:35:06 25 their version of what occurred is accurate, but I

05:35:08 1 can't tell the jury that this is a true or a false
05:35:12 2 confession, and that's not my role in the criminal
05:35:14 3 justice system as I understand it, correct.

05:35:18 4 MR. DU TREMBLE: I appreciate your candor,
05:35:20 5 doctor, and I have no further questions for you. I
05:35:20 6 hope you have a good evening.

05:35:22 7 THE WITNESS: Thank you very much.

05:35:26 8 MS. GAY: I just have a few questions on
05:35:26 9 redirect.

05:35:28 10

11 FURTHER EXAMINATION

12 BY MS. GAY:

05:35:28 13 Q. One of the things that Mr. DuTremble talked
05:35:28 14 to you about extensively is -- and he kind of summed
05:35:30 15 this up in his last question -- had to do with
05:35:34 16 whether or not you were here today to tell the jury
05:35:36 17 that this was a false confession. I think that you
05:35:38 18 indicated in both your training and research and
05:35:42 19 professional life as well as this case that there's
05:35:46 20 sort of two aspects of what you do, interrogation
05:35:48 21 and technique and false confession. Would that be
05:35:52 22 an accurate statement?

05:35:52 23 A. Correct. I sometimes describe my studies
05:35:58 24 of interrogation, my specialty, as police
05:36:00 25 interrogation as well as false confessions.

05:36:00 1 False --

05:36:02 2 Q. They're basically two separate things?

05:36:06 3 A. Well, they are related in that police

05:36:08 4 interrogation is what often produces false

05:36:12 5 confessions, but they are unrelated in that most

05:36:16 6 police interrogations don't result in false

05:36:18 7 confessions. So as I said, I believe, in response

05:36:22 8 to cross, false confessions are the exceptional or

05:36:26 9 atypical outcome of police interrogation, and so

05:36:30 10 they are related in that way, but much of my study

05:36:32 11 on police interrogation is not related to false

05:36:34 12 confessions.

05:36:36 13 Q. And just to clarify, a false confession is

05:36:40 14 actually a confession that you can determine through

05:36:44 15 various aspects is totally and completely

05:36:46 16 inaccurate.

05:36:48 17 A. Well, that's how we use the term, yes.

05:36:50 18 Sometimes I modify it and say, you know, partially

05:36:52 19 false confession. If somebody, say, was present at

05:36:54 20 a crime scene, only involved in a robbery, but

05:36:58 21 admitted to a robbery and a murder, well, that would

05:37:00 22 be a partially false, partially true statement. But

05:37:06 23 when we talk about false confessions, what we tend

05:37:08 24 to mean is somebody who makes a confession. They

05:37:12 25 admit to doing it and they tell a story about how

05:37:12 1 and why they did it, but they are completely
05:37:16 2 factually innocent of the crime.
05:37:16 3 Q. And in this case under no circumstances are
05:37:20 4 you indicating to this jury that you are here to
05:37:24 5 testify pursuant to your evaluation of this case
05:37:26 6 that this is a false confession.
05:37:26 7 A. Correct.
05:37:28 8 Q. And pursuant to the fact that the solicitor
05:37:36 9 discussed all these fact-fitting postadmission
05:37:38 10 facts, you have testified on direct and even in his
05:37:42 11 cross that you are not necessarily -- you are not
05:37:48 12 making an opinion as to the reliability of
05:37:48 13 Ms. Gilliard's actual statement.
05:37:50 14 A. That is correct.
05:37:52 15 Q. And that pursuant to that fact, you are
05:37:56 16 here, I believe you said, to give information about
05:38:00 17 her will, the voluntariness, things of that nature,
05:38:02 18 as opposed to the factual allegations listed or
05:38:08 19 factual scenario listed in her statement.
05:38:10 20 A. Correct. My understanding was I was asked
05:38:12 21 to provide information in response to the questions
05:38:20 22 asked based on my expertise that could assist in the
05:38:22 23 determination of voluntariness, not in the
05:38:22 24 determination of reliability.
05:38:28 25 Q. And pursuant to the solicitor's line of

05:38:28 1 questioning having to do with what you reviewed and
05:38:30 2 the fact that you didn't talk to any officers, you
05:38:32 3 reviewed all of the written material that was
05:38:40 4 provided to this defendant, my client, the police
05:38:42 5 reports, that type of stuff?

05:38:42 6 A. Well, I reviewed all the material that you
05:38:46 7 sent to me, and if you represent that that was all
05:38:48 8 the material that was provided to you, then I would
05:38:50 9 answer yes, but I -- I did not independently know
05:38:52 10 what was provided to you, so you would have to tell
05:38:54 11 me whether I reviewed everything that was provided
05:38:56 12 to you.

05:38:58 13 Q. If I told you that you reviewed everything
05:39:00 14 that was provided to me, you would say that you did
05:39:04 15 review everything I provided to you.

05:39:04 16 A. Correct, correct.

05:39:06 17 Q. And pursuant to that, you said that there
05:39:10 18 was no video, no tape of this particular
05:39:12 19 interrogation.

05:39:14 20 A. Correct.

05:39:14 21 Q. And you said that if there had been a video
05:39:18 22 or tape, we would -- you would be able to have more
05:39:24 23 information, and I think you referred to it as the
05:39:24 24 officer having more information about how this
05:39:28 25 interrogation occurred.

05:39:30 1 A. Correct. If we had an audio or videotape,
05:39:34 2 there would be no dispute between whether certain
05:39:38 3 techniques were used or certain things were said and
05:39:40 4 not said. We could look to the tape and the
05:39:42 5 transcript and say this person has an incorrect
05:39:46 6 memory because this is what was said and this is the
05:39:48 7 techniques that was used or that person has an
05:39:50 8 incorrect memory, and that's really the importance
05:39:52 9 of the tape. The tape is not favored against one
05:39:56 10 person, one side or another. It merely preserves a
05:39:58 11 record so that -- so that it cuts down on the
05:40:06 12 disputes, the factual disputes, in court about that
05:40:06 13 record.

05:40:06 14 Q. And pursuant to your understanding of
05:40:10 15 cases, serious cases, is it common practice to do
05:40:12 16 tapes in video?

05:40:16 17 A. Well, it's required in two states, Alaska
05:40:18 18 and Minnesota, and the best study on the subject,
05:40:22 19 which was done now eight or nine years ago, in 1992
05:40:24 20 or 1993, I believe, found that about 20 or 25 percent
05:40:28 21 of the jurisdictions taped either the interrogation
05:40:34 22 entirely or the confession. And so I guess if that
05:40:38 23 is correct, although the study predicted that the
05:40:42 24 numbers were increasing, I would say that 20 to 25
05:40:44 25 percent is common, but especially when you consider

05:40:48 1 the number of jurisdictions in the country, but it's
05:40:48 2 certainly not the majority.
05:40:54 3 Q. What would you say is the better practice?
05:40:54 4 A. Absolutely unquestionably, memorializing
05:40:56 5 what occurred during an interrogation by audio or
05:41:00 6 videotape is a far better practice than leaving it
05:41:04 7 to the participants' reconstruction based -- you
05:41:08 8 know, long after the fact.
05:41:14 9 Q. And also just on an aside from that,
05:41:16 10 generally police reports, investigative notes, the
05:41:20 11 types of materials that are generated or created in
05:41:22 12 the course of the investigation, is it your
05:41:24 13 understanding that those things are generally
05:41:32 14 compiled and put together contemporaneously with the
05:41:32 15 events?
05:41:32 16 A. Yes, yes. Sometimes supplementary reports
05:41:40 17 occur after, but typically the reports and notes
05:41:42 18 should be written contemporaneous. You know, after
05:41:48 19 an interrogation you write up the police report,
05:41:48 20 barring unusual or exigent circumstances.
05:41:52 21 Q. And the material that you reviewed, that
05:41:54 22 would have been material contemporaneously created
05:41:56 23 with this particular case?
05:41:58 24 A. That's my understanding, yes.
05:42:00 25 Q. And this advisement of constitutional

05:42:04 1 rights we know was contemporaneously done because

05:42:06 2 it's dated January 9, 2000.

05:42:10 3 A. Correct, if that's an accurate

05:42:10 4 representation, correct.

05:42:14 5 Q. And this thing doesn't have a time, so we

05:42:18 6 don't know what time. We discussed that.

05:42:18 7 A. Correct, although if the interrogation had

05:42:20 8 been recorded, presumably we would know, yes.

05:42:24 9 Q. All right. And certainly it is

05:42:28 10 Ms. Gilliard's position and what she told you, that

05:42:30 11 she signed this particular form at 7:30 in the

05:42:34 12 morning when she signed this statement and was not

05:42:38 13 given a verbal Miranda before she was interrogated.

05:42:40 14 That's her version of the facts.

05:42:40 15 A. That is my understanding, based on what she

05:42:42 16 told me during my interview, correct.

05:42:44 17 Q. Based on what you reviewed, which would

05:42:48 18 have been the contemporaneous reports as done by the

05:42:50 19 investigators in this case, the information that I

05:42:54 20 provided to you, is there anything in that

05:42:54 21 information that contradicts the fact that

05:43:02 22 Ms. Gilliard was given -- that Ms. Gilliard was not

05:43:06 23 given verbal Mirandas, anything to contradict that

05:43:10 24 in the material that you were provided?

05:43:12 25 A. Not that I recall. I mean --

05:43:16 1 Q. You are aware that -- you're aware that the
05:43:18 2 officers in this case, because we discussed it,
05:43:24 3 alleged that there was verbal Mirandas given. You
05:43:24 4 are aware of that; right?

05:43:24 5 A. Yes, yes. I recall that you had informed
05:43:28 6 me of that. I don't recall reading that, although I
05:43:30 7 may have and just don't recall the specific place
05:43:34 8 where that was said.

05:43:36 9 Q. Do you recall reviewing the preliminary
05:43:36 10 hearing?

05:43:36 11 A. Yes, I do.

05:43:42 12 MR. DU TREMBLE: Beyond the scope of
05:43:44 13 cross-examination.

05:43:44 14 MS. GAY: I'm almost finished.

05:43:44 15 Q. You stated when you were talking about the
05:43:46 16 fact-finding that the solicitor went into that all
05:43:50 17 of the facts that were in Ms. Gilliard's statement
05:43:52 18 you believed would show that they was present at the
05:43:56 19 scene. However, you said that there was no way that
05:43:56 20 you could determine her participation from her
05:44:00 21 statement.

05:44:02 22 A. Based on the facts that the prosecutor
05:44:06 23 asked me that were consistent with her reliable
05:44:10 24 statement, yes, I said they were consistent with her
05:44:12 25 being present at the crime scene, in my opinion, but

05:44:14 1 not -- they were not dispositive of what her role at
05:44:18 2 that crime scene was.

05:44:20 3 Q. And you said specifically, I think, in the
05:44:22 4 last part of the solicitor's questions, he was
05:44:26 5 saying that you could not say that it was a false
05:44:30 6 confession and that you could not discuss the
05:44:36 7 reliability of her statement. As you said a number
05:44:38 8 of times, that's not why you were -- that's not your
05:44:40 9 understanding of what you were supposed to be
05:44:40 10 talking about today.

05:44:42 11 A. Correct.

05:44:44 12 Q. And certainly we would all agree that
05:44:46 13 totality is something -- is a factor in this case
05:44:52 14 and that this jury would need to look at the
05:44:54 15 totality of the circumstances to make their own
05:44:58 16 determination as to whether or not Ms. Gilliard's
05:45:04 17 will was overborne, whether or not the statement was
05:45:06 18 voluntary, and whether or not anything in the
05:45:06 19 statement was either accurate or inaccurate.

05:45:08 20 A. Correct.

05:45:10 21 Q. And once again, just so we remember, your
05:45:12 22 understanding of coming here today was what, again?

05:45:16 23 MR. DU TREMBLE: Objection. Asked and
05:45:16 24 answered.

05:45:18 25 MS. GAY: I think that I am finished. I

05:45:22 1 don't believe I have any further questions.

05:45:22 2 THE WITNESS: Okay.

05:45:24 3 MR. DU TREMBLE: Thank you for coming,

05:45:24 4 professor.

05:45:26 5 THE WITNESS: Thank you very much.

05:45:28 6 THE VIDEOGRAPHER: So no more questions?

05:45:30 7 MR. DU TREMBLE: No more questions.

05:45:32 8 THE WITNESS: Was there a lingering

05:45:36 9 question? I don't know. Since there's no judge to

10 say the objection is sustained or overruled, I

11 didn't know whether the question was --

05:45:38 12 MS. GAY: I withdrew the question.

05:45:40 13 THE WITNESS: Okay. You withdrew the

05:45:42 14 question. Okay. I just wanted to make sure I

05:45:42 15 understood that. Thank you.

05:45:44 16 THE VIDEOGRAPHER: We are now going off the

05:45:46 17 video record. The time is 5:46.

05:45:50 18 (The deposition was concluded at 5:46 p.m.)

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1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF LOS ANGELES)
4
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1150

6 I, RICHARD A. LEO, PH.D., J.D., declare
7 under the penalties of perjury under the State of
8 California that the foregoing is true and correct.

9 Executed this day of ,
10 2001, at , California.
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14

15 RICHARD A. LEO, PH.D., J.D.
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1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF LOS ANGELES)

4 I, Kathleen E. McCarthy, Certified Shorthand
5 Reporter No. 4483 for the State of California, do
6 hereby certify:

7 That prior to being examined, the witness named
8 in the foregoing deposition was duly sworn to
9 testify the truth, the whole truth, and nothing but
10 the truth;

11 That said deposition was taken down by me in
12 shorthand at the time and place therein named and
13 thereafter reduced by me to typewritten form and
14 that the same is a true, correct, and complete
15 transcript of said proceedings.

16 I further certify that I am not interested in
17 the outcome of the action.

18 Witness my hand this 24th day of May, 2001.

19

20

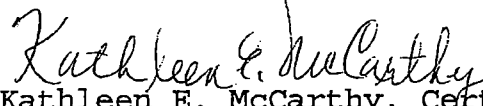
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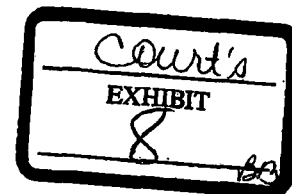
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Kathleen E. McCarthy, Certified
Shorthand Reporter No. 4483
for the State of California

INVESTIGATIVE ASSOCIATES OF CHARLESTON INC.
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REPORT OF POLYGRAPH EXAMINATION

SUBJECT : Kandy Latrice GILLIARD
DATE : December 20 2000
EXAMINER : Thomas C WILLIAMS
ATTORNEY : Melisa W GAY Esq.

SYNOPSIS

1. Subject has been arrested and charged with the robbery and murder of an employee of a poker parlor. Subject acknowledged involvement in the robbery but denied any pre-planning of the event. A polygraph examination was conducted regarding the matter and, in the opinion of the examiner, Subject DID NOT ATTEMPT DECEPTION in response to relevant questions regarding accusations made against her by the acknowledged perpetrator of the murder.

BACKGROUND DATA

2. Subject was arrested on 9 January 2000 for the 5 January 2000 murder/robbery of an attendant at a local video poker parlor. A man named Benjamin Lee JOHNSON, AKA "BJ" was also arrested for the same crime. "BJ" acknowledged strangling the attendant and implicated Subject in helping plan the crime. Subject initially denied involvement and subsequently signed a statement in which she admitted to the incident. She has since recanted this statement of admission stating she assisted in the robbery but did not pre-plan with "BJ" the robbery nor knew that "BJ" was planning for the crime on the date until she saw him at the parlor.

POLYGRAPH EXAMINATION

3. On 20 December 2000, Subject was administered a polygraph examination regarding the above. The following relevant questions, with Subject's responses thereto were utilized during the polygraph examination.

