

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Lee S. Alford, Circuit Court Judge

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S.C. Supreme Court

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-205909

APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

A. MATTISON BOGAN

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

NELSON MULLINS RILEY &
SCARBOROUGH, LLP
Meridian, 17th Floor
1320 Main Street
Columbia, South Carolina 29201
(803) 255-9589

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

ATTORNEYS FOR PETITIONER

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JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 Q HAD THE EXPERTS BEEN PICKED OUT BY MR. HANCOCK AND THE
2 DEATH PENALTY RESOURCE CENTER?

3 A I DON'T KNOW EXACTLY WHEN EACH OF THOSE WAS PICKED
4 OUT. BUT I BELIEVE MOST, IF NOT ALL OF THEM, HAD BEEN
5 CONTACTED, OR WERE IN THE PROCESS OF BEING PICKED OUT PRIOR
6 TO MY APPOINTMENT.

7 Q SO, IT WOULD BE SAFE TO SAY THAT MR. HANCOCK DID THE
8 LOGISTICAL WORK OF OBTAINING THE EXPERT WITNESSES IN
9 MITIGATION?

10 A I BELIEVE SO.

11 Q DID YOU HAVE ANY INPUT INTO THAT?

12 A WELL, AS FAR AS-- AT THAT TIME I DIDN'T-- THERE WAS
13 NOTHING HE HAD DONE AT THAT POINT THAT I DISAGREED WITH. SO,
14 I, TO THE EXTENT-- I DIDN'T REALLY PUT IN ANY INPUT INTO THE
15 SELECTION.

16 Q AFTER YOU RECEIVED ALL THE DISCOVERY MATERIAL AND GOT
17 TO THE POINT WHERE FIGHTING GUILT WAS ALMOST A LOSING
18 BATTLE, FOR LACK OF A BETTER WORD, I'M NOT TRYING TO PUT
19 WORDS IN YOUR MOUTH, DID YOU AGREE WITH MR. HANCOCK THAT
20 THE BEST DEFENSE WOULD BE TO PUT FORWARD A MENTAL ILLNESS
21 DEFENSE IN MITIGATION?

22 A YES.

23 Q IN YOUR EXPERIENCE IN DEATH PENALTY CASES, WOULD YOU
24 AGREE WITH ME THAT JURY SELECTION IS ONE OF THE MOST
25 IMPORTANT PHASES OF ANY DEATH PENALTY CASE?

- 1 A I WOULD AGREE.
- 2 Q DID YOU OR MR. HANCOCK HIRE A JURY CONSULTANT?
- 3 A NO, WE DID NOT.
- 4 Q WHAT DID YOU USE IN THE SELECTION OF THE JURY, OTHER
5 THAN THE VOIR DIRE AND THE QUESTIONNAIRES RETURNED TO THE
6 COURT?
- 7 A I'M TRYING TO THINK IF THERE WAS ANY OTHER INVESTIGATION
8 WITH RESPECT TO THE JURORS, AND I CANNOT THINK OF ANYTHING
9 ELSE.
- 10 Q PRIOR TO TRIAL, WAS THERE ANY DISCUSSION, TO YOUR
11 RECOLLECTION, OF ANY PLEA BARGAINS WITH THE SOLICITOR'S
12 OFFICE, MR. POPE OR MR. BRACKETT, OR ANYONE ASSOCIATED WITH
13 THEM?
- 14 A I BELIEVE THERE WAS A DISCUSSION ABOUT IT, OR AT LEAST
15 SOME TALKING ABOUT THE POSSIBILITY OF IT. BUT TO MY
16 RECOLLECTION, THERE WAS NEVER ANY-- IT DIDN'T COME TO THE
17 POINT OF ANY, CLOSE TO ANY AGREEMENT BEING REACHED.
- 18 Q WAS THERE ANY ROOM, IN YOUR OPINION, TO NEGOTIATE THIS
19 CASE?
- 20 A IF...
- 21 Q TO THE BEST OF YOUR MEMORY.
- 22 A I'M NOT SURE WHAT YOU MEAN BY ROOM. BY EITHER SIDE?
23 Q EITHER SIDE, OR WAS THERE ANY CHANCE OF PLEADING HIM TO
24 LIFE WITHOUT PAROLE? WAS THAT EVER OFFERED OR DISCUSSED OR
25 ANYTHING?

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 A I KNOW IT WAS DISCUSSED. I THINK I ASKED MR. POPE ABOUT
2 THAT BEING A POSSIBILITY. I BELIEVE I WAS TOLD NO.

3 Q AND THAT WAS PRETTY MUCH THE EXTENT OF THE PLEA
4 NEGOTIATIONS?

5 A WELL, WE PROBABLY MENTIONED THAT SEVERAL TIMES, BUT IT
6 WAS ALWAYS NO. THERE WAS NEVER ANY MOVE BY THE STATE THAT
7 THEY WOULD GO IN THAT DIRECTION.

8 Q SO, YOU UNDERSTOOD THAT YOU WERE KIND OF STUCK
9 BECAUSE YOU HAD TO TRY THIS CASE. IS THAT CORRECT?

10 A THAT'S CORRECT.

11 Q WOULD YOU BEGAN TRIAL, WOULD IT BE SAFE TO SAY, FROM
12 THE TRANSCRIPT, THAT YOU BASICALLY PUT UP NO EVIDENCE IN THE
13 GUILT PHASE?

14 A THAT'S CORRECT.

15 Q WHY IS THAT?

16 A WELL, THERE WAS REALLY-- THE CASE WAS OVERWHELMING.
17 THERE WAS REALLY NO EVIDENCE TO PUT UP THAT MR. ROBERTSON
18 WAS NOT GUILTY, THAT WAS VIABLE TO PUT UP.

19 ANOTHER REASON WAS ANYTHING WE COULD HAVE PUT UP
20 MAY HAVE DIMINISHED THE, COULD HAVE DIMINISHED THE
21 MITIGATION PHASE OF IT.

22 Q DID YOU EVER DISCUSS WITH MR. ROBERTSON, OR YOU AND MR.
23 HANCOCK TALK ABOUT A GUILTY BUT MENTALLY ILL PLEA?

24 A I CANNOT REMEMBER A DISCUSSION OF THAT. A GUILTY BUT
25 MENTALLY-- I MEAN, MY UNDERSTANDING THE DEFENDANT CAN

1 STILL GET THE DEATH PENALTY EVEN IF THE COURT ACCEPTS A PLEA
2 OF GUILTY BUT MENTALLY ILL. THAT WOULD HAVE TAKEN IT AWAY
3 FROM THE JURY.

4 Q FROM A STRATEGIC VIEWPOINT, THOUGH, YOU WOULD AGREE
5 WITH ME THAT THE GUILT WAS OVERWHELMING. IS THAT CORRECT?

6 A THAT'S CORRECT.

7 Q AND YOU WOULD AGREE WITH ME THAT THE ONLY WAY TO GO
8 TO THE BEST OF YOUR KNOWLEDGE AND TO THE BEST OF YOUR
9 ABILITY IN THIS CASE IN YOUR EXPERIENCE WAS WITH A MENTAL
10 ILLNESS DEFENSE. IS THAT CORRECT?

11 A THAT'S CORRECT.

12 Q AND YOU HAD EVIDENCE FROM AT LEAST DOCTOR PINCUS,
13 DOCTOR MORGAN, AND---

14 A DOCTOR EVANS.

15 Q DOCTOR EVANS. THANK YOU. THAT HE WAS MENTALLY ILL?

16 A THAT'S CORRECT.

17 Q AS A MATTER OF FACT, PINCUS EVEN OPINED AT THE TIME OF
18 THE INCIDENT THAT HE WAS UNDER A MANIC STATE. IS THAT
19 CORRECT?

20 A I BELIEVE SO. I CAN'T REMEMBER THE DETAILS.

21 Q I WANT TO ADDRESS YOUR EXPERTS RIGHT NOW. WOULD YOU
22 NOT AGREE THAT PINCUS, BY FAR AND AWAY, HAD THE BEST RESUME,
23 SO TO SPEAK, AND THAT HE WAS VICE-CHAIRMAN OF THE AMERICAN
24 BOARD OF NEUROLOGY?

25 A I...

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 Q THE GUY FROM GEORGETOWN UNIVERSITY?

2 A YEAH, YEAH, I KNOW WHO HE IS. YES, I THINK AS FAR AS
3 CREDENTIALS AND A NATIONWIDE REPUTATION, I THINK HE HAD THE
4 BEST CREDENTIALS.

5 Q WOULD IT NOT HAVE BEEN FEASIBLE IN THIS CASE TO PRESENT
6 EVIDENCE OF MENTAL ILLNESS IN THE GUILT PHASE FOR TWO
7 REASONS. ONE: TO GET THE JURY TO START THINKING ABOUT IT.
8 AND TWO: TO REQUEST THAT VERDICT AT THE CLOSE OF EVIDENCE.
9 WOULD THAT NOT HAVE BEEN A FEASIBLE ALTERNATIVE IN THE CASE
10 WHERE THE GUILT'S OVERWHELMING AND YOU ARE ARGUING
11 MENTAL ILLNESS, KIND OF LIKE TO SET A TONE FOR THE WHOLE
12 TRIAL?

13 A THAT WOULD BE A POSSIBILITY TO DO THAT. YOU KNOW, ONE
14 OF THE PROBLEMS WITH THAT WOULD BE THAT WE WOULD HAVE HAD
15 TO HAVE CONCEDED GUILT AT THAT PORTION OF THE TRIAL, WHICH
16 MAY HAVE BEEN A GOOD STRATEGY, BUT MR. ROBERTSON DID NOT
17 WANT TO DO THAT.

18 Q SO, HE COULD FORBID, KEPT Y'ALL FROM DOING THAT?

19 A I WOULDN'T SAY HE KEPT-- I DON'T REMEMBER THE EXACT
20 DISCUSSIONS WE HAD ABOUT THAT. BUT I DO REMEMBER MR.
21 ROBERTSON BASICALLY, ALTHOUGH HE FELT LIKE HE WOULD BE
22 FOUND GUILTY, HE WANTED TO TAKE WHATEVER THAT LITTLE
23 CHANCE WAS. THE PROSPECT OF SPENDING LIFE IN PRISON AS
24 OPPOSED TO THE DEATH PENALTY REALLY WASN'T APPEALING TO
25 HIM.

1 Q BUT FOR THAT OBJECTION, DO YOU THINK THAT WOULD HAVE
2 BEEN THE BETTER COURSE TO PURSUE?

3 A IT'S HARD TO ANSWER THAT AFTER THIS MANY YEARS, BUT
4 THAT WOULD HAVE CERTAINLY BEEN A VIABLE OPTION TO DO, TO
5 ASK THE JURY TO DO THAT.

6 Q HOW MUCH TIME DID YOU AND MR. HANCOCK SPEND WITH MR.
7 ROBERTSON PRIOR TO TRIAL?

8 A I DON'T REMEMBER HOW MUCH TIME I SPENT WITH MR.
9 ROBERTSON BEFORE TRIAL. I REMEMBER MEETINGS THAT WERE
10 RATHER LENGTHY WITH HIM. I THINK-- LIKE I SAY, WE WENT OVER
11 THE DETAILS OF IT, OF WHAT HAPPENED AND SOME OF HIS
12 BACKGROUND PRETTY EXTENSIVELY. BUT THE NUMBER OF MEETINGS
13 AND THE LENGTH I DON'T REMEMBER AT THIS STAGE.

14 Q IN YOUR MEETINGS WITH HIM AND CONVERSATIONS WITH HIM
15 DID YOU FIND HIM TO BE COMPETENT TO HELP IN HIS DEFENSE, OR
16 WAS HE SOMETIMES ON AND SOMETIMES OFF, FOR LACK OF A BETTER
17 TERM?

18 A I DON'T REMEMBER AT ANY TIME I WOULD THINK HE WOULD BE
19 NOT COMPETENT TO HELP WITH HIS DEFENSE. I MEAN, HE WAS ABLE
20 TO DISCUSS THINGS RATIONALLY. BY RATIONALLY, I DON'T MEAN
21 EVERY TIME IT WOULD BE A CORRECT DECISION WE WOULD WANT IT
22 TO BE, BUT HE UNDERSTOOD EVERYTHING AND WAS ABLE TO
23 CONVERSE AND I THINK UNDERSTOOD THE LEGAL CONCEPTS AND
24 THOSE TYPES OF THINGS.

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 Q YOU WOULD AGREE WITH ME IN YOUR ASSESSMENT OF THIS
2 CASE THAT AFTER EVALUATING ALL OF THE PSYCHOLOGICAL AND
3 PSYCHIATRIC RECORDS THAT THIS FAMILY HAD SOME SEVERE
4 PSYCHOLOGICAL AND PSYCHIATRIC PROBLEMS. WOULD THAT BE A
5 CORRECT STATEMENT?

6 A THAT WOULD BE CORRECT.

7 Q HOWEVER, IN THE GUILT PHASE, WHEN THE PROSECUTION, AND
8 I'LL GIVE YOU AN EXACT QUOTE FROM THE TRANSCRIPT, SAID IT WAS
9 "AN OZZIE AND HARRIET NELSON-TYPE FAMILY". YOU NOR MR.
10 HANCOCK ATTACKED ANY OF THOSE WITNESSES. IS THAT CORRECT?

11 A I--

12 Q I'M TALKING ABOUT FRIENDS, NEIGHBORS, SO FORTH, PUT
13 FORTH THIS OZZIE AND HARRIET NELSON PHILOSOPHY.

14 A IN THE GUILT PHASE?

15 Q IN THE GUILT PHASE.

16 A I GUESS NOT. I DON'T REMEMBER THOSE WITNESSES EXACTLY.

17 SO...

18 Q WOULD IT NOT HAVE BEEN A GOOD STRATEGY TO START
19 TEARING DOWN THAT FAÇADE AT THAT POINT IN TIME, POINTING OUT
20 THE PSYCHIATRIC AND PSYCHOLOGICAL PROBLEMS? I'M NOT
21 TALKING ABOUT JIMMY'S. I'M TALKING ABOUT CHIP, EARL AND
22 TERRY'S.

23 A I'D HAVE TO THINK ABOUT THAT. I'M NOT SURE BECAUSE....
24 AGAIN, IF YOU SPREAD IT OUT LIKE THAT, THAT MAY NOT BE THE

- 1 BEST TACTIC. I MEAN, THAT'S CERTAINLY ONE TACTIC. I DON'T KNOW
2 IF THAT WOULD BE BETTER OR NOT.
- 3 Q TELL ME WHAT Y'ALL'S, OR, YOUR THINKING WAS AS TO HOW TO
4 ATTACK THAT, OR BRING THAT BEFORE THE JURY?
- 5 A WELL, I THINK IN THE MITIGATION PHASE TO USE THE
6 MITIGATION BASICALLY THAT WE PUT ON TO ATTACK THAT IN FRONT
7 OF THE JURY.
- 8 Q WHEN WAS THE DECISION MADE TO GO WITH THE MENTAL
9 ILLNESS DEFENSE?
- 10 A I CAN'T SAY AN EXACT POINT IN IT, BUT PROBABLY FROM THE
11 VERY BEGINNING, AFTER HE HAD BEEN EXAMINED BY EXPERTS AND
12 THAT TYPE OF THING, AND LOOKING AT THE BACKGROUND TO GO
13 WITH THAT.
- 14 WHEN YOU'VE GOT A TRIAL LIKE THIS, THAT THE GUILT'S
15 OVERWHELMING, THERE'S REALLY NOTHING ELSE TO DO BUT GO WITH
16 THAT.
- 17 Q I'M SHOWING YOU APPLICANT'S EXHIBIT NUMBER FIVE, WHICH
18 IS THE PRELIMINARY REPORT FOR JAMES ROBERTSON BY MS. CASCIO,
19 DOCTOR CASCIO. WAS THAT NOT RECEIVED UNTIL MARCH 1, OR
20 MAILED TO YOU BY MARCH 1, 1999? ACTUALLY TO MR. HANCOCK ON
21 MARCH 1, 1999?
- 22 A IT APPEARS TO BE.
- 23 Q PRIOR TO THAT YOU HAD NOT RECEIVED ANYTHING FROM HER.
24 IS THAT CORRECT?

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 A I DON'T RECALL ANYTHING. I DON'T RECALL WHEN I FIRST SAW
2 THIS REPORT. SO... I KNOW-- I BELIEVE WE HAD MET WITH HER
3 PRIOR TO THIS ON SEVERAL OCCASIONS.

4 Q WAS THAT THE LAST REPORT THAT YOU RECEIVED, TO THE BEST
5 OF YOUR MEMORY?

6 A TO THE BEST OF MY MEMORY, BUT THAT'S BEEN EIGHT YEARS,
7 SO I DON'T REMEMBER ANOTHER REPORT.

8 Q DID YOU REVIEW THE MEDICAL RECORDS FROM DOCTOR HAYNE
9 McMEEKIN?

10 A I DON'T REMEMBER SITTING DOWN AND LOOKING AT THOSE
11 RECORDS. I CAN SAY I REVIEWED SO MUCH THAT I CAN'T REMEMBER
12 EXACTLY WHAT. I KNOW THAT MR. ROBERTSON HAD SEEN HIM. I
13 KNEW THAT WE HAD LOOKED AT RECORDS ABOUT THAT. BUT I DON'T
14 HAVE A DEFINITE RECOLLECTION OF SITTING DOWN AND LOOKING AT
15 THOSE RECORDS.

16 Q WHO CALLED SKIP MEYER TO THE STAND?

17 A I THINK MR. HANCOCK DIRECTED, DID THE DIRECT
18 EXAMINATION.

19 Q AND Y'ALL CALLED, YOU AND MR. HANCOCK CALLED HIM AS
20 YOUR WITNESS. IS THAT CORRECT?

21 A THAT'S CORRECT.

22 Q AT THAT POINT IN TIME MR. MEYER WAS HANDLING, OR
23 COUNSELING THE WHOLE FAMILY. IS THAT CORRECT?

24 A NOT AT THE TIME OF THE TRIAL, BUT PRIOR TO THAT, YES.

1 Q EXCUSE ME. DURING HIS-- IN THOSE RECORDS HE HAD
2 COUNSELED ALL FOUR OF THEM AT SOME POINT. IS THAT CORRECT?

3 A I BELIEVE SO. I CAN'T QUITE REMEMBER IF HE HAD COUNSELING
4 THE FATHER OR NOT. BUT I KNOW HE HAD BEEN HEAVILY INVOLVED
5 WITH THE MOTHER AND THE CHILDREN.

6 Q AND DID YOU ALSO KNOW THAT DOCTOR McMEEKIN HAD SEEN
7 CHIP, JIMMY AND TERRY ROBERTSON?

8 A I CAN'T RECALL AT THIS TIME. I KNOW HE HAD SEEN JIMMY,
9 BUT I DON'T REMEMBER THE OTHERS.

10 Q IF I TOLD YOU THAT DOCTOR McMEEKIN'S RECORDS DON'T
11 REFLECT ANY CONFLICT, OR TERRY'S AGGRAVATION, OR
12 DEGRADATION WITH HER CHILDREN, WOULD YOU NOT FIND THAT
13 SALIENT TO PRESENT TO THE JURY? WHEREAS, DOCTOR MEYER'S
14 RECORDS SHOW THE CONFLICT AND THE AGONY THE CHILDREN WERE
15 CAUSING HER.

16 A I DON'T-- THAT HIS RECORDS DID NOT SHOW THE CONFLICT? AT
17 THIS POINT I DON'T REMEMBER WHETHER THEY DID OR NOT. BUT I
18 DON'T KNOW IF PRESENTING THAT THEY DID NOT SHOW THAT WOULD
19 BE HELPFUL IN MITIGATION.

20 Q YOU WOULD AGREE THE USE OF RITALIN WAS AT THE CORE OF
21 THESE EVENTS. WOULD THAT BE A CORRECT STATEMENT?

22 A I THINK IT WAS-- ACCORDING TO WHAT WAS PRESENTED, THAT
23 WAS A-- THAT WAS SORT OF AN INSTIGATOR OF HIS ACTIONS.

24 Q WOULD THAT BE THE MATCH THAT LIT THE POWDER KEG, FOR
25 LACK OF A BETTER TERM?

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 A I WOULD SAY SO, YES.

2 Q AND THE RITALIN HE WAS TAKING WAS GIVEN TO HIM BY HIS
3 BROTHER, WAS CHIP'S RITALIN. WOULD THAT BE A CORRECT
4 STATEMENT?

5 A I'M TRYING TO RECALL THAT. I'D FORGOTTEN, BUT I THINK
6 THAT STRIKES A BELL. I THINK THAT'S CORRECT.

7 Q WERE YOU AWARE IN DOCTOR McMEEKIN'S NOTES THAT HE WAS
8 AWARE THAT CHIP WAS SNORTING AND SELLING THE RITALIN, BUT HE
9 STILL PRESCRIBED IT TO HIM?

10 A THAT STRIKES A BELL, TOO, AT THIS POINT. I THINK THERE WAS
11 SOMETHING IN THERE ABOUT THAT.

12 Q AS A MATTER OF FACT, WAS THERE SOMETHING IN MR., OR
13 DOCTOR McMEEKIN'S NOTES THAT SAID THAT IF CHIP AGREES TO GO
14 BACK TO SCHOOL I'LL WRITE HIM ANOTHER PRESCRIPTION FOR
15 RITALIN. SO, CHIP WENT BACK TO SCHOOL AND HE GOT ANOTHER
16 PRESCRIPTION FOR RITALIN. DO YOU REMEMBER THAT?

17 A AGAIN, THAT'S STRIKING A BELL, BUT I DON'T REMEMBER
18 EXACTLY.

19 Q DO YOU HAVE SOME VAGUE RECOLLECTION OF THAT?

20 A I HAVE A VAGUE RECOLLECTION OF THAT.

21 Q WOULD IT NOT HAVE A BEEN A GOOD STRATEGY-- DO YOU
22 KNOW IF DOCTOR McMEEKIN HAD BEEN DISCIPLINED BY THE SOUTH
23 CAROLINA MEDICAL ASSOCIATION, OR WHATEVER THE GOVERNING
24 AGENCY IS FOR DOCTORS IN THIS STATE? YOU KNEW THAT AT THE
25 TIME OF TRIAL, DID YOU NOT?

1 A YES.

2 Q DO YOU NOT THINK IN YOUR EXPERIENCE AS A DEATH PENALTY
3 LITIGANT THAT THE JURY WOULD NEED TO HEAR THAT BECAUSE
4 WHAT HE WAS DISCIPLINED FOR WAS OVER-PRESCRIBING DRUGS, AND
5 THE SAME THING WAS HAPPENING HERE? DO YOU NOT THINK THAT
6 WOULD HAVE HELPED JIMMY'S DEFENSE?

7 A I THOUGHT WE DID GET THAT OUT THROUGH DOCTOR MORTON.

8 Q IT'S TOUCHED ON IN DOCTOR-- LET ME SHOW YOU THE
9 TRANSCRIPT AND ASK YOU TO REVIEW IT.

10 (PAUSE TO LOCATE TRANSCRIPT REFERENCE)

11 STARTING ON PAGE 2690, IF YOU WILL JUST REVIEW DOWN TO
12 2692, THAT'S FOR ABOUT....

13 A (PAUSE TO REVIEW TRANSCRIPT) OKAY. I... OKAY. I'VE
14 REVIEWED THAT PART. I WAS THINKING, AND, OF COURSE, AFTER THIS
15 TIME, I COULD BE WRONG, THAT DOCTOR MORTON DID MENTION
16 SOMEWHERE IN HERE THAT DOCTOR McMEEKIN HAD BEEN
17 DISCIPLINED AT SOME POINT.

18 Q HE DOES.

19 A OKAY.

20 Q THAT'S IN THERE.

21 A OKAY.

22 Q LET ME ASK YOU THIS: DOCTOR MORTON-- ALL THE
23 INFORMATION YOU RECEIVED BY DOCTOR McMEEKIN CAME STRAIGHT
24 FROM DOCTOR McMEEKIN'S NOTES, DID IT NOT?

25 A YES, AS FAR AS I KNOW, YES.

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 Q EVEN THOUGH IT WAS BROUGHT OUT, IT WAS NEVER POINT-
2 BLANK ASKED, BUT FOR THIS OVER-PRESCRIBING OF DRUGS, THE
3 MATCH MIGHT NOT HAVE BEEN LIT AS TO WHAT HAPPENED. IS THAT
4 CORRECT?

5 A I DON'T THINK THAT BUT FOR QUESTION WAS ASKED. I DON'T
6 KNOW IF THAT WOULD-- I DON'T KNOW IF ANYBODY COULD TESTIFY
7 TO THAT.

8 Q IN A CASE OF THIS NATURE, A HEINOUS CRIME, WOULD IT NOT
9 BE A GOOD TACTICAL STRATEGY TO HAVE SOMEBODY ELSE TO POINT
10 THE FINGER TO TAKE SOME OF THE BLAME OFF OF THE DEFENDANT IN
11 THIS CASE, SUCH AS HAYNE McMEEKIN, WHO WOULD BE A BOXED-IN
12 WITNESS; THERE'S NOWHERE HE COULD GO ON THE STAND WITH
13 THOSE NOTES. WOULD THAT BE A CORRECT STATEMENT?

14 A I'M NOT SURE OF THAT. AS FAR AS PUTTING HIM ON THE
15 WITNESS STAND. BUT WHAT WE HAD FROM DOCTOR MORTON,
16 DOCTOR MORTON BASICALLY INDICTED DOCTOR McMEEKIN FOR
17 WHAT HE HAD DONE. TO GIVE DOCTOR McMEEKIN A CHANCE TO
18 EXPLAIN IT, I DON'T THINK PROBABLY WOULD HAVE BEEN A GOOD
19 IDEA.

20 THERE IS-- CERTAINLY, PROBABLY, HE WOULD HAVE GIVEN
21 REASONS. I'VE YET TO-- HAVING EXAMINED AND CROSS EXAMINED
22 DOCTORS BEFORE THEY SEEM TO ALWAYS BE ABLE TO JUSTIFY THEIR
23 ACTIONS SOME WAY. OR, HAVING DONE MEDICAL MALPRACTICE AND
24 SOME OTHER THINGS.

1 Q BUT, IN DOCTOR McMEEKIN'S CASE AT THIS GIVEN TIME, HE'S
2 JUST BEEN DISCIPLINED, PUBLICLY REPRIMANDED, THE NOTES WERE
3 THERE, THAT'S WHAT DOCTOR MORTON BASED HIS OPINION ON. AND
4 WE SPENT ABOUT TWO PAGES OF THE WHOLE TRIAL ON THIS ISSUE.
5 DO YOU NOT THINK IT SHOULD HAVE DELVED IN FURTHER?

6 A WELL, I DON'T KNOW IF IT COULD HAVE BEEN DELVED IN ANY
7 FURTHER WITHOUT ACTUALLY CALLING HIM TO THE WITNESS STAND.
8 BUT, YOU KNOW, THAT WOULD HAVE A POTENTIAL TACTIC. I MEAN, I
9 CAN SEE THAT BEING DONE. BUT WHETHER IT SHOULD HAVE BEEN
10 GONE INTO MORE, AFTER THIS PERIOD OF TIME, I REALLY CAN'T SAY
11 ONE WAY OR THE OTHER.

12 Q DID YOU CONSULT WITH ANOTHER PSYCHIATRISTS AS TO ANY
13 ETHICAL CONSIDERATIONS THAT DOCTOR McMEEKIN HAD IN
14 COUNSELING, TERRY, EARL, AND JIMMY, DUE TO THE FAMILY
15 CONFLICTS?

16 A NOT THAT I RECALL.

17 Q DID YOU FIND THAT TO BE SOMEWHAT OF AN ETHICAL
18 VIOLATION ON HIS BEHALF?

19 A I'M NOT FAMILIAR WITH THE ETHICS OF PSYCHIATRISTS AS FAR
20 AS COUNSELING DIFFERENT PEOPLE IN THE SAME FAMILY. SO, I
21 COULDN'T ANSWER THAT.

22 Q YOU WOULD AGREE THAT THAT WAS ALMOST A TRIANGLE, OR
23 FINGER-POINTING AT EACH OTHER, WHOSE FAULT THIS FAMILY
24 BREAK-UP WAS. WOULD THAT BE A CORRECT STATEMENT? IN

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 REVIEW DOCTOR MEYER'S RECORDS AND DOCTOR McMEEKIN'S

2 RECORDS. JIMMY'S BLAMING TERRY AND EARL'S BLAMING TERRY---

3 A. OH, YES, I WOULD--

4 Q ---AND TERRY'S BLAMING EARL---

5 A ---THINK SO, YES.

6 Q ---AND TERRY'S BLAMING JIMMY.

7 A THAT'S CORRECT.

8 Q DO YOU THINK THAT AVENUE WITH DOCTOR McMEEKIN WOULD

9 HAVE BEEN WORTH PURSUING - HOW COULD HE COUNSEL ONE OF

10 THEM WHEN HE'S GETTING CONFLICTING INFORMATION? AS A---

11 A WELL, THAT---

12 Q --PSYCHIATRIST, NOT AS A COUNSELOR.

13 A THAT COULD BE SOMETHING THAT COULD BE BROUGHT UP.

14 Q TELL ME WHAT, IF ANY, DIRECTION THE INVESTIGATION, YOU

15 AND MR. HANCOCK'S INVESTIGATION IN DEFENSE OF THIS CASE DID

16 CONCERNING CHIP ROBERTSON?

17 A WELL, THE INFORMATION WE HAD ON CHIP WAS BASICALLY ON

18 THE SOCIAL BACKGROUND, THAT TYPE OF THING. CHIP WAS BEING

19 REPRESENTED AT THAT TIME BY AN ATTORNEY, MIKE GILLEN. AND

20 CHIP WAS NOT-- I THINK WE APPROACHED MIKE ABOUT WHETHER

21 CHIP WOULD BE WILLING TO TESTIFY OR GIVE INFORMATION ABOUT

22 WHAT WENT ON IN THE FAMILY, THAT TYPE OF THING. CHIP WAS NOT

23 COOPERATIVE AT ALL DURING THIS WHOLE TIME.

24 Q DID YOU---

1 A HE HAD SOME OTHER LEGAL-- I THINK HE HAD SOME DRUG
2 CHARGES OR SOMETHING. HE WAS JUST NOT COOPERATIVE.

3 Q WAS HE NOT INCARCERATED ON HIS DRUG CHARGES DURING
4 THE VAST PERIOD OF THIS TIME?

5 A I CAN'T REMEMBER IF HE WAS INCARCERATED OR NOT, BUT I
6 KNEW THEY WERE PENDING.

7 Q DID MR. GILLEN GIVE YOU ACCESS TO HIM AS TO THE EVENTS
8 CONCERNING JIMMY ROBERTSON?

9 A I DIDN'T HAVE ANY ACCESS TO CHIP AT ALL.

10 Q DO YOU RECALL ANY REFERENCES TO CHIP IN MS. CASCIO'S
11 NOTES?

12 A NOT AT THIS TIME.

13 Q LET ME SHOW WHAT'S A COPY OF WHAT'S BEEN MARKED AS
14 APPLICANT'S EXHIBIT NUMBER SEVEN, A COPY OF MS. CASCIO'S NOTES.
15 AND DOES IT NOT SAY, "MOM WOULD MAIL CHIP RITALIN, TEN TO
16 FIFTEEN TABLETS PER WEEK"? IS THAT IN MS. CASCIO'S NOTES?

17 A WELL, IF THAT'S WHAT'S BEEN MARKED. I DON'T RECOGNIZE
18 THE HANDWRITING. I'M SURE---

19 Q BUT YOU---

20 A I'LL TAKE YOUR WORD FOR THAT, YES.

21 Q IT'S A COPY OF THIS DOCUMENT.

22 A I'LL TAKE YOUR WORD FOR IT.

23 Q IS THAT WHAT THAT SAYS?

24 A THAT'S CORRECT.

25 Q AND THAT WAS NOT BROUGHT BEFORE THE JURY?

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 A I DON'T REMEMBER IF THAT WAS OR NOT.

2 Q DOES IT ALSO NOT INDICATE IN THESE NOTES OF MS. CASCIO'S
3 THAT MM, MEREDITH MOON, WOULD KEEP HER MOUTH SHUT, A
4 CHECK FOR 50G?

5 A THAT'S WHAT THAT SAYS. I DON'T KNOW WHO MM REFERS TO.

6 Q ASSUMING, ARGUENDO, FOR THE SAKE OF THIS QUESTION, IT
7 REFERS TO MEREDITH MOON, WOULD THAT NOT BE---

8 A THAT WOULD BE WHAT IT SAYS.

9 Q MEREDITH MOON WAS ONE OF THE KEY WITNESSES AGAINST
10 HIM IN THIS CASE. IS THAT CORRECT?

11 A IN THE GUILT PHASE, YES.

12 Q AS A MATTER OF FACT, SHE WAS THE ONE WHO UNLOCKED THE
13 WHOLE KEY BY COOPERATING WITH THE PHILADELPHIA POLICE,
14 WHICH RESULTED IN A SEARCH IN VIRGINIA, MARYLAND, AND THE
15 HOUSE BACK IN ROCK HILL. IS THAT CORRECT?

16 A THAT'S CORRECT.

17 Q DO YOU THINK THIS WOULD NOT HAVE BEEN SALIENT TO
18 ATTACK HER CREDIBILITY WITH THIS STATEMENT, AFTER MR. POPE'S
19 CROSS EXAMINATION OF MS. CASCIO?

20 A WELL, ACTUALLY, I-- IT COULD HAVE PROBABLY BEEN USED IN
21 THE CROSS EXAMINATION OF MS. MOON, PERHAPS, AND BROUGHT
22 FORTH IN THAT. AGAIN, I DON'T REMEMBER WHETHER IT WAS OR NOT.

23 Q IF I TOLD YOU THAT-- MR. HANCOCK EXAMINED MS. MOON, DID
24 HE NOT?

25 A HE DID.

1 Q YOU WOULD AGREE WITH ME, THOUGH, THAT THAT WOULD BE
2 A VERY SALIENT ATTACK ON HER CREDIBILITY?

3 A IT WOULD.

4 Q AND IT WOULD ALSO SHOW THAT SHE HAD FURTHER
5 INVOLVEMENT IN THIS CRIME AND THAT SHE WAS IN IT FOR THE
6 MONEY, TOO?

7 A THAT'S CORRECT.

8 Q AND THAT WAS THE MAIN ALLEGATION THE PROSECUTION
9 MADE AGAINST MR. ROBERTSON, THAT HE KILLED HIS PARENTS FOR
10 MONEY, IS IT NOT?

11 A THAT'S CORRECT.

12 Q I'M SHOWING YOU ALSO ANOTHER COPY OF MS. CASCIO'S NOTES
13 IN REFERENCE TO CHIP. DOES IT NOT SAY, "CHIP CONSPIRED IN THIS
14 AND TOLD ME HE WAS GOING TO COME HOME AND DO IT, TOO." ALSO,
15 "HALLOWEEN, CHIP SAID, GO AHEAD AND DO IT. JUST BE CAREFUL
16 WHAT YOU DO."?

17 A YES, THAT'S IN HERE.

18 Q AND WOULD THAT NOT BE SAYING TO THE JURY THAT IT TAKES
19 SOME OF THE BLAME OR GUILT OFF JIMMY IN THIS CASE? WOULD
20 THAT NOT BE CORRECT?

21 A THAT COULD DO THAT. I MEAN, I CAN SEE THIS WORKING TWO
22 WAYS. ONE: IT PUTS IT MORE AS A PREMEDITATED TYPE THING,
23 RATHER THAN A DRUG-INDUCED, IMPULSIVE ACT. SO, I MEAN, I CAN
24 SEE THAT WORKING BOTH WAYS.

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 Q COULD IT NOT CONFIRM THAT HE WAS ACTING UNDER THE
2 CONTROL OR PERSUASION OF CHIP TO DO THIS; I.E., CHIP SUPPLYING
3 HIM WITH THE RITALIN, CHIP SAYING GO AHEAD AND DO IT, CHIP
4 SAYING DO IT HALLOWEEN, JUST DON'T GET CAUGHT?

5 A YEAH, I THINK THAT COULD, YES.

6 Q WOULD THAT NOT HAVE GIVEN YOU ANOTHER MITIGATING
7 CIRCUMSTANCE UNDER 16-03-20, SUBSECTION FIVE, WHICH IS ACTING
8 UNDER THE INFLUENCE OF ANOTHER PERSON?

9 A I THINK I'M FAMILIAR WITH ACTING UNDER THE INFLUENCE OF
10 ANOTHER PERSON.

11 Q ACTS UNDER DURESS OR DOMINATION OF ANOTHER PERSON.
12 WOULD THAT NOT HAVE GIVEN YOU ANOTHER MITIGATING
13 CIRCUMSTANCE TO ARGUE TO THE JURY?

14 A THAT COULD. I THINK THAT'S PRETTY WEAK, THAT IF THAT WAS
15 DOMINATION FROM JUST THAT, BUT POTENTIALLY, YES.

16 Q BUT IN THIS CASE, WHAT YOU HAD WAS WEAK, WAS IT NOT?

17 A WELL, I DON'T KNOW IF THE MITIGATION WAS THAT WEAK, AS
18 FAR AS THE HISTORY. BUT THE-- YOU KNOW, THAT WOULD HAVE
19 BEEN ANOTHER FACTOR. I THOUGHT IT DID COME OUT AT SOME POINT
20 THAT CHIP HAD TALKED ABOUT KILLING HIS PARENTS ALSO, BUT I
21 COULD BE WRONG ABOUT THAT.

22 Q MR. HANCOCK PUT MR. MEYER UP. IS THAT CORRECT?

23 A YES.

24 Q AND IN THAT TESTIMONY, ALTHOUGH HE GOES THROUGH
25 TERRY'S MEDICAL HISTORY, STARTING WITH HER IN THE NINTH

1 GRADE HAVING SUICIDAL THOUGHTS, HE DOES NOTHING WITH EARL'S,
2 WHICH RUNS ALONG THE SAME THEME, BASICALLY. WHY WAS THAT,
3 IF YOU KNOW?

4 A I DON'T REMEMBER.

5 Q DO YOU NOT THINK THAT WOULD HAVE BEEN SALIENT TO
6 BRING OUT TO THIS JURY THAT EARL ALSO HAD SOME OF THE SAME
7 PROBLEMS THAT TERRY HAD?

8 A I THINK IT WOULD, YES.

9 Q HOW DID MR. ROBERTSON GET A PHONE DURING THE LUNCH
10 BREAK TO CALL ERIN SAVAGE, ON THE LUNCH BREAK AND TELL HER
11 NOT TO COME BACK UP HERE? WAS THAT FROM MR. HANCOCK'S
12 PARALEGAL, OR FROM HIS INVESTIGATOR?

13 A I REMEMBER THAT HAPPENING. I DON'T REMEMBER HOW HE
14 GOT THE PHONE. I KNOW THERE WAS A SITUATION IN WHICH HIS
15 PARALEGAL DID LET JIMMY USE A CELL PHONE AT ONE POINT. I DON'T
16 REMEMBER IF THAT WAS THE CALL THAT THAT HAPPENED ON OR NOT.

17 Q AND WHEN MS. SAVAGE TOOK THE STAND, MR. BRACKETT
18 ASKED HER, DID HE TELL YOU NOT TO COME BACK UP HERE, AND
19 THERE WAS NO OBJECTION. DO YOU REMEMBER THAT?

20 A I REMEMBER THAT COMING OUT. I DON'T REMEMBER IF THERE
21 WAS AN OBJECTION OR NOT.

22 Q IF I TOLD YOU THERE WAS NOT AN OBJECTION, WOULD-- LET ME
23 ASK YOU THIS: DO YOU NOT THINK THAT SINCE HE DID NOT TAKE THE
24 STAND AND PRESENTED NO EVIDENCE IN THE GUILT PHASE, DO YOU
25 NOT THINK THAT AFFECTED HIS CREDIBILITY OR BELIEVABILITY ON

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 THE MITIGATION END AND THAT HE WAS TRYING TO HIDE SOMETHING
2 OR IS DEVIOUS?

3 A IT COULD, YES.

4 Q DID YOU KNOW ANYTHING ABOUT THE PHONE BEING GIVEN TO
5 HIM BACK THERE?

6 A NO, I DIDN'T.

7 Q YOU'RE FAMILIAR WITH SKIPPER V. SOUTH CAROLINA.
8 CORRECT?

9 A CORRECT.

10 Q AND YOU'RE FAMILIAR WITH ADAPTABILITY EVIDENCE. IS THAT
11 CORRECT?

12 A CORRECT.

13 Q YOU, NOR MR. HANCOCK, WITH THE EXCEPTION OF MR. STOBEE
14 WITH THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
15 PRESENTED ANY ADAPTABILITY EVIDENCE. IS THAT CORRECT?

16 A AS FAR AS I RECALL, NO.

17 Q AND ALTHOUGH HIS RECORD WASN'T PERFECT AT FIRST AND HE
18 HAD SOME MINOR INFRACTIONS, OVERALL IT WASN'T THAT BAD.
19 WOULD YOU AGREE WITH ME ON THAT?

20 A I DON'T BELIEVE HE HAD BEEN A BAD PRISONER.

21 Q AND AS A MATTER OF FACT, THE MEDICAL RECORDS FROM SCDC
22 - AND MR. HANCOCK DOES MAKE A POINT OF THIS IN THE RECORD - IS
23 THAT HE'S FINALLY GOT THE CORRECT DIAGNOSIS AND HIS MANIA,
24 MANIC DEPRESSIVE; I.E., BI-POLARISM, IS UNDER CONTROL. IS THAT A
25 CORRECT STATEMENT?

- 1 A I DON'T REMEMBER MR. HANCOCK MAKING THAT POINT, BUT
2 THAT PROBABLY, YES. PROBABLY.
- 3 Q WHY DIDN'T YOU AND MR. HANCOCK BRING THE DOCTOR FROM
4 SCDC UP HERE, WHO WROTE THAT REPORT?
- 5 A I DON'T RECALL AT THIS TIME.
- 6 Q DO YOU NOT THINK HE WOULD HAVE BEEN A GOOD WITNESS IN
7 MITIGATION BECAUSE HERE'S A GUY WHO WORKS FOR THE STATE
8 WHO'S COMING TO TESTIFY ABOUT HIS OWN DOCUMENTATION; HE'S
9 DOING BETTER, HE'S ON THE RIGHT MEDICATION, HE HAS THE RIGHT
10 DIAGNOSIS. DO YOU NOT THINK THAT WOULD IMPACT THE JURY AS
11 FAR AS ADAPTABILITY UNDER SKIPPER V. SOUTH CAROLINA
12 EVIDENCE?
- 13 A IT COULD. AGAIN, I HAVE ABSOLUTELY NO RECOLLECTION
14 ABOUT ANY THOUGHT PROCESS OF DOING THAT AT THAT TIME, AT
15 THIS POINT.
- 16 Q WAS ADAPT---
- 17 THE COURT: WHAT WAS THE NAME OF THAT WITNESS?
- 18 MR. BROWN: MR. STOBEE, WHO'S GOING TO TESTIFY TODAY.
19 HE'S THE---
- 20 THE COURT: HE IS TESTIFYING LATER TODAY?
- 21 MR. BROWN: YES SIR. HE'S THE CUSTODIAN OF RECORDS. BUT
22 IN THOSE RECORDS, YOUR HONOR, THE TRANSCRIPT, THERE WAS A
23 REPORT, A MEDICAL REPORT FROM A DOCTOR AT SCDC WHOSE NAME
24 ESCAPES ME RIGHT NOW. I CAN GET IT TO THE COURT IF YOU WANT IT,
25 YOUR HONOR. BUT IT'S A REPORT.

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

- 1 THE COURT: THAT'S ALL RIGHT. I'LL WAIT UNTIL I HEAR THAT
2 OTHER WITNESS.
3 MR. BROWN: OKAY.
4 Q BUT THAT WAS NEVER PURSUED. IS THAT CORRECT?
5 A THAT'S CORRECT.
6 Q WAS ADAPTABILITY DISCUSSED IN THINKING, IN STRATEGIZING
7 FOR THIS CASE?
8 A I'M SURE IT PROBABLY WAS, BUT I DON'T REMEMBER DETAIL OR
9 ANY SPECIFIC INSTRUCTIONS, DISCUSSIONS ABOUT IT.
10 Q YOU WOULD AGREE WITH ME THAT'S ONE OF THE IMPORTANT
11 THINGS IN A MITIGATION PHASE IN A DEATH PENALTY PHASE IN YOUR
12 EXPERIENCE. IS THAT CORRECT?
13 A THAT'S CORRECT.
14 Q AND YOU DIDN'T-- NEITHER YOU NOR MR. HANCOCK GOT AN
15 ADAPTABILITY EXPERT. IS THAT CORRECT?
16 A THAT'S CORRECT.
17 Q AND AS FAR AS ADAPTABILITY GOES COMPARATIVELY TO
18 OTHER DEATH PENALTY CASES YOU'VE TRIED, MR. ROBERTSON'S
19 RECORD, UP UNTIL THE TIME OF THE TRIAL, WAS PRETTY CLEAN AS
20 FAR AS ADAPTABILITY GOES, IN PRISON?
21 A YOU'RE ASKING COMPARED TO OTHER DEATH PENALTY--
22 Q YES SIR.
23 A ---I'VE HAD?
24 Q YES.

1 A I DON'T-- I DON'T RECALL ANY OF MY CLIENTS REALLY HAVING
2 A BAD PRISON RECORD PRIOR TO A TRIAL. SO, THE QUESTION IS
3 COMPARATIVELY. MR. ROBERTSON DID NOT HAVE A BAD PRISON OR
4 JAIL RECORD. I KNOW THAT.

5 Q HAVE YOU IN THE PAST, HAVE YOU ALWAYS PRESENTED
6 EVIDENCE OF ADAPTABILITY?

7 A I KNOW I HAVE IN AT LEAST TWO OTHER TRIALS, I BELIEVE. I
8 DON'T RECALL THE OTHERS THAT THERE WAS EVIDENCE OF
9 ADAPTABILITY PRESENTED.

10 Q WOULD YOU AGREE WITH ME THAT WHEN YOU'RE ARGUING FOR
11 LIFE VERSUS THE DEATH PENALTY THAT ADAPTABILITY IS A KEY
12 COMPONENT IN THE DEFENSE?

13 A YES, THAT'S AN IMPORTANT ISSUE.

14 Q AND THAT ISSUE REALLY WASN'T EXPLORED TOO MUCH IN MR.
15 ROBERTSON'S CASE, WAS IT? ASSUMING, ARGUENDO, THAT I'M
16 GIVING YOU THE FACTS DIRECTLY, OUTSIDE OF MR. STOBEE, THERE
17 WAS NO ADAPTABILITY EVIDENCE?

18 A THAT WOULD BE CORRECT.

19 Q I'M GOING TO SHOW YOU THE INDEX ON TRANSCRIPT ONE, PAGE
20 11. STARTING WITH THE MITIGATION PHASE ON DEFENSE, Y'ALL
21 CALLED DOCTOR PRYOR. IS THAT CORRECT?

22 A THAT'S CORRECT.

23 Q AND THEN YOU CALLED DOCTOR PINCUS?

24 A THAT'S CORRECT.

25 Q AND THEN YOU CALL CALLED DOCTOR EVANS?

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

- 1 A THAT'S CORRECT.
- 2 Q THEN YOU CALLED DOCTOR MILLER?
- 3 A THAT'S CORRECT.
- 4 Q THEN YOU CALLED DOCTOR STOBEE, OR MICHAEL STOBEE, THE
5 GUY FROM SCDC CUSTODIAL RECORDS?
- 6 A OKAY.
- 7 Q THEN YOU CALLED DOCTOR, MR. MEYER?
- 8 A THAT'S CORRECT.
- 9 Q AND THEN YOU CALLED SOME FRIENDS OF THE FAMILY WHO
10 BASICALLY ASKED-- DOCTOR HOPE, LINDA HOPE, JULIET
11 McLAUGHLIN, MICHAEL FAULKNER, WHO BASICALLY ASKED FOR
12 MERCY. IS THAT CORRECT?
- 13 A THAT'S CORRECT.
- 14 Q AND THEN YOU WIND UP WITH DOCTOR CASCIO. IS THAT
15 CORRECT?
- 16 A THAT'S CORRECT.
- 17 Q AND SHE IS THE LAST EXPERT, IS SHE NOT?
- 18 A I BELIEVE THAT'S CORRECT.
- 19 Q WOULD YOU AGREE WITH ME THAT IN YOUR RECOLLECTION OF
20 THIS CASE THAT DOCTOR PRYOR MADE A PRETTY GOOD WITNESS IN
21 MITIGATION?
- 22 A AS FAR AS I CAN RECALL, YES.
- 23 Q DOCTOR PINCUS MADE A PRETTY GOOD WITNESS IN
24 MITIGATION?
- 25 A THAT'S CORRECT.

1 Q DOCTOR EVANS MADE A PRETTY GOOD WITNESS IN
2 MITIGATION?

3 A THAT'S CORRECT.

4 Q DOCTOR MORTON MADE A PRETTY GOOD WITNESS IN
5 MITIGATION?

6 A THAT'S CORRECT.

7 Q WOULD YOU AGREE WITH ME THAT DOCTOR CASCIO WAS AN
8 UNMITIGATED DISASTER OF BIBLICAL PROPORTIONS IN THIS CASE?

9 A I DON'T KNOW IF I WOULD GO THAT FAR.

10 THE COURT: IN REFLECTING OVER THE TESTIMONY, THAT'S
11 GONNA CONFUSE ME.

12 (LAUGHTER)

13 MR. BROWN: A LITTLE LITERARY LICENSE, YOUR HONOR.

14 A I THINK DOCTOR CASCIO WAS ABLE ON THE DIRECT EXAM TO
15 BRING OUT GOOD POINTS AND HAVE BENEFICIAL INFORMATION. I
16 THINK THAT WAS OVERSHADOWED BY THE CROSS EXAMINATION AND
17 THAT THAT PART WAS A, VERY DEVASTATING TO THE DEFENSE.

18 Q LET ME BACK UP A SECOND, AND DO THIS CHRONOLOGICALLY.
19 THE DECISION THAT YOU TESTIFIED TO EARLIER NOT TO HAVE HIM--
20 MR. HANCOCK HAD CONTACTED THE DEATH PENALTY RESOURCE
21 CENTER AND GOT THESE EXPERTS. IS THAT CORRECT?

22 A YES. OR THEY HAD-- WE GOT THE NAMES AT LEAST FROM
23 THEM. AND I THINK THESE ARE EXPERTS MOST OF WHOM HAD BEEN
24 USED IN OTHER DEATH PENALTY LITIGATION.

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 Q SO, YOU DIDN'T RESEARCH THEIR RESUMES AND
2 BACKGROUNDS, YOU DIDN'T?

3 A I DON'T RECALL-- I SAW THEIR RESUMES, BUT AS FAR AS
4 RESEARCHING THEM PRIOR TO GETTING THEM, NO.

5 Q WERE YOU AWARE WHEN YOU PUT MS. CASCIO ON THE STAND
6 THAT SHE HAD NEVER TESTIFIED IN ANY COURT AS AN EXPERT
7 BEFORE?

8 A I DON'T RECALL IF I-- I KNEW THAT-- I MAY HAVE KNOWN THAT,
9 BUT I CAN'T REMEMBER RIGHT NOW IF SHE WAS.

10 Q WOULD YOU AGREE WITH ME IN A DEATH PENALTY CASE, IT'S
11 NOT WHERE YOU MAKE YOUR GREATEST EXPERT START OUT WITH?

12 A WELL, IT'S CERTAINLY BETTER IF SOMEONE HAS TESTIFIED
13 BEFORE. SOMETIMES, HAVING SOMEONE THAT IS NOT-- I MEAN,
14 HAVING PRIOR TESTIMONY DOESN'T NECESSARILY MEAN SOMEONE IS
15 GOING TO BE A BETTER WITNESS OR NOT A BETTER WITNESS. I CAN
16 FORESEE OF HAVING EXPERTS THAT HAVE NOT TESTIFIED IN THE
17 PAST, YOU KNOW, THEY COME WITH LESS BAGGAGE. THAT WOULDN'T
18 BE MY MAIN POINT OF WHETHER TO USE A WITNESS OR NOT, THEIR
19 PRIOR TESTIMONY.

20 Q AND WOULD THAT PLAY INTO YOUR DECISION, THOUGH,
21 WHETHER OR NOT TO--

22 A YEAH, IT COULD. IF I HAD TALKED TO OTHER ATTORNEYS AND
23 SAID THIS PERSON MAKES A GREAT WITNESS, YES. I MEAN, THAT-- OR
24 HAS MADE A BAD WITNESS IN THE PAST, THAT WOULD CERTAINLY

1 PLAY A PART IN THE DECISION. THAT WOULDN'T BE MY PRIMARY
2 DECISION MAKING.

3 Q WERE YOU ALSO AWARE THAT HER RESUME THAT SHE LISTS
4 THAT SINCE SHE GOT OUT OR GRADUATED-- OR, WERE YOU AWARE
5 THAT SHE GRADUATED FROM, OR FINISHED HER ACADEMIA IN 1996
6 FROM THE UNIVERSITY OF PENNSYLVANIA?

7 A I'M SURE I SAW HER RESUME. I DON'T REMEMBER WHEN SHE
8 GRADUATED.

9 Q I'LL SHOW YOU APPLICANT'S NUMBER FOUR WHERE IT SHOWS
10 SHE FINISHED UP HER Ph.D. IN 1996, AT THE UNIVERSITY OF
11 PENNSYLVANIA.

12 A THAT'S CORRECT.

13 Q AND THIS TRIAL TOOK PLACE IN MARCH OF 1999. IS THAT
14 CORRECT?

15 A THAT'S CORRECT.

16 Q AND ALSO, SHE SHOWS ON HER PRACTICE EXPERIENCE 1997
17 THROUGH PRESENT, EXPERT WITNESS TESTIMONY, CAPITAL
18 LITIGATION CASES, CENTER FOR CAPITAL LITIGATION, COLUMBIA,
19 SOUTH CAROLINA. IS THAT CORRECT?

20 A THAT'S CORRECT.

21 Q AND THAT'S THE ONLY EXPERIENCE THAT SHE SHOWS AS TO
22 DEATH PENALTY MATTERS AND CRIMINAL MATTERS. IS THAT
23 CORRECT?

24 A THAT'S CORRECT.

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 Q AND THAT'S THE DEATH PENALTY RESOURCE CENTER WE'RE
2 TALKING ABOUT. RIGHT?

3 A THAT'S CORRECT.

4 Q DOES THAT NOT HURT HER RESUME, SHOWING THAT THE ONLY
5 PEOPLE SHE'S WORKED FOR IS PEOPLE WHO DEFEND DEATH PENALTY
6 CASES?

7 A THAT'S CERTAINLY SOMETHING THAT CAN BE BROUGHT UP, AS
8 OPPOSED TO PROSECUTION OR SOMETHING OF THAT NATURE.

9 Q AND, FINDING AN EXPERT MASTER SOCIAL WORKER IS NOT
10 THAT HARD TO FIND, IS IT?

11 A PROBABLY NOT.

12 Q DO YOU KNOW WHO RECOMMENDED HER TO MR. HANCOCK?

13 A I THOUGHT THE DEATH PENALTY RESOURCE CENTER DID.

14 Q HOW DID IT BECOME IN THE PAST THAT YOU WERE GOING TO
15 TAKE HER AS A WITNESS?

16 A I DON'T RECALL EXACTLY. I KNOW MR. HANCOCK WAS TAKING,
17 I THINK, DOCTOR PINCUS AND DOCTOR EVANS. I WAS TAKING DOCTOR
18 MORTON. IT BASICALLY, I DON'T KNOW HOW IT CAME DOWN, BUT I
19 ENDED UP TAKING HER.

20 Q DO YOU RECALL WHEN YOU FIRST MET HER?

21 A I DON'T RECALL THE DATE. I THINK WE MET WITH HER AT THE
22 DEATH PENALTY RESOURCE CENTER IN COLUMBIA ON ONE OR MORE
23 OCCASIONS. I MET WITH HER ANOTHER TIME AT THE LAW SCHOOL IN
24 COLUMBIA, JUST ONE OTHER TIME.

1 Q DO YOU RECALL, EVEN THOUGH THE REPORT WAS MAILED TO
2 MR. HANCOCK, WHEN YOU FIRST GOT HER PRELIMINARY REPORT?

3 A I DON'T RECALL WHEN.

4 Q DO YOU RECALL WHEN YOU GOT HER NOTES, WHICH IS
5 APPLICANT'S EXHIBIT NUMBER SEVEN?

6 A I DO NOT.

7 Q DO YOU RECALL CONSENTING PRIOR TO TRIAL AT A MOTION
8 HEARING TO TURNING OVER ALL UNDERLYING DATA TO THE
9 PROSECUTION?

10 A I DON'T RECALL CONSENTING TO THAT, OR WHETHER THAT WAS
11 ORDERED. I GUESS THE ANSWER IS, NO, I DON'T RECALL THAT.

12 Q I'M GOING TO SHOW YOU A TRANSCRIPT, SIR, OF A HEARING ON
13 FEBRUARY 19, 1998, STARTING ON PAGE 44, LINE 9, IF YOU WOULD, JUST
14 BRIEFLY READ DOWN TO 45, LINE 10.

15 A (PAUSE TO REACH TRANSCRIPT) OKAY.

16 Q YOU DIDN'T OBJECT TO TURNING OVER UNDERLYING DATA. IS
17 THAT CORRECT?

18 A THAT'S CORRECT.

19 Q BY FEBRUARY 19, 1998, MR. AND MR. HANCOCK KNEW YOU HAD
20 A MENTALLY ILLNESS DEFENSE. IS THAT CORRECT?

21 A THAT'S CORRECT.

22 Q AND YOU ALSO KNEW THAT YOU WOULD HAVE SEVERAL MORE
23 EXPERTS PROBABLY THAN THE STATE. WOULD THAT BE A CORRECT
24 STATEMENT?

25 A THAT'S CORRECT.

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

- 1 Q WHERE WAS THE STRATEGIC ADVANTAGE OF AGREEING TO
2 THAT, WHEN Y'ALL WOUND UP WITH FIVE EXPERTS AND THEY ONLY
3 HAD ONE?
- 4 A I DON'T KNOW IF THERE WAS A STRATEGIC ADVANTAGE TO
5 THAT. MY IMPRESSION FROM, I THINK IT'S RULE 705 OF THE EVIDENCE
6 RULES, IS THAT BASICALLY THAT'S THE RULE THAT YOU, THAT THE
7 OTHER SIDE IS ENTITLED TO ALL UNDERLYING DATA.
- 8 Q AFTER THE PERSON TESTIFIES.
- 9 A DURING CROSS EXAMINATION, YES.
- 10 Q AND RULE 705-- THROUGHOUT THAT TRANSCRIPT, IF I TOLD
11 YOU, WOULD YOU DISAGREE WITH ME THAT NOBODY RAISES RULE 705
12 THROUGH THE WHOLE TRANSCRIPT?
- 13 A I DON'T RECALL THAT.
- 14 Q BUT AT ANY EVENT, IT WASN'T AN ISSUE BECAUSE YOU AGREED
15 TO IT. CORRECT?
- 16 A THAT'S CORRECT.
- 17 Q AND DO YOU KNOW WHEN THESE NOTES WERE TURNED OVER
18 TO THE STATE?
- 19 A ON MS. CASCIO?
- 20 Q YES.
- 21 A I THINK IT WAS THE EVENING BEFORE SHE TESTIFIED.
- 22 Q AS A MATTER OF FACT - AND SEE IF THIS WILL REFRESH YOUR
23 MEMORY - THERE'S A COLLOQUY BACK AND FORTH BETWEEN YOU
24 AND MR. HANCOCK AND MR. BRACKETT AND MR. POPE AND JUDGE
25 HAYES ABOUT WHERE THE NOTES ARE, SHE'S ON THE WAY UP HERE

1 WITH THEM, WHAT HAPPENED TO YOU, BLAH, BLAH, BLAH. DO YOU
2 RECALL THAT?

3 A VAGUELY, BUT I DO REMEMBER THEM BEING TURNED OVER.

4 Q WHEN DID YOU FIRST GET THESE NOTES, TO THE BEST OF YOUR
5 MEMORY?

6 A I DON'T REMEMBER.

7 Q DID YOU REVIEW THESE NOTES BEFORE YOU GAVE THEM TO
8 THE STATE?

9 A I'M SURE I DID.

10 Q DO THEY CONCERN YOU?

11 A YES.

12 MR. BROWN: YOUR HONOR, I DON'T WANT TO GO THROUGH THE
13 LITANY OF QUESTIONS I WENT THROUGH WITH MR. HANCOCK THE
14 OTHER DAY. I WOULD TIE THIS INTO ONE LONG QUESTION ABOUT THE
15 STATEMENTS THAT WERE BROUGHT OUT ON CROSS EXAMINATION.
16 OR, IF MR. SALTER WANTS TO STIPULATE IT WOULD BE THE SAME
17 THING AS THE PAGES IN THE TRANSCRIPT THAT I ASKED MR. HANCOCK
18 THE OTHER DAY.

19 I MEAN, YOU'RE THE TRYER, THE FINDER OF FACT IN THIS CASE
20 AND YOU'VE ALREADY HEARD THAT. I JUST DIDN'T WANT TO
21 BELABOR THE COURT, IF YOU DON'T THINK I NEED TO PUT THIS IN THE
22 RECORD.

23 THE COURT: NO, I DON'T THINK YOU HAVE TO PRESERVE THE
24 RECORD. THAT STUFF'S IN THE RECORD.

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

1 Q WITHOUT BORING YOU WITH THE WHOLE DETAILS THAT I WENT
2 THROUGH WITH MR. HANCOCK THE OTHER DAY ABOUT THE
3 STATEMENTS ON CROSS EXAMINATION, YOU WOULD AGREE WITH ME
4 THAT THEY WERE SEVERELY DAMAGING TO MR. ROBERTSON'S CASE?

5 A I WOULD SAY YES.

6 Q AS A MATTER OF FACT, I BELIEVE YOU SAID IN THE, TO THE
7 AUTHOR OF FAMILY BLOOD, LYNN RIDDLE, "LOOKING BACK, BOYD
8 SAID CASCIO'S TESTIMONY WAS THE MOST DAMAGING OF THE TRIAL."
9 WOULD THAT BE A CORRECT STATEMENT?

10 A THAT'S CORRECT.

11 Q AND AS FAR AS DEFENDING MR. ROBERTSON, THAT WAS THE
12 MOST DAMAGING OF THE TRIAL?

13 A I BELIEVE SO.

14 Q IT'S Y'ALL'S WITNESS.

15 A THAT'S CORRECT.

16 Q AND LET ME SAY THIS: DO YOU THINK BECAUSE OF HER
17 INEXPERIENCE AND NEVER TESTIFYING BEFORE THAT AS SHE GOT
18 BOXED IN SEVERAL TIMES BY MR. POPE WHERE SHE GOT YES, YES,
19 YES, AND SHE GOT THE MINDSET, WITHOUT EXPLAINING HER
20 ANSWERS, JUST AGREEING WITH WHATEVER HE PUT UP THERE?

21 A I DON'T KNOW IF THAT WAS THE INEXPERIENCE OR NOT, BUT--

22 Q COULD THAT BE ONE FACTOR FOR AN EXPERT WITNESS WHO'D
23 NEVER TESTIFIED BEFORE, NOT GOING ON AND EXPLAINING THEIR
24 ANSWERS, NOT EVEN OFFERING AN EXPLANATION, JUST AGREEING
25 WITH EVERYTHING THAT HE SAID?

1 A THAT COULD BE.

2 Q AND THIS WAS THE LAST EXPERT WITNESS YOU PUT UP?

3 A THAT'S CORRECT.

4 Q BUT FOR CALLING DOCTOR CASCIO, IS IT POSSIBLE YOU MAY
5 HAVE HAD A DIFFERENT OUTCOME IN THE SENTENCING PHASE?

6 A ANYTHING'S POSSIBLE.

7 Q COULD THAT HAVE BEEN A POSSIBILITY?

8 A THAT'S A POSSIBILITY.

9 Q REVIEWING THIS MATERIAL AND KNOWING HOW DAMNING IT
10 WAS TO THE DEFENDANT'S CASE, WOULD IT NOT HAVE BEEN BETTER
11 NOT TO PUT HER AND RESTED WITH DOCTOR PRYOR, DOCTOR PINCUS,
12 DOCTOR EVANS, AND DOCTOR MORTON?

13 MR. SALTER: YOUR HONOR, AT THIS POINT I'M GOING TO
14 OBJECT. THIS CALLS FOR SPECULATION INTO HINDSIGHT.

15 MR. BROWN: YOUR HONOR, I THINK THAT MR. BOYD IS
16 INFINITELY QUALIFIED AS PROBABLY THE BEST DEATH PENALTY
17 LITIGATION IN THE UPPER STATE. HIS RESUME AND RECORD SPEAKS
18 FOR ITSELF. I'VE TRIED CASES WITH HIM AND I CAN VOUCH FOR HIS
19 CREDIBILITY. I THINK HE'S ENTITLED AS AN EXPERT ALMOST IN
20 DEATH PENALTY LITIGATION TO ANSWER THAT QUESTION.

21 THE COURT: LET ME HEAR YOU ASK THE QUESTION, PLEASE.

22 Q DO YOU NOT THINK AT THE CONCLUSION OF DOCTOR MORTON,
23 DOCTOR PINCUS, DOCTOR EVANS, AND DOCTOR PRYOR THAT THE
24 BETTER MOVE, OR THE BETTER DECISION WOULD NOT HAVE BEEN TO
25 PUT HER UP?

JAMES BOYD - DIRECT EXAMINATION BY MR. BROWN

- 1 THE COURT: I OVERRULE THE OBJECTION.
- 2 A IN HINDSIGHT I WOULD AGREE WITH THAT.
- 3 Q AND YOU WOULD AGREE WITH ME THAT YOU HAD A WITNESS
- 4 WITH NO PRIOR TESTIFYING EXPERIENCE?
- 5 A I AGREE WITH THAT.
- 6 Q WHO WAS A DISASTER ON CROSS EXAMINATION. CORRECT?
- 7 A THAT'S CORRECT.
- 8 Q WHO DID NOT EXPLAIN HER ANSWERS WHEN THERE WAS A FULL
- 9 EXPLANATION SHE COULD HAVE WITH MR. POPE AND SHE GOT IN THE
- 10 HABIT OF JUST AGREEING TO EVERYTHING THAT HE SAID. IS THAT
- 11 CORRECT?
- 12 A THAT'S CORRECT.
- 13 Q AND ALL THE-- LET ME ASK YOU THIS: PRIOR TO THAT, WERE
- 14 THERE ANY INCULPATORY STATEMENTS ON MR. ROBERTSON'S
- 15 BEHALF, OTHER THAN WHAT MEREDITH MOON TESTIFIED TO?
- 16 A I DON'T REMEMBER. I'M TRYING TO THINK IF ANY OF THE OTHER
- 17 EXPERT WITNESSES HAD TESTIFIED ABOUT MR. ROBERTSON'S, THAT
- 18 MR. ROBERTSON FOUND WHAT HAPPENED. THERE'S CERTAINLY
- 19 NOTHING OF THAT DETAILED ABOUT IT IN THERE.
- 20 Q LET ME ASK THIS: YOUR OTHER EXPERTS, BECAUSE OF THEIR
- 21 EXPERIENCE IN TESTIFYING AS EXPERTS, DIDN'T PUT ALL THEIR
- 22 MATERIAL IN EVIDENCE, DID THEY?
- 23 A NO, THEY DIDN'T.
- 24 Q AND THAT'S AN EXPERIENCED EXPECT WITNESS, IS IT NOT?
- 25 A WELL, I DON'T KNOW THE REASON, BUT THEY DID NOT.

1 Q ONE LAST THING: MR. ROBERTSON SAID THAT NO ONE WAS
2 PRESENT WHEN THE STATE DID HIS MENTAL EVALUATION, OR DOCTOR
3 McKEE DID HIS MENTAL EVALUATION. DO YOU REMEMBER WHY THAT
4 WAS?

5 A NO, I DON'T AT THIS TIME.

6 Q AND WHEN DOCTOR McKEE TESTIFIED THAT ONE OF THE
7 REASONS FOR HIS UNDERLYING PREMISE WAS THAT HE ASSERTED HIS
8 FIFTH AMENDMENT PRIVILEGE IN PHILADELPHIA, YOU DID OBJECT TO
9 THAT?

10 A THAT'S CORRECT. I BELIEVE I MOVED FOR A MISTRIAL.

11 Q YES SIR, YOU DID.

12 MR. BROWN: I HAVE NO FURTHER QUESTIONS.

13 **CROSS EXAMINATION BY MR. SALTER:**

14 Q GOOD AFTERNOON, MR. BOYD. I'LL TRY TO BE AS BRIEF AS
15 POSSIBLE. YOU INDICATED YOU WERE FIRST APPOINTED ON APRIL 30,
16 1998?

17 A I BELIEVE THAT'S CORRECT.

18 Q THAT'S ABOUT A YEAR, ELEVEN MONTHS BEFORE THE MARCH
19 TRIAL. CORRECT?

20 A THAT'S CORRECT.

21 Q AND THE RECORD REFLECTS THAT CO-COUNSEL WAS
22 APPOINTED THE SAME DATE? DO YOU AGREE THAT'S CORRECT?

23 A WELL, IF THAT'S WHAT THE RECORD SAYS. I WAS UNDER THE
24 IMPRESSION HE HAD BEEN APPOINTED PRIOR TO ME, BUT I COULD BE
25 WRONG ON THAT.

JAMES BOYD - CROSS EXAMINATION BY MR. SALTER

- 1 Q I'LL SHOW YOU RESPONDENT'S EXHIBITS ONE AND TWO.
- 2 A THEY SHOW THE SAME DATE.
- 3 Q SO, Y'ALL WERE BOTH APPOINTED AT THE SAME TIME?
- 4 A IT APPEARS THAT WAY, YES.
- 5 Q BUT, REGARDLESS, THERE HAD BEEN SOME CONTACT MADE
- 6 WITH THE RESOURCE CENTER EARLY ON?
- 7 A THAT'S CORRECT.
- 8 Q NOW KNOWN AS THE CENTER FOR CAPITAL LITIGATION.
- 9 A THAT'S CORRECT.
- 10 Q AND YOU INDICATED ON DIRECT THAT ONE OF THE PERSONS
- 11 THAT YOU DID A SIT-DOWN WITH WAS YOUR CO-COUNSEL?
- 12 A THAT'S CORRECT.
- 13 Q DID YOU ALSO SPEAK TO YOUR CLIENT?
- 14 A SOMETIME AFTER THAT, YES.
- 15 Q DO YOU RECALL HOW MANY TIMES YOU MAY HAVE SPOKEN TO
- 16 HIM?
- 17 A NOT AT THIS TIME. I KNOW I VISITED HIM AT THE JAIL A
- 18 NUMBER OF TIMES, BUT I DON'T REMEMBER HOW MANY TIMES.
- 19 Q MORE THAN ONCE?
- 20 A OH, YES.
- 21 Q AND DID HE TELL YOU THAT HE IN FACT COMMITTED THE
- 22 MURDERS?
- 23 A YES.
- 24 Q THAT CREATED A PROBLEM IN PRESENTING A DEFENSE, DID IT
- 25 NOT, IN TERMS OF THE GUILT PHASE OF THE TRIAL?

1 A IN TERMS OF PUTTING HIM ON THE WITNESS STAND, YES. IN
2 TERMS OF PUTTING UP ANY EVIDENCE THAT WOULD HAVE BEEN
3 OBVIOUSLY FALSE, LIKE AN ALIBI, YES.

4 Q AND YOU INDICATED EARLIER THAT HE UNDERSTOOD YOUR
5 VARIOUS CONVERSATIONS WITH HIM, THAT HE UNDERSTOOD THAT HE
6 WOULD PROBABLY BE CONVICTED. CORRECT?

7 A THAT'S CORRECT.

8 Q BUT HE DIDN'T WANT TO PLEAD GUILTY?

9 A THAT'S CORRECT.

10 Q SO, THAT MADE A GUILTY BUT MENTALLY ILL PLEA SOMETHING
11 OF, THAT WAS NOT A FACTOR. CORRECT?

12 A IT WOULD'VE. THAT WOULDN'T HAVE BEEN MY
13 RECOMMENDATION ANYWAY, AS FAR AS A PLEA.

14 Q WHY IS THAT?

15 A BECAUSE THAT WOULD HAVE TAKEN IT AWAY FROM THE JURY,
16 EVEN IF THAT HAD BEEN ACCEPTED.

17 Q WHAT ABOUT A JURY INSTRUCTION OF GUILTY BUT MENTALLY
18 ILL?

19 A OKAY. HE COULD HAVE ENTERED THE NOT GUILTY PLEA AND
20 WE COULD HAVE ASKED FOR A PLEA OF GUILTY. I'M SORRY. A
21 VERDICT OF GUILTY BUT MENTALLY ILL FROM THE JURY. I DIDN'T--
22 THAT WAS NOT A ROUTE THAT I THINK THAT HE WOULD WANT TO GO.
23 HE WOULD NOT WANT TO CONCEDE GUILT.

JAMES BOYD - CROSS EXAMINATION BY MR. SALTER

1 Q NOW, WHEN YOU WENT OVER SOME OF YOUR PRIOR WORK
2 EXPERIENCE, I BELIEVE YOU INDICATED THAT YOU HAD TRIED SIX
3 DEATH PENALTY CASES PRIOR TO THIS ONE?

4 A SIX CLIENTS, YES.

5 Q SIX CLIENTS AND WON TWICE?

6 A YES.

7 Q AND YOU ASSISTED IN THE PROSECUTION OF ONE CASE?

8 A THAT'S CORRECT.

9 Q WOULD THAT HAVE BEEN RICKY TIM CALDWELL?

10 A THAT'S CORRECT.

11 Q AND YOU'VE TRIED A NUMBER OF MURDER CASES, ALSO, NOT
12 CAPITAL MURDER CASES, HAD YOU NOT?

13 A YES, I'VE TRIED A GOOD MANY.

14 Q DO YOU HAVE ANY IDEA HOW MANY?

15 A PROBABLY IN THE THIRTIES, SOMETHING OF THAT NATURE.

16 Q AND YOU'VE HAD OTHER MAJOR FELONY TRIAL EXPERIENCE AS
17 WELL. CORRECT?

18 A THAT'S CORRECT.

19 Q DO YOU RECALL, I THINK YOU TESTIFIED TO THIS PREVIOUSLY,
20 BUT HOW Y'ALL MADE A DECISION BETWEEN YOU AND YOUR CO-
21 COUNSEL IN TERMS OF HOW Y'ALL WOULD DIVIDE YOUR
22 RESPONSIBILITIES?

23 A WELL, AS IT CAME CLOSER TO TRIAL WE DID MAKE A DECISION
24 ON WHO WOULD TAKE WHAT WITNESS. GENERALLY, ON THE VOIR
25 DIRE, WE AGREED JUST TO BASICALLY TAKE TURNS DOING THAT. ON

1 THE-- WE HAD AGREED THAT ON OPENING STATEMENTS AND SOME OF
2 THE WITNESSES WE HAD AGREED TO DIVIDE UP THAT RESPONSIBILITY.

3 Q SO, Y'ALL HAD BOTH THE PARALEGAL AND THE INVESTIGATOR
4 FROM MR. HANCOCK'S OFFICE?

5 A THAT'S CORRECT.

6 Q TO ASSIST Y'ALL IN GATHERING INFORMATION. CORRECT?

7 A THAT'S CORRECT.

8 Q AND I BELIEVE MS. CASCIO, TO A CERTAIN EXTENT IN TERMS OF
9 GATHERING INFORMATION?

10 A THAT'S CORRECT.

11 Q DID Y'ALL NOT ALSO HAVE THE ASSISTANCE OF A LADY NAMED
12 DRUCY GLASS?

13 A SHE DID SOME WORK ON THE CASE. THAT IS CORRECT. SHE WAS
14 WITH THE DEATH PENALTY RESOURCE CENTER, I BELIEVE, AND DID
15 SOME WORK ON IT.

16 Q SHE WAS ACTUALLY PRESENT DURING MUCH, IF NOT ALL, OF
17 THE TRIAL. CORRECT?

18 A SHE WAS, YES, THAT'S CORRECT.

19 Q AND MS. CASCIO'S INVOLVEMENT WAS INVESTIGATION THE
20 FAMILY HISTORY AND THE MENTAL HEALTH HISTORY?

21 A THAT'S CORRECT.

22 Q DO YOU RECALL WHAT EFFORTS YOU AND YOUR CO-COUNSEL
23 MADE TO FIND THE MENTAL HEALTH RECORDS?

24 A WELL, WE GOT RECORDS FROM EVERY PHYSICIAN OR
25 PSYCHIATRIST OR PSYCHOLOGIST THAT HAD CONTACT WITH MR.

JAMES BOYD - CROSS EXAMINATION BY MR. SALTER

1 ROBERTSON AND THE FAMILY, TO MY KNOWLEDGE, THAT WAS
2 PRETTY EXHAUSTING.

3 I REMEMBER-- I THINK WE HAD SOME DIFFICULTY GETTING THE
4 RECORD FROM MR. MEYER. HE ACTUALLY RETAINED A LAWYER AND
5 TRIED TO PREVENT US FROM GETTING THOSE RECORDS, AND THERE
6 WAS A COURT HEARING ON THAT, I BELIEVE.

7 BUT, BASICALLY, LIKE I SAID, WE FOUND EVERY DOCTOR OR
8 PSYCHIATRIST OR PSYCHOLOGIST THAT HAD DEALT WITH THE
9 FAMILY.

10 Q YOU WERE ASKED EARLIER IF YOU HAD ANY INFO WITH REGARD
11 TO THE EXPERTS WHO WERE BEING USED IN THE CASE, AND I BELIEVE
12 YOU INDICATED YOU DIDN'T OBJECT, BUT YOU DIDN'T HAVE ANY
13 PROBLEMS WITH WHAT WAS BEING DONE. CORRECT?

14 A NO, I DID NOT.

15 Q AND THAT INCLUDED UP UNTIL THE TIME OF TRIAL. IS THAT
16 CORRECT?

17 A THAT'S CORRECT.

18 Q NOW, WITH RESPECT TO YOUR OVERALL STRATEGIC POSITIONS,
19 DID Y'ALL KEEP MR. ROBERTSON ADVISED OF ALL THOSE?

20 A YES.

21 Q AND HE SEEMED TO UNDERSTAND YOUR DISCUSSIONS?

22 A YES; HE DID.

23 Q NOW, YOU AND YOUR CO-COUNSEL DISCUSSED WITH MR.
24 ROBERTSON WHETHER OR NOT HE SHOULD TESTIFY. CORRECT?

25 A THAT'S CORRECT.

1 Q DID Y'ALL HAVE A DISCUSSION CONCERNING HIS DECISION TO
2 TESTIFY BEFORE THE TRIAL OR DURING THE TRIAL, OR DO YOU
3 RECALL WHEN THAT WOULD HAVE BEEN?

4 A I DON'T RECALL THE DISCUSSIONS BEFORE THE TRIAL. I'M SURE
5 THAT WAS DISCUSSED. WE HAD-- OF COURSE, IN DISCUSSING IT WITH
6 HIM BEFORE THE TRIAL, SINCE HE HAD ADMITTED TO US THAT HE
7 COMMITTED THE OFFENSE, IT WASN'T A QUESTION, YOU KNOW, OF
8 WHETHER HE WAS GONNA PLEAD NOT GUILTY, AND THEN GET UP AND
9 TELL WHAT HAPPENED.

10 I REMEMBER DISCUSSION AS FAR AS THE PENALTY PHASE OF IT.
11 THERE WAS A LOT OF DISCUSSION BETWEEN MR. ROBERTSON AND MR.
12 HANCOCK AND MYSELF CONCERNING THAT.

13 Q WOULD THAT HAVE BEEN BECAUSE OF MS. CASCIO'S
14 TESTIMONY?

15 A I DON'T RECALL IF THAT HAD ANYTHING TO DO WITH IT. IT WAS
16 BASICALLY, JIMMY FELT LIKE HE COULD GET UP, HE COULD TESTIFY
17 ABOUT A LOT OF THINGS THAT WENT ON IN THE FAMILY. AND HE
18 COULD HAVE TESTIFIED ABOUT THAT.

19 Q AND WAS THERE A FEELING BETWEEN YOU AND CO-COUNSEL
20 THAT THAT WOULD NOT HAVE BEEN BENEFICIAL TO HIM?

21 A YES, THAT WAS MY STRONG OPINION, THAT HE SHOULDN'T
22 HAVE TESTIFIED.

23 Q BECAUSE WHY?

24 A WELL, I THINK MS. CASCIO'S TESTIMONY BASICALLY
25 HIGHLIGHTED WHY HE SHOULDN'T TESTIFY. THAT WOULD HAVE BEEN

JAMES BOYD - CROSS EXAMINATION BY MR. SALTER

1 AN OPPORTUNITY FOR MR. POPE TO GO THROUGH WITH MR.
2 ROBERTSON EVERY SINGLE THING THAT HAPPENED DURING THAT
3 NIGHT, THE BLOW BY BLOW DESCRIPTION OF IT, IN FRONT OF THE
4 JURY. AND I THINK THAT WOULD HAVE BEEN EXTREMELY HARMFUL,
5 FOR HIM TO TESTIFY.