SERIES 1

- (A) DID YOU PLAN WITH BJ TO DO THAT ROBBERY THAT NIGHT?.....NO
(B) BEFORE THE ROBBERY, DID YOU TALK TO BJ ABOUT CHOKING DAWN?.....NO

In the opinion of the polygraph examiner, Subject DID NOT ATTEMPT DECEPTION in her response to question (B) and was INCONCLUSIVE to question (A).
Thereafter, another series was conducted utilizing the following relevant question with Subject's response thereto.

page two

SERIES 11

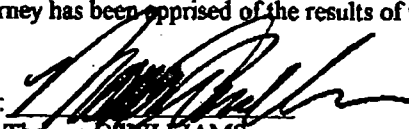
(C) BEFORE YOU SAW BJ AT THE POKER PARLOR, HAD YOU ALREADY AGREED TO HELP HIM IN THE ROBBERY?.....NO

In the opinion of the polygraph examiner, Subject DID NOT ATTEMPT DECEPTION in her response to the above question. Frank BLOOMINGBURG, a certified polygraph examiner, was present during the polygraph examination on Subject, has reviewed the polygraph charts and related material and concurs with the examiner's opinion regarding the truthfulness of Subject's responses.

NOTIFICATION OF POLYGRAPH RESULTS

4. Subject's attorney has been apprised of the results of this polygraph examination.

REPORTED BY:


Thomas C WILLIAMS
Certified polygraph Examiner

STATE OF SOUTH CAROLINA

County of Charleston

Kandy L. Gilliard, #275605

v.

State of South Carolina

05-CP-10-619
IN THE COURT OF COMMON PLEASAPPLICATION FOR
POST-CONVICTION RELIEF

BY

JULIE A. WIS/ROH
CLERK OF COURT

2005 FEB 15 AM 11:46

FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention **Camille Griffin Graham Correctional Institution
4450 Broad River Road, Columbia, SC 29210**
2. Name and location of Court which imposed sentence
County of Charleston General Sessions., Melbourne Avenue, Charleston, SC 29405
3. Name(s) of co-defendant(s) (if any) **Benjamin Bryan Johnson**
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) **2000-GS-10-2467 - Murder**
 - (b) **2000-GS-10-2468 - Strong Arm Robbery**
 - (c) **N/A**
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) **June 1st, 2001 - Natural Life Sentence**
 - (b) **June 1st, 2001 - 10 Years concurrent**

- (c) N/A
6. Check whether a finding of guilty was made:
- | | | |
|-----|---------------------------------|-----|
| (a) | after a plea of guilty | No |
| (b) | after a plea of not guilty | Yes |
| (c) | after a plea of nolo contendere | No |
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. **State of South Carolina in the Court of Appeals, Appeal from Charleston County**
 - ii. N/A
 - iii. N/A
- (b) the result in each such Court to which you appealed:
- i. **Appeal Dismissed**
 - ii. N/A
 - iii. N/A
- (c) the date of each such result:
- i. **Submitted February 20th, 2004 – Filed May 5th, 2004**
 - ii. N/A
 - iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. **Unpublished Opinion No. 2004-UP-296**
 - ii. N/A
 - iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
 - (b) N/A
 - (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) **Ineffective Assistance of Counsel**
 - (b) N/A
 - (c) N/A
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) **Trial Counsel was ineffective in preparing and representing me at trial.**
 - (b) N/A
 - (c) N/A
12. Prior to this application have you filed with respect to this conviction?
- (a) any petition in a State Court under South Carolina Law? Yes.
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions

- relief? **This is the first.**
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? **No.**
- (d) any other petitions, motions or applications in this or any other Court? **No.**
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. **South Carolina of Appeals Petition for Pro Se Brief**
 - ii. **Supreme Court of S.C. Petition for rehearing.**
 - iii. **South Carolina Bar Association Grievance on Attorney Mrs. Gay**
 - iv. **N/A**
- (b) the name and location of the Court in which each was filed:
- i. **SC Court of Appeals, 1015 Sumter Street, Columbia, SC 29201**
 - ii. **Supreme Court of SC, PO Box 11330, Columbia, SC 29211**
 - iii. **SC Bar Association, 450 Taylor Street, Columbia, SC 29202**
 - iv. **N/A**
- (c) the disposition thereof:
- i. **Pro Se Brief not accepted due to being late.**
 - ii. **Petition for rehearing was denied.**
 - iii. **N/A**
 - iv. **N/A**
- (d) the date of each such disposition:
- i. **Unknown**
 - ii. **Unknown**
 - iii. **Unknown**
 - iv. **Unknown**
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. **cc: Assistant Appellate Defense Attorney Robert M. Dudek, Assistant Deputy Attorney General Donald J. Zelenka and Ralph E. Hoisington, Esq.**
 - ii. **cc: Assistant Appellate Defense Attorney Robert M. Dudek, Assistant Deputy Attorney General Donald J. Zelenka and Honorable K. A. Richstad**
 - iii. **N/A**
 - iv. **N/A**
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? **Yes.**
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. **Grounds of facts Miranda Rights were clearly violated proven by the timing and signatures, or lack of, that were done after the exculpatory statement and preemptive period.**

- ii. **Rules 702 and 402 SCRE State -vs- Jones on the ground that the court greatly erred in not allowing the polygraph reports by State Licensed Professional T.W. to be admitted.**
 - iii. **N/A**
 - (b) the proceedings in which each ground was raised:
 - i. **The Court of Charleston County and the SC Court of Appeals**
 - ii. **The Court of Appeals**
 - iii. **N/A**
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) **The following ground was not presented in prior appeal due to lackadaisical effort by Appellant Defense Attorney Robert M. Dudek; the ground that testimony of the co-defendant should not have been allowed by the court due to the fact the co-defendant is a clinically diagnosed mental health patient who (not at the time of crime) is on the prescription Haldol (drug used to help treat major psychological and social dysfunctions.) The court erred in admitting this testimony while excluding expert examination reports available. These are very unjust decisions.**
 - (b) **N/A**
 - (c) **N/A**
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? **Yes.**
 - (b) your trial, if any? **Yes.**
 - (c) your sentencing? **Yes.**
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? **Yes.**
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? **Yes.**
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. **Peter D. Brown, 973 Houston Northcutt Blvd., Mount Pleasant, SC 29464**
 - ii. **Melisa Gay, Defense Attorney. 745-A Johnnie Dodds Blvd., Mount Pleasant, SC 29464**
 - iii. **Robert M. Dudek, 1205 Pendleton Street, Rm. 306, Columbia, SC 29201**
 - (b) the proceedings at which each such attorney represented you:
 - i. **The Preliminary Hearing**
 - ii. **The Criminal Trial May 29th, 2001 through June 1st, 2001**
 - iii. **In the Court of Appeals September 13th, 2002 through December 8th, 2003**

19. State clearly the relief you seek in filing this application:
I, Kandy L. Gilliard, am requesting a new trial.

20. Are you now under sentence from any other court that you have not challenged? **No.**

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, Kandy L. Gilliard, 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.

Kandy L. Gilliard
 Kandy L. Gilliard

SWORN to and subscribed before me this

10th day of February, 2008.

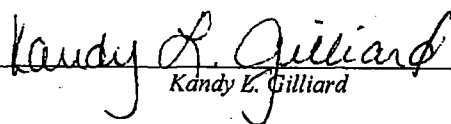
Kathy R. Henry (L.S.)
 Notary Public

My Commission Expires: 07-27-08

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

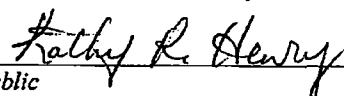
I, Kandy L. Gilliard, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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


Kandy L. Gilliard

SWORN or affirmed to and subscribed before me this

18th day of February, 2005.


Notary Public

My Commission Expires: 02-22-08

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Kandy Gilliard,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 12-CP-10-0383
	)	
State of South Carolina,	)	
	)	
Defendant.	)	

HEARING TO RECONSTRUCT RECORD

The within Hearing in the above-captioned matter was held on March 13, 2015, before The Honorable Roger Young in Courtroom 3A of the Charleston County Courthouse, 100 Meeting Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

Wanda Carter, Esq.
 INDIGENT DEFENSE FUND
 P O Box 11433
 Columbia, South Carolina 29211
 Appearing for Kandy Gilliard

Ashleigh Wilson, Esq.
 OFFICE OF ATTORNEY GENERAL
 P O Box 11549
 Columbia, South Carolina 29211
 Appearing for State of South Carolina

ALSO ATTENDING:

Kandy Gilliard

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
 P O Box 901
 Johns Island, South Carolina 29457
dgarrison@sccourts.org

Kandy Gilliard v State of South Carolina

2

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 THE COURT: Okay. Do we have
2 everybody here that needs to be here?

3 MS. WILSON: Yes, Your Honor.

4 THE COURT: Okay. Well, okay, I
5 guess we're here to reconstruct the record.
6 What's your thoughts on this, how to proceed?

7 MS. WILSON: Sure, Your Honor. I
8 can just kinda give you a little factual
9 background. I've done this before. It's
10 something that happens -- not too often but
11 it's something that happens a lot in our
12 office.

13 But this is Kandy Gilliard versus
14 the State of South Carolina. She was
15 indicted in June -- in April 2000 for murder,
16 strong-armed robbery.

17 She went to trial with Melisa Gay
18 and she was convicted in June -- she went to
19 trial before Judge Lockemy and he sentenced
20 her to life for murder and ten years for
21 strong-armed robbery.

22 Uh, she had -- she had an appeal
23 from that. Oh, right, she had an appeal from
24 that. Her, uh, co-counsel for that was Bob
25 Dutton (phonetic) and he filed an *Anders*

Kandy Gilliard v State of South Carolina

3

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 brief. The Court denied that on -- I mean
2 dismissed that appeal on May 2nd, 2004.

3 Then the Supreme Court denied
4 petition for cert on July 8th, 2004.

5 The remittitur was issued on June
6 11, 2004.

7 She filed an application for post-
8 conviction relief, her first one, on February
9 15th, 2005.

10 After filing that application, she
11 had her first PCR hearing on March 14th, 2007.

12 After, uh, that hearing took place,
13 the Court, uh, ordered that she be evaluated
14 for mental competency. So she was evaluated
15 by Dr. Cross on May 22, 2007.

16 Then the Court reconvened the
17 Hearing on June 4th, 2007, just basically to
18 give -- uh, to give the applicant an
19 opportunity to present to the Court the
20 findings of Dr. Cross as to her competency.
21 She was found competent. The Court then took
22 it under advisement and issued an Order of
23 Dismissal on July 20th, 2007.

24 After that, uh, Miss Gilliard filed
25 a second application -- post-conviction

Kandy Gilliard v State of South Carolina

4

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 relief application on January 7th, 2012. In
2 the application she alleged several
3 allegations, including that Mr. Runyon, her
4 first PCR attorney, didn't file a notice of
5 appeal or appeal her first PCR. So the State
6 ended up consenting to a belated appeal
7 based on talks with Mr. Runyon, and the Court
8 issued an Order granting her belated appeal
9 on January 15th, 2014.

10 We then subsequently had to have
11 hearings and Motions for the -- on the
12 State's Motion to dismiss all other claims
13 that were raised in her allegations; uh,
14 which was granted -- which was granted by the
15 Court and a Order filed in that on June 19th,
16 2014. So, you know, as to her second post-
17 conviction relief, counsel filed a notice to
18 appeal to, uh, you know, basically execute
19 the belated appeal that the Court granted.

20 In that we were unable to get the
21 PCR transcript from her first PCR action,
22 because of the five-year time span has
23 elapsed from where they keep the transcripts.
24 And, so, uh, counsel, appellate counsel Miss
25 Wanda Carter, she requested that the matter

Kandy Gilliard v State of South Carolina

5

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 be reconstructed and the State didn't have
2 any objection to it. So that's why we are
3 here today.

4 Essentially what normally happens is
5 that we basically just call the people who
6 were present at the prior hearing that we're
7 trying to reconstruct, and we just basically
8 ask their recollection of what happened.

9 In this instance, we're ---

10 THE COURT: We are reconstructing
11 the 2007 PCR ---

12 MS. WILSON: (Affirmative nod), PCR
13 hearing.

14 THE COURT: I was the judge?

15 MS. WILSON: You were the judge.

16 THE COURT: Okay.

17 MS. WILSON: Which isn't --
18 shouldn't be too terribly easy (sic) because
19 there was only one issue and only one
20 witness. So it shouldn't be terrible to
21 reconstruct.

22 Your Honor, I just have a -- of a
23 packet for you. It's essentially just what
24 kinda transpired and the Orders, the Order of
25 Dismissal that you signed; which gives a

Kandy Gilliard v State of South Carolina

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

6

1 pretty thorough summary of the facts, so we
2 just basically have to kinda go through that
3 and make sure that everybody's recollection
4 matches what's in the Order. So I'll present
5 that to the Court, (tendering).

6 THE COURT: All right.

7 MS. WILSON: And, also Your Honor
8 the State would like to make a court's (sic)
9 exhibit the assistant attorney general's
10 notes from -- who represented the State in
11 her first 2007 PCR Hearing. She -- we
12 normally would just subpoena them to come and
13 say what their recollection is and kinda
14 testify from what their file notes were, but
15 in this instance, since the assistant
16 attorney general was Jeanette Van Gino
17 (phonetic) and she now is in Abu Dhabi. So,
18 uh, for that reason she is not accessible to
19 be here today. So the State would just move
20 as a State's exhibit a copy of her notes from
21 the first hearing and the second hearing.
22 They are pretty thorough, and I reviewed
23 them. Just as an officer of the court, I'd
24 note for the record we usually take pretty
25 accurate notes during the hearings because we

Kandy Gilliard v State of South Carolina

7

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 don't have the funds to always order the
2 transcripts before we write Orders of
3 dismissal. So I'd just like to make her
4 notes from the -- I think it was March 2014
5 -- I mean March 14th (sic), 2007 and June 14th,
6 2007, as State's Exhibits 1 and 2.

7 THE COURT: Okay. Where is she
8 at?

9 MS. WILSON: She is in Abu Dhabi.

10 THE COURT: Where is that?

11 MS. WILSON: In the Middle East.

12 She -- okay, so -- she left our office and
13 went to Abu Dhabi -- to Amsterdam. So she
14 lived in Amsterdam and then the job took them
15 to Abu Dhabi. Uh, -- so.

16 THE COURT: Where is Abu Dhabi?

17 MS. WILSON: Oh, it's in the Middle
18 East. It's like in the -- I think it's in
19 the, uh, -- I see it on -- I see it on the
20 map. I think it's near the -- I don't know.
21 It's near the United Emirates of something
22 like that. It's a really cool place,
23 apparently.

24 For that reason we couldn't really
25 -- I've seen it on the map.

Kandy Gilliard v State of South Carolina

8

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 MELISA GAY: The Red Sea comes out
2 and then there's a bunch of little islands
3 and things right up in there, and it's right
4 up in there. Near the United Arab Emirates.

5 MS. WILSON: Yes, sir.

6 MS. WILSON: It's a cool-like
7 place. But, anyway, the State would just
8 make this State's 1 and 2. I gave Ms. Carter
9 -- yeah, that's right, I gave Ms. Carter a
10 copy of it. So we'd just like to send that
11 to the court reporter to mark.

12 MELISA GAY: And could I get a copy
13 of the notes to see what it was that I said?

14 MS. WILSON: Sure, (tendering).

15 COURT REPORTER: State's Exhibit 1
16 will be the notes of 3-19-07 and Exhibit 2
17 will be the 6-14-07 notes.

18 (SO ENTERED AS STATE'S EXHIBIT 1)

19 (SO ENTERED AS STATE'S EXHIBIT 2)

20 MS. WILSON: Thank you. Your
21 Honor, that's the State's recitation of the
22 fact. And, so, at this point I will turn it
23 over to Ms. Carter, who has the -- who has
24 the burden to show the reconstruction in this
25 matter.

Kandy Gilliard v State of South Carolina

9

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 MS. CARTER: May it please the
2 Court, Your Honor, the procedural history
3 given by Ms. Wilson is correct. We're here
4 to reconstruct the record of Miss Gilliard's
5 2007 PCR Hearing.

6 Melisa Gay was trial counsel, she's
7 available today. William Runyon was Miss
8 Gilliard's PCR attorney and he's also
9 available today.

10 THE COURT: So do you want to call
11 one of them then?

12 MS. CARTER: Yes, sir.

13 THE COURT: Okay. Which one do
14 you want first?

15 MS. CARTER: Mr. Runyon.

16 (WITNESS TAKES STAND)

17 WILLIAM L. RUNYON, JR., having been sworn
18 to tell the truth, and nothing but the truth,
19 testified as follows:

20 DIRECT EXAMINATION

21 BY MS. CARTER:

22 Q. Thank you, Mr. Runyon. It's my
23 understanding that you represented Miss
24 Gilliard back in 2007 for her PCR hearing?

25 A. Yes, ma'am.

Kandy Gilliard v State of South Carolina

10

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 Q. Also my understanding that the chief
2 issue raised was her competency to stand
3 trial?

4 A. Yeah, that became an issue the first
5 time that we appeared in court. The reason
6 why it became an issue was because she was
7 totally different on that day than she was
8 when I went to the institution to visit with
9 her.

10 Matter of fact, she is even
11 different today because, with all due
12 respect, she was a bit heavier then. She is
13 more diminutive today.

14 That came about that morning as it
15 related to -- she was very stable at the
16 institution. I was able to talk to the
17 institution about her -- the meds she was,
18 she was very compliant at the institution,
19 uh, and she talked very coherently.

20 That was back in 2007, so I've got
21 to underscore that this is to the best of
22 recollection. I remember that visit because
23 the day I left the institution and wound up
24 driving back to Charleston on my visitor's
25 pass to the institution, because they still

Kandy Gilliard v State of South Carolina

11

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 had my driver's license.

2 Then on the day of the hearing, she
3 was, for lack of a better expression, a real
4 "basket case." Frankly, I thought it was
5 genuine. I didn't think that she putting on.

6 Q. All right. It is my understanding
7 that the hearing was interrupted because Miss
8 Gilliard was not able to continue, that she
9 pretty much had a breakdown during the
10 hearing?

11 A. Yes. The bench, the judge, Judge
12 Young, initially -- it's my recollection --
13 indicated to all of us that she didn't
14 necessarily have to be competent to go
15 forward. But since I -- I think that I
16 recall that I was probably a bit trying on
17 the court's patience. The court, after
18 observing the defendant, Miss Gilliard,
19 finally decided, out of an abundance of
20 caution or passion or what-have-you, to have
21 her looked at.

22 My recollection was, and it was
23 refreshed today, is that it was done and that
24 the interruption was fairly shorter than what
25 the notes apparently show what it was today.

Kandy Gilliard v State of South Carolina

12

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 Basically, the court reconvened with a report
2 that said she was, quote, "competent" -- for
3 the purpose of that hearing.

4 Q. I understand. I have, and Ms.
5 Wilson has a copy of this. This was an Order
6 for a *Blair* evaluation that was issued by the
7 Court, I believe, if that looks familiar to
8 you. Or, if you would, recall when that
9 Order was issued, uh, -- I believe the date
10 on that Order is March 29th, 2007.

11 A. (Upon review), that is correct. I
12 printed my name on that. Yes, ma'am.

13 Q. So the PCR hearing convened on March
14 14th, the hearing was interrupted because of a
15 breakdown by Miss Gilliard, Judge Young
16 issued an Order for evaluation on March 29th,
17 2007 and it's my understanding that this
18 Order -- I'm sorry. This evaluation -- tell
19 me -- I need to make this an exhibit. I'm
20 sorry.

21 COURT REPORTER: Defendant's (sic)
22 Exhibit 1 for identification.

23 DIRECT EXAMINATION CONTINUED

24 BY MS. CARTER:

25 Q. What is it? That would be the Order

Kandy Gilliard v State of South Carolina
Case No. 12-CP-10-0383
Hearing of March 13, 2015
Before The Honorable Roger Young

13

1 for the evaluation?

2 A. Yes, ma'am.

3 Q. So this was the evaluation that was
4 conducted and these are the evaluation
5 results?

6 MS. CARTER: If that could be our
7 second exhibit, please.

8 COURT REPORTER: Exhibit 2 for
9 identification.

10 DIRECT EXAMINATION CONTINUED

11 BY MS. CARTER:

12 Q. And it's my understanding that there
13 was another hearing that was held or maybe
14 reconvened in order to discuss again Miss
15 Gilliard's competency. At that time no
16 testimony was taken and this mental
17 evaluation, the results of the mental
18 evaluation, the results were submitted to
19 Judge Young and no testimony was taken in
20 that.

21 A. I have to be candid with you, I
22 don't remember the events in that sequence.
23 If that's what the notes show, that's what
24 the notes show. 2007 is a lifetime ago for
25 me in, uh, this practice.

Kandy Gilliard v State of South Carolina

14

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 Q. The ---

2 A. I do remember that at one of the
3 hearings, and I'm not sure which but at one
4 of the hearings Ms. Gay testified as to her
5 conduct of the trial. This was a very
6 gruesome murder case, a very difficult murder
7 case and Ms. Gay handled it in a right
8 yeoman-like fashion considering the
9 difficulties with the case.

10 It was a case that -- what concerned
11 me about the PCR and what concerned me about
12 the whole case was that this was a case that
13 could very easily have qualified under all
14 the facts and circumstances as a potential
15 capital case. Miss Gilliard didn't really
16 want to go back and face the possibility of
17 retrial and -- and other problems.

18 Q. In preparing for the PCR hearing in
19 2007 when you represented Miss Gilliard, if
20 you recall any -- any research or any other
21 indication of history of mental illness. Or
22 were you aware that she may have been on
23 medications? I mean, just your general
24 presentation for PCR.

25 A. Well, Ms. Gay and I chased each

Kandy Gilliard v State of South Carolina
Case No. 12-CP-10-0383
Hearing of March 13, 2015
Before The Honorable Roger Young

15

1 other around on the telephone. I do have a
2 recollection of meeting her at her office in
3 Mount Pleasant to get this big box. She had
4 a box of materials on this case, the
5 discovery and what-have-you. I got that and
6 I think that I still have -- I'm sure that I
7 still have that box in my office. It was a
8 big box of paper and had all the -- every
9 scrap of paper that the prosecutor submitted
10 under Rule 5 and under *Brady*.

11 I was aware of the fact that she had
12 prior mental illness problems. The
13 evaluation report here, I see, says that she
14 was first seen by Mental Health when she was
15 a teenager. So at the time of the event she
16 had mental health problems.

17 Ms. Gay had, I think, vouched or --
18 or looked into the possibility of any mental
19 health defenses. This was a gruesome murder
20 with a bag over the head, an electrical cord
21 and all that sort of stuff.

22 I went by the scene just to
23 familiarize myself with the facts and I
24 reviewed Ms. Gay's materials, her filings of
25 Motions and -- there were some memoranda in

Kandy Gilliard v State of South Carolina

16

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 there that, I think that there were some --
2 and she -- I'm not sure if she had someone
3 else do some investigation or not.

4 That's my recollection.

5 Q. All right. Were there any other
6 issues back in 2007 with respect to Miss
7 Gilliard's PCR action other than her mental
8 competency.

9 A. Frankly -- no. In my opinion, Ms.
10 Gay had done a quite yeoman's like job in
11 trying the case. The difficulty with this
12 case was that Miss Gilliard was involved. It
13 was a gruesome murder and -- in my opinion
14 she -- you know, she did a pretty good job.
15 I couldn't find any deficiencies as outlined
16 in *Strickland*, to speak of. That's one
17 reason why towards the end of the possible
18 evaluation of the PCR I went to see Miss
19 Gilliard; and that's why the whole thing kind
20 of unraveled at the first hearing, now that
21 we see there were two. She was totally
22 different than the day that I went to see her
23 at the institution. It was a nonstressful
24 visit because it was in like a dining hall
25 versus an interview room with glass and what-

Kandy Gilliard v State of South Carolina
Case No. 12-CP-10-0383
Hearing of March 13, 2015
Before The Honorable Roger Young

17

1 have-you. She was quite talkative and very
2 communicative, what-have-you. Then when she
3 showed up at the courthouse she was just --
4 she was totally out of it, so to speak. In
5 my opinion it was genuine. I couldn't find
6 that she was putting on.

7 Q. And that's precisely why the first
8 hearing was interrupted?

9 A. Right. I mean, as a practical
10 matter she couldn't even answer my questions
11 that day. She couldn't testify in that
12 state. Ultimately, she didn't testify.
13 Ultimately she was evaluated by Order of the
14 court.

15 MS. CARTER: I don't have any other
16 questions, Your Honor.

17 THE COURT: Anything from the
18 State?

19 MS. WILSON: Yes, Your Honor.

20 CROSS EXAMINATION

21 BY MS. WILSON:

22 Q. Mr. Runyon, just to kind of start at
23 the beginning, is your testimony that you
24 were present at the March 14th, 2007, PCR
25 hearing? Is that correct?

Kandy Gilliard v State of South Carolina

18

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 A. Yes, ma'am.

2 Q. Do you have any notes or anything in
3 your file?

4 A. I do not have any formal notes from
5 that time, because that was the time in which
6 I -- I went back and checked, by the way.
7 That was the time when the primary issue was
8 my getting on the court's nerves about my
9 client being incompetent. I characterize
10 that -- that is my characterization. I am not
11 suggesting the court was vexed with the
12 presentation what-have-you. I was fairly
13 insistent on that and finally the decision
14 was made to have her evaluated.

15 Q. At that March 2007 hearing, only --
16 it is your recollection that Ms. Gay
17 testified; is that correct?

18 A. Beg your pardon?

19 Q. Only Ms. Gay testified?

20 A. Only Ms. Gaya testified because Miss
21 Gilliard was not able to talk to me co-
22 herently, let alone testify.

23 Q. Okay. Do you recall that the only
24 issue that was raised was the issue about her
25 competency at trial and whether she'd lost

Kandy Gilliard v State of South Carolina

19

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 the ability to be competent in your trial?
2 Do you recall that being the issue that was
3 raised?

4 A. I remember that there was some --
5 there was issue about her ability to
6 communicate and mental faculties during the
7 trial with Ms. Gay's handling of it. I think
8 that was -- you've got to bear with me. I
9 was called a liar in this courtroom
10 yesterday, so I don't want to be called a
11 liar a second day. My recollection was that
12 that -- that those issues were reviewed on
13 appeal, on direct appeal. So strictly
14 speaking they wouldn't be reviewable by the
15 court on PCR because they'd already been
16 reviewed.

17 Q. Do you by any chance recall any of
18 the questions that you asked Ms. Gay? Do you
19 frequently -- I mean, do you have any
20 standard questions that you ask?

21 A. No, I don't have any standard
22 questions. It depends on the case and it
23 depends upon the lawyer. It depends on
24 whether or not there was a trial or not.
25 I don't have any standard questions.

Kandy Gilliard v State of South Carolina

20

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 Q. Okay.

2 A. In getting the file from Ms. Gay --
3 and I have this vague recollection that I met
4 her in the parking lot of her office over in
5 Mount Pleasant initially and then for -- for
6 some reason she gave me the box, I think, out
7 of storage from the trunk of her car. I had
8 a pretty long conversation about the case
9 with her then.

10 Q. Okay.

11 A. So I had a pretty good briefing from
12 trial counsel as to what was done, why it was
13 done and what problems she had.

14 Q. Okay. Do you by chance recall any
15 of her testimony?

16 A. After nearly eight years, ma'am, I
17 don't recall what her testimony was. I wish
18 I could.

19 Q. Now, you also testified that you
20 were also present at a June 14th, 2007,
21 hearing. Is that correct?

22 A. I was present at a hearing when an
23 evaluation was -- to show you how -- I hate
24 to say "defective", but my memory in this
25 case was that the time was much more

Kandy Gilliard v State of South Carolina

21

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 compressed. The simple fact is that if the
2 calendars say it was June, it was June.

3 Q. Okay.

4 A. I was present then. The court
5 received the report.

6 Q. Okay. Do you recall who else was at
7 that hearing? Was Ms. Gay at that hearing?

8 A. Miss Gilliard was there. I don't
9 know if Ms. Gay was there or if your
10 testimony on the first occasion is all that
11 was necessary. I have absolutely no
12 recollection.

13 Q. And it is your testimony that you
14 were able to -- that at this second hearing
15 that Miss Gilliard had had the evaluation, so
16 you just submitted that evaluation to the
17 court essentially?

18 A. That was submitted. It was
19 basically a court evaluation, a court
20 exhibit. It wasn't necessarily my
21 evaluation. It was something which the State
22 had, something which I had.

23 Q. Have you had the opportunity to
24 review the Order of Dismissal that Miss
25 Gilliard submitted as part of her evaluation?

Kandy Gilliard v State of South Carolina

22

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 I think she, Ms. Carter, handed it to you
2 when she was questioning you. Do you have
3 a copy of it?

4 A. No, I don't have a copy of it.
5 This, Defendant's Exhibit 1, is the
6 Evaluation.

7 Q. And what I've just handed you is the
8 Order from the first PCR where you repre-
9 sented Miss Gilliard. Can you review that
10 just one second?

11 A. Yes, ma'am.

12 Q. Thank you.

13 A. (Upon review), okay.

14 Q. Thank you. Have you reviewed that
15 portion that reflects Ms. Gay's testimony?

16 A. Yes, ma'am.

17 Q. Does it appear to accurately reflect
18 what her testimony was at the hearing?

19 A. Absolutely, particularly about the
20 mental health aspects of the original trial
21 and to the fact that Ms. Gay had her
22 evaluated for the purposes of that trial.
23 The statement about that at some time during
24 the trial that Miss Gilliard sometime became
25 non-communicative, and Ms. Gay testified that

Kandy Gilliard v State of South Carolina

23

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 she was extremely exhausted after several
2 days of trial and had not brought that to the
3 attention of the court. Under the
4 circumstances of that case, I didn't think
5 that that rose to the level of defect under
6 *Strickland*, because the record was replete
7 with evaluation showing that she was
8 competent to stand trial.

9 Q. So it was pretty accurate?

10 A. Yes, ma'am, it's pretty accurate.

11 Q. And if there was something missing
12 or inaccurate in that report, would you have
13 brought it to the court's attention by a
14 post-hearing Motion or something after it was
15 filed?

16 A. Yes, ma'am, I would have. And I
17 can tell you that counsel for the State --
18 just like yourself, -- at that time and now,
19 the State has always been very responsive to
20 suggestions that the Order is not complete,
21 adding things to it or even deleting things
22 that may not have occurred.

23 Q. Okay. Thank you.

24 MS. WILSON: No further questions.

25 MS. CARTER: Nothing further, Your

Kandy Gilliard v State of South Carolina
Case No. 12-CP-10-0383
Hearing of March 13, 2015
Before The Honorable Roger Young

24

1 Honor.

2 THE COURT: Well, I just wanted to
3 state that the statement that you might have
4 gotten on my nerves, I would just like to
5 state Mr. Runyon -- I've known him for
6 probably a large portion of the thirty-two
7 years since I graduated from law school.
8 He's always been very generous to me. Most
9 respectful when he was on the court. I don't
10 think he's ever pulled any punches on behalf
11 of his client, even if he thought that he was
12 going to be irritating the court.

13 If I was acting as an irritable
14 S.O.B., I'm sure it was just a general
15 character flaw on my part and nothing that
16 you were doing. All right?

17 MR. RUNYON: Judge, I would ---

18 THE COURT: You're always a
19 zealous advocate on behalf of your clients.

20 MR. RUNYON: Judge, I would never
21 suggest that the bench acted as, to quote the
22 court, an S.O.B. I was merely making
23 reference to the fact that the court went
24 above and beyond, in that first hearing, in
25 acquiescing to my insistence that Miss

Kandy Gilliard v State of South Carolina

25

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 Gilliard be evaluated and looked at, because
2 you initially were extremely adamant about
3 the fact that she didn't have to be competent
4 for the purpose of that civil case. As I
5 said, I -- I don't mind aggravating the court
6 from time to time as long as I say it with
7 'all due respect.'

8 THE COURT: You always have.
9 You've always acted as a zealous advocate.
10 I've never thought that you were stepping out
11 of bounds or pulling any punches when you
12 needed to be punching. So, if I -- if I was
13 a little bit irritable, I assure you that it
14 was just a general character flaw on my part.