6 Q YOU WERE ASKED ABOUT CHIP ROBERTSON, AND WHETHER OR
7 NOT Y'ALL WOULD USE HIM AS A WITNESS, AND I BELIEVE YOU
8 INDICATED HE WAS PRETTY MUCH UNAVAILABLE TO YOU?

9 A YES, THAT'S CORRECT.

10 Q DO YOU RECALL WHETHER OR NOT YOU AND CO-COUNSEL
11 SPOKE TO MS. MOON?

12 A I SPOKE TO HER. SHE WAS REPRESENTED BY COUNSEL.

13 Q DO YOU KNOW OF ANYTHING THAT SHE MIGHT HAVE BEEN
14 ABLE TO TESTIFY TO , DURING THE GUILT PHASE, SOME SORT OF
15 MITIGATION EVIDENCE THAT WASN'T ALREADY DEVELOPED?

16 A NOT GUILT PHASE. WITHOUT TALKING TO HER-- I DON'T KNOW
17 ABOUT MITIGATING. I SUPPOSE SHE COULD HAVE TESTIFIED ABOUT
18 HE WAS UNDER THE INFLUENCE OF DRUGS OR SOMETHING OF THAT
19 NATURE, POTENTIALLY. BUT I WOULDN'T CONSIDER HER TO BE A
20 VERY HELPFUL WITNESS TO THE DEFENSE ON EITHER PART.

21 Q DO YOU RECALL WHETHER OR NOT Y'ALL ATTEMPTED TO
22 EXPLOIT THE POSSIBILITY OF AN INSANITY DEFENSE?

23 A WELL, THAT'S ALWAYS A QUESTION IN A CASE OF THIS NATURE,
24 BUT THERE WAS NO DOCTOR OR PSYCHIATRIST OR ANYONE WHO
25 THOUGHT THAT HE WAS LEGALLY INSANE.

1 Q DID YOUR EXPERTS INDICATE TO YOU THAT HE LACKED THE
2 CAPACITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE
3 LAW?

4 A THERE WAS-- I DON'T BELIEVE THEY STATED THAT. THERE WAS
5 TESTIMONY THAT AT THE TIME IT HAPPENED HE WAS UNDER THE
6 INFLUENCE OF THE DRUGS, BUT I DON'T THINK THAT WOULD COME
7 UNDER THE DEFINITION.

8 Q IS THAT WHY THE DEFENSE RESISTED THE STATE'S EVIDENCE TO
9 HAVE AN EVALUATION PRIOR TO TRIAL?

10 A WELL, WE RESISTED THOSE EFFORTS. ONE: THAT WOULD BE AN
11 OPPORTUNITY FOR THE STATE TO GATHER INFORMATION ON HIM TO
12 POTENTIALLY, THAT COULD BE USED AGAINST HIM. ANY STATEMENTS
13 HE MADE COULD BE USED AGAINST HIM POTENTIALLY. ANY KIND OF--
14 NOT KNOWING EXACTLY WHAT HE WOULD HAVE SAID. IT'S OF NO
15 BENEFIT TO THE DEFENSE TO CONSENT TO AN EVALUATION BY THE
16 PROSECUTION.

17 Q NOW, THE JUDGE ULTIMATELY ORDERED THE EVALUATION.
18 CORRECT?

19 A THAT'S CORRECT.

20 Q DO YOU RECALL WHETHER OR NOT YOU AND YOUR CO-
21 COUNSEL WOULD SIT DOWN, OR WHETHER OR NOT Y'ALL DID SIT
22 DOWN AND TALK TO MR. ROBERTSON AND EXPLAIN TO HIM THE
23 REASON FOR THE EVALUATION?

24 A YES.

JAMES BOYD - CROSS EXAMINATION BY MR. SALTER

1 Q DO YOU RECALL WHAT YOU WERE ABLE TO ADVISE HIM WITH
2 RESPECT TO THAT?

3 A I RECALL WE ADVISED HIM, I BELIEVE, TO TAKE THE FIFTH
4 AMENDMENT AS FAR AS ANY DETAILS ABOUT THE CRIME.

5 MR. BROWN: I'M SORRY. COULD YOU REPEAT THAT ANSWER?

6 A WE ADVISED HIM TO TAKE THE FIFTH AMENDMENT
7 CONCERNING ANY DETAILS ABOUT THE CRIME.

8 Q NOW, WITH RESPECT TO EFFORTS TO NEGOTIATE A PLEA, WERE
9 YOU EVER MADE AWARE OF A SUPPOSED OFFER OR PLEA BARGAIN
10 EXTENDED BY KEVIN BRACKETT TO CHIP ROBERTSON'S ATTORNEY?

11 A I HEARD THAT, I BELIEVE, FROM CHIP ROBERTSON'S ATTORNEY,
12 SOMETHING TO THE EFFECT THAT IT HAD BEEN TOLD TO HIM BY MR.
13 BRACKETT THAT IF HE CONTRIBUTED THE, SOME AMOUNT OF MONEY,
14 OR MAYBE THE ENTIRE ESTATE TO SOME CHARITY, THAT THEY
15 WOULD AGREE TO A LIFE SENTENCE.

16 I REMEMBER TALKING TO MR. POPE AND MR. BRACKETT ABOUT
17 IT. THIS WAS DURING THE TRIAL ITSELF, IF I RECALL, TALKING TO
18 THEM ABOUT IT. MR. BRACKETT SAID-- BECAUSE IT RAISED SOME
19 ETHICAL CONCERNS. SO, FRANKLY, I DIDN'T THINK IT WAS PROBABLY
20 SERIOUS. AND I DID TALK TO MR. POPE AND MR. BRACKETT ABOUT IT
21 AND MR. BRACKETT SAID THAT HE HAD BEEN JOKING AROUND WITH
22 MR. GILLEN WHEN HE SAID THAT AT THAT POINT. AND I TOOK MR.
23 BRACKETT AT HIS WORD ON THAT AND HAD NO REASON TO BELIEVE
24 OTHERWISE.

1 Q AND MR. POPE WOULD HAVE BEEN THE ONE WHO WOULD HAVE
2 THE POWER TO SAY SO?

3 A THAT'S CORRECT.

4 Q AND HE DIDN'T AGREE TO SUCH A PLEA?

5 A NO. IT WAS NEVER ANY DISCUSSION BETWEEN THE DEFENSE
6 AND MR. BRACKETT ABOUT IT. THIS WAS JUST SOMETHING I'D BEEN
7 TOLD. IT WAS BASICALLY TELLING MR. POPE, LOOK HERE, THIS IS
8 WHAT I'VE BEEN TOLD. IT WASN'T EVEN SOMETHING WE WERE
9 TALKING ABOUT AGREEING TO. I DON'T THINK IT WOULD HAVE BEEN
10 ETHICAL TO MAKE SUCH AN AGREEMENT.

11 BUT BECAUSE IT WAS AN ETHICAL CONCERN I APPROACHED
12 THEM ABOUT IT PRIVATELY. I DIDN'T THINK SUCH AN OFFER HAD
13 BEEN SERIOUS MADE, EVEN BEFORE I TOLD THEM. BUT I SAID THAT'S
14 WHAT I'M HEARING.

15 Q WITH RESPECT TO THE VARIOUS EXPERTS THAT Y'ALL
16 EMPLOYED, DO YOU RECALL WHETHER OR NOT EACH ATTORNEY
17 WOULD HAVE SAT DOWN WITH THE EXPERT THAT HE WAS GOING TO
18 HANDLE, OR DID Y'ALL SIT DOWN TOGETHER, FOR THE MOST PART?
19 HOW DID Y'ALL WORK THAT OUT?

20 A WELL, WE SAT DOWN TOGETHER WITH ALL OF THEM. WE HAD
21 MORE THAN ONE MEETING WITH ALL OF THEM. WE MET-- MR.
22 HANCOCK AND I WENT TO WASHINGTON, DC AND MET WITH DOCTOR
23 PINCUS. WE MET WITH DOCTOR EVANS AT THE DEATH PENALTY
24 RESOURCE CENTER IN COLUMBIA. I THINK MR. HANCOCK ALSO, PRIOR
25 TO HIS TESTIMONY, WENT OVER SOME MATTERS WITH DOCTOR EVANS

JAMES BOYD - CROSS EXAMINATION BY MR. SALTER

1 WHILE I WAS DOING SOMETHING ELSE. I DON'T REMEMBER WHAT
2 EXACTLY WHAT I WAS DOING.

3 I MET WITH DOCTOR MORTON TWICE WITHOUT MR. HANCOCK. I
4 THINK I MET WITH MS. CASCIO ONCE WITHOUT, DOCTOR CASCIO, ONCE
5 WITHOUT MR. HANCOCK.

6 DOCTOR MORTON CAME UP THE NIGHT BEFORE HIS TESTIMONY
7 AND I MET HIM AT HIS MOTEL AND WENT THROUGH HIS TESTIMONY
8 WITH HIM.

9 Q NOW, WITH RESPECT TO THE VARIOUS EXPERTS YOU HAD, DID
10 ANY OF THEM EVER REQUEST ADDITIONAL INFORMATION IN ORDER
11 TO RENDER AN OPINION?

12 A IF THEY DID, IT WAS PROVIDED TO THEM.

13 Q SO, YOU DON'T RECALL ANY OF THEM EVER TELLING YOU THAT
14 THEY HAD INSUFFICIENT INFORMATION TO RENDER AN OPINION?

15 A NOT THAT I RECALL.

16 Q I BELIEVE YOU INDICATED THAT YOU COULDN'T RECALL
17 WHETHER OR NOT YOU SPOKE TO DOCTOR McMEEKIN?

18 A I DON'T RECALL SPEAKING TO DOCTOR McMEEKIN.

19 Q BUT Y'ALL HAD HIS RECORDS?

20 A THAT'S CORRECT.

21 Q SO, Y'ALL HAD THAT INFORMATION. THE GOOD THAT YOU
22 COULD HAVE GOTTEN FROM HIM YOU ALREADY HAD. IS THAT
23 CORRECT?

24 A THAT'S CORRECT.

25 Q AND Y'ALL COULD GIVE THAT TO YOUR EXPERTS?

- 1 A YES.
- 2 Q AND THEY COULD UTILIZE IT AS THEY SAW BEST. CORRECT?
- 3 A THAT'S CORRECT.
- 4 Q AND YOU'VE INDICATED THAT YOU DIDN'T SEE HOW IT
- 5 WOULDN'T HAVE BEEN OF BENEFIT PUTTING HIM UP AND ALLOWING
- 6 HIM TO EXPLAIN ANY OVER-PRESCRIPTION OF RITALIN. CORRECT?
- 7 A THAT'S CORRECT.
- 8 Q WERE YOU AWARE OF ANY DISCIPLINARY PROBLEMS THAT HE
- 9 HAD AT SOME PERIOD BEFORE THE TRIAL?
- 10 A I DON'T REMEMBER WHEN I BECAME AWARE OF THAT. I THINK
- 11 THAT HAD BEEN CHECKED OUT AT SOME TIME PRIOR TO DOCTOR
- 12 MORTON'S TESTIMONY, OR I THINK PRIOR TO TRIAL WE WERE AWARE
- 13 OF THAT.
- 14 Q AND DOCTOR MORTON WAS VERY CRITICAL OF THE MANNER IN
- 15 WHICH DOCTOR McMEEKIN HAD HANDLED MR. ROBERTSON AND THE
- 16 ENTIRE FAMILY. CORRECT?
- 17 A THAT'S CORRECT.
- 18 Q SO, Y'ALL MADE A DECISION TO CALL HIM AS A WITNESS?
- 19 A THAT'S CORRECT.
- 20 Q AND Y'ALL NEEDED HIS TESTIMONY. CORRECT?
- 21 A THAT'S CORRECT.
- 22 Q NOW, WOULD THERE HAVE BEEN A PROBLEM IF YOU PUT HIM UP
- 23 AS A WITNESS, WOULD THERE HAVE THEN BE A PROBLEM TO PUT UP A
- 24 DOCTOR OF WHOM HE'S BEEN SO CRITICAL AS YOUR WITNESS?

JAMES BOYD - CROSS EXAMINATION BY MR. SALTER

1 A WELL, IT COULD. TYPICALLY, IF DOCTOR McMEEKIN HAD BEEN
2 ABLE TO GIVE GOOD EXPLANATIONS OF DOING WHAT HE HAD DONE.

3 Q SO, TO PUT HIM UP IN THAT SITUATION COULD POTENTIALLY
4 UNDERMINE THE GOOD THAT WAS DONE BY DOCTOR MORTON. IS
5 THAT CORRECT?

6 A THAT'S POSSIBLE.

7 Q WITH RESPECT TO MS. CASCIO, DID YOU AND CO-COUNSEL
8 WORK WITH HER AND TRY TO PREPARE HER FOR WHAT WOULD
9 HAPPEN ON CROSS EXAMINATION?

10 A WE WENT OVER SOME THINGS, YES. THE EXACT DETAILS I CAN'T
11 REMEMBER AFTER THIS PERIOD OF TIME.

12 Q DID YOU EXPLAIN TO HER THAT THE NOTES THAT SHE HAD
13 TAKEN WOULD BE SOMETHING THAT THE SOLICITOR BE ABLE TO
14 QUESTION HER ABOUT?

15 A YES, I'M SURE WE DID. AGAIN, THE DETAILS I CAN'T REMEMBER
16 AT THIS TIME.

17 Q AND Y'ALL MADE A DECISION TO PUT HER UP, KNOWING THAT
18 THE NOTES WOULD HAVE TO BE DISCUSSED UNDER RULE 705, THAT
19 WOULD BE REQUIRED?

20 A THAT'S CORRECT.

21 Q AND YOU WERE ASKED WHETHER OR NOT YOU THOUGHT SHE
22 WAS A DAMAGING WITNESS TO YOU. DID YOU HAVE THE SAME
23 ASSESSMENT AT THE END OF YOUR DIRECT EXAMINATION OF HER?

24 A AT THE END OF DIRECT EXAMINATION?

25 Q YES.

1 A I THOUGHT SHE HAD DONE WELL ON HER DIRECT EXAMINATION.

2 Q WASN'T SHE ABLE TO KIND OF PULL THINGS TOGETHER, OR
3 DRAW THINGS TOGETHER THAT THE OTHER EXPERTS WERE KIND OF A
4 LITTLE BIT SCATTERED ON?

5 A WELL, THAT WAS THE PURPOSE OF HAVING HER AS A WITNESS.

6 Q AND SHE DID THAT JOB WELL?

7 A YES, I WOULD SAY SO.

8 Q THE PROBLEM IS THAT SOLICITOR POPE CROSS EXAMINED HER
9 FROM HER NOTES?

10 A THAT'S CORRECT.

11 Q DO YOU RECALL WHETHER OR NOT Y'ALL MADE ANY EFFORTS
12 TO GET A DIFFERENT SOCIAL WORKER?

13 A NOT THAT I RECALL.

14 Q AND SHE'D BEEN RECOMMENDED BY THE RESOURCE CENTER.
15 CORRECT?

16 A I BELIEVE SO, YES.

17 Q AND MS. GLASS FROM THE RESOURCE CENTER WAS THERE WITH
18 Y'ALL?

19 A THAT'S CORRECT.

20 Q DO YOU RECALL WHETHER MS. GLASS SAID NO, DON'T PUT HER
21 UP ON THE STAND IF SHE'S GOT THESE NOTES?

22 A NO, I DON'T RECALL THAT. I DON'T KNOW IF MS. GLASS HAD
23 EVER READ THE NOTES, BUT I DON'T RECALL HER SAYING THAT.

JAMES BOYD - CROSS EXAMINATION BY MR. SALTER

1 Q HAS IT EVER BEEN-- IN YOUR YEARS OF EXPERIENCE HAS IT
2 EVER BEEN YOUR PRACTICE TO TELL AN EXPERT THAT YOU'VE
3 EMPLOYED HOW TO GO ABOUT HIS OR HER FIELD OF EXPERTISE?

4 A NO, NOT GENERALLY.

5 Q DO YOU BELIEVE THAT IS THEIR POSITION?

6 A YES.

7 Q YOU INDICATED ON DIRECT EXAMINATION THAT THE LACK OF
8 EXPERIENCE WOULD NOT BE A KEY REASON FOR NOT PUTTING UP A
9 WITNESS.

10 A THAT'S CORRECT.

11 Q WHY IS THAT?

12 A WELL, I THINK THAT'S NOT NECESSARILY AN INDICATION OF
13 WHY, OF HOW WELL A WITNESS WILL DO ON THE WITNESS STAND.
14 JUST FOR AN EXAMPLE, I ALSO HANDLED SOME MEDICAL
15 MALPRACTICE LITIGATION AND I THINK IN THOSE CIRCUMSTANCES
16 OFTENTIMES THE EXPERT THAT HAS NOT TESTIFIED BEFORE IS BETTER
17 OFF.

18 IF YOU GET ONE THAT HAS TOO MUCH EXPERIENCE THEY'RE
19 ATTACKED AS A HIRED GUN. OFTENTIMES THEY HAVE A TRAIL. I'VE
20 HAD SOME BAD EXPERIENCES IN CIVIL CASES WITH SOME EXPERTS
21 THAT HAVE TOO MUCH EXPERIENCE.

22 Q WITH RESPECT TO WHETHER OR NOT SHE WAS BOXED IN BY THE
23 STATE ON CROSS EXAMINATION WERE YOU NOT ABLE TO ON RE-
24 DIRECT TO DEVELOP ANYTHING THAT YOU FELT WHERE SHE'D BEEN
25 BOXED IN?

1 A I THINK I DID A RE-DIRECT, BUT I DON'T REMEMBER WHAT I
2 ASKED AT THAT TIME OR ANY OF THE DETAILS OF THAT.

3 MR. SALTER: I DON'T BELIEVE I HAVE ANYTHING FURTHER,
4 YOUR HONOR.

5 RE-DIRECT EXAMINATION BY MR. BROWN:

6 Q ON RE-DIRECT EXAMINATION OF MS. CASCIO, STARTING WITH
7 2856, QUESTION BY YOU:

8 "Q. WHAT WERE YOU ASKED TO DO IN REFERENCE TO THIS
9 CASE?

10 A. I WAS ASKED TO CONDUCT A SOCIAL HISTORY ASSESSMENT.

11 Q. OF WHO?

12 A. OF JIMMY ROBERTSON.

13 Q. OKAY. AND WHAT IS A SOCIAL HISTORY ASSESSMENT?

14 A. IN A SOCIAL HISTORY ASSESSMENT, WHAT YOU DO IS GET A
15 VARIETY OF DATA FROM A NUMBER OF DIFFERENT SOURCES.
16 YOU SIT DOWN, YOU ANALYZE IT, YOU SYNTHESIZE IT, YOU TRY
17 TO COME UP WITH WHAT'S THE DEFINITION OF THE PROBLEM.
18 AND THEN YOU LOOK AT WHAT FACTORS CONTRIBUTED TO
19 THAT PROBLEM AND MAINTAINED THAT PROBLEM.

20 Q. WHAT DID YOU DO IN YOUR ASSESSMENT OF THIS CASE?
21 WHAT DID YOUR ASSESSMENT IN THIS CASE CONSIST OF IN
22 GENERAL TERMS OF HOW'D YOU GO ABOUT IT?

23 A. I LOOKED AT A VARIETY OF DOCUMENTS HAVING TO DO
24 WITH THE ROBERTSON FAMILY. I LOOKED AT MEDICAL AND
25 PSYCHOLOGICAL RECORDS FROM ALL MEMBERS OF THE

JAMES BOYD - RE-DIRECT EXAMINATION BY MR. BROWN

1 FAMILY. I ALSO EXAMINED EARL ROBERTSON'S WORK
2 DOCUMENTS, SOME OF JIMMY'S INCARCERATION DOCUMENTS,
3 THE PERSONAL NOTEBOOKS OF TERRY ROBERTSON. I ALSO
4 CONDUCTED ABOUT THIRTEEN INTERVIEWS WITH PEOPLE WHO
5 WERE FROM A VARIETY OF AREAS OF JIMMY'S LIFE."

6 IS THAT CORRECT?

7 A THAT'S CORRECT.

8 Q NOWHERE IN THERE DOES SHE SAY SHE EVER INTERVIEWED
9 JIMMY. IS THAT CORRECT?

10 A NO, SHE DOESN'T.

11 Q AS A MATTER OF FACT, HER JOB IN THIS CASE WAS NOT TO GET
12 INTO THE DETAILS OF THIS CRIME, BUT TO CONDUCT A SOCIAL
13 HISTORY OF WHAT LED UP TO THIS PROBLEM.

14 A THAT'S CORRECT.

15 Q SO, SHE BASICALLY WENT ON A FISHING EXPEDITION NOT
16 RELATED TO WHAT SHE WAS THERE FOR.

17 A I DON'T KNOW HOW MUCH DETAIL SHE NEEDS TO GET TO
18 RELATE WHAT HAPPENED TO THE SOCIAL HISTORY. SO, I DON'T KNOW
19 AS I'M QUALIFIED TO ANSWER THAT. BUT IT WASN'T HER JOB TO GET
20 DETAILS OF THE CRIME, IF THAT'S WHAT YOU'RE SAYING.

21 Q BUT AS WE ALL KNOW, SHE DID THAT ANYWAY. IS THAT
22 CORRECT?

23 A THAT'S CORRECT.

24 Q WOULD IT BE SAFE TO SAY, OR, COULD ONE OF THE
25 CONTRIBUTING FACTORS TO HER GOING BEYOND THE SCOPE OF HER

1 EMPLOYMENT, FOR LACK OF A BETTER TERM, WAS HER
2 INEXPERIENCE?

3 A THAT'S A POSSIBILITY.

4 Q MR. SALTER ASKED YOU ABOUT THE MENTAL ILLNESS. DID NOT
5 DOCTOR PINCUS TESTIFY ON RE-CROSS BY MR. BRACKETT THAT IT
6 WAS THAT EXPERIENCE, PLUS THE PSYCHIATRIC DISEASE, PLUS THE
7 NEUROLOGICAL DISEASE AND THE DRUGS THAT BROUGHT HIM TO
8 THIS TERRIBLE, TERRIBLE SITUATION AND THIS TERRIBLE, TERRIBLE
9 ACT?

10 A THAT'S CORRECT.

11 Q THAT WOULD QUALIFY AS MENTAL ILLNESS, WOULD IT NOT?

12 A YES. WELL, THE DRUGS PART WOULD, YES.

13 Q AND ALSO, ON DIRECT BY MR. HANCOCK, DID HE NOT ALSO
14 TESTIFY, "WELL, IT WAS AN IMPULSE. THE NERVES WERE NOT ONLY
15 STIMULATED BY THE DRUGS HE WAS ON. AND THE MANIA HE WAS
16 HAVING WAS ALSO NOT CHECKED BY THE FUNCTIONING OF HIS
17 FRONTAL LOBE AT THE TIME, WHICH WAS NOT WORKING WELL
18 BECAUSE OF THE MEDICINE HE HAD TAKEN AND BECAUSE OF THE
19 ALCOHOL THAT HE HAD DRUNK AND BECAUSE THE STATUS OF HIS
20 BRAIN TO BEGIN WITH. THE THREE THINGS COMBINED, THE DISEASE,
21 THE DRUGS HE WAS ON, THE DAMAGE HE WAS ALREADY CARRYING."?

22 A THAT'S CORRECT.

23 Q AND YOU WOULD AGREE WITH ME THAT WOULD QUALIFY AS A
24 MENTAL ILLNESS. CORRECT?

25 A YES.

1 MR. BROWN: NO FURTHER QUESTIONS.

2 MR. SALTER: VERY BRIEFLY.

3 RE-CROSS EXAMINATION BY MR. SALTER:

4 Q YOU WERE ASKED ABOUT WHETHER OR NOT MS. CASCIO WAS
5 ON A FISHING EXPEDITION WITH RESPECT TO HER CONFERRING WITH
6 YOUR CLIENT. IS IT FAIR TO SAY THAT SINCE YOU ADVISED YOUR
7 CLIENT TO INVOKE THE FIFTH AMENDMENT WITH RESPECT TO
8 ANYTHING ABOUT THE CRIME WHEN HE SPOKE WITH DOCTOR McKEE,
9 AND HE DIDN'T DO IT, IS IT FAIR TO SAY THAT TELLING YOUR CLIENT
10 TO KEEP HIS MOUTH SHUT WITH OTHER PEOPLE, THAT THAT'S KIND OF
11 A HARD THING FOR YOU TO?

12 MR. BROWN: YOUR HONOR, I'M GOING TO OBJECT TO THAT
13 BECAUSE HE HAS NO INPUT IN PREPPING HIS OWN WITNESS. IT'S NOT
14 A---

15 THE COURT: WELL, I DON'T THE QUESTION RELATED TO THE
16 FIFTH AMENDMENT. I THINK THE QUESTION WAS WHETHER OR NOT IT
17 WAS DIFFICULT TO KEEP JIMMY ROBERTSON'S MOUTH SHUT.

18 MR. BROWN: YOUR HONOR, I WILL STIPULATE TO THAT.

19 THE COURT: YOU WILL STIPULATE THAT IT IS DIFFICULT?

20 (NO RESPONSE)

21 I'M GOING TO GO AHEAD AND LET THE WITNESS ANSWER THE
22 QUESTION.

23 A IM NOT SURE I UNDERSTOOD THE QUESTION.

24 Q IN LIGHT OF THE FACT THAT YOU ADVISED YOUR CLIENT NOT
25 TO SPEAK TO DOCTOR McKEE ABOUT THE FACTS CONCERNING THE

1 CRIME, AND HE ULTIMATELY DID SO, ISN'T IT FAIR TO SAY THAT HE
2 WOULD HAVE A HARD TIME KEEPING HIS MOUTH SHUT WITH RESPECT
3 TO WHAT HAPPENED ON NOVEMBER 25?

4 A I THINK THAT WOULD BE A FAIR STATEMENT.

5 RE-DIRECT EXAMINATION BY MR. BROWN:

6 Q WOULD THAT NOT BE PART OF COUNSEL'S JOB, TO KEEP HIS
7 MOUTH SHUT?

8 A YES.

9 Q THAT WAS PART OF YOU AND MR. HANCOCK'S JOB?

10 A I AGREE.

11 Q AND THAT WAS ALSO PART OF MS. CASCIO'S JOB, NOT TO GO
12 INTO THINGS SHE'S GOT NO BUSINESS GOING INTO, KNOWING SHE
13 COULD BE CROSS EXAMINED ON THEM.

14 A THAT WOULD BE TRUE, TOO.

15 Q AND THAT WASN'T DONE IN THIS CASE, WAS IT?

16 A NO.

17 MR. BROWN: NO FURTHER QUESTIONS.

18 THE COURT: MR. BOYD, I WANT TO ASK YOU A FEW QUESTIONS
19 ABOUT THAT SAME SUBJECT OF DOCTOR CASCIO.

20 A YES SIR.

21 THE COURT: YOU TESTIFIED THAT YOU DIDN'T RECALL
22 PRECISELY WHEN YOU RECEIVED THE NOTES FROM DOCTOR CASCIO.

23 A THAT'S CORRECT.

1 THE COURT: DO YOU RECALL GENERALLY? WAS IT JUST
2 BEFORE TRIAL, WAS IT WEEKS OR MONTHS BEFORE TRIAL? DO YOU
3 RECALL GENERALLY?

4 A I THINK THE RAW NOTES THEMSELVES WAS SOME TIME EITHER
5 RIGHT BEFORE OR DURING THE TRIAL.

6 Q DO YOU RECALL WHEN WAS THE FIRST TIME THAT YOU
7 REALIZED THAT JIMMY HAD MADE THESE STATEMENTS ABOUT THE
8 CRIME ITSELF TO DOCTOR CASCIO? WAS IT WHEN YOU RECEIVED THE
9 NOTES OR WAS IT SOMETIME BEFOREHAND?

10 A I BELIEVE IT WAS WHEN WE RECEIVED THE NOTES.

11 THE COURT: NOW, AS I RECALL THE DISCUSSION WE HAD
12 EARLIER TODAY, DOCTOR CASCIO HAD FOUR INTERVIEWS WITH
13 JIMMY, AND THE LAST ONE WAS DECEMBER 7, OR THEREABOUTS, OR
14 '98?

15 A THAT'S CORRECT.

16 THE COURT: SO, THOSE STATEMENTS HAD TO HAVE BEEN MADE
17 TO HER BEFORE, ON OR BEFORE THAT TIME?

18 A THAT'S CORRECT.

19 THE COURT: DURING THAT PERIOD BETWEEN DECEMBER AND
20 MARCH YOU DON'T THINK YOU KNEW THAT HE MADE SIMILAR, THOSE
21 TYPES OF STATEMENTS TO HER UNTIL YOU GOT INTO THE TRIAL?

22 A I DON'T BELIEVE SO. WE MAY HAVE HAD DISCUSSIONS WITH
23 HER THAT SHE RELATED SOMETHING ABOUT THAT, BUT NOT THAT I-- I
24 DON'T REMEMBER ANY DISCUSSIONS WITH HER ABOUT THOSE KIND OF
25 DETAILS.

1 THE COURT: OKAY. IF EITHER OF Y'ALL HAVE ANY QUESTIONS
2 YOU WANT TO ASK IN FOLLOW-UP TO MINE YOU MAY DO SO AT THIS
3 TIME.

4 MR. SALTER: I HAVE NO QUESTIONS, YOUR HONOR.

5 MR. BROWN: JUST ONE, YOUR HONOR.

6 RE-DIRECT EXAMINATION BY MR. BROWN:

7 Q THE NOTES CAME TO MR. HANCOCK. IS THAT CORRECT? OR AS
8 FAR AS I, AS THE RECORD INDICATES. WOULD THAT BE A CORRECT
9 STATEMENT?

10 A I DON'T REMEMBER HOW THEY CAME, FIRST CAME TO-- THEY
11 CAME-- THE REPORT CAME TO MR. HANCOCK. I DON'T REMEMBER
12 EXACTLY HOW THE NOTES CAME.

13 Q LET ME ASK YOU THIS: AND I HATE TO BEAT THIS DEAD HORSE.
14 BUT SHE WAS HIRED TO DO A SOCIAL HISTORY OF THE ROBERTSON
15 FAMILY, IN ESSENCE. IS THAT CORRECT?

16 A THAT'S CORRECT.

17 Q SHE WAS NOT HIRED TO INVESTIGATE THE CAUSE OR CAUSES OR
18 WHAT HAPPENED IN THE CRIME. IS THAT CORRECT?

19 A WELL,...

20 Q SHE WASN'T CALLED TO TESTIFY ABOUT THE CRIME, WAS SHE?

21 A THAT'S CORRECT.

22 Q COULD IT HAVE BEEN FEASIBLE IN THIS CASE, FOR THE PURPOSE
23 SHE WAS CALLED FOR; I.E., A SOCIAL HISTORY OF THE ROBERTSON
24 FAMILY, THAT THAT'S WHAT SHE WAS GONNA TESTIFY TO, WAS TO
25 SUPPRESS THOSE NOTES AS NOT RELEVANT AS TO WHAT SHE WAS

1 TESTIFYING TO? UNDER RULE 705 OR RULE 5 OR WHATEVER LEGAL
2 THEORY YOU WANT TO PROCEED ON?

3 A THAT WOULD BE A POSSIBLE OBJECTION TO THAT LINE, YES.

4 Q AND THE TRUTH OF THE MATTER IS, ON DIRECT, YOU NEVER
5 WENT INTO WHAT HAPPENED IN THE CRIME; YOU WENT INTO SOCIAL
6 HISTORY. IS THAT CORRECT?

7 A THAT'S CORRECT.

8 MR. BROWN: NO FURTHER QUESTIONS.

9 THE COURT: THANK YOU. YOU MAY STEP DOWN. ALL RIGHT.
10 WE'LL TAKE A SHORT BREAK AND THEN WE'LL-- DO YOU HAVE ONE
11 MORE WITNESS?

12 MR. BROWN: YOUR HONOR, WE HAVE-- CAN I INFORM THE
13 COURT IN ABOUT TWO MINUTES?

14 THE COURT: SURE. YOU CAN EVEN CHANGE YOUR MIND AFTER
15 YOU INFORM THE COURT IF YOU WANT TO. I'M JUST CURIOUS.

16 MR. BROWN: THANK YOU, YOUR HONOR.

17 (WHEREUPON THE COURT WAS IN RECESS AT 2:50 P.M.)

18 COURT IN SESSION - 3:00 P.M.

19 THE COURT: IS THERE SOMETHING YOU WANT TO PUT ON THE
20 RECORD?

21 MR. BROWN: YES SIR, YOUR HONOR. WE HAD PREVIOUSLY
22 STIPULATED THAT ONE OF THE APPLICANT'S EXHIBITS WERE THE
23 NOTES OF DOCTOR CASCIO. DURING MR. BOYD'S CROSS
24 EXAMINATION, MR. ROBERTSON HANDED ME A NOTE STATING HE
25 DIDN'T THINK THEY WERE THE NOTES. FOR THE RECORD, YOUR

1 HONOR, THESE ARE THE NOTES THAT I FOUND IN THE FILE LABELED
2 "DOCTOR CASCIO". IT HAD A REPORT THERE. IT HAD SEVERAL NOTES
3 AND THAT LETTER FROM HANCOCK. IT ALSO HAD THESE NOTES IN
4 THERE. IN CONVERSATION WITH MR. POPE AND MR. SALTER WE WANT
5 TO WITHDRAW THAT STIPULATION NOW. WE HAVE BOTH AGREED
6 THAT ONCE THE REAL NOTES ARE FOUND, ASSUMING ARGUENDO,
7 THESE ARE NOT THEM, THEY WILL BE BY STIPULATION PUT IN THE
8 RECORD.

9 MR. SALTER: THAT'S CORRECT, YOUR HONOR.

10 MR. BROWN: YOUR HONOR, I WILL ALSO NOTE FOR THE RECORD
11 THESE NOTES THAT I HAVE ALLUDED, PREVIOUSLY MARKED
12 APPLICANT'S EXHIBIT, COINCIDE WITH THE SAME DATES IN THE
13 TRANSCRIPT AND VERIFY HE WAS INTERVIEWED BY MS. CASCIO, THAT
14 BEING JULY 17, 1998 AND JULY 22, 1998, AND NOVEMBER 30, 1998. THE
15 DATES ON THESE NOTES MATCH THE SAME DATES IN THE TRANSCRIPT.

16 THE COURT: OKAY. CALL YOUR NEXT WITNESS.

17 MR. MATLOCK: YOUR HONOR, IF IT PLEASE THE COURT. WE
18 CALL JAMES ROBERTSON.

19 THE COURT: WELL, NOW, ARE YOU CALLING HIM IN REPLY?

20 MR. MATLOCK: REPLY, YES SIR.

21 THE COURT: YOU MIGHT WANT TO--

22 MR. MATLOCK: YOUR HONOR, ---

23 THE COURT: I'LL LET YOU DO WHATEVER YOU WANT; I DON'T
24 CARE. BUT I DON'T WANT YOU TO CALL HIM IN REPLY TWICE.

25 MR. MATLOCK: WE WON'T CALL HIM.

1 THE COURT: OKAY. DO Y'ALL HAVE ANY OTHER WITNESSES I
2 YOUR CASE IN CHIEF?

3 MR. BROWN: NO SIR.

4 THE COURT: OKAY. WELL, WHO IS THIS WITNESS THAT'S GOING
5 TO, THAT I WAS ASKING ABOUT A MINUTE AGO THAT Y'ALL-- IS THAT
6 SOMEBODY YOU'RE GOING TO CALL?

7 MR. BROWN: THAT'S HIS WITNESS, YOUR HONOR.

8 THE COURT: I SEE.

9 MR. BROWN: PART OF OUR STIPULATION.

10 THE COURT: GO AHEAD, THEN.

11 MR. SALTER: YOUR HONOR, THE STATE WOULD CALL MICHAEL
12 STOBEE.

13 MICHAEL STOBEE, DULY SWORN,

14 TESTIFIED AS FOLLOWS:

15 DIRECT EXAMINATION BY MR. SALTER:

16 Q MR. STOBEE, WOULD YOU PLEASE STATE YOUR FULL NAME FOR
17 THE RECORD AND SPELL YOUR LAST NAME?

18 A MICHAEL JOHN STOBEE, S-T-O-B-E-E.

19 Q WHERE ARE YOU CURRENTLY EMPLOYED AND IN WHAT
20 POSITION?

21 A I'M THE BRANCH CHIEF AT THE SOUTH CAROLINA DEPARTMENT
22 OF CORRECTIONS IN THE INMATE RECORDS OFFICE.

23 Q WHAT DO YOUR DUTIES ENTAIL AS BRANCH CHIEF?

24 A BASICALLY, CUSTODIAN OF RECORDS. AND I IMMEDIATELY
25 SUPERVISE THE DOCUMENT PROCESSING AND RELEASE SECTION

1 STAFF. IN GENERAL, ANY DOCUMENT THAT COMES IN ON AN INMATE
2 PAST THE SECOND DAY THAT THEY'RE INDUCTED INTO SCDC, MY
3 PEOPLE ANALYZE AND STICK IT IN THE COMPUTER. OF COURSE, WE
4 CHECK THE RECORDS RIGHT BEFORE THE INMATES ARE RELEASED TO
5 MAKE SURE THAT EVERYBODY'S DONE THE TIME THEY'RE SUPPOSED
6 TO, AND THAT WE RELEASE THE INMATES TO THE WARRANTING
7 AGENCIES THAT WANT THEM AND MAKE SURE THE RIGHT GUY GETS
8 OUT AT THE RIGHT TIME.

9 Q SO, YOU'RE THE RECORDS CUSTODIAN?

10 A RIGHT.

11 Q NOW, I'VE ASKED YOU TO BRING CERTAIN RECORDS PERTAINING
12 TO JAMES ROBERTSON.

13 A YES SIR. JAMES KENNEALLY, THE RECORDS MANAGEMENT
14 AREA PERSONNEL, GAVE ME THE CENTRAL RECORD OF MR.
15 ROBERTSON.

16 Q NOW, THE CENTRAL RECORD, TELL US WHAT THAT IS.

17 A BASICALLY, THE SENTENCING SHEETS; ALL THE COMPUTER
18 INFORMATION THAT WE GENERATE, TO A CERTAIN DEGREE. ANY
19 WARRANT, ARREST WARRANT INFORMATION THAT MIGHT STILL BE
20 PENDING AS FAR AS ADJUDICATION.

21 AND THEN, DISCIPLINARY-TYPE THINGS THAT HAPPEN TO THE
22 INMATE WHILE HE'S AT THE INSTITUTION. AND IF THAT GENERATES
23 CORRESPONDENCE WITH, LIKE, OUR LEGAL OFFICE, OR WITH OUR
24 OFFICE, THAT'S MAINTAINED THERE IN THE CENTRAL RECORD ALSO.

1 Q AND THE RECORDS THAT HAVE IN YOUR POSSESSION, ARE
2 THOSE GENERATED MORE OR LESS CONTEMPORANEOUSLY WITH THE
3 EVENTS THAT OCCUR?

4 A YES.

5 Q DO YOU HAVE THE DISCIPLINARY RECORDS OF MR. ROBERTSON?

6 A I HAVEN'T EXACTLY GONE THROUGH THEM AND TICKED THEM
7 OFF. I HAVE THE AUTOMATED DUMP FROM THE COMPUTER AND I DO
8 KNOW THAT THERE ARE QUITE A FEW DISCIPLINARIES WITHIN THE
9 CENTRAL RECORDS.

10 Q ALL RIGHT. WOULD YOU LOOK AT THOSE RECORDS, IF YOU
11 WOULD. AND STARTING WITH THE DATE OF NOVEMBER, 1997 FOR MR.
12 ROBERTSON, CAN YOU TELL ME THE VERY FIRST DISCIPLINARY
13 ACTION YOU SEE THERE FOR WHICH HE RECEIVED A DISCIPLINARY
14 PROCEDURE FOR VIOLATION OF SCDC RULES AND REGS?

15 A I'M SORRY, SIR. WHAT WAS THE DATE THAT YOU NEED?

16 Q NOVEMBER, 1997, ANYTHING FROM NOVEMBER, 1997, FORWARD.

17 A (PAUSE TO PERUSE RECORDS)

18 Q LET ME STOP YOU. WHEN DOES IT INDICATE THAT HE WAS FIRST
19 ADMITTED TO SCDC IN CONNECTION WITH THE DEATH SENTENCE?

20 A MARCH 27, 1999.

21 Q OKAY, FROM THAT DATE FORWARD,

22 A THE REASON I'M PAUSING HERE IS I HAVE-- STARTING FROM
23 MARCH OF 1999, THE INITIAL ONE WAS A POSSESSION OF A
24 CONTRABAND CHARGE. REPORTEDLY, IT HAPPENED NOVEMBER 29,
25 2002.

1 Q WHAT'S THE DATE OF THE POSSESSION?

2 MR. BROWN: YOUR HONOR, AS TO THIS HEARING I'M GOING TO
3 OBJECT TO ANYTHING AFTER MARCH OF 1999. ONE OF THE ISSUES I
4 RAISED WAS SKIPPER V. SOUTH CAROLINA ADAPTABILITY EVIDENCE.
5 AND I THINK THAT THE ONLY THING THAT WOULD BE RELEVANT AT
6 THIS HEARING IS WHAT HIS PRISON RECORD WAS AT THE TIME OF HIS
7 INCARCERATION IN NOVEMBER, 1997 UNTIL HIS TRIAL IN MARCH OF
8 1999.

9 MR. SALTER: AND THE PROBLEM I HAVE WITH THAT, YOUR
10 HONOR, IS WE GO BACK TO A RE-SENTENCING PROCEEDING, THEN
11 THESE RECORDS WILL BE SUBJECT TO COMING IN.

12 MR. BROWN: AND I AGREE, IF HE'S USING THEM FOR RE-
13 SENTENCING, THEY WOULD BE ADMISSIBLE AT THAT TIME, AS TO
14 ADAPTABILITY. BUT AS TO THIS HEARING ON INEFFECTIVE
15 ASSISTANCE OF COUNSEL---

16 THE COURT: I THINK I AGREE, THAT THE ONLY THING THAT'S
17 RELEVANT TO THIS HEARING IS WHAT WAS IN EXISTENCE UP UNTIL
18 THE TIME OF TRIAL. BECAUSE WHAT WE'RE DOING HERE IS
19 EVALUATING DECISIONS THAT WERE MADE BY COUNSEL AT THAT
20 POINT IN TIME. ANYTHING THAT HAPPENED AFTERWARDS COULD NOT
21 POSSIBLY HAVE WEIGHED-- AS I UNDERSTAND. MAYBE I'M WRONG.
22 YOU CAN EXPLAIN IT IF I AM. BUT ANYTHING THAT HAPPENED AFTER
23 THE TIME OF TRIAL COULDN'T HAVE WEIGHED INTO DECISIONS THAT
24 COUNSEL MADE DURING TRIAL OR BEFORE TRIAL.

1 MR. SALTER: I'M NOT SUGGESTING IT WEIGHED INTO COUNSEL'S
2 DECISION-MAKING PROCESS. WHAT I'M SAYING IT'S RELEVANT AS TO
3 WHETHER OR NOT IT WOULD SHOW PREJUDICE UNDER STRICKLAND
4 BECAUSE IF WE GO BACK FOR RE-SENTENCING AND THESE RECORDS
5 ARE GOING TO CERTAINLY COME IN. AND I THINK WHERE WE'RE
6 HEADED IS A SITUATION WHERE THEY WOULD NOT BE ADAPTABILITY
7 CONSIDERED.

8 THE COURT: WELL, I DON'T THINK THE STRICKLAND PRONG-- I
9 THINK THE STRICKLAND PRONG IS-- THE QUESTION ON SECOND
10 PRONG STRICKLAND IS IF COUNSEL HAD MADE A DIFFERENT
11 DECISION, WHAT IS THE PROBABILITY THAT THE OUTCOME OF THE
12 PROCEEDING WOULD HAVE BEEN DIFFERENT IN THE PREVIOUS TRIAL;
13 NOT WHAT IS THE PROBABILITY THAT THE OUTCOME WILL BE
14 DIFFERENT IN A FUTURE TRIAL. AND SO, I'M GOING TO SUSTAIN THE
15 OBJECTION.

16 MR. SALTER: YOUR HONOR, MAY I GO AHEAD AND PROFFER HIS
17 RECORDS?

18 THE COURT: YOU CAN PROFFER THE RECORDS.

19 Q JUST TO EXPEDITE THE MATTER, DO YOU HAVE A COPY OF THE
20 DISCIPLINARY RECORDS REFLECTING DISPOSITIONS FROM MARCH OF
21 1999 THROUGH 2007?

22 A SIR, I HAVE THOSE RECORDS THAT WERE GIVEN TO ME BY THE
23 RECORDS MANAGEMENT STAFF YESTERDAY AFTERNOON. NOW, I
24 HAVE NOT PERSONALLY GONE THROUGH THEM TO MAKE SURE, YOU
25 KNOW, MY AUTOMATED STUFF MATCHES WITH WHAT'S HERE. I MEAN,

1 IN THE COURSE OF A DAILY WORK AT OUR OFFICE, IF IT'S SENT, WE
2 FILE IT IN THE RECORD. IF IT'S NOT SENT, THEN IT MAY NOT BE IN THE
3 RECORD. AND I'M NOT SAYING THAT IT IS OR ISN'T, BECAUSE I DON'T
4 KNOW.

5 Q YOUR COMPUTER-GENERATED RECORDS, THEY CONTAIN THOSE
6 ITEMS THAT WERE IN FACT SENT?

7 A WELL, THE COMPUTER INFORMATION IS GENERATED AT THE
8 INSTITUTION AT THE TIME OR AS SOON THEREAFTER A HEARING IS
9 ACTUALLY CONDUCTED.

10 Q I SEE.

11 A SO, OF COURSE, THE PAPERWORK WOULD BE THE BASIS UNDER
12 WHICH THAT WOULD BE ENTERED INTO THE COMPUTER.

13 Q BUT THOSE MATTERS THAT ARE ACTUALLY ENTERED INTO THE
14 COMPUTER ARE THOSE FOR WHICH THE PAPERWORK HAS BEEN
15 REVIEWED. IS THAT CORRECT?

16 A YES SIR.

17 Q DO YOU HAVE A COPY OF THE COMPUTER-GENERATED LIST OF
18 INFRACTIONS?

19 A YES SIR.

20 Q AND THE DISPOSITIONS?

21 A YES SIR.

22 MR. SALTER: I WOULD MOVE TO INTRODUCE THOSE AS
23 RESPONDENT'S EXHIBIT SIX, SEVEN.

24 THE COURT: ALL RIGHT. THEY'RE ADMITTED. OR, ACTUALLY,
25 THEY'RE---

1 MR. SALTER: FOR IDENTIFICATION PURPOSES.

2 THE COURT: THEY'RE MARKED FOR IDENTIFICATION.

3 MR. BROWN: OF COURSE, YOUR HONOR, I HAVE NO OBJECTION
4 TO THE DISCIPLINARY RECORDS FROM NOVEMBER OF '97 TO MARCH
5 OF 1999 BEING ADMITTED.

6 MR. SALTER: YOUR HONOR, I DON'T BELIEVE I HAVE ANY OTHER
7 QUESTIONS OF MR. STOBEE.

8 THE COURT: OKAY.

9 MR. BROWN: NO QUESTIONS.

10 THE COURT: YOU CAN STEP DOWN.

11 (WHEREUPON WITNESS REMAINS ON THE STAND FOR CONFERENCE
12 WITH MR. SALTER)

13 Q MR. STOBEE, I BELIEVE YOU WERE JUST EXPLAINING
14 SOMETHING TO ME WITH RESPECT TO RESPONDENT'S EXHIBIT NUMBER
15 SEVEN FOR IDENTIFICATION PURPOSES.

16 A AGAIN, I JUST SHOULD HAVE WRITTEN IT DOWN THE FIRST TIME
17 YOU ASKED ME, AND I DIDN'T. THERE'S A DATE IN 1997 THAT SEEMS TO
18 BE, YOU KNOW, A CRUCIAL DATE. PRIOR TO HIS CONVICTION FOR
19 THESE MURDERS HE WAS WITH US AS A YOUTHFUL OFFENDER ON
20 PRIOR CHARGES.

21 TO THE BEST OF MY REMEMBRANCE FROM LOOKING AT THOSE
22 A FEW MINUTES AGO, THERE IS A 1998 OFFENSE THAT IS CATALOGED
23 OR LISTED UNDER HIS YOUTHFUL OFFENDER RECORD.

24 MR. BROWN: YOUR HONOR, THAT IS CORRECT. I HAVE NO
25 OBJECTION TO THOSE RECORDS.

1 Q I BELIEVE THOSE ARE THE FIRST SET OF RECORDS.

2 A THAT WAS THE FIRST GROUP. NOW, THERE WERE DOCUMENTS
3 INVOLVING DISCIPLINARIES THAT WERE PRIOR TO THAT '97 DATE, BUT
4 IT ALSO INCLUDED THE '98 DATE.

5 Q AND THE SECOND GROUP OF RECORDS YOU HANDED TO ME,
6 WOULD THOSE BE DISCIPLINARIES WHICH OCCURRED AFTER HE WAS
7 COMMITTED UNDER THE DEATH SENTENCE?

8 A THAT'S CORRECT.

9 MR. STOBEE: YOUR HONOR, I NOW MOVE, I BELIEVE, SIX INTO
10 EVIDENCE WITHOUT OBJECTION, AND SEVEN FOR IDENTIFICATION
11 PURPOSES.

12 MR. BROWN: SIX IS WHICH ONE?

13 MR. SALTER: THAT'S THE SAFEKEEPER OF RECORDS.

14 MR. BROWN: THOSE ARE YOA RECORDS?

15 MR. SALTER: YES.

16 MR. BROWN: NO OBJECTION TO THOSE.

17 (WHEREUPON DEFENDANT'S EXHIBIT SIX WAS ADMITTED INTO
18 EVIDENCE WITHOUT OBJECTION. DEFENDANT'S EXHIBIT NUMBER
19 SEVEN WAS MARKED FOR IDENTIFICATION PURPOSES)

20 Q THANK YOU, MR. STOBEE.

21 MR. BROWN: ONE QUESTION, YOUR HONOR. MY CLIENT JUST
22 ASKED ME SOMETHING.

23 **CROSS EXAMINATION BY MR. BROWN:**

24 Q MR. STOBEE, IS THE SAFEKEEPER-- WHAT IS SAFEKEEPER?

25 A UH,---

1 Q IN A NUTSHELL.

2 A IN A NUTSHELL, IT'S A PRE-TRIAL DETAINMENT REQUESTED BY
3 THE SHERIFF TO THE GOVERNOR THAT THE INMATE BE HOUSED AT
4 THE DEPARTMENT OF CORRECTIONS PRIOR TO HIS TRIAL BASED ON
5 SEVERAL DIFFERENT CRITERIA THAT THE COUNTY THAT'S
6 PROSECUTING HIM FEELS HE'S BETTER WITH THE DEPARTMENT OF
7 CORRECTIONS THAN HE WOULD BE THAN IN THE LOCAL DETENTION
8 CENTER.

9 AGAIN, THEY HAVE TO APPLY TO THE GOVERNOR AND THE
10 GOVERNOR HAS TO APPROVE IT.

11 Q DOES THAT HAVE ANYTHING TO DO WITH HIS DISCIPLINARY
12 RECORD WHILE INCARCERATED IN YOA PRIOR TO TRIAL?

13 A AGAIN, SIR, YOU ASKED ME THE QUESTION. NOT TO MY
14 KNOWLEDGE. I MEAN, AGAIN, TO THE BEST OF MY KNOWLEDGE, WE
15 WERE-- HE WAS UNDER AN ACTIVE YOUTHFUL OFFENDER SENTENCE
16 PRIOR TO HIS CONVICTION FOR THE MURDER TRIAL.

17 Q ARE THOSE THOSE RECORDS?

18 A YES SIR.

19 Q OKAY.

20 A SO, IN ESSENCE, WE ONLY HAVE HIM LISTED FOR TWO NUMBERS:
21 THE YOUTHFUL OFFENDER NUMBER AND THE PRISON FOUR-DIGIT
22 DEATH ROW.

23 MR. BROWN: BEG THE COURT'S INDULGENCE.

24 (PAUSE)

1 Q YOU JUST INTRODUCED INTO EVIDENCE THE RECORDS OF HIS
2 DISCIPLINARY PROCEEDINGS WHILE IN YOA ACTIVE AND PRIOR TO
3 THIS TRIAL WHILE HE WAS INCARCERATED. IS THAT CORRECT?

4 A YES SIR.

5 MR. BROWN: I HAVE NO OBJECTION TO THAT, YOUR HONOR.

6 THE COURT: ALL RIGHT. YOU MAY STEP DOWN.

7 A YES SIR.

8 THE COURT: YOU MAY CALL YOUR NEXT WITNESS.

9 MR. SALTER: THE RESPONDENT CALLS KEVIN BRACKETT.

10 KEVIN BRACKETT, DULY SWORN,

11 TESTIFIED AS FOLLOWS:

12 **DIRECT EXAMINATION BY MR. SALTER:**

13 Q PLEASE STATE YOUR NAME FOR THE RECORD.

14 A KEVIN BRACKETT.

15 Q SOLICITOR BRACKETT, HOW LONG HAVE YOU BEEN THE
16 SIXTEENTH JUDICIAL CIRCUIT SOLICITOR?

17 A SINCE NOVEMBER 17, 2006.

18 Q PRIOR TO THAT TIME HOW WERE YOU EMPLOYED?

19 A I WAS THE DEPUTY SOLICITOR, TOMMY POPE'S CHIEF DEPUTY
20 SOLICITOR.

21 Q FOR HOW LONG?

22 A SINCE MAY OF 1995.

23 Q SO, I ASSUME YOU WERE DEPUTY SOLICITOR BACK DURING THE
24 TIME PERIOD OF THE TRIAL OF MR. ROBERTSON FOR MURDER?

25 A YES SIR.

1 Q WHAT WERE YOUR DUTIES DURING THAT TRIAL?

2 A DURING THE ROBERTSON TRIAL?

3 Q YES SIR.

4 A TOMMY AND I BASICALLY SPLIT THE TRIAL UP. WE DIVIDED UP
5 THE WITNESSES AND I THINK I DID THE CLOSING IN THE GUILT PHASE
6 AND TOMMY DID THE CLOSING IN THE PENALTY PHASE. I DID THE
7 OPENING IN PENALTY AND TOMMY DID OPENING IN GUILT. AND THEN
8 WE HAD THE WITNESSES JUST DIVIDED UP BETWEEN US AS TO WHO
9 WAS GOING TO HANDLE WHICH ONE.

10 Q CAN YOU STATE WHETHER OR NOT CHIP ROBERTSON WAS EVER
11 INVESTIGATED AS A POSSIBLE SUSPECT?

12 A WE LOOKED VERY HARD AT CHIP. WE SUSPECTED AT THE TIME
13 AND STILL BELIEVE, I STILL BELIEVE THAT HE HAD SOME
14 INVOLVEMENT IN THIS CRIME. BUT SUSPICIONS DON'T AMOUNT TO
15 PROBABLE CAUSE SOMETIMES OR BEYOND A REASONABLE DOUBT.
16 SO, HE WAS NOT CHARGED. BUT WE DEFINITELY TOOK A HARD LOOK
17 AT THE EVIDENCE AND DID OUR BEST TO SEE IF HE WAS INVOLVED
18 BECAUSE IF HE WAS WE WANTED HIM TO BE BROUGHT TO JUSTICE AS
19 WELL.

20 Q DO YOU RECALL WHETHER OR NOT AS A PART OF YOUR DUTIES
21 AS DEPUTY SOLICITOR YOU WOULD HAVE ENTERED INTO ANY PLEA
22 NEGOTIATIONS IN CONNECTION WITH THIS CASE?

23 A NO SIR, I DID NOT.

24 Q DO YOU RECALL ANY PURPORTED PLEA OFFER MADE TO EITHER
25 CHIP ROBERTSON OR HIS ATTORNEY IN CONNECTION WITH THIS CASE?

1 A NO SERIOUS PLEA OFFER, NO. CHIP ROBERTSON WASN'T
2 CHARGED WITH ANY CRIME IN RELATION TO THIS. HE WAS CHARGED
3 WITH SOME DRUG OFFENSES THAT WERE TOTALLY UNRELATED, THAT
4 CAME ABOUT AS A RESULT OF SOME SUBSEQUENT INVESTIGATION BY
5 THE DRUG UNIT. BUT THAT WAS TOTALLY UNRELATED TO THIS
6 EVENT. SO, HE WASN'T CHARGED. THERE WAS NO REASON TO ENTER
7 INTO ANY PLEA NEGOTIATIONS. I HAD NO LEVERAGE ON HIM FOR THE
8 EVENTS RELATING TO THE DEATH OF TERRY AND EARL ROBERTSON.

9 Q DID YOU EVER HAVE ANY CONVERSATION WITH EITHER MR.
10 ROBERTSON OR HIS, CHIP ROBERTSON OR HIS ATTORNEY RELATING
11 TO A PLEA BY JAMES ROBERTSON TO THE MURDER CHARGES?

12 A A SERIOUS PLEA OFFER?

13 Q NO SIR. JUST ANY KIND OF CONVERSATION WHATSOEVER.

14 A THERE WAS A JOKE PLEA OFFER, BUT NOT A SERIOUS ONE.

15 Q WHAT WAS THE NATURE OF THAT JOKE?

16 A ESSENTIALLY, IT WAS BASED ON, IT FOCUSED ON OUR
17 SUSPICIONS. AND, FRANKLY, I THINK PRETTY MUCH EVERYBODY
18 THAT WAS INVOLVED IN THE CASE ON EITHER SIDE, THE DEFENSE OR
19 PROSECUTION, YOU KNOW, THERE WAS A SUSPICION THAT CHIP WAS
20 INVOLVED AND IT FOCUSED ON THE IRONY OF THE FACT THAT JIMMY
21 WAS PROBABLY GOING TO GET SENTENCED TO DEATH, OR LIFE, AT
22 THE VERY LEAST, AND THAT HE WAS GONNA TAKE THE FALL FOR
23 THIS. AND WE BELIEVED THAT CHIP WAS INVOLVED IN IT AS WELL.
24 THE IRONY SURROUNDING THAT.

1 I THINK THAT SOMETHING TO THE EFFECT-- I CAN'T EVEN
2 REMEMBER HOW MANY-- IT WAS WITHIN A DAY OR TWO PERIOD. I
3 FIRST TALKED ABOUT IT TO TOMMY AND WE WERE LAUGHING ABOUT
4 IT IN THE CONTEXT OF SOMETHING ELSE. BUT IT WAS NOT SERIOUS.
5 AND THEN I MENTIONED IT TO MR. HANCOCK AND MIKE GILLEN.
6 MAYBE EVEN MEREDITH MOON'S ATTORNEYS. I CAN'T RECALL.

7 Q SO, IT WAS BROUGHT TO THE ATTENTION OF TRIAL COUNSEL,
8 MR. HANCOCK?

9 A YES, AS A JOKE.

10 Q AND THEY UNDERSTOOD IT AS SUCH. CORRECT?

11 A I ASSUME SO. I MEAN, I NEVER FOLLOWED UP; THEY NEVER
12 CAME BACK TO ME. IT WAS INTENDED AS A JOKE. HOW THEY
13 RECEIVED IT, I CAN'T SPEAK TO THAT. BUT I CERTAINLY INTENDED IT
14 AS A JOKE.

15 Q NOW, AT THE TIME OF THE TRIAL, WOULD YOU HAVE BEEN
16 AUTHORIZED AS DEPUTY SOLICITOR TO MAKE ANY PLEA
17 NEGOTIATIONS WITHOUT THE APPROVAL OF SOLICITOR POPE?

18 A NO. I DIDN'T HAVE THE AUTHORITY TO SEEK THE DEATH
19 PENALTY. AND ONCE SOUGHT, I HAD NO AUTHORITY TO UN-SEEK IT.
20 THAT WOULD HAVE HAD TO COME FROM SOLICITOR POPE.

21 Q AND HE NEVER APPROVED ANY PLEA NEGOTIATIONS IN THIS
22 CASE?

23 A NO.

24 Q WHAT IS YOUR RECOLLECTION OF HOW THE PROSECUTION
25 OBTAINED THE NOTES OF TONI CASCIO, THE SOCIAL WORKER?

1 A OF COURSE, TONI CASCIO WAS TOMMY'S WITNESS TO CROSS,
2 NOT MINE. SO, MY MEMORY OF IT AS BEST I CAN RECALL IS WE GOT
3 HER NOTES PURSUANT TO RULE 705 IN THE MIDDLE OF HER
4 TESTIMONY. I THOUGHT THAT'S HOW WE CAME ABOUT GETTING
5 THEM. WE ASKED HER WHAT WAS THE UNDERLYING BASIS OF HER
6 OPINIONS, WHAT DID SHE RELY ON IN FORMING HER OPINIONS. THAT'S
7 WHAT I THOUGHT. I HAVEN'T-- I'M NOT POSITIVE ABOUT THAT,
8 THOUGH.

9 I SEEM TO RECALL WE GOT THEM MID-TRIAL, AND THAT WE
10 WERE REVIEWING THEM. WE GOT THEM IN THE COURTROOM BY
11 ASKING HER FOR THEM WHILE SHE WAS ON THE STAND. AND THEN
12 THERE WAS SOME SORT OF BREAK AND I SEEM TO RECALL TOMMY
13 AND I BACK IN OUR OFFICE GOING THROUGH THE NOTES, REVIEWING
14 THEM. PRIMARILY TOMMY WAS DOING THAT, BUT HE WOULD
15 PERIODICALLY CALL ME IN TO MENTION SOMETHING HE HAD FOUND
16 AND WAS HIGHLIGHTING THEM AND BASICALLY PREPARING TO CROSS
17 HER ON THOSE.

18 Q ALTHOUGH SHE WAS CROSS EXAMINED BY MR. POPE WHAT WAS
19 YOUR RECOLLECTION OF WHY SHE HAD BEEN IMPORTANT, OR
20 WHETHER OR NOT SHE WOULD BE IMPORTANT AS A DEFENSE
21 WITNESS?

22 A WHAT WAS MY RECOLLECTION OF WHY SHE WOULD BE
23 IMPORTANT AS A DEFENSE WITNESS?

24 Q YES SIR.

1 A IN ALMOST CAPITAL CASE THAT I'VE BEEN INVOLVED IN,
2 THERE'S BEEN A SOCIAL WORKER WHO'S COME IN AND BASICALLY
3 LAID THE GROUNDWORK FOR THE SOCIO-PSYCHOLOGICAL HISTORY
4 OF THE DEFENDANT. AND BASICALLY THEY COME IN AND EXPLAIN
5 WHAT A HORRIBLE CHILDHOOD THEY HAD AND ALL THE PROBLEMS
6 AND TRAUMAS THAT THEY ENDURED AND HOW ALL OF THIS LED UP
7 TO THE, SHAPING THEM TO BE THE PERSON THAT COMMITTED THIS
8 CRIME, OR CAUSED THEM TO DO WHAT THEY DID.

9 AND IT'S BASICALLY DONE IN MITIGATION. IT'S DONE WITH AN
10 EYE TOWARDS EVOKING SYMPATHY FOR THE DEFENDANT, DRAGGING
11 UP, YOU KNOW, A PARADE OF HORRIBLE INCIDENTS AND SO FORTH TO
12 TRY TO GET THE JURY TO FEEL SORRY FOR THE DEFENDANT.

13 MR. SALTER: I DON'T BELIEVE I HAVE ANYTHING FURTHER.

14 **CROSS EXAMINATION BY MR. BROWN:**

15 Q MR. BRACKETT, DO YOU RECALL THAT YOU GOT THE NOTES THE
16 NIGHT BEFORE SHE TESTIFIED?

17 A HONESTLY, MR. BROWN, I CAN'T RECALL SPECIFICALLY WHEN
18 WE GOT THEM. I RECALL-- I THOUGHT WE GOT THEM WHILE SHE WAS
19 ON THE STAND; THAT SHE HAD TO GO SOMEWHERE AND GET THEM.
20 AND THEN I RECALL THAT WE HAD SOME PERIOD OF TIME WITH THEM.
21 AND I THOUGHT IT WAS MAYBE OVER A LUNCH BREAK OR DURING
22 SOME BREAK.

23 IT WASN'T A LOT OF TIME BECAUSE I REMEMBER TOMMY SORT
24 OF HOLING UP IN HIS OFFICE TO GO THROUGH THEM BECAUSE HE
25 DIDN'T HAVE A LOT OF TIME TO DO IT. AND HE HAD A HIGHLIGHTER.

1 AND I WAS IN MY OFFICE AND HE CALLED ME IN SEVERAL TIMES TO
2 POINT OUT THINGS THAT HE'D DISCOVERED TO ASK, YOU KNOW,
3 STRATEGIC QUESTIONS, HOW BEST TO DEAL WITH THIS INFORMATION,
4 THAT SORT OF THING. BUT I CAN'T RECALL WITH CERTAINTY
5 EXACTLY WHEN WE GOT THEM.

6 Q I'M SHOWING YOU PAGE 2749 OF THE TRANSCRIPT, MARCH 24,
7 1999, WHEN THE COURT'S CLOSING DOWN.

8 "THE COURT: NO, WE'RE OFF THE RECORD. LET'S STAY ON IT.

9 MR. POPE: MS. CASCIO'S UNDERLYING DATA-- I KNOW Y'ALL
10 HAVE BEEN WORKING. I KNOW SHE HAD TO GO BACK AND FORTH.
11 BUT WE STILL NEED TO TRY TO GET THAT SO WE DON'T RUN INTO
12 THAT PROBLEM TOMORROW. WE'VE GOT A COPY TO GIVE YOU RIGHT
13 NOW.

14 THE COURT: ALL RIGHT. WE'LL BE AT EASE UNTIL NINE-THIRTY
15 IN THE MORNING."

16 AND IT STARTS BACK UP THE NEXT DAY, DOES IT NOT?

17 A YES, BUT I DON'T KNOW. IT SAYS UNDERLYING DATA. I DON'T
18 KNOW WHETHER SHE KNEW THE NOTES-- I MEAN, SPECIFICALLY THE
19 NOTES. I MEAN, THERE'S A LOT OF THINGS THAT SHE MAY HAVE
20 RELIED ON, LIKE SCHOOL RECORDS--

21 Q ARE YOU SAYING THAT'S NOT THE NOTES?

22 A I DON'T KNOW. I'M SAYING I'M NOT CERTAIN THAT THE NOTES
23 WERE INCLUDED IN WHAT-- SHE SAID WE HAVE THE UNDERLYING
24 DATA. I DON'T KNOW IF THAT ENCOMPASSES THE NOTES AS WELL AS
25 THE SCHOOL RECORDS AND ALL THE OTHER THINGS THAT, YOU

1 KNOW, MEDICAL HISTORY AND THAT SORT OF THING, SKIP MEYERS'
2 NOTES, OR WHATEVER, OTHER THINGS SHE MAY HAVE RELIEF ON.

3 Q ARE YOU-- HAVE YOU REVIEWED THIS TRANSCRIPT?

4 A BITS AND PIECES OF IT. I HAVE NOT REVIEWED IT IN ITS
5 ENTIRETY.

6 Q ARE YOU AWARE OF ANY OTHER PLACE IN THIS TRANSCRIPT
7 WHERE IT'S DISCUSSES MS. CASCIO'S UNDERLYING DATA?

8 A I AM AWARE OF SOME POINT IN THAT TRANSCRIPT SHE SAYS
9 SHE THINKS SHE HAS HER NOTES IN THE LIBRARY. I THOUGHT THERE
10 WAS SOME PART IN THERE THAT SOMETHING ABOUT THEY'RE IN THE
11 LIBRARY, I'LL HAVE TO GO GET THEM. I THOUGHT THAT WAS IN
12 THERE, TOO.

13 Q DO YOU RECALL TALKING TO LYNN RIDDLE ABOUT THIS
14 MATTER, THE AUTHOR OF FAMILY BLOOD?

15 A I REMEMBER SPEAKING TO LYNN RIDDLE, YES.

16 Q DO YOU NOT RECALL TELLING HER THE NIGHT BEFORE WHEN
17 THE NOTES WERE DELIVERED, BRACKETT THOUGHT HE COULD RIP
18 THROUGH THEM THE NIGHT BEFORE SHE TESTIFIED?

19 A NO, I DON'T RECALL TALKING ABOUT THAT.

20 Q COULD IT BE CORRECT THAT SHE---

21 A IS THAT A QUOTATION OR IS IT A... IS IT A DIGEST OF A
22 STATEMENT?

23 Q I DON'T KNOW IF IT IS OR NOT. I'LL LET YOU READ IT AND TELL
24 ME. "THEY COULD NOT BELIEVE THEY WERE READING ROBERTSON'S
25 OWN WORDS. THEY HIGHLIGHTED AND HIGHLIGHTED AND

1 HIGHLIGHTED SOME MORE INFORMATION THEY KNEW WOULD HELP
2 THEIR CASE. THEN THEY STARTED WHITTLING DOWN. IT WAS SO
3 MUCH, BRACKETT REMEMBERED LATER."

4 A THAT'S NOT A QUOTATION. IT'S JUST A DIGEST OF HER
5 INTERVIEW. SHE TALKED TO ME. SHE MAY HAVE TALKED TO MR.
6 BOYD AND MR. HANCOCK AND MR. POPE. I'M SURE SHE TALKED TO
7 EVERYBODY THAT SHE COULD HAVE. AND MAYBE SHE TALKED TO
8 MR. ROBERTSON. BUT THAT'S NOT A QUOTE.

9 Q I'M GOING TO SHOW YOU PART OF MR. POPE'S CROSS OF DOCTOR
10 CASCIO AND ASK YOU IF THIS WILL REFRESH YOUR MEMORY.

11 "Q MS. CASCIO, HAVE YOU HAD AN OPPORTUNITY RETRIEVE
12 YOUR NOTES?

13 A YES.

14 Q AND I BELIEVE YOU PROVIDED ME WITH A COPY OF THOSE
15 YESTERDAY?

16 A. YES."

17 A THAT'S WHAT IT SAYS.

18 Q SO, IT'S OBVIOUS PRETTY MUCH-- I KNOW IT'S TEN YEARS AGO.
19 BUT IT'S OBVIOUS PRETTY MUCH YOU GOT THE NOTES THE NIGHT
20 BEFORE. WOULD THAT BE A CORRECT STATEMENT BASED ON THIS?

21 A IT WOULD SEEM SO, BUT I COULDN'T SAY DEFINITELY. THE
22 TRANSCRIPT WOULD CERTAINLY SPEAK FOR ITSELF. BUT I CAN'T
23 RECALL GETTING THEM THE NIGHT BEFORE. THAT DOESN'T REFRESH
24 MY MEMORY.

25 MR. BROWN: NO FURTHER QUESTIONS, YOUR HONOR.

1 MR. SALTER: NOTHING FURTHER, YOUR HONOR.

2 THE COURT: ALL RIGHT, SIR. YOU CAN STEP DOWN.

3 MR. SALTER: THE STATE DOESN'T HAVE ANY FURTHER
4 WITNESSES.

5 MR. MATLOCK: YOUR HONOR, IF IT PLEASE THE COURT. WE
6 WOULD CALL MR. ROBERTSON TO THE STAND.

7 THE COURT: MR. ROBERTSON, COME AROUND. YOU ARE STILL
8 UNDER OATH FROM WHEN YOU TESTIFIED EARLIER IN THE WEEK.

9 JAMES ROBERTSON, HAVING BEEN
10 REMINDED OF HIS PREVIOUS OATH BY THE COURT, TESTIFIED AS
11 FOLLOWS:

12 DIRECT EXAMINATION BY MR. MATLOCK:

13 Q MR. ROBERTSON, YOU'VE HEARD THE TESTIMONY OF YOUR
14 TRIAL ATTORNEYS OVER THE COURSE OF THE PAST THREE DAYS. DID
15 YOU HEAR ANYTHING THAT WOULD PERSUADE YOU IN ANY MANNER
16 TO CHANGE YOUR POSITION WITH REGARD TO THIS POST CONVICTION
17 RELIEF ACTION?

18 A NO.

19 Q SO, IT'S YOUR POSITION AND YOU'RE STILL CONVINCED THAT
20 YOUR ATTORNEYS WERE INEFFECTIVE IN ASSISTING YOU IN YOUR
21 DEFENSE IN THIS CASE?

22 A YES SIR.

23 Q I'D LIKE TO ASK YOU SOME SPECIFIC QUESTIONS REGARDING
24 THAT POSITION. NOW, YOU WERE ARRESTED IN NOVEMBER OF 1997.

25 A YES.

1 Q CORRECT?

2 A YES.

3 Q AND YOU DIDN'T COME TO TRIAL UNTIL MARCH OF '99.

4 A THAT'S CORRECT.

5 Q NOW, DURING THAT PERIOD YOU WENT THROUGH EXTENSIVE
6 PSYCHOLOGICAL ANALYSIS AND GARNERING OF EVIDENCE AND
7 REVIEWING OF EVIDENCE, MEETING WITH YOUR ATTORNEYS. IS THAT
8 RIGHT?

9 A YES.

10 Q APPROXIMATELY HOW MANY HOURS DID YOU SPEND WITH
11 YOUR ATTORNEYS DURING THOSE MANY MONTHS?

12 MR. SALTER: YOUR HONOR, I'M GOING TO OBJECT. THIS IS
13 SOMETHING THAT SHOULD HAVE BEEN BROUGHT OUT, I BELIEVE, IN
14 HIS CASE IN CHIEF.

15 THE COURT: I'LL ALLOW IT. THEY DID ASK THESE QUESTIONS
16 OF-- AND YOU DID ASK THE LAWYERS THESE QUESTIONS. I'LL ALLOW
17 IT. OVERRULED.

18 MR. MATLOCK: THANK YOU.

19 Q HOW MANY HOURS DID YOU SPEND WITH YOUR ATTORNEYS
20 OUTSIDE THE COURTROOM?

21 A WITH ATTORNEYS SPECIFICALLY, I'D PUT THE GUESTIMATE AT
22 ABOUT TEN.

23 Q ABOUT TEN TOTAL HOURS?

24 A YES. AND THE MAJORITY OF THAT CAME IN ONE, ONE VERY
25 LENGTHY DAY AT LEE CORRECTIONAL INSTITUTION WITH SEVERAL

1 EXPERTS AND INVESTIGATORS. WE SAT AROUND A PRETTY BIG
2 CAFETERIA TABLE.

3 Q WAS THAT YOUR FIRST MEETING WITH YOUR ATTORNEYS?

4 A THAT MAY VERY WELL HAVE BEEN THE FIRST ONE. I GUESS I'D
5 BEEN DOWN THERE FOR ABOUT A MONTH OR SO, AND I WAS ON THE
6 VIOLATION OF A YOA. I MAY HAVE SEEN, MAY HAVE SEEN MR.
7 HANCOCK'S INVESTIGATOR BEFORE THAT, BUT I DON'T-- I BELIEVE
8 THAT'S THE FIRST TIME I SAW MR. HANCOCK AND MR. BOYD AND
9 THEIR PARALEGALS.

10 Q UNDERSTANDING, OF COURSE, THAT THIS WAS QUITE A FEW
11 YEARS AGO, EIGHT OR NINE YEARS AGO, SO THIS IS JUST AN
12 APPROXIMATION, SOMEWHERE AROUND TEN HOURS TOTAL TIME.
13 BETWEEN THE TIME YOU WERE ARRESTED IN 1997, IN NOVEMBER,
14 UNTIL MARCH OF 1999, YOU SAID YOU'D SPENT APPROXIMATELY TEN
15 HOURS WITH YOUR ATTORNEYS?

16 A YES.

17 Q AND THIS INITIAL MEETING WAS THE LION'S SHARE OF THAT. IS
18 THAT RIGHT?

19 A YES. THIS WAS A GOOD FOUR OR FIVE HOURS.

20 Q DURING THAT MEETING DID YOU DISCUSS ANY TRIAL TACTICS,
21 OR DID THEY ADVISE YOU ON THE LAW, OR WAS THIS BASICALLY JUST
22 BACKGROUND AND YOUR FAMILY HISTORY, ET CETERA?

23 A I WAS ASKED TO TELL THEM WHAT HAPPENED, AND THEN IT
24 BECAME VERY CLEAR THAT MY JOB IN MY DEFENSE WAS TO TELL
25 THEM EVERYTHING I KNEW ABOUT MY LIFE, MY BROTHER'S LIFE, MY

1 FAMILY LIFE, MY FATHER'S LIFE, MY MOTHER'S LIFE, WHERE RECORDS
2 COULD BE FOUND, WHAT HOSPITALS WERE VISITED, WHAT DOCTOR
3 WAS VISITED, WHAT SCHOOLS WERE ATTENDED. YOU KNOW, ANY
4 PLACE THAT ONE OF THEIR EXPERTS COULD GO AND DIG UP SOME
5 PAPERWORK. THAT BECAME MY JOB FOR THE NEXT YEAR.

6 Q SO, HOW WOULD YOU IN GENERAL DESCRIBE YOUR
7 PARTICIPATION IN YOUR OWN DEFENSE AS THIS PROCESS UNFOLDED?

8 A I MEAN, AS A DEFENSE, AS STRATEGICALLY, I WOULD SAY I WAS
9 LEFT OUT COMPLETELY.

10 Q DID YOU ASK TO BE MORE INVOLVED?

11 A IN AU- ---

12 Q DID YOU ASK TO SEE THE EVIDENCE?

13 A YES, IN AUGUST OF 1998, I WROTE A LETTER TO MR. HANCOCK
14 AND TOLD HIM THAT I'D LIKE TO SEE WHAT WAS BEING TURNED OVER
15 BY THE PROSECUTION IN DISCOVERY. HE RESPONDED THAT HE DIDN'T
16 THINK IT WAS A GOOD IDEA SINCE I WAS SITTING IN PRISON WITH A
17 ROOMMATE. AND I REITERATED MY FACT IN FURTHER LETTERS THAT
18 I WANTED TO SEE THIS, I HAD A RIGHT TO SEE THIS, I HAD A RIGHT TO
19 REVIEW THE EVIDENCE. AND EVENTUALLY IT JUST BECAME A MOOT
20 POINT; WE WEREN'T JUST GOING TO ARGUE ABOUT IT ANYMORE.

21 I ASKED TO GO AND SEE THE PHYSICAL EVIDENCE. I ASKED TO
22 GO AND SEE THIS BAT THAT THEY CLAIMED TO HAVE, THIS HAMMER.

23 Q BUT, BY AND LARGE, YOU DIDN'T SEE ANY OF THE EVIDENCE.
24 WOULD IT BE FAIR TO DESCRIBE YOUR PARTICIPATION IN YOUR OWN
25 DEFENSE AS MINIMAL?

1 A YES.

2 Q ALMOST NON-EXISTENT, I WOULD VENTURE?

3 A YES, STRATEGICALLY, NON-EXISTENT.

4 Q DID THEY EVER EXPLAIN TO YOU ANY OF THE LEGAL CONCEPTS
5 SUCH AS GUILTY BUT MENTALLY ILL THAT YOU'VE HEARD DISCUSSED,
6 AND OTHER CONCEPTS WITH REGARD TO TACTICS AND PROCEDURE
7 WITH THE TRIAL, WITH YOU?

8 A NO. I DON'T EVEN KNOW-- I DON'T BELIEVE I KNEW WHAT
9 WOULD HAPPEN IF YOU WALKED INTO A COURTROOM AND PLEAD
10 GUILTY TO CAPITAL MURDER UNTIL ABOUT THREE WEEKS AFTER I
11 GOT TO DEATH ROW AND I SPOKE TO SOMEBODY THAT HAD DONE IT.
12 THEN I REALIZED THAT YOU COULD ACTUALLY PLEAD GUILTY TO
13 CAPITAL MURDER AND YOU WOULD AUTOMATICALLY BE SENTENCED
14 TO DEATH.

15 BUT THOSE TWO YEARS PRIOR TO, I THOUGHT THAT WAS THE
16 DEAL, IF I WALKED IN HERE AND PLEAD GUILTY TO CAPITAL MURDER,
17 I WOULD RECEIVE THE DEATH PENALTY, I WAS GOING DOWN THE
18 ROAD TO DEATH ROW. I DIDN'T KNOW THAT THERE WAS AN OPTION. I
19 THOUGHT THAT THERE WAS NO OPTION; NO PLEA WAS BEING OFFERED
20 TO ME. THEY HAD COME TO ME WITH NO PLEA. THEY DISCUSSED NO
21 PLEA WITH ME. I THOUGHT THE ONLY OPTION WAS TRIAL.

22 Q NOW, YOUR ATTORNEYS OBVIOUSLY MADE A VERY SERIOUS
23 TACTICAL DECISION IN PRESENTING NO DEFENSE DURING THE GUILT
24 PORTION OF YOUR TRIAL. AND THAT WAS TANTAMOUNT TO

1 PLEADING GUILTY IN THIS CASE BECAUSE, OBVIOUSLY, AS WE HEARD,
2 THE EVIDENCE WAS OVERWHELMING.

3 WERE YOU BROUGHT INTO THE LOOP IN THAT DECISION TO THE
4 EXTENT THAT YOU FEEL YOU WOULD BE SATISFIED?

5 A YOU KNOW, I THINK I CAN POSSIBLY AGREE WITH A LITTLE BIT
6 OF WHAT THEY SAY, THAT IT WAS PRETTY CLEAR WHAT THE RESULT
7 OF THAT FIRST PART OF THE TRIAL WAS GOING TO BE.

8 Q I UNDERSTAND THAT. BUT YOU HAD---

9 A BUT I HAD NO SAY IN IT. I HAD NO REASON TO HAVE A SAY
10 BECAUSE I DIDN'T KNOW. I DIDN'T KNOW THAT THERE WAS AN OPTION
11 OTHER THAN---

12 Q BECAUSE THEY DIDN'T ADVISE YOU?

13 A RIGHT.

14 Q BUT THEY DID ADVISE YOU AND THEY SET YOU UP WITH EXPERT
15 WITNESSES, AS WE TALKED ABOUT. I THINK PINCUS, EVANS, CASCIO,
16 AND YOU HAD GONE TO SEE THOSE INDIVIDUALS AND HAD BEEN
17 INTERVIEWED BY THEM OVER THE COURSE OF THAT YEAR PLUS
18 THREE MONTHS.

19 A YES, I WAS TOLD TO SPEAK THE TRUTH.

20 Q OKAY. NOW STOP THERE JUST A SECOND. YOU WERE TOLD TO
21 SPEAK THE TRUTH. DID THEY AT ANY TIME TELL YOU TO INVOKE THE
22 FIFTH AMENDMENT IN YOUR DISCUSSIONS WITH THESE EXPERT
23 WITNESSES?

24 A NO. THE ONLY TIME THE FIFTH AMENDMENT EVEN BECAME A
25 DISCUSSION WAS OVER ABOUT AN EIGHT-MONTH PERIOD THAT WE

1 ARGUED OVER WHETHER I WOULD HAVE TO SEE THE STATE
2 PSYCHIATRIST OR SUBMIT TO THIS STATE-SPONSORED
3 PSYCHOLOGICAL EVALUATION. AND THAT WAS AN ONGOING THING
4 AND JUDGE HAYES FINALLY RULED ABOUT THAT. I GUESS IT WASN'T
5 BUT ABOUT TWO WEEKS BEFORE TRIAL. AND THEY GOT A DOCTOR
6 DOWN HERE. AND HE MADE IT CLEAR TO ME, MY ATTORNEYS MADE IT
7 CLEAR TO ME THAT I HAD A CHOICE. I DIDN'T HAVE TO SAY A WORD
8 TO THIS MAN, BUT EVERYTHING THAT OUR ENTIRE DEFENSE WAS
9 CENTERED AROUND COULD COME IN.

10 Q THIS WAS DOCTOR McKEE?

11 A YES.

12 Q AND YOUR ATTORNEYS DIDN'T SIT IN WITH YOU ON THAT
13 EVALUATION, DID THEY?

14 A NO. THEY TOLD ME THAT THEY COULDN'T. JUDGE HAYES TOLD
15 THEM THAT THEY COULDN'T.

16 Q OKAY.

17 A BUT THE DOCTOR--

18 Q THE DOCTOR TOLD YOU THEY COULD.

19 A THE DOCTOR TOLD THEM THEY COULD.

20 Q OBVIOUSLY, HE READ YOU YOUR MIRANDA RIGHTS. RIGHT?

21 A TO THIS DAY I'M STILL CONFUSED.

22 Q WELL, THAT'S WHAT I MEAN, DID YOU EVER ASK YOUR
23 ATTORNEYS TO ENLIGHTEN YOU OR FURTHER EXPLAIN WHAT WAS
24 GOING ON HERE WHEN THIS CONFUSION AROSE BEFORE YOU
25 PROCEEDED WITH THE INTERVIEW?

1 A NO. THEY MET WITH ME OUT IN THE HALLWAY BEFORE I WENT
2 INTO THE ROOM WITH THE DOCTOR AND REMINDED ME OF MY
3 CHOICES. AND THEY SAID, YOU CAME HERE TO TALK AND IF YOU
4 TALK YOU'VE GOT TO TELL HIM EVERYTHING. OR YOU CANNOT TALK.
5 IF YOU DON'T TALK, THEN THIS WHOLE THING'S OVER WITH.

6 Q AND THAT WAS DOCTOR McKEE. NOW, GETTING BACK TO YOUR
7 WITNESSES, THE DEFENSE'S EXPERT WITNESSES, CASCIO, PINCUS, AND
8 SO ON AND SO FORTH. DID THEY DISCUSS WITH YOU HOW YOU
9 SHOULD PROCEED WITH THESE INTERVIEWS? AND DID THEY PRETTY
10 MUCH TELL YOU HOW TO HANDLE YOURSELF? DID THEY ASK TO BE
11 THERE? I REALIZE IT'S A COMPOUND QUESTION. GO AHEAD.

12 A IF I REMEMBER CORRECTLY, DRUCY GLASS, MAYBE KATHERINE
13 SMITH, WERE AT PORTIONS OF SOME OF THESE THINGS.

14 Q I'M SORRY. I--

15 A MAYBE BRIEFLY AT THE BEGINNING OR END. BUT THEIR
16 OVERALL, GENERAL WORD OF ADVICE WAS TELL THEM EVERYTHING
17 YOU TOLD US, FROM THE MOMENT YOU WOKE UP THAT MORNING,
18 EVERYTHING. TO TREAT THEM AS IF IT WERE ATTORNEYS; AS IF IT
19 WAS PROTECTED.

20 Q AND DID THEY IN FACT TELL YOU THAT ANYTHING YOU TELL
21 THESE WITNESSES, YOUR EXPERT WITNESSES, YOUR DEFENSE
22 WITNESSES, WOULD BE PRIVILEGED AND WOULD NOT HAVE TO BE
23 PRESENTED IN THE COURSE OF THE TRIAL?

24 A YES.

25 Q SO, THAT WAS YOUR UNDERSTANDING?

1 A YES.

2 Q AND SO, SPECIFICALLY, DRAWING ATTENTION TO DOCTOR
3 CASCIO'S INTERVIEW, YOU WENT FAR AND AWAY BEYOND WHAT A
4 SOCIAL WORKER WOULD NORMALLY QUESTION YOU ON AND CAME
5 UP WITH THESE ANSWERS THAT WE HEARD EARLIER HERE IN THE
6 DAY, IN THE WEEK?

7 A YES. AND I WAS AWARE THAT SHE WAS WRITING A REPORT.
8 WHAT I WASN'T AWARE OF WAS THAT SHE WAS WRITING WHAT I SAID
9 WORD FOR WORD. AND, YOU KNOW, I WAS TOLD BEFORE I MET WITH
10 ONE EXPERT THAT THEY WOULD ALL BE WRITING REPORTS.

11 Q UH-HUH.

12 A BUT THAT I COULD SPEAK MY MIND, IT WOULD ALL BE
13 DIGESTED AND ALL SUMMARIZED, YOU KNOW. THAT WORDS WOULD
14 NOT BE TAKEN OUT OF CONTEXT. THAT MY FIRST INITIAL THOUGHT
15 WOULD BE NOTED, BUT IT WOULDN'T NECESSARILY BE NOTED WORD
16 FOR WORD.

17 Q NOW, YOU'VE GOT REPORTS FROM THESE VARIOUS WITNESSES
18 AND EXPERTS THAT YOU HAD CONSULTED WITH. IS THAT RIGHT? I
19 MEAN, YOUR DEFENSE GOT REPORTS.

20 A YES.

21 Q DID YOU SEE THESE REPORTS AT ALL PRIOR TO GOING TO TRIAL?

22 A NO. ABOUT SIX MONTHS AFTER I WAS SENTENCED.

23 Q ABOUT SIX MONTHS AFTER YOU WERE SENTENCED BEFORE YOU
24 EVEN SAW THE CONTENTS OF THESE REPORTS?

1 A YES, WHEN I PROCEEDED TO TRY TO GET MY FILE FROM MY
2 TRIAL ATTORNEY.

3 Q NOW, OF COURSE, YOU KNEW WHAT DOCTOR CASCIO'S REPORT
4 SAID BECAUSE SHE TESTIFIED ON THE STAND.

5 A YES. I WOUND UP SEEING WHAT A LOT OF THEM WROTE
6 BECAUSE I HEARD THEM TESTIFY TO IT.

7 Q WELL, LET ME ASK YOU THIS, JIM: IF YOU HAD KNOWN THAT
8 DOCTOR PINCUS, WHO WAS THE, BY FAR THE MOST CREDIBLE
9 WITNESS THAT APPEARED ON YOUR BEHALF-- I MEAN, HERE'S A MAN
10 WHO WENT TO COLUMBIA MEDICAL SCHOOL, YALE RESIDENCY, WAS A
11 PROFESSOR AT YALE AND ENDED UP AS A PROFESSOR EMERITUS AT
12 GEORGETOWN. IF YOU HAD KNOWN WHAT HE WOULD HAVE
13 TESTIFIED TO AND SEEN THESE REPORTS, DO YOU THINK IT WOULD
14 MADE ANY DIFFERENCE IN YOUR NEGOTIATIONS WITH YOUR
15 ATTORNEY REGARDING TRIAL TACTICS DURING THE CASE IN CHIEF OR
16 THE GUILTY PHASE OF THIS TRIAL? KNOWING WHAT YOU KNOW NOW
17 AND WHAT HE TESTIFIED?

18 WOULD IT HELP YOU IF I REFRESHED YOUR RECOLLECTION AS
19 TO WHAT HE TESTIFIED?

20 A I BELIEVE HE TESTIFIED THAT I WAS MENTALLY ILL. AND IT
21 WAS AS CLEAR CUT AS ANYTHING COULD BE CLEAR CUT. YOU KNOW,
22 AS CLEAR CUT AS YOU CAN DEFINE MENTALLY ILL IN THESE DAYS
23 AND AGES. NOW, KNOWING WHAT I KNOW, WHAT I READ SIX OR
24 SEVEN DAYS AFTER I GOT TO DEATH ROW, YOU KNOW, YOU WOULD

1 THINK THAT THE BETTER OPTION WOULD HAVE BEEN GUILTY BUT
2 MENTALLY ILL.

3 I DIDN'T UNDERSTAND. EVEN SIX DAYS AFTER I GOT TO DEATH
4 ROW AND SAW THE FIRST LAW BOOK AND TALKED TO THE FIRST GUY
5 ON THE ROW, I STILL DIDN'T UNDERSTAND THE WHOLE CONCEPT, ALL
6 AT WILL. BUT I UNDERSTOOD IT ENOUGH TO SAY, YOU KNOW WHAT,
7 THROW IN THE TOWEL IN THE GUILT PHASE, YOU'VE ALREADY
8 THROWN IT IN ANYWAY, AND SET THE FOUNDATION.

9 Q THAT WAS YOUR LEGAL ADVICE. RIGHT?

10 A THAT'S WHAT I LEARNED.

11 Q OKAY. DESPITE THE FACT THAT DOCTOR PINCUS TESTIFIED, OR,
12 DIAGNOSED YOU AS HAVING PHYSIOLOGICAL FRONTAL LOBE
13 DAMAGE OR ABNORMALITIES, PHYSIOLOGICAL PROBLEMS ---

14 A YES.

15 Q AND THIS IS A PHYSICIAN; THIS ISN'T PROFESSOR EMERITUS IN
16 THAT PARTICULAR FIELD OF STUDY. AND DESPITE THAT, PLUS THE
17 OTHER MENTAL HEALTH PROBLEMS, MENTAL ILLNESS THAT YOU
18 HAVE, BI-POLAR, MANIC DEPRESSIVE, STILL NO DISCUSSION AS TO
19 WHETHER OR NOT IT WAS IN YOUR BEST INTEREST TO THROW IN THE
20 TOWEL OR JUST GO WITH NO DEFENSE?

21 A RIGHT. I'D NEVER HEARD A DISCUSSION.

22 Q OKAY.

23 A THAT'S NOT TO SAY THAT THEY DIDN'T DISCUSS IT AMONG
24 THEMSELVES, BUT IT CERTAINLY WASN'T BROUGHT UP TO ME.
25 LITERALLY, THAT YEAR, THAT YEAR AND A HALF, OR WHATEVER, MY

1 JOB WAS TO TELL THEM ABOUT MY CHILDHOOD, MY BROTHER'S
2 CHILDHOOD, MY MOTHER'S CHILDHOOD, MY FATHER'S CHILDHOOD,
3 MY GREAT GRANDPARENTS' CHILDHOOD, YOU KNOW.

4 Q UH-HUH.

5 A YES, I UNDERSTOOD LEGAL TERMS, BUT PLEAS, NONE OF THAT,
6 YOU KNOW. I DIDN'T EVEN UNDERSTAND THAT YOU COULD STAND IN
7 FRONT OF A JUDGE AND PLEAD GUILTY TO CAPITAL MURDER. I DIDN'T
8 EVEN UNDERSTAND WHY YOU WOULD. I MEAN, WHAT'S THE POINT?

9 Q THE POINT BEING THAT IT WAS NOT EXPLAINED TO YOU.

10 A RIGHT.

11 Q YOU DIDN'T KNOW.

12 A WHAT WOULD BE THE POINT? I MEAN, YOU MIGHT AS WELL
13 TAKE A CRACK AT TWELVE JURORS.

14 Q OKAY.

15 A THAT WAS MY POSITION AT THE TIME. I KNOW THAT IT IS
16 DIFFERENT NOW, NOT THAT I HAVE READ A STATUTE OR TWO, AND
17 I'VE TALKED TO A FEW PEOPLE AND I'VE MET A FEW PEOPLE WHO
18 HAVE STOOD IN FRONT OF A JUDGE AND PLEAD GUILTY TO CAPITAL
19 MURDER.

20 Q AT THE TIME OF THE TRIAL, YOU WERE HOW OLD?

21 A TWENTY-FOUR.

22 Q YOU HAD NO LEGAL TRAINING?

23 A NO.

24 Q SO, BASICALLY, YOU WERE RELYING ENTIRELY ON YOUR
25 ATTORNEYS?

1 A ON MY ATTORNEYS. I MEAN, I DIDN'T HAVE, YOU KNOW, FOR--
2 HALF THE TIME I SPENT HERE AT THIS JAIL I HAD NO ACCESS TO A LAW
3 LIBRARY.

4 Q UH-HUH.

5 A AND THE OTHER HALF WAS IN LEE COUNTY, AND MY ACCESS
6 THERE WAS LIMITED. TO MAKE A LONG STORY SHORT BECAUSE I WAS
7 THERE ON A YOA AND YOU COULDN'T EXPLAIN TO A LIBRARIAN THAT,
8 HEY, I GOT DOUBLE MURDER HANGING OVER MY HEAD; I NEED TO
9 LOOK AT A FEW STATUTES.

10 THEY JUST DIDN'T BELIEVE BECAUSE ALL THEY SAW WAS A YOA
11 NUMBER. IT WASN'T UNTIL ABOUT THREE MONTHS BEFORE I LEFT
12 THERE THEY REALIZED THAT YORK COUNTY WAS WAITING ON ME FOR
13 CAPITAL MURDER. AND THEY PUT ME IN ANOTHER SECURITY
14 ASSIGNMENT, PUT ME IN A WHOLE DIFFERENT BUILDING, EVERYTHING
15 ELSE.

16 BY THEN I MIGHT HAVE BEEN ABLE TO GET INTO THE LIBRARY.
17 BUT, CONSEQUENTLY, IT WASN'T UNTIL DEATH ROW THAT I HAD
18 COMPLETE ACCESS TO A FULL LAW LIBRARY.

19 Q DIRECTING YOUR ATTENTION NOW, AND MOVING AHEAD A
20 LITTLE BIT TO SPECIFICALLY YOU HEARD AN AWFUL LOT OF
21 TESTIMONY AND FACTS COME OUT DURING THE COURSE OF THE LAST
22 THREE DAYS ABOUT DOCTOR CASCIO AND HER SNAFU OF BIBLICAL
23 PROPORTIONS, AS MR. BROWN BROUGHT UP.

24 DID YOU HAVE ANY IDEA WHEN SHE WAS BEING CALLED TO THE
25 STAND THAT SHE WAS GOING TO TESTIFY SO FAR BEYOND THE SCOPE

1 OF YOUR, THE INTENT OF YOUR INTERVIEW, OR WHAT YOU WERE
2 ADVISED YOUR INTERVIEW WAS GOING TO BE, AND INTO THOSE
3 DAMNING STATEMENTS AND TESTIMONY REGARDING YOURSELF AND
4 THE DEFENSE?

5 A IT WAS MY UNDERSTANDING THAT HER JOB WAS TO SIMPLY TIE
6 IT IN, EVERYTHING THAT EVERYBODY ELSE HAD DONE. THAT, YOU
7 KNOW, EVERYTHING THAT DRUCY GLASS HAD DONE, HER REPORT;
8 ALL THE DOCTORS; TO GO OVER ALL THE NOTES.

9 IT WASN'T NECESSARILY HER JOB TO INSTIGATE ANYTHING, TO
10 START ANYTHING NEW. IT WAS TO SIMPLY LOOK AT RECORDS THAT
11 HAD ALREADY BEEN PROVIDED TO HER THAT HAD BEEN GENERATED
12 BY OTHER EXPERTS, AND SIMPLY TIE EVERYTHING IN TO ONE,
13 CONCISE PICTURE OF THE FAMILY, THE PROBLEMS, MAYBE WHY THE
14 PROBLEMS WERE CAUSED, YOU KNOW.

15 Q RIGHT.

16 A WHERE BLAME SHOULD BE ACCESSED OR WHATNOT. BUT IT
17 WASN'T MY UNDERSTANDING THAT SHE EVEN, THAT SHE HAD ANY
18 POSITION, ANY JOB TO SEEK NEW INFORMATION.

19 Q EXACTLY. SHE WASN'T AN INVESTIGATOR; SHE WAS AN
20 EVALUATOR OF YOU AND YOUR PERSONAL HISTORY.

21 A SHE WAS LIKE AN EDITOR. HER JOB WAS TO LOOK AT
22 SOMETHING THAT HAD ALREADY BEEN WRITTEN AND PUT IT
23 TOGETHER.

24 Q WELL, AS IT TURNED OUT, THAT WAS NOT THE CASE. IS THAT
25 RIGHT?

- 1 A AS IT TURNED OUT, SHE TESTIFIED FOR ME.
- 2 Q AND SHE ACTUALLY TESTIFIED TO EVERYTHING THAT YOU
3 WERE TRYING TO KEEP OUT, OR YOUR ATTORNEYS AND YOU WERE
4 TRYING TO KEEP OUT OF THIS TRIAL? ISN'T THAT RIGHT? BY YOU NOT
5 TESTIFYING AND INVOKING YOUR FIFTH AMENDMENT PRIVILEGE?
- 6 A YES.
- 7 Q OKAY. NOW, YOU'RE A PRETTY SMART GUY. RIGHT?
- 8 A YEAH.
- 9 Q I MEAN, YOU'VE BEEN TO COLLEGE AND YOU'VE GOTTEN GOOD
10 IT SCORES AND WE KNOW ALL THAT, IT'S A MATTER OF RECORD. IS
11 THAT A FACT? YOU DON'T HAVE TO ANSWER THAT.
- 12 BUT IF YOU HAD BEEN TRYING THIS CASE PRO SE OR BY
13 YOURSELF, ACTING AS YOUR OWN ATTORNEY, WOULD YOU HAVE PUT
14 HER ON THE STAND KNOWING THAT SHE WAS GOING TO---
- 15 MR. SALTER: OBJECTION TO SPECULATION, YOUR HONOR.
16 THE COURT: SUSTAINED.
- 17 MR. MATLOCK: I WITHDRAW THAT QUESTION.
- 18 Q JUST A COUPLE OF COLLATERAL ITEMS AND I'LL LET YOU GET
19 DOWN OUT OF THERE, JIM. FIRST OF ALL, YOU TESTIFIED ON
20 EXAMINATION ON MONDAY THAT YOUR BROTHER GAVE YOU \$50,000
21 OVER THE COURSE OF THE TIME YOU'VE BEEN ON DEATH ROW. IS
22 THAT CORRECT?
- 23 A YES, APPROXIMATELY.
- 24 Q AND THAT WASN'T IN ANY WAY GIVEN TO YOU TO---

1 MR. SALTER: YOUR HONOR, IF COUNSEL COULD-- I MEAN, I'VE
2 SHOWN SOME INDULGENCE. BUT IF COUNSEL COULD ASK HIM A
3 QUESTION AND ALLOW HIM TO ANSWER.

4 MR. MATLOCK: I'LL REPHRASE THE QUESTION, YOUR HONOR.

5 MR. SALTER: THANK YOU.

6 Q YOU TESTIFIED THAT YOUR BROTHER GAVE YOU \$50,000?

7 A YES, APPROXIMATELY.

8 Q WHAT WAS THE REASON FOR THAT?

9 A OUT OF HIS GOOD GRACES, BECAUSE HE LOVES ME.

10 Q ANY ULTERIOR MOTIVE?

11 A BECAUSE HE WANTED TO. NO. IT WASN'T HANDED TO ME AT
12 ONE TIME. IT WASN'T HANDED TO ME WITH STRINGS ATTACHED. IT
13 WASN'T ARRANGED PRIOR TO. THERE WASN'T A CHECK WRITTEN
14 PRIOR TO THAT SAID PLEASE DO THIS. THIS WAS GIVEN TO ME
15 BECAUSE HE WANTED TO GIVE IT TO ME. AND I WAS TOLD TO SPEND
16 IT AS I SAW FIT.

17 Q LET ME JUST VERY BRIEFLY BACK UP TO THE CASCIO, DOCTOR
18 CASCIO'S TESTIMONY. AFTER SHE TESTIFIED WHAT HAPPENED WITH
19 REGARD TO DIALOG BETWEEN YOU AND YOUR ATTORNEYS?

20 A EXCUSE ME. I'M SORRY.

21 Q OKAY. AFTER DOCTOR CASCIO CONCLUDED HER TESTIMONY,
22 DID YOU HAVE OCCASION TO HAVE A DISCUSSION WITH YOUR
23 ATTORNEYS REGARDING YOUR POSITION AND WHETHER OR NOT YOU
24 WANTED TO DO SOME DAMAGE CONTROL, AS YOU MENTIONED ON
25 MONDAY?

1 A YES. THAT LITTLE ROOM RIGHT THERE, OUTSIDE THE
2 COURTROOM.

3 MR. MATLOCK: THE RECORD REFLECTS---

4 A YES.

5 MR. MATLOCK: ---THAT THE WITNESS IS POINTING TO---

6 A AS MR. HANCOCK SAID, MR. BOYD'S A PRETTY CALM PERSON.
7 SO, I WOULDN'T HAVE KNOWN HOW UPSET HE WAS. BUT HANCOCK
8 AND I GOT INTO EACH OTHER'S FACE. I MEAN, IT WAS HEATED.

9 Q LIKE THAT?

10 A IT WASN'T PERSONAL, BUT IT WAS HEATED AND IT WAS
11 EMOTIONAL. THERE WAS CRYING, THERE WAS YELLING. AND FOR
12 ALL I KNOW HE MAY HAVE BEEN JUST AS UPSET AT TONI CASCIO. AT
13 THE TIME I WAS UPSET AT HIM.

14 Q UH-HUH.

15 A I WASN'T REAL CONCERNED WITH WHO HE WAS UPSET WITH.

16 Q DID YOU ASK TO TESTIFY? TO RESPOND TO THAT, TO REPLY TO
17 THAT?

18 A I ALMOST DEMANDED. I ALMOST SAID, LOOK, THERE'S NO
19 CHOICE NOW; I MIGHT AS WELL. I'VE GOT NOTHING TO LOSE. BUT I
20 WAS ADVISED NOT TO. I WAS ADVISED THAT WHATEVER DAMAGE SHE
21 HAD DONE, TOMMY POPE COULD OPEN THE DOOR TO SOME MORE.
22 AND, YOU KNOW, YOU'RE ON TRIAL FOR YOUR LIFE AND YOU HAVE,
23 ARGUABLY, TWO OF THE BEST ATTORNEYS IN SOUTH CAROLINA, IN
24 THE UPSTATE OR ROCK HILL OR YORK COUNTY TELLING YOU THAT
25 WE CAN LIMIT THE DAMAGE BY LEAVING IT AS IS. WHAT DO YOU DO?

1 Q IN CONCLUSION, THOUGH, YOU WANTED TO TAKE THE STAND.
2 YOU VEHEMENTLY PROTESTED---

3 A YES.

4 Q ---THEIR NOT ALLOWING YOU TO DO SO?

5 A YES.

6 MR. MATLOCK: I HAVE NO FURTHER QUESTIONS.

7 Q ANSWER DEFENSE'S QUESTIONS.

8 MR. SALTER: BEFORE WE BEGIN, I WOULD ASK FOR A FIVE

9 MINUTE BREAK. WE'RE TRYING TO LOCATE SOME RECORDS

10 PERTAINING TO VISITATION BY COUNSEL, TO SHOW THAT COUNSEL

11 VISITED MORE THAN TEN HOURS.

12 MR. BROWN: WITHOUT OBJECTION, YOUR HONOR.

13 THE COURT: DO YOU THINK YOU'LL BE ABLE TO GET THAT

14 DONE IN THE NEXT FEW MINUTES?

15 MR. SALTER: I WOULD HOPE SO, YOUR HONOR.

16 THE COURT: ALL RIGHT. WE'LL TAKE A SHORT BREAK.

17 MR. SALTER: IF NOT, I'LL JUST GO AHEAD AND PROCEED.

18 (WHEREUPON COURT WAS IN RECESS AT 3:55 P.M.)

19 COURT IN SESSION - 4:00 P.M.

20 CROSS EXAMINATION BY MR. SALTER:

21 Q MR. ROBERTSON, WHEN YOUR ATTORNEYS ASKED YOU WHAT
22 HAPPENED ON THAT LONG INITIAL VISIT THAT YOU DESCRIBED
23 EARLIER, THE ONE THAT YOU SAID LASTED ABOUT FOUR OR FIVE
24 HOURS, YOU TOLD THEM WHAT HAPPENED. RIGHT?

25 A YES.

1 Q YOU TOLD THEM THAT YOU COMMITTED THE CRIME. RIGHT?

2 DID YOU NOT?

3 A YES.

4 Q AND YOU ALSO TOLD THEM ABOUT YOUR BACKGROUND, AS

5 BEST THAT YOU COULD, PROVIDED THEM WITH AS MUCH

6 INFORMATION AS YOU COULD. RIGHT?

7 A YES.

8 Q AND YOU CONTINUED TO DO THAT, DID YOU NOT?

9 A YES.

10 Q SO, YOU TOLD THEM EVERYTHING THAT YOU COULD THINK OF

11 ABOUT YOUR FAMILY'S BACKGROUND AND MENTAL HEALTH

12 HISTORY?

13 A YES.

14 Q NOW, AS I UNDERSTAND IT, YOU SAID YOU WANTED TO SEE THE

15 PHYSICAL EVIDENCE, YOU WANTED TO SEE THE PHYSICAL EVIDENCE

16 IN THIS CASE?

17 A THAT IS TRUE.

18 Q SPECIFICALLY, I THINK YOU SAID YOU WANTED TO SEE THE BAT

19 AND THE HAMMER?

20 A I WAS-- YES. I WAS-- I DIDN'T MEAN JUST THOSE TWO. I WAS

21 JUST USING THOSE AS AN EXAMPLE.

22 Q WHY DID YOU WANT TO SEE THEM?

23 A THAT'S WHAT'S GOING TO BE USED TO TRY ME. THAT WAS

24 WHAT GOING TO BE USED TO DETERMINE MY FATE,

25 Q WELL, YOU HAD ALREADY SEEN THEM BEFORE, HADN'T YOU?

1 A IT WAS OFFERED TO ME BY TOMMY POPE.

2 Q YOU HAD ALREADY SEEN THEM BEFORE, HAD YOU NOT?

3 A I SUPPOSE I HAD.

4 Q WHEN YOU USED THEM ON YOUR PARENTS?

5 A I TAKE THE FIFTH.

6 MR. SALTER: YOUR HONOR, HASN'T HE ALREADY WAIVED THAT
7 NOW?

8 THE COURT: BY ANSWERING THE PREVIOUS QUESTION?

9 MR. SALTER: YES SIR.

10 A YES. WE'LL MAKE THIS EASY.

11 Q YOU---

12 THE COURT: LET'S CLEAR UP. LET'S CLEAR THIS UP. ASK THE
13 QUESTION AGAIN, PLEASE. I DON'T THE RECORD ACCURATELY
14 REFLECTS WHETHER OR NOT THE QUESTION ANSWERED, AND IF SO,
15 WHAT THE ANSWER WAS.

16 Q YOU HAD PREVIOUSLY SEEN THE BAT AND THE HAMMER WHEN
17 YOU USED THEM ON YOUR PARENTS. CORRECT?

18 A YOUR HONOR, I'M TAKING THE FIFTH TO THAT. I ADMIT THAT I
19 COMMITTED THE CRIME, BUT NOT NECESSARILY IN THE MANNER THAT
20 HE'S STATING. I HAVE NO PROBLEM TO ADMITTING TO THE CRIME,
21 BUT TO THE MANNER THAT HE'S STATING, THAT A BAT WAS USED,
22 NECESSARILY, SPECIFICALLY, I TAKE THE FIFTH.

23 MR. SALTER: YOUR HONOR, I THINK HE'S WAIVED IT.

24 MR. BROWN: BEG THE COURT'S INDULGENCE JUST ONE SECOND.

25 (PAUSE)

1 MR. MATLOCK: YOUR HONOR, MY QUESTION, AS I RECALL, WAS
2 A VERY GENERAL QUESTION WITH RESPECT TO HAVING-- I DIDN'T GET
3 INTO ANY SPECIFICS. I DIDN'T ASK ABOUT ANY BALL BATS OR
4 HAMMERS OR ANYTHING LIKE THAT. I JUST ASKED A GENERAL
5 QUESTION, DID YOU ASK TO REVIEW THE EVIDENCE AND IT WAS
6 GENERALLY OUT THERE, THE BAT. AND HE ANSWERED.

7 THE COURT: IS IT YOUR POINT THAT THE QUESTION MR. SALTER
8 JUST ASKED IS NOT PROPERLY ASKED IN CROSS EXAMINATION?

9 MR. MATLOCK: NO. IT'S BEYOND THE SCOPE OF MY DIRECT
10 EXAMINATION.

11 THE COURT: WELL, I'M NOT GOING TO LIMIT-- THIS IS NOT AS
12 THOUGH THE-- I THINK THE QUESTION IS PROPERLY IN RESPONSE TO
13 QUESTIONS THAT WERE ASKED ON DIRECT. BUT THE REAL-- IF THAT'S
14 YOUR OBJECTION, I OVERRULE THAT OBJECTION.

15 BUT THE REAL ISSUE IS, WHEN HE ANSWERED THE QUESTION A
16 MINUTE AGO WHETHER OR NOT HE COMMITTED THE CRIMES, AND HE
17 ANSWERED THE QUESTION YES, IS THAT A WAIVER OF HIS RIGHT TO
18 REMAIN SILENT UNDER THE FIFTH AMENDMENT SUCH THAT I SHOULD
19 ORDER HIM TO ANSWER ALL SUBSEQUENT QUESTIONS RELATED TO
20 THE CRIME.

21 MR. MATLOCK: IF HE COMMITTED THE OFFENSE, THAT WAS THE
22 QUESTION AND HE ANSWERED YES, THEN---

23 THE COURT: DID THE YOU COMMIT THE CRIME, OR SOMETHING
24 LIKE THAT?

1 MR. SALTER: I ASKED WHETHER OR NOT HE TOLD HIS
2 ATTORNEYS THAT HE COMMITTED THE OFFENSES.

3 MR. MATLOCK: AND THAT WOULD BE A WAIVER OF HIS ENTIRE
4 RIGHTS UNDER THE FIFTH AMENDMENT? I DON'T BELIEVE SO.

5 THE COURT: THEN, SUBSEQUENTLY, THEN, HE SAID I DON'T
6 HAVE ANY PROBLEM ADMITTING THAT I COMMITTED THE CRIME. AND
7 IT'S MY UNDERSTANDING THAT THERE IS NO SUCH THING OF A
8 PARTIAL WAIVER OF THE RIGHT TO REMAIN SILENT. IT IS EITHER A
9 COMPLETE WAIVER OR IT IS A COMPLETE EXERCISE OF THAT RIGHT.

10 NOW, MR. ROBERTSON, YOU, OF COURSE, HAVE HAD YOUR
11 RIGHT TO REMAIN SILENT EXPLAINED TO YOU REPEATEDLY
12 THROUGHOUT THE LAST TEN YEARS. CORRECT?

13 A YES.

14 THE COURT: AND YOU UNDERSTAND IT?

15 A YES. THE ONE POINT THAT I WAS MAKING IS THAT--

16 THE COURT: NO, I DIDN'T ASK YOU WHAT POINT YOU WERE
17 MAKING. I ASKED YOU WHETHER OR NOT YOU UNDERSTAND YOUR
18 RIGHT TO REMAIN SILENT AND THE ANSWER IS YES.

19 NOW, WHEN YOU ANSWERED THAT QUESTION A MINUTE AGO,
20 YOU DIDN'T GET TRICKED INTO ANSWERING THAT QUESTION, DID
21 YOU?

22 A NO.

23 THE COURT: YOU CHOSE TO ANSWER THE QUESTION THAT YOU
24 HAD COMMITTED THE CRIMES?

1 A YES, IN THE HOPES OF AVOIDING THE OTHER SIXTY-FIVE
2 QUESTIONS THAT I PLEAD THE FIFTH TO---

3 THE COURT: RIGHT.

4 A ---THE OTHER DAY.

5 THE COURT: AND WHEN YOU ANSWERED THAT QUESTION YOU
6 KNEW THAT YOU DID NOT HAVE TO ANSWER THE QUESTION BECAUSE
7 YOU HAD THE RIGHT TO REMAIN SILENT REGARDING THE CRIME
8 ITSELF AND ALL THE FACTS AND CIRCUMSTANCES SURROUNDING THE
9 CRIME. ANYTHING THAT MIGHT TEND TO INCRIMINATE YOU, YOU
10 KNEW THAT YOU DIDN'T HAVE TO ANSWER THOSE QUESTIONS, DIDN'T
11 YOU?

12 A YES, EVEN THOUGH MY ATTORNEYS INCRIMINATED ME. THE
13 RIGHT TO SELF-INCRIMINATION WENT OUT THE DOOR WHEN THEY
14 BOTH TESTIFIED THAT I TOLD THEM SO. ALL I DID IS REPEAT THAT
15 YES, I TOLD MY ATTORNEYS---

16 THE COURT: THAT'S ENOUGH. I DIDN'T ASK YOU THAT.

17 A I'M SORRY.

18 THE COURT: DO Y'ALL HAVE-- THE STATE'S POSITION IS THAT
19 HE WAIVED HIS RIGHT TO REMAIN SILENT. AND I SUPPOSE THE
20 REQUEST IS THAT I ORDER HIM TO ANSWER THESE QUESTIONS?

21 MR. SALTER: YES SIR, YOUR HONOR.

22 MR. MATLOCK: YOUR HONOR, I UNDERSTAND THERE'S A LEGAL
23 PRINCIPLE THAT---

24 THE COURT: I'M JUST ASKING. I'M ASKING FOR YOUR
25 RESPONSE. I MEAN, THERE'S A LOT OF LAW THAT I DON'T KNOW OFF

1 THE TOP OF MY HEAD, AND THERE'S A LOT OF LAW THAT I THINK I
2 KNOW OFF THE TOP OF MY HEAD. BUT THAT'S ONE THAT I'M NOT
3 ABSOLUTELY POSITIVE I KNOW. AND BEFORE I JUMP RIGHT OUT AND
4 RULE ON IT, I WANT TO HEAR WHAT Y'ALL HAVE TO SAY.

5 MR. BROWN: YOUR HONOR, I WOULD SUBMIT TO YOU THAT DUE
6 TO THE BIFURCATION OF THE DEATH PENALTY CASE, THAT HE HAS
7 NOT WAIVED HIS FIFTH AMENDMENT RIGHT, BECAUSE, AS I TOLD YOU
8 EARLY ON, EVEN THOUGH I DON'T WAIVE MY RIGHT TO GO BACK INTO
9 THAT PHASE, WE HAVE NO QUALMS IN THIS POST CONVICTION RELIEF
10 AS TO A NEW TRIAL, POSSIBLY AS TO A NEW SENTENCING HEARING.

11 THE FACT THAT HE DID THE CRIME AS TO THE GUILT PHASE I
12 THINK IS A WASH. AS TO MITIGATION AND AGGRAVATION, I THINK HE
13 WOULD HAVE A FIFTH AMENDMENT RIGHT THERE DUE TO THE
14 HEINOUS NATURE OF THE ALLEGATION OF THIS CRIME. AND I THINK
15 HE HAS CHOSEN NOW TO ASSERT HIS FIFTH AMENDMENT RIGHT AS TO
16 THE AGGRAVATION, THE AGGRAVATED CIRCUMSTANCES OR THE
17 MITIGATING CIRCUMSTANCES OF THAT CRIME. AND I THINK HE
18 WOULD ALSO HAVE A FIFTH AMENDMENT RIGHT AS TO THAT PHASE
19 OF THE TRIAL, OR THE ALLEGATIONS.

20 MR. MATLOCK: AND IF I MAY, YOUR HONOR, JUST VERY
21 BRIEFLY. YOU WERE ASKING IF HE UNDERSTOOD HIS FIFTH
22 AMENDMENT RIGHTS. I THINK IT'S PATENTLY OBVIOUS FROM HIS
23 ANSWER THAT HE DIDN'T UNDERSTAND HIS FIFTH AMENDMENT
24 RIGHTS WHEN HE RESPONDED TO THAT QUESTION. HE WAS GOING ON
25 THE PREMISE THAT HIS ATTORNEYS HAD ALREADY WAIVED HIS FIFTH

1 AMENDMENT RIGHTS. HE HASN'T AFFIRMATIVELY WAIVED HIS
2 RIGHTS OR BEEN ADVISED OF HIS RIGHTS IN THIS PARTICULAR
3 QUESTION. SO, I DON'T THINK HE KNOWINGLY AND WILLINGLY
4 WAIVED HIS RIGHT BY ANSWERING THAT QUESTION.

5 MR. BROWN: I MEAN, AN ANALOGOUS SITUATION, YOUR HONOR,
6 WOULD BE, LIKE, YES, I COMMITTED THE CRIME; HOWEVER, I MAY
7 HAVE SOME AFFIRMATIVE DEFENSES SUCH AS SELF-DEFENSE,
8 INSANITY, MENTAL ILLNESS, ET CETERA. I DON'T THINK HE'S WAIVED
9 HIS FIFTH AMENDMENT RIGHT IN MITIGATION AND AGGRAVATION.

10 THE COURT: ALL RIGHT. IF YOU WANT TO CONTINUE ASKING
11 HIM QUESTIONS ON ANOTHER LINE, YOU MAY. AND I WILL RULE
12 WHEN I GET READY.

13 MR. SALTER: YES SIR, YOUR HONOR. VERY BRIEFLY, THEN.

14 Q YOU TESTIFIED ON DIRECT EXAMINATION THAT YOUR
15 ATTORNEY MET WITH YOU AND IMMEDIATELY ORDERED YOUR
16 EVALUATION BY DOCTOR MCKEE, THE STATE'S EXPERT?

17 A YES. I'M ALMOST-- I CANNOT-- I CAN STILL SEE IT, STANDING IN
18 THE HALLWAY FOR ABOUT A MINUTE AND A HALF OR TWO. I MAY BE
19 WRONG. IT MAY HAVE BEEN MR. MORTON, BUT I'M ALMOST POSITIVE.

20 Q AND I BELIEVE THEY TOLD YOU THAT YOU HAD AN OPTION; YOU
21 COULD EITHER TALK AND TELL THE TRUTH, OR DON'T TALK AT ALL
22 AND IT'S OVER. IS THAT RIGHT?

23 A THEY TOLD ME---

24 Q IS THAT---

1 A ---THAT I HAD TO COOPERATE; THAT I HAD TO TELL THEM
2 EVERYTHING.

3 Q SO THEY COULD PRESENT A MENTAL HEALTH DEFENSE. IS THAT
4 RIGHT?

5 A OTHERWISE, EVERYTHING THAT WE HAD PUT TOGETHER IN
6 MENTAL HEALTH WAS OUT.

7 Q AND YOU CHOSE TO GO AHEAD AND TALK TO HIM? AFTER THEY
8 MADE THIS EXPLANATION TO YOU, YOU CHOSE TO GO AHEAD AND
9 TALK TO HIM?

10 A AFTER THE ADVICE I WAS GIVEN, YES, I CHOSE TO TALK TO HIM.

11 Q NOW, I BELIEVE YOU SAID YOU HAD CHANGED YOUR VIEW ON
12 PLEADING CAPITAL MURDER AFTER DISCUSSIONS WITH SEVERAL
13 PEOPLE WHO HAVE PLEAD GUILTY TO CAPITAL MURDER? IS THAT
14 RIGHT?

15 A I JUST BELIEVE THAT I-- I BECAME-- I UNDERSTOOD MORE
16 ABOUT CAPITAL MURDER A LITTLE LATER ON.

17 Q AFTER TALKING TO PEOPLE LIKE MICHAEL PISSARO?

18 A I BELIEVE HE WAS ONE.

19 Q Y'ALL WERE FRIENDS, WEREN'T YOU?

20 A OH, WELL, YES, THAT'S UNQUESTIONABLE.

21 Q WHO ELSE?

22 A SPECIFIC NAMES, I DON'T REMEMBER. I DO REMEMBER HEARING
23 THAT YOU COULD SIMPLY, YOU KNOW, YOU COULD PLEAD GUILTY.
24 AND AFTER YOU PLEAD GUILTY, ASSUMING THAT THE JUDGE
25 ACCEPTED YOUR PLEA, THAT YOU COULD EMPANEL A JURY OR ASK

1 THE JUDGE TO DECIDE ON SENTENCING, YOU KNOW, ONE OF THE TWO.
2 BUT PRIOR TO THIS, I JUST ASSUMED IF I PLEAD GUILTY I WAS ON THE
3 ROPES FOR WHATEVER SENTENCE THE PROSECUTOR ASKED FOR, OR IT
4 COULD BE NEGOTIATED RIGHT THAT MINUTE IN COURT.

5 Q AND YOUR ATTORNEYS NEVER TOLD YOU ANYTHING
6 DIFFERENT?

7 A NO.

8 Q WITH RESPECT TO YOUR REQUEST TO TESTIFY AFTER MS.
9 CASCIO HAD TESTIFIED, WHAT DID YOU WANT TO TESTIFY TO?

10 A I WANTED TO TAKE THE SUBSTANCE OF WHAT SHE SAID AND
11 PUT IT BACK IN CONTEXT.

12 Q THE SUBSTANCE OF WHAT SHE SAID. THE SUBSTANCE OF WHAT
13 SHE SAID WITH RESPECT TO YOUR FAMILY'S MENTAL HEALTH
14 HISTORY, OR THE SUBSTANCE OF WHAT CAME OUT THROUGH HER
15 EXAMINATION AND CROSS EXAMINATION CONCERNING THE CRIME?

16 A THE SUBSTANCE OF HER REPORT, OF WHAT SHE WAS HIRED TO
17 DO.

18 Q BUT WHEN YOU SAID SUBSTANCE OF WHAT SHE WAS HIRED TO
19 DO, DO YOU WANT TO CLARIFY WHAT THE INFORMATION SHE
20 RELATED CONCERNING YOUR FAMILY'S PAST AND MENTAL HEALTH
21 HISTORY OR WHAT INFORMATION THAT CAME OUT CONCERNING THE
22 CRIME, OR BOTH?

23 A PRIMARILY THE HISTORY OF THE FAMILY. I WANTED TO BE THE
24 ONE-- I WANTED, YOU KNOW, I WANTED TO MAKE IT CLEAR THAT I
25 WAS LIVING IN THAT HOUSE. I KNEW WHAT HAPPENED, YOU KNOW.

1 THAT THE JURY WOULD HEAR IT OUT OF MY MOUTH. THAT THEY
2 WOULD HEAR, YOU KNOW, THE NIGHT THAT DAD DANGLED ME OVER
3 THE BALCONY. THAT THIS WASN'T JUST HEARSAY OR THIS WASN'T,
4 JUST DIDN'T COME THROUGH ME TALKING TO ONE EXPERT OR
5 ANOTHER EXPERT OR WHATEVER.

6 Q I'M GLAD YOU SAID THAT. YOU TOLD EACH OF YOUR EXPERTS
7 AS MUCH INFORMATION AS YOU COULD ABOUT YOUR MENTAL
8 HEALTH HISTORY. CORRECT? INCLUDING YOUR FAMILY'S?

9 A YEAH. I MEAN, I'M NOT A MEDICAL PROFESSIONAL, BUT, YES, AS
10 MUCH AS I KNEW OF THE SITUATION.

11 Q NOT JUST MS. CASCIO, ---

12 A WHO WAS BEING TREATED.

13 Q ---BUT THE OTHER EXPERTS AS WELL?

14 A YES.

15 MR. SALTER: YOUR HONOR, OTHER THAN MY OTHER
16 QUESTIONS, I THINK WE'RE BACK RIGHT WHERE WE WERE.

17 THE COURT: WELL, I'LL TELL YOU WHAT I'M GOING TO DO. I AM
18 NOT GOING TO GRANT YOUR MOTION AT THIS TIME. I AM NOT
19 SATISFIED THAT BY ANSWERING THE QUESTIONS THAT HE ANSWERED
20 THAT THAT CONSTITUTES A KNOWING AND VOLUNTARY AND
21 INTELLIGENT WAIVER OF HIS RIGHT TO REMAIN SILENT. AND SO, I
22 WILL NOT ORDER HIM AT THIS TIME TO ANSWER ANY FURTHER
23 QUESTIONS.

24 HOWEVER, ACKNOWLEDGING THAT THIS IS A COMPLICATED
25 AREA OF LAW THAT NONE OF US CAN RECITE OFF THE TOP OF OUR

1 HEADS, YOU MAY GET BACK TO YOUR OFFICE AND DECIDE THAT YOU
2 WANT TO RENEW YOUR MOTION IN WRITING WITH SOME LAW TO
3 BACK IT UP, AND I'LL BE HAPPY TO ENTERTAIN THAT MOTION IF YOU
4 DO, GIVING DEFENSE, GIVING APPLICANT'S COUNSEL A CHANCE TO
5 RESPOND. AND THEN I WILL RULE. AND IF I DECIDE AT THAT TIME TO
6 GRANT YOUR MOTION, WE'LL RECONVENE AND YOU CAN ASK THOSE
7 QUESTIONS.

8 MR. SALTER: THANK YOU, YOUR HONOR. I APPRECIATE THAT.
9 JUST TWO MORE QUESTIONS.

10 Q AS I UNDERSTAND YOUR COMPLAINT CONCERNING COUNSEL'S
11 HANDLING OF MS. CASCIO, IT'S BECAUSE OF THE INFORMATION THAT
12 YOU IMPARTED TO HER WAS RELAYED TO THE JURY. RIGHT?

13 A YES.

14 Q AND YOU SAID IN YOUR PREVIOUS TESTIMONY THAT YOU WERE
15 TRUTHFUL WITH ALL THESE EXPERTS. CORRECT?

16 A YES. I WAS TOLD TO BE.

17 Q SO, IN ESSENCE, WHAT YOU'RE COMPLAINING ABOUT IS THAT
18 COUNSEL WAS INEFFECTIVE FOR FAILING TO SUPPRESS THE TRUTH. IS
19 THAT CORRECT? IS THAT WHAT YOUR COMPLAINT IS?

20 A NO. IT'S MORE THAT---

21 MR. MATLOCK: YOUR HONOR, I OBJECT. THAT'S A STOP BEATING
22 YOUR WIFE QUESTION.

23 THE COURT: I THINK THAT REALLY THE QUESTION THAT YOU
24 ASKED IS MORE OF A LEGAL QUESTION AND I'M GOING TO SUSTAIN
25 THE OBJECTION.

1 MR. MATLOCK: THANK YOU, YOUR HONOR.

2 MR. SALTER: YOUR HONOR, I DON'T HAVE ANY FURTHER
3 QUESTIONS, BUT I DO BELIEVE THERE'S BEEN A STIPULATION I'LL BE
4 ALLOWED TO INTRODUCE VISITATION RECORDS DURING THE TIME
5 THAT MR. ROBERTSON WAS INCARCERATED FROM THE TIME HE WAS
6 INCARCERATED UNTIL THE TIME OF TRIAL.

7 MR. BROWN: CERTAINLY NO OBJECTION, YOUR HONOR.

8 THE COURT: ALL RIGHT.

9 MR. MATLOCK: I HAVE NO FURTHER QUESTIONS.

10 THE COURT: NOW, IN WHAT TIME FRAME DO YOU ANTICIPATE
11 THESE VISITATION RECORDS COMING IN? WELL, FIRST OF ALL, ANY
12 RE-DIRECT?

13 MR. MATLOCK: NO, YOUR HONOR.

14 THE COURT: ALL RIGHT. MR. ROBERTSON, YOU CAN STEP
15 DOWN.

16 WE'RE STILL LOOKING FOR YOU ALL TO CLEAR UP THE
17 QUESTION OF THESE NOTES.

18 MR. SALTER: YES SIR.

19 THE COURT: AND THEN YOU MIGHT INTRODUCE SOME
20 VISITATION RECORDS.

21 MR. SALTER: YES SIR.

22 THE COURT: OTHER THAN THOSE TWO THINGS, IS THERE GOING
23 TO BE ANY FURTHER EVIDENCE?

24 MR. SALTER: YOUR HONOR, I JUST SPOKE TO OTHER COUNSEL
25 ABOUT THIS. THESE ARE THE YORK COUNTY DETENTION RECORDS.

1 COUNSEL DOES NOT OPPOSE ME SUPPLEMENTING THEM WITH THE
2 SCDC VISITATION RECORDS THAT MAY BE AVAILABLE.

3 MR. BROWN: I HAVE THE VISITATION BY MR. HANCOCK AND MR.
4 BOYD AND ANYBODY CONNECTED WITH THEM IN THIS TRIAL. AND
5 THERE IS NOT OBJECTION TO THAT.

6 THE COURT: ALL RIGHT.
7 (WHEREUPON VISITATION NOTES WERE MARKED AS DEFENDANT'S
8 EXHIBIT NUMBER EIGHT AND ADMITTED INTO EVIDENCE WITHOUT
9 OBJECTION)

10 MR. BROWN: YOUR HONOR, I WOULD ALSO LIKE TO STIPULATE
11 THAT UPON RECEIPT OF DOCTOR CASCIO'S NOTES, WHEREVER THEY
12 MAY BE, THAT THEY WILL BE MADE PART OF THE RECORD.

13 MR. SALTER: THAT'S CORRECT, YOUR HONOR.

14 THE COURT: WELL, ADDRESSING THOSE TWO QUESTIONS. I
15 DON'T THINK THAT THE PRECISE AUTHENTICATION OF THIS UNKNOWN
16 SET OF NOTES FROM DOCTOR CASCIO IS REALLY ALL THAT
17 IMPORTANT. WHAT'S IMPORTANT IS THE NOTES THAT WE KNOW ARE
18 DOCTOR CASCIO'S AND WE KNOW THAT THOSE NOTES WERE CREATED
19 ON OR BEFORE DECEMBER 7, 1998. AND I THINK THAT'S ALL THE
20 INFORMATION THAT I NEED REGARDING THOSE NOTES.

21 Y'ALL MIGHT WANT TO CLEAR THAT UP JUST TO CLEAR IT UP.
22 BUT I DON'T THINK THAT STANDS IN THE WAY OF ME RULING ON THE
23 ISSUES REGARDING DOCTOR CASCIO.

24 MR. BROWN: YES SIR. AND I UNDERSTAND. I MEAN, I THINK THE
25 RECORDS ARE FULL OF WHAT OCCURRED.

1 THE COURT: BUT DO YOU DISAGREE WITH THAT?

2 MR. BROWN: NO SIR, I DO NOT.

3 THE COURT: WELL, LET ME---

4 MR. BROWN: I DON'T KNOW IF COLUMBIA MAY WANT TO SEE
5 THEM.

6 THE COURT: AS FAR AS THE VISITATION RECORDS, FRANKLY,
7 THOSE ARE NOT GOING TO AFFECT MY RULING ON THE CLAIM
8 REGARDING FAILURE TO VISIT WITH MR. ROBERTSON LONG ENOUGH
9 BEFORE TRIAL. BUT YOU MIGHT WANT TO-- AND I-- REALLY--

10 LET ME JUST ASK THIS QUESTION: WHAT EVIDENCE REGARDING
11 THAT CLAIM-- YOU MADE THE CLAIM THAT MR. BOYD AND MR.
12 HANCOCK DID NOT SPEND ENOUGH TIME VISITING WITH MR.
13 ROBERTSON BEFORE TRIAL IN ORDER TO FULLY AND COMPLETELY
14 PREPARE FOR TRIAL.

15 NOW, MR. HANCOCK TESTIFIED THAT THEY ACCOMPLISHED
16 THAT-- THAT THEY SAW THIS CASE AS A MITIGATION CASE. AND
17 THAT THEY FELT THAT THE WAY TO GAIN ALL OF THE INFORMATION
18 THAT THEY SHOULD GAIN FROM MR. ROBERTSON WAS THROUGH THE
19 EXPERTS. AND THAT IF YOU ADD IN THE TIME THE EXPERTS SPENT
20 WITH HIM TO THE TIME THAT THE LAWYERS SPENT WITH HIM, THAT
21 THAT WOULD BE AMPLE AMOUNT OF TIME.

22 THAT'S ONE RESPONSE. THAT'S ON THE FIRST PRONG OF
23 STRICKLAND. BUT ON THE SECOND PRONG OF STRICKLAND WHAT
24 EVIDENCE IS THERE IN THIS RECORD, IN THIS PCR TRIAL, THAT
25 COUNSEL COULD HAVE DONE ANYTHING DIFFERENT DURING EITHER

1 THE GUILT OR PENALTY PHASE OF THE TRIAL, IF THEY HAD SPENT
2 MORE TIME WITH MR. ROBERTSON BEFOREHAND?

3 MR. BROWN: YOUR HONOR, THE ONLY EVIDENCE IS FROM THE
4 APPLICANT HIMSELF.

5 THE COURT: AND WHAT IS THAT?

6 MR. BROWN: I WAS ASKED TO RAISE THAT. THERE IS NOT
7 ENOUGH TIME. WE HAVE NOT HAD ENOUGH TIME TO MAKE A FORMAL
8 DECISION ABOUT WHAT ROUTE TO TAKE ON HIS DEFENSE, ET CETERA;
9 WHAT ISSUES TO RAISE, THE GUILTY BUT MENTALLY ILL. AND THAT
10 WOULD JUST BE SOLELY ON PROFFER BY THE APPLICANT, YOUR
11 HONOR.

12 THE COURT: WAIT A MINUTE, NOW.

13 MR. BROWN: AND YOUR HONOR, I DON'T REMEMBER WHAT THE
14 EXACT TESTIMONY WAS, BUT THAT WOULD BE THE SOLE PROFFER, IF
15 IT DID EXIST. I UNDERSTAND WHAT THE COURT---

16 THE COURT: WAS IT THEY WOULD HAVE LEARNED MORE ABOUT
17 HIS MENTAL CONDITION?

18 MR. BROWN: NO SIR. HE WOULD HAVE HAD MORE INPUT INTO
19 THE ROUTE, THE STRATEGY THAT THEY TOOK IN THIS TRIAL, IS MY
20 UNDERSTANDING FROM MR. ROBERTSON.

21 THE COURT: THAT HE WOULD HAVE HAD MORE?

22 MR. BROWN: YES SIR. FOR WHAT IT'S WORTH, YOUR HONOR.

23 THE COURT: SO, THAT'S THE ONLY POSITION THAT THE
24 APPLICANT TAKES HERE AS TO HOW COUNSEL'S PERFORMANCE MEETS
25 THE STRICK--, THE SECOND PRONG OF THE STRICKLAND TEST AS TO

1 THE FAILURE TO VISIT WITH HIM ENOUGH BEFORE TRIAL. IF THEY DID
2 GET TO VISIT WITH HIM MORE, THEN ROBERTSON WOULD HAVE HAD A
3 BETTER OPPORTUNITY TO WEIGH IN ON THE STRATEGIC DECISIONS
4 THAT THE LAWYERS HAD TO MAKE DURING THE COURSE OF THE
5 TRIAL.

6 MR. BROWN: AND THE OPTIONS AVAILABLE TO HIM, YOUR
7 HONOR. AND I WOULD PROFFER THAT TESTIMONY FOR WHATEVER
8 THE COURT DEEMS THE VALUE, FOR THE SOLE TESTIMONY PRESENTED
9 IN HIS OWN BEHALF. WE HAVE NO OTHER EVIDENCE.

10 THE COURT: WELL, Y'ALL COME BACK HERE IN THE HALL JUST A
11 MINUTE, PLEASE, AND LET'S CHAT.

12 (WHEREUPON A CONFERENCE BETWEEN THE COURT AND
13 COUNSEL TOOK PLACE OUTSIDE OF THE COURTROOM AT 4:25 P.M.)

14 COURT IN SESSION - 4:30 P.M.

15 THE COURT: NOW, AS FAR AS-- NOW, AT THE BEGINNING OF
16 THIS TRIAL, I GOT YOU ALL TO LIST THE INDIVIDUAL CLAIMS FOR
17 RELIEF THAT YOU WANTED TO MAKE. AND YOU DID THAT AND WE
18 DISCUSSED IT. AND I'VE MADE NOTES OF THEM; I'VE GOT THEM ALL
19 HERE.

20 IS THERE ANY WAY IN WHICH YOU WANT TO SUPPLEMENT YOUR
21 CLAIMS BASED ON TESTIMONY WHICH CAME OUT OR ANYTHING THAT
22 HAPPENED DURING THE COURSE OF THE TRIAL?

23 MR. BROWN: NO SIR.

24 THE COURT: WHAT I-- OF COURSE, WE DIDN'T WORK MONDAY
25 MORNING OR TUESDAY MORNING OR THIS MORNING. AND DURING

1 THOSE BREAKS I WAS ABLE TO SPEND A LOT OF TIME REVIEWING THE
2 TRANSCRIPT OF THE TRIAL. AND BETWEEN MY LAW CLERK AND ME,
3 WE HAVE, I BELIEVE, REVIEWED EVERYTHING THAT YOU ALL ASKED
4 ME TO REVIEW, AND EVERYTHING THAT I NEEDED TO REVIEW FROM
5 THE TRIAL TRANSCRIPT. AND I AM PREPARED RIGHT NOW TO RULE ON
6 EVERY ISSUE EXCEPT FOR THE CASCIO ISSUE. AND I WOULD LIKE TO
7 DISCUSS THAT A LITTLE BIT.

8 AND IF I FEEL PREPARED TO-- I WOULD LIKE TO GO AHEAD AND
9 RULE ON EVERYTHING EXCEPT CASCIO, DISCUSS CASCIO NOW. AND
10 THEN IF I FEEL READY TO RULE, I MAY GO AHEAD AND RULE ON THAT
11 AS WELL.

12 ANY OBJECTION? DOES EVERYBODY FEEL PREPARED TO DO
13 THAT NOW?

14 MR. SALTER: YES SIR, YOUR HONOR.

15 MR. BROWN: YES SIR.

16 THE COURT: ALL RIGHT. THERE ARE A COUPLE OF THINGS,
17 MAYBE QUESTIONS I WANT TO ASK FIRST.

18 ONE OF THE THINGS THAT YOU MENTIONED, OR, TWO OF THE
19 THINGS THAT YOU MENTIONED WERE THE, WHEN YOU WERE LISTING
20 YOUR CLAIMS, WERE THE CROSS EXAMINATION OF SKIP MEYER AND
21 THE CROSS EXAMINATION OF MEREDITH MOON.

22 NOW, I DON'T REALLY RECALL THOSE CLAIMS BEING
23 ADDRESSED DURING THE COURSE OF THIS TRIAL. AND ALSO, I DON'T
24 RECALL ANYTHING BEING ADDRESSED DURING THE COURSE OF THIS

1 TRIAL REGARDING HOW THOSE CROSS EXAMINATIONS COULD HAVE
2 BEEN CONDUCTED DIFFERENTLY.

3 MR. BROWN: YOUR HONOR, IF I MAY?

4 THE COURT: YES SIR.

5 MR. BROWN: AS TO MR. MEYER, VERY BRIEFLY, DURING THE
6 LONGER QUESTIONING THAT I HAD FOR MR. HANCOCK AND MR. BOYD,
7 I PULLED OUT THE FACT THAT MR. MEYER HAD COUNSELED
8 EVERYONE IN THIS FAMILY: TERRY, EARL, JIMMY, AND CHIP.

9 ON CROSS EXAMINATION THE MITIGATION PHASE, MR.
10 HANCOCK CALLED HIM AS A DEFENSE WITNESS. THE ONLY THING HE
11 WENT INTO ON DIRECT WAS ABOUT TERRY'S PSYCHOLOGICAL
12 PROBLEMS. AND IT'S IN THE RECORD, YOUR HONOR. MR. MEYER'S
13 NOTES ARE THE IN RECORD.

14 HE ALSO COUNSELED EARL AND HE ALSO COUNSELED CHIP.
15 AND I THINK THOSE WOULD HAVE BEEN SALIENT TO THE DEFENSE IN
16 SHOWING, FOR LACK OF A BETTER TERM, HOW DYSFUNCTIONAL THIS
17 FAMILY WAS. AFTER THE GUILT PHASE, THEY BECAME THIS OZZIE
18 AND HARRIET NELSON.

19 THE COURT: ALL RIGHT.

20 MR. BROWN: I DIDN'T GO INTO ANY DETAIL ABOUT IT, YOUR
21 HONOR. AND THAT'S WHY I PUT THE RECORDS IN EVIDENCE. BUT
22 THAT WAS TOUCHED ON BY BOTH THE ATTORNEYS.

23 THE COURT: OKAY.

24 MR. BROWN: AND THE ONLY THING HE BROUGHT OUT WAS
25 TERRY'S RECORDS. HE DIDN'T TOUCH ON EARL'S AND ALL THE

1 PROBLEMS HE HAD, MUCH LESS CHIP, AND ALL THE PROBLEMS HE
2 HAD.

3 THE COURT: OKAY. NOW ABOUT MOON?

4 MR. BROWN: YOUR HONOR, THE ONLY THING I HAD ON MOON
5 WAS THE NOTES THAT I ASKED MR. BOYD ABOUT WHERE SHE WANTED
6 FIFTY GRAND. OBVIOUSLY, THAT WAS FROM THE NOTES. I DON'T
7 KNOW IF THEY'RE GOING TO BE IN THE NOTES THAT WE FIND. I THINK
8 THAT'S SALIENT. BUT CERTAINLY, WHEN IT'S THE STATE'S STAR
9 WITNESS, THE FACT THAT SHE WANTED FIFTY GRAND TO KEEP HER
10 MOUTH SHUT WOULD GO TO HER CREDIBILITY.

11 THE COURT: IS THERE ANY EVIDENCE THAT MR. BOYD AND MR.
12 HANCOCK KNEW OF THIS BEFORE, OR DURING THE TRIAL?

13 MR. BROWN: YOUR HONOR, AGAIN, GOING BACK TO THE
14 PROBLEM WITH MS. CASCIO, OR, DOCTOR CASCIO'S NOTES. I THOUGHT
15 THOSE WERE HER NOTES. THEREFORE, THAT'S WHY I RELIED ON THAT
16 AS LISTING THAT AS ONE OF THE THINGS. BECAUSE IN THOSE NOTES
17 IT SAYS THAT MS. MOON WILL KEEP HER MOUTH SHUT FOR \$50,000.
18 WHICH I THINK, CLEARLY, GOES TO HER CREDIBILITY ON CROSS
19 EXAMINATION AND SHE WAS NOT ASKED THAT.

20 NOW, IF IT'S IN THE NOTES-- THAT'S WHY I THINK THE COURT
21 WILL NEED DOCTOR CASCIO'S NOTES. I THINK THAT WOULD BE AN
22 IMPORTANT FACTOR.

23 THE COURT: IS THERE EVIDENCE THAT CASCIO TALKED TO
24 MOON?

25 MR. BROWN: NO SIR.

1 THE COURT: WELL, THEN HOW WOULD SHE HAVE KNOWN
2 ABOUT THIS?

3 MR. BROWN: I GUESS BACK DOOR IT THE SAME WAY HE DID ON
4 CROSS EXAMINATION. DID HE TELL YOU THIS, DID HE TELL YOU THIS,
5 DID HE TELL YOU THIS, DID HE TELL YOU THIS? WELL, THEY COULD
6 HAVE BROUGHT OUT DID HE TELL YOU THIS ON RE-DIRECT.

7 THE COURT: WELL, WAIT A MINUTE. HOW WOULD MS. CASCIO
8 HAVE KNOWN THAT MS. MOON SAID THIS IF SHE NEVER MET WITH MS.
9 MOON?

10 MR. BROWN: SHE DIDN'T, YOUR HONOR.

11 THE COURT: WELL, HOW WOULD SHE... ?

12 MR. BROWN: I DON'T KNOW IF SHE COULD HAVE. I DON'T IF IT
13 COULD HAVE COME IN EVIDENCE. I'M NOT SAYING IT'S A STRONG---

14 THE COURT: SO, YOU'VE GOT AN ENTRY IN THAT APPLICANT'S
15 EXHIBIT SEVEN THAT SAYS SOMETHING IN REFERENCE TO MS. MOON
16 WILL KEEP HER MOUTH SHUT FOR \$50,000?

17 MR. BROWN: YES SIR.

18 THE COURT: AND AT THIS POINT IN TIME YOU HAVE NO IDEA
19 WHERE THAT CAME FROM?

20 MR. BROWN: NO SIR.

21 THE COURT: OR HOW THAT COULD HAVE BEEN BASED ON
22 SOMETHING MS. MOON SAID?

23 MR. BROWN: NO SIR.

1 THE COURT: OKAY. FOR ALL WE KNOW, THAT COULD BE A
2 STATEMENT THAT ROBERTSON MADE TO HER SAYING SHE'LL
3 PROBABLY KEEP HER MOUTH SHUT IF SOMEBODY GIVES HER \$50,000?

4 MR. BROWN: IT COULD HAVE VERY WELL BEEN, YOUR HONOR.
5 BUT I FELT THE NECESSITY TO RAISE IT JUST IN CASE THERE'S SOME
6 VALIDITY TO IT.

7 THE COURT: OKAY.

8 MR. BROWN: THAT'S WHY I DIDN'T BELABOR THE POINT WITH
9 MR.-- I THINK I HAD TWO QUESTIONS IN THE WHOLE THING. I ASKED
10 MR. BOYD TWO QUESTIONS ABOUT THAT.

11 THE COURT: OKAY. NOW, YOU MENTIONED AT THE BEGINNING
12 THAT THERE WAS, THAT YOU MIGHT BRING UP SOMETHING
13 REGARDING A JUROR THAT YOU BELIEVE SHOULD HAVE BEEN
14 INSTRUCTED.

15 MR. BROWN: THAT DID NOT PAN OUT, YOUR HONOR.

16 THE COURT: ALL RIGHT. SO, YOU'VE ABANDONED THAT?

17 MR. BROWN: I'VE ABANDONED THAT.

18 THE COURT: AND ONE OTHER CLAIM THAT I DID NOT SEE.

19 WELL, ACTUALLY I WANT YOU TO EXPLAIN THIS: YOU MENTIONED
20 THAT YOU DIDN'T THINK DEFENSE COUNSEL PROPERLY HANDLED THE
21 STATE'S MENTAL EVALUATION OF MR. ROBERTSON. EXPLAIN THAT.

22 MR. BROWN: BASED ON WHAT MR. ROBERTSON TOLD ME, AND
23 AS HE TESTIFIED HERE TODAY, THIS IS MY RECOLLECTION OF THE
24 TESTIMONY AT ISSUE, YOUR HONOR: HE WAS TOLD TO TELL THEM
25 ALL. MR. BOYD, I BELIEVE, TESTIFIED TODAY THAT HE TOLD HIM -

1 AND I'M PARAPHRASING HERE - HE TOLD MR. ROBERTSON IN HIS
2 INTERVIEW NOT TO DISCUSS THE CRIME. AND THAT WOULD BE THE
3 EVIDENCE ON THAT, YOUR HONOR.

4 THE COURT: SAY THAT AGAIN, PLEASE.

5 MR. BROWN: MR. ROBERTSON TESTIFIED AND INFORMED ME
6 THAT HE WAS NOT TOLD, HE WAS JUST TOLD TO TELL THEM
7 EVERYTHING. MR. BOYD TESTIFIED TODAY THAT HE TOLD HIM WHEN
8 HE MET WITH DOCTOR McKEE NOT TO DISCUSS THE CRIME.

9 THE COURT: DID HE TELL DOCTOR McKEE ANYTHING ABOUT
10 THE CRIME?

11 MR. BROWN: NOT NEAR AS MUCH AS CASCIO, AND MY
12 MEMORY'S VAGUE ON THAT, YOUR HONOR. THAT'S VERY SHORT
13 TESTIMONY. I'M NOT GOING TO SIT HERE AND TELL THE COURT WHAT
14 HE TOLD HIM. WHATEVER IS THERE IS THERE. IT'S VERY SHORT
15 TESTIMONY, YOUR HONOR. HE WASN'T ON THE STAND VERY LONG.

16 MR. SALTER: IT DOESN'T COME OUT IN THE RECORD, YOUR
17 HONOR, WHAT WAS TOLD TO DOCTOR McKEE. HE, IN FACT, LEFT A
18 FEW NOTES, WHICH HIS NOTES ARE FAIRLY SIMPLE IN TERMS OF
19 INFORMATION PROVIDED. THE ONLY THING THAT CAME OUT IN
20 COURT WAS THAT DOCTOR McKEE RELIED IN PART ON HIS ASSERTION
21 OF HIS MIRANDA RIGHTS IN SUPPORT OF HIS EXPERT OPINION. WHICH,
22 AT THAT POINT THERE WAS AN OBJECTION MADE AND A MOTION FOR
23 A MISTRIAL. THE MISTRIAL WAS DENIED AND CURATIVE
24 INSTRUCTIONS WERE GIVEN. BUT THE JURY NEVER HEARD ANYTHING
25 IN TERMS OF ANY INFORMATION PROVIDED TO DOCTOR McKEE.

1 THE COURT: OKAY. TAKING SOME OF THESE ISSUES THAT YOU
2 RAISED AND GOING AHEAD AND RULING ON THEM. YOU SAID THAT
3 COUNSEL ERRED IN FAILING TO CALL DOCTOR McMEEKIN.

4 MR. BROWN: I STAND BY THAT ONE, YOUR HONOR. HIS
5 RECORDS ARE IN EVIDENCE AND I STAND BY THAT ONE, YOUR HONOR.

6 THE COURT: ALL RIGHT.

7 MR. BROWN: THE RECORD SPEAKS FOR ITSELF.

8 THE COURT: ALL RIGHT. WELL, I THINK I'VE ASKED ALL THE
9 QUESTIONS I'M GOING TO ASK. AND I THINK I'M JUST GOING TO GO
10 AHEAD AND RULE ON ALL THINGS NOW.

11 MR. BROWN: YES SIR.

12 THE COURT: ALL RIGHT. SO, AS FAR AS DOCTOR McMEEKIN IS
13 CONCERNED, I FIND THAT THE APPLICANT HAS FAILED TO PROVE
14 BOTH PRONGS OF THE STRICKLAND TEST. THE DECISION TO ALLOW
15 THAT EVIDENCE REGARDING McMEEKIN'S OVER-PRESCRIPTION OF
16 RITALIN AND DISCIPLINARY ISSUES TO COME IN THROUGH DOCTOR
17 MORTON WAS A VALID STRATEGIC DECISION. AND THAT IF THEY HAD
18 PUT DOCTOR McMEEKIN ON THE STAND HE PROBABLY COULD HAVE
19 EXPLAINED ALL OF THAT AWAY.

20 MOREOVER, THE FACT THAT DOCTOR McMEEKIN DID NOT
21 TESTIFY HERE IN THIS TRIAL MEANS THAT APPLICANT HAS FAILED TO
22 CARRY ITS BURDEN OF PROOF ON THE SECOND PRONG OF
23 STRICKLAND. AND THAT THERE'S NO EVIDENCE FROM WHICH I COULD
24 BASE A DECISION THAT THE OUTCOME OF THE CASE COULD HAVE
25 BEEN ANY DIFFERENT IF McMEEKIN HAD TESTIFIED.

1 NOW, AS FAR AS-- AND I'M JUST TAKING THEM IN THE ORDER
2 THAT I HAVE THEM IN MY NOTES. YOU CONTEND THAT FAILURE TO
3 CALL CHIP ROBERTSON WAS INEFFECTIVE. AND YOU CONTEND THAT, I
4 THINK, IN TWO RESPECTS. FIRST OF ALL YOU CONTEND THAT IF THEY
5 HAD CALLED CHIP ROBERTSON, THEY COULD HAVE PROVEN HIS
6 INVOLVEMENT IN THE CRIME.

7 FIRST OF ALL-- THERE'S SEVERAL REASONS WHY COUNSEL'S
8 DECISION NOT TO CALL CHIP ROBERTSON WAS NOT INEFFECTIVE.
9 FIRST OF ALL, I DON'T THINK THAT EVIDENCE WOULD HAVE BEEN
10 ADMISSIBLE IN THE FIRST PLACE. BECAUSE, IN ORDER FOR EVIDENCE
11 OF THIRD PARTY GUILT TO BE ADMISSIBLE, IT WOULD HAVE TO BE
12 EVIDENCE THAT TENDS TO EXONERATE THE DEFENDANT.

13 NOW, HOLMES VERSUS SOUTH CAROLINA CAME OUT THIS
14 CIRCUIT. RIGHT? HOLMES VERSUS SOUTH CAROLINA DOES NOT
15 CHANGE THAT RULE OF LAW. HOLMES SIMPLY SAYS THAT THAT
16 RULE CONTINUES TO BE EFFECTIVE EVEN IN THE FACE OF STRONG
17 FORENSIC EVIDENCE OF THE DEFENDANT'S GUILT.

18 SO, I DON'T THINK THE EVIDENCE WOULD HAVE BEEN
19 ADMISSIBLE IN THE FIRST PLACE. SECONDLY, I THINK IT WOULD HAVE
20 BEEN AS MR. BOYD POINTED OUT IN HIS TESTIMONY, BY PUTTING CHIP
21 ON THE STAND TO TESTIFY THAT HE AND JIMMY HAD CONSPIRED TO
22 DO THIS, THE DEFENSE WOULD BASICALLY HAVE BEEN PROVING A
23 MORE SOLID CASE OF PREMEDITATION ON THE PART OF JIMMY. AND
24 IT WOULD HAVE BEEN DETRIMENTAL TO HAVE DONE THAT.

1 AND THIRD: THERE IS EVEN AS WE SIT HERE NOW NO EVIDENCE
2 THAT JIMMY'S - I MEAN - THAT CHIP WAS INVOLVED IN THE CRIME. SO,
3 IN ADDITION TO HAVING FAILED TO PROVE THAT THE DECISION NOT
4 TO CALL CHIP WAS INEFFECTIVE, THERE'S NO EVIDENCE ON WHICH IC
5 COULD BASE A DECISION THAT IT WOULD HAVE MADE A DIFFERENCE
6 UNDER THE SECOND PRONG. BECAUSE, EVEN TO THIS DAY, CHIP HAS
7 NOT TESTIFIED.

8 NOW, AS FAR AS-- YOU ALSO CONTEND THAT THE DEFENSE
9 COUNSEL SHOULD HAVE PROVEN CHIP'S MENTAL ILLNESS HISTORY.
10 AND ACTUALLY, YOU MAKE THAT CONTENTION WITH REGARD TO THE
11 DAD AND I THINK TO SOME EXTENT, MAYBE THE MOTHER. BUT
12 CERTAINLY WITH REGARD TO THE FATHER AND TO CHIP YOU
13 CONTEND THAT DEFENSE COUNSEL SHOULD HAVE GIVEN THE JURY A
14 MORE COMPLETE PICTURE OF THE MENTAL HEALTH OF THE ENTIRE
15 FAMILY. SO, I'M GOING TO ADDRESS ALL THOSE THINGS AT ONCE IN
16 JUST A FEW MINUTES.

17 THE NEXT THING WOULD BE YOU CONTEND THAT DEFENSE
18 COUNSEL SHOULD HAVE OFFERED A PLEA OF GUILTY BUT MENTALLY
19 ILL. I DON'T BELIEVE THEY COULD HAVE DONE THAT. AND SO, I THINK
20 THE DECISION NOT TO DO THAT WAS NOT INEFFECTIVE. FIRST OF ALL,
21 AS MR. BOYD POINTED OUT TODAY, AND MR. HANCOCK MAY HAVE
22 POINTED IT OUT AS WELL - I BELIEVE HE DID - THAT THAT WOULD
23 HAVE TAKEN SENTENCING OUT OF THE JURY'S HANDS AND PUT IT
24 INTO THE HANDS OF THE JUDGE.

1 AND MR. ROBERTSON TESTIFIED HIMSELF TODAY THAT HE
2 WOULD NOT HAVE DONE THAT. WHY WOULD ONE ALLOW A JUDGE TO
3 MAKE THAT DECISION. HE WOULD HAVE RATHER, I THINK HE SAID,
4 CRANK UP TWELVE JURORS AND ALLOW THEM TO DO IT. SO,
5 COUNSEL'S DECISION NOT TO DO THAT IS A VALID DECISION.

6 AND THEN,-- WELL, IN ADDITION TO THAT, THOUGH, I THINK
7 THAT BEFORE THAT COULD BE DONE THE STATE WOULD HAVE TO
8 AGREE. THE STATE WOULD HAVE TO WAIVE ITS RIGHT TO A TRIAL BY
9 JURY ON THE QUESTION OF WHETHER OR NOT, UNDER 17-24-20,
10 SUBPARAGRAPH A, MR. ROBERTSON HAD A MENTAL DISEASE OR
11 DEFECT, SUCH THAT HE LACKED SUFFICIENT CAPACITY TO CONFORM
12 HIS CONDUCT TO THE REQUIREMENTS OF THE LAW.

13 I BELIEVE THE TESTIMONY HERE IS THAT THE STATE WOULD
14 NOT HAVE CONCEDED THAT FACT. AND THE STATE HAS A RIGHT TO A
15 TRIAL BY JURY ON THAT FACT. AND SO, IT COULD NOT HAVE
16 HAPPENED AS THE CASE UNFOLDED.

17 NOW, IN TERMS OF THE DECISION NOT TO SEEK A VERDICT OF
18 GUILTY BUT MENTALLY ILL, I THINK THE DECISION NOT TO DO THAT
19 WAS A VALID DECISION. BECAUSE, AS A PRACTICAL MATTER, IT
20 DOESN'T SEEM TO ME LIKE IT MAKES A WHOLE LOT OF DIFFERENCE.
21 THE FOCUS OF THE CASE WAS ON MENTAL ILLNESS. IT WAS A
22 STRATEGIC DECISION THAT COUNSEL HAD MADE TO MAKE THAT PUSH
23 DURING THE SENTENCING PHASE. IF THEY HAD SOUGHT A VERDICT OF
24 GUILTY BUT MENTALLY ILL THEY WOULD HAVE HAD TO DO THAT
25 DURING THE GUILTY PHASE. THAT'S CONTRARY TO THE STRATEGY

1 THAT THEY TESTIFIED THEY EMPLOYED. AND SO, I THINK THE
2 DECISION NOT TO DO THAT WAS A VALID ONE.
3 BUT EVEN IN ADDITION TO-- SO, THAT IS APPLICABLE TO THE FIRST
4 PRONG OF STRICKLAND. ON THE SECOND PRONG, THERE IS NO
5 EVIDENCE THAT I'M AWARE OF-- I'M GOING TO GIVE YOU A CHANCE
6 TO CORRECT ME RIGHT NOW IF I'M WRONG. THERE IS NO EVIDENCE
7 THAT I'M AWARE OF THAT'S IN THIS RECORD THAT MR. ROBERTSON
8 LACKED THE CAPACITY TO CONFORM HIS CONDUCT TO THE LAW. IS
9 THERE?

10 MR. BROWN: YOUR HONOR, I DO DISAGREE WITH THAT. THERE
11 IS DOCTOR McMEEKIN'S REPORT, THE MEDICAL RECORDS. IN MY
12 OPINION THERE'S EVIDENCE IN THE TRANSCRIPT OF RECORD, AND THE
13 QUESTIONS ASKED OF MR. BOYD, AND THE RECORDS OF DOCTOR
14 MORTON AND DOCTOR EVANS.

15 THE COURT: I HAVE CONSIDERED THAT EVIDENCE, AND I FIND
16 THAT THE EVIDENCE THAT HAS BEEN SUBMITTED IS INSUFFICIENT TO
17 PROVE THAT MR. ROBERTSON LACKED THE CAPACITY TO CONFORM
18 HIS CONDUCT TO THE REQUIREMENTS OF THE LAW. SO, THEREFORE,
19 THE APPLICANT HAS FAILED ON THE SECOND PRONG OF THE
20 STRICKLAND TEST AS TO THE CLAIM THAT COUNSEL SHOULD HAVE
21 PURSUED A GUILTY BUT MENTALLY ILL VERDICT.