15 MR. RUNYON: Judge, let's clarify
16 the record. I am not suggesting that the
17 court was irritable on that day. We don't
18 want someone to review transcripts some day
19 and pass it along to some body over at the
20 Legislature that they ask you a question
21 about why you were irritable on that day.
22 The court has never been irritable with this
23 counsel or with any other counsel that I have
24 observed.

25 THE COURT: Okay. Thank you. You

Kandy Gilliard v State of South Carolina

26

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 may step down.

2 (WITNESS STEPS DOWN)

3 THE COURT: Who do you want to
4 call next?

5 MS. CARTER: Your Honor, we'd like
6 to call Melisa Gay as our next witness.

7 MELISA GAY: I don't claim to never
8 have irritated the court. I think that is
9 part of some of the things that I do more
10 often than not, unfortunately. I'm sorry.

11 (WITNESS TAKES STAND)

12 MELISA GAY, having been sworn to
13 tell the truth, and nothing but the truth,
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MS. CARTER:

17 Q. Ms. Gay, do ---

18 A. It might be easier if I just talk,
19 say what I remember. Is it okay if I do
20 that?

21 Q. Go right ahead. Do you recall
22 representing Miss Gilliard back in 2001?

23 A. Yes.

24 Q. Do you recall testifying during a
25 PCR hearing held for Miss Gilliard in 2007?

Kandy Gilliard v State of South Carolina
Case No. 12-CP-10-0383
Hearing of March 13, 2015
Before The Honorable Roger Young

27

1 A. Yes, and I've been provided the
2 Order and some notes.

3 Q. Can you give us a recollection of
4 the testimony that you gave with respect to
5 Miss Gilliard's competency at trial.

6 A. Yes. This is the easiest way to do
7 it, so let me get -- (arranging papers).

8 I've looked over the notes that were
9 provided of my testimony that were written by
10 the attorney general at the time as well as
11 the paragraph of Findings of Facts and
12 Conclusions in the Order of Dismissal with
13 prejudice.

14 It appears that the focus of what I
15 was being asked, other than some general
16 stuff about my practice and representing her
17 was about her mental health problems before
18 trial, during trial, after trial.

19 I had her evaluated pursuant to my
20 desire to find out a little bit more about
21 what was going on with her.

22 Kandy was involved in a situation
23 where another person who was -- who had
24 significant mental limitation had, in her
25 version, killed a woman and she was there;

Kandy Gilliard v State of South Carolina

28

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 and maybe she, during her comments with me,
2 was not as involved as the State assumed that
3 she had been. But it was definite that the
4 other individual had actually committed the
5 act of death.

6 So everything about talking to her
7 about the case was difficult because she was
8 -- in many of these notes it refers to me
9 testifying that she'd created her own
10 reality. So she was living -- her version of
11 the facts, her understanding of the criminal
12 justice process and why she was charged as a
13 principal in the case as opposed to some type
14 of mere presence or accessory, it was very,
15 very difficult to get her to understand.

16 I had her evaluated and it says here
17 that -- well, first, they asked me:

18 Q. Did you have her evaluated?

19 A. Yes, I did.

20 Q. Did you know that the co-
21 defendant was considered "slow?"

22 A. Yes.

23 Q. Was the codefendant evaluated?

24 A. Yes.

25 I did cross-examine him. It says,

Kandy Gilliard v State of South Carolina
Case No. 12-CP-10-0383
Hearing of March 13, 2015
Before The Honorable Roger Young

29

1 (reading):

2 Q. Did you hire an expert to
3 formally question or look at the codefendant?

4 I would not have done that. There
5 was a competency evaluation sort of floating
6 around that had to do with him from the State
7 hospital or MUSC group, but not anything that
8 I got individually.

9 It says, (reading):

10 A. No, I did not hire a medical
11 expert to formulate my cross examination of
12 the codefendant.

13 Then they asked me if it was a
14 capital case and I said that it was never a
15 capital case.

16 That I'd received discovery, that I
17 had gotten my discovery from the solicitor,
18 that I had not subpoenaed anything from North
19 Charleston directly. That I don't normally
20 do that.

21 I didn't know -- it says, (reading):
22 "Doesn't know of anything that exists that
23 she would need for the case." In other
24 words, I think my response would have been
25 that I thought that I had everything that I

Kandy Gilliard v State of South Carolina

30

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 thought that I needed for my trial.

2 I evaluated Miss Gilliard with Randy
3 Waid. He evaluated her and his conclusion or
4 his report was that she was difficult to talk
5 with, that she was in a non-reality based
6 situation, that she didn't know if she --
7 couldn't understand or couldn't communicate
8 about why she was being charged.

9 It says something about, (reading):

10 Q. Did you have her physically
11 evaluated?

12 A. I don't know that I believed
13 that she had any physical impairments, so I
14 didn't have her physically evaluated but
15 mentally evaluated.

16 And it says, (reading):

17 Defendant could understand what was
18 going on but her view was different from
19 everybody else in the reality of what it was.

20 In other words, she believed that
21 the facts should be perceived as she was sort
22 of present at this other person's violent
23 crime scene and that she wasn't a player.

24 So in the course of my evaluation
25 with her, I was told that she was competent

Kandy Gilliard v State of South Carolina

31

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 and criminally responsible. So we proceeded
2 with trial.

3 However, before and during this
4 competency evaluation process she was
5 completely out of touch with reality at many
6 times and inconsistent; which is what Mr.
7 Runyon was saying.

8 Some days I'd go talk to her and it
9 was easier to make some sense. It was easier
10 to talk about her case and what was
11 happening. Then other days I'd go talk to
12 her and it wasn't making any sense. It was
13 all upset about, you know, going back to the
14 point of 'why am I being charged in the first
15 place?'

16 So it says -- and the response on
17 this note says that my response would have
18 been, *"she was out of touch with reality and*
19 *the exposure that she was going to have*
20 *because the codefendant had actually*
21 *physically killed the lady."*

22 She didn't understand at all why the
23 codefendant was getting some kind of deal
24 when he was the person who actually killed
25 the woman and committed the offense and that

Kandy Gilliard v State of South Carolina

32

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 he would actually testify against her.

2 It says that I testified that she
3 didn't qualify for mental health defenses
4 before the case started, and that -- whether
5 or not she had a history of mental illness or
6 was just suffering from some type of trauma
7 because of the fact that she'd been charged.
8 I couldn't.. I didn't know.

9 So we prepared the case based on the
10 evidence that was presented. It says that I
11 didn't go to the North Charleston Police
12 Department to see if there was anything else,
13 which normally would not be the procedure.

14 My comment here is *"her behavior was*
15 *bizarre before and during the trial."*

16 Then we start talking about the
17 trial itself.

18 She chose to testify. In order for
19 her to choose to testify, I would have
20 explained to her that she had a right not to
21 under the Constitution, obviously. But she
22 chose to and wanted to.

23 Before she chose to testify, it was
24 obvious to me, and I think that there are
25 parts in here about the first day and then

Kandy Gilliard v State of South Carolina

33

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 the second day, that whoever she was the
2 second day wasn't the same person that she
3 had been the first day. That became a
4 serious problem because I was in the middle
5 of the trial.

6 But it does say that I never told
7 the judge that I believed that I was having
8 difficulties with my client's sanity, which
9 basically is what it is all about.

10 But she wanted to testify, which I
11 would not have advised her to do. It says I
12 didn't bring to the judge's attention that
13 the defendant was acting weird. The
14 defendant appeared to understand the right to
15 testify enough to know that it was her
16 choice, that she wasn't listening to my
17 advice about this person, who at that time,
18 in retrospect, may have been under some type
19 of medication. I am not so sure it was
20 legal. Something that was dealing with the
21 stress of -- you know, she'd zoned out
22 completely. She was staring in space. You
23 couldn't have a conversation with her. She
24 had, whatever shutdown mechanism she had
25 going on to deal with the stress of the

Kandy Gilliard v State of South Carolina

34

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 trial. She had become nonresponsive in many
2 ways.

3 She appeared to understand -- and it
4 says, "neuro-feedback diagnosed personal
5 disorder." I have no idea what that means in
6 these notes, but maybe it came out of my
7 mouth.

8 Then it says that there had been a
9 memo from Dr. -- oh, anyway. I had something
10 in my file that there was a memo from Dr.
11 Patrick Harvey, who was the counselor and
12 psychologist at the jail. It said that they
13 had been treating her for depression while
14 she at the jail.

15 When she went up to testify, she was
16 talking about having seen the counselors at
17 the jail and, you know, -- that's what this
18 is all about. I would have had documentation
19 from the jail's counselor that, you know, she
20 wasn't doing all that well.

21 Then these notes say that, (reading):
22 "The State knows that the defendant was
23 evaluated. Defendant may have been taking
24 some kind of drug during the trial."

25 Now, since she was in jail -- I take

Kandy Gilliard v State of South Carolina

35

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 it back -- it probably was prescribed. But I
2 don't ever remember stopping at the trial and
3 going, 'excuse me, I need to find out what
4 this lady is on because it's making her have
5 one of those, you know, Haldol-type effects
6 of just 'naaaaaa.' She wasn't engaging, she
7 wasn't making any sense.

8 I know now, many years later, that
9 she's had much more of a mental health
10 history since she's been incarcerated and
11 that there have been times in the Department
12 of Corrections where she is in fact
13 considered out of touch with reality and
14 psychotic, some things like that.

15 I know whatever it is that she has
16 post-trial conviction, she was exhibiting
17 signs of it on that day. I didn't know
18 that's what that was.

19 And I didn't tell the judge that she
20 was -- that she was acting so odd or maybe
21 was having mental healthy freakout, because I
22 was in the midst of a trial. It says in here
23 that she says "she was so tired, she wanted
24 it to end." You know, this went on.

25 Kandy got up in the middle of the

Kandy Gilliard v State of South Carolina

36

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 trial and reenacted the murder scene; which
2 is probably something I will never forget in
3 my life, because it was certainly not
4 anything that I told her to do. I don't
5 believe that it was helpful in her case at
6 all. It was so bizarre that -- it was not
7 okay. It was like a strange response to what
8 was going on in the courtroom.

9 It says here that she may have been
10 taking some kind of drug through the jail.

11 Then this lady who did the notes for
12 my day says that "she hasn't connected to the
13 treatment by this doctor", that the doctor
14 may have been prescribing her some drugs.

15 And it says the coping skills were
16 better at times during the trial on the first
17 day and -- then into -- other than the second
18 day.

19 Then I guess I said that, (reading):
20 "I think that the defendant understood it as
21 much as she could understand. The case was
22 ready to be moved, there was no question that
23 we were all ready to go." And this is
24 somebody else, I think, other than me because
25 I was ready, had done my research and gotten

Kandy Gilliard v State of South Carolina

37

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 ready for it.

2 It either says "attorney is hard to
3 control" or -- which is possible -- or it
4 says "attorney said the client, the defendant
5 was hard to control." Based on the sentence
6 it says "hard to control, none of it was
7 easy, more of lack of understanding of how
8 serious the charge was. She was very
9 entrenched in her own reality."

10 So I'm going to say that the
11 attorney said that the defendant was hard to
12 control. There is a possibility that I may
13 not have been having a good day either.

14 Then it says in here that the
15 defendant took the stand. There are some
16 things in here about what the defendant was
17 supposed to have said. I don't know if she
18 is going to testify or not, but apparently
19 she did say some things on that day that
20 didn't seem to make a whole lot of sense. It
21 says that she was moving all around, that she
22 got weird, started to cry and some things.
23 That was the day of the PCR hearing.

24 Q. So -- this was a three-day trial?
25 It was either a two- or three-day trial? I

Kandy Gilliard v State of South Carolina

38

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 think it was ---

2 A. I think it was a three-day trial.

3 Q. So it is my understanding that you
4 were not aware of the range or the depth of
5 the mental illness issues that Miss Gilliard
6 had at the time of the trial.

7 MS. WILSON: Your Honor, I am going
8 to object to this line of questioning because
9 it doesn't appear that it is relevant to Ms.
10 Gay's recollection of what took place during
11 Miss Gilliard's post-conviction relief
12 hearing, which is what we're here for. We
13 are not here to expound on post-conviction
14 relief.

15 THE COURT: Go ahead.

16 DIRECT EXAMINATION CONTINUED

17 BY MS. CARTER:

18 Q. Continue.

19 A. She was "out there" at the time of
20 the trial. Even before the trial started
21 there were a lot of problems communicating
22 with Kandy. There was -- you know, Dr. -- it
23 says Dr. Wong but I think it is supposed to
24 maybe be Dr. Waid.

25 You know, I had her evaluated

Kandy Gilliard v State of South Carolina

39

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 because I was concerned about her under-
2 standing of the process and her competency.
3 You know, you get the piece of paper back
4 that they are competent and what do you do
5 then?

6 She was actively having whatever --
7 whether we call them psychotic instances or
8 bouts of depression that may have led to
9 suicidal ideations. That was all going on
10 before the trial.

11 When we went to trial the first day
12 she, you know, put the smile on, maybe had
13 some hope that this was not really going to
14 be real.

15 Kandy was a normal person before
16 this. She is not somebody that woke up one
17 day and was committing crimes all the time.
18 She made some very bad choices and she was
19 involved in something that was very bad. But
20 her family was nice, her home of origin was
21 nice. So this was so completely foreign from
22 what she had lived.

23 Also, in her mind she believed that
24 the other guy who actually strangled the
25 woman had acted out of line with what they

Kandy Gilliard v State of South Carolina

40

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 had talked. She claimed that she'd never
2 intended for the woman to die, to be killed.
3 So for him to have the deal that was going to
4 get him out of jail in just a few years and
5 for her to be going to jail, looking at Life,
6 was unbelievable to her.

7 So whatever growing mental illness
8 problems that she was having at the time that
9 she was -- from the time that she was
10 arrested until the time that she went to
11 trial, all of that was going on in the jail.
12 You know, probably in the jail records or
13 whatever.

14 When I was testifying, when I was
15 doing her case, I had been given something --
16 because she testified and she talked about
17 how she was on meds for depression. I don't
18 ever remember recalling, you know, asking for
19 a subpoena for the kind of meds that she was
20 on at the time. I don't know, I don't
21 remember. It could have been something
22 serious.

23 Then as she came in the second day
24 and probably even, I think, the third day
25 that we just waited for the verdict and -- it

Kandy Gilliard v State of South Carolina

41

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 came back and it was awful.

2 But the second day she was just
3 "flat." She was just like, you know,
4 'duhhhh.' My investigator is here in the
5 courtroom and I talked to him about it and I
6 remembered that she was not there. I mean,
7 she just mentally was not there. When she
8 got up and said 'I want to testify' and she
9 got up there started doing all that stuff on
10 the floor and everything, it was like 'oh, my
11 god, what are we dealing with here?'

12 I just don't think that she ever
13 understood the significance of what was
14 happening to her and the choices that she
15 needed to be making about her defense. I
16 think that she was not capable of making --
17 and I do believe that she -- as I said, once
18 she went to prison, I know from talking with
19 Mr. Runyon, that she's had lots of different
20 times in the Department of Corrections where
21 she has had to be -- her medicines had to be
22 changed. Maybe she was making sense one day
23 but she wasn't making sense the next day. I
24 mean, that's medically been established. I
25 personally believe that was going on while

Kandy Gilliard v State of South Carolina

42

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 she was in the County jail. I just didn't
2 know that.

3 Hindsight is 20/20. Now that we
4 know that she had all these ongoing mental
5 health problems, I believe all of that was
6 manifesting before her trial but I did not
7 know that.

8 Q. I just have one more question. At
9 that PCR hearing back in 2007, based on the
10 Order that was issued in the case, you did
11 testify Miss Gilliard was not able to assist
12 you in her defense.

13 A. Oh, that is in these notes some-
14 where, (affirmative nod), that I said that
15 *"defendant couldn't assist defense counsel,*
16 *didn't bring at trial to the judge's*
17 *attention because she was too tired and*
18 *wanted the case over."* So, yes, it does say
19 in these notes that I said that I felt like
20 she was not able to assist in her defense, at
21 the end of the trial, before the trial ended
22 and that I didn't bring it to the court's
23 attention. For one, I didn't know the depth
24 of the problem. I just wanted it to end that
25 day. That was an alarming experience.