22 NOW, ON THE QUESTION OF SPENDING TIME WITH MR.
23 ROBERTSON BEFORE TRIAL, WE ALREADY DISCUSSED THAT JUST A
24 SECOND AGO. BUT TO GO BACK OVER IT, COUNSEL TESTIFIED THAT
25 THEY HAVE MADE THE DECISION WHICH IS PATENTLY REASONABLE

1 ON THE FACTS OF THIS CASE TO MAKE THEIR FOCUS ON MITIGATION.
2 AND THAT THEY HAD DECIDED THAT THEY WOULD GATHER THE
3 INFORMATION THAT THEY NEEDED RELATING TO MITIGATION BY
4 USING EXPERTS AND MITIGATION INVESTIGATORS. AND THAT IS, IN
5 MY VIEW, A COMPLETELY REASONABLE APPROACH TO TAKE SINCE IT
6 IS THE EXPERTS WHO ARE GOING TO HAVE TO LAY THE FACTUAL
7 FOUNDATION BEFORE THE JURY FOR THE JURY TO UNDERSTAND THIS
8 MENTAL ILLNESS, NOT ONLY OF MR. ROBERTSON, BUT ALSO
9 THROUGHOUT HIS FAMILY.

10 SO, I THINK THE DECISION TO STRUCTURE THEIR PRE-TRIAL
11 INVESTIGATION OF THOSE ISSUES BY PRIMARILY RELYING ON EXERTS
12 TO GATHER THAT INFORMATION WAS A REASONABLE DECISION AND
13 WAS NOT INEFFECTIVE.

14 BUT SECONDLY, THERE IS NO EVIDENCE THAT I'M AWARE OF
15 THAT-- THERE'S NO EVIDENCE IN THIS RECORD THAT SHOWS ME THAT
16 THERE'S ANYTHING ELSE THE LAWYERS COULD HAVE DONE IN
17 GATHERING INFORMATION ABOUT MR. ROBERTSON OR ANYTHING
18 ELSE THAT HE MIGHT HAVE KNOWN THAT THEY FAILED TO DO BY
19 FOLLOWING THE STRATEGY THAT THEY FOLLOWED, WHICH WAS TO
20 USE EXPERTS. SO, THERE'S NO EVIDENCE AT ALL THAT THE OUTCOME
21 OF THE CASE COULD HAVE BEEN ANY DIFFERENT IF THEY HAD SPENT
22 MORE TIME WITH HIM. AND I THINK THE CLAIM THAT BY SPENDING
23 MORE TIME WITH HIM THEY WOULD HAVE GIVEN MR. ROBERTSON A
24 CHANCE TO WEIGH IN ON THE STRATEGIC DECISIONS THAT THE
25 LAWYERS HAD TO MAKE IS AN INTERESTING SUGGESTION, BUT IT

1 DOESN'T HAVE ANY SIGNIFICANCE AT ALL IN TERMS OF THE
2 INEFFECTIVENESS OF COUNSEL. BECAUSE THE DECISIONS THAT
3 YOU'RE TALKING ABOUT BEING MADE ARE NOT TO BE MADE BY MR.
4 ROBERTSON, THEY'RE TO BE MADE BY COUNSEL. AND SO, I THINK
5 THAT THE APPLICANT HAS FAILED ON BOTH PRONGS OF THE
6 STRICKLAND TEST IN THAT RESPECT.

7 NOW, THE NEXT TO LAST POINT THAT I JUST MADE, THAT
8 THERE'S EVIDENCE THAT HAS COME OUT IN THIS TRIAL THAT THEY
9 COULD HAVE LEARNED HAD THEY SPENT MORE TIME WITH MR.
10 ROBERTSON ALSO GOES BACK TO RELATING TO THE FIRST PRONG.
11 BECAUSE, IF THERE WAS NOTHING MORE TO DO, THEN THE DECISION
12 TO DO NOTHING MORE WAS REASONABLE. SO, THAT'S MY RULING ON
13 THAT POINT.

14 NOW, AS FAR AS THE SUGGESTION THAT COUNSEL SHOULD
15 HAVE PURSUED THIS PLEA BARGAIN, I THINK THAT COUNSEL DID
16 EVERYTHING THEY COULD TO TRY TO BRING ABOUT A PLEA BARGAIN.
17 AS A FACT, I FIND THAT THE STATE WAS NOT WILLING UNDER ANY
18 CIRCUMSTANCES TO TAKE THE NOTICE OF DEATH PENALTY OFF THE
19 TABLE. AND SO, THEREFORE, THERE WAS NOTHING THAT COUNSEL
20 COULD HAVE DONE THAT COULD HAVE TAKEN THE QUESTION OF THE
21 DEATH PENALTY AWAY FROM THE JURY AND GIVEN MR. ROBERTSON
22 A CHANCE TO PLEAD GUILTY TO LIFE WITHOUT PAROLE. SO, ON BOTH
23 PRONGS OF THE STRICKLAND TEST, THERE IS A FAILURE TO PROVE.

24 THE NEXT POINT IS REGARDING MR. ROBERTSON'S DECISION
25 NOT TO TESTIFY. I SUPPOSE THERE ARE TWO COMPONENTS TO YOUR

1 CLAIM ON THAT POINT. THE FIRST IS THAT YOU CONTEND THAT
2 COUNSEL WAS INEFFECTIVE IN ADVISING MR. ROBERTSON ABOUT
3 WHETHER OR NOT HE SHOULD TESTIFY. AND THE RECORD IS CLEAR
4 HERE THAT THE ADVICE OF COUNSEL WAS THAT HE SHOULD NOT
5 TESTIFY. AND AFTER HAVING LISTENED TO ALL THE TESTIMONY,
6 PARTICULARLY THE FACT THAT MR. ROBERTSON HAD TOLD THE
7 LAWYERS THAT HE HAD COMMITTED THE CRIMES AND HAD GIVEN
8 THEM THE DETAILS OF THE CRIMES, THAT THE DECISION TO GIVE HIM
9 THAT ADVICE WAS REASONABLE BECAUSE IT WOULD HAVE BEEN A
10 BAD IDEA FOR HIM TO TESTIFY.

11 AND SO, THE DECISION - I MEAN - THE ADVICE THAT COUNSEL
12 GAVE TO MR. ROBERTSON NOT TO TESTIFY, EVEN IN THE CONTEXT OF
13 THE HEATED DISCUSSION THAT OCCURRED AFTER DOCTOR CASCIO
14 HAD TESTIFIED, IN MY OPINION, WAS CORRECT AND REASONABLE AND
15 VALID ADVICE.

16 SO, THERE'S A FAILURE TO PROVE THE FIRST PRONG OF THE
17 STRICKLAND TEST. BUT ALSO, VERY IMPORTANTLY, MR. ROBERTSON
18 HAS DECLINED IN THE TRIAL OF THIS PCR, BY EXERCISING HIS RIGHT
19 TO REMAIN SILENT, TO SHARE WITH THIS COURT THE FACTS THAT HE
20 WOULD HAVE TESTIFIED TO IN FRONT OF THAT JURY.

21 SO, THERE'S NO WAY THAT I CAN DETERMINE WHETHER HIS
22 TESTIFYING COULD POSSIBLY HAVE MADE A DIFFERENCE IN THE
23 OUTCOME OF THE TRIAL. SO, THERE'S A FAILURE OF PROOF ON THE
24 SECOND PRONG AS WELL.

1 THE OTHER COMPONENT OF YOUR CLAIM, I THINK, IS THAT MR.
2 ROBERTSON PERHAPS WAS NOT ALLOWED TO MAKE HIS OWN
3 DECISION. IN MY OPINION, THAT IS AN APPELLATE ISSUE. JUDGE
4 HAYES, ON THE RECORD, - AND I'M LOOKING IN THE PENALTY PHASE
5 WHERE HE CONDUCTED THIS INQUIRY AT ABOUT PAGE 3041 THROUGH
6 3044, 3043. AND JUDGE HAYES INDICATES THERE THAT HE HAD DONE
7 IT THREE PREVIOUSLY TIMES, I BELIEVE. JUDGE HAYES MAKES A
8 LEGAL AND FACTUAL FINDING THAT MR. ROBERTSON HAS FREELY,
9 VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY, UNDERSTANDING
10 HIS RIGHT TO TESTIFY AND HIS RIGHT TO REMAIN SILENT, HE WAIVES
11 HIS RIGHT TO TESTIFY AND EXERCISES HIS CONSTITUTIONAL RIGHT TO
12 REMAIN SILENT.

13 IF THAT IS AN INCORRECT DECISION, IN MY VIEW, THAT'S AN
14 APPELLATE-- THAT'S A DECISION TO BE ATTACKED ON DIRECT
15 APPEAL. BECAUSE COUNSEL HAD NOTHING TO DO WITH JUDGE HAYES
16 MAKING THAT DECISION OTHER THAN TO PRESENT TO HIM THE
17 EVIDENCE HE NEEDS TO MAKE THAT DECISION.

18 BUT, NEVERTHELESS, EVEN TO THE EXTENT THAT IT IS A,
19 SOMETHING THAT CAN BE ADDRESSED ON POST CONVICTION RELIEF, I
20 FIND ABSOLUTELY NO REASON TO DISAGREE WITH THE FINDING THAT
21 JUDGE HAYES MADE THAT IT WAS MR. ROBERTSON WHO MADE THIS
22 DECISION AND NOT HIS LAWYERS.

23 I NEED TO ALSO POINT OUT-- AND I CAN'T REMEMBER IF IT WAS
24 MR. HANCOCK OR MR. BOYD WHO TESTIFIED TO THIS. BUT IN
25 ADDITION TO THE FACT THAT MR. ROBERTSON HAD ADMITTED HIS

1 GUILT TO THEM, THEY HAD MADE AN ASSESSMENT OF HIM. AND WE
2 SORT OF SEMI-JOKED ABOUT A LITTLE EARLIER, HIS INABILITY TO
3 KEEP HIS MOUTH SHUT. THEY HAD MADE AN ASSESSMENT ABOUT HIM
4 THAT HE WOULD BE A BAD WITNESS AND THAT IT WOULD BE A BAD
5 IDEA TO PUT HIM ON THE STAND, JUST FROM HIS STANDPOINT FROM
6 HIS INABILITY TO CONTROL HIMSELF AND WHAT HE MIGHT SAY. SO,
7 THAT'S ANOTHER REASON WHY THEIR DECISION TO ADVISE HIM NOT
8 TO TESTIFY, IN MY OPINION, WAS A VALID DECISION.

9 NOW, ONE MORE CLAIM IS THAT YOU CONTEND THAT COUNSEL
10 SHOULD HAVE OFFERED SOME EVIDENCE OF MR. ROBERTSON'S
11 ADAPTABILITY, HIS FUTURE ADAPTABILITY IN PRISON. AND, FIRST OF
12 ALL, I FIND NOTHING SUSPECT OR NOTHING UNREASONABLE NOT TO
13 OFFER THAT TESTIMONY.

14 I'M JUST OF THE OPINION THAT THAT IS NOT ALL THAT
15 VALUABLE EVIDENCE. NOW, I REALIZE THAT IS SOMETHING THAT
16 OTHER FOLKS MIGHT DISAGREE WITH. BUT I DON'T THINK THAT-- IN
17 ORDER FOR ME TO SAY THAT IT SATISFIED THE STRICKLAND PRONG,
18 THE FIRST PRONG OF STRICKLAND, TO FAIL TO PUT THAT FORWARD,
19 THAT TYPE OF EVIDENCE, I WOULD HAVE TO SAY THAT IT IS
20 MANIFESTLY UNREASONABLE IN ALL CIRCUMSTANCES NOT TO OFFER
21 EVIDENCE OF FUTURE ADAPTABILITY. AND THAT'S NOT TRUE. THERE
22 ARE PLENTY OF LAWYERS WHO MIGHT MAKE A DECISION ON A
23 VARIETY OF DIFFERENT BASES NOT TO OFFER THAT TYPE OF
24 EVIDENCE. MY OWN OPINION IS THAT IT'S NOT A VERY EFFECTIVE

1 FORM OF EVIDENCE. SO, I FIND THE DECISION NOT TO OFFER IT IS NOT
2 UNREASONABLE.

3 BUT ALSO, IMPORTANTLY, IS THAT ON THE SECOND PRONG OF
4 STRICKLAND, THERE'S NO EVIDENCE OF FUTURE ADAPTABILITY IN
5 THE RECORD BEFORE ME RIGHT NOW. AND EVEN IF I WERE TO DECIDE
6 THAT COUNSEL'S DECISION NOT TO OFFER THAT EVIDENCE IN THE
7 TRIAL WAS INEFFECTIVE, THERE WOULD BE NO BASIS ON WHICH I
8 COULD CONCLUDE THAT THE OUTCOME OF THE TRIAL COULD HAVE
9 BEEN ANY DIFFERENT BECAUSE THERE'S NO EVIDENCE OF IT OFFERED
10 HERE. THE TIMES THAT I HAVE HEARD WITNESSES OFFER THIS
11 EVIDENCE BEFORE, IT BASICALLY IS SIMPLY THAT THE DEPARTMENT
12 OF CORRECTIONS IS CHARGED WITH THE RESPONSIBILITY OF TAKING
13 CARE OF ALL INMATES, REGARDLESS OF THEIR INDIVIDUAL
14 CHARACTERISTICS, AND THEY CAN DO THAT. THAT'S ESSENTIALLY
15 WHAT FUTURE ADAPTABILITY IS. I DON'T THINK THERE'S ANY
16 EVIDENCE IN THIS RECORD THAT EVIDENCE OF FUTURE ADAPTABILITY
17 COULD HAVE CHANGED THE OUTCOME OF THIS TRIAL.

18 NOW, I THINK THAT I HAVE COVERED EVERYTHING EXCEPT FOR--
19 - WAIT A MINUTE. I NEED TO--

20 NOW, REGARDING THE ALLEGED ERRORS IN THE CROSS
21 EXAMINATION OF MEREDITH MOON. THAT WOULD BE THAT COUNSEL
22 SHOULD HAVE CONFRONTED HER WITH THIS SUPPOSED PRIOR
23 STATEMENT THAT SHE WOULD KEEP QUIET FOR FIFTY THOUSAND
24 DOLLARS.

1 THERE'S NO EVIDENCE BEFORE ME THAT THE LAWYERS KNEW
2 SHE-- FIRST OF ALL, THERE'S NO EVIDENCE BEFORE ME THAT SHE
3 EVER MADE THAT STATEMENT. THERE'S NO EVIDENCE BEFORE ME
4 THAT THE LAWYERS KNEW SHE MADE THAT STATEMENT. SO, THE
5 DECISION NOT TO CROSS EXAMINE HER ON THAT STATEMENT, TO ME,
6 IS A REASONABLE DECISION.

7 IF THE LAWYERS HAD KNOWN THAT SHE HAD MADE THAT
8 STATEMENT AT THE TIME THEY CROSS EXAMINED HER, THEN THAT
9 WOULD RAISE THE QUESTION OF WHETHER OR NOT IT WAS STILL A
10 GOOD IDEA TO DO THAT. AND YOU'RE TALKING ABOUT A LOT OF
11 UNKNOWNNS RIGHT THERE, BECAUSE THERE'S NO EVIDENCE THAT I
12 KNOW OF THAT MR. ROBERTSON COULD HAVE DONE IT, COULD HAVE
13 PAID HER FIFTY THOUSAND DOLLARS. THERE'S NO EVIDENCE THAT
14 CHIP WAS INTERESTED IN DOING IT. IT'S ILLEGAL. AND THERE ARE
15 JUST A LOT OF PROBLEMS, I THINK, WITH RAISING THAT SPECTER.
16 THAT DOESN'T MEAN THAT IT MIGHT NOT BE REASONABLE TO DO IT
17 BECAUSE IF IT WERE A STATEMENT BY HER, IT WOULD AFFECT HER
18 CREDIBILITY. IT WOULD JUST BE A JUDGMENT CALL BY THE LAWYER
19 ABOUT WHETHER OR NOT IT WOULD BE APPROPRIATE TO DO IT. AND I
20 DON'T FIND THAT THERE'S ENOUGH PROOF IN THIS RECORD THAT IT
21 WAS INEFFECTIVE NOT TO DO IT FOR THOSE REASONS THAT I JUST
22 STATED.

23 SINCE THERE'S NO EVIDENCE IN THE RECORD THAT THE
24 STATEMENT WAS MADE BY HER IN THE FIRST PLACE IN THIS TRIAL,
25 THEN THERE'S NO EVIDENCE THAT HER HAVING BEEN ASKED THAT

1 QUESTION-- FIRST OF ALL, THERE'S NO EVIDENCE AS TO WHAT HER
2 ANSWER WOULD HAVE BEEN. SHE MIGHT HAVE HAD AN
3 EXPLANATION FOR THAT THAT TOTALLY NEUTRALIZED ANY
4 PREJUDICIAL EFFECT THAT MAY HAVE AGAINST HER CREDIBILITY. WE
5 DON'T KNOW THAT. AND SO, THERE'S NO BASIS ON WHICH I COULD
6 CONCLUDE THAT THE OUTCOME OF THE TRIAL COULD HAVE BEEN
7 ANY DIFFERENT.

8 THAT LEAVES-- OKAY. THE ONE ADDITIONAL THING YOU SAID
9 WAS THAT COUNSEL DID NOT PROPERLY ADVISE MR. ROBERTSON
10 BEFORE HE WENT DOWN TO THE STATE'S MENTAL EVALUATION. AND
11 THAT WAS DOCTOR WHO?

12 MR. BROWN: DOCTOR McKEE, YOUR HONOR.

13 THE COURT: DOCTOR McKEE. AND DOCTOR McKEE IS THE ONE
14 THAT Y'ALL JUST TOLD ME WHEN HE TESTIFIED, HE DID NOT TESTIFY
15 CONCERNING THE SUBSTANCE OF WHAT MR. ROBERTSON TOLD HIM.
16 ABOUT THE DETAILS OF THE CRIME. CORRECT?

17 MR. BROWN: THAT'S CORRECT, YOU HONOR.

18 THE COURT: SO, EVEN IF-- AND, YOU KNOW, I DON'T KNOW
19 WHAT COUNSEL TOLD HIM, EXCEPT THAT THEY TOLD ME. WELL, THAT
20 ALLEGATION HAS SEVERAL LEVELS ON IT. FIRST OF ALL, COUNSEL
21 SHOULD HAVE ADVISED HIM NOT TO DISCUSS THE FACTS OF THE CASE
22 WITH THE STATE'S DOCTOR. THEY DID THAT. I FIND THAT AS A FACT
23 THAT THEY DID THAT.

24 SECOND OF ALL, COUNSEL SHOULD HAVE DONE EVERYTHING
25 THEY COULD TO MAKE SURE THAT THIS OVER-TALKATIVE

1 DEFENDANT DIDN'T DISOBEY THEIR INSTRUCTIONS WHEN HE WENT
2 DOWN THERE. THERE'S NO EVIDENCE THAT THEY DID THAT. AND
3 THAT, UNDER SOME CERTAIN CIRCUMSTANCES COULD HAVE BEEN
4 INEFFECTIVE. BUT AS I UNDERSTAND IT, THEY WERE NOT ALLOWED
5 INTO THE MEETING WITH DOCTOR McKEE. AND THAT, THEREFORE,
6 BECOMES AN APPELLATE ISSUE RATHER THAN A PCR ISSUE.

7 IF JUDGE HAYES WAS INCORRECT IN RULING THAT BOYD AND
8 HANCOCK WERE NOT TO BE ALLOWED IN THAT MEETING IN ORDER TO
9 CONTROL WHAT MR. ROBERTSON MIGHT SAY CONCERNING THE FACTS
10 OF THE CASE, THAT'S AN APPELLATE ISSUE, NOT AN INEFFECTIVENESS
11 ISSUE. BUT EVEN TO THE EXTENT IT IS AN INEFFECTIVENESS ISSUE,
12 THERE'S NO EVIDENCE THAT IT COULD HAVE MADE ANY DIFFERENCE
13 BECAUSE McKEE DID NOT TESTIFY TO THOSE PREJUDICIAL FACTS.
14 THEY DIDN'T COME OUT AT TRIAL. THEY DIDN'T AFFECT WHAT THE
15 JURY'S DECISION WAS.

16 SO, THAT LEAVES US WITH TWO CATEGORIES OF CLAIMS. I
17 THINK I HAVE RULED ON EVERYTHING EXCEPT THESE TWO
18 CATEGORIES OF CLAIMS. ONE IS THE FAILURE TO DEVELOP THE
19 MENTAL HEALTH HISTORY OF THE ENTIRE FAMILY, WHICH WOULD
20 INCLUDE THE FAILURE TO PROPERLY CROSS EXAMINE SKIP MEYER,
21 AND THE ISSUES SURROUNDING DOCTOR CASCIO.

22 NOW, I THINK THOSE ARE INTERTWINED BECAUSE DOCTOR
23 CASCIO'S TESTIMONY IS THE VEHICLE BY WHICH COUNSEL WENT
24 ABOUT DEVELOPING THE FAMILY'S MENTAL HEALTH HISTORY, OR AT
25 LEAST, IT'S THE MAJOR VEHICLE BY WHICH THEY DID THAT.

1 AND SO, TO THAT EXTENT, YOU KNOW, YOUR CLAIMS ARE A
2 LITTLE CONTRADICTORY. SO, CLEARLY, I THINK THE LAWYERS COULD
3 HAVE DEVELOPED THE FAMILY MENTAL HEALTH HISTORY MORE
4 COMPLETELY. THERE'S NO DOUBT ABOUT THAT. BUT I CAN'T SIT
5 HERE AND SAY THAT THERE ISN'T A POINT AT WHICH YOU REACH
6 ENOUGH. AND WHERE THAT POINT IS IN A FAMILY LIKE THIS IS A
7 JUDGMENT CALL THAT HAS TO BE MADE DURING THE COURSE OF THE
8 TRIAL. AND I FIND NO REASON TO BELIEVE THAT THE DECISION TO
9 PRESENT NO MORE OF THE FAMILY'S MENTAL HEALTH HISTORY THAN
10 THEY DID WAS UNREASONABLE.

11 AND, SECONDLY, I FIND THAT BASED ON THAT I HAVE HEARD,
12 BASICALLY WHAT YOU HAVE PRESENTED IN ADDITIONAL MENTAL
13 HEALTH EVIDENCE REGARDING THE FAMILY ARE THESE RECORDS
14 THAT YOU PUT IN. YOU HAVEN'T PUT IN ANY ADDITIONAL
15 TESTIMONY, THE RECORDS. AND I WILL SAY THAT THAT IS AN
16 INSUFFICIENT BASIS, IN MY OPINION, ON WHICH FOR ME TO
17 CONCLUDE, UNDER THE SECOND PRONG OF STRICKLAND, THAT THE
18 OUTCOME OF THE TRIAL COULD HAVE BEEN ANY DIFFERENT.

19 SO, ON THE GROUP OF CLAIMS THAT RELATE TO THE AMOUNT
20 OF MENTAL HISTORY THAT COUNSEL CHOSE TO PRESENT TO THE
21 JURY, I FIND THAT THE APPLICANT HAS FAILED ON BOTH PRONGS OF
22 THE STRICKLAND TEST.

23 AND SO, THAT GETS US DOWN TO CASCIO. BEFORE I GET INTO
24 CASCIO, IS THERE ANYTHING THAT YOU WOULD LIKE TO POINT OUT
25 TO ME NOW WHERE I MIGHT HAVE MISSED SOMETHING, OR WHERE I

1 MIGHT HAVE MIS-REMEMBERED SOMETHING OR OVERLOOKED
2 SOMETHING? ANYTHING I SAID THAT YOU THINK IS WRONG, BASED
3 ON THE EVIDENCE?

4 I MEAN, OBVIOUSLY, YOU DISAGREE WITH WHAT I'VE SAID. BUT
5 IF YOU THINK I HAVE NOT CONSIDERED SOMETHING THAT IS
6 IMPORTANT, OR IF I HAVE MISUNDERSTOOD SOMETHING, THEN PLEASE
7 POINT THAT OUT TO ME NOW.

8 MR. BROWN: NO SIR, YOUR HONOR. IF YOU DON'T FIND ON
9 STRICKLAND, THE FIRST PRONG OF STRICKLAND, THE ONLY EVIDENCE
10 I FORGOT TO OFFER, AND THE BEST EVIDENCE FROM MY PERSPECTIVE
11 OF THIS TRIAL, IS NOT BECAUSE OF THE DOCTORS, AS MR. BOYD
12 POINTED OUT, THAT EXPLAIN IT AWAY. THE RECORDS SPEAK FOR
13 THEMSELVES, YOUR HONOR.

14 THE COURT: ALL RIGHT. NOW, REGARDING CASCIO, YOU'VE
15 GOT WHAT I THINK ARE FOUR BASIC CLAIMS. FIRST OF ALL, YOU
16 CLAIM THAT BECAUSE SHE HAD NEVER TESTIFIED IN A DEATH
17 PENALTY CASE BEFORE; IN FACT, NEVER TESTIFIED AT ALL BEFORE,
18 THAT THE DECISION TO USE HER AS A CONSULTANT AND A WITNESS IN
19 THE FIRST PLACE WAS AN UNREASONABLE DECISION, AND I DISAGREE
20 WITH THAT.

21 I THINK THAT VARIOUS-- THERE ARE PROS AND CONS TO
22 HAVING EXPERIENCED, EXPERT WITNESSES. SOME WITNESSES WHO
23 HAVE TESTIFIED IN A LOT OF DEATH PENALTY CASES ARE OPEN TO
24 EFFECTIVE CROSS EXAMINATION ABOUT THE BIASES AND THE
25 PREJUDICES THAT THOSE WITNESSES BRING INTO A TRIAL OF THIS

1 NATURE. AND SO, THE FACT THAT SHE WAS INEXPERIENCED IN
2 TESTIFYING, IN MY OPINION, IS NOT A VALID REASON TO REJECT HER
3 AS A WITNESS. SO, ON THAT PARTICULAR POINT, I FIND YOU'VE
4 FAILED TO PROVE THE FIRST PRONG.

5 AND I THINK IN ORDER TO PROVE THE SECOND PRONG ON THAT,
6 YOU'VE GOT TO BRING IN ANOTHER WITNESS TO SHOW ME THE
7 DIFFERENCE IT WOULD HAVE MADE TO HAVE AN EXPERIENCED
8 WITNESS DO THIS.

9 NOW, I'LL GET AROUND TO WHAT YOU CONTEND IS THE BIG
10 DIFFERENCE IN A MINUTE, AND THAT IS AN EXPERIENCED WITNESS
11 WOULD NEVER HAVE ALLOWED ROBERTSON TO TELL HER THE
12 SPECIFIC FACTS OF THE CASE. I'LL GET INTO THAT IN A MINUTE.

13 MR. BROWN: YOUR HONOR, THERE'S ONE OTHER THING I DIDN'T
14 BRING UP. NOT ONLY HAD SHE NOT TESTIFIED BEFORE, AND I
15 BROUGHT THIS UP TODAY, SHE HAD ONLY WORKED ON ONE OTHER
16 CASE AND DID NOT END UP TESTIFYING ON THAT ONE PRIOR TO THIS
17 CASE. SO, HER TOTAL EXPERIENCE WAS ONE OTHER.

18 THE COURT: RIGHT. BUT YOU KNOW, MY VIEW OF EXPERTS IS
19 THAT EXPERTS ARE NOT ADVOCATES. AND EXPERTS ARE THERE TO
20 PRESENT TECHNICAL, SCIENTIFIC OPINIONS. AND IT'S AN INCORRECT
21 SUGGESTION THAT A TECHNICALLY QUALIFIED, BUT LEGALLY
22 INEXPERIENCED WITNESS IS NOT A GOOD CHOICE FOR SOMEONE TO
23 USE AS A WITNESS. SO, I'VE RULED ON THAT POINT.

24 THEN, THE SECOND POINT IS THAT COUNSEL SHOULD NEVER
25 HAVE AGREED TO PROVIDE THE NOTES. AND AS I SAID DURING THE

1 COURSE OF THE TRIAL, IN MY VIEW, IF THE WITNESS TESTIFIES, THE
2 NOTES GET PRODUCED. NO EXCEPTIONS. SO, I THINK THE QUESTION,
3 THEN, THAT JUST PUTS THE QUESTION TO NUMBER THREE, WHICH IS
4 WHETHER OR NOT THEY SHOULD HAVE PUT HER ON THE STAND. THE
5 DECISION TO AGREE, IF THEY DID THAT, TO TURN OVER THE NOTES IS
6 A REASONABLE DECISION ONCE THEY DECIDED TO PUT HER ON THE
7 STAND.

8 NOW, THAT LEAVES WHAT I THINK ARE TWO IMPORTANT
9 QUESTIONS. FIRST OF ALL, WHY DIDN'T THEY FIND ANOTHER
10 WITNESS WHEN THEY DISCOVERED THAT THESE NOTES WERE GOING
11 TO BE SO DAMNING?

12 NOW, TELL ME IF I'M WRONG. AND YOU WILL RECALL, THIS IS A
13 QUESTION I ASKED. THERE'S NO EVIDENCE THAT I HAVE BEFORE ME
14 THAT EITHER OF THESE LAWYERS KNEW ABOUT THESE NOTES MORE
15 THAN A WEEK BEFORE TRIAL.

16 MR. BROWN: YOUR HONOR, I DISAGREE TOTALLY WITH THAT,
17 WITH ALL DUE RESPECT TO THE COURT. THE EVIDENCE, APPLICANT'S
18 EXHIBITS NUMBER FIVE AND NUMBER SIX, YOUR HONOR. THESE
19 NOTES ARE WHERE THE VAST MAJORITY OF WHERE MR. POPE'S CROSS
20 EXAMINATION CAME FROM. THE DECEMBER 7 NOTES WERE FAXED
21 AND MAILED TO MR. HANCOCK ON MARCH 1, 1999.

22 THE COURT: ALL RIGHT. THAT'S---

23 MR. BROWN: WHICH WAS TWO WEEKS' PRIOR TO TRIAL.

1 THE COURT: ALL RIGHT. TWO WEEKS. NOW, HELP ME RECALL
2 THE TESTIMONY, BECAUSE THE REPORT INDICATES THAT IT WAS
3 FAXED ON MARCH 1 BECAUSE IT HAD THAT---

4 MR. BROWN: ATTACHED TO IT WAS THE NOTES, YOUR HONOR.

5 THE COURT: WELL, THE REPORT HAS THIS LINE AT THE TOP
6 THAT SAYS COLLEGE OF SOCIAL WORK, DA-DA-DA, 99-3-1, SO AND SO,
7 PAGE TWO OF FIVE. THE NOTES DON'T HAVE THAT ON THERE. IF
8 THERE ARE FOUR PAGES TO THE REPORT AND YOU ADD IN THE COVER
9 SHEET THAT MAKES FIVE PAGES.

10 MR. BROWN: I CAN'T DISPUTE THAT, YOUR HONOR.

11 THE COURT: MY RECOLLECTION OF THE TESTIMONY IS THAT
12 THE LAWYERS DIDN'T KNOW ABOUT THIS UNTIL BASICALLY THE EVE
13 OF TRIAL, ABOUT THE NOTES.

14 MR. BROWN: I HAVE A PROBLEM WITH THAT, YOUR HONOR.

15 THE COURT: I'LL GO BACK. I'LL SAY THAT THE EVIDENCE IS
16 THAT THEY KNEW ABOUT THIS SOMETIME, LESS THAN TWO WEEKS
17 BEFORE TRIAL, MORE OR LESS.

18 MR. BROWN: AND THAT BEGS THE QUESTION, YOUR HONOR, IF
19 THEY MET WITH HER ON---

20 THE COURT: WELL, THAT'S A DIFFERENT QUESTION. I'M GONNA
21 GET TO THAT.

22 MR. BROWN: OKAY.

23 THE COURT: THAT'S A DIFFERENT QUESTION. I'LL ADDRESS
24 THAT. I THINK IT IS. THE QUESTION IS WHETHER OR NOT THEY

1 SHOULD HAVE GONE OUT AND FOUND OUT MONTHS BEFORE TRIAL
2 WHAT IT IS THAT ROBERTSON TOLD HER.

3 MR. BROWN: BECAUSE THE DATES ARE JULY 17, JULY 22,
4 NOVEMBER 30 AND DECEMBER 2. SO, THE LAST ONE WAS THREE
5 MONTHS' PRIOR TO TRIAL.

6 THE COURT: RIGHT, RIGHT.

7 MR. BROWN: AND THE FIRST ONE IS EIGHT MONTHS BEFORE
8 TRIAL.

9 THE COURT: SO, WE'LL DIVIDE THIS UP INTO TWO COMPONENTS.
10 SO, THE CLAIM IS THEY SHOULD HAVE GONE OUT AND GOTTEN
11 ANOTHER WITNESS INSTEAD OF DOCTOR CASCIO TO DO THE WORK
12 THEY HAD INITIALLY HIRED DOCTOR CASCIO TO DO.

13 MR. BROWN: OR, IN THE ALTERNATIVE, NOT USED HER.

14 THE COURT: WELL, I KNOW, BUT THAT'S THE LAST POINT.

15 MR. BROWN: YES SIR.

16 THE COURT: RIGHT NOW, I'VE GOT TWO POINTS LEFT. THEY
17 SHOULD HAVE GONE AND GOTTEN ANOTHER WITNESS; THAT'S ONE.
18 THEY SHOULDN'T HAVE CALLED HER TO TESTIFY; THAT'S TWO. THE
19 FIRST ONE, SHOULD HAVE GOTTEN ANOTHER WITNESS, HAS TWO
20 COMPONENTS. FIRST OF ALL, YOU CLAIM THEY SHOULD HAVE
21 SOUGHT OUT INFORMATION FROM DOCTOR CASCIO AS TO WHAT
22 ROBERTSON TOLD HER. AND THE SECOND ONE IS THAT ONCE THEY
23 ACTUALLY HAD INFORMATION ABOUT WHAT ROBERTSON TOLD HER
24 AND REALIZED IT WAS SO DAMAGING, THEY SHOULD HAVE DONE

1 SOMETHING TO AVOID, SOMETHING TO ALLOW THEM TO PUT A
2 DIFFERENT WITNESS ON THE STAND.

3 MR. BROWN: IT GOES DEEPER THAN THAT, YOUR HONOR. ONE
4 OF THE LAST QUESTIONS I ASKED MR. BOYD IS-- I MADE A POINT OF
5 ASKING MR. BOYD IS, WHAT WAS SHE HIRED FOR. TO DO A SOCIAL
6 HISTORY OF THIS FAMILY. SHE WAS NOT HIRED TO GET THE WHO,
7 WHAT, WHY, WHERE OF THE ACTUAL FACTS OF THIS CRIME. SO, IN MY
8 HUMBLE OPINION, WHAT SHE WAS HIRED FOR, SHE EXCEEDED HER
9 AUTHORITY, WHICH TIES BACK TO MY OPINION ABOUT HER
10 INEXPERIENCE THAT SHE HAD IN DOING THIS. SHE WAS NOT HIRED TO
11 GET AT THE WHO, WHAT, WHY, WHERE OF THE CRIME. SHE WAS HIRED
12 TO DO A SOCIAL HISTORY OF THIS FAMILY.

13 THE COURT: I THINK THE EVIDENCE WAS SHE WAS INSTRUCTED
14 TO DO A SOCIAL HISTORY. SHE WAS NOT INSTRUCTED TO DO AN
15 INQUIRY INTO THE FACTS OF THE CASE. I UNDERSTAND YOUR CLAIM.
16 I'M READY TO RULE ON IT.

17 MR. BROWN: YES SIR.

18 THE COURT: SO, AS FAR AS THE SUGGESTION THAT THE
19 WITNESS' INEXPERIENCE CAUSED HER TO GO BEYOND THE SCOPE OF
20 WORK THAT SHE HAD BEEN EMPLOYED TO PERFORM; THAT COUNSEL
21 SHOULD HAVE SOUGHT HER OUT AND ASKED HER, NOW, WAIT A
22 MINUTE, LET'S MAKE SURE THAT MR. ROBERTSON DIDN'T TELL YOU
23 ANYTHING ON A SUBJECT THAT WE DIDN'T ASK YOU TO INQUIRE INTO.
24 YOU KNOW, THOSE ARE CERTAINLY THINGS THAT LAWYERS COULD
25 DO. BUT, I MEAN, A LAWYER IS NOT EXPECTED TO ANTICIPATE EVERY

1 POSSIBLE THING THAT COULD GO WRONG IN THE MONTHS LEADING UP
2 TO TRIAL.

3 AND THE REASON THAT I THINK THIS OCCURRED IS BECAUSE
4 EVEN THOUGH THE LAWYERS HAD HIRED HER FOR A PURPOSE THAT
5 DID NOT REQUIRE HER TO INQUIRE THE FACTS OF THE CASE; AND
6 EVEN THOUGH THEY HAD TOLD ROBERTSON TO KEEP HIS MOUTH
7 SHUT WHEN HE TALKS TO THE EXPERTS, IT'S ROBERTSON'S INABILITY
8 TO KEEP HIS MOUTH SHUT THAT CAUSED THAT CONVERSATION TO
9 TAKE PLACE AND CAUSED DOCTOR CASCIO TO BE GIVEN THIS
10 INFORMATION WHICH SHE, I'M CERTAIN, WAS ETHICALLY REQUIRED
11 TO RECORD.

12 AND SO, THAT'S WHY THE INFORMATION ENDS UP IN HER NOTES.
13 IT'S NOT AS A RESULT OF ANYTHING THE LAWYERS DID THAT WAS
14 UNREASONABLE. WHILE, CERTAINLY THE LAWYERS COULD HAVE
15 DONE MORE; THEY COULD HAVE HAD A CRYSTAL BALL OUT AND BEEN
16 ABLE TO DETERMINE THAT ROBERTSON IS CERTAINLY GOING TO RUN
17 HIS MOUTH DESPITE OUR INSTRUCTIONS NOT TO; AND CERTAINLY
18 THIS CONVERSATION WITH THE EXPERT IS GOING TO GO INTO AREAS
19 THAT WE DIDN'T HIRE HER TO WORK IN.

20 THE FACT THAT THEY DID NOT ANTICIPATE THAT AND DID NOT
21 ACTUALLY GO OUT AND INTERROGATE HER MONTHS AND WEEKS
22 BEFORE TRIAL AS TO WHAT ROBERTSON MIGHT HAVE TOLD HER, IN
23 MY OPINION, IS NOT INEFFECTIVE, NOT UNREASONABLE. SO, ON THAT
24 PARTICULAR PRONG, YOU HAVE FAILED TO SATISFY THE STRICKLAND
25 TEST, THE FIRST PRONG OF THE STRICKLAND TEST.

1 NOW, ON THE SECOND CLAIM-- THE SECOND COMPONENT OF
2 THAT FIRST ONE IS THAT ONCE THEY FOUND OUT THE INFORMATION
3 THEY SHOULD HAVE TAKEN STEPS TO GET ANOTHER WITNESS TO
4 TAKE THE PLACE OF MS. CASCIO.

5 MR. BROWN: YOUR HONOR, I DON'T MEAN TO INTERRUPT. BUT,
6 REGARDING THAT, I WOULD TAKE THAT A STEP FURTHER AS
7 ANOTHER PRONG. SHE WAS HIRED TO GIVE AN OPINION AS TO THE
8 SOCIAL HISTORY OF THIS FAMILY. THAT WAS THE LIMITS OF WHAT
9 THEY WANTED HER TO DO. I WAS ALSO QUESTIONING FOR THE
10 RECORD, AND ASKED MR. BOYD THIS, THE LAST QUESTION I ASKED
11 MR. BOYD THIS, THE DECISION TO TURN THOSE NOTES OVER TO
12 RELATE TO THE CRIME. BECAUSE IN REACHING HER OPINION AS TO
13 UNDERLYING SOCIAL VALUES AND THE SOCIAL HISTORY OF THIS
14 FAMILY, THOSE NOTES IN NO WAY RELATED TO WHAT SHE NEEDED TO
15 DO TO REACH THAT DECISION AS TO THE PSYCHOLOGICAL HISTORY OF
16 THIS FAMILY. SO, I QUESTION THAT DECISION, TOO, YOUR HONOR.

17 THE COURT: WELL, AS TO--

18 MR. BROWN: WHAT THEY COULD HAVE DONE WAS ASK FOR A
19 SUPPLEMENTAL IN-CAMERA HEARING IN FRONT OF JUDGE HAYES AT
20 THAT POINT IN TIME AND SAY, LOOK, JUDGE, THIS IS WHAT WE'VE
21 GOT, THIS IS WE'RE PUTTING HER UP HERE FOR; DO I HAVE TO GIVE
22 THESE NOTES AND CAN THEY USE THEM.

23 THE COURT: ALL RIGHT. I'LL ADDRESS THAT.

24 MR. BROWN: THE DAMNING EFFECT OF THAT TESTIMONY, IT'S
25 MY HUMBLE OPINION, YOUR HONOR, IF THERE WAS ANY WAY TO KEEP

1 THAT OUT, I WOULD HAVE KEPT IT OUT. AND, THEN, WHEN YOU'RE
2 TALKING ABOUT---

3 THE COURT: I UNDERSTAND YOUR CLAIM. THIS ALL BOILS
4 DOWN TO THE QUESTION OF THE DECISION OF WHETHER OR NOT TO
5 CALL HER AS A WITNESS. YOU'RE RIGHT. I AGREE THAT ONCE THE
6 NOTES WERE MADE AWARE TO THE LAWYERS THEY SHOULD HAVE
7 DONE EVERYTHING THEY COULD TO KEEP THOSE NOTES FROM BEING
8 TURNED OVER TO THE STATE. BUT THE ONLY THING THEY COULD DO,
9 IF THEY'D MADE THE DECISION TO CALL HER AS A WITNESS, THE ONLY
10 THING THEY COULD DO WOULD BE TO PUT IT IN THE HANDS OF THE
11 JUDGE. IF THEY HAD SAID TO THEMSELVES, NO, WE THINK WE'RE
12 GONNA GIVE UP THE NOTES THAT RELATE TO THE SOCIAL AND
13 MENTAL HISTORY, BUT NOT GIVE UP THE NOTES THAT RELATE TO THE
14 CRIME, THEN ONE OF THOSE LAWYERS WOULD ULTIMATELY HAVE
15 ENDED UP SPENDING SOME TIME IN JAIL.

16 MR. BROWN: AND I AGREE WITH THAT, YOUR HONOR, BUT---

17 THE COURT: I'VE HEARD ALL THE ARGUMENTS I NEED. I THINK
18 I'M READY.

19 MR. BROWN: JUST ONE MORE STATEMENT, JUDGE. I THINK THEY
20 SHOULD HAVE HAD AN IN-CAMERA---

21 THE COURT: I KNOW. I FULLY UNDERSTAND, MR. BROWN. I'M
22 READY TO ADDRESS THAT RIGHT NOW. IN MY OPINION, ONCE THEY
23 MAKE THE DECISION TO CALL HER AS A WITNESS, THEY GIVE THE
24 NOTES TO JUDGE HAYES AND ASK JUDGE HAYES NOT TO MAKE THEM
25 TURN OVER THE NOTES RELATING TO WHAT MR. ROBERTSON'S SAID,

1 JUDGE HAYES' ANSWER WOULD HAVE BEEN NO. IF SHE'S GONNA
2 TESTIFY, ALL THE NOTES GET TURNED OVER.

3 SO, THAT BRINGS IT ALL AROUND TO THE ONE POINT: WAS IT A
4 REASONABLE DECISION TO CALL HER AS A WITNESS, WHICH I'LL GET
5 TO IN A MINUTE. WELL, ACTUALLY, I'LL GET TO IT RIGHT NOW.
6 IN ANSWERING THAT QUESTION, I THINK YOU HAVE TO LOOK AT--
7 THAT QUESTION HAS TO BE ANSWERED IN COMBINATION WITH THE
8 SECOND PRONG OF STRICKLAND. BECAUSE WHAT COUNSEL HAS TO
9 DO IS THEY HAVE TO LOOK AT THE SITUATION THAT THEY'RE IN. AND
10 THERE THEY ARE IN TRIAL AND THEY HAVE TO GIVE OVER THESE
11 NOTES IF SHE'S GONNA TESTIFY. THE TRIAL'S ALMOST OVER. SHE IS
12 THE ONLY VEHICLE LEFT TO TIE ALL THIS MENTAL HEALTH HISTORY
13 TOGETHER.

14 IF THEY ARE GOING TO CALL HER AS A WITNESS AND
15 ACCOMPLISH THE GOAL THAT THEY SET OUT AT THE WHOLE
16 BEGINNING OF THE TRIAL, WHICH IS TO LAY IT ALL OUT IN THE FIRST
17 PLACE, TIE IT ALL TOGETHER IN THE LAST. IF THEY'RE GONNA DO
18 THAT, THEY'VE GOT TO CALL HER AS A WITNESS.

19 SO, THEY'VE GOT TO WEIGH THE VALUE THAT THEY GET FROM
20 PUTTING HER ON THE STAND AND LETTING HER TIE IT ALL TOGETHER
21 AGAINST THE CLEAR DETRIMENT THAT THEY WILL SUFFER FROM
22 THOSE NOTES COMING OUT THROUGH THE EFFECTIVE CROSS
23 EXAMINATION OF SOLICITOR POPE. AND THE DECISION THAT
24 COUNSEL HAS TO MAKE AT THE CRUCIBLE THERE IN THE MIDDLE OF
25 THE TRIAL IS VERY SIMILAR TO THE DECISION THAT I HAVE TO MAKE

1 ON THE SECOND PRONG OF STRICKLAND: WOULD IT HAVE MADE ANY
2 DIFFERENCE.

3 NOW, I'VE SPENT A LOT OF TIME DURING THE COURSE OF THIS
4 TRIAL READING THE TESTIMONY OF OTHER WITNESSES. SO,
5 COUNSEL'S GOT TO LOOK AT SEVERAL THINGS. THEY'VE GOT TO
6 LOOK AT THE TESTIMONY OF WHAT WAS MEREDITH MOON. THEY'VE
7 GOT TO LOOK AT WHAT IS THE OTHER EVIDENCE THAT IS IN THE
8 RECORD REGARDING THE WAY THIS CRIME UNFOLDED. THAT
9 INCLUDES DOCTOR SEXTON. THAT INCLUDES OTHER WITNESSES AS
10 WELL.

11 MEREDITH MOON HAS ALREADY TESTIFIED ABOUT A LOT OF
12 THINGS THAT DOCTOR CASCIO QUOTES ROBERTSON AS HAVING SAID.
13 UNDOUBTEDLY, THE WAY THAT ROBERTSON PRESENTS IT TO CASCIO,
14 THE WAY IT COMES OUT THROUGH CASCIO IS SIGNIFICANTLY MORE
15 DAMAGING THAN IT WAS COMING THROUGH MEREDITH MOON. BUT,
16 NEVERTHELESS, A LOT OF THAT TESTIMONY IS ALREADY IN THE
17 RECORD TO SOME EXTENT.

18 THEN YOU TAKE DOCTOR SEXTON. SO, I'VE GOT A LITTLE
19 OUTLINE TO WHAT DOCTOR SEXTON TESTIFIED TO REGARDING THE
20 BLOWS THAT HAD BEEN ADMINISTERED TO THE HEAD TO EARL
21 ROBERTSON WITH HAMMER TINES. HE DISCUSSED BLOWS TO THE
22 HEAD ON PAGE 2258, LINES 14 TO 16; BLOWS TO THE LEFT SIDE OF THE
23 HEAD, TWO PAIRS ON PAGE 2259, LINES 20 TO 24; IN THE TEMPLE, 2260,
24 LINES 6 TO 7; IN THE RIGHT SHOULDER, PAGE 2262, LINES 11 AND 19;
25 RIGHT SIDE OF THE NECK, 2263, LINES 13 TO 15; BACK OF THE LEFT

1 HAND, 2265, LINES 11 AND 15; BACK OF THE RIGHT HAND, 2265, LINES 18
2 TO 23.

3 SO, JUST RIGHT THERE, YOU'VE GOT AT LEAST EIGHT BLOWS
4 WITH THE TINES OF THE HAMMER ADMINISTERED BY WHOEVER
5 COMMITTED THIS CRIME TO THE VICTIM, TESTIFIED TO BY A MEDICAL
6 DOCTOR USING A CHART, SHOWING A JURY, AS I UNDERSTAND,
7 PHOTOGRAPHS OF THE BODY SHOWING WHERE THESE MARKS ARE ON
8 THE BODY. THAT IS A LEVEL OF DETAIL REGARDING THAT
9 PARTICULAR TYPE OF ASSAULT THAT IN MY OPINION HAS A GREATER
10 IMPACT BEFORE THE JURY BECAUSE OF ITS LEVEL OF DETAIL, IT'S
11 SCIENTIFIC AND MEDICAL ACCURACY, THAT IS MORE EFFECTIVE AND
12 MORE DAMAGING TO THE DEFENDANT THAN HIS OWN ADMISSION
13 THAT CAME OUT THROUGH DOCTOR CASCIO.

14 THEN WE GO ON TO THE BASEBALL BAT, STILL REGARDING
15 EARL ROBERTSON. BASEBALL BAT BLOWS TO THE TOP OF THE SPINE,
16 2253, LINES 22 TO 24; LEFT SIDE OF THE BACK, 2254, LINES 7 TO 10;
17 UPPER RIGHT BACK, 2254, LINES 21 TO 22.

18 OTHER PARTS OF THE HAMMER. HE WAS HIT IN THE EAR, PAGE
19 2260, LINES 7 TO 10. HE WAS CUT WITH A KNIFE, 2252, LINE 17, AND
20 THAT WAS IN THE HAND. ON THE BACK OF THE NECK HE WAS CUT
21 WITH A KNIFE.

22 I'M GONNA GO AHEAD AND PUT ALL THIS IN THE RECORD. 2252,
23 LINES 18 AND 19. CUT IN THE LEFT KNEE; 2264, LINES 3 TO 9; RIGHT
24 SIDE OF THE NECK WITH A KNIFE, 2263, LINES 15 TO 16.

1 UNDERSTANDING THAT MY SUMMARY OF THESE THINGS
2 PROBABLY HAS SOME ERRORS IN IT. AND I DON'T MEAN TO GIVE
3 THESE PAGE NUMBERS AND LINE NUMBERS AND I DON'T WANT
4 SOMEBODY TO GO BACK AND SAY, NO, YOU MISSED ONE POINT,
5 BECAUSE I GUARANTEE YOU I MISSED A COUPLE OF POINTS. I'M SURE
6 I LEFT OUT SOME. I'M SURE I INCLUDED SOME THAT WERE NOT
7 ACTUALLY TESTIFIED TO AS CORRECTLY AS I SAID THEY WERE.
8 THEN DOCTOR SEXTON GOES BACK ON 2269 AND 70 AND HE
9 SUMMARIZES ALL THAT.

10 THEN YOU'VE GOT THE EXHIBITS. I THINK I'VE GOT WHAT MUST
11 BE A REDUCED SIZE COPY OF 267. DO YOU HAVE A BLOW-UP OF THAT?

12 MR. SALTER: I'LL CHECK.

13 THE COURT: SEE IF THIS IS THE ACTUAL EXHIBIT OR THIS IS A
14 COPY.

15 MR. POPE: THIS IS THE COPY THAT WAS USED, YOUR HONOR,
16 WHICH WAS USED WITH A PRESENTER TO PRESENT IT. WE ALSO
17 SUPPLEMENTED IT WITH THIS.

18 THE COURT: OKAY. NOW, THAT IS THE TESTIMONY FROM
19 DOCTOR SEXTON REGARDING EARL ROBERTSON. I'VE GOT A SIMILAR
20 BREAK-DOWN OF TESTIMONY REGARDING THE BLOWS THAT WERE
21 ADMINISTERED TO TERRY ROBERTSON. AT LEAST-- I MEAN, I GUESS
22 I'M GONNA JUST GO AHEAD AND READ ALL THIS INTO TO THE RECORD.
23 BECAUSE, IN MY OPINION, AFTER LOOKING AT THE GRAPHIC NATURE
24 OF DOCTOR SEXTON'S TESTIMONY, THE ABILITY BY DOCTOR SEXTON
25 TO IDENTIFY SO MANY DIFFERENT BLOWS. AND NOT ONLY TO

1 IDENTIFY THEM, BUT TO EXPLAIN HOW HE IDENTIFIES THEM, AS
2 SHOWING PICTURES AND DIAGRAMS, TO BOTH THESE VICTIMS,
3 COMBINED WITH THE TESTIMONY OF MEREDITH MOON, AND ALSO
4 COMBINED WITH THE OTHER TESTIMONY REGARDING THE
5 CIRCUMSTANCES, THE DNA, THE BLOOD, THE BROKEN WINDOW, THE
6 DROPPING OF THE CLOTHES IN MARYLAND, ALL THIS STUFF.
7 EVEN BEFORE DOCTOR CASCIO GETS ON THE STAND, THERE IS A VIVID
8 AND GRAPHIC AND OVERWHELMING PICTURE PAINTED BEFORE THAT
9 JURY OF THE HEINOUS NATURE, NOT ONLY OF THE CRIME, BUT OF THE
10 DEFENDANT THAT COMMITTED IT.

11 SO, IN MY OPINION, THE EFFECT OF THE ADMISSIONS MADE BY
12 ROBERTSON AS TESTIFIED THROUGH CASCIO, WHILE SIGNIFICANT, ARE
13 NOT SO STRONG THAT I COULD SAY WITH CONFIDENCE THAT THERE IS
14 A REASONABLE PROBABILITY THAT IF THOSE ADMISSIONS HAD NOT
15 BEEN ENTERED INTO EVIDENCE, THE OUTCOME OF THE PROCEEDING
16 WOULD HAVE BEEN ANY DIFFERENT. BECAUSE I BELIEVE, IN THIS
17 RESPECT, EVEN THOUGH YOU HAVE DONE AN OUTSTANDING JOB OF
18 EXPLAINING ALL THIS TO ME, IN THE END, IT'S MY OPINION THAT YOU
19 HAVE FAILED TO MEET YOUR BURDEN OF PROOF ON THE SECOND
20 PRONG OF STRICKLAND REGARDING THE TESTIMONY OF CASCIO.

21 AND BECAUSE COUNSEL IS CHARGED WITH THE STRATEGIC
22 DECISION IN THE CRUCIBLE OF THE TRIAL OF DECIDING WHETHER OR
23 NOT TO PUT THIS WITNESS ON THE STAND WHO IS GOING TO HELP
24 THEM AND HURT THEM BECAUSE THE BALANCE COMES OUT SO EVEN,

1 AS I HAVE JUST DESCRIBED, COUNSEL'S DECISION TO PUT HER ON THE
2 STAND WAS NOT UNREASONABLE.

3 AND SO, I THINK YOU HAVE FAILED ALSO TO PROVE THE FIRST
4 PRONG OF STRICKLAND WITH REGARD TO THE DECISION TO PUT HER
5 ON THE STAND. AND THEN JUST LIKE I SAID, AND I'VE BEEN SAYING
6 THIS ALL THROUGH THE TRIAL, EVERYTHING REGARDING CASCIO
7 FLOWS FROM THE DECISION TO PUT HER ON THE STAND. ONCE THAT
8 DECISION IS MADE, THE NOTES HAVE TO BE TURNED OVER AND THE
9 DAMAGE IS GONNA COME. UNLESS, PERHAPS, YOU KNOW, YOU'VE
10 GOT A GLEEFUL, OVER-CONFIDENT PROSECUTOR WHO GOES HOME
11 AND HAS A COUPLE OF DRINKS THE NIGHT BEFORE HE CROSS
12 EXAMINES CASCIO INSTEAD OF READING THE NOTES THAT HAVE JUST
13 BEEN TURNED OVER TO THEM, PERHAPS HE MIGHT HAVE THEN OVER
14 LOOKED IT. BUT WE ALL KNOW THAT SOLICITOR POPE DIDN'T DO
15 THAT.

16 NOW, WHAT I'M GONNA DO, IS I'M GONNA JUST TAKE THIS
17 SUMMARY AND MAKE IT A COURT'S EXHIBIT.

18 (WHEREUPON COURT'S EXHIBIT NUMBER ONE WAS MARKED AND
19 MADE A PART OF THE RECORD)

20 THESE ARE PART OF THE RECORD. THESE ARE THE PLAINTIFF'S
21 AND DOCTOR SEXTON'S TESTIMONY REGARDING THE REPEATED
22 BLOWS TO TERRY ROBERTSON WITH HAMMER TINES, LATERAL EDGE
23 OF HAMMER, KNIFE. I'M COUNTING TWENTY-EIGHT. NOW, THERE MAY
24 BE SOME OVERLAP IN THE ONES THAT I HAVE IDENTIFIED. I'M SURE
25 THERE IS. FOR EXAMPLE, HE'S GOT HAMMER TINES BLOWS AND HE'S

1 ALSO LACERATIONS. HE MAY BE COUNTING THE LACERATIONS AS
2 HAVING BEEN MADE BY THE HAMMER TINES.

3 BUT WHETHER IT'S TWENTY-EIGHT, EIGHTEEN OR THIRTY-
4 EIGHT, IT'S A SIGNIFICANT NUMBER. THE TESTIMONY REGARDING
5 HOW THOSE BLOWS WERE ADMINISTERED, THE ABILITY TO SHOW THE
6 DIAGRAMS AND THE PHOTOGRAPHS TO THE JURY, AS I HAVE SAID, IN
7 MY OPINION IS MUCH MORE EFFECTIVE AND DAMAGING THAN THE
8 ADMISSIONS GIVEN BY ROBERTSON.

9 SO, THAT'S MY RULING, AND I WOULD LIKE FOR THE STATE TO
10 PREPARE AN ORDER.

11 MR. SALTER: YES, YOUR HONOR.

12 THE COURT: AND WE'LL MAKE THIS A COURT'S EXHIBIT AS
13 WELL.

14 (WHEREON COURT'S EXHIBIT NUMBER TWO WAS MARKED AND MADE
15 A PART OF THE RECORD)

16 AND BEFORE WE GO OFF THE RECORD LET ME SAY THAT
17 OBVIOUSLY THERE'S AN EXTENSIVE FACTUAL RECORD IN THIS CASE. I
18 HAVE, FOR EXAMPLE, IN DISCUSSING THE EFFECT OF MEREDITH
19 MOON'S TESTIMONY ON ME IN DECIDING WHETHER OR NOT THE
20 SECOND PRONG OF STRICKLAND WAS MET REGARDING THE DECISION
21 TO CALL CASCIO, YOU'RE GONNA HAVE TO TAKE THAT TESTIMONY
22 AND PUT IN THE ORDER THOSE DETAILS THAT ARE PERTINENT TO THE
23 POINT THAT I JUST MADE.

24 MR. SALTER: YES SIR.

1 THE COURT: NOT ONLY THOSE DETAILS IN THEIR IMPORTANCE
2 TO MY DECISION ON THE SECOND PRONG, BUT THOSE DETAILS IN
3 THEIR IMPORTANCE TO COUNSEL WHEN THEY'RE MAKING THAT
4 DIFFICULT DECISION RIGHT THERE IN THE MIDDLE OF TRIAL.

5 MR. SALTER: YES SIR.

6 THE COURT: AND ON OTHER POINTS, TOO. OBVIOUSLY, THERE'S
7 NO WAY THAT I COULD HAVE GONE THROUGH THE DETAIL OF
8 TESTIMONY IN MY RULING THAT, EVEN THOUGH I ADMIT WAS LONG-
9 WINDED, THAT NEEDS TO BE DONE IN THE ORDER ITSELF.

10 MR. SALTER: YES SIR.

11 THE COURT: I ENJOYED BEING WITH Y'ALL.

12 MR. SALTER: THANK YOU, YOUR HONOR.

13 MR. BROWN: THANK YOU, YOUR HONOR.

14 THE COURT: ANYTHING FURTHER?

15 MR. BROWN: I FORGOT HOW YOU FILE A VOUCHER.

16 THE COURT: I'M HAPPY TO SAY THAT YOU NOW SEND IT
17 STRAIGHT TO OJD. IT DOES NOT HAVE TO COME TO ME.

18 MR. BROWN: OKAY. THANK YOU.

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CERTIFICATE

I, THE UNDERSIGNED PHYLLIS S. BARRETT, OFFICIAL COURT REPORTER FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING HELD IN THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT, YORK COUNTY, SOUTH CAROLINA, ON THE 29TH, 30TH AND 31ST DAYS OF JANUARY, 2007.

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



PHYLLIS S. BARRETT

3652

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
James D. Robertson, #5067,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

C. A. No. 06-CP-46-532

ORDER OF DISMISSAL

JAVIER HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

2008 MAR 24 PM 1:01

FILED-RECEIVED

This matter is before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed on March 1, 2006. Respondent submitted its Return on October 20, 2006. The Court held an evidentiary hearing on January 29-31, 2007 at the Moss Judicial Center in York, South Carolina.

Applicant testified on his own behalf at the hearing. He also presented testimony from his trial counsel, James William Hancock, Jr. and James W. Boyd. The State presented testimony from the current Sixteenth Circuit Solicitor, Kevin S. Brackett; the former Sixteenth Circuit Solicitor, Thomas E. Pope; Michael Stobbe, the Branch Chief of Inmate Records at the South Carolina Department of Corrections (SCDC); and Ms. Merry Collins, an Investigator with the Sixteenth Circuit Solicitor's Office. The Court also had before it: the trial transcript (including pre-trial motions hearings); the records from Applicant's direct appeal to the South Carolina Supreme Court and the waiver of his appeal; the June 16, 2005 letter requesting a stay of execution; Respondent's June 21, 2005 letter opposing the request for a stay of execution; the July 7, 2005 Order of the South Carolina Supreme Court granting the stay; the Order Appointing Counsel for Post-Conviction Relief; the York County Clerk of Court's records; and the Post-

Conviction Relief Application and the Return. For the following reasons, Post-Conviction Relief is denied.

The Applicant, James D. Robertson, presently is confined at the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) pursuant to commitment orders from the York County Clerk of Court. The York County Grand Jury indicted Robertson at the April 23, 1998 term of court for two counts of murder (98-GS-46-1020 & 1021), one count of armed robbery (98-GS-46-1022), and one count of financial transaction card fraud (98-GS-46-1023). On April 30, 1998, the State served a Notice of Intent to seek the death penalty on Robertson, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002). At that time, the State also gave notice that it would rely upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; larceny with the use of a deadly weapon; and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value, and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. *See* S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2007).

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock and James W. Boyd represented Robertson at trial.¹ Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motions on July 17,

¹ Thad Lee Myers was originally appointed to represent Robertson but was relieved because of a conflict of interest.

² 

September 22 and 25, 1998; November 2 and 20, 1998; December 4 and 18, 1998; and on February 12 and 19, 1999.

Robertson's jury trial began on March 15, 1999. The jury found him guilty of each of the indicted offenses. A sentencing phase was conducted following Robertson's exercise of the 24-hour statutory waiting period in § 16-3-20(B). In addition to the five statutory aggravating circumstances relied upon by the State, Judge Hayes instructed the jury on the statutory mitigating circumstances that Robertson did not have any prior convictions involving the use of violence against another person, that the murders were committed while he was under the influence of a mental or emotional disturbance, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and his age and mentality at the time of the crimes. § 16-3-20(C)(b)(1)-(2), (6) and (7). The jury found each of the alleged statutory aggravating circumstances and sentenced Robertson to death for both murders. Judge Hayes affirmed their decision and imposed the death sentence.

Robertson did not file a timely Notice of Appeal, but Judge Hayes entered a Consent Order granting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). At various points on appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III represented Robertson before the South Carolina Supreme Court.

On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Robertson's behalf, which presented three issues:

1. The judge erred by forcing Robertson to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.

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2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.
3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against Robertson.

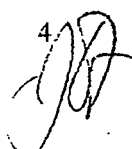
4/15/02 Initial Brief of Appellant at p. 1.

However, Robertson wrote the South Carolina Supreme Court on June 3, 2002 and asked the Court to relieve Mr. Savitz and allow Robertson to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme Court filed an Order on June 26, 2002, in which it remanded the matter to Judge Hayes for a hearing on Robertson's competency to appear *pro se*. Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002. Bruce M. Poore represented Robertson at the hearing. Senior Assistant General William Edgar Salter, III represented the State. Robertson was the only witness at the hearing.

On October 28, 2002, Judge Hayes signed a Report to the Supreme Court of South Carolina, in which he found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003. He presented seven issues for appellate review:

1. The judge erred in denying three separate motions for a directed verdict based on insufficient evidence and State's failure to meet the burden of proof as to first element of corpus delicti of murder at the conclusion of State's case.
2. The judge erred by forcing Robertson to submit to a state-sponsored psychological evaluation solely for the purpose of

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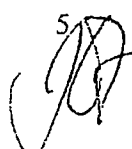
obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.

3. The judge erred by denying the jury's request to take notes while being recharged as to the law during guilt phase deliberations.
4. The judge erred in revealing the location where the jurors were sequestered, thereby denying Robertson his constitutional right to a fair and impartial jury.
5. The judge erred in not allowing defense to define "life imprisonment" as it appears in the state statute to potential jurors during *voir dire*, thereby denying Robertson a fair and impartial jury.
6. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against Robertson.
7. The judge erred in sentencing Robertson to death.

Pro Se Initial Brief of Appellant at p. 2. The State filed the Initial Brief of Respondent on December 31, 2003.

However, Robertson subsequently indicated to the South Carolina Supreme Court that he wished to abandon his right to direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing was held before Judge Hayes on February 22, 2005 at the Moss Justice Center in York, South Carolina. Robertson appeared *pro se* and testified at the hearing. Mr. Salter again represented the State. In a Report to the Supreme Court dated February 23, 2005, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order

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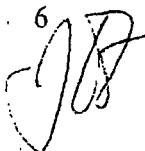
dated June 3, 2005, the Supreme Court of South Carolina agreed with Judge Hayes' finding that Robertson was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003) and concluded that

the death penalty was not the result of passion, prejudice, or other arbitrary factors, and the evidence supports the jury's finding of aggravating circumstances. The death sentence is not excessive or disproportionate to the penalty imposed in similar cases. *See State v. Williams*, 321 S.C. 327, 468 S.E.2d 626, *cert. denied*, 519 U.S. 891 (1996); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997); *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116, *cert. denied*, 525 U.S. 1043 (1998).

Therefore, the Court dismissed the appeal and directed the Clerk of that Court to issue an execution notice pursuant to *In re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

On June 16, 2005, Robertson requested a Stay of Execution to file a Post-Conviction Relief application. Respondent opposed the request by way of a June 21, 2005 letter, but the Supreme Court granted a stay pursuant to *In Re: Stays of Execution in Capital Cases*, in a July 7, 2005 Order. In the same Order, the Supreme Court appointed this Court to preside over this case and directed this Court to hold a hearing to determine whether Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), this Court held a hearing at the Greenville County Courthouse on September 23, 2005. The Court filed an Order Appointing Counsel for Post-Conviction Relief dated September 9, 2005, in which the Court appointed Michael Brown to represent Robertson. Thereafter, the Court appointed Joseph David Matlock to assist in representing Robertson.

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Robertson raised the following ground for relief in his March 1, 2006 Application:

1. Ineffective assistance of counsel - specifics to be amended later.

Robertson amended his Application at the outset of the PCR hearing and proceeded on the following specific grounds of ineffective assistance of counsel:

1. Counsel failed to present Dr. Hayne McMeekin as a witness and failed to develop evidence that Dr. McMeekin over-prescribed Ritalin;
2. Counsel failed to present Chip Robertson as a defense witness;
3. Counsel failed to pursue a verdict of guilty but mentally ill (GBMI), either by advising Robertson to enter such a plea or by requesting a verdict of GBMI at the trial;
4. Counsel failed to spend an adequate amount of time with Robertson prior to trial;
5. Counsel never pursued a proposed plea bargain allegedly offered by the State;
6. Counsel erroneously advised Robertson not to testify in the sentencing phase of his trial;
7. Counsel failed to present evidence that Robertson is adaptable to prison life;
8. Counsel failed to cross-examine Robertson's co-defendant, Meredith Moon about a statement in which she allegedly agreed to "keep quiet" about the murders in exchange for \$50,000.00;
9. Counsel failed to request removal of a juror where the juror had made statements on *voir dire*;
10. Counsel did not adequately advise Robertson before he was evaluated by the prosecution's psychologist, Dr. Geoffrey McKee;
11. Counsel failed to adequately present evidence of the Robertson family's mental health history; and

12. Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because of (a) Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; (c) counsel's failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness.

GROUND 10(a)(1)

Robertson's first allegation is that trial counsel was ineffective for failing to present Dr. Hayne McMeekin, a psychiatrist who had seen Robertson and his family for several years, as a defense witness. Robertson contends that counsel's failure to present Dr. McMeekin was prejudicial because counsel could have established further evidence that Dr. McMeekin overprescribed Ritalin. The Court finds that Robertson has failed to prove either deficient performance or resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

Both of the attorneys who represented Robertson at trial testified that Mr. Hancock was lead counsel, but both attorneys shared the responsibility of representing Robertson. Both attorneys also testified as to their experience in handling capital and non-capital murder cases. Based upon that testimony and the reasons that follow, the Court finds that counsel were eminently qualified to represent Robertson and that they did so in a professional manner that was consistent with the requirements of *Strickland* and its progeny.

Mr. Hancock testified that counsel's investigation led them to conclude that the prosecution had overwhelming evidence of guilt, and counsel did not find anything which led to the conclusion that either Meredith Moon or anyone else committed the murder. Therefore, counsel primarily focused on the sentencing phase of the trial, and they attempted to secure a sentence of life imprisonment without parole (LWOP). Counsel obtained all of Robertson's school records which they could locate (including records from California); the records from his

Youthful Offender Act conviction for burglary; Robertson's records from an involuntary commitment to the Willis S. Hall Psychiatric Institution; Robertson's SCDC records; records from Kanawha Insurance Company; records from Piedmont Mental Health Associates; and the Robertson family counseling records from the Carolina Counseling Center, where Robertson and his family were treated by Dr. McMeekin and family and marriage counselor Julius F. "Skip" Meyer, Jr. It was Mr. Hancock's impression that the defense obtained all of Dr. McMeekin's records through Mr. Meyer.²

Mr. Meyer testified as a defense witness, and counsel was able to introduce a substantial amount of evidence relating to the mental health counseling that Robertson and his family received. Counsel also introduced Mr. Meyer's notes of the various therapy sessions as Defendant's Ex. 18. Counsel thereafter introduced a number of mental health records through Ms. Cascio. Additionally, counsel employed several defense experts with the assistance of the Center for Capital Litigation in Columbia: Dr. Jonathan Pincus (a neurologist); Dr. James Evans (a neuropsychologist); and Toni Cascio, a social worker. Each of these experts testified at trial. See Tr. pp. 2458-2530 (Dr. Pincus); pp. 2535-89 (Dr. Evans); pp. 2610-2736 (Dr. Morton); pp. 2852-3031 (Ms. Cascio). Mr. Hancock testified that counsel made all of the records that the defense had available to each of the experts, counsel did not deliberately withhold any records from their experts, and none of the experts indicated that he or she needed additional mental health information in order to form his or her opinion.

Mr. Hancock testified that the defense was aware that Dr. McMeekin was treating the entire Robertson family but stated that Mr. Meyer was doing most of the counseling. Counsel

² However, Mr. Hancock had previously turned over his file to Robertson and did not have his file at the time of the hearing.

did not consult a psychiatrist to determine whether Dr. McMeekin was over-prescribing Ritalin. However, counsel did consult with Dr. Morton, who was of the opinion that Robertson had never received proper treatment for his drug abuse and that Dr. McMeekin has prescribed too much Ritalin and other drugs as well. Also, counsel was aware that Dr. McMeekin had a disciplinary infraction against his license that was affirmed by an Administrative Law Judge approximately a year before Robertson's trial.

Counsel felt that the disciplinary action would create a problem for the defense if they elected to call Dr. McMeekin as a defense witness. Moreover, if counsel presented Dr. McMeekin as a witness, Dr. McMeekin would be given an opportunity to undermine Dr. Morton's opinion by explaining his treatment. Counsel made a strategic decision to present Dr. Morton and not Dr. McMeekin. In addition, both attorneys testified that they were not sure that the jury would have considered as mitigating evidence several notes from Dr. McMeekin's treatment of Terry Robertson, which made no mention of problems with her children.

Co-counsel, Mr. Boyd, testified that there was overwhelming evidence of guilt and that a mental health based defense was important to the defense. Although it was Mr. Boyd's recollection that Mr. Hancock had already lined up the various defense experts (through the Center for Capital Litigation) before he was appointed, Boyd testified that he worked most closely with Dr. Morton. He met with Dr. Morton on several occasions before Robertson's trial, and Boyd testified that the defense had made a strategic decision to call Dr. Morton as a witness. Counsel also testified that they made the strategic decision to present Dr. Morton as a witness because they believed his opinions were beneficial to the defense's case in mitigation.

Dr. Morton testified at trial that he was unclear as to whether Robertson was experiencing a manic episode at the time of the crimes. However, Dr. Morton analogized Ritalin abuse with abuse of amphetamine and cocaine. He explained, “[p]eople that use these drugs get psychotic and get paranoid.” Dr. Morton also described behavioral problems associated with Ritalin abuse. Tr. pp. 2640-41; pp. 2653-56; pp. 2665-67; p. 2702.

Dr. Morton further testified that Ritalin abuse would make a pre-existing mental illness worse. Tr. pp. 2641-42. He emphasized that people who use as much Ritalin as Robertson claimed to have used on the night before and morning of the murders (30-60 milligrams as a time) can become psychotic and paranoid, and it may result in unprovoked violence. In Robertson’s discussions with Dr. Morton, Robertson described a sense of a great deal of energy, some paranoia, and “he described the crime almost like he was depersonalized.” Dr. Morton testified that these statements were consistent with a toxic state of Ritalin intoxication, and Dr. Morton believed that Robertson had Ritalin intoxication at the time of the murders. Tr. pp. 264-67. Dr. Morton testified that Ritalin abuse “was a major factor that influenced what happened to his parents.” Tr. p. 2667, ll. 14-16. Dr. Morton concluded that Robertson did not or could not control the impulse to kill his parents. Tr. pp. 2648-51; 2667-94.³

In Dr. Morton’s expert opinion,

I don’t think [Robertson] ever received treatment for his drug problems. I think it was talked about. It was talked about that he should quit drinking when he came out of the state hospital. It was talked about various therapists, that he should stop drinking, he should attend an AA meeting. I don’t know that he was ever given an ultimatum to go into a treatment to go into a treatment program. I don’t know that he was ever forced into a treatment program with consequences, if you don’t do this, then you can’t do that.

³ See Ground 10(a)(3), *infra*.

Tr. pp. 2665-66. Dr. Morton explained that, if left untreated, the results of Ritalin abuse get worse, and one might see more paranoia, which could progress to a psychotic state with time.

Tr. pp. 2666-67.

Later, Dr. Morton also expressed his opinion that Robertson did not receive appropriate treatment of his bipolar disorder:

Unfortunately, one out of three people receive appropriate treatment. That was not Jimmy; he didn't receive appropriate treatment. I'm not sure his doctor could deliver appropriate treatment. And I'm not sure that this is the place to raise who is going to deal with the doctor who prescribed all these drugs, but hopefully someone here will be concerned about what this man and his family were receiving and the amounts of drugs that they were receiving.

Tr. p. 2269, ll. 14-23.⁴ Dr. Morton later revisited this opinion and explained that "[i]n my professional judgment, he never received proper treatment for his bipolar disorder until he was ... incarcerated here."⁵

Dr. Morton further testified that the pharmacy records of the Robertson family (Defense Exs. 9-14) as well as notes from Dr. McMeekin showed that a "pretty impressive" quantity of drugs were coming into Robertson's home, including large amounts of Ritalin and anti-depressants. Specifically, Dr. Morton noted that Ritalin had been prescribed for both Robertson's father and his brother, Chip. Also, Dr. McMeekin continued to prescribe Ritalin to

⁴ The trial transcript reflects that the trial judge sustained the State's objection when Dr. Morton expressed his concern about the amount of drugs prescribed, and the trial judge instructed defense counsel to "go on and ask the next question." Tr. p. 2669, l. 24 - p. 2670, l. 4.

⁵ Dr. Morton also explained that a study had concluded that certain types of substance abuse make bipolar disorder worse, Tr. pp. 2680-83, and he later testified that Dr. McMeekin had prescribed Lithium for Robertson's bipolar disorder but had not prescribed a sufficient dosage to have a positive effect. Tr. p. 2686.

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Chip even though another doctor had taken Chip off of Ritalin after discovering Chip's abuse of the drug. Dr. McMeekin's records reflected that Chip needed Ritalin to go back to school, despite the fact Dr. McMeekin's own records reflected that Chip was snorting Ritalin. Finally, Dr. Morton reviewed the various mental health diagnoses for each of the family members that were reflected in the records he reviewed and the defense introduced a chart reflecting those diagnoses. Tr. pp. 2684-2703; Defense Ex. 15.

To establish that he received ineffective assistance of counsel, an applicant must make a two-fold showing. See *Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective at the time." *Id.* at 689. See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy, judged with the benefit of hindsight."). Further, there is a strong presumption that the actions taken by counsel were sound trial strategy. *Strickland*, 466 U.S. at 690.

Even if an applicant establishes that counsel's performance was deficient, he is only entitled to relief if he can also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. See also *Florida v. Nixon*, 543 U.S. 175 (2004); *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). In the context of a capital sentencing proceeding, the applicant must prove that "there is a reasonable

probability that ... the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 333 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (petitioner did not meet burden).

Applying these principles to the present case, the Court finds that Robertson’s argument lacks merit. The Court finds that trial counsel’s testimony concerning this allegation (and those which follow) is credible, and the Court rejects Robertson’s arguments to the contrary. Based upon the credible evidence, the Court finds that counsel’s decision to present evidence through Dr. Morton that Dr. McMeekin had over-prescribed Ritalin, rather than present Dr. McMeekin as a witness, reflects a reasonable, strategic choice under *Strickland*.

The Court finds that Dr. McMeekin’s credibility would have been subject to impeachment with the disciplinary infraction discussed at the hearing before this Court. The Court further finds that if counsel had presented Dr. McMeekin as a witness, he would have had an opportunity to explain and defend his treatment of the Robertson family and dispute Dr. Morton’s expert opinion concerning the over-prescription of Ritalin and other drugs to the various members of the Robertson family. This would have created a “battle” among the defense’s experts that could have been exploited by the State. The Court finds that it was not unreasonable to avoid presenting an expert who could undermine the defense’s case in mitigation by creating such a battle of defense experts. *Lyle v. Jordan*, 22 P.3d 666, 679 (N.M. 2001) (“Defense counsel may simply have concluded that a battle of experts would not be beneficial to



the defense or that it would have unduly emphasized or inadvertently reinforced the State's evidence"); see also *Smith v. Angelone*, 111 F.3d 1126, 1132-33 (4th Cir. 1997).

Even assuming *arguendo* that trial counsel's performance was somehow deficient, the Court finds that Robertson failed to prove that he was prejudiced by counsel's error. First, while Robertson did present evidence before this Court of portions of Dr. McMeekin's notes that were not elicited at trial, a review of Dr. Morton's testimony clearly reflects that Dr. Morton relied, at least in part, upon records from Dr. McMeekin in reaching his conclusions. The Court also finds that at least some of Dr. McMeekin's notes were also relied upon by Ms. Cascio, who prepared three charts "marking all of the psychological visits with either Skip Meyer or Dr. McMeekin for Terry and Earl during" 1995 through 1997. Ms. Cascio testified about those diagnoses, as well as a 1994 diagnosis by Dr. McMeekin that Robertson was depressed. Defendant's Ex. 25-27. *E.g.*, Tr. pp. 2882-87.

It is unclear whether Dr. Pincus, the neurologist employed by the defense, also reviewed Dr. McMeekin's records as part of "the medical records" that he reviewed (Tr. p. 2472), but it appears that he was familiar with and testified about the records of Robertson's treatment for bipolar disorder and his abuse of Ritalin. Tr. pp. 2493-99.⁶

Moreover, Dr. McMeekin did not testify at the PCR hearing. Therefore, the Court finds that Robertson cannot prove any prejudice because he did not present any evidence upon which this Court can find that there "is a reasonable probability that, but for counsel's unprofessional

⁶ Dr. Pincus testified that Robertson was abusing Ritalin, which had been prescribed for his brother, Chip, when Chip "was probably misdiagnosed as having attention deficit disorder of the kind that would respond to Ritalin." Although it did not help Chip's problems, the Robertson family "was able to get, apparently legal shipments of [Ritalin]" and Robertson abused it. Tr. pp. 2494-95.

errors, the result of the proceeding would have been different.” *Srtickland*, 466 U.S. at 694. See *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005) (“A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence”); *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial); *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (applicant's mere speculation what witness' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice). See generally *Beaver v. Thompson*, 93 F.3d 1186, 1195 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence through the testimony of family members, where there was no proffer of this testimony).⁷

GROUND 10(a)(2)

Robertson next alleges that trial counsel were ineffective for failing to call Robertson's brother, Chip Robertson, as a defense witness. Robertson contends that Chip could have testified concerning (1) his own involvement in the murder, and (2) the family's mental health history. The Court finds that Robertson has failed to prove either deficient performance or Sixth Amendment prejudice resulting from counsel's failure to present Chip as a witness.

⁷ This same rule applies in federal habeas corpus proceedings. “Complaints of uncalled witnesses are not favored in federal habeas review.” *Murray v Maggio*, 736 F.2d 279, 282 (5th Cir. 1984). “Therefore, if potential witnesses are not called, it is incumbent on the petitioner to explain their absence and demonstrate, with some precision, the content of the testimony they would have given at trial.” *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987). See also *Beaver*, 93 F.3d at 1195.

Robertson testified at the PCR hearing that he had a "fairly tenuous" relationship with his family around the time of the murders and that the family was not the typical American family that it appeared to be. He stated that most of his parent's family problems centered on him and Chip. When Chip and Robertson were on a break from school, they would use marijuana and alcohol. Later, they snorted Ritalin. Robertson indicated that Chip had a prescription for Ritalin.

Mr. Hancock testified that he did not think that anyone from the defense team spoke to Chip Robertson because Chip was represented by counsel and was being investigated in connection with the murder of his parents. Although Mr. Hancock was aware that Robertson and Chip were close at the time of the murders, he described their relationship as that of "partners in crime, in their attitude and action, their drug use and their attitudes about their parents." Counsel was unable to develop information that Chip prompted or encouraged Robertson to harm his parents.

Mr. Hancock testified that he had heard "street rumors" that Chip had taken people on a tour of the house where Terry and Earl Robertson were murdered and was having parties. Mr. Hancock felt that Chip could not help the defense because whatever information the defense could develop through him would have been more harmful than beneficial to Robertson's case. Also, Robertson did not want trial counsel to go after Chip.

Mr. Boyd testified that Chip had a drug problem at the time of the offense. Mr. Boyd approached Chip's attorney, but Chip was not cooperative with his brother's defense. In Mr. Boyd's estimation, even if they presented Chip and he testified concerning his own involvement in the murder, this would only give weak evidence of another mitigating circumstance. In fact, it would make the murders appear even more pre-planned.

The two prosecutors in the case, Solicitor Brackett and former-Solicitor Pope, testified that the State investigated Chip Robertson as a possible suspect in his parents' murders. However, the State was unable to develop sufficient evidence to indict him in connection with this case.

The Court finds that Robertson has failed to prove either deficient performance or resulting prejudice on this allegation as well. First, it does not appear that testimony from Chip concerning his involvement in the murders would have been admissible in the guilt phase of the trial because it is not inconsistent with Robertson's guilt.

In *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), the South Carolina Supreme Court set forth the rule governing the admissibility of evidence offered by the defendant to establish that someone else committed the offense with which he was charged. This rule for the admission of "third party guilt" was stated as follows:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible..... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

198 S.C. at 104-105, 16 S.E.2d at 534-35 (quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur., *Evidence* § 265, p. 254 (1939); footnotes omitted).

In *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 1733 (2006), the United States Supreme Court held that the South Carolina Supreme Court in *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001) and *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2005), vacated and



remanded, 547 U.S. 319 (2006) "had radically changed and extended the rule." The Court explained that

In *Gay*, after recognizing the standard applied in *Gregory*, the court stated that "[i]n view of the strong evidence of appellant's guilt – especially the forensic evidence – ... the proffered evidence ... did not raise 'a reasonable inference' as to appellant's own innocence." *Gay*, 343 S.C. at 550, 541 S.E.2d at 545 (quoting *Gregory*, 198 S.C. at 104, 16 S.E.2d at 534, in turn quoting 16 C.J., § 1085, at 560). Similarly, in the present case, as noted, the State Supreme Court applied the rule that "where there is strong evidence of [a defendant's] guilt, ... the proffered evidence about a third party's alleged guilt" may (or perhaps must) be excluded. 361 S.C. at 342, 605 S.E.2d at 24.

126 S.Ct. at 1733-34. The Supreme Court found that the modification of *Gregory* enunciated in *Gay* and *Holmes* rule was "'arbitrary' in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have 'a meaningful opportunity to present a complete defense.'" 126 S.Ct. at 1734 (citations omitted).

Applying the rule set forth in *Gregory*, this Court finds that it has not been presented with any evidence of Chip's involvement in the murders, which is inconsistent with Robertson's guilt, that was not already before the jury.⁸ For instance, there was no testimony presented at the PCR hearing that Chip was involved. Also, Chip had not given any statements to law enforcement,

⁸ Based upon the cross-examination of the State's DNA expert, the defense was able to argue in closing (as part of the argument that Moon's testimony was not corroborated) that a bloodstain found on a moccasin that was in the bag with the murder weapons and other items seized in Maryland, which was not matched to Robertson, might have been Chip's DNA. Also, the defense noted the absence of any testimony of Chip's whereabouts at the time of the murders. See Tr. p. 1938, ll. 1-21.

and the Court has not been presented with any supposed admissions by Chip. The Court has only been presented with speculation as to any involvement by Chip in the murders.

Thus, the Court finds that evidence Chip may have been involved in the murders is inadmissible under *Gregory*. See 98 S.C. at 104-105, 16 S.E.2d, at 534-535. See also *Holmes*, 126 S.Ct. at 1732-33 (recognizing that "rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged" are "widely accepted" and Constitutional).⁹

Second, and assuming its admissibility in the sentencing phase, the Court finds that Robertson cannot show deficient performance by his trial counsel because Chip was unavailable to the defense, not based upon any deficient performance on the part of Robertson's attorneys, but because his attorney refused to permit counsel to talk to him when counsel inquired. See *United States v. Kamel*, 965 F.2d 484, 497 (7th Cir. 1992) (trial counsel's failure to interview defendant's brother-in-law to determine if he and codefendant were solely responsible for fire was not deficient performance in arson prosecution, where defendant "fully and knowingly participated in the decision to adopt a joint *alibi* strategy" with co-defendant, and brother-in-law was unavailable at time of trial). Under these circumstances, the Court finds that Robertson's counsel made reasonable efforts to interview Chip and that they were ethically prevented from any further attempts to interview him after Chip's attorney refused to make him available to the

⁹ The Court further finds that Robertson had admitted his guilt to both of his attorneys, and that counsel were limited in their ability to present contrary evidence that Chip committed the murders. See Rule 407, SCACR, Rule 3.3(a) (3) (a lawyer shall not knowingly offer evidence that the lawyer knows to be false); *Lucas v. State*, 352 S.C. 1, 572 S.E.2d 274 (2002) ("an attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony"). See also *Nix v. Whiteside*, 475 U.S. 157 (1986) (criminal defendant's sixth amendment right to effective assistance of counsel was not violated when the attorney refused to cooperate with the defendant in presenting perjured testimony at trial).

defense. See Rule 407, SCACR, Rule 4.2, RPC (“[A] lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter....”).

The Court also finds that Robertson’s current allegation is inconsistent with his stated desire at the time of trial, as testified to by Mr. Hancock, for trial counsel not to go after Chip in connection with the murders. The Court further finds that what Chip would have testified to, had he been called as a witness, is unknown because, to date, he has not testified, and the Court has not been presented with any incriminating statements that he has made concerning the murders.

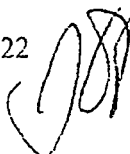
Moreover, the Court finds that if Chip had been asked about his own culpability as to the murders, he would have had the protection of the privilege against self-incrimination, and there is nothing in the record to suggest that he would have been willing to waive his privilege. Again, the Court finds that Robertson’s showing is merely speculative and does not entitle him to relief under *Strickland*. See *Eisemann v. Herbert*, 401 F.3d 102 (2d Cir. 2005);¹⁰ *Stewart v. Wolfenbarger*, 468 F.3d 338 (6th Cir. 2006). See also *Fletcher v. Mann*, No. 97-2137, 1998 WL 743744, at *4 (2d Cir. Oct. 21, 1998) (unpublished table opinion) (finding no ineffective

¹⁰ In *Eisemann*, a father and son were charged with various counts of sexual abuse. The father was charged with abusing a girl and her twin brother; the son was charged with abusing only the girl. The father and son hired the same attorney, Holtman. *Id.* at 105. In 1985, the father pled guilty to the charges. The son went to trial, represented by Holtman and another attorney. The jury found the son guilty on several charges. *Id.* In federal habeas corpus, the son argued that his counsel provided ineffective assistance, as a conflict of interest prevented counsel from calling the father to testify that he had committed the acts of which the son was accused. *Id.* at 108. The Second Circuit Court of Appeals, however, rejected that argument. That court first found that it was unknown what the father would have testified to, if he had been called as a witness. *Id.* at 109. Further, even if the father was asked about his own culpability as to the charges against the son, the father “would have had the protection of the privilege against self-incrimination, and nothing in the record suggests that he was willing to waive his privilege.” *Id.*

assistance of counsel where the witnesses whom counsel failed to subpoena, who counsel also represented, "were virtually certain" to invoke the right against self-incrimination).

Further, the Court agrees with Mr. Boyd's assessment at the PCR hearing that although presenting evidence that Chip was involved in his parents' murders would have given the defense another statutory mitigating circumstance, *see* § 16-3-20(C)(b)(5) ("The defendant acted under duress or under the domination of another person"), this would have been a relatively weak mitigating circumstance. On the other hand, evidence that Chip was an accomplice or conspirator would have strengthened the prosecution's case in aggravation of punishment, and it would have been inconsistent with the evidence from the experts who testified at trial that Robertson's actions were caused, at least in large part, by his bipolar personality disorder and his use and abuse of Ritalin. Therefore, the Court finds that Robertson has failed to prove that trial counsel were deficient for not presenting Chip Robertson to testify about his possible involvement in the murder of his parents. *See United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir. 1991) (there is no ineffective assistance of counsel even where the attorney chooses one reasonable strategy to the exclusion of another); *United States v. Adamo*, 882 F.2d 1218, 1227-28 (7th Cir. 1989).

Because Chip did not testify either at trial or at the PCR hearing, the Court finds that it is likewise speculative as to whether Chip would have provided information about the Robertson family background or the family's mental health history that was generally consistent with the mitigation case at trial and Robertson's showing in PCR, or whether he would testify contrary to counsel's reasonable presentation of evidence in mitigation of punishment concerning the



family's social history and mental health history.¹¹ Therefore, the Court finds that Robertson has failed to prove deficient performance on this allegation.

Even assuming that counsel were deficient, the Court finds that Robertson has failed to prove any prejudice. In addition to the reasons already stated, the Court finds that it is impossible for the Court to conclude that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" under *Strickland* because Robertson did not present testimony from Chip concerning his involvement in the murders or the family background and mental health history. See *Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814 ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence"); *Bannister*, 333 S.C. at 303, 509 S.E.2d at 809 ("PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial."). *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987). Particularly in light of the State's overwhelming evidence of Robertson's guilt of the murders and the statutory aggravating circumstances, the Court finds that Robertson has failed to prove that "there is a reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones*, 332 S.C.

¹¹ For the reasons stated in connection with **Ground 10(a)(7) & (12)-(13)**, the Court finds that trial counsel's investigation for and presentation of evidence concerning the mental health history of Robertson and his family was objectively reasonable under *Strickland*, and that Robertson did not prove any prejudice resulting from counsel's performance.

at 332, 504 S.E.2d at 823 (concluding that petitioner did not meet burden).¹² *Cf. Timberlake v. Davis*, 409 F.3d 819, 824 (7th Cir. 2005) (“Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features”).

GROUND 10(a)(3)

Robertson further alleges that trial counsel were ineffective because they neither advised him to plead guilty but mentally ill (GBMI) nor requested that the trial judge submit a verdict of GBMI to the jury. The Court disagrees and finds that Robertson has not met his burden of proving deficient performance or resulting prejudice as to either allegation.

As previously discussed, trial counsel employed three experts who eventually testified as to Robertson’s mental state at the time of the murders. Dr. Pincus, the neurologist who performed both a neurological¹³ and physical examination of Robertson, testified that his testing revealed that Robertson had frontal lobe damage. He explained that the frontal lobes provide judgment and the inhibition of impulses. Tr. pp. 2480-91; 2509-10.

Dr. Pincus testified that his testing supported the earlier diagnosis of bipolar disorder. Robertson reported abusing Ritalin and alcohol to self-medicate, and Dr. Pincus testified that this was common for persons with bipolar disorder. Tr. pp. 2458-80; 2494-96. Dr. Pincus explained that Robertson did something on the night of the murders that he had planned for some time. Tr. pp. 2490-91.

¹² The Court further finds that evidence that Chip may have been a conspirator or an accomplice in his parents’ murders would only strengthen the case in aggravation and would not lead the Court, to “conclude[] that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695.

¹³ Dr. Pincus saw Robertson on two occasions: on November 1, 1998, and on the morning of his testimony. Tr. pp. 2471-72. Also, he did not perform a “very complete examination,” which he estimated might take “a day or two.” Tr. p. 2480.

With respect to Robertson's mental state at the time of the murders, Dr. Pincus testified that:

[t]he history that he gave me indicated that he does indeed have manic depressive illness.

And the history that I found in the records confirms that. So, *I believe that he is manic depressive and he was probably having an episode of mania ... at the time of the murder[s].*

Tr. p. 2497 (emphasis added).

Dr. Pincus based his opinion on evidence that Robertson was not sleeping and had not had more than three hours sleep in the twenty-four to thirty-six hours before the murders; Robertson's history of gambling, running up debts and not being able to concentrate (even though he could concentrate when Dr. Pincus examined him); and his treatment for bipolar disorder at the time. Tr. pp. 2497-99. Dr. Pincus testified that Robertson reported using 250 mgs. of Ritalin on the night of the murders, which is "an enormous overdose of Ritalin" and ten times the amount that Dr. Pincus would prescribe.

Dr. Pincus also testified that:

The combination of the urge that he had been controlling up to that time to kill his parents, under the influence of a mania and the drug Ritalin which exacerbates the symptoms of mania, reproduces them, accentuates them, I think that is the reason that at that time he did that.

I also base that on the fact of what he did. This was no assassination; he obliterated them. He was in the grip of a colossal emotion.

Tr. p. 2699, ll. 11-20. Dr. Pincus added that Robertson had an urge to kill his parents that was stimulated by his drug use. This was "unchecked by the functioning of his frontal lobe at that

time which was not working well because of [his drug and alcohol use] and because of the status of his brain to begin with." Tr. p. 2500, ll. 6-13.

Dr. Pincus testified that his opinion would not be affected by evidence of efforts to cover up the murders. However, he admitted that if there was evidence that Robertson had written notes on the day of the murder, then "there would have to be a presumption of planning." Tr. pp. 2501-02. Also, Dr. Pincus agreed that Robertson was making choices about the medications he would take and the order he would do so at the time of the murder; and he had been advised of the effects of drug and alcohol use on his bipolar disorder. Tr. p. 2517.

Moreover, Robertson reported to Dr. Pincus that the only times he thought of killing his parents was when he was taking Ritalin, cocaine or "speed." Tr. pp. 2520-22. The Court finds that this information is inconsistent with other information available to trial counsel (and testified to by a number of State's witnesses) that Robertson often talked of killing his parents for the insurance money.¹⁴

Dr. Evans, the defense neuropsychologist, testified that Robertson's full scale I.Q. was 112.¹⁵ However, neuropsychological testing and a quantitative E.E.G. (Q.E.E.G.) administered by Dr. Evans revealed that Robertson had damage to the right hemisphere of his brain and/or frontal lobe dysfunction.¹⁶ Dr. Evans explained that Robertson had previously been diagnosed

¹⁴ For instance, his co-defendant, Moon, testified in the guilt phase that Robertson had previously told her on many occasions that he planned to kill his parents, both when he was sober and when he was drunk. Also, he explained that his motive was the insurance money, which Moon said was "a couple of million" dollars. Tr. pp. 1592-93; see also Tr. pp. 1632-33; 1642. Other witnesses testified to similar comments in the sentencing phase. *E.g.*, Tr. pp. 2155-57; 2163-65; 2177-78; 2187-89; 2202-03; 2219; 2222; 2228.

¹⁵ His verbal I.Q. was 118, but his non-verbal I.Q. was 102.

¹⁶ The frontal lobes are the portion of the brain that allows humans to have executive functioning, plan ahead and restrain impulses.

with bipolar disorder and attention deficit hyperactivity disorder (ADHD), the latter of which "most people today believe is a brain based disorder, especially with most cases being frontal lobe related." Tr. pp. 2546-69; 2577-78.

According to Dr. Evans, Robertson described having periods of disassociation, and Dr. Evans testified that both prior diagnoses of ADHD and bipolar disorder were correct and supported by his testing. However, Dr. Evans did not know what Robertson's mental state was at the time of the crime, and he could not say that Robertson had a disassociative episode at the time of the crime because Robertson never claimed that he had one when the murders occurred. Indeed, Dr. Evans did not discuss the facts of the crime with Robertson. He likewise admitted that Robertson could have fabricated the report of disassociative episodes to create a mental health defense. Tr. pp. 2569-70; 2575; 2584; 2586.

Dr. Morton, the defense expert in psycho-pharmacology, agreed with the diagnoses previously given to Robertson. He also testified that Robertson met the diagnostic criteria for alcohol abuse and dependence, as well as poly-substance abuse – based on Robertson's stimulant abuse and marijuana abuse. The primary stimulant that he abused was methylphenidate, which is sold under the trade name of Ritalin. According to Dr. Morton, "[d]rug-induced psychiatric disturbances are probably more prevalent among abusers of CNS stimulants [such as Ritalin] than any other type of drug." Tr. pp. 2613-37.

The difficulties caused by these disturbances can include manic-like states, "serious psychoses resembling schizophrenia, depressions that are almost identical to major affective disorders, especially during withdrawal, and other types of anxiety disorders. However, most of the psychotic states caused by abuse of these stimulants are transitory, "just lasting a brief period

of time, and will usually disappear, whether its hours or weeks." Tr. p. 2636. See also Tr. pp. 2638-39; 2652-67.¹⁷

Robertson reported using between 240 and 300 mgs. of Ritalin. Dr. Morton analogized Ritalin abuse with abuse of amphetamine and cocaine. He explained that "[p]eople that use these drugs get psychotic and get paranoid." Dr. Morton testified that a person would have impaired judgment, and "extreme anger with the threat of acting out aggressive behavior" may occur. Also, paranoid ideation and auditory as well as tactile¹⁸ hallucinations may occur, and Dr. Morton described behavioral problems associated with Ritalin abuse. Tr. pp. 2640-48; 2653-56; 2665-67; 2680-83; 2702.

Dr. Morton testified that he was unclear as to what affect Robertson's bipolar disorder had at the time of the crimes. However, he testified that Ritalin abuse would make a pre-existing mental illness worse. Dr. Morton emphasized that people who use as much Ritalin as Robertson claimed to have used on the night before and morning of the murders (30-60 milligrams as a time) can become psychotic and paranoid, and it may result in unprovoked violence. In Robertson's discussions with Dr. Morton, he described a sense of a great deal of energy, some paranoia, and "he described the crime almost like he was depersonalized." Dr. Morton believed that these statements were consistent with a toxic state of Ritalin intoxication, and Dr. Morton believed that Robertson had Ritalin intoxication at the time of the murders. Tr. pp. 2654-67.

¹⁷ Dr. Morton testified people that "use these drugs get psychotic and get paranoid." They have "[l]oose associations" which do not make sense, and they develop behavioral problems. Tr. pp. 2640-41.

¹⁸ Tactile hallucinations refer to a person experiencing the feeling that something is crawling on him.

In Dr. Morton's opinion, Ritalin abuse "was a major factor that influenced what happened to his parents," Tr. p. 2667, ll. 14-16, and Dr. Morton testified that Robertson did not or could not control the impulse to kill his parents. Tr. pp. 2648-51; 2667-94. Dr. Morton based his conclusions upon his experience in treating those who abuse stimulants; Robertson's self-reporting to him about the night of the murders; and the literature concerning the effects of such large amounts of stimulants on individuals. Tr. pp. 2641-42; 2709; 2711-13; 2730-31.

Mr. Hancock testified that he thought the defense discussed the possibility of a plea of GBMI, but the State never offered such a plea.¹⁹ Also, a GBMI plea would have required that a trial judge sentence Robertson. *See State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992). Robertson, however, was never interested in a guilty plea and always wanted a jury trial. Likewise, counsel did not want Robertson to be sentenced by a trial judge. Rather, they preferred to take their chances with a jury, and they so advised their client.

Mr. Hancock further testified that he did not think the opinions of the defense experts would support a GBMI plea under the statute. Although these experts would suggest a finding of mental illness, they did not support a conclusion that Robertson had the inability to conform his conduct to the requirements of the law because of the mental illness. *See S.C. Code Ann. §17-24-20(A)* (Supp. 2006).

In addition, there is no evidence to suggest that the State would have been willing to waive its right to a trial by jury on the question of whether Robertson had the inability to conform his conduct to the requirements of the law. Mr. Boyd testified that he thought he asked

¹⁹ Both Solicitor Brackett and then-Solicitor Pope testified that the State wanted to seek the death penalty against Robertson in this case at all times and that there were never any serious offers of a negotiated plea.

Solicitor Pope about a possible guilty plea for Robertson, but Mr. Pope said no. Also, Mr. Boyd corroborated Mr. Hancock's testimony that trial counsel wanted a jury to sentence Robertson, as opposed to a trial judge, and a GBMI plea would have taken away Robertson's right to jury sentencing. With respect to a verdict of GBMI, Mr. Boyd testified that counsel would have had to concede Robertson's guilt, and Robertson did not want to concede guilt, even though he was aware that he would be found guilty. According to Mr. Boyd, the possibility of an LWOP sentence was not appealing to Robertson. Further, Mr. Boyd would not concede that such a verdict would have been the best course for the defense but admitted it was a viable option.

Both attorneys agreed that Robertson was mentally ill. However, Mr. Hancock clearly testified that he felt Robertson knew the difference between right and wrong, and both attorneys felt like he understood their discussions with him. Also, both indicated that he admitted his guilt to them, and Mr. Hancock testified that Robertson explained why he had committed the murders.

Robertson testified that counsel never discussed a possible plea with him but admitted that he never inquired and only changed his mind about the desirability of a guilty plea to capital murder after he got onto death row. When asked questions about his guilt of the murders or any admissions which he may have made relating to the murders, Robertson invoked his Fifth Amendment privilege against self-incrimination. See **Ground 10(a)(6)**, *infra*. Robertson did not present additional expert testimony on this issue.

Based upon the present record, the Court finds that counsel were not deficient for failing to advise Robertson to plead GBMI. In South Carolina,

[a] defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental



disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

See S.C. Code Ann. § 17-24-20(A) (Supp. 2006); see also *Wilson*, 306 S.C. at 504-05, 413 S.E.2d at 23; *State v. Bell*, 293 S.C. 391, 398, 360 S.E.2d 706, 710 (1987).²⁰ To warrant submission of a GBMI verdict, “the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).” § 17-24-20(B).

The purposes for the enactment of the GBMI statute are “(1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society’s benefit while incarcerated.” *State v. Hornsby*, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997). Section 17-24-20 makes clear that a GBMI verdict is still a guilty verdict. *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872 (a finding of GBMI “does not absolve a defendant of guilt”).²¹ If there is evidence of mental illness and

²⁰ In an unpublished decision, the Fourth Circuit Court of Appeals has found that counsel was not ineffective for failing to investigate adequately the possibility that a South Carolina death row inmate might possess a viable GBMI defense. See *Atkins v. Moore*, 139 F.3d 887 (4th Cir. 1998) (Unpublished) (“counsel were aware of the existence of the GBMI defense and consulted with various mental health experts regarding Atkins’ mental state. These consultations revealed only that Atkins abused alcohol and that he suffered from symptoms of post-traumatic stress disorder. In short, counsel’s investigation revealed nothing on which to base a GBMI claim. Under these circumstances, we cannot say that the performance of Atkins’ counsel fell outside the broad range of professionally competent assistance”).

²¹ As the court explained in *Hornsby*, this statute “simply recognizes the continuum in the law regarding mental illness and provides a guide for a jury when considering whether a defendant is not guilty; not guilty by reason of insanity (incapable of determining right from wrong); guilty but mentally ill (incapable of conforming his conduct to the requirements of the law but capable of distinguishing right from wrong); or guilty (suffers no mental illness).” Also, “a conviction of GBMI provides a signal to the Department of Corrections that a new prisoner may have a mental illness and should be treated before integrating him into the general prison population.” *Hornsby*,

evidence that a criminal defendant lacked sufficient capacity to conform his conduct to the requirements of law, a jury must be instructed on the forms of verdict of guilty, GBMI, not guilty, and not guilty by reason of insanity. *State v. Rimert*, 315 S.C. 527, 446 S.E.2d 400 (1994) (citing S.C. Code Ann. § 17-24-30).²²

The Court finds that the only credible evidence in this case is that counsel preferred for Robertson to be tried and sentenced by a jury, rather than a trial judge, and a GBMI plea would have required a judge to impose the sentence. *See Wilson*, 306 S.C. at 502, 413 S.E.2d at 21. *See also State v. Truesdale*, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982) ("Pleas of guilty are unconditional, and if an accused attempts to attach any condition or qualification thereto, the trial court should direct a plea of not guilty"); *State v. Patterson*, 278 S.C. 319, 321-22, 295 S.E.2d 264, 265 (1982) (guilty plea and sentence vacated where "a significant inducement for entering the plea was the condition that the jury determine punishment, an impermissible condition under the statutory mandate that the trial judge alone determines punishment when a defendant pleads guilty to murder"). Also, the Court finds that, at the time of his trial, Robertson wanted a jury trial and would not have entered a guilty plea of any description. The Court further finds that there is no evidence that the State would have agreed to a GBMI plea. Instead, the only evidence is that the State was not interested in a plea bargain but wished to seek the death penalty. Therefore, Robertson has failed to prove either deficient performance or prejudice under *Strickland*.

326 S.C. at 126-27, 484 S.E.2d at 872. *See also State v. Downs*, 361 S.C. 141, 145-46, 604 S.E.2d 377, 379-80 (2004) (recognizing that the principal difference between guilty and GBMI pertains only to post-sentencing medical treatment).

²²In *Wilson*, the Court held that the "must" in § 17-24-30 concerning the submission to the jury was mandatory. In *Rimert*, the Court concluded that a GBMI form could not be waived once he raised the issue of his sanity. 315 S.C. at 530-31, 446 S.E.2d at 401-02.

The Court likewise finds that the decision not to seek a GBMI verdict at trial was reasonable under *Strickland*. The focus of the case was Robertson's mental illness and drug abuse and how the mental illness and drug abuse mitigated his conduct. Counsel made a reasonable, strategic decision to present the defense evidence in the sentencing phase. To paraphrase Mr. Hancock's testimony, if counsel had presented their evidence in the guilt phase, they would have "fired all of their guns" in the guilt phase.²³

More importantly, the Court finds that pursuit of a GBMI verdict would have required counsel to pursue a verdict that was inconsistent with their chosen strategy of not conceding guilt in the guilt phase.²⁴ Again, the strategy actually followed, as opposed to that now suggested, was consistent with Robertson's desire to receive a jury trial and sentencing. See *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872; *Strickland*, 466 U.S. at 689 (although defendant's consent to trial strategy does not alone vitiate all ineffective assistance claims, his consent is probative both of the reasonableness of the chosen strategy and of counsel's performance); cf. *Nixon*, 543 U.S. at

²³ Further, GBMI, or irresistible impulse, has never been accepted in South Carolina as a complete defense to crime. "It will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts." *State v. Levelle*, 34 S.C. 120, ___, 13 S.E. 320, 321 (1891). And the Court has further stated: "It is a matter that is not susceptible of proof, and to allow a person to escape the consequences of his criminal act by asserting that he acted under an impulse which he could not restrain, although he knew his act to be unlawful, would be dangerous, if not destructive, to the peace of society." See *State v. Bundy*, 24 S.C. 439, 445 [58 Am.Rep. 263] (1886). See also *State v. Gilstrap*, 205 S.C. 412, 32 S.E.2d 163 (1944) ("After mature consideration, we firmly adhere to the rule so forcibly expressed in *State v. Levelle*, [34 S.C. 120, 13 S.E. 320]; and we may add that the doctrine that a criminal act may be excused or mitigated because prompted by an irresistible impulse, where the offender has the mental capacity to appreciate his legal and moral duty in respect to it, has no place in the law"). Similarly, South Carolina has always rejected diminished capacity as a defense. *State v. Gill*, 346 S.C. 209, 552 S.E.2d 26 (2001) (flatly rejecting as a defense testimony that defendant's borderline intellect and antisocial personality prevented him from being able to formulate malice aforethought).

²⁴ The Court finds that counsel's strategy was reasonable even though Mr. Hancock further testified that the defense did not wish to mount such a vigorous and futile defense in the guilt phase that the attorneys might lose credibility with the jury.

189-92 (counsel's concession of guilt in the guilt phase of a capital murder trial, made after consultation with the client but without his express approval, did not constitute deficient performance where counsel's strategy was reasonable under *Strickland* and counsel's strategy did not "rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary'" (footnote omitted); *Bell v. Evatt*, 72 F.3d 421, 427-30 (4th Cir. 1995) (concluding that – given overwhelming evidence of guilt – counsel's concession of defendant's guilt to kidnapping charge and pursuing GBMI verdict for murder and kidnapping charges in spite of the defendant's denial that he committed the crime was objectively reasonable trial strategy to which defendant consented, and observing that "neither Bell nor any other aggrieved defendant can manipulate this forum to construe a reasonable, but ultimately unsuccessful strategy in his favor. Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel").

Alternatively, the Court finds that Robertson has not met his burden of proving that he was prejudiced by counsel's failure to pursue a GBMI verdict. First, the Court finds that the opinions of the three defense experts did not support a GBMI verdict. *See Laws v. Armontrout*, 863 F.2d 1377, 1389 (8th Cir. 1988) (en banc) (counsel's failure to pursue psychiatric evidence was not objectively unreasonable when "[n]othing made known to counsel during his representation of [defendant] ... suggested to counsel that presenting evidence of [defendant's] psychiatric state would be of any benefit in his defense") (internal quotation marks omitted).

Dr. Pincus testified that Robertson was "*probably having an episode of mania ... at the time of the murder[s].*" Tr. p. 2497. His opinion as to Robertson's mental state, however, is predicated upon both the mental illness and Robertson's reported abuse of alcohol and Ritalin.

Also, neither he nor the other experts ever testified that Robertson met the criteria for a GBMI verdict, as defined as defined in § 17-24-20(A).²⁵

The Court finds that Dr. Evans could not conclude that Robertson had a disassociative episode at the time of the murders because Robertson never claimed that he had one when the murders occurred, and Dr. Evans could not give an opinion as to Robertson's mental state at the time of the murders because he did not question Robertson about the facts of the crime. Tr. pp. 2569-70; 2575; 2584; 2586.

Finally, Dr. Morton's opinion was not that Robertson "lacked sufficient capacity to conform his conduct to the requirements of the law" because of a "mental disease or defect," as required for submission of a GBMI verdict. See § 17-24-20(A). Rather, he based his opinion on the drug and alcohol abuse. While Dr. Morton testified that use of Ritalin and alcohol makes a pre-existing mental illness worse, he admitted that he is not a psychiatrist and does not diagnose. Tr. p. 2615, ll. 21-22. More importantly, he candidly admitted that he did not "know what part [Robertson's] manic depressive illness played in this." Tr. p. 2656, ll. 6-7.

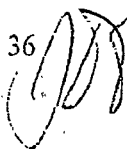
Further, Dr. Morton did not testify that the Ritalin and alcohol abuse "had caused permanent and irreversible brain damage which manifests itself in a mental illness." *Contra State v. Hartfield*, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990) (defendant was entitled to present defense of insanity or attempt to obtain GBMI verdict where there was expert testimony his drug use "had caused permanent and irreversible brain damage which manifests itself in a mental illness").

²⁵ The State introduced a copy of his report at trial, as State's Ex. 284. Dr. Pincus does not indicate in that report that Robertson is GBMI.

Thus, the Court finds that none of the opinions from the defense's experts supported a GBMI verdict. See *State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995) (observing in *dicta* that even if appellant's therapist had been qualified to give expert testimony on defendant's state of mind at the time of the incident, "this testimony would not have supported a verdict of guilty but mentally ill; therefore, the trial court's refusal to allow the jury to hear it did not prejudice [defendant]" because the therapist "only vaguely opined [defendant]'s judgment was impaired and he was out of control at the time of the incident"). Cf. *State v. Thorne*, 239 S.C. 164, 121 S.E.2d 623 (1961) (upholding guilty verdict where there was no testimony the defendant was insane or mentally defective to the extent he did not know right from wrong, notwithstanding testimony he suffered from moody spells and engaged in displays of temper); *State v. Lewis*, 328 S.C. 273, 277, 494 S.E.2d 115, 116 (1997) (expert testimony that, because of his severe depression, appellant was unable to conform his conduct to the requirements of the law supported GBMI verdict).²⁶

Even assuming *arguendo* that the testimony of one or more of the experts who testified at trial would have supported a GBMI verdict, the Court finds that there is still no reasonable probability that the result of the proceeding would have been different, but for counsel's errors. *Strickland*, 466 U.S. at 694. A finding of GBMI "does not absolve a defendant of guilt." See *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872. Likewise, it would not have prevented the State from seeking a death sentence, as *Wilson* and *Bell* make clear.

²⁶Robertson argues that Dr. McMeekin's records support a GBMI verdict. However, the records introduced by Robertson do not support this conclusion. Also, Dr. McMeekin was not presented as a witness in PCR, and there is no evidence before this Court that he ever concluded that Robertson is GBMI, as defined in § 17-24-20(A).



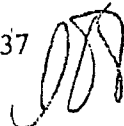
Nor would Robertson have been allowed to inform the guilt phase jury of the consequences of a finding of GBMI. *Bell*, 293 S.C. at 399-400, 360 S.E.2d at 710; *Rimert*, 315 S.C. at 530, 446 S.E.2d at 401 (trial judge was not required to instruct jury on effect of GBMI and not guilty by reason of insanity verdicts). Also, the State would have been allowed to rebut the defense's presentation of evidence concerning Robertson's mental illness by presenting Dr. McKee in the guilt phase of the trial. The defense fought hard to prevent any evaluation or presentation of Dr. McKee's opinion in the sentencing phase, and the Court finds that Robertson was not prejudiced by counsel's failure to allow this testimony to be presented in the guilt phase of his trial.

Further, the State could have exploited any inconsistencies in the opinions of Robertson's three experts, as well as Dr. Evans' concessions that Robertson "certainly ha[d] a strong motive not to tell [me] the truth," Tr. p. 2586, ll. 8-10, and Robertson could have fabricated the report of disassociative episodes to create a mental health defense. Tr. p. 2575, ll. 4-14. Therefore, the Court finds that Robertson has failed to prove any Sixth Amendment prejudice under *Strickland* and its progeny.

GROUND 10(a)(4)

Robertson maintains that his attorneys were ineffective because they failed to spend an adequate amount of time with him in preparation for the trial. However, the Court finds that Robertson has not proved either that counsel's performance was deficient or that he was prejudiced by counsel's failure to spend more time with him before the trial.

Robertson testified that his attorneys only spent approximately four or five hours discussing the case with him before his trial. He described the first interview as fairly lengthy,



and they discussed the crimes. The remaining time counsel spent with him, they discussed the mental health history of Robertson and his family. Robertson provided them with as much detail concerning the mental health history as he could.

Mr. Hancock testified that he could not recall the precise amount of time he spent with Robertson before the trial, but he indicated it could have been approximately ten hours or so. In their conversations with Robertson, he admitted that he had murdered his parents and he explained why he had done so.

Mr. Boyd testified that he likewise did not remember how much time he spent with Robertson prior to trial but recalled that there were a number of lengthy meetings. Robertson was able to discuss matters rationally, and he understood counsel's discussions with him. Mr. Boyd recalled going over the details of what happened and the mental health history at length. Mr. Boyd also testified that Robertson admitted to killing his parents. Counsel also discussed whether Robertson should testify, and both attorneys testified that they advised Robertson not to testify.

Strickland applies great deference to decisions by defense attorneys out of concern that a rigid set of guidelines or rules would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. See also *United States v. Cronin*, 466 U.S. 648, 658 n.23, 659 n.26 (1984) (because reviewing courts must "presume that the lawyer is competent to provide the guiding hand that the defendant needs," the defendant must prove a constitutional violation which undermines competence in the outcome of his trial).



"Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise prepare for trial violates a defendant's Sixth Amendment right to counsel." *Morris v. Slappy*, 461 U.S. 1, 11 (1983). Further, Robertson's mere assertion that counsel only met with him four or five times is insufficient to overcome the presumption that counsel rendered reasonable assistance. *United States v. Henry*, 933 F.2d 553, 561 (7th Cir. 1991) (defendant's allegation that he met with his public defender for only ten to fifteen minutes before he pleaded guilty was insufficient to overcome presumption of reasonable assistance).

Moreover, the Court finds that the credible evidence is that counsel met with Robertson on a number of occasions and, following a constitutionally reasonable investigation into the facts of the case,²⁷ counsel made the strategic decision to focus primarily upon the sentencing phase of the case in mitigation. To this end, they hired a number of experts. Each expert met with

²⁷ In *Strickland*, the Court stated that "strategic decisions made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 690-91. See also *Wiggins*, 539 U.S. at 525 (further investigation is excusable where counsel has evidence suggesting it would be fruitless); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (concluding that limited investigation was reasonable because all witnesses brought to counsel's attention provided predominantly harmful information).

In addition to Robertson's admission of his guilt to counsel, counsel otherwise thoroughly investigated the facts of the case: although both attorneys had extensive major felony trial experience and had tried both non-capital and capital murder cases, they consulted other attorneys experienced in trying capital cases; they hired a DNA expert; they had an investigator and a paralegal to assist them; they reviewed the State's evidence; and Mr. Hancock went to the crime scene with the investigator and ascertained that it was possible for Ms. Moon to have heard the matters she described in her statement. Also, they employed the mental health experts referenced throughout the Order and were unable to develop evidence of insanity or GBMI.

Robertson on one or more occasions and gathered any additional information he or she felt was necessary and relevant directly from him and the various records acquired by the defense team.

The Court finds that the decision to utilize experts to gather and present information to the jury was reasonable since it is the experts who have to lay the foundation for the jury to understand Robertson's mental illness and the mental health history of his family. *Cf. Florida v. Nixon*, 543 U.S. 175, 191 (2004) ("Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. ... In such cases, 'avoiding execution [may be] the best and only realistic result possible.' ... Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared." (Citations and footnotes omitted).

The Court further finds that Robertson was in apparent agreement with counsel's strategy, and, rather than voicing any objection to that strategy, he cooperated fully with the defense experts and counsel's efforts to present a case in mitigation of punishment. Nor has Robertson demonstrated anything else that counsel could have done in gathering information about Robertson or his family that they failed to do as the result of following the strategy they employed.

Yet, even if Robertson could prove that counsel were deficient, the Court finds that he has totally failed to prove any resulting prejudice. *See Strickland*, 466 U.S. at 691; *United States v. Goudy*, 792 F.2d 664, 672 (7th Cir. 1986) (counsel's failure to meet with client in months immediately preceding trial does not amount to ineffective assistance, absent a showing of

prejudice). Again, the Court finds that Robertson has not presented any evidence that the outcome of the case could have been any different if counsel had spent more time with him.

The Court further finds that Robertson's suggestion that he could have weighed in on the strategic decisions made by his attorneys if they had met with him more often is misplaced. The Supreme Court recently stated that "[A]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy ... That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Nixon*, 543 U.S. at 187 (citing *Strickland*, 466 U.S. at 688 and *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) (an attorney has authority to manage most aspects of the defense without his client's approval). See also *Faretta v. California*, 422 U.S. 806, 820-21 (1975) ("when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to counsel the power to make binding decisions of trial strategy in many areas"); Further, the Court finds, as noted, that Robertson consented to counsel's strategy and did not voice any complaint such as that raised before this Court. Therefore, he has failed to prove any prejudice on this allegation.

GROUND 10(a)(5)

Robertson also maintains that his attorneys were ineffective for failing to pursue a supposed plea bargain offered by the prosecution, whereby Robertson would be allowed to plead guilty to the murders and receive a life sentence if his bother, Chip, agreed to donate the proceeds of their parents' estates to a charity. The Court finds that the credible evidence before it is that the "offer" referred to by Robertson was merely a comment made in jest by Mr. Brackett to Chip's attorney. Robertson has not proved that counsel was deficient or resulting

prejudice because counsel made reasonable inquiries concerning a plea, but then-Solicitor Pope was not interested in a plea and wished to seek the death penalty for the murders at all relevant times.

Robertson testified that his attorneys never discussed a plea bargain with him during his March 1999 trial. Later, he read a newspaper article stating that then-Deputy Solicitor Brackett had proposed a plea offer to Chip's attorney, in which the State would agree to allow Robertson to plead guilty to the murders and receive a life sentence if Chip would agree to donate the proceeds from their parents' estates to charity. When Robertson later discussed the matter with Chip, Chip indicated that he would not agree to such an offer.

Mr. Hancock testified that he was aware of the discussion between Mr. Brackett and Chip's attorney. He characterized this as "hall talk" and was not a serious offer. Further, Robertson was not interested in a plea and wanted a jury trial, despite admitting his guilt to his attorneys.

Mr. Boyd testified that he attempted to negotiate a plea bargain on Robertson's behalf, but no agreement was ever reached. He thought he asked then-Solicitor Pope about a guilty plea in exchange for a life sentence, but was told "no". Mr. Boyd became aware of the conversation that Mr. Brackett had with Chip's attorney. Although he did not take it as a serious plea bargain, he inquired of the Solicitor's Office during Robertson's trial, and Mr. Brackett told him that the discussion was part of a joke and was not a serious offer. Also, it was Mr. Boyd's understanding that Solicitor Pope would have had to approve any plea bargain, and there was no indication that Solicitor Pope would accept a plea.

Mr. Pope testified that during the time he was Solicitor of the Sixteenth Circuit, and he had to personally approve any plea bargains in capital cases. Although he was aware of the discussions Mr. Brackett had with Chip's attorney, he characterized the discussion as a joke. He emphasized that he always intended to seek the death penalty for the murders in this case and that he never had any intention of accepting a guilty plea in exchange for a life sentence.

Solicitor Brackett testified that there were never any serious plea negotiations in this case and that the discussion alleged by Robertson was merely a joke made by him to Chip's attorney. He corroborated that then-Solicitor Pope would have had to approve any plea bargain in a capital case, and that Mr. Pope did not approve any plea bargain in this case.

Based upon the current record, the Court finds that counsel took reasonable steps to bring about a plea bargain. However, there was never any credible evidence that a plea bargain was ever offered by the State. To the contrary, the only credible evidence is that the State was not willing under any circumstances to take the notice of intent to seek the death penalty off of the table and allow Robertson to receive a sentence of LWOP. The Court further finds that the plea bargain referred to in this allegation was not meant as a serious offer by the State but was merely part of a conversation by Mr. Brackett which he intended to be humorous. Therefore, the Court finds that Robertson has failed to prove either deficient performance or resulting prejudice under *Strickland*.

GROUND 10(a)(6)

Robertson next claims that counsel was ineffective because they advised him not to testify in the sentencing phase of his trial, and that he was not allowed to make his own decision as to whether or not to testify. As to the first part of this allegation, the Court finds that

Robertson has failed to prove either deficient performance or resulting prejudice. As to his contention that he was not permitted to make his own decision about testifying, the Court finds that the allegation is not appropriate in Post-Conviction Relief because it is an allegation that could have been raised at trial and on direct appeal. *See* S.C. Code Ann. §17-27-20(b) (1985).

I. Counsel's advice for Robertson not to testify.

Robertson testified that he wanted to testify in the sentencing proceeding after he heard the testimony of Ms. Cascio, the social worker (*See* Tr. pp. 2852-3031) because he felt that what she had divulged was about the same as if he had testified about the crimes. However, both of his attorneys advised him not to testify, and he followed their advice. When the State asked him substantive questions about the offenses and his guilt or innocence at the PCR hearing, he invoked his Fifth Amendment privilege against self incrimination.²⁸

Mr. Hancock testified that he and co-counsel had a heated conversation with Robertson about whether or not he would testify in the sentencing phase. Although Mr. Hancock felt that some damage had been done to the defense's case by Ms. Cascio's testimony, Mr. Hancock did not think the defense stood any chance of a life sentence if Robertson testified. In his assessment, Mr. Hancock believe that Robertson – who had admitted to counsel that he murdered his parents and only he did so – would have been a very bad witness, and any cross-examination

²⁸ The only exception occurred when he was cross-examined by the State in his testimony on reply. Although he answered a question concerning his guilt or innocence, he sought to invoke his Fifth Amendment privilege with respect to the details of the murders. However, this Court found, after an objection by PCR counsel and another colloquy between the Court and Robertson, that he had not knowingly and voluntarily waived his right to assert the Fifth Amendment because he did not adequately understand the scope of it and the effect of any waiver.

by Solicitor Pope would have been devastating. Mr. Pope testified that he was prepared for and wanted Robertson to testify. Thus, his testimony corroborates that of Mr. Hancock.

Mr. Boyd testified, consistently with Mr. Hancock, that Robertson had admitted to counsel that he murdered his parents. He also corroborated that there was a lengthy discussion about whether Robertson should testify in sentencing and respond to the testimony from Ms. Cascio. He agreed that the State's cross-examination of Ms. Cascio had hurt the defense but felt that Robertson would have made a bad witness because the State could have impeached him and cross-examined him about the facts of the case.

Based upon the testimony of trial counsel and Mr. Pope, the Court finds that Robertson has failed to prove that counsel were deficient. First, it is clear that Robertson was aware of his right to testify. In addition to the testimony offered at PCR, the record reflects that Judge Hayes' on-the-record waiver of Robertson's right to testify in the sentencing phase ensured Robertson understood that this was a right personal to him -- as was his right to remain silent -- and that Robertson made a knowing and intelligent waiver of his right to testify. *See* Tr. pp. 3041-43.

Second, the Court finds that trial counsel made a reasonable, tactical decision to advise Robertson not to testify. The Court finds that it was quite reasonable for counsel to conclude that it would be unwise for Robertson to testify in the sentencing phase: he had previously admitted to counsel that he had murdered his parents and his reasons for doing so; and he would have been subject to lengthy cross-examination by the State concerning the facts of the murder. Also, counsel's decision is supported by Mr. Hancock's assessment of Robertson's demeanor and counsel's assessment of the prosecutors in the case. *See Daniels v. Lee*, 316, F.2d 477, 491-92 (4th Cir. 2003) (petitioner failed to prove either deficient performance or prejudice resulting

from counsel's failure to compel him to testify in the sentencing phase of his capital trial where counsel made a tactical decision that petitioner should not testify). *Cf. Carter v. Lee*, 283 F.3d 240, 249 (4th Cir. 2002) (“[T]he advice provided by a criminal defense lawyer on whether his client should testify is a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance”) (internal quotations and citations omitted).

The Court further finds that Robertson has totally failed to prove any prejudice whatsoever arising from trial counsel's advice that he should not testify. Although he testified both in his case-in-chief and in reply to the State's case at the PCR hearing, he asserted his privilege against self-incrimination when asked any questions by the State concerning his guilt of the murders. Although the Court allowed him to assert this right, the Court can draw an adverse inference from his assertion of the privilege. *Baxter v. Palmigiano*, 425 U.S. 308, 316-19 (1976) (holding that it was permissible to draw adverse inference from inmate's assertion of Fifth Amendment privilege in prison disciplinary proceedings and observing that “[o]ur conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment does not preclude the inference where the privilege is claimed by a party to a Civil case.”). *Bean v. Calderon*, 166 F.R.D. 452, 453-55 (E.D. Cal. 1996) (adverse inference could be drawn from capital defendant's invocation of Fifth Amendment in deposition by the State taken during habeas corpus proceeding). *Cf. Griffith v. Griffith*, 332 S.C. 630, 640-41, 506 S.E.2d 526, 532 (Ct. App. 1998) (it is permissible for fact-finder to draw an adverse inference in a civil case against a party invoking the Fifth Amendment privilege against self-incrimination).

Furthermore, Robertson's failure to respond to the State's cross-examination at PCR means that there is no evidence before this Court from which it can conclude that there is a reasonable probability of a different result in the sentencing proceeding but for counsel's errors under *Strickland* because he has not provided this Court with any evidence he would have offered if he had testified at trial. See 466 U.S. at 694. See also *Brown v. Artuz*, 124 F.3d 73 (2nd Cir. 1997) (while court could not say habeas corpus applicant was aware that he personally possessed the ultimate decision on whether to testify, applicant cannot show prejudice in any event, because his proposed testimony did not satisfy the elements of the state law self-defense); *LaVigne v. State*, 812 P.2d 217 (Alaska 1991) (defendant challenging his trial based on attorney's denial of his right to testify has initial burden of showing he would have offered relevant testimony at trial). Cf. *Engelen v. United States*, 68 F.3d 238 (8th Cir. 1995) (rejecting claim of prejudice from trial counsel's alleged ineffectiveness in failing to recommend a plea of guilty because the habeas petitioner continued to proclaim his innocence and did not indicate he would have pled guilty).

2. Robertson was not permitted to make his own decision about testifying.

The Court finds that Robertson's contention that counsel compelled him not to testify in the sentencing phase and he, therefore, was not permitted to make his own decision is not an appropriate ground of PCR because it could have been raised at trial and on direct appeal.

After the sentencing phase testimony of defenses witness Dr. Ronald Pryor, the trial judge addressed Robertson. He explained that Robertson had the right to present evidence of "mitigating circumstances" and he defined that phrase for Robertson. The trial judge then explained to Robertson that he would be subject to cross-examination by the State if he testified.

However, if Robertson chose not to testify, the trial judge stated that he would charge jurors that they could not hold Robertson's exercise of this right against him, that it could not factor into their deliberations in determining the appropriate sentence to impose and they could not even discuss it in the jury room or "factor that into their own mind." Tr. pp. 2416, l. 21 - 2417, l. 24.

Robertson indicated that he understood this explanation and the trial judge's explanation of his right to make a closing argument. Robertson also indicated that he did not have any questions. Both of his trial attorneys indicated that they had discussed this with Robertson and believed that he understood it. Neither trial counsel nor the State asked the trial judge to cover anything else with Robertson at that time. Tr. pp. 2417, l. 21 - 2418, l. 23.

Following Ms. Cascio's testimony, the trial judge conducted an on-the-record waiver of Robertson's right to testify in the sentencing phase. *Accord State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991). The trial judge first explained that Robertson had the right to testify, and he had the right to remain silent and not testify. The trial judge explained that if Robertson testified, he would be subject to cross-examination by the State, he could be impeached with any prior offenses and "they can use certain things regarding your past that are indicative of your character." The trial judge further explained that, if Robertson elected not to testify, "I will again as I did in the guilt phase tell the jury they cannot consider that, discuss that or factor that into their deliberation on the punishment to be imposed in any way whatsoever." Tr. pp. 3041, l. 22 - 3042, l. 19.

The following colloquy then occurred between the trial judge and Robertson:

THE COURT: Mr. Robertson, what is your decision?

MR. ROBERTSON: I waive my right to testify at this time.

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THE COURT: You say at this time, this is the time.

MR. ROBERTSON: I waive my right to testify.

Tr. p. 3042, ll. 20-25.

Based upon the responses, the trial judge found that Robertson had "freely, voluntarily, knowingly and intelligently, understood his right to testify and his right to remain silent, waives his right to testify and exercised his constitutional right to remain silent." Tr. p. 3043, ll. 1-6.

Because there was an on-the-record waiver of Robertson's right to testify in the sentencing phase, the Court finds that the current allegation could have been raised, if at all, at trial and on direct appeal. *Cf. State v. Rocheville*, 310 S.C. 20, 24-25, 425 S.E.2d 32, 34-35 (1993) (in capital cases tried after *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991), review of whether there was knowing and voluntary waiver of right to testify is best resolved in PCR where record is silent.). Because the current allegation could have been raised at trial and on appeal, it is not an appropriate allegation for PCR. *See* S.C. Code Ann. §17-27-20(b) (1985); *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel); *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983)

Even viewing this allegation as one of ineffective assistance of counsel, the Court finds that it lacks merit for the reasons described: counsel made a reasonable strategic decision that Robertson should not testify, and he agreed with that decision, albeit reluctantly, at the time of trial. Nor has he met his burden of showing prejudice for the stated reasons.

GROUND 10(a)(7)

Robertson contends that trial counsel were ineffective for failing to adequately present evidence that he was adaptable to life in prison. Again, the Court finds that he has failed to prove either prong necessary for relief under *Strickland*.

The defense did not present any witness who testified that Robertson was adaptable to life in prison. However, counsel established through Dr. Morton that Robertson's bipolar disorder and Ritalin abuse – to which all of the defense experts greatly attributed the murders – could be and were successfully treated in SCDC. Tr. pp. 2703-04. Indeed, it was Dr. Morton's opinion that Robertson had never been properly treated for his Ritalin abuse or bipolar disorder until his incarceration. Tr. pp. 2665-69; 2675-76.

The defense also presented Michael J. Stobbe, the SCDC records custodian. The defense elicited that Dr. Ed Bradley had diagnosed Robertson on September 3, 1996 as having a bipolar manic-depressant disorder. Also, Dr. Bradley's comments indicated that Robertson was not capable of vigorous physical activity. Another SCDC medical record (Defendant's Ex. 17) reflected that, as of December 12, 1998, he was in a therapy group for treatment. The records further established that he was responding favorably to the treatment he was receiving. Tr. pp. 2740-45.

Mr. Hancock testified at the PCR hearing that the defense did not present a witness to testify to Robertson's adaptability to prison life, but counsel did establish that Robertson had not misbehaved in prison since correctly diagnosed. Mr. Hancock further recalled that Robertson had several infections, and Mr. Hancock believed his mental health evidence in mitigation was strong. Mr. Boyd testified that the defense probably discussed the question of Robertson's

adaptability to prison but he did not recall the discussions. He confirmed that the defense did not present any expert testimony on this issue.

The Court finds that Robertson has failed to prove deficient performance. *Skipper v. South Carolina*, 476 U.S. 1 (1976) (evidence of defendant's food behavior in prison is admissible in mitigation of punishment as relevant to future adaptability), and the cases applying it simply hold that a capital defendant may present evidence of his adaptability to prison life in mitigation of his sentence. See, e.g., *State v. Tucker*, 324 S.C. 115, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability are relevant in the sentencing phase of a capital trial); *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986) (exclusion of expert opinion relative to defendant's adaptability to prison life constituted reversible error under *Skipper*). However, neither *Skipper* nor *Strickland* require trial counsel to present whatever evidence of adaptability counsel may find, in order to provide constitutionally adequate representation. See *Drayton*, 312 S.C. at 10-11, 430 S.E.2d at 521-22 (defendant failed to prove deficient performance or prejudice under *Strickland* resulting from counsel's failure to present evidence of adaptability where counsel had information of "unfavorable psychiatric evaluations and poor disciplinary reports compiled during Drayton's confinement as a juvenile in a detention facility as well as some accounts of misconduct during his prior incarceration as an adult."); *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997) (en banc) (rejecting ineffectiveness claim based upon failure to offer evidence of adaptability to prison and agreeing with the state PCR court that inmate's past prison record presented a "double[-]edge[d] sword' in that any further evidence of [inmate]'s prior federal prison experience may have detrimentally highlighted his past criminal record"). See also *Lusk v. Dugger*, 890 F.2d 332, 339 (11th Cir. 1989) (defendant did not show

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that he was prejudiced by trial counsel's failure to present evidence of his adaptability to prison based upon record which included evidence that he committed the murder for which he was on trial while in prison); *Commonwealth of Pennsylvania v. Wharton*, 811 A.2d 978, 988 (Pa. 2002).²⁹

Further, counsel is not ineffective for pursuing a reasonable trial strategy, even if that strategy is pursued to the exclusion of another reasonable strategy. See *Guerrero*, 938 F.3d at 730; Cf. *Strickland*, 466 U.S. at 690-91. Here, the Court does not find anything suspect in counsel's failure to present evidence of Robertson's adaptability. The Court finds that the sentencing phase transcript supports Mr. Hancock's recollection of Robertson's prior infractions.

As part of the State's case in aggravation of punishment, it presented evidence of Robertson's previous incarceration and evidence of his misconduct while incarcerated on that occasion. For instance, while Robertson was incarcerated at the York County Detention Center in 1996, he submitted an inmate service telephone form bearing his name (State's Ex. 200). Tr. pp. 2120-23.³⁰ Over an *in camera* objection of Mr. Boyd (Tr. pp. 2123-24), the State presented Ms. Carole Sarn, a Rock Hill resident. She identified the telephone number on State's Ex. 200 as her telephone number. She also published State's Ex. 200. On that form, Robertson listed Sarn's Rock Hill phone number, and stated that "[r]elatives were in process of moving when I

²⁹ In *Wharton*, the Court rejected the appellant's claim that his trial counsel was constitutionally obliged under *Skipper* to obtain and introduce – and, therefore, ineffective under *Strickland* for not presenting – evidence of his adaptability to prison occurring during the seven years between his first and second penalty hearings: “Properly speaking, the issue before this Court is not whether appellant's prison adjustment was relevant mitigation evidence that the trial court erred in excluding [under *Skipper*]. Instead, the issue is whether appellant's counsel was ineffective for failing to introduce evidence of that adjustment as mitigation evidence to convince the jury that he had made a positive adjustment to prison.” *Wharton*, 811 A.2d at 102; see also *Keen v. State*, 2006 WL 1540258 at *41 (Tenn. Crim. App. June 5, 2006).

³⁰ This exhibit was admitted over Mr. Hancock's objection.

was incarcerated and had not yet received new phone number and have since written with New York phone number. These relatives could be influential in helping me make bond." Tr. pp. 2125-26.

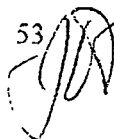
Ms. Sarn testified that the relatives listed on State's Exhibit 200 were the aunt and uncle. However, she said that she was not Robertson's aunt, that she had the telephone number for twenty-three years, and that Robertson's aunt and uncle had never lived with her. Tr. p. 2126.

The State also presented Mr. Stobbe, SCDC's records custodian.³¹ Through him, the State introduced evidence that, between Robertson's admission on September 3, 1996 and his conditional release on Youthful Offender Act parole on July 31, 1997, he had a December 15, 1996 conviction for "damage, destroying property" (State's Ex. 201); a February 11, 1997 conviction for fighting without a weapon (State's Ex. 202); a February 11, 1997 conviction for lying to an employee and damage, destroying property (State's Ex. 203); and a September 11, 1998 conviction for refusing or failing to obey (State's Ex. 204). Tr. pp. 2130-33; 2141-43.³²

³¹ The trial judge overruled Mr. Hancock's objection that the records concerning misconduct by Robertson while incarcerated were hearsay narratives. In response to an objection that the incident dated October 3, 1996 was dismissed, the State agreed to inquire only about infractions for which he was convicted. Tr. pp. 2127-30.

³² Mr. Hancock established on cross-examination that the charge of fighting without a weapon, reflected in State's Ex. 202, was "a minor infraction," and that no one actually saw a fight. Rather, a correctional officer apparently heard a loud noise and, upon going into the dayroom to investigate, saw Robertson getting up off of the floor with a small cut on his cheek and swelling under his eye. There also was nothing in the report that said he hit or beat or threatened anyone else. Tr. pp. 2133-35.

Mr. Hancock's cross-examination also established that the charges in State's Exhibit 203 included possession of contraband, which was cigarettes, and the damage to property charge resulted from the fact Robertson tore a hole in his jacket so that he could hide the cigarettes. Counsel also established that the incident documented by State's Ex. 201 resulted from Robertson breaking a window on a door by knocking too hard on the door. (The trial judge sustained the State's objection when counsel attempted to establish Robertson's motive for knocking on the door was to get assistance for another inmate). Tr. pp. 2136-43.



The State also presented Scott Williams, from the South Carolina Department of Probation, Parole and Pardon Service. Mr. Williams supervised Robertson while he was on the Y.O.A. conditional release on parole. Supervision began on July 31, 1997, and was supposed to have run until August 1, 2002. However, the conditional parole was revoked on April 28, 1998, and Robertson was admitted to SCDC. Tr. pp. 2144-49. Cross-examination by Mr. Hancock established that Robertson violated parole merely by changing his residence when he moved back into his parents' home. This was only discovered after he was charged with murder. Tr. pp. 2150-51.

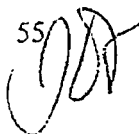
Further, at least some of the evidence presented in mitigation of punishment to support the mental health defense is inconsistent with the idea that Robertson is adaptable to prison because this evidence – which defense experts attributed to his mental illness, his substance abuse and the absence of proper treatment for either of these – showed that Robertson would challenge authority. *E.g.*, Tr. pp. 2828-35.

Based upon the Court's own experience in presiding over both capital trials and capital PCRs, it is the Court's conclusion that evidence of adaptability to life in prison is not very valuable as evidence in mitigation of punishment. Regardless of whether it is effective evidence in mitigation, however, based upon the present record, the Court cannot find that Robertson's attorneys were deficient for not presenting evidence of his adaptability and instead, pursuing a much stronger mental health case in mitigation. *See Drayton*, 12 S.C. at 10-11, 430 S.E.2d at 521-22; *Wharton*, 811 A.2d at 988-89 (finding that counsel were not deficient and defendant failed to prove prejudice); *Commonwealth v. Spatz*, 896 A.2d 1191, 1235-36 (Pa. 2006).

Alternatively, the Court finds that Robertson has failed to prove that he was prejudiced by trial counsel's failure to present evidence of his adaptability to prison life because he failed to present any evidence at the PCR hearing which demonstrates that he is, in fact, adaptable to prison life. To the contrary, Robertson admitted on cross-examination by the State at the PCR hearing that he had been convicted of several disciplinary infractions while on death row,³³ and he only disputed a charge of loan sharking. Therefore, the Court finds that the only evidence in the record is that he has not been able to adapt to incarceration, even though housed in the strict confines of death row.

Also, trial counsel did establish that much of the State's evidence of misconduct in prison involved relatively minor offenses. *Id. See also Bell v. State*, 879 So.2d 423, 444 (Miss. 2004) (trial counsel not deficient for failing to present mitigating evidence regarding defendant's adaptation to prison in sentencing phase of capital murder trial, where defendant failed to cite what evidence of good behavior in prison should have been presented and how such evidence would have affected the outcome of his sentencing proceeding); *Crawford v. State*, 867 So.2d 196, 217-18 (Miss. 2003); *Cf. McNeill v. Polk*, 476 F.3d 206, 217 (4th Cir. 2007) (petitioner could not prove prejudice resulting from counsel's presentation of evidence of an infraction he committed while in prison, where petitioner did not present any admissible evidence in support of his position that he did not commit the infraction, and the infraction was presented in the context of overwhelmingly positive testimony regarding McNeill's time in prison).

³³ For instance, he admitted that he had been found guilty of several charges of possession of contraband (including marijuana) and or being under the influence. The Court disallowed extrinsic evidence concerning his disciplinary history.

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In light of the evidence before the jury (both in aggravation and mitigation of punishment), the Court finds that it is highly unlikely that the sentencing jury would have been swayed to impose a life sentence based upon Robertson's evidence of "adaptability." This is particularly true since the State did not argue Robertson's future dangerousness, See Tr. pp. 3125-72 and, instead, focused upon whether the jury believed the defense's case in mitigation or that Robertson was "the spoiled rich kid who could not wait to receive his inheritance." Tr. p. 3134, ll. 4-14. Based on his failure of proof, he cannot prove a reasonable probability of a different result but for counsel's failure to present evidence of his adaptability. See *Drayton*. See also *Strickland, supra*. See also *Wilkinson v. Polk*, ___ F.3d ___, 2007 WL 1051436 at ** 8 n. 3 (4th Cir., April 5, 2007) (Unpublished).³⁴

GROUND 10(a)(8)

Robertson further alleges that trial counsel were ineffective because they failed to impeach his co-defendant, Meredith Moon, with a statement that she allegedly made, in which she agreed to "keep quiet" about the murders in exchange for \$50,000.00.³⁵ The Court finds that Robertson has failed to establish deficient performance or prejudice under *Strickland, supra*.

First, the Court finds that there is no credible evidence that Moon ever made such a statement. There was absolutely no evidence this statement was ever made to a member of law

³⁴ In connection with this allegation, the Court would note that the South Carolina Supreme Court has recently cautioned both the prosecution and the defense bar about the presentation of evidence concerning prison confinement unrelated to the specific defendant. See *State v. Burkhardt*, ___ S.C. ___, 640 S.E.2d 450 (2007); *State v. Bowman*, 366 S.C. 495, 623 S.E.2d 378 (2005).

In light of these cases, it is clear that any evidence of adaptability must be strictly confined to evidence pertaining to the specific defendant, as to prison condition, generally. Again, the only evidence presented at PCR was that Robertson is not adaptable to confinement.

³⁵ The trial transcript reflects that Mr. Hancock cross-examined Moon in the guilt phase of Robertson's trial. Tr. pp. 1618-39; 1644-46.

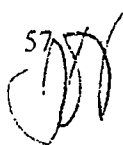
enforcement or that counsel should have learned of the statement after a reasonable investigation. Also, Robertson did not present a taped, handwritten or typed copy of this alleged statement. The only evidence that such a statement exists comes from Robertson, and the Court finds that his testimony is not credible.

The Court further finds that Robertson has not proved any prejudice resulting from counsel's failure to impeach Moon with the alleged statement. First, while cross-examination of Moon about this alleged statement would have provided some additional impeachment of her testimony,³⁶ the statement would have further strengthened the State's case in aggravation of punishment. Second, Robertson did not present Moon as a witness at the PCR hearing. Therefore, the Court finds that there is no indication of how she would respond if asked whether she, in fact, made the statement attributed to her by Robertson. In the absence of any evidence as to how she would testify, the Court finds that Robertson has failed to prove a reasonable probability of a different result, but for trial counsel's failure to impeach her with the alleged statement. *See Glover*, 318 S.C. 496, 458 S.E.2d 538 (1995); *Beaver*, 93 F.3d 1186 (4th Cir. 1996).

GROUND 10(a)(9)

Robertson has specifically waived his contention that counsel were ineffective for failing to move for dismissal of a petit juror based upon comments made by the juror. The Court finds that he has freely and voluntarily made a knowing and intelligent decision to abandon this allegation.

³⁶ Robertson has not alleged counsel's cross-examination was otherwise deficient, and the Court does not find any deficiency. Further, counsel did impeach Moon within the permissible parameters of ethical representation, given Robertson's statement to counsel admitting that he murdered his parents and telling counsel why he did so.

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GROUND 10(a)(10)

Next, Robertson contends that trial counsel were ineffective for failing to adequately and properly advise him before he was evaluated by the State's psychologist, Dr. Geoffrey McKee. The Court, again, finds that he has failed to prove any deficiency in counsel's performance or, more importantly, any resulting prejudice.

At a September 25, 1998, motions hearing, the State noted that the defense had not yet provided notice of whether it would rely on either insanity or GBMI as a defense.³⁷ Robertson's counsel argued that the State's request was "somewhat premature" because the defense had not yet determined whether it was going to rely upon either defense. Counsel stated that a neuropsychologist had examined Robertson on the previous day and that there was a defense psychiatrist who had to review the records before they could make this determination. Tr. pp. 67-72.

The State then argued that the purpose of requiring notice of an insanity defense was to allow the State to prepare and respond to it. Because of the amount of mental health records involved in the case, the State asked the trial judge to determine if Robertson needed to be evaluated.³⁸ In response to the trial judge's inquiry, counsel indicated that he could determine

³⁷ The State had filed a motion requesting notice of insanity or GBMI on July 8, 1998. Tr. p. 69. It had previously indicated at a September 22, 1998 motions hearing that it intended to ask the trial judge to consider a court-ordered competency evaluation. Tr. p. 55.

³⁸ The State explained that Robertson had "intermittently" seen a psychiatrist between 1993 and 1997; he had been involuntarily committed to the William S. Hall Psychiatric Institute in 1995; and other witnesses said that Robertson had previously boasted of being able to malingering and convince psychiatrists of their findings. Tr. pp. 74-76.

whether GBMI or insanity were at issue by November 1, 1998. The trial judge deferred ruling until then. Tr. pp. 74-77.³⁹

The issue was revisited at a November 20, 1998 hearing, wherein the State argued its November 19, 1998 motion to request an independent psychiatric and/or psychological evaluation for purposed of determining Robertson's mental condition.⁴⁰ Defense counsel argued that counsel had not received ten days notice of the State's motion and stated that competency was not yet at issue. The trial judge gave Robertson ten days within which to respond, 11/20 Tr. pp. 24-25, and counsel responded on November 30, 1998.

The trial judge heard further arguments on the issue at a December 4 motions hearing. Counsel conceded that S.C. Code Ann. § 44-23-410 (Supp. 1998) allowed the trial court to order an evaluation but only upon a showing that was not met in this case, since Robertson had not asserted a mental health defense or asserted that he was incompetent to stand trial. Counsel argued that this was a fishing expedition to determine Robertson's mental state; and that if any such information came in during the sentencing phase, it would violate his Fifth Amendment privilege against self-incrimination. Also, counsel argued that he State's experts could perform a competency evaluation within ten minutes. Tr. pp. 103-05.

³⁹ The issue was again raised by the State at a November 2, 1998 motions hearing, but the trial judge did not rule because he felt there must be a showing first. Tr. pp. 86-87.

⁴⁰ The State argued that the defense had not yet disclosed any reports by its experts and that under *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982), Robertson had a right to refuse to submit to an evaluation. However, he would waive his right to present experts concerning his mental status if he did so because he could not interject a mental health issue and prevent the State from either confirming or rebutting his evidence. Further, the State asserted that it would take time to have an evaluation done and for the State to adequately review it. Also, it would be impractical to allow the evaluation to take place during the course of the trial when Robertson finally introduced his mental health evidence. Finally, the State claimed that the matter was one of fairness and the State's opportunity to prepare. 11/20 Tr. pp. 4-5: pp. 21-23.

The State asserted that § 44-23-420 recognizes the inherent power of the trial court to order a competency or insanity evaluation.⁴¹ Further, the only way for the State to effectively cross-examine the defense experts on mental health issues was to require an evaluation on competency, *McNaughten*, and GBMI. The State disputed the claim there had not been a showing that required an evaluation, noting Robertson's prior involuntary commitment. Also, the State maintained that a "chain of evaluations" by his experts had taken place and that mental health issues were present. Again, the State argued that an evaluation was necessary as a matter of justice, and so that the case could progress in a timely fashion, while protecting both Robertson's and the State's rights. Tr. pp. 105-10.

Defense counsel again asserted that the State's motion was premature because he had not yet received the reports from his experts. He noted that mental health issues may arise in the sentencing phase but not in the guilt phase, and asserted Fifth Amendment problems with a court-ordered evaluation. The trial judge observed that Robertson's response during the interview could be prohibited. However, he took the matter under advisement and said he would issue a written order. Tr. pp. 110-115; p. 120.

The trial judge initially denied the State's request in an Order filed on December 18, 1998. However, he entertained the State's motion to reconsider his previous ruling at a hearing on February 12, 1999. The State argued that Robertson had indicated he would potentially use at least three experts who had evaluated him, including Dr. Pincus, Dr. Evans and Ms. Cascio (who had prepared a psycho-social history). The State stated that it had yet to receive copies of reports from any of these experts, and it again noted that at the time of the previous involuntary

⁴¹ Again, the State recognized that Robertson could refuse to cooperate in the evaluation but under *Sloan* would be barred from presenting expert testimony in mental health issues.

commitment in August 1995, Robertson was diagnosed as having bipolar disorder, manic; the potential for acting out; and depression. The State requested an evaluation, so that it could either confirm or rebut what the defense may present at trial, and asserted that it was logistically impractical to keep a jury sequestered and have an evaluation during the course of a trial. The State also presented a copy of a psychiatric report (introduced as Court's Exhibit 1 at the hearing) and asserted that this exhibit alone warranted a court ordered evaluation. 2/12/99 Tr. pp. 8-15. Trial counsel, once again, opposed the State's motion to reconsider and asserted that an evaluation would violate Robertson's Fifth Amendment privilege against self-incrimination. The trial judge agreed to take the matter under advisement. 2/12/99 Tr. pp. 14-16. Both parties then briefed the issue.

On February 17, 1999, the trial judge filed an Order for Evaluation as to Competency and Criminal Responsibility, in which he reconsidered the previous Order and ordered Robertson to submit to an independent psychiatric examination relating to his mental capacity by examiners designated by the State. *See State v. Locklair*, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000) (rejecting defendant's argument the trial judge abridged his Fifth Amendment rights by ordering him to submit to a psychiatric examination where he did not assert an insanity defense and did not give notice that he would plead GBMI and holding that "[t]he trial judge in this case has the inherent, discretionary authority to order an independent psychiatric evaluation of Locklair if he believed Locklair was not fit to stand trial or if he believed that Locklair's mental competency would be an issue at trial. The mental competency of the defendant to stand trial is a baseline inquiry by the court. In order to protect the legal process and preserve the integrity of the trial, a trial judge has the authority to order a psychiatric evaluation of the defendant when his or her



competency may be in question"). Judge Hayes based his decision upon his review of records relating to the involuntary commitment to the Hall Institute in 1995, as well as trial counsel's representation that the defense may present testimony relevant to Robertson's mental status through Dr. Pincus, Dr. Evans and Ms. Cascio, in either the guilt or penalty phase of the trial.⁴² Judge Hayes further found that fundamental fairness dictated that the State be allowed the opportunity to verify or rebut evidence presented by defense experts regarding Robertson's mental status; that an adequate rebuttal could not be made without independent examination; and that an independent psychiatric examination under these circumstances "is a distinct aid in the determination and the administration of justice in order to confirm a claim of mental illness, discover fraudulent claims or to rebut psychiatric testimony which can only reasonably be accomplished by the presentation of expert testimony."

The trial judge further ordered that any report from the evaluation be made to the State and the trial court within five days of the completion of the examination and that it should contain a diagnosis of Robertson's mental condition, as well as clinical findings bearing on the issues of (1) whether Robertson was competent to stand trial; (2) whether Robertson was criminally responsible at the time of the offense under *McNaughten*; and (3) whether or not Robertson was GBMI at the time of the offense. The trial judge further ordered that neither the results of the examinations nor any communications by Robertson during the evaluation should be admissible in any criminal proceedings against him unless the defense first interjected his mental status as an issue in either the guilt or sentencing phases of the trial or the evidence was necessary to rebut testimony or evidence offered by Robertson. Finally, the trial judge's order

⁴² However, he observed that Robertson had asserted that he did not intend to present GBMI or insanity "at this time."

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stated that “[n]othing in this Order shall be construed to abridge the defendant’s Fifth Amendment right to remain silent.”

Dr. Geoffrey McKee, a forensic psychologist, thereafter examined Robertson pursuant to this Order and later testified – in response to Robertson’s mental health witness – as a reply witness in the sentencing phase of the trial. Tr. pp. 3059-72; 3079-83.

Before Dr. McKee’s testimony, Mr. Boyd unsuccessfully renewed his objection *in camera*, and the trial judge held an *in camera* hearing to determine the admissibility of any statements Robertson made to Dr. McKee during the evaluation. Tr. pp. 3044-55. The trial judge found that the statements made by him were admissible. The trial judge further found that Robertson had been advised of his rights under the Fifth and Sixth Amendments and advised as a constitutional safeguard provided by *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial judge also found that, before the interview took place, counsel had represented Robertson for some time; and that counsel was aware of the interview and its potential use at trial. He further found that Robertson was aware of his right to remain silent as well as his other *Miranda* rights but intelligently waived those rights. Therefore, the trial judge found that the evidence could be presented in rebuttal. Tr. pp. 3055-57.

Dr. McKee testified that he reviewed witness statements, incident reports, statements by people who were in or around the scene at the time of the murders, medical reports and medical records before he saw Robertson. Specifically, he reviewed Robertson’s medical records from his pediatrician, a psychiatrist that Robertson had seen, the records from the 1995 commitment to Hall Institute and records of medical and psychiatric treatment while Robertson was incarcerated for the present crimes. He then saw Robertson for a clinical interview and administered a

psychological test on March 5, 1999. He later saw Robertson for a four hour interview and administered three other psychological tests. Tr. pp. 3059-63.

Dr. McKee advised Robertson of his *Miranda* rights before they began the interviews; and it was Dr. McKee's opinion that he understood his rights. Dr. McKee testified that Robertson did suffer from bipolar disorder, manic, but without psychotic features.⁴³ Also, the bipolar disorder was in full remission at the times he interviewed Robertson. Likewise, Robertson also suffered from alcohol dependence, which was also in remission. Robertson relayed a history of marijuana and amphetamine (specific Ritalin) abuse prior to his arrest for the murders and had a history of poly-substance intoxication, including cocaine, LSD, Xanax and inhalants. He also had a history of ADHD. Also, it was Dr. McKee's opinion that Robertson had features of borderline antisocial personality traits. Tr. pp. 3062-64.

Dr. McKee testified that there is no difference between a psychosis resulting from a severe mental illness, such as schizophrenia or bipolar disorder, and a drug induced psychosis. Both types of psychoses are similar in that "there's a presence of delusions and/or hallucinations." However, he testified that Robertson was not experiencing a psychotic episode at the time of the crimes on November 25, 1997. Robertson did have bipolar disorder during this time, but Dr. McKee testified that Robertson was not experiencing the symptoms of his bipolar disorder at the time he committed the offenses. Dr. McKee testified that the facts relayed to him

⁴³ Dr. McKee explained that psychoses is the presence of symptoms of delusions (fixed false beliefs); and hallucinations (false sensory experiences). Tr. pp. 3065-66.

by Robertson were virtually identical to those in the notes of Robertson's social worker, Ms. Cascio. Tr. pp. 3066-67.⁴⁴

Dr. McKee further testified that Robertson knew right from wrong at the time of the crimes. Dr. McKee based this conclusion upon evidence that Robertson put socks over his hands before the crimes in order to cover his fingerprints; he took the phone off the hook in his mother's bedroom before attacking her; he waited until his father was in the shower before attacking his mother; during the attack on his mother, he went and checked to see if his father was still in the shower on two separate occasions; he waited outside his father's bathroom door with a bottle of Tilex and with a hammer to use it when his father came out of the shower; and he sprayed his father with Tilex before hitting him with the hammer. Also, after the incident, Robertson told Moon to put the bloody clothes, socks, the bat and the knife in a bag; he showered for approximately twenty-five minutes to remove blood from his person; he checked to see whether his neck was scraped because of his concern there might have been blood if his father scraped his neck; and he decided to use his father's credit card rather than writing checks because he was worried that he and Moon might be observed on bank cameras. Following the offense Robertson poked a hole in the glass on the door in an effort to make the incident appear as if it were a robbery; he took the bag of clothes, bat and knife with him; he placed his bag in the trunk of the car and disposed of it in a dumpster in Maryland; and, once on the road, he called back to his house and got the answering machine. This indicated to Robertson that someone had placed the phone back on the hook, and that made him anxious. Each of these actions in Dr.

⁴⁴ Trial counsel withdrew a previous objection when it became clear that the information related by Dr. McKee – although consistent with Robertson told Ms. Cascio – came from his own notes. Tr. pp. 3073-75.

McKee's estimation indicated that Robertson could distinguish right from wrong. Tr. pp. 3067-70.⁴⁵

Dr. McKee testified that Robertson had the capacity to conform his conduct to the requirements of the law because these same actions showed that Robertson could control any impulse, as did evidence that Robertson discussed his plan with Moon; he obtained two knives, a hammer, a baseball bat and Tilex before the crimes. Also, following the attack on his father but before using a baseball bat on him, Robertson had gone and checked to see if his mother was still alive; and after his assault of his father, he twice returned to assault his father after hearing his father breathing. Again, his conduct after the incidents reflected a capacity to conform his conduct to the requirements of the law. Tr. pp. 3071-72.

Finally, Dr. McKee stated "And then at arrest [he had] enough control to not make a statement during his interrogation." At that point, Mr. Boyd objected, and, during an *in camera* hearing, moved for a mistrial. The trial judge denied the motion for a mistrial but agreed to give a curative instruction, Tr. pp. 3072-75, which he subsequently gave to the jury. The trial judge instructed jurors that Robertson "had an absolute constitutional right to remain silent, and the

⁴⁵ Any alleged impropriety of Dr. McKee's testimony about the information he received from Robertson under *Hudgins v. Moore*, 337 S.C. 333, 524 S.E.2d 105 (1999), is not properly before this Court because the trial judge overruled trial counsel's objection, and ruled that the statements made by Robertson were admissible. See Tr. pp. 3044-57. Thus, the question of his ruling could have been raised on direct appeal and is barred in PCR. See §17-27-20(b); *Drayton*, 312 SC at 9, 430 SE2d at 520 (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel). Alternatively, the Court finds that there was no violation of *Hudgins*.

exercise of that right cannot and must not be used against him in any fashion whatsoever. So, disregard [Dr. McKee's] statement." Tr. p. 3078, ll. 13-22.⁴⁶

Robertson testified at the PCR hearing that his attorneys met with him before the evaluation by Dr. McKee. They advised him that he should meet with Dr. McKee and talk with him. Otherwise, they would not have a defense. Robertson later spoke to Dr. McKee.