Kandy Gilliard v State of South Carolina

43

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 Q. And some of this was exhibited
2 before trial? Prior to trial? Her behavior
3 and the problems, communicating with her --
4 or her communicating with you.

5 A. Yes, I had her evaluated; which is
6 what I would have done to determine whether
7 or not I had any kind of mental health
8 defense to present to the court to avoid the
9 trial or whatever.

10 In the interim, when the trial
11 started, I saw and knew from her testimony
12 that she was seeing somebody at the jail but
13 I don't remember -- I know -- unless Bill has
14 my file and I did something different, but I
15 don't remember subpoenaing any of the jail
16 records. I may have but I don't remember.
17 It became much worse. I mean, the first day
18 we sort of got through it. But the second
19 day it became -- as the day went on, and the
20 third day went on.

21 She always had issues with non-
22 reality. I guess now we're referring to it
23 as delusions. At the time I just thought
24 that it was, you know, -- you know, your
25 garden variety nonacceptance of response-

Kandy Gilliard v State of South Carolina

44

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 bility on some level. But I do believe,
2 based on what I now know and what I have been
3 told, that she has more of a significant
4 mental health history. A problem. You know,
5 not that she was just not wanting to see it
6 my way that day.

7 MS. CARTER: I don't have any
8 further questions?

9 THE COURT: Cross?

10 MS. CARTER Nothing from the
11 State, Your Honor.

12 THE COURT: Thank you, you may
13 step down.

14 MS. GAY: Your Honor, may I be
15 excused?

16 THE COURT: Do either of you have
17 any need for Ms. Gay to stay?

18 MS. WILSON: I think that was the
19 last witness, Your Honor.

20 THE COURT: Okay. Thank you. All
21 right. Well, we agree that this is as good
22 as it gets? Send the transcript from today
23 on to Columbia?

24 MS. CARTER: We should do it.

25 MS. WILSON: I think you just have

Kandy Gilliard v State of South Carolina

45

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 to ---

2 MS. CARTER: I will request the
3 transcript, Your Honor. I will do that.

4 THE COURT: This Order that I have
5 from the Supreme Court to have this Order,
6 dated January 30th, said we should have this
7 hearing within forty-five days, which we got
8 it within.

9 It says, *"If Judge Young determines*
10 *that reconstruction is not possible, he shall*
11 *notify this Court and the parties within*
12 *fifteen days of the reconstruction hearing."*

13 It says if the record is
14 reconstructed that the parties shall notify
15 this court and the matter will proceed *"on*
16 *Petitioner's receipt of the transcript from*
17 *the reconstruction hearing."*

18 So since reconstruction is possible,
19 it doesn't require me to do an Order or to
20 notify the Court. It just says that y'all
21 are to notify the Court that a hearing was
22 held, then once you get the transcript you'll
23 go forward. Is that the way y'all read that?

24 MS. CARTER: That's correct. It is
25 my job from here on out. I will send the

Kandy Gilliard v State of South Carolina

46

Case No. 12-CP-10-0383

Hearing of March 13, 2015

Before The Honorable Roger Young

1 Court a letter indicating that we did have
2 the reconstruction hearing today and that we
3 were able to reconstruct the record, and I'll
4 order the transcript. I believe that's all
5 the Court requires.

6 THE COURT: All right. Thank you.

7 (HEARING CONCLUDED)

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Kandy Gilliard v State of South Carolina
Case No. 12-CP-10-0383
Hearing of March 13, 2015
Before The Honorable Roger Young

47

CERTIFICATE OF COURT REPORTER

I, the undersigned Deborah Garrison,
Circuit Court Reporter for the 9th Judicial
Circuit, hereby certify that the foregoing
is a complete and accurate transcript of the
hearing held in the within action heard on
March 13, 2015, before The Honorable Roger
Young;

I further certify that I am neither
kin nor counsel to any of the parties and
have no interest in the outcome of this
action.



Deborah Garrison

Charleston, South Carolina

March 14, 2015

Kandy Gilliard

6-14-07

~~- Judge -~~

- Judge -
- PCR hearing - Runyon had concerns Δ not competent
- J ordered evaluation
- Δ found competent by Dr. Cross of DMH
- evaluation made an exhibit

Arguments

Runyon

- ? is not as complicated as to whether she was competent or not competent at trial
- App thoroughly evaluated - found competent to stand trial prior to trial
- Δ was able to assist in own defense the 1st day but not the second day - don't know why she couldn't assist
- Gay did a great job trying the case
- rep not def in preparation or trying the case differently

- I couldn't assist in defense
- didn't bring to trial judge's attention
- b/c she was tired & wanted case over

May have met 1st prong - IAC ^{or he did}
but what about 2d prong - has ^{voluntarily} full on sword by PCR
being

- Ms Gay's testimony is not believable
when you look at the record

MUA

Attorney's
Report of Trial or Hearing

To be prepared by the attorney and submitted to the Attorney General and Chief Deputy each time an attorney appears in any court.

Attorney: Jeanette Van Ginhoven Section: PCR

Other AAG(s) appearing: _____

Opposing counsel: William L. Runyon, Jr.

Case name: Kandy Gilliard v. State 2005-CP-10-0619

Day & date of appearance: 3/14/07 Time: 09:30

Court: PCR County: Charleston

Judge: Roger M. Young

Type of trial or hearing: PCR hearing
(eg. Jury trial, bench trial, motions(s), jury selection, guilty plea, sentencing, appellate argument, roster meeting, post-conviction relief hearing.)

Description of event, issues and result _____

Matter under advisement with Judge Young.

3-19-07
Date

Jeanette Van Ginhoven
Attorney

Distribution
Original - Attorney General
Copies - Chief Deputy
Legal file

evaluator

- not psych not an expert
- had D. evaluated. Comp & cum resp.

Kandy Shliard's PCR

3-14-07

Lisa Day

- crim def. lawyer for 16 yrs.
- ~~had~~ family, primarily mother lived her
- had Δ evaluated - received report from physician.

- CO Δ in case - had some impairment - "slow" per state

- CO Δ had been evaluated

- crim examined Johnson

- did not hire expert to formulate?

on Mr. Johnson

- did not hire ^{med.} expert to formulate crim exam.

- never a capital case

- received discovery via Rule 5

- did not subpoena N. Carol. PD

- doesn't normally do that

- doesn't know if anything that exists

that she would need for the case

- Randy Wade - had Δ evaluated - Δ was very difficult to talk to - non reality based - ~~she~~ didn't know if she didn't understand & couldn't communicate

- "physical evaluation requires Δ to physically impair?"

- bad facts

what was results

comp & crim resp

what were results

get report that

doctor spoke w/ Δ

- didn't have her evaluated
- Δ could understand what was going on - her view was different from the reality of what was going on
- had her evaluated - she was competent & crim. resp.
- Out of touch w/ realities & exposure bc coD actually physically killed woman
- State cut a deal w/ coD - couldn't understand the
- didn't qualify for mental defense - she didn't have a real history of ~~the~~ mental illness
- prepared case based on evidence from Rule 5
- didn't go to N Carol PD
- behavior was bizarre before & during trial
- Δ testified - never told Judge @ difficulties -
- Δ wanted to testify
- didn't bring to Judge's attention Δ was acting weird
- Δ appeared to understand it to testify
- Neurofeedback
- Diagnoses - personal disorder

short did N
have know?
when is it

sent to
testing
I wait
over
plea deals
I went over

- memo from Mr. Hawey ^{Patrizi} - Counselor ^{not psychologist}

2-16-01 - mental health counselor at jail
- rec cont. treatment for Depression

- State knew D was evaluated

▷ - D may have been taking Celexa during trial

- coping skills better at time of trial 1st
beginning of arrest

- D understood as much as she could
understand

- ready for case to be moved

- no question atty was ready to go
forward to try case - D conceded

- atty is hard to control - none of it
was easy - more of lack of understanding
how serious the charge was - she was
very entrenched in her own reality

- D took stand & it all fell apart

- told her what options were - J. Lockemy
~~used~~ ~~have~~ went over options

- more concerned w/ getting case over

- didn't realize how she was going
to present herself

- they had talked & discussed prior ^{to} trial

what you discuss
what D was
going to ^{do}

- toward end of case - D totally out of control
- atty pt was to end the case just get it over
- D may have been incompetent at end of trial
- atty not ready for it to end
- she was overwhelmed

~~Q~~ - in end she was unable to assist in her own defense - wasn't the same as the beginning

- D was moving all over the place
- got on the floor to do real reenactment on floor
- D was all over the place
- D behavior

State believed she was actual participant peer at heart if one is had of all

- didn't discuss if he was to trial ready testifying
- no mental health D
- could have been mitigation if peer

Judge's Questions

- Wang - D doesn't have mental disorder - has personality disorder
- closer to psychotic than intellectual
- more emotional man - reality
- didn't know if raised to level of psychosis but
- D is competent



- D became unable to assist after co D's testimony
 - she wanted to tell
 - she got off stand - D was staying off into space
 - never asked ct to evaluate her or tell ct of issues she was having
 - D may have needed medict from the jail
-

- Repleat of trial course being ~~very~~ effective

MUA

- Judge going to take under advisement
- Can get more evidence
- Can ask more c/w's

Council v. Cattel

- At 10:00 corp. at PCR hearing

Runyon
is
IDL
76

STATE OF SOUTH CAROLINA
COUNTY OF CHALRESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2005-CP-10-0619

Kandy Gilliard,
SCDC No. 275605,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL
WITH PREJUDICE

FILED
2007 JUL 23 PM 1:02
JULIE A. ARSTRONG
CLERK OF COURT

William Runyon, Esq. appearing for the Applicant.

Jeanette Van Ginhoven, Esq., Assistant Attorney General, appearing for the Respondent.

This is a post-conviction relief (PCR) matter. The Applicant alleges in her PCR application filed February 15, 2005, that she is being held in custody unlawfully due to the ineffective assistance of trial counsel. An evidentiary hearing was convened at the Charleston County Courthouse on March 14, 2007.

I. PROCEDURAL BACKGROUND

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the April 2000 term of the Charleston County Grand Jury for murder (00-GS-10-2467) and strong arm robbery (00-GS-10-2468). She was represented by Melissa Gay, Esquire. On June 1, 2001, the Applicant proceeded to trial after which she was found guilty as indicted. She was

R

sentenced by the Honorable James E. Lockemy to confinement for a period of her natural life and ten years concurrent.

A timely notice of appeal was filed on Applicant's behalf. Applicant's appellate counsel, Robert Dudek, Esquire, petitioned to be relieved as counsel and filed an Anders brief with the Court. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Gilliard, Op. No.2004-UP-296 (S.C. Ct. App. filed May 5, 2004). The Applicant subsequently filed a petition for writ of certiorari, which was denied by the South Carolina Supreme Court on July 8, 2004. On August 19, 2004, the South Carolina Supreme Court denied the Applicant's petition for rehearing.

On March 14, 2007, this Court started the Applicant's PCR hearing. The Applicant called Melisa Gay as a witness. After Ms. Gay's testimony, PCR counsel stated that the Applicant was crying and that he was not sure if she was competent to go forward. By Order dated March 29, 2007, this Court ordered that the Applicant be evaluated by the South Carolina Department of Mental Health. The Applicant was evaluated on May 22, 2007, by Dr. Michael Cross. Dr. Cross found that the Applicant possessed the capacity to understand the proceedings against her and to assist in her appeal. This Court continued the Applicant's PCR hearing on June 14, 2007. The Applicant and State did not present witnesses at this hearing but did introduce Dr. Cross' evaluation as part of the record.

II. APPLICABLE LAW

a. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry v. State; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

III. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

The only witness called during the PCR hearing was trial counsel. The Applicant did not testify. The Applicant claims trial counsel was ineffective for failing to bring to the trial court's attention that the Applicant had a mental break and was no longer assisting in her own defense during the trial. The Applicant fully admits that trial counsel adequately prepared for trial and

that her performance was reasonable under professional norms except for the fact that she did not bring to the trial court's attention that the Applicant could not assist in her own defense because she was tired after the three day trial.

Trial counsel testified that she has practiced law for sixteen years. Trial counsel testified that the Applicant was difficult to communicate with because she did not seem to grasp the seriousness of her charges. Trial counsel had the Applicant evaluated by Dr. Wong. Dr. Wong performed a psychological exam. Dr. Wong found that the Applicant was competent to understand the proceedings and assist in her own defense. Dr. Wong found that the Applicant did not suffer from a mental disorder. Trial counsel testified that she did not have a basis to assert a mental defense. Trial counsel testified that the Applicant's behavior was bizarre before and during trial. Trial counsel testified that after the co-defendant testified, that the Applicant was no longer able to assist in her own defense. Trial counsel testified that she was tired after this three day trial which is why she did not bring this fact to the trial court's attention.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the testimony presented at the evidentiary hearing, observed the witness presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the transcripts. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

To be competent to stand trial or continue trial, a defendant must have "a rational, as well



as a factual, understanding of the proceedings against him and the ability to consult with his lawyer with a reasonable degree of rational understanding. Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). A defendant must prove that he is incompetent to stand trial by a preponderance of the evidence. Id. The Supreme Court of South Carolina has found that a PCR judge erred in granting relief on the basis that the defendant was not competent to stand trial when: (1) counsel testified at the PCR hearing that he had no trouble communicating with the defendant; (2) the trial transcript showed that the defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated the defendant prior to trial and found the defendant's medical conditions did not affect his mental state. Id.

In this case, trial counsel testified that she could communicate with the Applicant but that she did not seem to appreciate the seriousness of the charges. Trial counsel later testified that at some point after the co-defendant testified, the Applicant had a "mental break" and could no longer assist in her own defense. However, the trial transcript refutes this assertion.

The trial court questioned trial counsel and the Applicant as to whether they had discussed the Applicant testifying at trial, plea negotiations and sentence exposure. (T. pp. 576-582). The Applicant understood the questions and responded in an appropriate manner. The trial judge instructed trial counsel to advise the Applicant regarding her right to testify a second time. (T. p. 582). Trial counsel then informed the trial court that the Applicant wished to testify but told the trial court they would discuss it again during the lunch break. (T. p. 663). The trial court again went over the Applicant's right to testify and the Applicant again understood the questions and answered in an appropriate manner. (T. pp. 691-693). The Applicant testified during the trial informing the jury of her involvement in the murder. The Applicant testified

during trial that the co-defendant came to the store but she did not know why. She let the co-defendant into the store and he said he was going to rob the store and that she was going to help him. She testified that he had a monkey wrench and she was afraid if she didn't help him that he would harm her. Throughout the Applicant's testimony during trial, she is appropriately answering trial counsel's questions and the State's questions.

Trial counsel testified that prior to the trial, she had the Applicant evaluated by Dr. Wong. Dr. Wong found that the Applicant's mental health issues did not affect her competency. Dr. Cross, who evaluated the Applicant, after the first PCR hearing, diagnosed the Applicant with depressive disorder, not otherwise specified. Dr. Cross also found that there was no evidence that the Applicant had significant problems with her mood, thinking, reality testing, communication, or behavior.

I find the Applicant has failed to prove by a preponderance of the evidence that she lost competency to stand trial during her trial. It is clear from the trial transcript that trial counsel was adequately prepared for trial. In fact, the Applicant admits that trial counsel was not ineffective in preparing for trial or actually conducting the trial except for failing to bring to the trial court's attention that the Applicant could not assist in her own defense. I believe that counsel's testimony at the post-conviction relief hearing is an attempt to "fall on the sword" for a young client who received a life sentence. However, the trial record, viewed as a whole and with an objective eye finds that at no point did the Applicant act in such a way as to indicate a lack of cognitive or volitional abilities during the course of her trial such that indicates she lacked capacity to understand what was going on or to assist her attorney. Therefore, this Court finds that trial counsel was not ineffective.

The State argues that even if trial counsel was ineffective, the Applicant has failed to



carry his burden in this action and cannot show prejudice. I disagree. If the Applicant became incompetent during trial, the court should have continued the trial or declared a mistrial until such time as Applicant became competent. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). However, because I find that Applicant failed to show her counsel was ineffective, this cannot be considered the basis for a grant of relief.