As to Robertson's claim that counsel should have advised him not to discuss the facts of the case with Dr. McKee, the Court finds that the credible evidence presented before it is that trial counsel made a strategic decision to present a mental health defense and eventually presented extensive evidence concerning the mental health history of Robertson and his family. Moreover, Robertson agreed with this decision to present such a defense. The Court further finds that counsel met with Robertson and explained that the State had the right to have him evaluated if the defense wished to present evidence of his mental health in mitigation, *see Sloan*, 278 S.C. 435, 298 S.E.2d 92, and that Robertson consented to the evaluation by Dr. McKee.

Also, the Court finds that Robertson was well aware of his right to remain silent. Apart from evidence concerning the advice that counsel gave him, the transcript clearly reflects that Dr. McKee advised him of his *Miranda* rights, including his right to remain silent, before Dr. McKee evaluated him. However, Robertson nevertheless voluntarily discussed the facts of the crimes with Dr. McKee. Also, his statements to Dr. McKee were consistent with Ms. Cascio's notes of her conversations with Robertson. Therefore, the Court finds that Robertson failed to prove either deficient performance with respect to the advice given by counsel or any resulting prejudice.

⁴⁶ On appeal, Robertson initially raised the failure to grant a mistrial as his second Issue. However, he voluntarily abandoned his direct appeal.

Robertson further contends that, following their advice to him, counsel should have done more to ensure that Robertson did not discuss the facts of the case with Dr. McKee. The Court, however, rejects this argument as well. Counsel could not have been deficient in this regard because the trial judge's Order authorizing the evaluation by Dr. McKee did not permit counsel to be present during the evaluation. Here, counsel did all that they could when they gave their advice to Robertson before Dr. McKee's evaluation. Further, the Court finds that there is no probability of a different result but for counsel's alleged error, since Dr. McKee also administered *Miranda* warnings to Robertson before speaking to him. Robertson was, therefore, aware of his right to remain silent but knowingly, intelligently and voluntarily waived it and discussed the facts surrounding the murders with Dr. McKee.⁴⁷

Moreover, while Dr. McKee's testimony was clearly relevant to rebutting Robertson's case in mitigation, Dr. McKee was limited to giving his opinion that Robertson was neither insane nor GBMI at the time of the murders; that he was not psychotic at the time; and giving the reasons for these opinions. Dr. McKee was not permitted to answer the State's questions concerning whether Robertson's behavior was consistent with a layman's understanding of "psychopath." Tr. pp. 3075-78.

Also, the defense experts did not dispute that Robertson was not GBMI. Thus, the trial judge's ruling in this regard was consistent with *Sloan* and *State v. Locklair*, 341, S.C. 352, 363-65, 535 SE2d 420, 426-27 (2000). Finally, the Court finds that the statements attributed to

⁴⁷ Because the trial judge ruled that Dr. McKee could testify concerning the statements Robertson made to him in answering questions related to Robertson's mental health status at the time of the murders, the propriety of his ruling is not properly before this Court. Rather, it could have been challenged on direct appeal, but for Robertson's decision to abandon his appeal.



Robertson by Dr. McKee were cumulative of the testimony of Ms. Cascio. *See* Tr. pp. 3010-31.

Therefore, Robertson has failed to prove prejudice under *Strickland*.

GROUND 10(a)(11)

Robertson further contends that counsel were ineffective because they did not introduce sufficient evidence of the mental health history of the Robertson family. The Court finds that this claim is without merit, and that Robertson has not met his burden of proving either prong for relief under *Strickland*.

It was clear from reviewing the trial transcript that each of the defense's mental health experts – Drs. Pincus, Evans and Morton – relied upon the various records they received. Also, none of these experts testified that he had an insufficient amount of information to reach his opinion as to Robertson's mental illness and drug and alcohol abuse.

Further, counsel presented Skip Meyer as a defense witness. Tr. pp. 2750-2817. Mr. Meyer testified about his counseling of Robertson and his parents. Mr. Meyer testified that the most of his counseling "was done in connections with [Robertson]." Tr. p. 2753, ll. 8-11. He thereafter testified at length concerning his counseling of Robertson and his family. While most of his testimony centered on therapy sessions with Robertson and Terry Robertson and their mental health issues, he did testify about several sessions that involved Earl Robertson, Sr. *See* Tr. pp. 2759-65.

Among the matters covered by the defense in Meyer's testimony, he testified:

- Robertson's dislike of his father because his father was verbally abusive towards him;
- Robertson's report that Earl, Sr.'s parents were planning to reduce the amount of their estates that they would leave to him and increase the amount that they will leave to Robertson and Chip;

- Robertson's manic behavior and the effects of it on his parents;
- The disagreement between Robertson's parents on how lenient to be with him;
- Mental health problems Terry had, which first surfaced in childhood, and Meyer's suspicion that she may have been sexually abused;
- Robertson's efforts to maintain employment, as well as the effects of his manic states on his work (principally, this resulted in his working exceptionally long hours at a time and having impaired judgment of what he could do because of his extremely positive self concept);
- That conflicts within the family seemed to arise when Robertson and Chip got together;
- Earl, Sr.'s frustrations with his children's irresponsible behavior;
- Earl's worry that the family was falling apart and the financial and psychological cost of his children's behavior on him and Terry;
- The anger, embarrassment, shame and humiliation he felt as the result of his children's behavior;
- Earl's feeling that his life had been ruined by Robertson;
- Terry's depression resulting from her belief that "she has bad children;"
- The movement of the Robertson family to Michigan, California and back to South Carolina;
- Terry's statement that the children overwhelm her, and her fear and guilt of not being able to say "no" to them;
- Various problems between Robertson's parents stemming from their relationship as husband and wife – including a horrible fight(s) (which Meyer thought was isolated);
- Suicidal thoughts and superficial suicide "attempts" by Terry;
- Violent behavior of Earl, Sr. toward Chip when the family was on a vacation;
- Obsessive-compulsive behavior and depression by Terry; and

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- That Terry had been diagnosed as bipolar – and at times had described visual hallucinations (which may have been caused by medications that she had been taking).

Tr. pp. 2753-89.

Further, Mr. Meyer described Terry as a “very depressed person.” This resulted from her having very strict parents, her mother’s illness, conflicts in the home, the father not being emotionally available, being an only child, and the pressure of the lifestyle she and Earl had lived. Mr. Meyer described Earl as a good person that was troubled by “[w]hat was going on with his family.” Tr. pp. 2789-90. Finally, trial counsel introduced a copy of Mr. Meyer’s notes as Defendant’s Ex. 18. *See* Tr. pp. 2806-07.⁴⁸

Ms. Cascio testified as the last expert called by the defense. Ms. Cascio gave a detailed social history assessment of Robertson. Tr. pp. 3852-3031. To do the assessment, she “looked at medical and psychological records from all members of the family.” Also, Ms. Cascio interviewed Robertson, and she “examined Earl Robertson’s work documents; some of [Robertson’s] incarceration documents; personal notebooks of Terry Robertson. And I also conducted about 13 interviews with people from a variety of areas in [Robertson’s] life.” Tr. p. 2857.

Ms. Cascio testified that she “found that Jimmy came from a very chaotic home” and there “were a variety of things going on. For example, physical abuse and emotional abuse. And there is definitely mental illness throughout the family.” Tr. p. 2858, ll. 4-8. Ms. Cascio then gave a detailed history of each member of the family. Ms. Cascio described the various

⁴⁸ The State’s cross-examination of Mr. Meyer also elicited further evidence of his counseling of Earl, Sr., and problems Earl, Sr., had with his sons. Tr. pp. 2797-99.

problems that Terry had within her family as a child, including conflict with mother, Terry's emotional and psychological problems, and Cascio testified that "a variety of indicators ... suggest that Terry was sexually abused as a child." Much of Ms. Cascio's testimony concerning Terry's childhood was corroborated, in her opinion, by excerpts of Skip Meyer's notes. Defendant's Exs. 21-22; Defendant's Ex. 28; Tr. pp. 2858-65; 2882-84.

With respect to Earl, Sr., Ms. Cascio testified that he was very bright but ambitious and "very confrontational." She also testified that, in 1989, Spring Industries decided that he "was not leadership material." Also, many people to whom she spoke described him as "pushy and kind of domineering". Tr. pp. 2865-67.

Ms. Cascio indicated that Robertson's grandmother described him as "a very happy outgoing child although he did have some delayed development." In particular, he was "slow to talk." She indicated that "there seemed to be poor attachment between Jimmy and his parents ... [a]t a very young age." Ms. Cascio explained that children who are unable to form emotional attachments "have a lot of problems later on in life." Usually, they have "difficulty forming relationships because they just don't have a basis for it." Also, they "tend to be mistrustful" of others. They likewise tend to be angry and aggressive and after have self-control problems. Tr. pp. 2867-69.

Ms. Cascio testified that Robertson began banging his head when he was one or two years old, and she explained that this was "often a sign of poor attachment." Tr. p. 2869.⁴⁹ Ms. Cascio further testified that "there is a very strong association between maternal depression," such as that experienced by Terry, and a child's poor attachment because depressed mothers tend

⁴⁹ In her opinion, this is usually seen in children who are raised in institutional settings and orphanages.

to be less responsive to the child's needs and more involved with their own problems. Depressed mothers also do not spend as much time with a child; they use "more negative language," are more hostile, more irritable, and are more harsh or arbitrary in their discipline. Children, however, need consistency. Tr. pp. 2869-73.

Ms. Cascio further testified that she "found indications of physical abuse" with Robertson. These included scars on his back and buttocks which he did not have a memory of receiving. Also, "both children confirmed that they were routinely beaten with a belt several times a week when they were "pre-school and [in] grade school." Further, Robertson said that Earl, Sr., would often beat him with a belt to make him stop banging his head. She likewise relayed other incidents in which Earl, Sr., was physically abuse to Robertson and Chip. One incident with Chip was documented in Skip Meyer's notes, which was introduced as Defendant's Ex. 23. Robertson's pediatric records from 1988 reflected that he was seen because he had been hit with a fist. Tr. pp. 2873-76.

Again, the multiple physical abuses, combined with psychological abuse, tend to create "negative outcomes for the children." Through Ms. Cascio's testimony and the extracts from Mr. Meyer's notes, the defense established that: (1) Terry was afraid of Earl's temper and did not feel like she had done enough to protect her sons; (2) there was a great deal of psychological abuse in the home;⁵⁰ (3) the sons may have witnessed domestic violence by Terry attacking Earl; (4) there was evidence that Chip hit women; (5) Robertson had problems with his memory, which can be an indicator of trauma; and (6) "everyone in the family had a history of mental

⁵⁰ This abuse included degradation and name calling; Terry telling Robertson that she wished he had never been born; and verbal abuse by Terry of both sons.

illness.”⁵¹ Tr. pp. 2876-81. *See also* Defendant’s Ex. 24. All of these factors “set the stage for something to go wrong in adolescence.” Tr. p. 2885, ll. 10-16.

Likewise, counsel introduced three charts (Defendant’s Exs. 25-27), which reflected psychiatric visits by the victims. These charts showed that Terry was seen in therapy roughly 170 times between 1995 and 1997, with a variety of problems, including hallucinations, self-mutilation, obsessive-compulsive disorder and suicide attempts. Tr. pp. 2881-86.

In addition to Robertson’s problems that she had previously discussed, Ms. Cascio testified that Robertson “was often an outcast in school.” Other students teased him and did not quickly accept him. By the ninth grade, he was suicidal. He started using illegal drugs while he was at Georgia Tech University and was “very suicidal” at that time as well. He also started engaging in behavior that was consistent with mania, such as spending large sums of money and gambling. Ms. Cascio also discussed Dr. McMeekin’s 1994 diagnosis that he was depressed and his involuntary commitment to William S. Hall, following the 1995 D.U.I. At that time, he was diagnosed as bipolar, alcohol dependent and “having mental illness with severe family strife. Also, he did not have many friends. Ms. Cascio testified that “all of these factors [discussed by her], I believe, led him to start relying more heavily upon drugs which then in turn led to what happened later on.” Tr. pp. 2886-88. She later explained on cross-examination that, in light of the various factors she found in Robertson’s life, “he might have felt [at the time of the murders] that [violence] was [his only alternative]” See Tr. pp. 2949-52.

⁵¹ Terry was diagnosed as having severe depression, bipolar disorder and obsessive-compulsive disorder. Earl was diagnosed as having depression, panic disorder and ADD. Robertson had bipolar disorder and ADD; and Chip had ADD and possibly bipolar disorder. Tr. pp. 2881-82.

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Ms. Cascio further testified that Robertson and Chip had a "close relationship," and they often did things together, including criminal activity. She testified that Chip had similar problems with substance abuse, and he had experienced physical and psychological abuse. She also testified that Chip was incarcerated at the time of Robertson's trial. Tr. pp. 2888-90. Finally, the defense introduced several excerpts from Terry's "notebook," which were contained in Mr. Meyer's notes; and Ms. Cascio testified to the substance of the extracts. Tr. pp.2892-95; Defendant's Exs. 30-32.

As discussed in Ground 10(a)(1), *supra*, Mr. Hancock testified that the defense attempted to get all of the records concerning Robertson that they could locate. They got all of Robertson's school records which they could locate (including records from California); the records from his Youthful Offender Act conviction for burglary; Robertson's records from an involuntary commitment to the Willis S. Hall Psychiatric Institution; Robertson's SCDC records; records from Kanawha Insurance Company; records from Piedmont Mental Health Associates,⁵² and the Robertson family counseling records from the Carolina Counseling Center, where Robertson and his family were treated by Dr. McMeekin and family and marriage counselor "Skip" Meyer, Jr. It was Mr. Hancock's impression that the defense obtained all of Dr. McMeekin's records through Mr. Meyer. Counsel were assisted in their efforts to garner records by their social worker, Ms. Cascio.

Mr. Hancock testified that the parents began therapy after their sons started acting out. He was aware that Dr. McMeekin was treating the family and that Skip Meyer was doing the counseling. Although he could not remember why he did not extensively examine Mr. Meyer

⁵² The State introduced two Orders requiring the production of records from Kanawha Insurance Company and Piedmont Metal Health Associates as Respondent's Exhibits 3 and 4, respectively.

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about Earl, Sr.'s treatment, he recalled that Earl was treated for a shorter period of time and later than the rest of the family. Also, much of the records from Meyer related to Terry and her problems. Apart from the matters testified to by Ms. Cascio, Mr. Hancock indicated that the defense did not discover any evidence of physical abuse by Earl.

Both attorneys testified about their other steps to develop a mental health defense, and both were clear that they provided each of their experts with the records in their possession; they never withheld any records from their experts; and none of their experts ever claimed that he or she could not reach an opinion without additional records or information. Robertson did not present any expert testimony in support of this allegation, although he did introduce additional mental health records as Applicant's Exs. 1-3.

Based upon the present record, the Court finds that Robertson has not established either deficient performance or resulting prejudice under *Strickland*. First, the Court finds that Robertson's attorneys – with the assistance of their social worker – made an objectively reasonable investigation into the mental health history of both Robertson and his family, as required by *Strickland*, 466 U.S. at 690-91. *See also Wiggins*, 539 U.S. at 521-22. The Court likewise finds that counsel made an objectively reasonable presentation of this evidence.

While trial counsel could have presented the jury with a more complete picture of the family's mental health history, the presentation made was quite extensive. Further, the Court finds that it was reasonable for them to rely upon their experts to develop and focus upon the most salient aspects of the mental health history. The principal witness that counsel chose to

develop this information through was Ms. Cascio.⁵³ The Court does not find any reason to believe that the decision to present no more of the family's mental health history than counsel presented was deficient performance.

The Court also finds that Robertson has failed to prove any prejudice with respect to the current allegation. The only credible evidence is that all of the records counsel had were provided to their experts, and that no expert complained that he or she lacked sufficient records upon which to reach an opinion. The Court further finds that Applicant's Exs. 1-3 do not provide it with a sufficient basis to conclude that Robertson has proved prejudice under *Strickland*.⁵⁴ Moreover, there was overwhelming evidence of Robertson's guilt for both murders and proof of the statutory aggravating circumstances.

Also, the evidence presented at the PCR hearing does not support any additional statutory or non-statutory mitigating circumstance apart from those which were submitted to the jury, as the result of the evidence presented by trial counsel. See § 16-3-20(c)(b) (1) – (2), (6) and (7). Therefore, the Court finds that Robertson has not established that "there is a reasonable probability that ... the sentencer ... [can] conclude[] that the balance of aggravating and mitigating circumstances [do] not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 10(a)(12)

⁵³ Therefore, the Court finds that the present allegation and the ineffectiveness claims relating to Ms. Cascio are intertwined.

⁵⁴ One of the primary matters focused upon by Robertson at this hearing was that the notes for some sessions in Applicant's Exs. 1-3 did not reflect any complaints by the victims centered on Robertson or Chip. In that regard, the Court finds that this position is not only inconsistent with the recollection of trial counsel and the extensive trial testimony discussed *supra*, it is also inconsistent with Robertson's own testimony before this Court.

Robertson's remaining allegation is that trial counsel were ineffective for presenting Ms. Cascio as an expert witness. Robertson raised several issues about counsel's decision to employ Ms. Cascio at the PCR hearing. Aside from her lack of experience in testifying, his principal complaints concerned the information elicited by the State on its cross-examination of her about notes of her conversations with Robertson. It was Robertson's position that the cross-examination by the State should have been reasonably foreseeable to counsel. For the following reasons, the Court finds that each of his claims relating to counsel's decision to call Ms. Cascio are without merit.

The State began its cross-examination of Ms. Cascio by focusing upon remarks Robertson made to her during a November 30, 1998, interview about other bad acts and the family social history. Robertson contends that the prosecution was able to elicit evidence concerning prior bad acts, such as stalking (e.g., Tr. pp. 3000-3003); that his parents were "clueless" about his drug abuse (Tr. p. 2962); that he had a bad work history; that he stole his father's credit cards; that he and his father were, at one point, about to have a confrontation involving the use of knives; Robertson did not like college, it was forced upon him and he rebelled against it; "he [my father] put the work ethic in me [but] wanted to take it out of me by sending me to college;" that his parents' ideal was for him to attend college from eighteen to twenty-two and marry and have children by age twenty-five; by the time his parents realized that he would not do the great things they wanted him to do, it was too late; he failed out of college to prove a point; "what hurt most was his [father's] image;" "she (his mother) always tried to look out for me;" "she used to subsidize my income straight out of her pocket;" "love was financial in

terms to [his father];" and other comments concerning the social history, such as the turbulent relationship he had with Earl, Sr. Tr. pp. 2955-70; 2979-3008.

Robertson also complains of the damage to the defense's case by the State's cross-examination regarding admissions he made to Ms. Cascio concerning the facts of the crime and his activities around the time of the murder, including admissions that:

- he had taken 250-280 mg of Ritalin over the course of the previous evening and the morning of the murders;
- Meredith Moon and Erin Savage were at the residence for approximately two hours that morning;
- he and Moon snorted 40 mgs. of Ritalin at that time;
- he continued to use Ritalin after they left;
- he talked to Chip for about two hours about coming home for Thanksgiving, and that Chip was dropping out of school;
- he later called Moon and spoke to her on two or three occasions;
- he asked Moon to give him \$ 75.00 to get Chip home and, although she wouldn't give him money, she agreed to drive up and get Chip;
- Moon was infatuated with him and would have done anything he asked;
- After Moon came to his house, they began talking about the problems surrounding Chip coming home and "somehow it led to I'm going to do it;"
- he discussed which bat to use;
- he decided not to use the wooden one because it was autographed and he did not want to ruin it;
- he condensed two bottles of Tilex;
- he sat in his room and waited for his father to get in the shower before killing his mother because there would be noise;
- he took the phone off of the hook and laid a knife in the hallway in case his father came in;
- he went in the bedroom and started struggling with his mother, who began screaming for his father;
- "it was getting at me to hear her screaming;"
- he was "in a rage like a maniac;"
- he came downstairs and said "one down, one to go;"
- he laid the bat at the top of the stairs, sat and waited with the hammer "like I was standing on the other side of myself watching me;"
- it was "like someone else committing the crime and I was watching;"
- he sprayed Tilex in his father's eyes and buried the hammer in his head;
- his father "put up a fight with the hammer stuck in his head;"

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- eventually, his father fell to the ground and Petitioner hit him 200 times with the hammer and bat;
- he said that "22 years of hatred came out;"
- it was "overkill" and he "went on and on and on and on;"
- he then went into the bedroom and checked on his mother;
- he hit his mother in the head with the hammer to make sure that she was dead;
- Moon thought he was going to kill her;
- he later heard a noise upstairs and it was his father breathing into the carpet;
- he wondered "how is he still breathing;"
- he "went to find the drill to end the matter;"
- he then took the bat upstairs to beat his father again and he kicked him with his toe to make sure he was dead;
- he cleaned up, took the money and car keys and packed stuff to dump;
- he said that "Meredith's testimony wasn't good enough by itself;"
- he broke the window downstairs to make it look like a robbery;
- a man pulled up across the street and he waived then got in car and left;
- he explained how he used his father's credit card, and how he stopped and bought Neosporin for his finger;
- he was going to get Chip and bring him to South Carolina, where they would discover his parents;
- no one would notice that his parents were missing;
- what he had done would not be a surprise to his brother;
- he called home and realized that someone had found the bodies and put the phone back on the hook;
- he thought he was "too smart to let this happen," meaning getting caught;
- Meredith was "running her mouth" but he never confessed; and
- he killed his mother because he couldn't live with her knowing that he killed his father.

Tr. pp. 3009-25.

Finally, the Court would note that, before the State began cross-examining Ms. Cascio about Robertson's admissions related to the murders, she was specifically asked whether she took Robertson's statements about the crime into consideration informing her evaluation of him. Ms. Cascio replied, "I was looking at early childhood history that could have led him to that point;" and she agreed that she factored Robertson's statements into her assessment. Tr. p. 3010, ¶ 10-22.

Mr. Hancock testified that Ms. Drucie Glass and the Center for Capital Litigation, which specialized in providing assistance to defense lawyers trying capital cases, recommended that the defense hire Ms. Cascio as a social worker and they hired her. Counsel were well aware of her limited experience and that she had never testified as a forensic social worker. See Applicant's Ex. 4 (curriculum vitae for Toni A. Cascio), Tr. pp. 2852-55. However, another social worker with experience (Ms. Glass) and the Center for Capital Litigation had recommended Ms. Cascio. Also, counsel had met with Ms. Cascio a number of times over the course of a year to prepare her testimony, and Mr. Hancock did not report any problems in terms of her gathering information for the social history of Robertson. Nor were counsel able to locate a more experienced social worker.

It was Mr. Hancock's recollection that counsel objected to production of Ms. Cascio's notes, which contained a number of admissions by Robertson with which Ms. Cascio was cross-examined by the State at trial. Both attorneys, however, made the joint decision to present her as a witness even though they were aware that her notes would have to be disclosed to the prosecution because counsel felt that she was a necessary part of the defense's case in mitigation. Mr. Hancock was not happy with the State's cross-examination of Ms. Cascio and felt that she hurt the defense. However, he testified that she had provided the jury with a good deal of mitigating evidence on direct examination.⁵⁵

⁵⁵ Mr. Pope characterized Ms. Cascio as the one defense expert who could pull together the various matters testified to by the other experts for the jury's benefit.

As discussed, Mr. Boyd mistakenly thought that Mr. Hancock had already hired the defense experts before he was appointed.⁵⁶ However, Mr. Boyd testified that he did not object to what had been done with regard to the experts. Ms. Cascio was hired to investigate Robertson's mental health history and his family history. In Mr. Boyd's estimation, it was important to develop Robertson's background and mental health problems in order to find a reason for what had happened. Mr. Boyd also testified that the defense received a copy of Ms. Cascio's report shortly before trial; and Robertson introduced Applicant's Ex. 6, which is a March 1, 1999 letter from Ms. Cascio to Mr. Hancock providing counsel with a copy of the preliminary report.

Mr. Boyd further testified that Ms. Cascio was the last defense expert who testified. He felt that all of the other defense experts were good witnesses. Although Ms. Cascio was able to provide beneficial information to the jury on direct examination, Mr. Boyd felt that this benefit was overshadowed by the damage resulting from the State's cross-examination of her.

Mr. Boyd did not recall whether he was aware, at the time of the trial, that Ms. Cascio had never testified before Robertson's trial. However, Mr. Boyd noted that sometimes it is not a good idea to hire someone with previous experience in testifying and this would not be his main reason for not using an expert witness. As with Mr. Hancock, Mr. Boyd did not recall consenting to the disclosure of Ms. Cascio's notes (Applicant's Ex. 7). Likewise, Mr. Boyd did not recall when he became aware of the notes;⁵⁷ but he testified that he would have reviewed them before disclosing them to the State. Mr. Boyd testified that he met with Ms. Cascio on

⁵⁶ Both the Order appointing Mr. Hancock and the Order appointing Mr. Boyd were filed in the York County Clerk of Court's Office on the same date. See Respondent's Exs. 1-2.

⁵⁷ Mr. Boyd's recollection was that he became aware of the admissions in the notes either shortly before or during the trial, and he did not recall any conversations with Ms. Cascio between December 1998 (the date of her last interview with Robertson) and March 1999, but admitted that Ms. Cascio may have told him about the notes.

more than two occasions and that co-counsel was not present on at least one occasion. Counsel corroborated that he and co-counsel decided to use her as a witness at trial, even after they learned that they would have to disclose her notes, because of the importance of her testimony to the defense.

Robertson testified that counsel had advised him to fully cooperate, and be honest with the defense experts, and he did so.

A. Cascio's lack of experience.

Robertson's first complaint is that counsel were ineffective for employing Ms. Cascio because she had never testified before his trial. The Court rejects this allegation. In *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), the Supreme Court held that under some circumstances, a state must assure an indigent defendant "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

However, Robertson did not have a constitutional right to insist on the appointment of any particular expert. See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); *Walton v. Angelone*, 321 F.3d 442, 464 (4th Cir. 2003); *Wilson v. Greene*, 155 F.3d 396, 401-02 (4th Cir. 1998). Also, "[t]he Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." *Wilson*, 155 F.3d at 401; see also *Joseph v. Angelone*, 184 F.3d 320, 327 (4th Cir. 1999); *Pruett v. Thompson*, 996 F.2d 1560, 1573 n.12 (4th Cir.1993); *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992); *Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir. 1989) (per curiam), *cert. denied*, 492 U.S. 936 (1989).⁵⁸

⁵⁸ Even if this Court were to conclude that such a right exists under the Constitution, it would be prohibited by *Teague v. Lane*, 489 U.S. 288, 311-13 (1989), from applying the rule here. See *Fisher v. Angelone*, 163 F.3d at 853. See also *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167,

Further, even though *Ake* refers to an "appropriate" evaluation, this Court finds that it is doubtful "that the Due Process Clause prescribes a malpractice standard for a court appointed psychiatrist's performance. Rather, the decision in *Ake* reflects primarily a concern with ensuring a defendant access to a psychiatrist or psychologist, not with guaranteeing a particular substantive result." *Wilson*, 155 F.3d at 401. Yet, "[e]ven if *Ake*'s use of the term 'appropriate' suggests that an examination must satisfy some minimal level of professional competence," the Court finds that Ms. Cascio's met that standard here. *See Wilson*, 155 F.3d at 402.

The Court finds that Robertson cannot meet his burden of proving deficient performance by merely relying on the fact Ms. Cascio had not testified before her testimony in Robertson's case or was otherwise inexperienced. The Court finds that experts are not advocates. Rather, they present medical, technical, scientific or other opinions related to their field of expertise. Nor is Robertson correct in asserting that it cannot be a reasonable under *Strickland* for counsel to employ an expert who is qualified in his or her field of expertise but legally inexperienced.

The Court finds that there are both advantages and disadvantages to employing experienced expert witnesses. Some expert witnesses, who have testified in numerous death penalty cases, are open to effective cross-examination by the State about the biases and prejudices that the witnesses bring into a trial of this nature. On the other hand, an expert who does not have a "track record" may not be subject to similar impeachment.

178 (1990) ("In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions"); *Gibson v. State*, 355 S.C. 429, 586 S.E.2d 119 (2003) (applying *Teague* to determine whether *Sandstrom v. Montana*, 442 U.S. 510 (1979), should be applied retroactively on collateral review).

Moreover, if Robertson's reasoning is followed to its logical conclusion, then counsel could not employ any social worker (or other expert), who had not previously testified in capital cases. This is an unworkable rule, and the Court finds that it is not required by the Constitution. Indeed, the United States Supreme Court rejected a similar claim in the context of the inmate's ineffective assistance of counsel claim in *Cronic*, 466 U.S. 648. The Court in *Cronic* refused to apply a presumption of prejudice to the representation by a young, inexperienced attorney whose principal practice was in real estate, and who was participating in his first jury trial. In doing so, the Court observed that "[e]very experienced criminal defense attorney once tried his first criminal case." *Cronic* 466 U.S. at 665.

Even assuming *arguendo* that Robertson had established that counsel were ineffective for hiring Ms. Cascio based solely upon her lack of experience, the Court finds that Robertson has failed to prove any prejudice because he did not present a social worker or any other evidence of mitigating information that a more experienced social worker would have found which was not discovered by Ms. Cascio. In the absence of evidence to support any additional statutory or non-statutory mitigating circumstance(s), apart from those which were submitted to the jury as the result of the evidence presented by trial counsel (see § 16-3-20(c)(b) (1) - (2), (6) and (7)) the Court finds that Robertson has not established that "there is a reasonable probability that ... the sentencer ... [can] conclude[] that the balance of aggravating and mitigating circumstances [do] not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

B. Counsel's agreement to provide Ms. Cascio's notes to the State.

Robertson contends that trial counsel were ineffective for agreeing to provide and providing Ms. Cascio's handwritten notes to the prosecution. As discussed, it was Mr.

Hancock's recollection that the defense opposed producing the notes but that the trial judge ordered the defense to produce them.

As discussed, Mr. Hancock recalled that the defense only disclosed the notes after the trial judge ruled that disclosure was required. A review of the pretrial motions hearings reflects that the defense did object to production of any reports of experts under the reciprocal discovery provisions act of Rule 5(b), S.C. R. Crim. P., until such time as the prosecution had fully complied with the defense's request for discovery under Rule 5(a) and until the defense could complete their testimony. The transcript from those proceedings further reflect that the trial judge required reciprocal discovery. *See* 7/20/98 r. pp. 4-20; 2/12/99 Tr. pp. 3-4; 8/16; Tr. pp. 74-78 (9/25/98 hearing); 79-82; 86-87 (11/2/98 hearing); 90-103; 116 (12/4/98 hearing).

Before the state began its cross-examination of Dr. Pincus in the sentencing phase of the trial, Mr. Brackett asked for Dr. Pincus' notes and underlying data. After the trial judge ordered that they be provided, the State requested a break to review those materials, in order to prepare for cross-examination; and the trial judge granted his request. Mr. Brackett then noted that, "for the sake of expediency," that the defense should produce any similar information for "any other experts that are going to testify." The defense did not object, and Mr. Boyd stated that "I thought we took a big box of all that stuff to your office the other day." Tr. pp. 2505-06.

After Dr. Pincus' testimony, the trial judge asked if the State needed "any further help in getting what they are entitled to." (Sic). Mr. Brackett, again, stated that, "if [he] could get all of the information from any expert they have who is going to testify, [he] will have a chance to review the other two over lunch and that will be plenty of time." Tr. pp. 2531. Mr. Hancock stated that the defense was doing everything it could to provide the information. The trial judge

indicated that, if judicial intervention was necessary, he would bring in the experts and Order them to determine whether they were going to testify. In response to the trial judge's inquiry, Mr. Hancock stated that "if we haven't, we will get them, your Honor." When the trial judge asked if Ms. Cascio's notes had been produced, Mr. Hancock said no, and the trial judge stated, "I think they've got a right to have it to cross-examine." Tr. pp. 2532 l. 2 - p. 2533, l. 23.

During an *in camera* break after Dr. Evans had testified, then-Solicitor Pope noted that the State had not yet received Ms. Cascio's underlying data. Mr. Boyd explained that Ms. Cascio had left her notes in Columbia and had gone to get them and bring them to court. Tr. pp. 2604-05.

Ms. Cascio testified the next day. Early in the State's cross-examination of her, Mr. Pope asked for and received a copy of her notes, without objection. Tr. pp. 2897, ll. 1-16.

Rule 705, SCRE, provides that:

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.⁵⁹

Thus, the Court finds that Rule 705 "permits the cross-examination to require the expert to reveal otherwise inadmissible underlying information before the jury, subject to a Rule 403, SCRE prejudice analysis. See *United States v. A&S Council Oil Co., et al.*, 947 F.2d 1128, 1134 (4th Cir. 1991). See also *State v. Slocumb*, 336 S.C. 619, 821 SE2d 507 (Ct. App. 1999). Moreover, the Court finds that the record demonstrates that the trial judge ordered production of

⁵⁹ The notes to Rule 705 state that "The rule is identical to the federal rule. It differs from former Rule 43(m)(4), SCRCP, and former Rule 24(d), SCRCP, which contained the phrase 'without prior disclosure of' in place of the phrase 'without first testifying to.'"

all notes of the defense experts, for the purposes of the State's cross-examination, and that his ruling is consistent with this Court's construction of Rule 705. In other words, the underlying notes or other data must be produced if the expert witness testifies. Further, this Court would not permit any exception because the purpose of disclosure is to counteract the liberality of the Rule, see *A&S Council Oil*, 947 F.2d at 1134; *United States v. Gillis*, 773 F.2d 549, 553-54 (4th Cir. 1985),⁶⁰ and Ms. Cascio clearly testified that the statements by Robertson pertaining to the murders, as reflected in her notes, was considered by her in arriving at her opinion. Tr. p. 3010, ll. 10-22. Under these circumstances, the Court finds that Robertson cannot show any deficient performance because disclosure of the notes was objectively reasonable under *Strickland*.

C. Counsel's failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker.

Robertson contends that counsel was ineffective for failing to discover Robertson's damaging admissions about the crime in enough time to permit counsel to employ a different social worker. The Court, however, finds that Robertson has not proved that trial counsel's performance was deficient in this regard. The only evidence before the Court is that counsel only learned about the notes shortly before trial. However, the Court finds that it was not unreasonable for counsel to fail to anticipate that Ms. Cascio's work on the case would result in her asking Robertson questions concerning the case or for otherwise failing to instruct her as to how to conduct an appropriate social history assessment. To the contrary, the reason counsel employed her as an expert witness was to take advantage of her expertise in the area of

⁶⁰ This construction of Rule 705 appears to be consistent with the changes discussed in the Notes to Rule 708, SCRE. Also, the Court would note that both *A&S Council Oil* and *Gillis* were cited with approval in *Slocumb*, 336 S.C. 619, 821 SE2d 507.

performing a social history. The Court finds that *Strickland* does not require counsel to instruct defense experts on how they should conduct their evaluations in their areas of expertise.

Nor was counsel ineffective in failing to anticipate that Ms. Cascio would seek information from Robertson about the facts of the crime in order to have enough information to formulate her opinion as to the social history, or that he would freely discuss the crime with her.⁶¹ While an attorney can be expected to learn that the client has relayed potentially damaging information to an expert, counsel is not required to anticipate everything that can possibly go wrong in the client's interaction with an expert in the months before a trial.

Further, while Robertson has characterized Ms. Cascio's inquiry into the facts of the case as going beyond the scope of her employment, *i.e.*, to perform a social history assessment of Robertson, the only evidence is Ms. Cascio's contrary testimony that Robertson's admissions relating to the murders were considered by her in formulating her opinion that at the time of the crimes, Robertson might have felt like violence was his only alternative. *See* Tr. pp. 2886-88; 2949-52; 3010, ll. 10-22. Robertson likewise did not present testimony from any social worker that he or she would have been able to work on Robertson's case. In the absence of any testimony that this information is unnecessary or not part of a proper social history in a capital case, the Court finds that Robertson has failed to prove either deficiency or prejudice resulting from counsel's failure to learn of Robertson's admissions earlier in time to hire another social worker or find a suitable alternative to presenting Ms. Cascio as a witness. *See Glover*, 318 S.C. 496, 458 S.E.2d 538. Finally, the Court notes that two of Robertson's mental health witnesses, Dr. Pincus (Tr. p. 2472) and Dr. Evans (Tr. pp. 2545-46) relied upon the information gathered by

⁶¹ In this regard, the Court would note that Robertson's current allegation may have simply resulted from his own decision to discuss the murder freely.

Ms. Cascio, at least in part, in reaching their conclusions about his mental status at the time of the offense. Under the circumstances, the Court finds that Robertson has not proven either deficient performance or prejudice under *Strickland*.

D. Counsel's presentation of Ms. Cascio as a witness.

Robertson contends that it was reasonably foreseeable that the State would engage in the lines of cross-examination discussed above; and, therefore, counsel were ineffective for presenting Ms. Cascio as a witness. The Court rejects this allegation because the Court finds that Robertson has failed to prove any prejudice resulting from the State's cross-examination of her. *See Strickland*, 466 U.S. at 687 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed").⁶²

Here, the Court finds that, upon discovering the existence of Ms. Cascio's notes, counsel was faced with the choice of either producing the notes and calling Ms. Cascio as a witness or not presenting her as a witness.⁶³ Moreover, if counsel was going to accomplish the previously determined strategy of having all of the evidence in mitigation tied together for the benefit of the sentencing jury, they had to call her as a witness. Thus, counsel was forced to weigh the benefit

⁶² The Court does not find that Robertson has met his burden of proving that counsel's performance was deficient; and, in light of the facts discussed throughout this allegation, the Court specifically finds that counsel were not deficient. However, the remaining portions of this Order only discuss the lack of prejudice.

⁶³ For the reasons set forth in this section as well as the reasons set forth in connection with the preceding sections of this allegation, the Court rejects Robertson's contention that counsel were ineffective for failing to move *in limine* to bar production of the portion of the notes relating to Robertson's admissions to the crimes. Once the decision to call her was made, the notes had to be produced because the admissions to the murders formed part of the basis of her opinion on Robertson's social history assessment. *See Tr. p. 3010, ll. 10-22.*

to the defense from presenting her as a mitigation witness against the potential harm to the defense resulting from the State's cross-examination of her about the admissions that Robertson had made. In this regard, the Court finds that counsel's decision was much like the decision this Court must make in determining whether there is prejudice under *Strickland*.⁶⁴ After this Court's review of the record, the Court finds that there is no reasonable probability of a different result but for counsel's decision to present Ms. Cascio as a witness.

First, the Court finds that both lines of inquiry at issue in this allegation only took place after the State had already cross-examined Ms. Cascio, at length, about her findings to which she had testified on direct examination. *See* Tr. pp. 2895-2955. Second, Ms. Cascio's testimony was only part of a lengthy case in mitigation, but it served to tie all of the other evidence together. Third, the Court finds that the statements concerning his family's mental health and social history clearly were cumulative to other evidence in the record, including – but not limited to – Ms. Cascio's testimony on direct examination, the testimony concerning his involuntary admission to the William S. Hall Institute, and the testimony of Mr. Meyer.

The record is replete with evidence of the strained, tumultuous and confrontational relationship Robertson had with his parents, especially his father. Much of that history is discussed throughout this Order, and Robertson discussed similar evidence in his PCR testimony. Moreover, the Court finds that this was a proper line of cross-examination. The Court also finds that the State's inquiries concerning evidence of other bad acts was a proper topic for cross-

⁶⁴ In order to make such an assessment, counsel had to look at Moon's testimony, as well as Dr. Sexton's testimony and other evidence presented by the prosecution in both phases of the trial relating to proof of their client's guilt of the murders and the alleged statutory aggravating circumstances. This evidence included the manner in which Robertson committed the murders. Additionally, counsel had to consider that the State was going to be allowed to present Dr. McKee as a reply witness.

examination because it reflected upon Robertson's character. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979); see also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), *rev'd. on other grounds.*, 476 U.S. 1 (1986) ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, the trial transcript clearly reflects that counsel objected when the State began cross-examining Ms. Cascio about Robertson's involvement in prior stalking incidents. However, the trial judge overruled the objection and permitted the examination. Also, Ms. Cascio took this information into account in forming her opinion. E.g., Tr. pp. 3000-3003.

Moreover, Robertson cannot show any conceivable prejudice resulting from the sentencing phase jury hearing this information. This evidence of other bad acts was cumulative to evidence of bad acts discussed elsewhere in the Order. It was likewise cumulative to evidence presented by the State that Robertson had previously burglarized his neighbor's home and stole over \$15,000.00 worth of valuables, including a car, blank checks and credit cards; Tr. pp. 2107-20.⁶⁵ Also, the trial judge's sentencing phase charge included a limiting instruction, in which he

⁶⁵ Based upon that crime and his subsequent activities with the credit cards, Robertson was charged with a series of offenses to which he pled guilty. The State introduced the indictments and subsequent sentencing sheets into evidence, as follows: State's Ex. 191, an indictment and sentencing sheet to burglary in the second degree; State's Ex. 192, an indictment for burglary in the first degree and guilty plea and sentencing sheet for burglary in the second degree; State's Ex. 193, an indictment and sentencing sheet for grand larceny; State's Ex. 194, an indictment and sentencing sheet for grand larceny; State's Ex. 195, an indictment and sentencing sheet for

instructed jurors that, before they considered any such evidence, they must first find that the State had proved that Robertson committed any bad acts beyond a reasonable doubt. Even if the jury found that the State had met its burden of proof, the evidence could only be considered as evidence of "his character in general." The evidence could not be considered as proof of any aggravating circumstances. Tr. pp. 3217-18. He charged that prior convictions could only be considered as character evidence as well. Tr. p. 3218.

The trial judge further instructed the jury that, in considering whether to recommend a sentence of death, it must first find the existence of one or more aggravating circumstances beyond a reasonable doubt. He also instructed jurors that they could only consider the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon, larceny with the use of a deadly weapon and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. Tr. pp. 3203-26. In light of the sentencing phase instructions, the Court finds that the challenged evidence was not prejudicial.

The Court further finds that Robertson was not prejudiced by the State's cross-examination concerning Robertson's admissions concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury. His

forgery; State's Ex. 196, an indictment and sentencing sheet for financial transaction card fraud; State's Ex. 197, an indictment and sentencing sheet for financial transaction card fraud. Tr. p. 2119. Robertson gave a statement to the police in which he attributed the crimes to a drug problem. Tr. pp. 2117-19; State's Ex. 190.

co-defendant, Meredith Moon testified in the guilt phase that she met Robertson "[a]bout mid-'95," when he was dating her friend Erin. They "partied together" and "hung out at his apartment." She began to get to know him better in the fall of 1997, when they worked together at Dinkins in the food court at Winthrop. Tr. pp. 1575-76.

On the morning of Monday, November 24, 1997, Moon picked up Robertson, and they went to Charlotte, North Carolina, where they shopped. That night, she and another friend went to the Outback Steakhouse and ate. There, she saw her friend Erin, sometime between 11:30 p.m. and 12:30 a.m. on November 25. Later, Erin came by her house, picked her up and the two women went to Erin's. They "hung out" for several minutes before they went to Robertson's house. Tr. pp. 1576-78.

When she first went to visit him in the early morning of November 25,⁶⁶ his parents were upstairs and she did not see them. Neither she nor Robertson were drinking but they snorted "[a] couple of lines" of Ritalin. She and Erin eventually left and Erin drove her home after Moon retrieved her purse from Erin's apartment.⁶⁷ Tr. pp. 1578-81.

Moon could not sleep because of the effects of the Ritalin. Between 3:00 and 3:30 a.m., she received a call from Robertson, who wanted to use Moon's mother's credit card so that he could buy a bus or plane ticket for this brother, Chip, and bring Chip home for Thanksgiving.

⁶⁶ By then, she estimated that it was between 12:30 and 1:30 a.m. Erin wanted to show Robertson a pool stick that she had bought as a gift for her boyfriend's birthday. Tr. p. 1579.

⁶⁷ The Court finds that her testimony is substantially corroborated by the guilt phase testimony of Erin Savage. Savage added that they parked off to the side of the house on the left-hand side of the road, in order not to wake anyone. She and Moon entered the house through the downstairs door leading to the basement. Robertson was "cleaning" when they arrived. Tr. pp. 1537-42.

Moon, however, told him no.⁶⁸ Moon subsequently received another call from Robertson around 5:00 a.m. He told her to come to his house and "bring some traveling clothes." She was under the impression that they were going to Philadelphia to bring Chip home. Tr. pp. 1581-82. After telling her father a lie about where she was headed, she drove to Robertson's home in her Honda Accord. Again, she entered the home through the rear door, where Robertson was waiting for her. Tr. pp. 1582-85.

She sat down on the sofa in the basement, and they talked. During their conversation, Moon saw a note on the coffee table that had a list of things to do.⁶⁹ Also, Robertson revealed his plan to kill his parents. He told her that he was going to wait until his father's alarm clock rang and his father got into the shower. Then, he was going to kill his mother. Moon unsuccessfully tried to talk him out of this plan, but he would not listen. Instead, he told her to put socks on her hands, "take two bottles of Tilex and pour them into one" bottle. Moon did as she was told, and the two snorted Ritalin. She did not know how much they snorted but agreed that it impaired her judgment. Tr. pp. 1584-97; 1623-28; 1644-46.⁷⁰

⁶⁸ Erin had received a call "probably around 3:30" from Robertson. He wanted to know if Moon was there, and Erin said no. He then asked if Moon's father would be home if he called her house, and Erin did not know. Tr. p. 1542.

⁶⁹ This list (State's Ex. 25) had several things listed on it, such as "trash bags" and "need to scrub out the shower for blood." Tr. pp. 1624; 1636. She further testified that, at Robertson's direction, she also later wrote a list of things to do, such as "alarm clock, wipe blood from downstairs doorknob and dispose of yard rake. She stated that these were things Robertson planned to do. Tr. pp. 1636-38; 1643.

⁷⁰ Robertson had previously told her on many occasions that he planned to kill his parents, both when he was sober and when he was drunk. Also, he explained that his motive was the insurance money, which Moon said was "a couple of million" dollars. As discussed in **Ground 10(a)(3)**, *supra*, a number of sentencing phase witnesses testified about similar conversations. Tr. pp. 2155-57; 2163-68; 2177-78; 2187-89; 2202-03; 2219; 2222; 2228. He had also often told Moon that he did not have the same type of freedom as his peers enjoyed in high school to go out, party and do things with his friends. Tr. pp. 1642-43.

Moon testified that Robertson was not always with her throughout the ensuing time, and she did know where he went when he left her.⁷¹ She was alone and sitting on the couch in Robertson's bedroom when she heard the alarm clock ring and the shower start running. "In a couple of minutes," she heard a struggle commence. During the struggle, she heard Terry Robertson screaming for Earl, and saying, "no, Jimmy; no, Jimmy." This lasted for about a minute or so, and she could hear even though she had her hands over her ears. She went outside, smoked a cigarette and returned to Robertson's room. She testified on cross-examination that she did not leave because she was scared. Tr. pp. 1597-99; pp. 1625-27.

Shortly thereafter, she went upstairs at his direction and saw him covered with blood. She went downstairs and, unable to leave through the garage, retrieved a knife from the kitchen and gave it to him. Following his instructions, she went back to his bedroom and sat on the couch. Within minutes, the shower stopped running and she heard a loud thumping noise for about a minute.⁷² Robertson then came downstairs and again was covered in blood. Because "he thought he heard something upstairs," he went back upstairs for about five minutes. Upon his return, he took off all of his clothes and showered. Tr. pp. 1599-1602; p. 1616.

Once he had showered, he put the bloody clothes in a garbage bag that was in front of the fireplace. He also placed other items in the bag, but Moon did not see what they were.⁷³ By now, it was between 7:30 and 8:00 a.m. Again following his instructions, Moon grabbed the bag and they went outside through the downstairs door, which he then broke with the end of a rake.

⁷¹ In her estimation, "he was a little more hyper, but he was acting pretty much the way he always does." Tr. 1596.

⁷² She said that the noise sounded "like a hand beating on a pillow." Tr. p. 1601.

⁷³ She did, however, remember seeing Earl's wallet and Terry's purse on the pool table in the basement; and she saw Robertson take Earl's credit card from the wallet. Tr. pp. 1615-16; 1635.

Next, they walked up to the driveway and she put the bag in the trunk of a red Mazda.⁷⁴ They waved to a neighbor who saw them. Tr. pp. 1602-04; pp. 1615-16.⁷⁵

After the car was loaded, they got on I-77 and headed north. They stopped at the Peach stand in Fort Mill, where they bought gasoline, as well as Neosporin and some band-aids because Robertson had "cut his finger pretty badly" when he broke the glass on the window to the back door.⁷⁶ They used Earl's credit card to pay for these items. Tr. pp. 1604-06. Also, Moon called Savage and told her that she was on her way to Philadelphia. Tr. pp. 1542-43; 1605-06.⁷⁷ Following this stop, they got back onto I-77 North and drove until they reached I-85 North. They then drove until they reached I-95 North and headed to Philadelphia.⁷⁸ Tr. pp. 1606-07.

During their ten hour trip to Philadelphia, Robertson repeatedly said that his brother was going to be proud of him, and he told Moon that he had broken off a knife blade in his mother's neck during the course killing her. He said that he was glad that it was over, and that he was going to use the insurance money to buy a house on the lake and renovate a local club. Finally, he told her the plan was to pick up Chip, return home, discover the bodies and call 911. Tr. pp. 1609-16; pp. 1632-33; pp. 1641-42.

Also, they stopped at a rest area in Virginia and at a rest area called the Chesapeake House in Maryland. While at the Chesapeake House, Robertson got the garbage bag containing

⁷⁴ Another witness testified that the Mazda was registered to Chip. Tr. p. 1409.

⁷⁵ This neighbor was Wayne Langley, Sr., and he corroborated this portion of Moon's testimony. Tr. pp. 1423-28.

⁷⁶ Photographs taken after Robertson's arrest reflect that he his index finger had abrasions and injuries, and he had an abrasion on his elbow. Tr. pp. 1486-88; State's Ex. 138.

⁷⁷ Glenda Johnson, the cashier at the Peach Stand corroborated their stop at the store, as did a receipt for their purchases (State's Ex. 90), a surveillance videotape from the store (State's Ex. 89) and still photographs from the tape (State's Exs. 123-124). Tr. pp. 1428-35; 1438-42.

⁷⁸ They took turns driving. At some point, they stopped at a rest area, where Robertson telephoned work and told his employer that he would not be coming to work. Tr. p. 1606.

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the bloody clothes and other items out of the trunk, and he threw it in a dumpster. They eventually went on to Philadelphia and were arrested outside of Chip's apartment. Tr. pp. 1607-15; 1632-33; 1641-42.

Based upon information provided by Moon, law enforcement officers from other jurisdictions located a credit card receipt for the purchase of gasoline on Earl's credit card at a Shell station in Lady Smith, Virginia (State's Ex. 91), and officers recovered the garbage bag and its contents from a dumpster at the Chesapeake House exit off I-95 in Maryland. Among the items in the bag were a beach towel; a gray t-shirt intertwined with a maroon sweatshirt; a small roll of toilet paper; a white t-shirt; a pair of yellow Union Bay pants; two prescription bottles of Ritalin with Chip Robertson's name on them; the Eaton aluminum baseball bat and the Craftsman claw hammer used by Robertson on his parents; a bottle of Zydol dry powder; a kitchen towel; a serrated, wooden handled knife; a file with a wooden handle and a scalpel with a black plastic handle; a pair of moccasins; two check receipts with the name of Robertson on them; check numbers 5219 and 5220; a check receipt and check number 6111, with the name Robertson on it; a kitchen hand towel. Tr. pp. 1442-78; 1530-31.

Subsequent to Robertson's arrest in Philadelphia, an officer from the University of Pennsylvania Police Department recovered Robertson's wallet (State's Ex. 88) from Robertson's back pocket. Tr. pp. 1468-73. Inside the wallet, the officer found a South Carolina identification card with Robertson's name on it (State's Ex. 88.1); a NationsBank Visa card in Earl Sr.'s name (State's Ex. 88.2); and a receipt from the Peach Stand (State's Ex. 88.3). Tr. pp. 1478-80.

The investigation at the crime scene revealed that the back door was open and the glass in the window had been broken, in the condition that Moon described, a yard rake with a broken

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handle was found in Robertson's back yard. Subsequent testing by SLED's trace evidence department revealed that a smear on the rake handle was consistent with paint on the rear door. Tr. pp. 1347; 1657-59; 1748-51.

Inside the house, there was broken glass on the floor near the back door. Earl was found, clad only in his underwear, in a hallway at the top of the stairs. He was lying face down in a large pool of blood, and his hands were underneath his body. There was blood "all about the upper portion of the staircase" and in the hallway. Terry was found just to the right of the bed in the master bedroom. The sheets were pulled on top of her. Both "multiple wounds" and blood "all over the bed" were clearly present. A knife with a broken tip was found in the bed and the tip of the knife was found under Terry. A towel with blood on it (State's Ex. 13) was found under the couch downstairs. Tr. pp. 1354-55; 1397-1400; 1659-66; 1675-77; 1689; 1700; 1710-11; 1715-16.

On Earl's underwear, SLED Agent Bret Baker, an expert witness in latent prints and crime scene analysis, found what appeared to be an impression made by the heel of a shoe of some other object after the other had come into contact with blood. See State's Ex. 3.1. However, the impression was "too partial for him to render a meaningful conclusion." Tr. pp. 1679-80. An impression on a floral sheet found near Earl's body, similar to the one found on his underwear, was consistent with the fabric weave of several pairs of socks retrieved from the dumpster in Maryland. Tr. pp. 1691-95. Likewise, the top fitted sheet off of Terry's bed had impressions which were consistent with the fabric weave of three of the socks found in the dumpster in Maryland. Tr. pp. 1700-03. Earl's wallet was found at the end of the hallway, and

Terry's purse – with the “contents somewhat hanging out” was found in the bedroom. Tr. pp. 1707-09.

Downstairs, Agent Baker found a note in the kitchen, in which Robertson told his parents that he had “gone to get Chip in his car. Sorry, but he needs me right now. Love, Jim.” (State's Ex. 24). His right palm print was on the note. Agent Baker found a pad with a “to do” list (State's Ex. 25) from a table in the basement. Subsequent handwriting analysis revealed that Robertson wrote State's Ex. 24.

Agent Baker gave blood spatter opinion evidence in the sentencing phase, which he supported with photographs (State's Exs. 206-37) and a videotape (State's Ex. 279).⁷⁹ He testified that the blood spatter patterns he found in the hallway were indicative of a beating and he opined that Earl had been hit at least four times with a circular, long, cylindrical object. Most of the blood spatter was 18-24” from the floor, indicating that Earl was on the floor throughout most of the beating. Also, he found a piece of brain matter and skull. He likewise gave opinion evidence concerning the blood spatter found in the bedroom around Terry. He found transfer blood on the purse and a blood smear on a Tilex bottle at the top of the stairs, near Earl's body. He also testified, in both phases of the trial that he could smell the odor of Tilex in the hallway. Tr. pp. 2379-83; 2386-2415.

In a search of the red Mazda conducted pursuant to a search warrant, Tr. pp. 1485-86; 1496-98; 1653, Agent Baker collected a number of items. Of particular relevance were a receipt from a Shell station in Ladysmith, Virginia; a Fred Pryor seminar manual with a list written on the back of it; check number 5233, on Earl and Terry Robertson's account (and a duplicate); a

⁷⁹ The jurors were not shown the victims on this video.

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check on Earl and Terry's account, number 5221 (and a duplicate) which "was partially written out beginning with" Robertson's name and the date November 10, and both Moon's and Robertson's fingerprints. Tr. pp. 1726-32. Subsequent handwriting analysis revealed that Robertson wrote the note on the Fred Pryor manual. Tr. pp. 1820-24.⁸⁰

Other testimony showed that three Caucasian head hairs recovered at autopsy from Earl's right hand were consistent with his hair, as were numerous grey and brown Caucasian head hairs recovered from the upstairs bathroom. Numerous brown Caucasian head hairs recovered from the claw hammer (State's Ex. 64) were consistent with either Terry or Earl. Moreover, a number of Caucasian head hair fragments recovered from the socks retrieved from the dumpster were similar to those of the victims, and they could not be eliminated as the source of those hairs. However, the fragments were too small to make further analysis of them. Tr. pp. 1751-56; 1758-59.

Restriction Fragment Length Polymorphism (RFLP) DNA analysis was performed on a number of items recovered in the case. Cuttings from one of the white socks and the yellow Union Bay pants retrieved from the dumpster in Maryland matched Earl's DNA. The probability of selecting an unrelated person at random having a DNA profile matching the DNA on these items is one in 35,000,000,000 blacks and "one in four point seventy billion caucasians." Blood found on the Tilex bottle and a cutting from another white sock found in the dumpster also matched Earl's DNA. The DNA found on cuttings from the sheet, a swab of the purse strap, a swab from the end of the knife blade, a cutting from the Union Bay pants, cuttings from two socks retrieved from the dumpster and a cutting from the kitchen towel found in the dumpster, all

⁸⁰ Handwriting analysis also linked Robertson to a check seized from the dumpster (State's Ex. 85). Tr. pp. 1824-25.

matched Terry's DNA profile. The probability of selecting an unrelated person at random with DNA profile matching the DNA on those items is approximately "one in one hundred and eighty-eight billion blacks and one in five point five trillion caucasians." Tr. pp. 1830-37; 1839-51; State's Ex. 189 (RFLP results work sheet); State's Ex. 187 (report of DNA expert).

DNA from stains found on the green pillowcase and a white pillow cover also matched Earl's DNA; and the probability of selecting someone at random with a matching DNA profile is approximately "one in one point nine trillion blacks and one in one hundred and ninety billion caucasians." The DNA profile from a stain on the "low end" of the claw hammer was consistent with either Earl or Robertson's DNA, which was "not uncommon in this case because the suspect ... is the sons of the victims." The DNA profile of a cutting from a beige sock retrieved from the dumpster and a stain found on the tip of the bat was consistent with being a mixture of different individuals, and neither Earl, Terry nor Robertson could be eliminated as the source of these stains. However, Moon was eliminated as a contributor. Tr. pp. 1851-57; State's Exs. 186-187.

Dr. Joel Sexton, the forensic pathologist who performed the autopsies on Terry and Earl Robertson, testified at length in both phases of the trial about his findings. His sentencing phase testimony involved opinion evidence, relevant to the statutory aggravating circumstance of physical torture, concerning whether the victims were conscious throughout the attacks, whether they may have suffered pain and whether any of the knife wounds were deliberately inflicted after the victim's were immobilized. Tr. pp. 1784-1808; 2249-2302.

His sentencing phase findings as to Terry Robertson were that she had three pairs of hammer tine marks on the left side of her head, where most of her injuries were located. Tr. p.

2277, ll. 3-8. There were also three deep lacerations on her back associated with hammer tines (Tr. p. 2278, ll. 8-16) and a tine mark on her shoulder. Tr. p. 2281, ll. 22-23. An injury to the back of her right hand was caused either by the tines or a knife. Tr. p. 2288, ll. 6-10.

Dr. Sexton also found injuries that were consistent with the lateral edge of a hammer. There were two such lacerations on the left side of Terry's head (Tr. p. 2277, ll. 9-14), one on the back of her neck (Tr. p. 2278, ll. 22-24) and another on the side of her head. Tr. p. 2278, l. 25 – p. 2279, l. 1. Additionally, he found injuries consistent with knife wounds. One was on the back of Terri's neck (Tr. p. 2279, l. 25 – p. 2280, l. 6); three lacerations were found on the front of her shoulder (Tr. p. 2280, ll. 23-24); a "very shallow wound" across her wrist was found that "runs parallel to a much deeper incised wound" (Tr. p. 2284, ll. 3-5); there were four cuts on the left forearm (Tr. p. 2285, ll. 17-25); one on the back of her left wrist (Tr. p. 2286, ll. 22-24); three stab wounds in her lower right back (Tr. p. 2288, ll. 25-p. 2289, l. 12);⁸¹ a cut across the left cheek and jaw (Tr. p. 2291, ll. 9-7); multiple cuts on her neck (Tr. p. 2291, l. 10); and a "mutilating injury" across the right side of her face. Tr. p. 2292, ll. 14-19. Dr. Sexton characterized a number of the knife wounds as "deliberate" and opined that they were inflicted after Terry was immobilized or no longer moving. Some were inflicted after her heart had stopped. Tr. p. 2284, l. 17 – p. 2285, l. 14.

The various injuries Dr. Sexton found on Terry were all detailed in diagrams which were introduced as State's Ex. 267. Dr. Sexton opined that most of the knife wounds were perimortem; and he described them as "superficial" because they did not cause her death. The fatal wounds were "the ones that are in the left temporal region where there were multiple

⁸¹ One wound was close to "an actually impacted the spine. This wound was only 2¼." Two did not enter the abdominal cavity but only went about "four inches into the soft tissue of the back."

fractures in the skull." This included a "pair of marks" on the left ear and two more above the left ear, as well as "deeper lacerations that extend around to the back side and had [multiple fractures] underlying them." Tr. pp. 2294-96; State's Ex. 268.

Dr. Sexton gave similar testimony regarding the injuries that he found on Earl Robertson's body. He testified that he found a number of hammer tines injuries. He found one penetrating on the head (Tr. p. 2258, ll. 14-25); two pairs of injuries on the left side of the head (Tr. p. 2259, ll. 20-24); and tines marks on the temple (which actually could have been caused by "the blunt edge of the hammer turned sideways") that pinched part of the ear off (Tr. p. 2260, ll. 6-12). He found similar injuries on the right shoulder (Tr. p. 2262, ll. 11-19); the right side of Earl's neck (Tr. p. 2263, ll. 13-15); on the back of Earl's left hand (Tr. p. 2265, ll. 11-215); and on the back of Earl's right hand. Tr. p. 2265, ll. 18-23.

Dr. Sexton further testified that he found two linear abrasions consistent with the baseball bat on the top of the spine (Tr. p. 2253, ll. 22-24); one on the left side of Earl's back (Tr. p. 2254, ll. 7-10); and one on the upper right back. Tr. p. 2254, ll. 21-22. Dr. Sexton likewise found another injury consistent with the hammer on Earl's ear. Tr. p. 2260, ll. 7-11. There was a stab wound, consistent with being caused by a knife, on Earl's hand (Tr. p. 2252, l. 17); a cut from a knife or other sharp object on the right back side of Earl's neck (Tr. p. 2252, ll. 18-20); a perimortem knife injury "just above the left knee" (Tr. p. 2264, ll. 3-9); and another injury on the ride side of the neck. Tr. p. 2263, ll. 15-16.

As with the injuries to Terry, Dr. Sexton utilized several diagrams (State's Ex. 267) to illustrate Earl's various injuries. Again, he indicated that the knife wounds were superficial because they were not fatal. However, many would have been painful. Tr. pp. 2269-72; State's

Ex. 267. He further testified that the head injuries would not have caused immediate unconsciousness or immediate death. Also, the blow that "caused the most damage" and was the most likely cause of death was the one on the top of the head, which he testified was consistent with a bat. Tr. pp. 2274-76; State's Ex. 267.

After reviewing the graphic nature of Dr. Sexton's testimony, it is clear that he was able to both identify the many different blows and show these injuries to the jury through pictures and diagrams. When this testimony is viewed in combination with Moon's testimony, the DNA evidence and other forensic evidence discussed above, the Court finds that the sentencing jury had already been presented with an overwhelmingly graphic and vivid picture of what had occurred at the time of the murders before Ms. Cascio testified. The jury was, therefore, aware of both the heinous nature, not only of the crimes, but also of the defendant who committed them.

Thus, the Court finds that, although admissions testified to by Ms. Cascio are significant, they are not so strong that this Court can conclude that there is a reasonable probability of a different result but for the presentation of her testimony. *See Strickland*, 466 U.S. at 695 (to prove that "there is a reasonable probability that ... the sentencer ... [can] conclude[] that the balance of aggravating and mitigating circumstances [do] not warrant death"); *see also Wiggins*, 539 U.S. at 537. The obvious lack of any discernable prejudice from cross-examination is manifestly clear when Dr. McKee's subsequent reply testimony is considered on this issue. *See* Tr. pp. 3067-72.⁸² The Court finds that his testimony presented the substance of many, if not all

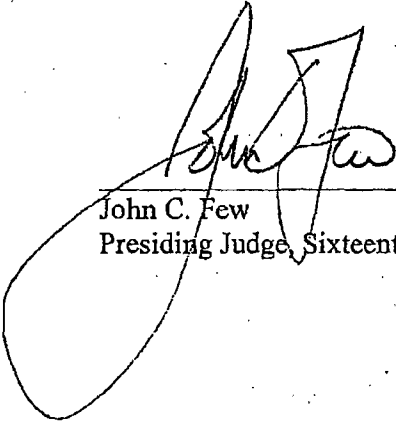
⁸² Again, any supposed impropriety of Dr. McKee's testimony about the information he received from Robertson under *Hudgins* is not properly before this Court because the trial judge overruled trial counsel's objection, and ruled that the statements made by Robertson were admissible. Tr.

of Ms. Cascio's testimony on cross-examination; and he testified that the factual information provided to him by Robertson was virtually identical to those facts in the notes of Ms. Cascio. Tr. pp. 3066-67. For the above-stated reasons, the Court finds that this allegation is without merit.

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief in this matter is dismissed with prejudice; and
2. That Robertson is remanded to the custody of Respondent.

IT IS SO ORDERED.



John C. Few
Presiding Judge, Sixteenth Judicial Circuit

March 7, 2008

pp. 3044-57. Thus, the question of his ruling could have been raised on direct appeal and is barred in PCR. *See* § 17-27-20(b); *Drayton*, 312 S.C. at 9, 430 SE2d at 520 (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel). Moreover, the Court concludes, in the alternative, that this objection was properly overruled.

3758

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on April 23, 1998 the Grand Jurors of York County present upon their oath:

MURDER

That James Dejarnette Robertson did in York County on or about November 25, 1997, with malice aforethought, kill one Earl Robertson, Sr. by means of beating and/or stabbing the said victim and said victim died as a result thereof, all in violation of Section 16-3-10, 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.

LE Pope
SOLICITOR

3759

WITNESSES

CD/Hager

DOCKET NO. 98-GS-46-1020

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

April 23, Term 1998

THE STATE

vs.

JAMES DEJARNETTE ROBERTSON

ARREST WARRANT NUMBER

F337309 ✓

ACTION OF GRAND JURY

TRUE BIL

Reba Freeman
Foreperson of Grand Jury

4/23/98

VERDICT

Guilty

May B. Linn 3/20/1999
Foreperson of Petit Jury

Date:

Indictment for

MURDER

SC Code: 16-3-10

CDR Code: 0116

CLERK OF COURT
YORK COUNTY, SC

2005 MAR -9 PM 2: 10

COURT REPORT TRUE COPY

3760

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

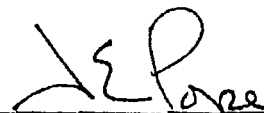
INDICTMENT

At a Court of General Sessions, convened on April 23, 1998 the Grand Jurors of York County present upon their oath:

MURDER

That James Dejarnette Robertson did in York County on or about November 25, 1997, with malice aforethought, kill one Terry Robertson by means of beating and/or stabbing the said victim and said victim died as a result thereof, all in violation of Section 16-3-10, South Carolina Code of Laws, (1976, as amended).

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



SOLICITOR

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

April 23, Term 1998

THE STATE

vs.

JAMES DEJARNETTE ROBERTSON

Indictment for

MURDER

SC Code: 16-3-10

CDR Code: 0116

ARREST WARRANT NUMBER

F337314 ✓

ACTION OF GRAND JURY

TRUE BILL

Robert Freeman
Foreperson of Grand Jury

4/23/98

VERDICT

Guilty

Jerry B. Quinn 3/20/1999
Foreperson of Petit Jury
Date:

CERTIFIED TRUE COPY
2006 MAR -9 PM 2:10
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

3761

3762

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on April 23, 1998 the Grand Jurors of York County present upon their oath:

ARMED ROBBERY

That James Dejarnette Robertson did in York County on or about November 25, 1997, while armed with a deadly weapon, feloniously take from the person or presence of Earl Robertson, Sr., by means of force or intimidation goods or monies of said Earl Robertson, Sr., all in violation of §16-11-330, Code of Laws of South Carolina, (1976, as amended).

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



SOLICITOR

3763

WITNESSES

CSD/Hager

DOCKET NO. 98-GS-46-1022

The State of South Carolina

County of York

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

April 23, Term 1998

hereby appear in my own proper person and pl guilty to the within indictment or to

ARREST WARRANT NUMBER

F337355 ✓

THE STATE

vs.

Defendant

Witness:

ACTION OF GRAND JURY

TRUE BILL

JAMES DEJARNETTE ROBERTSON

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2006 MAR -9 PM 2:10
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Richard Freeman
Foreperson of Grand Jury
Date: 4/23/98

VERDICT

Guilty

Indictment for

ARMED ROBBERY

James B. Munn 3/20/1999
Foreperson of Petit Jury
Date:

SC Code: 16-11-0330

CDR Code: 0139

3764

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on April 23, 1998 the Grand Jurors of York County present upon their oath:

FINANCIAL TRANSACTION CARD FRAUD

That James Dejarnette Robertson did in York County on or about November 25, 1997, wilfully and unlawfully with intent to defraud, use a Visa Card issued to Earl Robertson, Sr. to obtain goods, money, or services or any other things of value, by presenting the financial transaction card without the authorization or permission of the cardholder, all in violation of §16-14-60, Code of Laws of South Carolina, (1976, as amended).

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


SOLICITOR

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3

WITNESSES

YCS/D/Hager

The State of South Carolina

County of York

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

April 23, Term 1998

I hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

F337356 ✓

THE STATE

vs.

Defendant

Witness:

C.C.C. PLS. AND G.S.

JAMES DEJARNETTE ROBERTSON

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

R. Freeman
4/23/98

VERDICT

Guilty

Indictment for

FINANCIAL TRANSACTION CARD FRAUD

SC Code: 16-14-60

CDR Code: 0062

For person of Petit Jury

Date:

Jerry B. Quinn 3/24/1999

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DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
John C. Few, Circuit Court Judge

JAMES D. ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

JOSEPH L. SAVITZ, III
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel was ineffective at sentencing (1) for advising Robertson that anything he revealed to Ms. Cascio – including theretofore undisclosed details about the crimes – was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio's notes by the State and (3) for calling Ms. Cascio as a defense witness at sentencing under these circumstances.

STATEMENT OF THE CASE

In March 1999 Jimmy Robertson stood trial in York County, before Judge John C. Hayes, III, and a jury, on indictments charging him with the murder of his parents, Terry and Earl Robertson, as well as a related armed robbery and credit card fraud. The Robertsons were beaten to death the morning of November 25, 1997.

The State sought the death penalty, relying on five statutory aggravators: (1) the murders were committed during armed robbery; (2) the murders were committed during larceny involving the use of a deadly weapon; (3) the murders involved physical torture; (4) the murders were committed for money; and (5) two people were murdered pursuant to one scheme. *S.C. Code Section 16-3-20(C)(a)*.

Earl Robertson was an executive at Springs Industries. The State asserted that Robertson had killed his parents so that he and his younger brother, Chip, would inherit their money before their father could invest it in a golf course he hoped to build after retiring from Springs. Robertson talked with Chip twice on the telephone before the homicides and was arrested outside his brother's Philadelphia apartment later that day.

Terry Robertson was beaten to death with a hammer as she lay in bed. Earl Robertson was attacked with the hammer and a baseball bat as he got out of the shower. Robertson's accomplice, Meredith Moon, claimed that he was drenched in his parents' blood when he was finished. Moon was the State's key witness. She and Robertson were arrested in Philadelphia before they could meet up with Chip.

The defense rested without presenting any evidence during the guilt phase. The jury found Robertson guilty as charged after deliberating less than two hours.

At sentencing, the State introduced a substantial amount of victim impact evidence, as well as evidence of Robertson's misbehavior in the years leading up to the homicides. Robertson had previously discussed killing his parents on a number of occasions. He was involuntarily committed to the State Hospital in 1995 because of growing concern that he would harm them, particularly his mother. He once told a roommate he wanted to kill his parents because "[t]hey have made my life a living hell."

Expert testimony suggested that something deeper than mere greed prompted these crimes. Intrafamily crimes of this type display remarkable similarities: mental illness, substance abuse, ancient resentments grown poisonous and a shocking level of violence. A review of "domesticated" homicides concludes that "in general murderous attacks tended ... to grow wilder as the relationship between victim and killer grew closer, as the fury of betrayal or years of anger were reflected in the number of shots, blows, or cuts inflicted, often on an already lifeless body." Roger Lane, *Murder in America* (1997), p. 259.

Referring to the condition of the victims' bodies in this case, one expert witness observed, "[H]e obliterated them." Robertson told another, "Twenty-two years of hatred came out." A seasoned SLED crime scene investigator testified, "[Y]ou look and see this type of mutilation and you think of anger, a lot of anger."

At sentencing, the defense introduced evidence that Robertson's psychological problems were exacerbated by his consumption of amphetamines before the homicides. A neurologist testified that Robertson was "out of control" at the time. A neuropsychologist stressed that the crimes were the product of a dysfunctional brain. (A State psychologist disagreed with these conclusions, finding Robertson merely antisocial.)

At the conclusion of sentencing, the judge refused a defense request to instruct the jury that “[e]vidence of voluntary intoxication is a proper matter for consideration ... and mitigation of punishment.” (He had previously charged the jury that “voluntary intoxication is never an excuse for ... a crime” in his guilt phase instructions.)

In addition to the five statutory aggravators previously listed, the judge instructed the jury on four statutory mitigators: (1) Robertson had no prior convictions involving the use of violence against another person; (2) the murders were committed while Robertson was under the influence of mental or emotional disturbance; (3) Robertson’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (4) Robertson’s age and mentality at the time of the crimes. *S.C. Code Section 16-3-20(C)(b)*.

The jury deliberated for just over three hours and thirty minutes, then sentenced Robertson to death for both murders after finding all five aggravators alleged by the State.

In April 2002, the undersigned filed an Initial Brief of Appellant on Robertson’s behalf presenting three issues; among them: “The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.” Robertson asked the Court to relieve counsel and permit him to appear *pro se*. After Judge Hayes found Robertson competent to waive appellate counsel on remand, the Supreme Court relieved the undersigned and allowed Robertson to proceed *pro se*. Robertson filed his own Initial Brief of Appellant, but omitted the issue addressing the mitigating effect of voluntary intoxication. Robertson subsequently moved to abandon his direct appeal. On remand, Judge Hayes found Robertson competent to waive his direct appeal. After conducting the proportionality review mandated by *S.C. Code Section 16-3-25*, the Court dismissed the appeal.

On March 1, 2006, counsel appointed to represent Robertson filed an application for post-conviction relief alleging that he had not received effective assistance of counsel. On January 29 through 31, 2007, Judge John C. Few held an evidentiary hearing. At the outset of the hearing, counsel amended the application to include twelve allegations of trial counsels' ineffectiveness, including:

Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because of (a) Cascio's lack of experience; (b) counsels' agreement to provide Ms. Cascio's notes to the State; (c) counsels' failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) counsels' presentation of Ms. Cascio as a witness.

Order of Dismissal, p. 8. The judge denied relief from the bench and later by written order (prepared by counsel for the State) dated March 7, 2008.

Robertson, through his (once again) undersigned counsel, now petitions the Supreme Court for Writ of Certiorari to review the denial of post-conviction relief.

ARGUMENT

Trial counsel were ineffective at sentencing (1) for advising Robertson that anything he revealed to Ms. Cascio – including theretofore undisclosed details about the crimes – was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio’s notes by the State and (3) for calling Ms. Cascio as a defense witness at sentencing under these circumstances.

Toni Cascio was hired by the defense “to conduct a social history assessment of Jimmy Robertson,” *not* “to get the details of the crime,” according to defense counsel. App. p. 2856, lines 4-18; PCR Tr. p. 289, lines 15-20. She testified as an expert for the first time ever at Robertson’s sentencing. App. p. 2854, line 24 – p. 2855, line 1. Cascio essentially obtained Robertson’s confession, including previously undisclosed details about the crimes. PCR Tr. p. 289, line 11 – p. 290, line 3.

Robertson testified that counsel had advised him “to be completely open and honest” with Cascio. PCR Tr. p. 31, line 9. “I was told to speak frankly with respect to what happened that evening,” Robertson testified at the PCR hearing. App. p. 31, lines 9-11. Counsel told Robertson that anything he told Cascio would be privileged, “as if I was speaking with my attorneys.” App. p. 32, lines 17-22.

Cascio was the last major defense witness at sentencing. PCR Tr. p. 220, lines 15-19. Prior to Cascio’s testimony, the Solicitor requested the notes of her interview with Robertson, which included the theretofore undisclosed circumstances of the crimes as related to Cascio by Robertson. App. p. 2604, lines 23-25. Defense counsel surrendered Cascio’s notes to the State without objection. App. p. 2605, lines 19-23; App. p. 2749, lines 12-17; PCR Tr. p. 187, lines 5-15.

As he reviewed Cascio's notes overnight, the Solicitor testified at the PCR hearing, he realized that he had been given a "gift ... [a]nd I was just hoping I didn't blow it." PCR Tr. p. 218, lines 9-16. He need not have worried. The Solicitor's cross-examination of Cascio was so damaging to Robertson that he thereafter used it to teach fledgling prosecutors. PCR Tr. p. 220, line 24 – p. 221, line 6.

Prior to the Solicitor's cross-examination of Cascio, Robertson had not directly incriminated himself. PCR Tr. p. 147, lines 17-20; PCR Tr. p. 221, lines 7-12. But "[i]t [was] as if Mr. Robertson was testifying against himself," one of his defense lawyers acknowledged at the PCR hearing, "when those notes were brought into trial." PCR Tr. p. 126, lines 12-17. Both defense counsel – and the PCR judge – agreed that Cascio's disclosure of Robertson's disturbing admissions was the most damaging evidence *in aggravation* adduced at sentencing. PCR Tr. p. 88, lines 16-20; PCR Tr. p. 262, lines 7-17; PCR Tr. p. 269, lines 6-10; PCR Tr. p. 380, lines 13-15.

The Solicitor's cross-examination of Cascio is reproduced in the Appendix on pages 2895 through 3025. The Court's attention is especially directed to the last ten pages. Among other things, Robertson reveals that he had decided not to use an autographed baseball bat to kill his father because it was valuable and "he didn't want to ruin it" and that he had also considered using an electric drill on his father "to end the matter." App. p. 3015, lines 10-21; App. p. 3019, line 7 – App. 3020, line 1. There is much more, which is summarized on pages 79 and 80 of the Order of Dismissal.

At the PCR hearing, the Solicitor understandably sought to downplay the importance of this evidence to the death sentence which resulted. He testified that it "really did no more than confirm what the physical evidence said. ... [I]f anything, it shored that up." PCR Tr. p. 204, lines 11-23.

At trial, however, the Solicitor had repeatedly exploited his cross-examination of Cascio throughout his closing argument. App. pp. 3125-3172.

At the PCR hearing, both defense counsel agreed that, as a mitigation witness, Cascio fell somewhere along the continuum between "bad" and "a disaster." PCR Tr. p. 189, lines 8-14; PCR Tr. p. 271, lines 6 and 7. They also acknowledged that calling Cascio as a witness under these circumstances had been a prejudicial mistake. PCR Tr. p. 148, line 21 – p. 149, line 6; PCR Tr. p. 270, line 22 – p. 271, line 2.

The PCR judge agreed "that once the notes were made aware (*sic*) to the lawyers they should have done everything they could to keep those notes from being turned over to the State." PCR Tr. p. 378, lines 5-8. He denied Robertson's PCR application because of his belief that, under *Rule 705, SCRE*, "the underlying notes or other data must be produced if the expert witness testifies" and because he further believed that "Robertson was not prejudiced by the State's cross-examination concerning Robertson's admissions concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury." Order of Dismissal, pp. 88 and 93.

Rule 5, SCRCrimP, governs discovery in criminal cases. Subsection (b)(2) of that rule states:

Except as to scientific or medical reports, this [role] does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statement made by the defendant, or by prosecution or defense witnesses, or by perspective prosecution or defense witnesses, to the defendant, his agents or attorneys.

Rule 705, SCRE, one of four rules dealing with expert testimony, provides:

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

“There is no right to discovery in a criminal case unless permitted by statute or court rule.” *State v. Miller*, 289 S.C. 316, 345 S.E.2d 489, 490 (1986).

In *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452, 455 (1996), a case interpreting *Rule 5*, the Court recognized that the role of an expert such as Ms. Cascio is “not to investigate crimes or the occurrence in question.” More to the point:

There is nothing in the language of the rule that requires [a party] to produce an expert’s *notes* of an examination. [Citation omitted.] The notes taken during an interview ... are merely the raw data from which the expert may later draw the conclusions that are noted in a report or test result.

Nor does *Rule 5* “authorize the trial judge to require parties to generate written reports solely for the benefit of the opponent.” *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873, 878 (2007).

Rule 705 does not appear to have been the subject of significant judicial interpretation in this State. See, for example, *State v. Slocumb*, 336 S.C. 619, 521 S.E.2d 507 (Ct. App. 1999).

In any case, both rules are subject to *Rule 403, SCRE*, which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

A PCR applicant alleging that trial counsel was ineffective must show (1) counsel's performance was deficient and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008). "[W]hen a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590, 596 (2007), quoting *Strickland v. Washington*, 466 U.S. at 695. On the other hand, "the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury." *State v. McClure*, 342 S.C. 403, 537 S.E.2d 273, 275 (2000).

If Cascio's notes containing Robertson's damaging admissions were (as the State contends) discoverable under either *Rule 5* or *Rule 705*, then defense counsel were ineffective for advising Robertson that anything he revealed to Cascio was not subject to discovery by the State. "Failure to inform a client of his Fifth Amendment rights and the *consequences of exercise and waiver of those rights* falls below an objective standard of reasonable representation." *Brown v. State*, 340 S.C. 590, 533 S.E.2d 308, 311 (2000) (emphasis added). If her notes were not discoverable under those rules, then counsel were ineffective for consenting to their disclosure. In either case, counsel were ineffective for calling Cascio as a defense witness at sentencing under these circumstances. See, for example, *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

Defense counsels' deficiency in this regard could not possibly have been harmless at sentencing. At the conclusion of the PCR hearing, the judge himself observed:

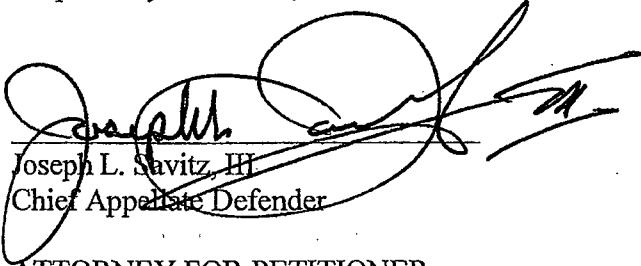
Meredith Moon has already testified about a lot of things that Dr. Cascio quotes Robertson as having said. Undoubtedly, the way that Robertson presents it to Cascio – the way it comes out through Cascio – is significantly more damaging than it was coming through Meredith Moon. But nevertheless, a lot of that testimony is already in the record to some extent.

PCR Tr. p. 380, lines 11-17. In the Order of Dismissal, he wrote, “Robertson was not prejudiced by the State’s cross-examination concerning Robertson’s admissions [to Cascio] concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury.” But, even without considering *State v. McClure*, that is not the test: The admission of improper evidence is harmless only where the evidence is *merely* cumulative to other evidence. *State v. Price*, 268 S.C. 494, 629 S.E.2d 363 (2006). The PCR judge himself acknowledged that the information contained in Cascio’s notes concerning the details of the homicides was not merely cumulative, but was in fact the most damaging evidence in aggravation adduced at sentencing.

CONCLUSION

At the PCR hearing, Robertson satisfied his burden of establishing that defense counsel were prejudicially deficient at sentencing. For this reason, the Court should grant certiorari, allow full briefing of this important issue and, ultimately, reverse Robertson's death sentence and remand for resentencing.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of April, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

John C. Few, Circuit Court Judge

JAMES D. ROBERTSON,

PETITIONER,

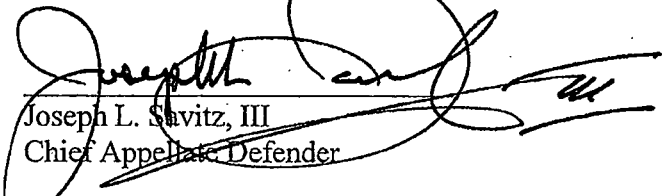
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on William Edgar Salter, III, Esquire this 15th day of April, 2009.


Joseph L. Savitz, III
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of April, 2009.

Karen D. Elliott (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

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

April 15, 2009

William Edgar Salter, III, Esquire
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: James D Robertson v. State of South Carolina

Dear Ed:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed today with the S.C. Supreme Court.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Savitz", with a large loop at the end.

Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosures



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

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

April 15, 2009

Mr. James D Robertson #5067
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

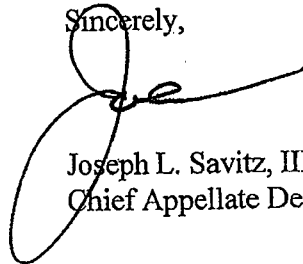
Re: Your appeal

Dear ~~Mr. Robertson:~~ 

Enclosed please find a copy of the petition for writ of certiorari and a copy of the appendix in your case that I filed today with the South Carolina Supreme Court on your behalf.

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

Sincerely,



Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosures

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From York County
Honorable John C. Few, Circuit Court Judge**

JAMES D. ROBERTSON,

Petitioner,

v.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

**HENRY D. McMASTER
Attorney General**

**JOHN W. McINTOSH
Chief Deputy Attorney General**

**DONALD J. ZELENKA
Assistant Deputy Attorney General**

**WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General**

**P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305**

**KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit
1675-1A York Hwy.
York, South Carolina 29745-7422
(803) 628-3020**

ATTORNEYS FOR RESPONDENT.

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PETITIONERS' QUESTION PRESENTED

Trial counsel was ineffective at sentencing (1) for advising Robertson that anything he revealed to Ms. Cascio - including theretofore undisclosed details about the crimes - was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio's notes by the State and (3) for calling Ms. Cascio as a witness under these circumstances.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether this Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State was not presented to or ruled upon by the PCR judge and he did not seek a ruling by filing a Rule 59(e), SCRCP, motion?

Whether this Court should deny certiorari because probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness?

STATEMENT OF THE CASE

Petitioner, Robertson, is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of a York County murder convictions and death sentences for killing his parents. The York County Grand Jury indicted Robertson at the April 23, 1998 term of court for two counts of murder (98-GS-46-1020 & 1021), one count of armed robbery, (98-GS-46-1022) and one count of financial transaction card fraud (98-GS-46-1023). **App. 3758-65.** On April 30, 1998, the State served him with a Notice of Intent to seek the death penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002). The State also gave notice at that time that it would rely upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; larceny with the use of a deadly weapon; and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. *See* S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2007).

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock, Esquire, and James W. Boyd, Esquire, represented Robertson.¹ Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motion hearings on July 17, September 22 and 25, 1998; November 2 and 20, 1998; December 4 and 18, 1998; and on February

¹ Thad Lee Myers, Esquire, who had originally been appointed to represent Robertson, was relieved because of a conflict of interest.

12 and 19, 1999.²

Robertson's jury trial began on March 15, 1999. The jury convicted him of all of the indicted offenses; and a sentencing phase was conducted, after his exercise of the 24-hour statutory waiting period in § 16-3-20(B). In addition to the five statutory aggravating circumstances relied upon by the State, Judge Hayes instructed the jury on the statutory mitigating circumstances that Robertson did not have any prior convictions involving the use of violence against another person; that the murders were committed while he was under the influence of a mental or emotional disturbance; that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and his age and mentality at the time of the crimes. § 16-3-20(C)(b)(1)-(2), (6) and (7). The jury found each of the alleged statutory aggravating circumstances and sentenced Robertson to death for each of the murders. Judge Hayes affirmed their decision and imposed the death sentence for murder. **App. 1-3242.**

Robertson did not file a timely Notice of Appeal but Judge Hayes entered a Consent Order granting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). At various points on appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III represented Robertson before the South Carolina Supreme Court.

On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Applicant's behalf.³ However,

² Robertson did not include the transcripts of the motion hearings in the Appendix, but his counsel has informed the undersigned that they will be included in a Supplemental Appendix.

³ The Initial Brief prepared by counsel presented three issues:

1. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.
3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.

Robertson wrote a letter to the South Carolina Supreme Court on June 3, 2002, asking the Court to relieve Mr. Savitz and allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme Court filed an Order on June 26, 2002, in which it remanded the matter to Judge Hayes for a hearing on Robertson's competency to appear *pro se*.

Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002.⁴ On October 28, 2002, Judge Hayes signed a Report in the Supreme Court of South Carolina. He found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003.⁵ The State

4/15/02 Initial Brief of Appellant at p. 1.

⁴ Robertson was present at the hearing and Bruce M. Poore, Esquire, represented him. Senior Assistant General William Edgar Salter, III, represented the State. Robertson was the only witness at the hearing.

⁵ This Brief presented seven issues for appellate review:

1. The judge erred in denying 3 separate motions for a directed verdict based on insufficient evidence and State's failure to meet the burden of proof as to first element of corpus delicti of murder at the conclusion of State's case.
2. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
3. The judge erred by denying the jury's request to take notes while being recharged as to the law during guilt phase deliberations.
4. The judge erred in revealing the location where the jurors were sequestered thereby denying appellant his constitutional right to a fair and impartial jury.
5. The judge erred in not allowing defense to define "life imprisonment" as it appears in the state statute to potential jurors during *voir dire*, thereby denying appellant a fair and impartial jury.
6. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.
7. The judge erred in sentencing appellant to death.

filed the Initial Brief of Respondent on December 31, 2003. However, Robertson subsequently indicated to the South Carolina Supreme Court that he wished to abandon his right to direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing was held before Judge Hayes on February 22, 2005, at the Moss Justice Center in York, South Carolina.⁶ In a February 23, 2005 Report to the Supreme Court, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order filed June 3, 2005, the Supreme Court of South Carolina agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003), it dismissed the appeal and it directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

On June 16, 2005, Robertson requested a Stay of Execution to file a Post Conviction Relief application. Over Respondent's opposition, the Supreme Court filed a July 7, 2005 Order granting a stay pursuant to *In Re: Stays of Execution*. The Court also appointed the Honorable John C. Few to preside over this case and directed Judge Few to hold a hearing to determine whether Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), Judge Few held a hearing at the Greenville County Courthouse on September 23, 2005.⁷ Judge Few filed an Order Appointing

Pro Se Initial Brief of Appellant at p. 2.

⁶ Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

⁷ Robertson was present at this hearing, as was Mr. Salter, who represented the State.

Counsel For Post-Conviction Relief dated September 9, 2005, appointing Michael Brown, Esquire, to represent Robertson. The Court later appointed Joseph David Matlock, Esquire, to assist in representing Robertson. Robertson filed his PCR Application on March 1, 2006. **App. 3244-51.** Respondent filed its Return on October 20, 2006. **App. 3252-62.**

Judge Few held an evidentiary hearing into the matter on January 29-31, 2007, at the Moss Judicial Center in York, South Carolina. Robertson was present at the hearing, and Messrs. Brown and Matlock, Esquires, represented him. Mr. Salter represented the State.⁸ At the outset of the PCR hearing, Robertson amended his Application and proceeded twelve specific grounds of ineffective assistance of counsel, including the following, relevant allegation (**App. 3658-59**):

Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because (a) of Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; © counsel's failure to discover Applicant's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness.

Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. **App. 3652-3757.**

Robertson served and filed a timely notice of appeal. He thereafter filed a Petition for Writ of Certiorari.

ARGUMENT

This Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was

⁸ Robertson testified on his own behalf at the hearing. He also presented testimony from his trial counsel, James William Hancock, Jr., and James W. Boyd, Esquires. The State presented the current Sixteenth Circuit Solicitor, Kevin S. Brackett; the former Sixteenth Circuit Solicitor, Thomas E. Pope, Esquire; Michael Stobbe, the Branch Chief of Inmate Records at the South Carolina Department of Corrections (S.C.D.C.); and Ms. Merry Collins, an Investigator with the Sixteenth Circuit Solicitor's Office. **App. 3263-3650.** The Court also had before it the trial transcript (including pre-trial motions hearings); the records from Robertson's direct appeal to the South Carolina Supreme Court and the waiver of his appeal; the June 16, 2005 letter request for a stay of execution; Respondent's June 21, 2005 letter opposing the request for a stay of execution; the July 7, 2005 Order of the South Carolina Supreme Court granting the stay; the Order Appointing Counsel for Post-Conviction Relief; the York County Clerk of Court's records; the Post-Conviction Relief Application and the Return. **Order, App. 3652-53.**

privileged against discovery by the State was not presented to or ruled upon by the PCR judge and Petitioner did not seek a ruling by filing a Rule 59(e), SCRPC, motion. Also, probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness.

Robertson argues that trial counsel were ineffective, with respect to their representation in the sentencing phase "(1) for advising Robertson that anything he revealed to Ms. Cascio - including theretofore undisclosed details about the crimes - was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio's notes by the State and (3) for calling Ms. Cascio as a witness under these circumstances." Respondent submits that this Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State was not raised as a specific allegation, it was not ruled upon by the PCR judge and Petitioner did not seek a ruling by filing a Rule 59(e), SCRPC, motion. Also, certiorari should be denied as to the remaining arguments because the PCR judge's ruling thereon is supported by evidence of probative value, and it is not controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

A. Summary of Ms. Cascio's trial testimony.

Ms. Toni Cascio, the defense social worker, was the last expert called by the defense. She gave a detailed social history assessment of Robertson. **App. 2852-3031.**⁹ Ms. Cascio testified that she "found that Jimmy came from a very chaotic home." She found evidence of "physical abuse and emotional abuse. And . . . definitely mental illness throughout the family." **App. 2858, ll. 4-8.** She

⁹ To do the assessment, she "looked at medical and psychological records from all members of the family." Also, she interviewed Robertson and she "examined Earl Robertson's work documents; some of [Robertson's] incarceration documents; personal notebooks of Terry Robertson. And I also conducted about 13 interviews with people from a variety of areas in [Robertson's] life." **App. 2857.**

then gave a detailed history of each member of the family.¹⁰ Robertson's grandmother described him to Ms. Casio as "a very happy outgoing child although he did have some delayed development." In particular, he was "slow to talk." She indicated that "there seemed to be poor attachment between Jimmy and his parents ... [a]t a very young age." She explained that children who are unable to form emotional attachments "have a lot of problems later on in life." Usually, they have "difficulty forming relationships because they just don't have a basis for it." Also, they "tend to be mistrustful" of others. They likewise tend to be angry and aggressive and after have self-control problems. **App. 2867-69.** She testified that Robertson began banging his head when he was one or two years old. She explained that this was "often a sign of poor attachment; and she opined that this is usually seen in children who are raised in institutional settings and orphanages. She further opined that "there is a very strong association between maternal depression," such as that experienced by Terry, and a child's poor attachment because depressed mothers tend to be less responsive to the child's needs and more involved with their own problems.¹¹ **App. 2869-73.**

Further, Ms. Cascio "found indications of physical abuse" with Robertson, including scars on his back and buttocks which he did not have a memory of receiving. "Both children confirmed that they were routinely beaten with a belt several times a week when they were pre-school and [in] grade school." Further, Robertson said that Earl, Sr., would often beat him with a belt to make him stop banging his head. Robertson's pediatric records from 1988 reflected that he was seen because

¹⁰ Ms. Cascio described the various problems that Terry Robertson had within her family as a child, including conflict with her mother, Terry's emotional and psychological problems, and Cascio opined that "a variety of indicators ... suggest that Terry was sexually abused as a child." Much of her testimony concerning Terry's childhood was corroborated, in her opinion by excerpts of Skip Meyer's notes. **Def.'s Exs. 21-22; 28; App. 2858-65; 2882-84.** Ms. Cascio testified that Earl, Sr., was very bright but ambitious and "very confrontational." She also testified that, in 1989, Spring Industries decided that he "was not leadership material." Also, many people to whom she spoke described him as "pushy and kind of domineering". **App. 2865-67.**

¹¹ Depressed mothers also do not spend as much time with a child; they use "more negative language," are more hostile, more irritable, and are more harsh or arbitrary in their discipline. Children, however, need consistency.

he had been hit with a fist.¹² App. 2873-76. Again, the multiple physical abuses, combined with psychological abuse, tends to create “negative outcomes for the children.” Through Ms. Cascio’s testimony and the extracts from Mr. Meyer’s notes, the defense established that: Terry was afraid of Earl’s temper and did not feel like she had done enough to protect her sons; there was a great deal of psychological abuse in the home, including degradation and name calling, Terry telling Robertson that she wished he had never been born and verbal abuse by Terry of both sons; the sons may have witnessed domestic violence by Terry attacking Earl; there was evidence that Chip hit women; Robertson had problems with his memory, which can be an indicator of trauma; and “everyone in the family had a history of mental illness.” Terry was diagnosed as having severe depression, bipolar disorder and obsessive-compulsive disorder. Earl was diagnosed as having depression, panic disorder and ADD. Robertson had bipolar disorder and ADD; and Chip had ADD and possibly bipolar disorder. All of these factors “set the stage for something to go wrong in adolescence.” App. 2881-82; 2876-82; 2885, ll. 10-16. See also Def.’s Ex. 24.¹³

In addition to Robertson’s problems that she had previously discussed, Ms. Cascio testified that Robertson “was often an outcast in school.” Other students teased him and did not quickly accept him. By the ninth grade, he was suicidal. He started using illegal drugs while he was at Georgia Tech University and was “very suicidal” at that time as well. He also started engaging in behavior that was consistent with mania, such as spending large sums of money and gambling.¹⁴

¹² She likewise relayed other incidents in which Earl, Sr., was physically abuse to Robertson and Chip. One incident with Chip was documented in Skip Meyer’s notes, which was introduced as Def.’s Ex. 23.

¹³ Likewise, through Cascio, counsel introduced three charts (Def.’s Exs. 25-27), which reflected psychiatric visits by the victims. These charts showed that Terry was seen in therapy roughly 170 times between 1995 and 1997, with a variety of problems, including hallucinations, self-mutilation, obsessive-compulsive disorder and suicide attempts. App. 2881-86.

¹⁴ Ms. Cascio discussed Dr. Hayne McMeekin’s 1994 diagnosis that he was depressed and his involuntary commitment to William S. Hall, following the 1995 D.U.I. At that time, he was diagnosed as bipolar, alcohol dependent and “having mental illness with severe family strife.”

Also, he did not have many friends. Ms. Cascio opined that “all of these factors [discussed by her], I believe, led him to start relying more heavily upon drugs which then in turn led to what happened later on.” **App. 2886-88.** She later explained on cross-examination that, in light of the various factors she found in Robertson’s life, “he might have felt [at the time of the murders] that [violence] was [his only alternative].” **App. 2949-52.**¹⁵ Finally, before the State began cross-examining Ms. Cascio about Robertson’s admissions related to the murders, she was specifically asked whether she took his statements about the crime into consideration informing her evaluation of him. She replied, “I was looking at early childhood history that could have led him to that point;” and she agreed that she factored his statements into her assessment. **App. 3010, ll. 10-22.**

B. PCR testimony.

Robertson testified that counsel had advised him to fully cooperate, and be honest with the defense experts because they could not know how to prepare a defense unless they knew everything about him. He also claimed that counsel told him that what he disclosed was “not going to wind up in the wrong hands.” So, he very candidly spoke about “very sensitive, intimate things” concerning his family and background and some of the “criminal aspects of the trial” with the defense experts, “no differently than” he did when he met with counsel. **App. 3292-95; 3314; 3581-82; 3605-06.**¹⁶

Mr. Hancock testified that counsel’s investigation¹⁷ led them to conclude that the prosecution

¹⁵ Ms. Cascio further testified that Robertson and Chip had a “close relationship,” and they often did things together, including criminal activity. She testified that Chip had similar problems with substance abuse, and he had experienced physical and psychological abuse. She also testified that Chip was incarcerated at the time of Robertson’s trial. **App. 2888-90.** Finally, the defense introduced several excerpts from Terry’s “notebook” that were contained in Mr. Meyer’s notes; and Ms. Cascio testified to the substance of the extracts. **App. 2892-95; Def.’s Exs. 30-32.**

¹⁶ When cross-examined about the murder and the statements he made to Cascio concerning the murder, he was permitted to invoke his Fifth Amendment privilege against self-incrimination, over objection, although he admitted to murdering his parents at one point. **See App. 3320-25; 3596-3063; 3606-07.**

¹⁷ Counsel’s qualifications and their investigation are discussed throughout the Order. Mr. Hancock had tried two capital cases and prepared for another. He also had tried eight non-capital murder cases, with six clients being acquitted. **App. 3414-16.** Mr. Boyd had practiced criminal law for almost thirty years. He had represented defendants in six capital trials (including Sylvester Adams twice) and he had prosecuted another case. **App. 3496-97.**

had overwhelming evidence of guilt, and counsel did not find anything which led to the conclusion that either Meredith Moon or anyone else committed the murder. “[W]e had one of the worse cases I’ve seen.” Therefore, counsel primarily focused on the sentencing phase of the trial and they attempted to secure a sentence of life imprisonment without parole (LWOP). Counsel got all of Robertson’s school, mental health and other records that they could locate,¹⁸ as well as the Robertson family counseling records from the Carolina Counseling Center, where he and his family were treated by Dr. McMeekin and family and marriage counselor Julius F. “Skip” Meyer, Jr.¹⁹ Mr. Meyer testified as a defense witness and counsel was able to introduce a substantial amount of evidence relating to the mental health counseling that Robertson and his family received. Counsel also introduced Mr. Meyer’s notes of the various therapy sessions as **Def.’s Ex. 18**. Counsel thereafter introduced a number of mental health records through Ms. Cascio.²⁰ **App. 3329-39; 3343-44; 3348-49; 3374; 3390; 3419-34; 3439-43; 3451.**

Counsel were well aware of Ms. Cascio’s limited experience and that she had never testified as a forensic social worker. *See App.’s Ex. 4* (C.V. for Toni A. Cascio), **App. 2852-55**. However, Ms. Drucie Glass (another social worker, who had experience in capital cases) and the Center for Capital Litigation (C.C.L.), which specialized in providing assistance to defense lawyers trying

¹⁸ This included local school records; school records from records from California; the records from his Youthful Offender Act conviction for burglary; his records from an involuntary commitment to the Willis S. Hall Psychiatric Institution; his South Carolina Department of Corrections (SCDC) records; records from Kanawha Insurance Company; and records from Piedmont Mental Health Associates.

¹⁹ While it was Mr. Hancock’s impression that the defense obtained all of Dr. McMeekin’s records through Mr. Meyer, he had previously turned over his file to Robertson and did not have his file at the time of the hearing.

²⁰ Additionally, counsel employed several defense experts whom they developed with the assistance of the Center for Capital Litigation, in Columbia: Dr. Jonathan Pincus (a neurologist); Dr. James Evans (a neuro-psychologist); and Toni Cascio, a social worker. Each of these experts testified at trial. *See Tr. pp. 2458-2530* (Dr. Pincus); **pp. 2535-89** (Dr. Evans); **pp. 2610-2736** (Dr. Morton); **pp. 2852-3031** (Ms. Cascio). Counsel explained that “the parents were the cause. . . . [Also,] that the family was dysfunctional and because of that . . . Jimmy had turned to some alcohol, drugs, Ritalin, and that it was basically the parents’ fault for Jimmy having killed them.” At the same time, counsel had to balance this defense with “showing that there was some sympathetic problems that could be associated with the family” that might cause jurors find sympathy for Robertson. **App. 3434, ll. 6-22.**

capital cases, recommended that the defense hire Ms. Cascio as a social worker. Counsel obtained her C.V. They then interviewed her to determine whether she was qualified, and she assured them that she was qualified to help them. Nor were counsel tried but were unable to locate a more experienced social worker, and they were assured of her competence. So, they hired her. Also, counsel had met with her a number of times over the course of a year to prepare her testimony, and he did not report any problems in terms of her gathering information for the social history of Robertson. App. 3340-43; 3380-82; 3421; 3426-28; 3436-37.

Counsel told Robertson to be honest in discussing the case with the experts.²¹ At some point prior to trial, the defense received her notes. Mr. Hancock's recollection was that counsel had objected to production of Ms. Cascio's notes, which contained a number of admissions by Robertson with which Ms. Cascio was cross-examined by the State at trial. Both attorneys made the joint decision to present her as a witness even though they were aware that her notes would have to be disclosed to the prosecution and that she would be hurt on cross-examination because counsel felt that she was a necessary part of the defense's case in mitigation: she could "tie everything together [in mitigation]" to evoke some sympathy from at least one of the jurors. The jury had already heard "many of the operative facts" through the State's "massive amount of evidence" and, without her testimony, the other experts' testimony was largely based upon speculation.²² He also agreed that the admissions that were elicited on the State's cross-examination of her were cumulative to much of the Moon's testimony and the State's circumstantial evidence presented in the guilt phase. App.

²¹ Counsel felt that this was very important because counsel was afraid that the jury might figure out if the defense presented dishonest information. App. 3349.

²² In hindsight, Mr. Hancock was unhappy with the State's cross-examination of Ms. Cascio and he felt that her testimony was "harmful" to the defense. However, he testified that she had provided the jury with a good deal of mitigating evidence on direct examination.

3350; 3381-83; 3386-91; 3436-39; 3450-55.²³

Mr. Boyd mistakenly thought that Mr. Hancock had already hired the defense experts before he was appointed, using the C.C.L. However, he testified that they never really discussed which one was lead counsel; and he agreed with the trial strategy to which Hancock testified for many of the same reasons. Also, he did not object to what had been done with regard to the experts. Ms. Cascio was hired to investigate Robertson's mental health history and his family history. In Mr. Boyd's estimation, it was important to develop Robertson's background and mental health problems, to find a reason for what had happened. He also testified that the defense received a copy of Ms. Cascio's report shortly before trial; and Robertson introduced App.'s Ex. 6, which is a March 1, 1999 letter from Ms. Cascio to Mr. Hancock providing counsel with a copy of the preliminary report. As to not objecting to production of her notes, he believed Rule 705 required production for cross-examination. **App. 3498-3515; 3526-31; 3536-43.**

Mr. Boyd further testified that Ms. Cascio was the last defense expert who testified. In hindsight, he felt that all of the other defense experts were good witnesses. Although Ms. Cascio was able to provide beneficial information to the jury on direct examination, he felt that this benefit was overshadowed by the damage resulting from the State's cross-examination of her. He may have known but did not recall that Cascio had never previously testified as an expert. However, he noted that sometimes it is not a good idea to hire someone with previous experience in testifying and this would not be his main reason for not using an expert witness. As with Mr. Hancock, Mr. Boyd did not recall consenting to the disclosure of her notes (**App.'s Ex. 7**). Nor did he recall when he

²³ Former Solicitor Pope characterized Ms. Cascio as the one defense expert who could pull together the various matters testified to by the other experts for the jury's benefit. **App. 3465-67**. He described her notes as a bonus (**App. 3481**), and he explained that many of Robertson's admissions merely confirmed or "shore[d] up" other evidence that the jury had heard as to guilt. **App. 3467**.

became aware of them; but he testified that he would have reviewed them before disclosing them to the State. Mr. Boyd testified that he met with Ms. Cascio on more than two occasions and that co-counsel was not present on at least one occasion. Counsel corroborated that he and co-counsel decided to use her as a witness at trial, even after they learned that they would have to disclose her notes, because of the importance of her testimony to the defense since she could tie the mitigation case together. Also, Ms. Glass was present and never suggested not using her. **App. 3524-35; 3547-52; 3556-58.**

C. Discussion.

1. Robertson's first issue is not preserved for appellate review.

Respondent submits that this Court should deny certiorari on Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio was privileged against discovery by the State because it is not properly before the Court, since it was not raised as a specific allegation, it was not ruled upon by the PCR judge and Petitioner did not seek a ruling by filing a Rule 59(e), SCRCP, motion.

In order to preserve an issue for review by this Court, it must be presented to and passed upon by the PCR court. *See State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"). Clearly, Robertson did raise this specific allegation (*see App. 3658-59*); and Respondent did not question counsel about whether they advised him that anything said to the experts was privileged. It is thus barred. Yet, even if the Court views this issue as adequately pled, there was no ruling thereon by the PCR judge. The PCR judge's failure to specifically rule on the issues precludes appellate review of the issues. *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). To preserve an issue for review that is not specifically addressed in the PCR court's order, "[e]ither

party must timely file a Rule 59(e), SCRPC, motion to preserve for review any issues not ruled upon by the court in its order.” *Al-Shabazz v. State*, 338 S.C. 354, 364-65, 527 S.E.2d 742, 747 (2001) (citations omitted); *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007). Thus, his argument is barred from review on certiorari.²⁴

2. Counsel’s failure to adequately object to producing Ms. Cascio’s notes.

This Court must deny certiorari to review Robertson’s remaining allegations because the PCR judge’s ruling thereon is supported by evidence of probative value, and it is not controlled by an error of law. *Suber*, 371 S.C. at 558-59, 640 S.E.2d at 886. To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys’ “representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). “Judicial scrutiny of counsel’s performance must be highly deferential,” and “every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel’s perspective as the time.” *Id.* at 689. *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight”). The inmate must also demonstrate that he was prejudiced by his attorneys’ ineffectiveness. *Id.* at 691 (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment”). In the context of a capital sentencing proceeding, he must prove that “there is a reasonable probability that ... the

²⁴ *See also Simpson v. Moore*, 367 S.C. 587, 600 n.3, 627 S.E.2d 701, 708 n.3 (2006); *Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (same). Alternatively, the Court should deny certiorari for the reasons discussed with respect to his remaining arguments. At worst, he failed to establish Sixth Amendment prejudice.

sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 504 S.E.2d 822, 829-30 (S.C. 1998) (petitioner did not meet burden).

As discussed, Mr. Hancock recalled that the defense only disclosed the notes after the trial judge ruled that disclosure was required. A review of the pretrial motions hearings reflects that the defense did object to production of any reports of experts under the reciprocal discovery provisions act of Rule 5(b), SCRCrimP, until such time as the prosecution had fully complied with the defense's request for discovery under Rule 5(a) and until the defense could complete their testimony. The transcript from those proceedings further reflect that the trial judge required reciprocal discovery. *See* 7/20/98 Tr. pp. 4-20; 2/12/99 Tr. pp. 3-4; 8/16; Tr. pp. 74-78 (9/25/98 hearing); 79-82; 86-87 (11/2/98 hearing); 90-103; 116 (12/4/98 hearing).

Before the state began its cross-examination of Dr. Pincus in the sentencing phase of the trial, Mr. Brackett asked for Dr. Pincus' notes and underlying data. After the trial judge ordered trial counsel to provide them, the State requested a break to review those materials, to prepare for cross-examination; and the trial judge granted his request. Mr. Brackett then noted that, "for the sake of expediency," the defense should produce any similar information for "any other experts that are going to testify." The defense did not object and Mr. Boyd stated that "I thought we took a big box of all that stuff to your office the other day." App. 2505-06.

After Dr. Pincus' testimony, the trial judge asked if the State needed "any further help in getting what they are entitled to." (Sic). Mr. Brackett, again, stated that if he could "get all of the information from any expert they have who is going to testify. I will have a change to review the other two over lunch and that will be plenty of time." App. 2531. Mr. Hancock stated that the

defense was doing everything it could to provide the information. The trial judge stated that, if necessary, he would bring in the experts and Order then to determine whether they were going to testify. In response to the trial judge's inquiry, Mr. Hancock stated that "if we haven't, we will get them, your Honor." When the trial judge asked if Ms. Cascio's notes had been produced, Mr. Hancock said no, and the trial judge stated, "I think they've got a right to have it to cross-examine."

App. 2532 I. 2 – p. 2533, I. 23.

During an *in camera* break after Dr. Evans had testified, then-Solicitor Pope noted that the State had not yet received Ms. Cascio's underlying data. Mr. Boyd explained that Ms. Cascio had left her notes in Columbia and had gone to get them and bring them to court. **App. 2604-05.**

Ms. Cascio testified the next day. Early in the State's cross-examination of her, Mr. Pope asked for and received a copy of her notes, without objection. **App. 2897, II. 1-16.**

Rule 705, SCRE, provides that:

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The PCR judge found that:

Rule 705 "permits the cross-examination to require the expert to reveal otherwise inadmissible underlying information before the jury, subject to a Rule 403, SCRE prejudice analysis. *See United States v. A&S Council Oil Co., et al.*, 947 F2d 1128, 1134 (4th Cir. 1991). *See also State v. Slocumb*, 336 S.C. 619, 821 SE2d 507 (Ct. App. 1999). Moreover, the Court finds that the record demonstrates that the trial judge ordered production of all notes of the defense experts, for the purposes of the State's cross-examination, and that his ruling is consistent with this Court's construction of Rule 705. In other words, the underlying notes or other data must be produced if the expert witness testifies. Further, this Court would not permit any exception because the purpose of disclosure is to counteract the liberality of the Rule, *see A&S Council Oil*, 947 F2d at 1134; *United States v. Gillis*, 773 F2d 549, 553-54 (4th Cir. 1985) and Ms. Cascio clearly testified that the statements by Applicant pertaining to the murders, as reflected in her notes, was considered by her in arriving at her opinion. Tr. p. 3010, II. 10-22.

Order, App. 3738-39.

Under these circumstances, the PCR judge found that Robertson had not shown deficient performance because disclosure of the notes was objectively reasonable under *Strickland*. **App. 3739**. Particularly in light of her testimony that she considered Robertson's statements pertaining to the murders in arriving at her opinion, **App. 3010**, this ruling is supported by evidence in the record. See *Slocumb*, 336 S.C. at 628-34, 821 SE2d at 514-15; and *Suber*, *supra*. Certainly, Petitioner cannot prove any prejudice under *Wiggins* and *Strickland* because there is no reasonable probability of a different result.²⁵

The PCR judge's further finding that it was not unreasonable for counsel to fail to anticipate that Ms. Cascio's work on the case would result in her asking Robertson questions concerning the case or for otherwise failing to instruct her as to how to conduct an appropriate social history assessment (**App. 3739-41**), is likewise supported by the record. The reason counsel employed her as an expert witness was to take advantage of her expertise in the area of performing a social history. The PCR court correctly found that *Strickland* does not require counsel to instruct defense experts on how they should conduct their evaluations in their areas of expertise. Nor was counsel ineffective in failing to anticipate that Ms. Cascio would seek information from Robertson about the facts of the crime in order to have enough information to formulate her opinion as to the social history, or that he would freely discuss the crime with her.²⁶ While an attorney can be expected to learn that the client has relayed potentially damaging information to an expert, counsel is not required to anticipate

²⁵ *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *Cedillos v. State*, 250 S.W.3d 145, 154 (Tex.App. 2008) (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful); *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995) (counsel's failure to make an *in limine* motion was not ineffective because an *in limine* motion is inherently a strategic part of trial strategy).

²⁶ In this regard, Respondent submits that Robertson's complaints with Cascio may have simply resulted from his own decision to discuss the murder freely.

foreseeable that the State would engage in the lines of cross-examination of which he complains. The PCR judge rejected this allegation (App. 3741-57) because he found that Robertson has failed to prove any prejudice resulting from the State's cross-examination of her. See *Strickland*, 466 U.S. at 687 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed"). This Court should deny certiorari, since probative evidence supports his ruling.²⁹

Initially, the PCR judge found that:

Here, the Court finds that, upon discovering the existence of Ms. Cascio's notes, counsel was faced with the choice of either producing the notes and calling Ms. Cascio as a witness or not presenting her as a witness.Fn. 63 Moreover, if counsel was going to accomplish the previously determined strategy of having all of the evidence in mitigation tied together for the benefit of the sentencing jury, they had to call her as a witness. Thus, counsel was forced to weigh the benefit to the defense from presenting her as a mitigation witness against the potential harm to the defense resulting from the State's cross-examination of her about the admissions that [Robertson] had made. In this regard, the Court finds that counsel's decision was much like the decision this Court must make in determining whether there is prejudice under *Strickland*.Fn. 64 After this Court's review of the record, the Court finds that there is no reasonable probability of a different result but for counsel's decision to present Ms. Cascio as a witness.

Fn.63/ For the reasons set forth in this section as well as the reasons set forth in connection with the preceding sections of this allegation, the Court rejects [Robertson's] contention that counsel were ineffective for failing to move *in limine*

²⁹ The PCR judge expressly stated that he did not find that Robertson had proved deficient performance. App. 3731 n. 62. Also, the testimony of counsel (particularly Mr. Hancock's testimony) supports a finding that they made an objectively reasonable decision under *Strickland* to present her as a witness, even though they knew that the State would be able to elicit harmful evidence on its cross-examination of her, because they considered the positive aspects of her testimony more important to the defense than any potential harm, since she could tie the mitigation case together and much of the harmful information that would be elicited on cross-examination was cumulative to the State's lengthy guilt phase case that jury had already heard. App. 3388, 3390-91, 3436-37, and 3450-54 (Hancock); 3549-50 (Boyd). Also, Mr. Hancock correctly observed that they were only required to sway the decision of one juror. See *Wiggins*, 539 U.S. at 537 (Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.

to bar production of the portion of the notes relating to [Robertson's] admissions to the crimes. Once the decision to call her was made, the notes had to be produced because the admissions to the murders formed part of the basis of her opinion on [Robertson's] social history assessment. See Tr. p. 3010, ll. 10-22.

Fn. 64/ In order to make such an assessment, counsel had to look at Moon's testimony, as well as Dr. Sexton's testimony and other evidence presented by the prosecution in both phases of the trial relating to proof of their client's guilt of the murders and the alleged statutory aggravating circumstances. This evidence included the manner in which [Robertson] committed the murders. Additionally, counsel had to consider that the State was going to be allowed to present Dr. McKee as a reply witness.

First, the Court finds that both lines of inquiry at issue in this allegation only took place after the State had already cross-examined Ms. Casio, at length, about her findings to which she had testified on direct examination. See Tr. pp. 2895-2955. Second, Ms. Casio's testimony was only part of a lengthy case in mitigation, but it served to tie all of the other evidence together. Third, the Court finds that the statements concerning his family's mental health and social history clearly were cumulative to other evidence in the record, including – but not limited to – Ms. Casio's testimony on direct examination, the testimony concerning his involuntary admission to the William S. Hall Institute, and the testimony of Mr. Meyer.

The record is replete with evidence of the strained, tumultuous and confrontational relationship [that Robertson] had with his parents, especially his father. Much of that history is discussed throughout this Order, and [Robertson] discussed similar evidence in his PCR testimony. Moreover, the Court finds that this was a proper line of cross-examination. The Court also finds that the State's inquiries concerning evidence of other bad acts was a proper topic for cross-examination because it reflected upon [Robertson's] character. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979) (same); see also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), rev'd. on other grds., 476 U.S. 1 (1986) ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, **the trial transcript clearly reflects that counsel objected when the State began cross-examining Ms. Casio about [Robertson's] involvement in prior stalking incidents. However, the trial judge overruled the objection and permitted the examination.** Also, Ms. Casio took this information into account in forming her opinion. *E.g.*, Tr. pp. 3000-3003.

Order, App. 3741-43 (emphasis in bold added).

The State submits that the PCR judge's findings are supported by probative evidence and a correct application of *Strickland* and its progeny. See *Suber, supra*. Furthermore, the PCR judge properly concluded that Robertson failed to prove show any conceivable prejudice resulting from the sentencing phase jury hearing this information. This evidence of other bad acts was cumulative to evidence of bad acts discussed elsewhere in the Order; and it was cumulative to evidence presented by the State that Robertson had previously burglarized his neighbor's home and stole over \$15,000.00 worth of valuables, including a car, blank checks and credit cards. **App. 2107-20.**³⁰ Also, the trial judge's sentencing phase charge included a limiting instruction, in which he instructed jurors that, before they considered any such evidence, they must first find that the State had proved that Robertson committed any bad acts beyond a reasonable doubt. Even if the jury found that the State had met its burden of proof, the evidence could only be considered as evidence of "his character in general." The evidence could not be considered as proof of any aggravating circumstances. **App. 3217-18.** He charged further that Robertson's prior convictions could only be considered as character evidence as well. **App. 3218.**

The trial judge further instructed the jury that, in considering whether to recommend a sentence of death, it must first find the existence of one or more aggravating circumstances beyond a reasonable doubt; and that jurors could only consider the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon,

³⁰ Based upon that crime and his subsequent activities with the credit cards, Robertson was charged with a series of offenses to which he pled guilty. The State introduced the indictments and subsequent sentencing sheets into evidence, as follows: State's Ex. 191, an indictment and sentencing sheet to burglary in the second degree; State's Ex. 192, an indictment for burglary in the first degree and guilty plea and sentencing sheet for burglary in the second degree; State's Ex. 193, an indictment and sentencing sheet for grand larceny; State's Ex. 194, an indictment and sentencing sheet for grand larceny; State's Ex. 195, an indictment and sentencing sheet for forgery; State's Ex. 196, an indictment and sentencing sheet for financial transaction card fraud; and State's Ex. 197, an indictment and sentencing sheet for financial transaction card fraud. **Tr. p. 2119.** Additionally, the jury heard that Robertson had given a statement to the police in which he attributed the crimes to a drug problem. **Tr. pp. 2117-19; State's Ex. 190.**

larceny with the use of a deadly weapon and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. **App. 3203-26**. In light of the sentencing phase instructions, the PCR judge correctly found that the challenged evidence was not prejudicial.

Likewise, the Court PCR judge correctly found that Robertson was not prejudiced by the State's cross-examination concerning his admissions concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury, including the guilt phase testimony of his co-defendant, Meredith Moon, who was present in his parents home when he murdered them and accompanied him when he left South Carolina and drove to Philadelphia, Pennsylvania (*See, e.g., App. 1575-1616; 1623-25; 1632-38; 1641-46*); the guilt and penalty phase testimony of Dr. Joel Sexton regarding his autopsy findings (*See, e.g., App. 1784-1808; 2249-2302*); the evidence recovered from the scene, the car Robertson and Moon had used to flee the State and locations provided by Moon; the results of the State's fingerprint, hair, DNA and other forensic testing of evidence in the case; and the other witnesses discussed in the Order. **App. 3744-56**.

As the PCR judge correctly found, a review of the graphic Dr. Sexton's testimony concerning his findings clearly demonstrates that he was able to both identify the many different blows and show these injuries to the jury through pictures and diagrams. When his testimony is viewed along with Moon's testimony, the DNA evidence and other forensic evidence discussed above, the PCR judge quite reasonably found that "the sentencing jury had already been presented with an overwhelmingly graphic and vivid picture of what had occurred at the time of the murders before Ms. Cascio testified.

The jury was, therefore, aware of both the heinous nature, not only of the crimes, but also of the defendant who committed it." **App. 3756.**

As a result there is probative evidence to support the PCR judge's conclusion that, "although [the] admissions testified to by Ms. Cascio are significant, they are not so strong that this Court can conclude that there is a reasonable probability of a different result but for the presentation of her testimony." **App. 3756.** (Citing *Strickland*, 466 U.S. at 695 (defendant required to prove that "there is a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death"); *Wiggins*, 539 U.S. at 537).³¹

Respondent would further note that Robertson's reliance upon *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).³² Likewise, in arguing that he was prejudiced by counsel's alleged errors,

³¹ Finally there cannot be any discernable prejudice from the State's cross-examination of Cascio if Dr. McKee's subsequent reply testimony is considered on this issue. *See App. 3067-72.* The PCR judge found that "his testimony presented the substance of [most], if not all of Ms. Cascio's testimony on cross-examination; and he testified that the factual information provided to him by [Robertson] was virtually identical to those facts in the notes of Ms. Cascio. Tr. pp. 3066-67." **Order, App. 3756.** Also, the PCR judge found that any challenge to the admissibility of McKee's testimony about the information he received from Robertson, under *Hudgins v. Moore*, 337 S.C. 333, 524 S.E.2d 105 (1999), was not properly raised in PCR because the trial judge had overruled trial counsel's objection, and ruled that Robertson's statements were admissible. *See App. 3044-57.* "Thus, the question of his ruling could have been raised on direct appeal and is barred in PCR. *See* §17-27-20(b); *Drayton*, 312 SC at 9, 430 SE2d at 520 (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel). Alternatively, the Court finds that there was no violation of *Hudgins*" and that this objection was properly overruled. **Order, App. 3717 n. 45. See also App. 3756 n. 82.**

³² First, *Ingle* is a non-capital case; and the present allegation involves the reasonableness of counsel's decision to present the testimony of a forensic social worker, who could testify to matters that neither the other defense experts nor lay witnesses could testify. *Cf. Wiggins, supra.* Second, the Court held in *Ingle* that counsel was ineffective because he called a witness (Afify) as a defense witness without interviewing her first to ascertain whether she would support petitioner's theory of the defense, and, instead, relying solely on petitioner's representation that she "would admit to having intercourse with petitioner on the morning of the alleged assault" and presuming that her testimony would be favorable to petitioner when she was not called as a witness by the State. *Id* at 471, 560 S.E.2d 403.

The Court found that petitioner was prejudiced by trial counsel's deficient performance for several reasons. First, she was the first witness called in petitioner's defense, but her testimony and the State was able to "elicit additional damaging testimony on cross-examination. The effect of Afify's testimony, which totally contradicted petitioner's defense, was heightened by the fact that Afify was called as petitioner's first witness." Also, this Court reasoned that reasonable doubt could have been established without her "denial that they had sexual intercourse on the morning in question" because "petitioner's theory that his semen was transferred to the victim's shorts via the bedsheets was not implausible;" and "other evidence called into question the credibility of the victim's allegations." *Id* at 471-72, 560 S.E.2d 403-04.

Here, however, Cascio was the last witness called; and she was a key witness in the case in mitigation, as

he mistakenly relies upon the Court's decisions in *State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000), and *State v. Price*, 368 S.C. 494, 629 S.E.2d 363 (2006) (another non-capital case). The PCR judge relied upon the proper standard set forth in *Strickland*. See 466 U.S. at 695 (defendant required to prove that "there is a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death"). See also *Wiggins*, 539 U.S. at 537; *Jones v. State*, *supra*.

Finally, given that the United States Supreme Court's decision in *Wiggins* stresses the need to present a capital defendant's background and family history in many cases, as well as the importance of utilizing a social worker when that is the only way to present this evidence, and this Court's decision in *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (finding that trial counsel were ineffective for not presenting an adequate sentencing phase case in mitigation),³³ it cannot be said that Robertson was prejudiced by his attorney's decision to present Ms. Cascio's testimony.

opposed to the witness in *Ingle*. Further and contrary to *Ingle*, counsel in the sentencing phase was seeking one juror to vote for life. See *Wiggins*, 539 U.S. at 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance"). Also, counsel had interviewed her extensively before presenting her; and they had both her report and her notes. They were thus aware of the beneficial evidence to which she could testify and the potential for damaging cross-examination by the State, and they weighed these counterbalancing factors before calling her to testify.

³³ Counsel in *Council* did not present any medical evidence or other testimony describing his mental health issues or that several of his immediate family members suffered from mental illness. Counsel also failed to present evidence that: Council's father was an extremely violent alcoholic, who was divorced by his mother on the ground of physical cruelty; he and his siblings resided in bad neighborhoods; lived in poverty, and often lived in homes without running water or indoor plumbing; he "and his siblings were neglected by their parents and, as a result, on one occasion [he] suffered severe burns while trying to cook without supervision;" Council had a significant drop in his I.Q. between the ages of seven and ten which may have been the result of a head injury or the onset of mental illness; that he began getting into trouble at the age of ten years most likely as the result of his violent family environment and negative influence of his siblings; his immediate family members had been diagnosed with mental illnesses such as schizophrenia, schizoid, bipolar disorder, depression, and borderline personality disorder; he had learning disabilities; DJJ caseworkers recognized his emotional and mental problems; he began using drugs and alcohol at sixteen years old; he attempted suicide in his twenties; he had a borderline I.Q. and frontal lobe brain dysfunction; and the onset of his current diagnosis of schizophrenia may have begun in early adolescence or childhood. *Id.* at 177, 670 S.E.2d at 365.

CONCLUSION

Based upon the foregoing reasons, Respondent respectfully submits that this Court should deny certiorari.

Respectfully submitted,

HENRY D. McMASTER
Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit
1675-1A York Hwy.
York, South Carolina 29745-7422
(803) 628-3020

By: 

WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

July 15, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From York County
Honorable John C. Few, Circuit Court Judge

JAMES D. ROBERTSON,

Petitioner,

v.

THE STATE,

Respondent.

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Joseph L. Savitz, III, Esq., SCCID, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211-1589.

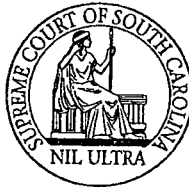
I further certify that all parties required by Rule to be served have been served.

This 15th day of July, 2009.


WILLIAM EDGAR SALTER, III

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

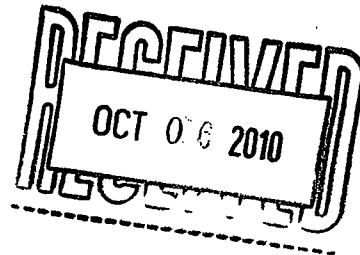
POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 6, 2010

Chief Appellate Defender Joseph L. Savitz, III
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211



Re: Robertson, James D. v. State

Dear Counsel:

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

“Petition for Writ of
Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

October 6, 2010.”

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

Very truly yours,

CLERK

Robertson, James D. v. State
Page Two
October 6, 2010

cc: Senior Assistant Attorney General William Edgar Salter, III

either attorney met the statutory criteria for appointment as qualified PCR counsel in a capital case.

In March 2006, approximately six months after their appointment, counsel filed a PCR application on Robertson's behalf. The sum total of the allegations contained in the application was "Ineffective assistance of counsel – specifics to be amended later." App. 3246. By the time of the January 29-31, 2006, evidentiary hearing, no amended application had been filed. In response to questioning by the PCR judge about the claims they intended to pursue at the hearing, counsel identified approximately a dozen theories under which trial counsel assertedly had been ineffective. App. 3268-73. At the evidentiary hearing, counsel called three witnesses: Robertson, trial attorney James Hancock, and trial attorney James Boyd.

Consistent with the limited presentation before the PCR court, the records reviewed by undersigned counsel indicate that Robertson's PCR attorneys did not perform an independent investigation to determine the existence of claims for relief based on evidence not contained within the record generated at trial. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1 and Commentary, reported in 31 HOFSTRA L. REV. 913, 1085-86 (2003) ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."). Additionally, as set forth more fully in Grounds V through XI of the Petition for Writ of Habeas Corpus filed with this Court, PCR counsel overlooked at least seven (7) colorable challenges to Robertson's convictions and sentences that were apparent from the trial record. *See* Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. at 1086 ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues.").

The seven claims for relief overlooked by state PCR counsel and alleged in Grounds V

through XI of Robertson's habeas corpus petition are also the subject of a new application for state post-conviction relief filed contemporaneously with this motion in the York County Court of Common Pleas. Because state court review of those claims must be completed before merits review by this Court can become permissible, and because a grant of state post-conviction relief on one or more of them would obviate the need for a full adjudication by this Court, a stay of Robertson's federal habeas proceedings is necessary.

II. RELEVANT LEGAL PRINCIPLES AND DISCUSSION.

It has long been settled law that a federal district court may not adjudicate a "mixed" habeas corpus petition, *i.e.*, one containing both exhausted and unexhausted claims. *See* 28 U.S.C. § 2254(b) & (c); *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (establishing "total exhaustion rule"). Prior to the Anti-Terrorism and Effective Death Penalty Act (AEDPA), mixed petitions were typically subject to dismissal without prejudice, which allowed the prisoner to present any unexhausted claims to the relevant state courts, and then, if necessary, to return to federal court with a new federal petition once full exhaustion had been achieved. *See, e.g., Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998).

After AEDPA took effect, however, the one-year limitations period prescribed by 28 U.S.C. § 2244(d) added new and severe consequences to the traditional dismissal-without-prejudice procedure. This was so because, although § 2244(d)(2) provides for tolling of the limitations period pending resolution of state post-conviction procedures, it does not permit tolling during the pendency of a mixed federal petition. *See Duncan v. Walker*, 533 U.S. 167, 172 (2001). As a result, the time a federal court spent determining that a petition was mixed, and therefore subject to dismissal, was counted against the prisoner's one-year limitations period, and a subsequent dismissal ostensibly to

facilitate exhaustion could – and in many cases did – result in an instant and permanent termination of the prisoner’s ability ever to secure federal habeas review. *See, e.g., Piler v. Ford*, 542 U.S. 225, 238 (2004) (Breyer, J. dissenting) (“after *Duncan*, the dismissal of [a mixed] petition will not simply give state courts a chance to consider the unexhausted issues ...; it often also means the permanent end of *any* federal habeas review”).

In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court “recognize[d] the gravity of this problem and the difficulty it ... posed for petitioners and federal district courts alike.” *Rhines*, 544 U.S. at 275. The Court responded by endorsing the use of stay and abeyance procedure, under which a federal district court, rather than dismissing a mixed petition, orders that proceedings on the petition be stayed and held in abeyance pending the exhaustion of previously unexhausted claims. Pursuant to *Rhines*, a stay should be granted where (1) “there was good cause for the petitioner’s failure to exhaust his claims” in a prior state court proceeding; (2) the unexhausted claims are not “plainly meritless”; and (3) “there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” *Id.* at 276. Where these criteria are satisfied, “it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition” *Id.* at 278. As discussed below, the circumstances presented by this case warrant a stay under *Rhines*.

A. Good cause.

While the Supreme Court has yet to precisely define “good cause” as that term is used in *Rhines*, it has suggested the requirement is not a particularly demanding one. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (“A petitioner’s reasonable confusion about whether a state filing would be timely will ordinarily constitute ‘good cause’ for him to file in federal court.”). In this case, Robertson’s failure to exhaust the claims alleged in Grounds V through XI of his federal

habeas petition was a direct result of his dependence upon the competence and judgment of the lawyers appointed to represent him in his first state post-conviction relief proceedings. As described above, state law required that appointed counsel possess a modest level of knowledge and experience, and established professional norms required, at a minimum, that they conduct an adequate investigation and raise all colorable claims. As it happened, however, Robertson's counsel did not meet the qualifications for appointment, and they unquestionably failed to carry out their obligation to identify and pursue viable claims for post-conviction relief that were apparent from the face of the trial record. For his own part, Robertson – who lacks formal legal training and is mentally ill – could not have recognized what his appointed lawyers were missing. Under these circumstances, Robertson's ignorance and good faith reliance upon counsel are easily equivalent to the "reasonable confusion" over the timeliness of a state court filing deemed sufficient to constitute "good cause" in *Pace*.

B. Grounds V through XI are not "plainly meritless."

Grounds V through XI are set forth at pages 18-25 of the petition and Robertson will not burden the Court by repeating them here. Each of them alleges the existence of a constitutional violation affecting the reliability and fairness of Robertson's capital trial. Whether any one or more of them will ultimately be determined by the state courts or this Court to require a grant of relief remains to be seen. For purposes of determining Robertson's entitlement to a stay under *Rhines*, however, it cannot be said that any of the claims alleged in Grounds V through XI are "plainly meritless."¹

¹In *Rhines*, the Supreme Court followed its articulation of the "plainly meritless" criterion with a "*Cf.*" citation to 28 U.S.C. § 2254(b)(2), which permits a federal court to deny relief on an unexhausted claim. While the Supreme Court has yet to address the circumstances under which it

C. “[I]ntentionally dilatory litigation tactics.”

The record of state court proceedings in Robertson’s case contains no hint of intentionally dilatory litigation tactics. Robertson has no history of stalling or otherwise attempting to manufacture delay, and the state PCR action for which he seeks a stay of these federal habeas proceedings has already been filed. Thus, entry of a stay would do no more than to permit that action to be considered and ruled upon in due course by the state courts.

may be appropriate for a federal habeas court to exercise this authority, several lower federal courts have made clear that it is to be used only where a claim has absolutely no hope of prevailing. *See, e.g., Goines v. Walker*, 54 F.Supp.2d 153, 155-56 (E.D.N.Y. 1999) (declining to deny relief on unexhausted claim under § 2254(b)(2) because claim was “not patently frivolous”); *Gaylor v. Harrelson*, 962 F.Supp. 1498, 1500 (N.D.Ga. 1997) (explaining with regard to § 2254(b)(2) that, if initial review of a mixed petition “arouses the slightest suspicion that the [unexhausted] claims have merit, dismissal without prejudice is appropriate to allow the State court an opportunity to consider the claims”).

III. CONCLUSION.

Robertson is entitled to have the South Carolina state courts consider and resolve the claims alleged in Grounds V through XI in the first instance. Permitting him to pursue that review now, by following the stay and abeyance procedure endorsed by the Supreme Court in *Rhines*, would in no way prejudice the State or result in an unjust windfall to Robertson. Because Robertson satisfies each of the criteria for a stay articulated by the Supreme Court in *Rhines*, "it likely would be an abuse of discretion ... to deny a stay" *Id.* at 278.

Respectfully submitted,

JOHN H. BLUME
KEIR M. WEYBLE
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-3805

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, SC 29211
(803) 765-1044

By: s/Keir M. Weyble

January 7, 2011.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

JAMES D. ROBERTSON)	
)	
<i>Petitioner,</i>)	CIVIL ACTION NO. 8:11-cv-00063-SB-BHH
)	
v.)	
)	
JON OZMINT, Commissioner,)	
South Carolina Department of Corrections)	
<i>Respondent.</i>)	

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (VERIFIED)

1. (a) James D. Robertson was convicted and sentenced in the York County Court of General Sessions in South Carolina.
- (b) York County Case Nos. 98-GS-46-1020, 98-GS-46-1021, 98-GS-46-1022 and 98-GS-46-1023
2. Petitioner was convicted on March 20, 1999, and sentenced on March 26, 1999.
3. Petitioner was sentenced to death.
4. Petitioner was convicted of more than one crime.
5. Petitioner was convicted of two counts of murder and sentenced to death on each count.
 Petitioner was convicted of financial card transaction fraud and sentenced to one year concurrent.
 Petitioner was convicted of armed robbery and sentenced to thirty years concurrent.
6. (a) Petitioner pled not guilty.
- (b) Not applicable.
- (c) Petitioner was tried by a jury.
7. Petitioner did not testify at a pre-trial hearing, trial, or post-trial hearing.
8. Petitioner appealed his convictions and sentences.

9. (a) Petitioner appealed directly the Supreme Court of South Carolina.
- (b) Unknown.
- (c) The South Carolina Supreme Court dismissed the appeal.
- (d) The order dismissing petitioner's appeal was entered on June 3, 2005.
- (e) Not applicable.
- (f) Petitioner raised the following grounds in his direct appeal:
1. Whether the court erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
 2. Whether the court erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.
 3. Whether the court erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.
 4. Whether the court erred in denying three separate motions for a directed verdict based on insufficient evidence and the State's failure to meet the burden of proof as to the first element of corpus delicti of murder at the conclusion of the state's case.
 5. Whether the court erred in denying the jury's request to take notes while being recharged as to the law during guilt phase deliberations.
 6. Whether the court erred in revealing the location where the jurors were sequestered, thereby denying appellant his constitutional right to a fair and impartial jury.
 7. Whether the court erred in not allowing the defense to define "life imprisonment" as it appears in the state statute to potential jurors during voir dire, thereby denying appellant a fair and impartial jury.
 8. Whether the court erred in sentencing appellant to death.
- (g) Petitioner did not seek further review by a higher state court because no such higher state court exists.

- (h) Petitioner did not file a petition for certiorari in the United States Supreme Court.
10. Other than the direct appeal, petitioner has sought relief through two applications for post-conviction relief in the state courts of South Carolina.
11. (a) (1) Petitioner filed an application for post-conviction relief in the York County Court of Common Pleas.
- (2) York County Court of Common Pleas case number 06-CP-46-00532.
- (3) An application for post-conviction relief was filed on March 1, 2006.
- (4) Petitioner sought post-conviction relief through filing an application for post-conviction relief.
- (5) Petitioner raised the following grounds in his first application for post-conviction relief:
1. Ineffective assistance of counsel due to trial counsel's failure to call Dr. Hayne McMeekin to testify at trial and failure to develop evidence that Dr. McMeekin over-prescribed Ritalin to the Robertson family.
 2. Ineffective assistance of counsel due to trial counsel's failure to call Chip Robertson to testify at trial.
 3. Ineffective assistance of counsel due to trial counsel's failure to advise petitioner to plead guilty but mentally ill or request that the trial judge submit a guilty but mentally ill verdict for the jury's consideration.
 4. Ineffective assistance of counsel due to trial counsel's failure to spend an adequate amount of time with petitioner to prepare for trial.
 5. Ineffective assistance of counsel due to trial counsel's failure to pursue a plea bargain offered by the prosecution.
 6. Ineffective assistance of counsel due to trial counsel advising petitioner not to testify and not permitting petitioner to make his own decision to testify.
 7. Ineffective assistance of counsel due to trial counsel's failure to present adequate evidence of petitioner's adaptability to confinement.

- 8. Ineffective assistance of counsel due to trial counsel's failure to impeach the State's witness, Meredith Moon, with a statement she made that she would "keep quiet" about the murders in exchange for \$50,000.
- 9. Ineffective assistance of counsel due to trial counsel's failure to move to dismiss a juror.
- 10. Ineffective assistance of counsel due to trial counsel's failure to adequately advise petitioner before he was evaluated by the State's expert, Dr. Geoffrey McKee.
- 11. Ineffective assistance of counsel due to trial counsel's failure to introduce sufficient mental health evidence about the Robertson family.
- 12. Ineffective assistance of counsel due to trial counsel's advice to petitioner that anything he revealed to their expert Ms. Toni Cascio – including theretofore undisclosed details about the crimes – was privileged against discovery by the state; trial counsel's failure to object to disclosure of Ms. Cascio's notes to the State; and trial counsel's decision to call Ms. Cascio to testify under these circumstances.

(6) Petitioner received an evidentiary hearing on his first application for post-conviction relief.

(7) & (8) The first application for post-conviction relief was denied on March 24, 2008.

- (b) (1) Petitioner filed a second application for post-conviction relief in the York County Court of Common Pleas.
- (2) Unknown.
- (3) The second application for post-conviction relief was filed on January 6, 2011.
- (4) Petitioner sought post-conviction relief through filing an application for post-conviction relief.
- (5) Petitioner raised the following grounds in his second application for post-conviction relief:
 - 1. Applicant's Sixth and Fourteenth Amendment right to a fair jury trial was violated by the solicitor's improper and prejudicial

closing argument during the guilt-or-innocence phase of the trial during which the solicitor argued that the jury should not deliberate when determining whether the state had proven Applicant's guilt beyond a reasonable doubt. (*Appendix p. 1916*).¹ Applicant was further denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – when trial counsel failed to object to this argument. Trial counsel's performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

2. Applicant's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment were violated by the state's introduction of a list of Applicant's prison infractions during the sentencing phase of his capital trial. Applicant's trial counsel unreasonably failed to object and preserve for appellate review the federal constitutional issues related to the state's introduction of this list, in violation of Applicant's right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution. *See Strickland v. Washington*, 466 U.S. 668 (1984).
3. Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – during the sentencing phase of his capital trial when trial counsel failed to object to the state eliciting testimony that one of the victims, Terry Robertson, would have been mortified by the testimony introduced about her by defense witnesses in court. Counsel further failed to develop and introduce evidence that the victims were opposed to capital punishment and would not have wanted their son to be sentenced to death. Counsel's failures were unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).
4. Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the solicitor's improper closing argument during the sentencing phase of Applicant's capital trial during which the solicitor argued that that the defense's mitigation presentation was equivalent to raping the victim in the courtroom. ("You know, Ms. Cascio talked about Terry being sexually abused. Terry has been raped. She was raped in this courtroom when they take her

¹ This petition references the Appendix submitted with the petition for writ of certiorari following the denial of petitioner's first application for post-conviction relief.

through this based on his actions.”) (*Appendix p. 3144*). Applicant was further denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – when trial counsel failed to object to this argument. Trial counsel’s performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

5. Applicant’s Sixth, Eighth and Fourteenth Amendment rights were violated by the trial court’s error in failing to strike a panel of potential jurors who violated the trial court’s instructions and discussed news stories about the case while waiting to be questioned on individual voir dire. *Appendix p. 425 & 1283*. Applicant was further denied the right to effective assistance of appellate counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – when appellate counsel failed to raise this issue on appeal. Appellate counsel’s performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).
6. Applicant was denied the right to effective assistance of appellate counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – when appellate counsel failed to raise the issue whether the trial court erred by denying the defense’s motion to specifically define mitigating circumstances and to question potential jurors about specific mitigating circumstances, where several potential jurors indicated that they did not understand what mitigating circumstances were even after hearing the general legal definition. (*Appendix pp. 193-96*). Appellate counsel’s performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).
7. Applicant was denied the right to effective assistance of appellate counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – when appellate counsel failed to raise the issue whether the trial court erred by denying the defense’s motion to limit the State’s presentation of victim impact evidence to testimony from immediate family members. (*Appendix pp. 1985-98*). Appellate counsel’s performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

- (6) Petitioner has not yet received an evidentiary hearing on his second application for post-conviction relief. His application remains pending.
- (7) Not applicable. Petitioner's second application for post-conviction relief is pending in the York County Court of Common Pleas.
- (8) Not applicable. Petitioner's second application for post-conviction relief is pending in the York County Court of Common Pleas.
- (c) Petitioner has not filed a third application for post-conviction relief.
- (d)&(e)
 - (1) Petitioner appealed the denial of his first application for post-conviction relief to the South Carolina Supreme Court.
 - (2) Petitioner has not filed an appeal regarding his second application for post-conviction relief because that application is currently pending pre-hearing in the York County Court of Common Pleas.
 - (3) Petitioner has not filed a third application for post-conviction relief.

12. GROUNDS FOR FEDERAL HABEAS CORPUS RELIEF.

Grounds Exhausted on Direct Appeal²

I. PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY TRIAL, GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WAS VIOLATED BY THE TRIAL COURT'S FAILURE TO SELECT A JURY FROM ANOTHER COUNTY.

A. Supporting Facts.

i. Background.³

In March 1999, Petitioner stood trial in York County, before Judge John C. Hayes, III, and a jury, on indictments charging him with the murder of his parents, Terry and Earl Robertson, as well

² The procedural history and exhaustion information required by sub-parts (b), (c), (d), and (e) of question 12 of the model form for § 2254 petitions contained in the Appendix of Forms accompanying the Rules Governing Section 2254 Cases, as it relates to Grounds I through III is given in the subsections following the allegations supporting Ground III.

³ This subsection contains general background information relevant to all of petitioner's grounds for relief.

as a related armed robbery and credit card fraud. The Robertsons were beaten to death the morning of November 25, 1997.

The State sought the death penalty, relying on five statutory aggravating circumstances: (1) the murders were committed during armed robbery; (2) the murders were committed during larceny involving the use of a deadly weapon; (3) the murders involved physical torture; (4) the murders were committed for money; and (5) two people were murdered pursuant to one scheme. *S.C. Code Section 16-3-20(C)(a)*.

Earl Robertson was an executive at Springs Industries. The State asserted that Petitioner killed his parents so that he and his younger brother, Chip, would inherit their money before their father could invest it in a golf course he hoped to build after retiring. Petitioner talked with Chip twice on the telephone before the homicides and was arrested outside his brother's Philadelphia apartment later that day.

Terry Robertson was beaten to death with a hammer as she lay in bed. Earl Robertson was attacked with the hammer and a baseball bat as he got out of the shower. Petitioner's accomplice, Meredith Moon, was the State's key witness. She and Petitioner were arrested in Philadelphia before they could meet up with Chip. The defense rested without presenting any evidence during the guilt-or-innocence phase. The jury found Petitioner guilty as charged.

At sentencing, the State introduced a substantial amount of victim impact evidence, as well as evidence of Petitioner's misbehavior in the years leading up to the homicides. Petitioner was involuntarily committed to the State Hospital in 1995 because of growing concern that he would harm himself or others, particularly his mother. He once told a roommate he wanted to kill his parents because "[t]hey have made my life a living hell." The defense introduced evidence that Petitioner's psychological problems were exacerbated by his consumption of amphetamines before

the homicides. A neurologist testified that Petitioner was "out of control" at the time of the crimes. A neuropsychologist stressed that the crimes were the product of a dysfunctional brain.

At the conclusion of sentencing, the trial judge refused a defense request to instruct the jury that "[e]vidence of voluntary intoxication is a proper matter for consideration ... and mitigation of punishment." (He had previously charged the jury that "voluntary intoxication is never an excuse for ... a crime" in his guilt-or-innocence phase instructions.)

In addition to the five statutory aggravators previously listed, the judge instructed the jury on four statutory mitigating circumstances: (1) Petitioner had no prior convictions involving the use of violence against another person; (2) the murders were committed while Petitioner was under the influence of mental or emotional disturbance; (3) Petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (4) Petitioner's age and mentality at the time of the crimes. *S.C. Code Section 16-3-20(C)(b)*.

The jury deliberated for just over three hours and thirty minutes, then sentenced Petitioner to death for both murders after finding all five aggravators alleged by the State.

ii. Specific Facts Relevant to Ground One.

Before jury selection began for Petitioner's capital trial, his trial counsel moved to select a jury from another county, noting that the case had been the subject of intense media scrutiny and widespread community gossip. *Appendix p. 186*. The trial judge acknowledged that the case had been the focus of substantial media and public attention, specifically saying that the case had received a great deal of "notoriety." The Robertson family was wealthy and prominent in the community. The case was highly publicized. Television cameras and newspaper reporters were in the courtroom to cover the trial. The trial court initially ruled that it would take the defense

motion under advisement and decide the motion after the individual voir dire process was complete.

Of the 61 potential jurors questioned about the subject of pretrial publicity, 44 indicated that they had prior knowledge of Petitioner's case and 8 of those 44 were ultimately seated on his jury. The overwhelming majority of potential jurors knew at least one person on the witness list for either the State or the defense. The solicitor noted that York County is a small community, such that "[i]t's impossible . . . to find people who don't know other people." The public in this small community had strong opinions about the case and definite expectations about the outcome. One of the potential jurors, Steven Samios, initially told the court that he had "never heard anything about the case before at all." But that evening, after the trial court determined that Samios was qualified as a potential juror, he stopped at a bar and grill and let slip that he might be selected for Petitioner's jury. Samios recounted the other patrons' reactions:

[E]verybody seemed to know what the case was. It's not a secret, I found that out . . . [I]t was a pretty big, well-publicized case . . . [a]nd it seems like everybody pretty much has their mind made up on certain decisions. That kind of makes me feel uneasy about it.

Appendix p. 1284-85. Samios then asked to be excused from jury service due to the pressure of community sentiment:

It kind of made me feel a little bit different, now knowing that somebody knows that I'm here. And I live in the community. . . I think it would change my point of view a little bit.

The trial court allowed Samios to be excused. The defense renewed its motion to select an unbiased jury from a different county due to the notoriety of the case and the community sentiment against Petitioner. *Appendix p. 1273.* The trial court denied the motion.

In certain circumstances, particularly those involving a combination of pretrial publicity and strong public sentiment, juror bias may be expected as a matter of human nature and

common sense. *Rideau v. Louisiana*, 373 U.S. 723 (1963). A potential juror's general assertion that he or she can be fair and impartial is insufficient to guard against potential bias. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 735 ("as to general questions of fairness and impartiality, . . . jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed"). The United States Supreme Court has held that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a judge ever watchful to prevent prejudicial occurrences." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Here, the trial court erred by failing to take into account the combination of both pretrial publicity and public sentiment, including community expectations about the case. Thus, Petitioner's right to a fair trial before an unbiased jury was violated.

II. PETITIONER'S SENTENCE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER WAS FORCED TO SUBMIT TO A STATE-SPONSORED PSYCHOLOGICAL EVALUATION FOR THE SOLE PURPOSE OF OBTAINING EVIDENCE TO BE USED AGAINST HIM AT SENTENCING AND TO WAIVE HIS RIGHT TO COUNSEL FOR PURPOSES OF THAT EVALUATION.

A. Supporting Facts.

Prior to trial, the state moved to have Petitioner evaluated by its own psychologist solely for the purpose of obtaining evidence to use against him at sentencing; even though neither competency to stand trial, guilty but mentally ill, nor insanity were at issue. *Appendix p. 98*. The defense objected to an evaluation under these circumstances. *Appendix p. 103*. The State argued that the trial court should order Petitioner to submit to the state-sponsored evaluation or forgo presenting mental health testimony from his own experts at sentencing. *Appendix p. 105-107*. In a written order, the trial court ruled in favor of the State:

Fundamental fairness dictates that the state be afforded the opportunity to verify or rebut evidence presented by the defense through expert testimony regarding the defendant's mental status. Adequate rebuttal cannot be had without an independent examination. . . . An independent psychiatric examination under these circumstances is warranted and is a distinct aid in the determination and the administration of justice, in order to confirm a claim of mental illness, discover fraudulent claims, or to rebut psychiatric testimony which can only reasonably be accomplished by the presentation of expert testimony. It is therefore, under the circumstances of this case, within the inherent power of this court to require an independent psychiatric evaluation of the defendant, where he may offer such evidence in this case.

The defense moved for reconsideration of this order. The trial court ordered briefing, took the matter under advisement, and issued a second order denying the defense motion for reconsideration. The trial court further ruled that Petitioner did not have a right for his counsel to be present during the state-sponsored evaluation.

Petitioner submitted to the evaluation shortly before the start of his trial. Dr. Geoffrey McKee performed tests and conducted two "clinical interviews." At sentencing, Petitioner offered expert testimony that his behavior at the time of the homicides was not the product of rational thought, but of a synergistic combination of inherited mental illness and amphetamine abuse. A neurologist testified that Petitioner was "out of control." A neuropsychologist explained the genetic and biological basis of Petitioner's mental illness.

The defense renewed its objection to the testimony of Dr. McKee when the state called him in reply. The trial court overruled the objection, and Dr. McKee testified that Petitioner's mania was in "full remission" at the time of the crimes; that Petitioner had "features of borderline antisocial personality traits;" and that Petitioner had confessed in detail to Dr. McKee that he had killed his parents. The trial court erred in ordering Petitioner to submit to the state-sponsored evaluation or forgo his mitigation presentation and in admitting Dr. McKee's

testimony at trial. These circumstances violated Petitioner's Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. *Estelle v. Smith*, 451 U.S. 454 (1981); *Powell v. Texas*, 492 U.S. 680 (1989).

III. PETITIONER'S SENTENCE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY AT SENTENCING THAT VOLUNTARY INTOXICATION COULD BE CONSIDERED MITIGATING.

A. Supporting Facts.

During voir dire, the trial court would not allow the defense to ask prospective jurors whether they would be able to consider intoxication as a mitigating circumstance. At the guilt-or-innocence phase of Petitioner's trial, the State requested that the court instruct the jury that voluntary intoxication could not be considered in determining Petitioner's guilt. The trial court charged the jury as follows:

[V]oluntary intoxication is never an excuse for, or a defense to, a crime . . . A person who voluntarily renders themselves intoxicated is no less responsible for their acts while they are in such a condition. If one voluntarily is under the influence of drugs and becomes intoxicated to whatever degree, and if while in that condition the person commits an act that would be a crime if it had been committed by a sober person, the fact of intoxication would not relieve the intoxicated person from responsibility.

At sentencing, the defense introduced evidence that Petitioner has snorted 250 mg. of Ritalin in the hours leading up to the killings which, combined with his mania, rendered him "out of control" at the time. The defense moved that the trial court instruct the jury that "[e]vidence of voluntary intoxication is a proper matter for consideration by the jury in mitigation of punishment." *Appendix p. 3097*. Trial counsel argued that this instruction was necessary because the jury had previously been told that they could not consider voluntary intoxication during the guilt-or-innocence phase. Thus, without a specific instruction, the jurors would not

know that they were permitted to consider this mitigating circumstance. The trial judge denied the motion, stating that he did not believe that voluntary intoxication was a mitigating circumstance:

Getting drunk and killing somebody, I don't know that that's mitigating. You can argue it; I mean, I'm not going to stop you from arguing that he was under the influence, but voluntarily getting under the influence I don't think is a mitigating circumstance. If that were the case, then all anybody would have to do if they wanted to do physical harm to somebody is to go get just drunk enough not to pass out and then go beat the heck out of somebody and say, well, you shouldn't bother me, I was drunk.

Appendix p. 3098.

The trial court erred in denying Petitioner's motion for an involuntary intoxication charge, thereby preventing the jury from giving meaningful consideration to Petitioner's mitigating evidence. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Tennard v. Dretke*, 542 U.S. 274 (2004).

B. Exhaustion.

Petitioner exhausted his state remedies on Grounds I, II and III.

C. Direct Appeal of Grounds I, II and III.

Petitioner raised these issues on direct appeal.

D. Post-Conviction Proceedings.

Petitioner did not raise these issues through a post-conviction motion or petition for habeas corpus in a state trial court because they were exhausted on direct appeal and, therefore, they are not cognizable claims for post-conviction review.

E. Other Remedies.

Petitioner has not used any other procedures to exhaust his state remedies on Grounds One, Two and Three.

Grounds Exhausted By Petitioner's First Post-Conviction Relief Proceedings

IV. PETITIONER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY TRIAL COUNSEL'S ACTIONS IN ADVISING PETITIONER THAT ANYTHING HE REVEALED TO THE DEFENSE EXPERT MS. TONI CASCIO WAS PRIVILEGED, TRIAL COUNSEL'S FAILURE TO OBJECT TO DISCOVERY OF MS. CASIO'S NOTES BY THE STATE, AND TRIAL COUNSEL'S DECISION TO CALL MS. CASCIO TO TESTIFY UNDER THESE CIRCUMSTANCES.

A. Supporting Facts.

On March 1, 2006, counsel appointed to represent Petitioner filed an application for post-conviction relief alleging that he had not received effective assistance of counsel. On January 29 through 31, 2007, Judge John C. Few held an evidentiary hearing. At the outset of the hearing, counsel amended the application to include twelve allegations of trial counsels' ineffectiveness, including:

Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because of (a) Cascio's lack of experience; (b) counsels' agreement to provide Ms. Cascio's notes to the State; (c) counsels' failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) counsels' presentation of Ms. Cascio as a witness.

Order of Dismissal, p. 8. The judge denied relief from the bench and later by written order (prepared by counsel for the State) dated March 7, 2008.

Toni Cascio was hired by the defense to conduct a social history assessment of Petitioner. She testified as an expert for the first time ever at the sentencing phase of Petitioner's trial. During her preparations for the case, Cascio essentially obtained Petitioner's confession, including previously undisclosed details about the crimes.

Trial counsel had advised Petitioner to be completely open and honest with Cascio. They told him to speak frankly with respect to what happened that evening. Trial counsel advised Petitioner that anything he told Cascio would be privileged just as if he was speaking with his attorneys.

Cascio was the last major defense witness at sentencing. Prior to Cascio's testimony, the Solicitor requested the notes of her interview with Petitioner, which included the theretofore undisclosed circumstances of the crimes as related to Cascio by Petitioner. Trial counsel surrendered Cascio's notes to the State without objection on the night before her testimony. They proceeded the following morning to call Cascio to testify.

As he reviewed Cascio's notes overnight, the Solicitor testified at the PCR hearing, he realized that he had been given a "gift ... [a]nd I was just hoping I didn't blow it." He need not have worried. The Solicitor's cross-examination of Cascio was so damaging to Petitioner that he thereafter used it to teach fledgling prosecutors.

Prior to the Solicitor's cross-examination of Cascio, Petitioner had not directly incriminated himself. But, once the State began with its cross examination of Cascio, "[i]t [was] as if [Petitioner] was testifying against himself." All parties agreed that Cascio's disclosure of Petitioner's disturbing admissions was the most damaging evidence *in aggravation* adduced at sentencing. Among other things, Cascio revealed that Petitioner had decided not to use an autographed baseball bat to kill his father because it was valuable and "he didn't want to ruin it" and that he had also considered using an electric drill on his father "to end the matter." Cascio's notes revealed that Petitioner said his mother started screaming while he was killing her, and that "it was getting to me to hear her scream." The notes detailed how Robertson described burying a claw hammer in his father's head, and that Robertson said his father "put up a fight with the hammer stuck in his head." Cascio told

the jury that Petitioner said he was angry after the killings because his other family members did not feel sorry for him that he had lost two parents. Her notes described how Petitioner went back and kicked and beat his parents' lifeless bodies to make sure that they were dead.

At the PCR hearing, both of Petitioner's former trial counsel agreed that, as a mitigation witness, Cascio fell somewhere along the continuum between "bad" and "a disaster." They also acknowledged that calling Cascio as a witness under these circumstances had been a prejudicial mistake. Trial counsel's errors in relation to Ms. Cascio were unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008).

B. Exhaustion.

Petitioner exhausted his state remedies on Ground Four.

C. Direct Appeal of Ground Eight.

Petitioner did not raise this ground on direct appeal because it relies on evidence outside the trial record and was therefore not cognizable on direct review.

D. Post-Conviction Proceedings.

Petitioner raised this issue through an application for state post-conviction relief, filed in the York County Court of Common Pleas on March 1, 2006, Case Number 06-CP-46-00532. Petitioner received an evidentiary hearing on his application for post-conviction relief. Post-conviction relief was denied by order dated March 24, 2008. A copy of the order denying post-conviction relief is attached to this petition as Exhibit A. Petitioner appealed from the denial of his application for post-conviction relief by filing a petition for writ of certiorari in which he raised this issue. The appeal was filed before the South Carolina Supreme Court. The Petition

for Writ of Certiorari was denied on October 6, 2010. A copy of the order denying certiorari is attached to this petition as Exhibit B.

E. Other Remedies.

Petitioner has not used any other procedures to exhaust his state remedies on Grounds One, Two and Three.

**Unexhausted Grounds Pending in Petitioner's
Second Application for State Post-Conviction Relief⁴**

V. PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR JURY TRIAL WAS VIOLATED BY THE SOLICITOR'S IMPROPER AND PREJUDICIAL CLOSING ARGUMENT DURING WHICH HE ARGUED THAT THE JURY SHOULD NOT DELIBERATE WHEN DETERMINING WHETHER THE STATE HAD PROVEN PETITIONER'S GUILT BEYOND A REASONABLE DOUBT. PETITIONER'S TRIAL COUNSEL UNREASONABLY FAILED TO OBJECT TO THIS ARGUMENT IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Supporting Facts.