CONCLUSION

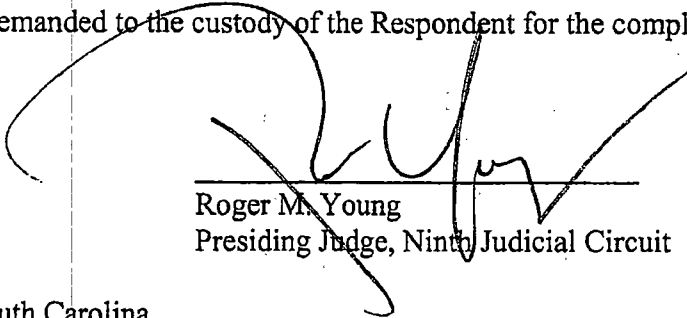
Based on the specific findings above, this Court concludes that the Applicant failed to carry her burden of proof to show that her trial counsel's representation fell below reasonable professional norms. The Applicant's former trial counsel rendered reasonably effective assistance under prevailing professional norms and demonstrated a normal degree of skill, knowledge, and professional judgment that is expected of an attorney in a criminal case. Strickland v. Washington; Cherry v. State.

As to any and all allegations which were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that the Applicant waived such allegations and failed to meet her burden of proof regarding them. Accordingly, they are denied and dismissed with prejudice.

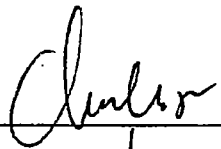
IT IS THEREFORE ORDERED THAT:

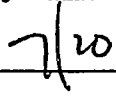
1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**.
2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

3. The Applicant is remanded to the custody of the Respondent for the completion of her sentence.

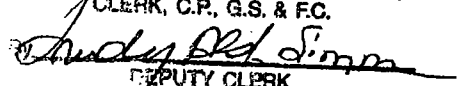


Roger M. Young
Presiding Judge, Ninth Judicial Circuit


_____, South Carolina


_____, 2007

ATTEST A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.



DEPUTY CLERK

FORM 5

2012-09-10-0383

STATE OF SOUTH CAROLINA

County of Charleston

IN THE COURT OF COMMON PLEAS

Kandy Billiard #275605

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

JULIE J. ARMSTRONG
CLERK, C.J. & G.S.

JAN 17 2012

FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention _____
2. Name and location of Court which imposed sentence 9th Circuit Court
Charleston - General Sessions
3. Name(s) of co-defendant(s) (if any) Brian Johnson
Benjamin Johnson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2000-GS-10-2467, Murder, Life

(b) 2000-GS-10-2468, Armed Robbery 10 yrs. - con.

(c) N/A

5. The date upon which sentence was imposed and the terms of the sentence:

(a) June 2001

(b) June 2001

(c) N/A

6. Check whether a finding of guilty was made:

(a) after a plea of guilty N/A

(b) after a plea of not guilty YES

(c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Supreme Court

ii. Courts Of Common Pleas

iii. South Carolina Courts Of Appeals

(b) the result in each such Court to which you appealed:

i. Denied

ii. Denied

iii. Denied

(c) the date of each such result:

i. May 5th 2004

ii. July 8th 2004 and August 19th 2004

iii. July 23rd 2007

(d) if known, citations of any written opinion or orders entered pursuant to such

results:

i. OP. No. 2004-UP-296 (S.C. Ct. App.)

ii. August 19th 2004 Petition for Rehearing

iii. Dismissed (2005-CP-ID-0619)

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

- (b) N/A
- (c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Subject-Matter Jurisdiction

- (a) Dismissal of Indictment, Pre-Indictment Delay 18 USA
- (b) Entrapment, Nolle Pross, 5th Amendment USCA
- (c) Self Incrimination, Ineffective Counsel 6th Amendment USCA

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Co-defendant Plead Guilty to Murder & Arm Robbery before
- (b) Presence at crime scene, Co-defendant plea. Miranda ^{my trial} Rights.
- (c) To testify in court, Attorney failed to charge Jury on
Nolle Pross. & Indictments

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? YES

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Direct Appeal Jury Trial
- ii. Post Conviction Relief
- iii. Appeal Post Conviction Relief
- iv. N/A

(b) the name and location of the Court in which each was filed:

- i. South Carolina Supreme Court
- ii. Charleston County General Sessions, Chas. SC.
- iii. South Carolina Courts of Appeals Col. SC.

- iv. N/A
- (c) the disposition thereof:
- i. Denied
- ii. Denied
- iii. N/A
- iv. N/A
- (d) the date of each such disposition:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

N/A

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

- (b) the proceedings in which each ground was raised:

i. N/A

ii. N/A

iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Entrapment, Nolle Pross. Attorney did not raise the defense,
 (b) Ineffective Assistance. Appellate Counsel did not raise the defense
 (c) Miranda Rights violated before Trial, during Trial, Attorney failed to charge the jury on issues and defect delayed indictment.

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

- i. Malisa Gaye, Esquire, Trial Attorney
Charleston, SC
 ii. Robert Dudek, Appellate Defense Attorney
Columbia, SC
 iii. William Runyon P.A., PCR Attorney

- (b) the proceedings at which each such attorney represented you:

- i. Jury Trial
General Sessions Court
 ii. Direct Appeal
South Carolina Supreme Court
 iii. Post Conviction Relief, Action Denial Appeal
Courts of Common Pleas

19. State clearly the relief you seek in filing this application:

Fast + Speedy Trial within 90 days "Jury Trial"
Injunction Relief on Charges. Lesser Charge.
Re-Open the State's evidence "Motion To Compell Evidence"

20. Are you now under sentence from any other court that you have not challenged?

N/A

N/A

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Richland)

VERIFICATION

I, Kandy Gilliard #275005, 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.

Kandy Gilliard

SWORN to and subscribed before me this 12th
 day of December, 2011.

Peggy Kyle Lyle (L.S.)
 Notary Public

My Commission Expires: 11/23/2014

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

I, Kandy Gilliard #275605, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Kandy Gilliard
Applicant

SWORN or affirmed to and subscribed before me this
12th day of December, 2011.

Peggy K. Hahn
Notary Public

My Commission Expires: 11/23/2014

Exhibit A

The State Of South Carolina
In The County Of Charleston

In The Courts Of Common Pleas
4th Judicial Circuit

Inre #275605 Kandy Gilliard

Exhibit A Page 1

The State Of South Carolina

Applicants Statement of Facts

The "Applicant" States the following facts concerning how she has been entrapped for the crimes of murder and Armed Robbery. The "Applicant" states that she was with the employee at the store. The (Co-defendant) implicated her as co-conspirator in the crime. Video of the store will reveal that the "Applicant" was used and held against her own free will in the crime. Trial transcripts, revealed that "Applicant" did try to prevent the murder or any physical harm by pulling (Co-defendant) off of the victim.

The "Applicant" was forced to cooperate in the robbery. "Applicant" fled from the (Co-defendant) because she feared he would harm her, as well as, had harmed the employee of the store.

The "Applicant" further states that under the Nolle Pross. Doctrine or Statute, The State accepted a guilty plea of the (Co-defendant) for Murder which would bar the State from charging her with murder.

Under this statute and other statutory provisions, whenever a person pleads guilty to any crime, the court issues judgement as defined whenever a person admitted he has committed a crime, because Co-defendant plead guilty and was sentenced to 30 years. The indictment for murder against the applicant has to be DISMISSED. Meaning the "State could not prosecute" the applicant for murder because of the confession of the co-defendant that he committed the murder, which frees her of the burden. However, the state used Co-defendants, confession and guilty plea to entrap the "applicant" as a co-conspirator of the crime. Defense Attorney failed to charge the jury on the following charges: Dismissal of Indictment for Pre-Indictment Delay, when Co-defendant "admitted to killing the victim, with a written statement confessing that he had killed the victim and entered a guilty plea for murder. The State failed to Squash the murder indictment against the "applicant" and allowed the indictment for murder to remain as is on the applicants Indictment, which was in violation of the 5th and 14th amendments, U.S.C.A. Under 18 U.S.C.A. 3161 (1988 Act) The "Applicant" Argues this statute, because

Applicant's Statement Of Facts Exhibit A page 2

Co-defendant plead guilty and had a speedy trial, whereas the "applicant's" trial wasn't heard for nearly 2 years. Therefore, the State had ample time to file a motion to Amend the Applicant's Indictment to a lesser Included Offense, which was never offered. Yet, the Attorney for the "applicant" failed to charge the jury on Indictment a Nolle Pross. Statute, whereas the co-defendant, again admitted that (he) had killed the victim and not the applicant (Kandy Gilliard). The applicant further states that Defense Attorney failed to charge the jury on Nolle Pross. Statute. Defense Attorney, failed to charge the jury to bring back a verdict for "A Motion Not Withstanding the Verdict to find the "Applicant" Not Guilty of The Murder of the victim.

Defense Attorney, failed to charge the jury on Entrapment Statute, because the "Applicant" was used to assist the co-defendant in the crime, she was charged for the crime. The Defense Attorney failed to charge the jury to bring back a verdict of Not Guilty for Armed Robbery, because the "co-defendant" Confessed to the Armed Robbery as well. The Defense Attorney failed to charge the jury to bring back a verdict of Not Guilty on Murder and Armed Robbery but charged the "jury" on an Conspiracy after the fact of murder and Armed Robbery because (Applicant) did not call police...

#25605 Kandy Gilliard
December 12, 2011

Sworn to and Subscribed
before me on this 12th Day
of December 2011

Notary Public For The State Of
South Carolina Reaggy Kyle Loh

My commission expires 11/23/2014

Exhibit B
 The State of South Carolina
 In The County Of Charleston
 In re) #2756005 Kandy Gillard
 VS
 The State Of South Carolina

In The Courts Of Common Pleas
 9th Judicial Circuit
 The "Applicant" files this brief in support
 of her Post Conviction Relief Application.
 Under the 5th and 14th Amendment U.S.C.
 Exhibit B

The "Applicant" Brief in support of her P.C.R. second Application.

For A First Defense: In Affective Assistance of Trial Counsel and Appellate Defense Counsel... Trial Counsel negligence fell below the horn of legal representation's when counsel failed to obtain a Qualified Expert Witness to testify in court, Concerning the Trauma and the After Effects of the murder "which caused the "Applicant" to suffer from Depression Disorders. Whereas this condition was found at her P.C.R. hearing when trial court Judge Ordered A Continuance and for a psychological Examination of the "Applicant"; Who was Examined by the S.C. Dept. of Mental Health on May 22, 2007 "Attending Physician was Dr. Michael Cross, who issued the opinion that the "Applicant" suffered from Depression. Which was contrary to Dr. Wong's finding of no allege mental illness, Mers. Rea. However, both (Dr.'s) issued a written opinion absent a court room - testimony. The "Appellate" Defense Attorney, Mr. Robert Dudek, failed to comb the record for any legal technical errors and submitted A Defective Appeal Brief "Anders Brief" to prevent and to Concealed the "Applicants" Conviction. However, the Appellate Defense Attorney failed to Perfect her Appeal and failed to submit a legal argument or record of Appeal.

For a second defense: Entrapment statute, Defense consists of three distinct elements; ① Idea for commission of Crime must originate with State Agent; ② Coercion and deceit, Agents under persuasion of "co-defendant" to implicate the "Applicant" as his co-conspirator.

For A Third Defense: Nolle Pross. Statute or Doctrine, co-defendant confessed plead guilty to Murder and Armed Robbery, which release the "Applicants of Murder and Armed Robbery.

The State of South Carolina
 In The County of Charleston
 In re) # 275605 Kandy Gilliard
 VS
 The State of South Carolina

In The Courts of Common Pleas
 9th Judicial Circuit
 Exhibit B Applicant Brief
 Affidavit of Service

For A Fourth Defense: Miranda Rights was violated, Police questioned Co-defendant and "Applicant" absent an attorney to obtain a Confession Statement.

For A Fifth Defense: Confession obtained in violation of 4th Amendment U.S.C.A. Denied Due Process of a Fair Trial and Denied a Right to a fair PCR Hearing, without the store video tape being entered in for the jury to determine the facts in the case, and Self Incrimination to be a witness against herself.

CITING CONSTITUTIONAL LAWS: 5th, 6th and 14th Amendments U.S.C.A.

5th Amendment - Miranda Rights violation and Self-Incrimination

6th Amendment - U.S.C.A. Attorney False Representation

14th Amendment - U.S.C.A. Denied Equal Protection. Due Process of Law.

Entrapment Statute, Nolle Pross. Doctrine 18 U.S.C.A. 3161 Delay Indictment, Defect Indictment (90) Statute.

Kandy Gilliard
 #275605 Kandy Gilliard

Dec. 12, 2011
 Date

Sworn to and subscribed before me

On this 12 Day of December 2011

Notary Public For The State of South Carolina

Peggy K. Hahn

11/23/2014
 My Commission Expires

Exhibit C

The State of South Carolina
 In The County of Charleston
 In re) # 2756005 Kandy Gilliard
 VS
 The State of South Carolina

In The Common Pleas Courts
 9th Judicial Circuit
 Motion For A Fast And
 Speedy Trial
 18 U.S.C.A. 3161-3174 (1988) Act.
 16th Amendment U.S.C.A.

The above captioned "Applicant" hereby moves on her own accord, petitioning the court to enter an order granting her a fast and Speedy Trial in the above reference case.

For a first defense: The "Applicant" states that she is entitled to have a jury trial on the merits of her 2nd P.C.R. Application, based on the following facts.

① The "Applicant" counsel did not acquire any witnesses or evidence for the "Applicants" Trial. ② There was no Independent Outside Expert Opinion Concerning the "Applicants" Mental State during the course of her P.C.R. hearing and Conflicting the testimony of Dr. Cross and Dr. Wongs alleged Expert Opinion absent any physical "Scientific Proof" of X-Rays MRI's Showing any form of Damage to the "Applicants Brain", which would cause the "Applicant" to become disillusional and dysfunctional in addition with being or having (Bezzard) behavior in lieu of being diagnosed with depressive disorders by Dr. Micheal Cross open court testimony is needed.

For a second defense:

The Rights to be a speedy trial is provided for by the 14th Amendment and 14th Amendment to the U.S. Constitution, the S.C. Constitution Art. 1 & 14 DOBETT -v- U.S. 112 S.Ct. 2686 (U.S. 1992) STATE -v- CHAPMAN 344 S.E.2d. 611 (S.C. 1986), And SC Code Ann Law: section: 17-23-909 (1996 as amended)

For a third defense:

The "Applicant" raises the Entrapment Defense

The State of South Carolina
In The County of Charleston

In re) #275605 Kandy Gilliard
-VS-

The State of South Carolina
Exhibit C-2

In The Common Pleas Courts
9th Judicial Circuit

Motion For A Fast And
Speedy Trial
18 U.S.C.A. 3161-3174
(1988) Act. With Amendment USCA.

For A Fourth Defense:

The Applicant raises the Nolle Pross. STATUTE.

Now therefore "the Applicant" moves that this court Order her Release "IF" the solicitor or Attorney General does not set this case for trial within the (30) days time frame not to exceed (90) days after receipt of this Notice.

The "Applicant" states that she wishes to avail herself of the rights to a speedy trial contained in the Federal and State Constitution, and other Statutory Provisions and Applicable Federal and State Case Law.

Kandy Gilliard
#275605 Kandy Gilliard

December 12, 2011

Sworn to and subscribed before me

On this 12 day of December 2011

Notary Public For The State of South Carolina
Peggy Kyle Goh

my Commission Expires
11/23/2014

Exhibit D

The State of South Carolina
In The County of Charleston

In The Court of Common Pleas
9th Judicial Circuit

In re #275605 Kandy Gilliard
VS
The State of South Carolina

AFFIDAVIT
OF
SERVICE

I, #275605 Kandy Gilliard, Certify that I have
Submitted the following documents
along with (1) P.C.R. Application

- 1. Statement of Fact (Exhibit A) 2 pages
- 1. Brief Exhibit (B) 2 pages
- 1. Motion for a fast and Speedy Trial (Exhibit C)
2 pages
- 1. Affidavit of service (Exhibit D)
- 1. Table of Authorities (2) pages (Exhibit D-1 + D-2)
- 1. Letter in reference of PCR action (Exhibit E)

Sworn To And Subscribe
before me on this 12 day
of December 2011
Notary Public For The State of South Carolina.

Kandy Gilliard
#275605 Kandy Gilliard
December 12 2011

Peggy K. Hahn

11/23/2014
My Commission Expires

The State Of South Carolina
 In The County Of Charleston
 In re) # 275605 Kandy Billiard
 - Vs -
 The State Of South Carolina

In The Courts Of Common Pleas
 9th Judicial Circuit
 Exhibit D-1
 Table Of Authorities case law

① 18 U.S.C.A. (1988 (Act.) United States -v- Scott
 437. U.S. 82, 98, N. 1198. S.Ct. 2187, 2197, N-11, 57.
 L.Ed. 2d. 65 (1978) "The Dismissal Of an Indictment
 for preindictment delay, represents a legal judgement
 that a "defendent," although criminally capable, may not
 be punished, because of a supposed Constitutional
 violation, Id. At. 98. 98 S.Ct. at 2179

② Estelle -v- Smith, 451, U.S. 454, 462, 101. S.Ct.
 1866 L.Ed. 2d. 359. The 5th Amendment prevents
 a person from being compelled in any criminal
 case to be witness against himself. To maintain
 that sentencing proceedings are not part of
 any criminal case is contrary to the Fed.R. of
 Crimp Procedure and to common sense. PP. 1313, 1314.
 Citing - Mitchell -v- U.S. 199 S.Ct. 1307 (1999 case law)

③ Nolle Pross. Doctrine Defense. Co-defendent
 admitted to the killing of the victim, signed
 an affidavit and plead guilty, also testified of
 "Applicants" Trial that he killed the victim, Offered
 a plea deal of 30yrs. SC. constitutional law, and
 or common law statute.

④ Miranda Rights: violated under S.C. R. Crimp,
 Rule 408 State used information gained throughout
 the interrogation of defendent and co-defendent, during

The State of South Carolina
In The County of Charleston
In re) # 275605 Kandy Gilliard
The State of South Carolina

In The Courts of Common Pleas
9th Judicial Circuit
Exhibit D-2

Table Of Authorities Case law

the Investigation to breach terms of a plea agreement for the co-defendant "If" he would not testify. Plea Agreement, NO LIFE SENTENCE
⑤ Subject-Matter Jurisdiction, of the Court to sentence the "Applicant" for Murder when the codefendant entered a plea agreement during his arrest and throughout his preliminary hearing, as well as, at the closing and sentencing of his bench trial. The State agreed to (30) years Guilty Plea, in exchange for testimony to "Entrap" the "Applicant" which makes the Indictment against the "Applicant" IN VALID, and the Entrapment Defense, as well as, Nolle Pross. Defense is a legal Argument which makes it unlawful and illegal to prosecute the "Applicant" for a Murder she did NOT commit. The Indictment is Invalid, Fraud by the Court. Under false Claim Doctrine and under 18 U.S.C.A. 1503, 1504, Tampering with the jury, falsifying the record, model Penal code. 224.4. 18 U.S.C.A. 1504, 2071, 2073. Also false statement, false Swearing model Penal code. 241.2 Smith-V- State. 66 GA. APP. 669. 19, 552d. 168, 169.

275605 Kandy Gilliard
December 12, 2011
Kandy Gilliard

Sworn to and subscribed
before me on this 12th Day of December 2011
Notary Public for the State of South Carolina
Peggy K. Nichols
my Commission Expires
11/23/2014

Aw
9

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Kandy Gilliard, #275605,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2012-CP-10-0383

AMENDED PARTIAL
RETURN AND MOTION TO DISMISS

FILED
2013 JUN -7 PM 1:45
JULIE A. HARRIS
CLERK OF COURT

The Respondent, making its Return to the Application for post-conviction relief filed January 17, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the April 2000 term of the Charleston County Grand Jury for murder (2000-GS-10-2467) and armed robbery (2000-CP-10-2468). Melissa Gay, Esquire, represented the Applicant. On June 1, 2001, the Applicant proceeded to trial and was found guilty as indicted. The Honorable James Lockemy sentenced him to confinement for life for murder and 10 years for armed robbery.

The Applicant filed a timely Notice of Appeal. Applicant's appellate counsel Robert Dudek, Esquire, petitioned to be relieved as counsel and filed an Anders brief with the Court. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Gilliard, Op. No. 2004-UP-296 (S.C. Ct. App. filed May 5, 2004). The Applicant subsequently filed a petition for writ of certiorari, which was denied by the South Carolina Supreme Court on

July 8, 2004. On August 19, 2004, the South Carolina Supreme Court denied the Applicant's petition for rehearing.

Applicant subsequently filed an application for post-conviction relief (PCR) on February 15, 2005. In his application for PCR, the Applicant requested relief on the following grounds:

1. "Trial counsel was ineffective in preparing and representing me at trial."
2. "Lackadaisical effort by Appellate Defender Attorney Robert M. Dudek."

The Respondent made its Return on August 16, 2005. An evidentiary hearing into the matter was convened on March 14, 2007 and reconvened on June 14, 2007 at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by William Runyon, Esquire. Jeanette Van Ginhoven, Esquire, of the South Carolina Attorney General's Office represented the Respondent. The Honorable Roger M. Young denied and dismissed the application with prejudice by written Order filed July 23, 2007.

II.

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Subject Matter Jurisdiction
2. "Dismissal of indictment, pre-indictment delay 18 USCA"
3. Entrapment
4. "Nolle Pross. 5th Amendment USCA"
5. "Self-Incrimination"
6. Ineffective Assistance of Counsel
 - a. "Attorney failed to charge jury on Nolle Pross. and indictments."

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Order of Dismissal from the Applicant's prior PCR, and the Applicant's appellate records.

III.

The Court should summarily dismiss the current Application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

IV.

The Respondent submits that this Application for Post-Conviction Relief should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses she challenges in this Application on June 1, 2001. This Application was filed on January 17, 2012, which was almost 10 years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

V.

In response to the Conditional Order of Dismissal signed by the Honorable Roger M. Young and dated January 17, 2013, the Applicant alleges that she was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. The Respondent lacks sufficient information to admit or deny this allegation. The Respondent requests an evidentiary hearing on this ground for relief. Sharper, Id.; Austin, 305 S.C. 453, 409 S.E.2d 395.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, Respondent requests that an evidentiary hearing be held to solely resolve the issue of whether the Applicant voluntarily waived her right to a direct appeal. The Respondent also moves to summarily dismiss all other allegations as this application is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Chief Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:

AL R W S
Attorneys for the Respondents

Columbia, South Carolina

June 5, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

KANDY GILLIARD. #275605

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2012-CP-10-0383

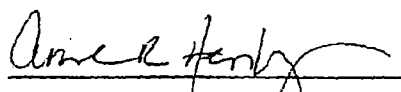
AFFIDAVIT OF SERVICE BY MAIL

2013 JUN -7 PM 1:45
JULIE A. ARMSTRONG
CLERK OF COURT
BY

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Amended Partial Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kandy Gilliard, #275605
Graham Correctional Institution
4450 Broad River Rd
Columbia, SC 29210

DATED this 5th day of June, 2013



Anne Henley, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

KANDY GILLIARD,)
APPLICANT,) TRANSCRIPT OF RECORD
V.) 2012-CP-10-0383
STATE OF SOUTH CAROLINA,)
RESPONDENT.)

NOVEMBER 21, 2013

CHARLESTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE STEPHANIE P. MCDONALD, JUDGE

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

CHRISTOPHER L. MURPHY, ESQUIRE

ATTORNEY FOR THE APPLICANT

- ASHLEIGH R. WILSON, ASSISTANT ATTORNEY GENERAL

ATTORNEY FOR THE STATE

SHARON L. VIZER

CIRCUIT COURT REPORTER

I N D E X

	PAGE
Post-Conviction Relief Hearing.....	3
Certificate of Reporter.....	8

NO EXHIBITS WERE INTRODUCED

1 Thursday, November 21, 2013

2 THE COURT: All right. Good morning.

3 Ms. Gilliard, I understand that -- I think Mr. Murphy has
4 a motion; is that correct?

5 MR. MURPHY: Yeah. We've reached an agreement,
6 Your Honor.

7 THE COURT: All right.

8 MS. WILSON: If you don't mind, I'll call the case
9 for the record.

10 THE COURT: Okay.

11 MS. WILSON: This is Ashley Wilson for the State of
12 South Carolina. This is Kandy Gilliard vs. The State of
13 South Carolina, docket number 2012-CP-10-0383, and
14 Ms. Gilliard was indicted in April of 2000 for murder and
15 armed robbery. She received a trial June 1st, 2011 and
16 was found guilty of murder and given a life sentence, and
17 guilty of armed robbery and given a 10-year sentence.

18 Ms. Gilliard had one PCR already and she was
19 represented by Mr. Runyon. And the issue here today is
20 whether or not Mr. Runyon filed an appeal of her PCR, and
21 the State is here today to consent to the granting of her
22 belated appeal under the circumstance that I would like
23 for Mr. Runyon to put on the record.

24 THE COURT: Okay. All right.

25 MS. WILSON: Thank you.

1 THE COURT: You're welcome to stand right there and
2 put it on the record if you want to, sir, or we can --
3 whatever is easier for you.

4 MR. RUNYON: Your Honor, my recollection, and if
5 called to testify I would present to the Court, and I've
6 discussed this with the attorney general, at some point
7 in time after filing Ms. Gilliard's PCR I was substituted
8 as counsel. I went to the prison in Columbia, had an
9 extensive interview with Ms. Gilliard.

10 I believe she was represented by Ms. Gay because I
11 remember interviewing her defense counsel. And at that
12 time, one of the conversations -- part of the
13 conversation was about her mental health treatment that
14 she was getting and that's relevant because -- in any
15 event, I remember that because I left the prison, they
16 kept my driver's license and I drove all the way back to
17 Charleston on their visitor's pass, and that's the only
18 reason why I remember that specific visitation.

19 In addition to that, Judge, when the time for the
20 hearing came in 2007 Ms. Gilliard was extremely
21 distraught and upset. She had this history of mental
22 illness, mental problems and treatment. I argued to
23 Judge Young that there should be a continuance and that
24 she should be evaluated. The State argued very
25 forcefully, very vigorously that she didn't have to be

1 competent to have her PCR adjudicated.

2 MS. WILSON: It wasn't me.

3 THE COURT: Who was that?

4 MR. RUNYON: I think it was Mr. Freeman. And Judge
5 Young, for better or for worse he agreed with me and
6 ordered an evaluation. Subsequent to that while they
7 were trying to get the evaluation done I had a chest
8 x-ray for bronchitis and I wound up being referred to a
9 cardiologist and I wound up ultimately during the course
10 of all this evaluation getting five bypasses, and I was
11 out. Sometime during this period of time the evaluation
12 came down and without another hearing Judge Young issued
13 an order.

14 THE COURT: Okay.

15 MR. RUNYON: I originally had gotten the case when
16 I was at one office. My wife had purchased some property
17 on Gamecock Avenue, which I moved my office to in 2007.
18 I don't know whether it was sent to the correct office or
19 not. In any event, I did not file an appeal.

20 THE COURT: Okay.

21 MR. RUNYON: No question about that. And there was
22 orders of protection at the time.

23 THE COURT: Sure.

24 MR. RUNYON: And so anyway, those are the
25 circumstances I related to the attorney general and I

1 guess the basis of their agreement.

2 THE COURT: Okay. I'm happy to sign off on that.

3 You all just submit something to me.

4 MS. WILSON: Your Honor, I'd just like to put one
5 other additional thing on the record. In Ms. Gilliard's
6 PCR application, the second one that she filed, there are
7 other allegations other than the Austin issue, whether or
8 not she should get a belated PCR appeal, the State would
9 just move to dismiss those other allegations.

10 THE COURT: I would likely find those to be
11 successive but let's stay that until we get the appeal
12 issue handled and then we can go from there. Okay?

13 MS. WILSON: In what way do you mean?

14 THE COURT: In what way do I mean?

15 MS. WILSON: Uh-huh.

16 THE COURT: I mean that after everything you all
17 just put on the record if you've got a consent order
18 about the appeal we'll get the appeal handled. I don't
19 have any information from what was before Judge Young to
20 be able to determine what was successive, what she would
21 have said had she been competent at the PCR hearing. I
22 think as you know these often get amended from the
23 witness stand, correct?

24 MS. WILSON: Okay.

25 THE COURT: That answer your question?

1 MS. WILSON: Okay. Thank you.

2 THE COURT: In that way.

3 All right. I've got your copies for you right here
4 or I can just deny it. I mean, we can just -- there's
5 that option, too.

6 MS. WILSON: Your Honor, we'll get you a consent
7 order.

8 THE COURT: Thank you.

9 (WHEREUPON, the hearing was concluded.)

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1 C E R T I F I C A T E

2

3 I, Sharon L. Vizer, Official Court Reporter for the
4 Ninth Judicial Circuit of the State of South Carolina, do
5 hereby certify that the foregoing is a true, accurate and
6 complete transcript of record of all the proceedings had
7 and the evidence introduced in the hearing of the
8 captioned case in Circuit Court on the 21st day of
9 September 2013.

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

12

13 October 2, 2014

14 s/Sharon L. Vizer

15 SHARON L. VIZER

16 CIRCUIT COURT REPORTER

17

18

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25

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
 Kandy Gilliard,	)	
	)	
Applicant,	)	
v.	)	Case No. 05-CP-10-0619
	)	and 12-CP-10-0383
State of South Carolina,	)	
	)	
Defendant	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on April 15, 2014, before The Honorable R. Markley Dennis in Courtroom 4D of the Charleston County, 100 Broad Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

Christopher Murphy, Esq.
 STUCKEY LAW FIRM
 123 Meeting Street
 Charleston, South Carolina 29401
 Appearing for Applicant

Ashleigh Wilson, Esq.
 U.S. ATTORNEYS OFFICE
 P O Box 11549
 Columbia, South Carolina 29211
 Appearing for State of South Carolina

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
 P O Box 901
 Johns Island, South Carolina 29457
dgarrison@sccourts.org

Kandy Gilliard v State of South Carolina
Case No. 05-CP-10-0619 and 12-CP-10-0383
Hearing of April 15, 2014
Before The Honorable R. Markley Dennis

2

1 MS. WILSON: May it please the Court,
2 Your Honor?

3 THE COURT: Yes.

4 MS. WILSON: This is Kandy Gilliard
5 versus the State of South Carolina. It is
6 12-CP-10-0383. We are here today on the
7 State's Motion to Dismiss. I am going to
8 hand up for you just a pack of the past
9 documents and stuff. I'm sorry that I didn't
10 give you a ---

11 THE COURT: That's okay. No problem.

12 MS. WILSON: Here's all we have,
13 (tendering).

14 THE COURT: Do you have these docu-
15 ments, Mr. Murphy?

16 MR. MURPHY: Yes, sir, I've gone through
17 them.

18 MS. WILSON: And, Your Honor, just as
19 matter of procedural history, Ms. Gilliard
20 was indicted in April of 2000 for murder and
21 armed robbery. She was represented by Ms.
22 Lisa Gay. She proceeded to trial and was
23 convicted in June of 2001 and Judge Lockamy
24 sentenced her to life for murder and to ten
25 years for armed robbery.

Kandy Gilliard v State of South Carolina
Case No. 05-CP-10-0619 and 12-CP-10-0383
Hearing of April 15, 2014
Before The Honorable R. Markley Dennis

3

1 She had a direct appeal, in which
2 the Court of Appeals dismissed her appeal
3 pursuant to *Anders v. California*, 2004. The
4 remittitur was issued on June 11th, 2004.

5 She filed her first application for
6 post-conviction relief on February 15th, 2005.
7 She was represented by Bill Runyon. They had
8 an evidentiary hearing on that application on
9 March 14th, 2007, in Charleston. The
10 application was denied and dismissed with
11 prejudice by Judge Young on July 20th, 2007.

12 Ms. Gilliard filed this current
13 application on January 17th, 2012. The State
14 filed a return and Motion to dismiss based on
15 the successive nature of the application and
16 the fact that it was filed outside of the
17 statute of limitations. The State also filed
18 a conditional Order of dismissal, which I
19 believe was sent to -- I believe Judge Young,
20 or maybe Judge Jefferson. But in response to
21 that conditional Order of dismissal, which
22 hadn't been signed yet, Ms. Gilliard alleged
23 that she had freely and voluntarily waived
24 her right to appeal her first PCR denial. So,
25 uh, the State amended it's Motion to dismiss

Kandy Gilliard v State of South Carolina
Case No. 05-CP-10-0619 and 12-CP-10-0383
Hearing of April 15, 2014
Before The Honorable R. Markley Dennis

4

1 and just requested that a hearing solely on
2 the appeal issue, and moved to dismiss all
3 the remaining allegations. A hearing on
4 that issue was held on November 21st, 2013,
5 and, uh, Mr. Runyon about his representation
6 and consented to her having a belated appeal
7 of her PCR.

8 We are here today moving to dismiss
9 those outstanding allegations because they
10 were successive and Ms. Gilliard hasn't
11 provided any reason why she couldn't have
12 raised those same grounds in her first
13 allegation (sic) for post-conviction relief.
14 Also ---

15 THE COURT: Let me just stop you
16 for a minute.

17 MS. WILSON: Yes, Your Honor.

18 THE COURT: What you ---

19 MR. MURPHY: I agree that it's
20 successive, Your Honor.

21 THE COURT: All right, so it's --
22 so the previous Order -- the case is over
23 other than the appeal.

24 MR. MURPHY: Right.

25 MS. WILSON: We just need an Order

Kandy Gilliard v State of South Carolina
Case No. 05-CP-10-0619 and 12-CP-10-0383
Hearing of April 15, 2014
Before The Honorable R. Markley Dennis

5

1 from the Court.

2 THE COURT: If you will prepare
3 the appropriate the appropriate Order.

4 MS. WILSON: I will.

5 THE COURT: Ms. Gilliard, do you
6 understand that?

7 APPLICANT: Yes, sir.

8 THE COURT: All right. The Order will
9 be forthcoming confirming the appeal, but
10 otherwise dismissing it. It's clearly
11 successive and outside the statute of
12 limitations. Thank you.

13 (HEARING CONCLUDED)

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STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF CHARLESTON)

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Deborah Garrison

Charleston, South Carolina
September 6, 2014

cc
AG
AT

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Kandy Gilliard, #275605,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2012-CP-10-0383

**CONSENT ORDER GRANTING AN
APPEAL PURSUANT TO AUSTIN V. STATE**

FILED
2014 JAN 15 AM 11:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Presiding Judge:

Applicant's Attorney:

Respondent's Attorney:

PCR Counsel:

Date of Hearing:

Court Reporter:

The Honorable Stephanie P. McDonald

Christopher L. Murphy, Esquire

Ashleigh R. Wilson, Esquire

William Runyon, Esquire

November 21, 2013

Sharon Vizer

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 17, 2012. The Respondent made its Return on January 15, 2013. An evidentiary hearing on the matter was convened on November 21, 2013 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent. Also present was William Runyon, Esquire.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the April 2000 term of the Charleston County Grand Jury for murder (2000-GS-10-2467) and armed robbery (2000-CP-10-2468). Melissa Gay, Esquire, represented the Applicant.

SPM

On June 1, 2001, the Applicant proceeded to trial and was found guilty as indicted. The Honorable James Lockemy sentenced him to confinement for life for murder and 10 years for armed robbery.

The Applicant filed a timely Notice of Appeal. Applicant's appellate counsel Robert Dudek, Esquire, petitioned to be relieved as counsel and filed an Anders brief with the Court. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Gilliard, Op. No. 2004-UP-296 (S.C. Ct. App. filed May 5, 2004). The Applicant subsequently filed a petition for writ of certiorari, which was denied by the South Carolina Supreme Court on July 8, 2004. On August 19, 2004, the South Carolina Supreme Court denied the Applicant's petition for rehearing.

Applicant subsequently filed an application for post-conviction relief (PCR) on February 15, 2005. In his application for PCR, the Applicant requested relief on the following grounds:

1. "Trial counsel was ineffective in preparing and representing me at trial."
2. "Lackadaisical effort by Appellate Defender Attorney Robert M. Dudek."

The Respondent made its Return on August 16, 2005. An evidentiary hearing into the matter was convened on March 14, 2007 and reconvened on June 14, 2007 at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by William Runyon, Esquire. Jeanette Van Ginhoven, Esquire, of the South Carolina Attorney General's Office represented the Respondent. The Honorable Roger M. Young denied and dismissed the application with prejudice by written Order filed July 23, 2007.

ALLEGATIONS

In her current application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Subject Matter Jurisdiction

2. "Dismissal of indictment, pre-indictment delay 18 USCA"
3. Entrapment
4. "Nolle Pross. 5th Amendment USCA"
5. "Self-Incrimination"
6. Ineffective Assistance of Counsel
 - a. "Attorney failed to charge jury on Nolle Pross. and indictments."

On January 15, 2013, the Respondent submitted a Return and Motion to Dismiss the application as successive and filed outside of the statute of limitations. The Honorable Roger Young, Sr. signed an Conditional Order of Dismissal on January 17, 2013. In response to the Conditional Order of Dismissal signed by Judge Young, the Applicant alleges that she was denied the right to appeal the dismissal of his previous post-conviction relief application. An evidentiary hearing was held to solely address whether or not the Applicant freely and voluntarily waived her right to appeal the denial of her application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant alleges that she was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to appeal the denial of allegations in the Applicant's post-conviction relief application, the parties below have consented to the granting of an appeal pursuant to Austin v. State of the Applicant's first post-conviction relief application (2005-CP-10-0619). The parties agree that the Applicant did not voluntarily waive her right to appeal the post-conviction relief court's denial and dismissal of the Applicant's application for post-conviction relief. Counsel for the Applicant has indicated the Applicant did not freely and voluntarily waive the right to appeal her first application for post-conviction relief and that he failed to file a timely Notice of Appeal of the

application.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first PCR (2005-CP-10-0619) pursuant to Austin v. State is warranted. It is appearing the below listed individuals all consent to the granting of a PCR appeal in this matter. This Court also finds that all other allegations raised in this application will be addressed in a separate order.

IT IS THEREFORE ORDERED:

1. That the Applicant remain in the custody of the South Carolina Department of Corrections and/or the South Carolina Parole and Community Corrections Department if under the supervision of either agency; and
2. That the Applicant be granted an appeal of case 2005-CP-10-0619 pursuant to Austin v. State.

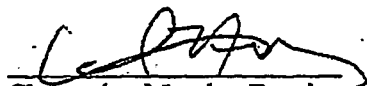
AND IT IS SO ORDERED this 9 day of January, 2014.



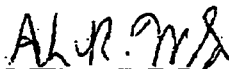
The Honorable Stephanie P. McDonald
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.

I CONSENT:



Christopher Murphy, Esquire
Attorney for Applicant



Ashleigh R. Wilson, Asst. Attorney General
Attorney for Respondent

1264

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 AG
 AT
 3
 SOL

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Kandy Gilliard, #275605,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2012-CP-10-0383

BY

2014 JUN 19 AM 9:44
 JULIE J. HARRIS
 CLERK OF COURT

FILED

**Order Granting State's Motion to Dismiss
 All Remaining Allegations**

Presiding Judge:

Applicant's Attorney:

Respondent's Attorney:

Date of Hearing:

Court Reporter:

The Honorable R. Markley Dennis

Christopher L. Murphy, Esquire

Ashleigh R. Wilson, Esquire

April 15, 2014

Deborah Garrison

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 17, 2012. The Respondent made its Return on January 15, 2013. An evidentiary hearing on the matter was convened on November 21, 2013 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent. Also present was William Runyon, Esquire. At the November 21, 2013 hearing, the State and the Applicant's consented to the granting of an appeal pursuant to Austin v. State. A Consent Order was signed and filed by the Honorable Stephanie P. McDonald on January 15, 2014. In this Order, the Court directed the resolution of all the other allegations raised in the Applicant's application be addressed in a separate order.

A hearing was convened on April 15, 2014 at the Charleston County Courthouse to address the State's outstanding motion to dismiss the Applicant's remaining allegations. The

am 7/1

Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the April 2000 term of the Charleston County Grand Jury for murder (2000-GS-10-2467) and armed robbery (2000-CP-10-2468). Melissa Gay, Esquire, represented the Applicant. On June 1, 2001, the Applicant proceeded to trial and was found guilty as indicted. The Honorable James Lockemy sentenced him to confinement for life for murder and 10 years for armed robbery.

The Applicant filed a timely Notice of Appeal. The Applicant's appellate counsel Robert Dudek, Esquire, petitioned to be relieved as counsel and filed an Anders brief with the Court. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Gilliard, Op. No. 2004-UP-296 (S.C. Ct. App. filed May 5, 2004). The Applicant subsequently filed a Petition for Writ of Certiorari, which was denied by the South Carolina Supreme Court on July 8, 2004. On August 19, 2004, the South Carolina Supreme Court denied the Applicant's Petition for Rehearing.

The Applicant subsequently filed an application for post-conviction relief (PCR) on February 15, 2005. In her application for PCR, the Applicant requested relief on the following grounds:

1. "Trial counsel was ineffective in preparing and representing me at trial."
2. "Lackadaisical effort by Appellate Defender Attorney Robert M. Dudek."

The Respondent made its Return on August 16, 2005. An evidentiary hearing into the matter

was convened on March 14, 2007 and reconvened on June 14, 2007 at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by William Runyon, Jr., Esquire. Jeanette Van Ginhoven, Esquire, of the South Carolina Attorney General's Office represented the Respondent. The Honorable Roger M. Young denied and dismissed the application with prejudice by written Order filed July 23, 2007.

ALLEGATIONS

In her current application, the Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. Subject Matter Jurisdiction
2. "Dismissal of indictment, pre-indictment delay 18 USCA"
3. Entrapment
4. "Nolle Pross. 5th Amendment USCA"
5. "Self-Incrimination"
6. Ineffective Assistance of Counsel
 - a. "Attorney failed to charge jury on Nolle Pross. an indictments."

On January 15, 2013, the Respondent submitted a Return and Motion to Dismiss the application as successive and filed outside of the statute of limitations. The Honorable Roger Young, Sr. signed an Conditional Order of Dismissal on January 17, 2013. In response to the Conditional Order of Dismissal signed by Judge Young, the Applicant alleges that she was denied the right to appeal the dismissal of her previous post-conviction relief application. An evidentiary hearing was held on November 21, 2013 to solely address whether or not the Applicant freely and voluntarily waived her right to appeal the denial of her application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By Order filed on January 15, 2014, the parties have agreed to the granting of an appeal of the dismissal of the Applicant's first post-conviction relief application pursuant to Austin v.

State. The only issue still before this Court is the State's Motion to Dismiss all allegations other than the Applicant's claim challenging the voluntary waiver of her right to appeal the denial of her first application for post-conviction relief. In the State's "Amended Partial Return and Motion to Dismiss" filed June 7, 2013, the State argued these allegations should be summarily dismissed with prejudice because the application is successive and was filed outside the statute of limitations. The Honorable Roger M. Young, Sr. signed a Conditional Order of Dismissal on January 17, 2013 conditionally dismissing these allegations.

This Court finds all remaining allegations in the Applicant's current application for post-conviction relief are dismissed because this Application is successive to her prior applications for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in her original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent Application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the remaining allegations presented by the Applicant were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. The

Applicant has failed to establish sufficient reason why she could not have raised these allegations in her previous application for post-conviction relief; therefore, she has failed to meet the burden imposed upon her. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

This Court also finds that this Application for Post-Conviction Relief is dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses she challenges in this Application on June 1, 2001. This Application was filed on January 17, 2012, which was almost 10 years after the statutory filing period had expired.

The Applicant also claims the Court lacked subject matter jurisdiction to accept her guilty plea because her co-defendant entered a plea of guilty for murder in exchange for agreeing to testify against her at trial. An Applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). This Court finds the Applicant has failed to show that her case is of some class over which the circuit court does not have authority to preside. "Circuit courts obviously have subject matter jurisdiction to try criminal cases." Gentry, 363 S.C. 93; See also S.C. Const. Art. V, § 7. The Applicant was indicted by the Charleston County Grand Jury for the criminal offenses for which

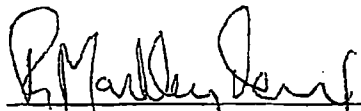
LMQ/5

she was convicted at trial. Since the Applicant's conviction involved a criminal charge in General Sessions Court, the circuit court had subject matter jurisdiction. This Court also finds the resolution of the Applicant's co-defendant's charges had no bearing on the Court's subject matter jurisdiction over the Applicant's charges. This Court finds this allegation is without merit and is dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. That the State's Motion to Dismiss all claims alleged in this application for post-conviction relief other than the Applicant's claim regarding her right to appeal the denial of her first application is GRANTED; and
2. That the Applicant remain in the custody of the South Carolina Department of Corrections and/or the South Carolina Parole and Community Corrections Department if under the supervision of either agency.

AND IT IS SO ORDERED this 13th day of June, 2014.


 The Honorable R. Markley Dennis
 Presiding Judge
 9th Judicial Circuit

Moncks Corner, South Carolina

MJM 2000-02-00607

WITNESSES

JOHN BURNETT AND/OR

KEITH HAIR

SLOANE, NCPD

20000470

ARREST WARRANT NUMBER

G368465

JANUARY 9, 2000

ACTION OF GRAND JURY

TRUE BILL

Robert R. Roubert
Foreperson of Grand Jury

APR 04 2000

VERDICT

Guilty

Robert R. Roubert
Foreperson of Petit Jury

Date:

June 1, 2001

DOCKET NO. · 2000-GS-10- 2467

· **The State of South Carolina**

County of Charleston

COURT OF GENERAL SESSIONS

APRIL TERM 2000

THE STATE

· vs.

· **KANDY LATRICE GILLIARD**

· **Indictment for**

MURDER

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on April 3, 2000 the Grand Jurors of Charleston County present upon their oath:

That Kandy Latrice Gilliard did in Charleston County on or about January 5, 2000 while acting in concert with another, feloniously, willfully and with malice aforethought murder one Dawn Russ, to wit: the defendant did place a plastic bag over her head and/or wrap an electrical extension cord around the victim's neck and that Dawn Russ did die as a proximate result. This is in violation of Section 16-3-10 of the South Carolina Code of Laws (1976) as amended

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


ASSISTANT SOLICITOR

MJM 2000-02-00607

WITNESSES

JOHN BURNETT AND/OR

KEITH HAIR

SLOANE, NCPD

0000470

ARREST WARRANT NUMBER

G368466

JANUARY 9, 2000

ACTION OF GRAND JURY

TRUE BILL

Robert R. Rader
Foreperson of Grand Jury

APR 04 2000

VERDICT

GUILTY

Theresa K. H. Sullivan
Foreperson of Petit Jury

Date: *April 1, 2001*

DOCKET NO. - 2000-GS-10-2468

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

APRIL TERM 2000

THE STATE

vs.

KANDY LATRICE GILLIARD

Indictment for

STRONG ARM ROBBERY

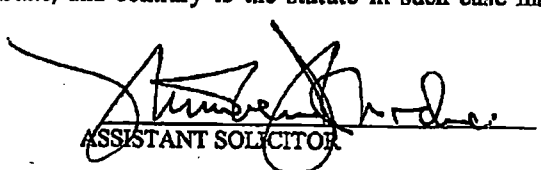
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
STRONG ARM ROBBERY

At a Court of General Sessions, convened on April 3, 2000 the Grand Jurors of Charleston County present upon their oath:

That Kandy Latrice Gilliard did in Charleston County on or about January 5, 2000 while acting in concert with another, feloniously attempt to take from Dawn Russ and/or The Game Room, by means of force or intimidation goods or monies, such goods or monies being described: One Thousand Two Hundred Ninety-Two Dollars (\$1,292.00) in United States currency. This is in violation of the Common Law for the State of South Carolina

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


ASSISTANT SOLICITOR