In closing argument during the guilt-or-innocence phase of Petitioner's capital trial, the solicitor argued to the jury as follows:

Ladies and gentlemen, they put chairs in the jury room so that you can sit down and deliberate over the evidence, so that you can have a place to sit comfortably and talk about the evidence you've heard. I submit to you that in this case you don't need to see any of this, you know what happened; you know in your hearts this man is guilty. Don't you give him – don't give him the satisfaction of five minutes thinking that maybe you're out there wondering whether he's guilty. Don't you give him five minutes. You go back there; you take your vote; you come back in here and you tell this filthy murderer that you know he killed his parents. You tell him he's guilty and you don't give him five minutes satisfaction.

⁴ The procedural history and exhaustion information required by sub-parts (b), (c), (d), and (e) of question 12 of the model form for § 2254 petitions contained in the Appendix of Forms accompanying the Rules Governing Section 2254 Cases, as it relates to Grounds V through XI is given in the subsections following the allegations supporting Ground XI.

Appendix p. 1916. This argument was fundamentally unfair as it denigrated petitioner's decision to exercise his constitutional right to jury trial and misrepresented the jury's role in the proceeding. *Darden v. Wainwright*, 477 U.S. 168 (1986). Petitioner's trial counsel failed to object to this argument. Counsel's failure to object was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).

VI. PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WERE VIOLATED BY THE STATE'S INTRODUCTION OF A LIST OF PETITIONER'S PRISON INFRACTIONS. PETITIONER'S TRIAL COUNSEL UNREASONABLY FAILED TO OBJECT AND PRESERVE FOR APPELLATE REVIEW THE FEDERAL CONSTITUTIONAL ISSUES RELATED TO THE STATE'S INTRODUCTION OF THIS LIST, IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Supporting Facts.

During the sentencing phase of petitioner's capital trial, the State introduced a list of prison disciplinary infractions that petitioner had allegedly committed through a single witness, Michael John Stobbe. *Appendix p. 2129.* Mr. Stobbe did not witness any of the alleged infractions, nor did he participate in any grievance proceedings in which it was determined whether or not Petitioner had in fact committed the alleged offenses. Rather, Mr. Stobbe was simply the branch chief for document processing at the South Carolina Department of Corrections. He had no personal knowledge of the alleged events described in the list of disciplinary infractions. *Id.* The admission of Mr. Stobbe's testimony, along with the list of prison disciplinary infractions, violated Petitioner's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment.

Trial counsel objected to the admissibility of the list of infractions on the basis of state hearsay rules, but the trial court agreed with the State's position that the list fell within the business record exception to the state hearsay prohibition. Trial counsel failed, however, to

further object on federal constitutional grounds – namely, the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Thus, trial counsel failed to preserve the federal constitutional bases for their objection for appellate review. *See State v. Stone*, 655 S.E.2d 487, 488–89 (S.C. 2007) (failure to argue the specific federal constitutional grounds at the time of the objection results in procedural default). Trial counsel's error was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).

VII. PETITIONER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATE ELICITING TESTIMONY THAT THE VICTIM WOULD HAVE BEEN MORTIFIED BY THE TESTIMONY INTRODUCED ABOUT HER BY DEFENSE WITNESSES AND TRIAL COUNSEL'S FAILURE TO INTRODUCE EVIDENCE THAT THE VICTIMS WERE OPPOSED TO CAPITAL PUNISHMENT.

A. Supporting Facts.

At sentencing, the State elicited testimony from the Robertson's family counselor that Terry Robertson was a very private person and would have been "mortified" to know that her personal and family secrets were being shared for everyone to hear in the courtroom by defense witnesses. In closing argument, the State argued that the jury should sentence Petitioner to death, in part, because he had humiliated his mother even in her death by dragging her family problems out into the open and essentially "raping her" in the courtroom. *See* Ground Eight. Petitioner's trial counsel failed to object to this testimony and further failed to rebut this claim with evidence that Petitioner's parents were morally opposed to capital punishment and would not have wanted their son to be sentenced to death. Counsel's failures were unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).

VIII. PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE SOLICITOR'S IMPROPER CLOSING ARGUMENT DURING THE PENALTY PHASE OF PETITIONER'S CAPITAL TRIAL. PETITIONER'S TRIAL COUNSEL UNREASONABLY FAILED TO OBJECT TO THIS ARGUMENT IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A. Supporting Facts.

During his penalty phase closing argument, the solicitor argued that Petitioner's mitigation presentation was equivalent to raping his mother in the courtroom:

You know, Ms. Cascio talked about Terry being sexually abused. Terry has been raped. She was raped in this courtroom when they take her through this based on his actions."

The solicitor's argument was inflammatory, calculated to arouse passion and prejudice, and was inherently prejudicial and fundamentally unfair. Moreover, the argument invited the jury to penalize Petitioner for exercising his constitutional right to jury trial, his constitutional right to present a defense, and his constitutional right to present mitigating evidence. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (noting that when specific guarantees are implicated, the United States Supreme Court "has taken special care to assure that the prosecutorial conduct in no way impermissibly infringes on them"); *Darden v. Wainwright*, 477 U.S. 168, 182 (1986) (warning against prosecutorial misconduct that "implicate[s] other specific [constitutional] rights of the accused"). Petitioner's trial counsel failed to object to this argument. Trial counsel unreasonably failed to object to this argument. Counsel's error was prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).

IX. PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S ERROR IN FAILING TO STRIKE A PANEL OF POTENTIAL JURORS WHO VIOLATED THE TRIAL COURT'S INSTRUCTIONS AND DISCUSSED NEWS STORIES ABOUT THE CASE WHILE WAITING TO BE QUESTIONED ON INDIVIDUAL VOIR DIRE. PETITIONER'S APPELLATE COUNSEL UNREASONABLY FAILED TO RAISE THIS ISSUE ON DIRECT APPEAL, IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

A. Supporting Facts.

During the individual voir dire of potential Juror Michael Goeller, the parties learned that an entire panel of potential jurors – consisting of eight or nine prospective jurors – had violated the trial court's orders and discussed news accounts of the case while they waited to be questioned individually. These discussions included speculation about the relevance of potential witnesses from Philadelphia. One potential juror responded that the news stories said that Petitioner had gone to Philadelphia after the crime. Another speculated that perhaps the armed robbery charge was related to something he had done in Philadelphia. Others discussed how news accounts reported that Petitioner had killed a man and a woman. Another stated that he did not know if the robbery charge was related to "one continuing act of violence" or if the robbery was related to Petitioner's actions when he fled to another state. Upon discovering that this panel had disregarded the court's instructions, and had discussed news reports with each other in detail, trial counsel moved to disqualify the entire panel. The panel included Juror Stikeleather, who was later seated as a juror. The trial court denied the motion, saying that it would ask a series of curative questions at a later time. Just prior to the striking process, the trial court stated that it was aware that one panel had had some discussions about the case prior to voir dire and in contradiction of the court's instructions. The court asked if anyone who heard those conversations felt that they could not be fair and impartial jurors because of that fact. No one responded. The trial court erred in its decision to deny the defense motion to disqualify the panel

for cause. Appellate counsel's failure to raise this error on appeal was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).

X. PETITIONER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY APPELLATE COUNSEL'S FAILURE TO RAISE THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO SPECIFICALLY DEFINE MITIGATING CIRCUMSTANCES AND TO QUESTION POTENTIAL JURORS ABOUT SPECIFIC MITIGATING CIRCUMSTANCES DURING VOIR DIRE.

A. Supporting Facts.

Prior to voir dire, defense counsel moved for permission to give specific examples of mitigating circumstances to prospective jurors and to question them about their ability to give meaningful consideration to those circumstances. The trial court denied the motion, saying that defense counsel could read the general, legal definition of mitigating circumstances, but could not go any further than that. Defense counsel objected, arguing that it was impossible to determine if prospective jurors could give meaningful consideration to mitigation if they did not understand what it is. The trial court instructed potential jurors during individual voir dire that mitigating circumstances are things that "do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability." Even after receiving this instruction, many prospective jurors stated that they still did not understand what mitigating circumstances are, but defense counsel were not permitted to give them specific examples. The Sixth Amendment to the United States Constitution guarantees a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. See *Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-158 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-473 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-723

(1961). "Any juror to whom mitigating factors are ... irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan*, 504 U.S. at 738-739. Thus, if a juror is substantially impaired in his or her ability to meaningfully consider and give effect to any mitigating evidence relevant in the defendant's particular case, the juror must be removed. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989). In Petitioner's case, it was impossible to determine whether or not potential jurors met this standard for qualification since the trial court erroneously denied his motion to specifically explain mitigating circumstances. Appellate counsel's failure to raise this error on appeal was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).

XI. PETITIONER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY APPELLATE COUNSEL'S FAILURE TO RAISE THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO LIMIT THE STATE'S PRESENTATION OF VICTIM IMPACT EVIDENCE TO TESTIMONY FROM IMMEDIATE FAMILY MEMBERS.

A. Supporting Facts.

Prior to the start of the penalty phase of Petitioner's capital trial, defense counsel moved to limit the State's presentation of victim impact evidence to testimony from immediate family members. The defense argued that *Payne v. Tennessee*, 501 U.S. 808 (1991), was a narrow holding that only permits a brief glimpse into the impact on the immediate family members; it does not extend to non-family friends and extended relatives. The trial court denied this motion, permitting the state to offer victim impact evidence from the victim's friends, co-workers, and extended family members. The trial court erred in denying this motion. Appellate counsel's

failure to raise this error on appeal was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).

B. Exhaustion.

Petitioner raised Grounds Five through Eleven in his second application for state post-conviction relief, filed on January 6, 2011. These claims are not yet exhausted because petitioner's second application for state post-conviction relief remains pending.

C. Direct Appeal of Grounds Five Through Eleven.

Petitioner did not raise these grounds on direct appeal because they are based on evidence outside the appellate record and were therefore not cognizable for direct review.

D. Post-Conviction Proceedings.

Petitioner raised these claims in his second application for state post-conviction relief filed in the York County Court of Common Pleas on January 6, 2011. This application remains pending. Petitioner has not yet received an evidentiary hearing or a result relative to that application.

E. Other Remedies.

Petitioner has not used any other procedures to exhaust his state remedies on Grounds Five through Eleven.

13. (a) Not all grounds for relief raised in this petition have been presented to the highest state court. Grounds Five through Eleven have not been presented to the state's highest court because they are currently pending in petitioner's second application for post-conviction relief filed on January 6, 2011.
- (b) All grounds in this petition have been presented in state court.
14. Petitioner has not previously filed any petition, application, or motion in federal court regarding the convictions that he challenges in this petition.

15. Petitioner has an application for state post-conviction relief now pending in the York County Court of Common Pleas.
16. The names and addresses of each attorney who previously represented petitioner are as follows:
 - (a) At preliminary hearing: James W. Hancock, P.O. Box 2851, Rock Hill, South Carolina, 29732, and James W. Boyd, 1544 Ebenezer Road, Rock Hill, South Carolina, 29732.
 - (b) At arraignment and plea: same as above.
 - (c) At trial: same as above.
 - (d) At sentencing: same as above.
 - (e) On appeal: Robert Dudek and Joseph L. Savitz, III, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.
 - (f)(i) In the first state post-conviction proceedings: Michael L. Brown, Jr., P.O. Box 1025, Rock Hill, South Carolina, 29731, and Joseph D. Matlock, P.O. Box 11101, Rock Hill, South Carolina, 29731.
 - (f)(ii) In the second state post-conviction proceedings: John H. Blume & Keir Weyble, Cornell Law School, Myron Taylor Hall, Ithaca, New York, 14853, and Emily C. Paavola, Death Penalty Resource & Defense Center, P.O. Box 11311, Columbia, South Carolina, 29211.
 - (g) On appeal from the denial of the first application for state post-conviction relief: Joseph L. Savitz, III, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.
17. Petitioner has no future sentences to serve after the completion of the sentences imposed by the judgment challenged in this petition.
18. **TIMELINESS OF PETITION:** The limitations period calculations with respect to this petition have already been addressed by the Court and the parties, who have agreed that the time for filing the petition prescribed by 28 U.S.C. § 2244(d) expires on January 8, 2011.

WHEREFORE, petitioner prays that the Court issue an order to have him brought before it, to the end that he may be discharged from the unconstitutional confinement and restraint, and grant such other relief as may be necessary and appropriate.

Respectfully submitted,

JOHN H. BLUME
KEIR M. WEYBLE
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030
(607) 255-3805

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, SC 29211
(803) 765-1044

BY: s/Keir M. Weyble

January 7, 2011.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. Executed by court-appointed counsel for petitioner on January 7, 2011.

BY: s/Keir M. Weyble

STATE OF SOUTH CAROLINA

COUNTY OF YORK

JAMES D. ROBERSTON, # 5067 C.C. 68-989
Applicant, York County, SC

vs.

State of South Carolina,
Respondent.

2011 CP 4600072
IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST- CONVICTION RELIEF

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court which imposed sentence: York County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 98-GS-46-1020
5. The date upon which sentence was imposed and the terms of the sentence: March 26, 1999 (Death Sentence)
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8.
 - (a) The Court to which applicant appealed: The South Carolina Supreme Court.
 - (b) The result in each Court to which applicant appealed: Appeal dismissed
 - (c) The date of such result: June 3, 2005
 - (d) Not applicable
9. Not applicable.

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2011 JAN -7 PM 4:44
DAVID HANLTON
CLERK OF COURT
YORK COUNTY, SC

GROUND FOR RELIEF WITH SUPPORTING FACTS

10(a): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in Section 11(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. See *Strickland v. Washington*, 466 U.S. 668 (1984).

11(a): Trial counsel's acts or omissions included:

- (i) Counsel failed to object to the Solicitor's improper closing argument. The solicitor encouraged the jury to rely on their own emotions and passion, rather than the evidence presented, by telling the jury that they did not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty. (Trial Tr. 1916). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

10(b): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 11(b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. See *Strickland v. Washington*, 466 U.S. 668 (1984).

11(b): Trial counsel's acts or omissions included:

- (i) Counsel failed to object to presentation of Applicant's prison disciplinary record by a single witness, who had not witnessed the presented events, in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. (Trial Tr. 2129).
- (ii) Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that the victim, Terry Robertson, was a very private person and would have been deeply upset by the revelation of her counseling records. (Trial Tr. 2792). SCRE 403.
- (iii) Counsel failed to develop and introduce evidence that the victims were opposed to capital punishment and would not have wanted their son to be sentenced to death.
- (iv) Counsel failed to object to the State's improper statements during closing argument that Applicant's presentation of relevant mitigating evidence of his family's mental health history had been a "rape" of his mother Terry Robertson,

and that this evidence had dragged Terry "through the mud." (Trial Tr. 3144, 3142). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

10 & 11(c): Applicant's Sixth and Fourteenth Amendment right to a fair jury trial was violated by the solicitor's improper and prejudicial closing argument during the guilt-or-innocence phase of the trial during which the solicitor argued that the jury should not deliberate when determining whether the state had proven Applicant's guilt beyond a reasonable doubt. (Trial Tr. 1916).

10 & 11(d): Applicant's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment were violated by the state's introduction of a list of Applicant's prison infractions during the sentencing phase of his capital trial. (Trial Tr. 2129).

10 & 11(e): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the solicitor's improper closing argument during the sentencing phase of Applicant's capital trial during which the solicitor argued that that the defense's mitigation presentation was equivalent to raping the victim in the courtroom. ("You know, Ms. Cascio talked about Terry being sexually abused. Terry has been raped. She was raped in this courtroom when they take her through this based on his actions.") (Trial Tr. 3144).

10 & 11(f): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the trial court's error in failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire. (Trial Tr. 425 & 1283).

10 (g): Applicant was denied the right to effective assistance of appellate counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – when appellate counsel committed the acts or omissions set forth below in Section 11(g). Appellate counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

11(g): Appellate counsel's acts or omissions included:

- (i) Appellate counsel failed to claim on appeal that the trial court had violated Applicant's Sixth, Eighth and Fourteenth Amendment rights by failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire.
- (ii) Appellate counsel failed to raise the issue whether the trial court erred by denying the defense's motion to specifically define mitigating circumstances and to question potential jurors about specific mitigating circumstances, where several

potential jurors indicated that they did not understand what mitigating circumstances were even after hearing the general legal definition. (Trial Tr. 193-96).

- (iii) Appellate counsel failed to raise the issue whether the trial court erred by denying the defense's motion to limit the State's presentation of victim impact evidence to testimony from immediate family members. (Trial Tr. 1985-98). Appellate counsel's performance was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984).
12. (a) Yes, applicant has filed a mandatory appeal to the State Supreme Court, an application for post-conviction relief to the York County Court of General Sessions, and a petition for writ of certiorari from denial of his application for post-conviction relief to the State Supreme Court.
- (b) Yes, applicant has previously filed an application for post-conviction relief in State court. Applicant is currently filing a petition for habeas corpus in Federal court.
- (c) No, no other petitions have been filed in the United States Supreme Court.
- (d) No, no other petitions, motions or applications in this or any other court.
13. (a) Specific nature of other petitions:
- (i) Application for post-conviction relief
 - (ii) Petition for writ of certiorari from denial of application for post-conviction relief
- (b) Name and location of the Court in which each was filed:
- (i) York County Court of General Sessions
 - (ii) South Carolina Supreme Court
- (c) Disposition thereof:
- (i) Application denied
 - (ii) Cert denied
- (d) Date of such disposition:
- (i) March 24, 2008
 - (ii) October 6, 2010
- (e) Citations of any written opinion or orders entered pursuant to such results:
Not applicable.

14. Have the grounds set forth in Sections 10 and 11 been previously presented to this or any other Court, State or Federal? No
15. (a) Which grounds have been presented: Not applicable
(b) The proceedings in which each ground was raised: Not applicable
16. Reason why grounds set forth in (10) have not previously been presented to any Court:
(a) Applicant's post-conviction relief counsel were not qualified for appointment under the terms of the capital PCR statute.
(b) Applicant's PCR counsel conducted an inadequate investigation.
(c) Applicant's PCR counsel failed to provide competent, reasonable representation.
16. Applicant was previously represented by counsel.
17. Applicant was represented at trial by James W. Hancock, P.O. Box 2581, Rock Hill, South Carolina, 29732 and James W. Boyd, 1544 Ebenezer Road, Rock Hill, SC 29732.

On direct appeal, Applicant was initially represented by Robert Dudek and Joseph Savitz, of the Office of Appellate Defense, P.O. Box 11589, Columbia, SC 29211, but ultimately proceeded *pro se*.

In his initial application for post-conviction relief, Applicant was represented by Michael L. Brown, Jr., P.O. Box 1025, Rock Hill, SC, 29731 and Joseph D. Matlock, P.O. Box 11101, Rock Hill, SC 29731.

In his petition for writ of certiorari from denial of his application for post conviction relief, Applicant was represented by Joseph L. Savitz III, 1330 Lady Street, Suite 401, Columbia, SC 29201.
18. Applicant seeks relief from his conviction and sentence.
19. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, South Carolina 29211
(803) 765-1044

JOHN H. BLUME
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, South Carolina 29211
(803) 765-1044

KEIR WEYBLE
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, South Carolina 29211
(803) 765-1044

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

January 6, 2011

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 JAMES D. ROBERTSON, SK 5067,)
Applicant,)
)
 v.)
)
 STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS
 Case No.:

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 6th day of January, 2011, upon the following:

William Edgar Salter
 Assistant Attorney General
 P.O. Box 11549
 Columbia, SC 29211

Jill A. Rider
 Jill A. Rider

2011 JAN -7 PM 3:35
 DEAN HAMILTON
 C.C.P. & SS
 YORK COUNTY, SC

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

JAMES D. ROBERTSON, #5067,)	C/A No. 8:11-00063-SB-BHH
)	
Petitioner,)	
)	RESPONSE IN OPPOSITION TO
vs.)	MOTION TO STAY PROCEEDINGS
)	PENDING EXHAUSTION OF
JON OZMINT, Director,)	STATE REMEDIES
South Carolina Department of Corrections,)	
)	
Respondent.)	

Respondent hereby makes a Response to the Motion To Stay Proceedings Pending Exhaustion Of State Remedies. Respondent submits that Petitioner’s motion must be denied for the following reasons:

I. PROCEDURAL HISTORY

A. Robertson’s trial and the voluntarily abandoned direct appeal.

Petitioner, James D. Robertson, is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his two York County murder convictions and death sentences for killing his parents. The York County Grand Jury indicted Robertson at the April 23, 1998 term of court for two counts of murder (98-GS-46-1020 & -1021), one count of armed robbery, (98-GS-46-1022) and one count of financial transaction card fraud (98-GS-46-1023). App. 3758-65. On April 30, 1998, the State served him with a Notice of Intent to seek the death penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002). The State also gave notice at that time that it would rely upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; larceny with

the use of a deadly weapon; and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. See S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2010).

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock, Esquire, and James W. Boyd, Esquire, represented Robertson.¹ Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motion hearings on July 17, September 22 and 25, 1998; November 2 and 20, 1998; December 4 and 18, 1998; and on February 12 and 19, 1999.

Robertson's jury trial began on March 15, 1999. The jury convicted him of all of the indicted offenses; and a sentencing phase was conducted, after his exercise of the 24-hour statutory waiting period in § 16-3-20(B). In addition to the five statutory aggravating circumstances relied upon by the State, Judge Hayes instructed the jury on the statutory mitigating circumstances that Robertson did not have any prior convictions involving the use of violence against another person; that the murders were committed while he was under the influence of a mental or emotional disturbance; that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and his age and mentality at the time of the crimes. § 16-3-20(C)(b)(1)-(2), (6) and (7). The jury found each of the alleged statutory aggravating

¹ Thad Lee Myers, Esquire, had originally been appointed to represent Robertson. However, Mr. Myers was relieved because of a conflict of interest.

circumstances and it sentenced Robertson to death for each of the murders. Judge Hayes affirmed their decision and imposed the death sentence for the murders. **App. 1-3242.**

Robertson did not file a timely Notice of Appeal; but Judge Hayes entered a Consent Order granting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). At various points on direct appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III represented Robertson before the South Carolina Supreme Court. On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Robertson's behalf.² However, Robertson wrote a letter to the South Carolina Supreme Court on June 3, 2002, in which he asked the Court to relieve Mr. Savitz and to allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme Court filed an Order on June 26, 2002, in which it remanded the matter to Judge Hayes for a hearing on Robertson's competency to appear *pro se*.

Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002.³ On

² Appellate counsel Savitz' Brief presented three issues:

1. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.
3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.

4/15/02 Initial Brief of Appellant at p. 1.

³ Robertson was present at the hearing and Bruce M. Poore, Esquire, represented him. Senior Assistant General William Edgar Salter, III, represented the State. Robertson was the only witness at the hearing.

October 28, 2002, Judge Hayes signed a Report in the Supreme Court of South Carolina. He found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

Robertson thereafter filed a pro se Initial Brief of Appellant, dated July 25, 2003, in which he presented seven issues for appellate review:

1. The judge erred in denying 3 separate motions for a directed verdict based on insufficient evidence and State's failure to meet the burden of proof as to first element of corpus delicti of murder at the conclusion of State's case.
2. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
3. The judge erred by denying the jury's request to take notes while being recharged as to the law during guilt phase deliberations.
4. The judge erred in revealing the location where the jurors were sequestered, thereby denying appellant his constitutional right to a fair and impartial jury.
5. The judge erred in not allowing the defense to define "life imprisonment" as it appears in the state statute to potential jurors during *voir dire*, thereby denying appellant a fair and impartial jury.
6. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.
7. The judge erred in sentencing appellant to death.

Pro Se Initial Brief of Appellant at p. 2. The State filed the Initial Brief of Respondent on December 31, 2003.

However, the direct appeal was dismissed and re-instated on several occasions because of Robertson's failure to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the South Carolina Supreme Court that he wished to abandon his right to a direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing was held before Judge Hayes on February 22, 2005, at the Moss Justice Center in York, South Carolina.⁴ In a February 23, 2005 Report to the Supreme Court, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order filed June 3, 2005, the Supreme Court of South Carolina agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003), it dismissed the appeal and it directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). Thus, Petitioner did not exhaust any claim on direct appeal because he knowingly and voluntarily abandoned the appeal.

B. Intervening action prior to PCR filing.

On June 16, 2005, Robertson requested a Stay of Execution to file a Post-Conviction Relief (PCR) application. Over Respondent's opposition, the Supreme Court filed a July 7, 2005 Order granting a stay pursuant to *In Re: Stays of Execution*. The Court also appointed the Honorable John C. Few to preside over this case and it directed Judge Few to hold a hearing to determine whether Robertson desired to have counsel appointed.

⁴ Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), Judge Few filed an Order Appointing Counsel For Post-Conviction Relief dated September 9, 2005, in which he appointed Michael Brown, Esquire, to represent Robertson.⁵ Judge Few held a hearing at the Greenville County Courthouse on September 23, 2005. Robertson was present at this hearing, as was Mr. Salter, who represented the State. The appointment of Mr. Brown was confirmed at that hearing.⁶ Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

C. State PCR proceedings.

Robertson filed his PCR Application on March 1, 2006. App. 3244-51. Respondent filed its Return on October 20, 2006. App. 3252-62. Judge Few held an evidentiary hearing into the matter on January 29-31, 2007, at the Moss Judicial Center in York, South Carolina. Robertson was present at the hearing, and Messrs. Brown and Matlock, Esquires, represented him. Mr. Salter represented the State.⁷

⁵ A copy of this Order is attached to this Response.

⁶ The undersigned counsel has checked both its PCR files and the mail logs for counsel in the years 2005 and 2006. The transcript of the September 23, 2005 hearing is not in the files and Respondent apparently did not order this transcript because Robertson did not contest counsel's qualifications in state PCR. Pursuant to Rule 607(I), SCACR, "a court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that period." Respondent has not previously requested the transcript of the September 23, 2005 hearing and is unaware if Robertson has done so. See *State v. Serrette*, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct.App.2007) (stating the burden is on the appellant to provide an appellate court with an adequate record for review); *State v. Williams*, 321 S.C. 455, 464 n. 4, 469 S.E.2d 49, 54 n. 4 (1996). See also Rule 210(h), SCACR (an appellate court need not consider any fact which does not appear in the record).

⁷ Robertson testified on his own behalf at the hearing. He also presented testimony from his trial counsel, James William Hancock, Jr., and James W. Boyd, Esquires. The State presented the current Sixteenth Circuit Solicitor, Kevin S. Brackett; the former Sixteenth Circuit Solicitor, Thomas E. Pope, Esquire; Michael Stobbe, the Branch Chief of Inmate Records at the South Carolina Department of

At the outset of the PCR hearing, Robertson amended his Application and proceeded on twelve specific grounds of ineffective assistance of counsel, including the following, relevant allegations:

1. Counsel failed to present Dr. Hayne McMeeKin as a witness and failed to develop evidence that Dr. McMeeKin over-prescribed Ritalin;
2. Counsel failed to present Chip Robertson as a defense witness;
3. Counsel failed to pursue a verdict of guilty but mentally ill (GBMI), either by advising Applicant to enter such a plea or by requesting a verdict of GBMI at the trial;
4. Counsel failed to spend an adequate amount of time with Applicant prior to trial;
5. Counsel never pursued a proposed plea bargain allegedly offered by the State;
6. Counsel erroneously advised Applicant not to testify in the sentencing phase of his trial;
7. Counsel failed to present evidence that Applicant is adaptable to prison;
8. Counsel failed to cross-examine Applicant's co-defendant, Meredith Moon about a statement in which she allegedly agreed to "keep quiet" about the murders in exchange for \$50,000.00;
9. Counsel failed to request removal of a juror where the juror had made statements on *voir dire*;

Corrections (S.C.D.C.); and Ms. Merry Collins, an Investigator with the Sixteenth Circuit Solicitor's Office. App. 3263-3650. The Court also had before it the trial transcript (including pretrial motions hearings); the records from Robertson's direct appeal to the South Carolina Supreme Court and the waiver of his appeal; the June 16, 2005 letter request for a stay of execution; Respondent's June 21, 2005 letter opposing the request for a stay of execution; the July 7, 2005 Order of the South Carolina Supreme Court granting the stay; the Order Appointing Counsel for Post-Conviction Relief; the York County Clerk of Court's records; the Post-Conviction Relief Application and the Return. Order, App. 3652-53.

10. Counsel did not adequately advise Applicant before he was evaluated by the prosecution's psychologist, Dr. Geoffrey McKee;
11. Counsel failed to adequately present evidence of the Robertson family's mental health history; and
12. Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because (a) of Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; (c) counsel's failure to discover Applicant's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness.

App. 3268-73. *See also App. 3658-59.* Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. **App. 3652- 57.** The Order of Dismissal addressed the claims that Robertson had raised at the PCR hearing.

Petitioner timely served and filed a notice of appeal. Chief Deputy Appellate Defender Joseph L. Savitz, III, represented him in collateral appellate proceedings. Thereafter, Mr. Savitz filed a Petition for Writ of Certiorari on Petitioner's behalf. The only Question Presented in the Petition was stated as follows:

Trial counsel was ineffective at sentencing (1) for advising Robertson that anything he revealed to Ms. Cascio - including theretofore undisclosed details about the crimes - was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio's notes by the State and (3) for calling Ms. Cascio as a witness under these circumstances.

Petition for Writ of Certiorari at p. 1. The State, through the undersigned counsel, filed a Return to Petition for Writ of Certiorari on July 15, 2009. The State re-stated the issues before the South Carolina Supreme Court as follows:

Whether this Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio; the defense social worker, was privileged against discovery by the State was not presented to or ruled upon by the PCR judge and he did not seek a ruling by filing

a Rule 59(e), SCRPC, motion?

Whether this Court should deny certiorari because probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness?

Return to Petition for Writ of Certiorari at p. ii.

The South Carolina Supreme Court filed a letter Order denying certiorari on October 6, 2010. It sent the Remittitur to the York County Clerk of Court on October 22, 2010.

D. The Petition for Writ of Habeas Corpus.

On October 27, 2010, Robertson filed a Motion for Stay of Execution and a Motion for Appointment of Counsel [**Dock. No. 1**], so that he might pursue relief pursuant to a timely petition for a writ of habeas corpus under 28 U.S.C. § 2254 and 2244(d). Respondent received these motions on October 28, 2010 and made a Response thereto on November 1, 2010. [**Dock. No. 3**]. The Honorable Sol Blatt, Jr., United States District Judge, entered an Order granting Petitioner's Motion for Stay of Execution. [**Dock No. 10**]. The Honorable Bruce Howe Hendricks, United States Magistrate Judge thereafter entered Orders appointing John H. Blume, Esquire (as lead counsel); Keir M. Weyble, Esquire; and Emily C. Paavola, Esquire to represent Robertson. [**Dock. Nos. 14; 17**].

Robertson filed his Petition for Writ of Habeas Corpus on January 7, 2011. [**Dock No. 20**]. He also filed the above captioned motion for a stay on January 7th. [**Dock No. 21**].

II.

Robertson premises his stay motion on the assertion that "[t]he record available to undersigned counsel contains no indication that either [collateral] attorney met the statutory criteria for appointment as qualified PCR counsel in a capital case." See S.C. Code Ann. § 17-27-160 (2003)

He further asserts that collateral counsel were ineffective because they failed to raise the various allegations in **Grounds V-XI. See Petition for Writ of Habeas Corpus, pp. 18-25.** However, his stay request must be denied.

First, his complaint is one of a state law violation that was never litigated in state PCR proceedings. As this Court is well aware, “federal habeas corpus relief does not lie for errors of state law.’ ... [Also], . . . it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). See also *Wilson v. Corcoran*, 131 S.Ct. 13 (2010);⁸

⁸ In a *per curiam* opinion, the Court summarily vacated a decision in which the Seventh Circuit granted habeas corpus relief for an Indiana state prisoner. Jurors at Joseph E. Corcoran’s state-court trial found that he was guilty of quadruple murder, found the statutory aggravating circumstance of multiple murders present, and recommended a death sentence. In adopting that recommendation, the trial judge made certain references to the innocence of Corcoran’s victims, the heinousness of the offense, and his likely future dangerousness. Based on a clarification that the trial judge provided on remand, the Indiana Supreme Court accepted that his comments were intended only to provide context, and did not reflect any reliance on aggravating factors beyond those recognized by Indiana statute. Corcoran then sought federal habeas corpus relief, alleging in part that he had been improperly sentenced based on non-statutory aggravating factors. Ultimately, the Seventh Circuit granted relief. It found that the state high court’s conclusion on the sentencing issue constituted an “unreasonable determination of the facts” under 28 U.S.C. §2254(d)(2). It added that remanding the case for sentencing would “prevent noncompliance with Indiana law,” which “[Corcoran] contend[ed] . . . also violates the federal Constitution.” *Id* at 14-16.

The Supreme Court unanimously reversed. The Court reaffirmed that “it is only noncompliance with federal law that renders a State’s criminal judgment susceptible to collateral attack in federal courts. The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner ‘only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.’ 28 U.S.C. § 2254(a). And we have repeatedly held that federal habeas corpus relief does not lie for errors of state law.” (internal quotation marks omitted). *Corcoran*, 131 S.Ct. at 16.

The Court criticized the Seventh Circuit panel for providing “no hint that it thought the violation of Indiana law it had unearthed also entailed the infringement of any federal right.” Nor, held that Court, did it matter that the Seventh Circuit based its holding on §2254(d)(2). That provision “does not repeal the command of §2254(a) that habeas relief may be afforded to a state prisoner ‘only on the ground’ that his custody violates federal law.” Without expressing a view as to the merits of Corcoran’s underlying claims, the Court remanded the case for further proceedings not inconsistent with its decision. *Id* at 16-

Swarthout v. Cook, 562 U.S. ___, No. 10-333 (U.S.S.Ct, Jan., 24, 2111) (*per curiam*). Further, alleged defects in state post-conviction procedures are not cognizable in a federal habeas corpus action. *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) (holding that errors and irregularities in connection with state post-conviction proceedings are not cognizable on federal habeas review). *See also Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir. 1998) (rejecting claim as outside the scope of federal habeas corpus relief, because “[a] federal court “shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.A. § 2254(a),” and petitioner was “not currently detained as a result of a decision of the Virginia Supreme Court in the state habeas action”). However, Robertson chose not to pursue this allegation in state PCR.

Moreover, his asserted basis for a successive PCR Application lacks merit. Neither state court, *see Aice v. State*, 409 S.E.2d 392 (S.C. 1991), nor this Court will grant relief based upon the ineffective assistance of collateral counsel. *See* § 2254(I) (“[t]he ineffectiveness ... of counsel during ... State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254”); *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (en banc); *Longworth v. Ozmint*, 377 F.3d 437, 448 n. 2 (4th Cir. 2004); *Martinez v. Johnson*, 255 F.3d 229, 245 (5th Cir. 2001) (in light of § 2254(I), the Court was “unpersuaded” by petitioner's argument “that the State of Texas violated the Fourteenth Amendment by arbitrarily depriving him of his statutorily-created liberty interest in a competent post-conviction counsel”); *Shackelford v. Armontrout*, 950 F.2d 521, 522 (8th Cir. 1991) (rejecting petitioner's argument that a Missouri Supreme Court rule “mandating

appointment of counsel in post-conviction proceedings, created a state liberty interest in effective assistance of counsel”); cf. *Bonin v. Calderon*, 59 F.3d 815, 842 (9th Cir.1995) (“Bonin's contention that he was deprived of a state-created liberty interest in having two attorneys make closing arguments must therefore fail.... [T]here is certainly no federal constitutional right to have two attorneys make closing arguments even in death penalty cases.” (citation omitted)); *Livingston v. Kansas*, 2010 WL 4318817 (10th Cir., Nov. 2, 2010) (unpublished); *Espinoza v. Estep*, 276 F. App'x 781, 786 (10th Cir.2008) (“[w]e are not at liberty to consider” an argument that “a limited state right to effective assistance of post-conviction counsel ... creates an interest that cannot be denied without violating the Due Process Clause of the Fourteenth Amendment” because it is precluded by 28 U.S.C. § 2254(I), which was not alleged to be unconstitutional).

Additionally, this supposed lack of qualification was an issue that could have been raised, if at all, at the time of the appointment and later pursued on appeal. See *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992)(An issue must have been raised to and ruled upon by the PCR judge to be preserved for appellate review); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (petitioner failed to preserve for review on appeal claim that trial counsel was ineffective for failure to object that sentences constituted cruel and unusual punishment where point was not raised in PCR application or at hearing). As a result, it may not be asserted as a basis for a successive PCR Application. S.C. Code Ann. § 17-27-90 (2003); *Aice v. State, supra*.

Also, his claim is obviously barred in PCR by the one year statute of limitations governing PCR applications, S.C. Code Ann. § 17-27-45(A) (Supp. 2010). Likewise, laches bars relief in state court because of Robertson's failure to timely obtain the transcript of the September 2005 hearing.

See *Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005).⁹

The State would further note that the argument lacks merit as a matter of state law. Robertson contends that to be qualified in a capital PCR a lawyer either needs to have either previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief. However, in her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 13th, 2003, the Chief Justice of the South Carolina Supreme Court specifically rejected this interpretation, finding that it would lead to the absurd result that an attorney qualified to represent a capital inmate at trial would not be qualified to represent him in PCR.¹⁰ Thus, it was concluded that the “not less than twelve hours of CLE education” clause and the “or professional training primarily involving advocacy in capital appellate

⁹ In *Bray*, the state supreme court explained that:

Laches is “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.” *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

In this case, petitioner's PCR application was filed seven years after the denial of his first PCR application. He offered no explanation for the delay other than the fact that he only recently discovered he could seek a belated review of that denial. The tapes of petitioner's first PCR hearing have now been destroyed. Counsel had no notes on the PCR hearing, and neither petitioner nor his prior plea counsel or PCR counsel could specifically recall the testimony presented at the PCR hearing. Based on these facts, the PCR judge properly found that petitioner's claim was barred by laches. *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (this Court must affirm the rulings of the PCR judge if there is any evidence to support the decision).

Bray, 366 S.C. at 140-41, 620 S.E.2d at 745.

¹⁰ Respondent has attached a copy of this Memorandum to the current Response.

or PCR defense" clause of S.C. Code Ann. § 17-27-160(B) were independent means through which an otherwise death penalty-qualified attorney could qualify to represent a death row inmate in PCR. Accordingly, an otherwise death-qualified attorney's twelve hours of CLE within the previous two years did not necessarily have to be in the field of capital appellate or PCR defense.

Here, Judge Few specifically relied on the statute and this memorandum to conclude that PCR counsel were sufficiently qualified. His September 9, 2005 Order appointing Mr. Brown specifically states that "[t]he defendant contends that he is indigent and in need of an attorney as contemplated by law." "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990). As a result, the presumption is that Judge Few appointed in accordance with § 17-27-160(B).¹¹ Thus, there was no violation of the capital PCR qualification statute, and accordingly no basis for remanding this case and treating the proceedings that have taken place as a nullity.

Finally, Respondent has attached pleadings from *Abdiyyah ben Alkebulanyahh, #6012 v. State*, a capital PCR appeal in which the state supreme court, on October 20, 2010, summarily denied a Motion to Remand for Additional Post-Conviction Proceedings filed on the petitioner's behalf by Robertson's lead counsel, Mr. Blume. Thus, Robertson's counsel are well aware that the present motion is without merit.

Each and every allegation contained within the Motion not hereinbefore either expressly admitted, qualified or explained is hereby denied.

CONCLUSION

¹¹ Reliance upon the presumption would be unnecessary if Robertson had timely raised the matter in state PCR.

WHEREFORE, having made its Response to the Motion To Stay Proceedings Pending Exhaustion Of State Remedies, Respondent requests that the Motion be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
ID No. 4425

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
ID No. 3710

ATTORNEYS FOR RESPONDENT

By: s/William Edgar Salter, III
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

January 24, 2011.

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DEFENSE OF INDIGENTS ACT
FORM NO. IV

HAMILTON
P & G.S.
COUNTY, SC

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
DOCKET NO. _____)

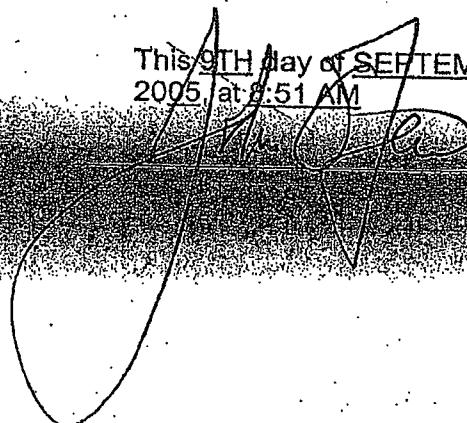
STATE OF SOUTH CAROLINA)
VS.)
JAMES D. ROBERTSON)
DEFENDANT)
_____)

ORDER OF APPOINTMENT OF LEGAL
COUNSEL OF INDIGENT DEFENDANT

The defendant contends that he is indigent and in need of services of an attorney as contemplated by law. THEREFORE, MICHAEL BROWN, Attorney-at-Law, is appointed as Counsel for the Defendant.

This 9TH day of SEPTEMBER,
2005, at 8:51 AM

FOR DEATH PENALTY
P.O. DRAWER #250
ROCKHILL, SC 29762
803-329-4200
SEE ATTACHED MEMO
FROM JUDGE FEW.



Court News

The Supreme Court of South Carolina

JEAN HOEFER TOAL
CHIEF JUSTICE

POST OFFICE DRAWER 12458
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1584
FAX: (803) 734-1167

August 13, 2003

TO: All Circuit Court Judges
FROM: Chief Justice Jean H. Toal
DATE: August 15, 2003

RE: Appointment of Counsel in Capital Post-Conviction Relief Matters.

Recently, issues have arisen over the nature of the qualifications required of attorneys appointed to represent petitioners in post-conviction relief (PCR) matters. South Carolina Code Ann. § 17-27-160 sets forth the qualifications necessary for an attorney to represent a petitioner in a capital PCR and, a dispute has arisen over the interpretation of the requirement that an appointed attorney: "have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense." § 17-27-160(B).

It is my opinion that the second clause: or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense does not modify the first clause but is a separate way to become qualified under the rule. To otherwise read the statute would lead to the absurd result that an attorney qualified to represent a defendant in the trial of a capital case¹ would not necessarily be qualified to represent a petitioner in a capital PCR proceeding. I do not believe that the intent of the Legislature was to create such a situation when it enacted § 17-27-160. Accordingly, anyone who is qualified to represent a capital defendant at trial, and has completed their CLE requirements should be deemed qualified to represent a petitioner in a capital PCR proceeding under § 17-27-160.

¹To be qualified to represent a defendant in a capital trial, one of the attorneys must have at least five years experience as a licensed attorney and at least three years' experience in the actual trial of felony cases.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

**REPLY TO RESPONSE TO MOTION TO REMAND FOR
ADDITIONAL POST-CONVICTION PROCEEDINGS**

Petitioner, through undersigned counsel, files this reply to the Response in Opposition to Motion to Remand for Additional Post-Conviction Proceedings.

ARGUMENT IN REPLY

**I. Petitioner's Post-Conviction Counsel Were Not Qualified
Under the Plain Language of § 17-27-160(B).**

In 1996, the South Carolina Legislature enacted S.C. Code Ann. § 17-27-160 ("Capital Case Post-Conviction Procedures") with the intention of "opting-in" to the expedited habeas corpus

procedures for capital cases contained in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Tucker v. Moore*, 56 F.Supp.2d 611, 613-14 (D.S.C. 1999) (State argued that S.C. Code Ann. § 17-27-160 was enacted to attempt to satisfy 28 U.S.C. §§ 2261(b)-(c) of AEDPA).¹ To qualify as an "opt-in" jurisdiction, a state is required to, *inter alia*: a) establish a mechanism to provide qualified and adequately compensated counsel in post-conviction proceedings; appoint counsel pursuant to that mechanism, 28 U.S.C. § 2261(b); and b) offer counsel to all state prisoners under capital sentence, 28 U.S.C. § 2261(c). The statute enacted by the South Carolina General Assembly in response to this federal incentive requires the appointment of two attorneys for indigent applicants, at least one of which:

[M]ust have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) [five years practicing law with three years in the actual trial of felony cases] and Section 16-3-26(F) [any Supreme Court promulgated guidelines for attorneys handling death penalty cases] and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

S.C. Code Ann. § 17-27-160(B).

It is uncontested that neither of petitioner's post-conviction relief (PCR) attorneys had either (1) previously represented a death-sentenced inmate in state or federal post-conviction relief

¹The United States District Court in *Tucker* construed § 17-27-160(B) as requiring one of the two appointed attorneys to have either: (1) previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings; or, (2) met the requirements of capital trial counsel in § 16-3-26(B) and § 16-3-26(F) and have completed at least twelve hours of continuing legal education in *capital appellate* and/or *post-conviction* defense. Report and Recommendation at 10-13, *Tucker v. Moore*, 56 F.Supp.2d 611 (D.S.C. 1999) (No. 0:98-681-8BD). Respondent conceded these statutory requirements and further conceded that *Tucker's* PCR counsel, who were admittedly qualified under § 16-3-26(B), did not qualify for appointment as post-conviction counsel under the language of the statute at issue here. *Id.* Counsel in *Tucker* had the same experience as counsel appointed to represent petitioner.

proceedings; or, (2) completed twelve hours of continuing legal education or professional training in capital appellate and/or post-conviction defense within two years of their appointment to represent petitioner in this case.

Respondent does not attempt to offer a construction of the statute under which petitioner's PCR counsel were qualified, but instead relies entirely on an August 15, 2003 letter from the Chief Justice of the South Carolina Supreme Court to all Circuit Court Judges stating that the qualifications for capital post-conviction representation under § 17-27-160(B) are identical to those for capital trial representation under § 16-3-26(B). Response at 2. In her letter, the Chief Justice concluded that the use of "or" between "continuing legal education" and "professional training primarily involving advocacy" in § 17-27-160(B) gives courts the discretion to appoint attorneys in capital post-conviction relief proceedings that either: (1) have completed any twelve hours of South Carolina Bar approved continuing legal education, *regardless of the topic*, or (2) completed twelve hours of South Carolina Bar approved professional training *specific* to advocacy in the field of capital appellate and/or post conviction defense. The Chief Justice further opined that requiring more stringent qualifications for attorneys appointed in capital post-conviction relief than for attorneys appointed in capital trial proceedings would be an absurd result that the legislature could not have intended.

Respondent's reliance on the Chief Justice's letter is misplaced for two reasons: (1) It is outside the scope of her unilateral authority as Chief Justice of this Court as conferred upon her by the State Constitution and relevant statutes; and, (2) even if it were within the Chief Justice's authority to issue this unilateral change to the rules, it violates the separation of powers doctrine by contradicting clear and unambiguous statutory language that is not so *plainly absurd* that the legislature could not have intended it.

A. The South Carolina Constitution Does Not Give the Chief Justice Authority to Create Rules and Standards for the Appointment of Counsel in Capital Cases.

The South Carolina Constitution creates a Supreme Court consisting of a Chief Justice and four Associate Justices. S.C. Const. art. V, § 2. In addition to its original and appellate jurisdiction, the Supreme Court has the power to: (1) make rules governing the administration of the courts; and, (2) subject to statutory law, make rules governing the practice and procedure in all courts. S.C. Const. art. V, § 4; S.C. Code Ann. § 14-3-640 (1976).

New rules promulgated by the Supreme Court governing the administration of state courts “become effective upon publication of such rules in the Court Register.” S.C. Code Ann. § 14-3-940(a) (1976). In contrast, new rules “governing the practice and procedure of all courts . . . shall become effective upon publication in the Court Register and review by the General Assembly pursuant to the provisions of § 14-3-950.” *Id.* at (b).²

The Constitution appoints the Chief Justice of the Supreme Court as the administrative head of the state judicial system and assigns certain limited powers to the Chief. S.C. Const. art. V, § 4. As administrative head, the Chief Justice has the power to: (1) appoint an administrator of the courts and such assistants as deemed necessary; and, (2) set the terms of any court and assign any judge to sit in any court within the unified judicial system. *Id.*

²All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court shall be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting. S.C. Code Ann. § 14-3-950 (1976).

The Chief Justice's unilateral authority to issue orders is limited to these two enumerated powers and does not extend to issuing advisory opinions, changing court administrative rules, or changing the rules governing practice and procedure. This is further supported by the language in Article V, § 4 that specifically grants the power to make rules governing the administration of all state courts and the power to make rules governing the practice and procedure in all courts to the "Supreme Court." *Id.* In order for the "Supreme Court" to make rule changes, it necessarily must conform to Article V, § 2, which requires this Court to have a three-justice quorum for the "transaction of business." Further, if the Court makes changes to the rules governing practice and procedures in state court, these changes must be submitted to the respective Judiciary Committees of General Assembly per S.C. Const. art. V, § 4A, as codified in S.C. Code Ann. § 14-3-950. None of these requirements are met by a letter sent to Circuit Court judges from the Chief Justice setting forth her interpretation of a state statute.

By concluding that § 17-27-160(B) places no additional requirements on capital post-conviction relief representation, the Chief Justice effectively created a new and different standard for the appointment of counsel in capital cases. By any definition of the term, this is either rulemaking or legislating. No single justice of this Court is empowered to unilaterally change the law through statutory interpretation, especially in an area as significant as capital representation. It necessarily follows from a plain reading of the Constitution and related statutes that the Chief Justice's letter dated August 15, 2003 was outside the scope of her authority.

B. The Change to the Appointment of Counsel Standards in Capital Post-Conviction Cases Violates the Separation of Powers.

The Chief Justice's letter also violates basic separation of powers principles because it

changes the plain wording of the statute as enacted by the South Carolina Legislature. Additionally, even if the Chief Justice has unilateral authority to change the statutory rules governing capital post-conviction relief, her opinion must be rejected on well-established principles of statutory interpretation.

First, it is well established by this Court that “[a] basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject.” *Berkebile v. Outen*, 311 S.C. 50, 53 426 S.E.2d 760, 762 (1993); accord *Kerr v. Richland Mem’l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009); *City of Camden v. Fairfield Elec. Coop.*, 372 S.C. 543, 548, 643 S.E.2d 687, 690 (2007); *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003); *Scott v. State*, 334 S.C. 248, 253, 513 S.E.2d 100, 103 (1999).

The statutory qualifications for trial attorneys appointed to defend an indigent in a death eligible case are found in S.C. Code Ann. § 16-3-26. This statute, enacted in 1977, requires that at least one of the appointed attorneys have a minimum of five years’ experience as an attorney and three years’ experience in the actual trial of felony cases. S.C. Code Ann. § 16-3-26(B)(1) (1976). The statutory qualifications for capital post-conviction relief were codified in 1996 in S.C. Code Ann. § 17-27-160, well after § 16-3-26. Additionally, § 17-27-160(B) explicitly references the minimum qualifications in § 16-3-26(B)(1), and then adds an additional requirement of continuing legal education (CLE) or professional training involving capital appellate and/or post-conviction defense. Clearly, the legislature was aware of § 16-3-26(B)(1) when it explicitly incorporated it into § 17-27-160(B), and before adding the CLE requirement. If the legislative intent in § 17-27-160(B) were simply to mirror the requirements of § 16-3-26(B)(1), it would simply have referenced that statute and said no more. The additional language after the reference to § 16-3-26(B)(1) in § 17-27-

160(B) cannot be construed as being devoid of any meaning without totally torturing basic principles of statutory construction. *See, e.g., State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.”) (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)); *Savannah Bank and Trust Co. of Savannah v. Shuman*, 250 S.C. 344, 348, 157 S.E.2d 864, 866-67 (1967) (Finding “[t]he construction urged by the appellant would disregard and treat as surplusage the quoted [section of the statute]. We are not at liberty to do so.”).

Second, this Court has repeatedly held that it must interpret statutory language according to its plain meaning. *See, e.g., Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.”) (citation omitted). The Court will only reject the plain reading of a statute “when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.” *Kiriakides v. United Artists Commc’ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing *Stackhouse v. Rowland*, 86 S.C. 419, 68 S.E. 561, 562 (1910)); *see also Harris v. Anderson County Sheriff’s Office*, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009) (“One rule of statutory construction allows the Court to deviate from a statute’s plain language when the result would be so patently absurd that it is clear that the Legislature could not have intended such a result.”) (citation omitted); *Hodges*, at 87, 533 S.E.2d at 582 (2000) (“[A] court will reject the ordinary meaning of words used in a statute when, to accept the ordinary meaning, will lead to a result so plainly absurd that it can not possibly have been intended by the legislature.”) (citations omitted).

As stated in Petitioner's Motion to Remand, there are several reasons why the legislature would enact a different, and more stringent, standard for appointment of counsel in capital post-conviction cases than for appointment at the trial level. First, post-conviction litigation is an unusual combination of trial and appellate practice. Thus, persons competent to represent a death sentenced inmate at trial due to their extensive trial experience as reflected in § 16-3-26(B)(1), do not necessarily have the requisite skills to represent an individual in a capital post-conviction proceeding.³ Second, at trial, the defendant has a Sixth Amendment right to counsel, and thus a Sixth Amendment right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984). If trial counsel performs incompetently and the incompetence contributes to the conviction or death verdict, the defendant has a remedy. See, e.g., *Hall v. Catoe*, 601 S.E.2d 335 (S.C. 2004) (counsel found ineffective for failing to object to improper victim impact argument). However, in post-conviction proceedings, there is no currently recognized constitutional right to counsel and thus there is no clear remedy for substandard representation. See *Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991) (finding second post-conviction petition barred as successive and appearing to reject ineffective assistance of post-conviction counsel as a "sufficient reason" for failing to raise issues in the first application); Cf. *Washington v. State*, 478 S.E.2d 833, 835 (S.C. 1996) (allowing second post-conviction application to proceed due to "many procedural irregularities" in the first post-conviction proceedings). Third, the legislature enacted standards for

³See AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN CAPITAL CASES (2003) Guideline 1.1 (commentary) ("Post-conviction proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. . . . For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers.").

capital post-conviction counsel for a specific purpose, i.e., to meet federal "opt-in" requirements. Thus, it makes perfect sense that the statutory standards would have specific requirements requiring either prior capital post-conviction experience or capital post-conviction CLE training.⁴

It easily follows, therefore, that when drafting the procedures for indigent "capital post-conviction representation," the legislature intended § 17-27-160(B) to require at least one of the appointed attorneys to have training that involves "advocacy in the field of capital appellate and/or post-conviction defense." Otherwise, it is impossible to explain what purpose the second clause "involving advocacy in the field of capital appellate or post-conviction defense" would serve since the minimum standard in the first clause of *any* South Carolina Bar approved training would inevitably be met by any duly licensed attorney in South Carolina. S.C. App. Ct. R. 408 (a) ("All persons admitted to the South Carolina Bar shall be required to attend at least fourteen (14) hours of approved continuing legal education (CLE) courses each year").⁵

The legislature was well aware of the qualifications for capital trial attorneys when it enacted the qualifications for post-conviction relief attorneys, and therefore the CLE requirement must be read as an additional qualification for capital post-conviction representation. There are also a number of plausible reasons for the legislature to have required different and more stringent qualifications for capital post-conviction relief, and in light of these reasons, the *plainly absurd*

⁴A number of other states have different requirements for capital trial and capital appellate or post-conviction counsel. *See, e.g.*, A.R.S. R. Crim. Pr. 16 (b) & (c) (requiring post-conviction counsel to have prior capital appellate or post-conviction experience or requiring a combination of felony trial and post-conviction experience); Oh, Sup. R.20(A) & (B) (setting forth different criteria for appointment as lead counsel for a capital trial v. a capital direct appeal).

⁵Not to belabor the point, but such an interpretation of the statute would mean that an attorney could meet the qualifications for appointment in a capital post-conviction case, but not have sufficient CLE hours to be licensed. Obviously, the legislature can not have intended such an illogical result.

threshold is not met. Therefore, even if the Chief Justice had the unilateral authority to interpret §17-27-160(B), her interpretation must be rejected.

II. Because Petitioner's Appointed PCR Counsel did not Have the Experience or Qualifications Required by §17-27-160, and Because Petitioner was Prejudiced by Their Lack of Experience, Petitioner's Case Should be Remanded to the Circuit Court for Additional Post-Conviction Proceedings.

Respondent additionally maintains that the case should not be remanded to the circuit court for additional post-conviction proceedings because: a) the statute does not provide a remedy for failing to appoint qualified counsel; and, b) petitioner can not demonstrate prejudice as a result of the failure to appoint counsel who satisfied the statutory criteria. Both arguments must fail.

While it is true that the statute does not specifically state what relief is available in the event a court appoints unqualified counsel, the same can be said of many (if not most) statutes. The capital trial statute does not specifically state what the remedy would be if a circuit court judge appointed trial counsel who did not meet the statutory criteria. But, if a court were to appoint counsel who did not meet those criteria and a defendant was convicted and sentenced to death, this Court would certainly reverse the conviction and sentence and remand for the appointment of qualified counsel and a new trial. *See State v. Diddlemeyer*, 371 S.E.2d 793 (S.C. 1988) (holding that "the trial court's failure to follow the mandates of Section 16-3-26(B) denied appellant a fair trial"). There is no other appropriate remedy which would satisfy the statute's purposes. Similarly, in petitioner's case, there is no remedy other than remanding the case to the circuit court for additional post-conviction proceedings that will satisfy the statute's purposes. No showing of prejudice should be required.⁶

⁶Respondent cites and attaches an order of this Court denying a petition for writ of habeas corpus in *Young v. State*. Respondent's Exhibit B. Young sought a petition for writ of habeas corpus and alleged that he was denied due process because his post-conviction counsel did not meet

However, even if this Court were to require a showing of potential or actual prejudice, such a showing is easily made. First, as set forth in detail in the Motion to Remand, petitioner's PCR counsel: a) obtained no funds for investigative and/or expert services and retained no investigators (neither fact nor social history/mitigation investigators); b) conducted no extra-record investigation to determine if there were viable claims for post-conviction relief not apparent from the trial record; and, c) failed to pursue or raise a number of claims which were apparent from the record. The PCR hearing, for the most part, consisted of counsel calling petitioner as a witness to "air his grievances" against his trial counsel. Undersigned counsel, who was appointed by this Court on appeal, does not, given the procedural posture of the case, have access to funds for investigative and expert services and thus has not (and can not reasonably be expected to have) conducted a necessary and competent post-conviction investigation.⁷ The failure to conduct any investigation or retain any experts of any

the requirements of § 17-27-160(B), and further alleged that qualified counsel would have raised two additional issues, which this Court ultimately determined to have no merit. There are a number of factors which distinguish *Young* from petitioner's case. The first distinction is the very different procedural posture of the cases. *Young* had already completed state post-conviction and federal habeas corpus proceedings (in which he was represented by different counsel) before he raised any objection to the qualifications of his original post-conviction counsel. Petitioner, on the other hand, has raised the issue of the qualifications of his PCR counsel at the earliest possible opportunity. Second, *Young* was seeking a writ of habeas corpus. Pursuant to this Court's jurisprudence, a writ of habeas corpus will only issue if there is a constitutional violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. See *Butler v. State*, 397 S.E.2d 87, 92 (S.C. 1990). Given that petitioner has not completed his initial post-conviction proceedings, and thus has not had a "full bite" at the post-conviction apple, he should not be required to satisfy the habeas corpus standard. However, even given the differences, it is important to note that this Court did address the merits of the issues raised by *Young* which his unqualified counsel did not present in his initial post-conviction proceedings. Appendix B at 5. Given the greater equities in petitioner's favor in his case, he is clearly entitled to a remand for additional post-conviction proceedings.

⁷At a minimum, petitioner should be afforded: a) the services of a forensic psychiatrist and other mental health professionals (e.g., a neuropsychologist) to further inquire into petitioner's competency at the sentencing phase of his trial as well as his current competency; and b) the services of an investigator to interview the jurors.

kind should, in and of itself, satisfy any prejudice requirement.⁸

Second, in the Motion to Remand previously filed, petitioner set forth a number of potentially viable post-conviction issues which were not included in the amended application for post-conviction relief. In support of one of the potentially viable issues, i.e., whether petitioner became incompetent during the sentencing phase of the trial, petitioner provided a supporting affidavit from a highly qualified forensic psychiatrist. This was evidence which could have, and should have, been presented at petitioner's post-conviction relief hearing.⁹

Additionally, petitioner also noted a number of issues apparent from the record which could and should have been raised below, not only as substantive allegations for post-conviction relief but also, depending on the issue, as ineffective assistance of trial or appellate counsel. Motion to Remand at 7-11. In response to these issues, respondent makes a number of easily refutable points. First, as for petitioner's claim that he was deprived of his constitutional right to fair sentencing trial because he was shackled without any showing of necessity, respondent contends that there is no evidence the jury saw petitioner's feet shackled. Response at 6. It would be remarkable if the jurors did not see the shackles, as petitioner was placed in a glass room and there is no indication in the record any attempt was made to prevent the jurors from seeing the shackles. Furthermore, this is precisely the type of investigation which could have, and should have, been done prior to petitioner's post-conviction relief hearing. Second, in response to petitioner's claim that trial counsel was

⁸Undersigned counsel, who has represented indigent death sentenced inmates in South Carolina since 1985, is aware of no other capital post-conviction case where no funds for investigative and expert services were obtained nor any investigation conducted.

⁹Respondent points out that a claim of competence (although a different claim than the claims raised by undersigned counsel) was raised during the PCR proceedings but no evidence was presented in support of the claim. Response at 5. That, of course, only proves the point. No evidence was sought and no evidence was presented.

ineffective for failing to object to the erroneous admission of evidence and improper argument by the solicitor during the penalty phase of the trial (Motion to Remand at 9-10), respondent maintains that there was no objection to the evidence to preserve the issues for direct appeal (which is correct), but then asserts that petitioner can not "push the blame" onto standby counsel when petitioner chose to represent himself. Response at 7. This is simply wrong. The trial judge, after removing petitioner from the courtroom, specifically charged standby counsel with the responsibility of objecting to any inadmissible evidence or argument. Tr. 3541-42, 3556-57. Thus, petitioner does have a viable claim of ineffective assistance of trial counsel. Third, as for petitioner's potentially meritorious claims of ineffective assistance of appellate counsel (Motion to Remand at 10), respondent asserts that the issues are without merit either because there was no objection or the issues were discussed in the PCR order. Response at 7. Again, that is not correct. Several of the issues, e.g., failure to terminate petitioner's *pro se* status and the failure to conduct a competency hearing could have, and petitioner submits should have, been raised on direct appeal. As for the other issues, the PCR order did not address the merits of the issues because they were raised only as free-standing claims of error and were rejected by the lower court on procedural grounds as issues which could or should have been raised on direct appeal. PCR Order at 42, 48 & 51¹⁰. Again, the proof is in the pudding; given the procedural posture of the case, the only way to present the merits of these issues was to raise them

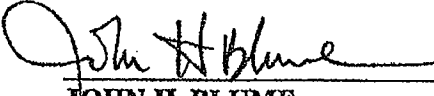
¹⁰Respondent refers a number of times to the PCR order of Judge Mullen. Response at 5,6,7. Another unique feature of this case is that the case was originally assigned to Judge Roger Young. Judge Young appointed counsel and presided over the PCR hearing. For reasons which are not stated in the order transferring the case, it was reassigned at this very late state of the proceedings to Judge Mullen on 17, 2008. It does not appear from the record that any post-hearing briefs were submitted to Judge Mullen, or that the court heard arguments before signing verbatim the state's proposed order.

as issues of ineffective assistance of appellate counsel, which petitioner's PCR counsel failed to do.¹¹

CONCLUSION.

For the reasons stated above, as well as those set forth in the Motion to Remand, petitioner's case should be remanded to the Beaufort Court of Common Pleas for additional post-conviction proceedings. Petitioner should also have counsel appointed to represent him who meet the requirements set forth in S.C. Code §17-27-160(B), and who are sufficiently familiar with capital post-conviction representation to provide adequate representation in a capital post-conviction case.

Respectfully submitted,



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

August 9, 2010

¹¹Petitioner does not concede that the issues set forth in the Motion to Remand at 7-11 are the only potentially meritorious issues in the case. Without conducting the appropriate investigation, counsel can make no such representation.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

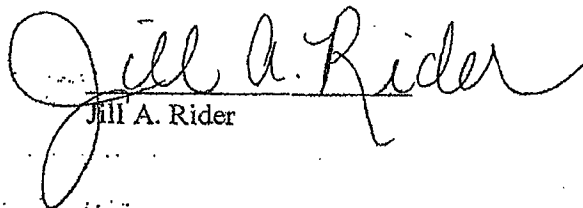
v.

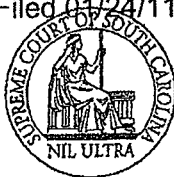
State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Applicant's Reply to Response to Motion to Remand for Additional Post-Conviction Proceedings was mailed today by first class United States mail, postage prepaid, this 9th day of August, 2010, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 20, 2010

John H. Blume, III, Esquire
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211

Re: Roberts, Tyree, a/k/a Alkebulanyahh v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Remand for Additional Post-Conviction Proceedings in the above entitled case on appeal.


“Motion to remand for additional
post-conviction proceedings is denied.

s/ Jean H. Toal C.J.
For the Court

October 20, 2010.”

Please be advised the Petition for a Writ of Certiorari and Appendix should be served and filed within thirty (30) days of the date of this letter.

Very truly yours,



CLERK

DES/dmh

3887

8:11-cv-00063-SB -BHH Date Filed 01/24/11 Entry Number 28-4 Page 2 of 2

Roberts, Tyree, a/k/a Alkebulanyahh v. State

Page Two

October 20, 2010

cc: Chief Appellate Defender Robert M. Dudek
✓ Assistant Attorney General Alphonso Simon, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

James D. Robertson,)	C/A No.: 8:11-00063-SB-BHH
)	
Petitioner,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
Jon Ozmint, Commissioner, South Carolina)	
Department of Corrections,)	
)	
Respondent.)	

I, William Edgar Salter, III., do hereby certify that on this date, I served the *Respondent's Response in Opposition to Motion to Stay Proceedings Pending Exhaustion of State Remedies*, (with attachments) in the foregoing action on counsel for the Petitioner by depositing one copy of the same in the United States mail, first-class postage prepaid, and addressed as follows:

John H. Blume, III, Esq.
Keir M. Weyble, Esq.
Blume, Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211

Emily Paavola, Esq.
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, SC 29211

This 24th day of January, 2011.

s/William Edgar Salter, III
WILLIAM EDGAR SALTER, III

3889

8:11-cv-00063-SB -BHH Date Filed 01/24/11 Entry Number 28-5 Page 2 of 2

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA

JAMES D. ROBERTSON,)	
<i>Petitioner,</i>)	
)	
v.)	Civil Action No. 8:11-cv-00063-SB-BHH
)	
JON OZMINT, Commissioner,)	
South Carolina Dept. of Corrections,)	
<i>Respondent.</i>)	
_____)	

REPLY TO OPPOSITION TO MOTION TO STAY PROCEEDINGS
PENDING EXHAUSTION OF STATE REMEDIES

Petitioner, James D. Robertson, by and through undersigned counsel, submits this Reply to respondent's January 24, 2011 Response in Opposition to Motion to Stay Proceedings Pending Exhaustion of State Remedies (hereinafter "Opposition"). As explained below, nothing in respondent's submission justifies refusing the stay Robertson has requested.

As described in Robertson's Motion to Stay Proceedings Pending Exhaustion of State Remedies, *Rhines v. Weber*, 544 U.S. 269, 276 (2005), established three criteria for determining whether to stay a habeas corpus action to facilitate exhaustion of state remedies. In its Opposition, however, respondent fails even to cite *Rhines*, and offers no argument as to how the circumstances of this case might fail to satisfy any of the criteria identified in that decision. Thus, although Robertson's request is governed by a simple test clearly articulated by the Supreme Court, respondent has chosen not to discuss that test at all.

Instead of addressing the *Rhines* criteria, respondent offers a series of inaccurate and irrelevant assertions about the nature of Robertson's request and the present availability of state court

review. For example, respondent suggests Robertson is seeking habeas relief from this Court on the basis of “a state law violation that was never litigated in state PCR proceedings.” Opposition at 10; *see also id.* at 11 (mischaracterizing Robertson’s stay motion as a claim of “ineffective assistance of collateral counsel”). As his previous submissions to this Court make plain, Robertson has made no such claim. While it is true that a poor performance by unqualified state post-conviction counsel has necessitated further state court proceedings – and a related stay of the proceedings in this Court – it does not follow that Robertson has asserted (or intends to assert) any non-cognizable, state law claim before this Court.

Respondent’s additional arguments about the viability of Robertson’s state post-conviction action are simply misplaced.¹ To the extent there are any questions about Robertson’s ability to proceed in state court, those questions are for the state court – not this Court – to answer. As reflected in the holding of *Rhines*, where a state court is willing to consider a prisoner’s claims, there is no legitimate federal interest in impairing access to that consideration by refusing a stay. *See, e.g., O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (“Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.”); *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973)) (“The exhaustion doctrine is principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings.”).

¹*See* Opposition at 12 (asserting that “this supposed lack of qualification was an issue that could have been raised ... at the time of the appointment”); *id.* (Robertson’s “claim is obviously barred in PCR by the one year statute of limitations governing PCR applications”); *id.* at 13 (disputing statutory criteria for qualification for appointment as state post-conviction counsel); *id.* at 14 (purporting to invoke “presumption” that Robertson’s counsel were qualified).

Finally, it is important to recognize that respondent's assurances that a South Carolina death row inmate's second application for post-conviction relief would be turned away by the state courts have been wrong before. In *Elmore v. Ozmint*, 4:04-cv-22310-DCN, for example, respondent convinced the district court that the prisoner's second state court application would be rejected for procedural reasons, and that a stay of the federal habeas proceedings was therefore unnecessary. In fact, *Elmore* was permitted to proceed in state court over respondent's objections, and the Fourth Circuit eventually found it necessary to stay the federal case pending the disposition of the state court proceeding.² Similarly, former South Carolina death row inmate Luke Williams, whose initial state post-conviction relief counsel were unqualified, was permitted a second round of state post-conviction review over the objections of the state's counsel. See *Williams v. Ozmint*, 494 F.3d 474, 483 (4th Cir. 2007) ("Williams filed two applications for state post-conviction relief, the second of which was granted by the circuit court (PCR court)."). While the South Carolina Supreme Court ultimately reversed the circuit court's grant of relief in that case, it did so on the merits, not on the ground that Williams' second application was procedurally barred. See *Williams v. State*, 611 S.E.2d 232 (S.C. 2005).

In sum, respondent's opposition to Robertson's request for a stay fails to address the governing criteria prescribed in *Rhines*, and relies instead on mischaracterizations and misdirected arguments about the availability of state court review. Because Robertson has already demonstrated his satisfaction of the *Rhines* criteria, and because respondent has come forward with nothing to establish that it would be inappropriate to allow the presently pending state court application to

²The Fourth Circuit's unpublished order in *Elmore* is attached to this Reply as Exhibit 1. The state court proceedings in that case recently concluded with a grant of penalty phase relief.

proceed in the ordinary course, "it likely would be an abuse of discretion for [this] court to deny a stay" *Rhines*, 544 U.S. at 278.

Respectfully submitted,

JOHN H. BLUME
KEIR M. WEYBLE
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-3805

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, SC 29211
(803) 765-1044

By: s/ Keir M Weyble

February 1, 2011.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2011, I electronically filed the foregoing with the Court using the ECF system, which sent notification of the filing to counsel for respondent.

/s/ Keir M. Weyble
Counsel for Petitioner

EXHIBIT 1

FILED: March 24, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-14
(4:04-cv-22310-DCN)

EDWARD LEE ELMORE,

Petitioner - Appellant

v.

JON OZMINT, Director, South Carolina Department of Corrections;
HENRY MCMASTER, Attorney General, State of South Carolina,

Respondents - Appellees

O R D E R

In this federal habeas corpus matter, the district court granted the appellant a certificate of appealability on multiple exhausted constitutional claims relating to his state convictions and death sentence, plus an unexhausted Eighth Amendment claim that, being mentally retarded, he is ineligible for the death penalty under Atkins v. Virginia, 536 U.S. 304 (2002). By way of a Rule 28(j) letter and counsel's advice during oral argument, it has come to this Court's attention that

- subsequent to the district court's denial of habeas corpus relief on the appellant's claims - additional significant factual development has occurred in the state habeas court with respect to the Atkins claim. Furthermore, the state habeas court has taken steps toward an expeditious disposition of the Atkins claim, which disposition will likely require the resolution of novel state law questions and impact this appeal.

Accordingly, in these circumstances and in the interests of federalism and comity, this appeal is hereby stayed, pending (1) final disposition of the appellant's Atkins claim in the state habeas corpus proceedings, or (2) further order of this Court.

Entered at the direction of Judge King, with the concurrences of Judge Wilkinson and Judge Gregory.

For the Court

/s/ Patricia S. Connor, Clerk



ALAN WILSON
ATTORNEY GENERAL

March 24, 2011

The Honorable David Hamilton
Clerk of Court, York County
P.O. Box 649
York, SC 29745

Re: *James D. Robertson vs. State of South Carolina*
C.A. No.: 2011-CP-46-00072


Dear Mr. Hamilton:

Enclosed please find an original and one (1) copy of Respondent's Return and Motion to Dismiss to Applicant's Post-Conviction Relief Application, as well as a proposed Conditional Order of Dismissal regarding the above matter.

Kindly file same in your office and return a copy of the Return marked accordingly to the undersigned in the self-addressed stamped envelope provided.

If there are any questions or comments, please feel free to contact me.

Sincerely,



William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: The Honorable Lee S. Alford (w/copies of encls.)
Emily C. Paavola, Esq. (w/copies of encls.)
John H. Blume, Esq. (w/copies of encls.)
Keir Weyble, Esq. (w/copies of encls.)

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

JAMES D. ROBERTSON, #5067,
 Plaintiff)

v.)

STATE OF SOUTH CAROLINA)
 Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO. 2011-CP-46-00072

MOTION INFORMATION FORM
 AND COVER SHEET

Plaintiff's Attorney: Emily C. Paavola, Esq. Death Penalty Resource P.O. Box 11311 Columbia, SC 29211	Defendant's Attorney: William E. Salter, III, Bar No. 4806 Address: Post Office Box 11549 Columbia, SC 29211 phone: (803) 734-6305 fax: (803) 734-4035 e-mail: agesalter@scag.ov
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Capital PCR Estimated Time Needed: _____ Court Reporter Needed: YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion Type	
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion - I hereby move for relief or action by the court as set forth in the attached proposed order.	
<div style="display: flex; justify-content: space-between;"> Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant 3-24-11 </div> Date submitted:	
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____	
<input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

James D. Robertson, #5067,)

C. A. No. 11-CP-46-00072

Applicant,)

v.)

RETURN AND
MOTION TO DISMISS

State of South Carolina,)

Respondent.)

Respondent hereby makes a Return and Motion to the Application for Post-Conviction Relief (PCR) filed by Applicant, James D. Robertson (Robertson) through counsel, on January 7, 2011. Respondent submits that this 2011 Application must be summarily dismissed because (1) it is not verified by Robertson; (2) it is barred by the one year statute of limitations governing PCR applications, S.C. Code Ann. § 17-27-45(A) (Supp. 2011); (3) it is impermissibly successive to a previously filed application and this Court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel or PCR counsel's lack of statutory qualifications; (4) the supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge; (5) laches bars relief because Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application; and (6) the argument lacks merit as a matter of state law. In support of this motion to dismiss, Respondent would show this Court that:

I. PROCEDURAL HISTORY

A. Robertson's trial and the voluntarily abandoned direct appeal.

Robertson is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his two York County murder convictions and death sentences for killing his parents. The York County Grand Jury indicted him at the April 23, 1998 term of court for two counts of murder (98-GS-46-1020 & -1021), one count of armed robbery (98-GS-46-1022) and one count of financial transaction card fraud (98-GS-46-1023). App. 3758-65. On April 30, 1998, the State served him with a Notice of Intent to seek the death penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002). The State also gave notice at that time that it would rely upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; larceny with the use of a deadly weapon; and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. See S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2010).

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock, Esquire, and James W. Boyd, Esquire, represented Robertson.¹ Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motion hearings on July 17 (App. 32-48), September 22 (App. 49-55) and 25, 1998 (App. 55-79); November 2 (App. 79-90) and 20, 1998; December 4 (App. 90-121) and 18, 1998; and on February 12 and 19, 1999.

¹ Thad Lee Myers, Esquire, had originally been appointed to represent Robertson. However, Mr. Myers was relieved because of a conflict of interest.

Robertson's capital jury trial was held on March 15-26, 1999. The jury convicted him of all of the indicted offenses (App. 122-1977); and a sentencing phase was conducted, after his exercise of the 24-hour statutory waiting period in § 16-3-20(B). In addition to the five statutory aggravating circumstances relied upon by the State, Judge Hayes instructed the jury on the statutory mitigating circumstances that Robertson did not have any prior convictions involving the use of violence against another person; that the murders were committed while he was under the influence of a mental or emotional disturbance; that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and his age and mentality at the time of the crimes. § 16-3-20(C)(b)(1)-(2), (6) and (7). The jury found each of the alleged statutory aggravating circumstances and it sentenced Robertson to death for each of the murders. Judge Hayes affirmed their decision and imposed the death sentence for the murders. App. 1977-3242.

Robertson did not file a timely Notice of Appeal; but Judge Hayes entered a Consent Order granting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).² At various points on direct appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III represented Robertson before the South Carolina Supreme Court. On May 28, 1999, Robertson, through Mr. Dudek, filed a Petition for Writ of Certiorari seeking *White v. State* appellate review, to which the State consented. The Supreme Court entered an Order on June 25, 1999 granting direct appellate review under *White*.

Robertson wrote the Supreme Court on August 28, 2000. In this letter, he asked the Court

² "Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a *White v. State* review." *Davis v. State*, 288 S.C. 290, 291, n. 1, 342 S.E.2d 60, 60 n. 1] (1986)" (emphasis omitted).

to relieve Mr. Dudek as counsel, to allow him to drop his appeals and to permit him to be executed. Mr. Dudek made a Return to Motion on September 11, 2000. On October 6, 2000, the Supreme Court entered an Order remanding the case to Judge Hayes for the purpose of conducting a hearing on Robertson's competency to be executed.

After Judge Hayes had entered Orders appointing Christopher A. Welborn, Esquire, to represent Robertson at the hearing (on February 2, 2001) and ordering a psychiatric evaluation of his competency to be executed (on February 15, 2001), Robertson signed a March 15, 2001 affidavit stating that he wished to pursue all available appellate remedies. He also asked to have Mr. Dudek relieved as counsel and to have alternative counsel appointed. Judge Hayes made a Report to the Supreme Court dated October 12, 2001. He found that it was unnecessary to hold a competency hearing because Robertson no longer desired to appear *pro se*. Therefore, the South Carolina Supreme Court filed an Order on November 15, 2001 relieving Mr. Dudek as counsel and appointing Mr. Savitz as appellate counsel.

On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Robertson's behalf.³

³ Appellate counsel Savitz' Brief presented three issues:

1. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.
3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.

4/15/02 Initial Brief of Appellant at p. 1.

Again, Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote the South Carolina Supreme Court on April 18, 2002 and asked for the Court to relieve Mr. Savitz because Mr. Savitz did not represent his interests. The Court denied his request in a May 16, 2002 Order.

However, Robertson again wrote a letter to the South Carolina Supreme Court dated June 3, 2002, in which he asked the Court to relieve Mr. Savitz and to allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme Court then filed an Order on June 26, 2002, remanding the matter to Judge Hayes for a hearing on Robertson's competency to appear *pro se*.

Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002.⁴ On October 28, 2002, Judge Hayes signed a Report in the Supreme Court of South Carolina. He found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003, in which he presented seven issues for appellate review:

1. The judge erred in denying 3 separate motions for a directed verdict based on insufficient evidence and State's failure to meet the burden of proof as to first element of corpus delicti of murder at the conclusion of State's case.
2. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to

⁴ Robertson was present at the hearing and Bruce M. Poore, Esquire, represented him. Senior Assistant General William Edgar Salter, III, represented the State. Robertson was the only witness at the hearing.

stand trial, guilty but mentally ill nor insanity were ever at issue in the case.

3. The judge erred by denying the jury's request to take notes while being recharged as to the law during guilt phase deliberations.
4. The judge erred in revealing the location where the jurors were sequestered, thereby denying appellant his constitutional right to a fair and impartial jury.
5. The judge erred in not allowing the defense to define "life imprisonment" as it appears in the state statute, to potential jurors during *voir dire*, thereby denying appellant a fair and impartial jury.
6. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.
7. The judge erred in sentencing appellant to death.

Pro Se Initial Brief of Appellant at p. 2. The State filed the Initial Brief of Respondent on December 31, 2003.

However, the direct appeal was dismissed and re-instated on several occasions because of Robertson's failure to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the South Carolina Supreme Court that he wished to abandon his right to a direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing was held before Judge Hayes on February 22, 2005, at the Moss Justice Center in York, South Carolina.⁵ In a February 23, 2005 Report to the Supreme Court, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order filed June 3, 2005, the

⁵ Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

Supreme Court of South Carolina agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003), it dismissed the appeal and it directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

Thus, Petitioner did not exhaust any claim on direct appeal because he knowingly and voluntarily abandoned the appeal and it was dismissed *at his request* without the South Carolina Supreme Court considering any issues that Petitioner raised in his *pro se* Initial Brief of Appellant.⁶

B. Intervening action prior to PCR filing.

On June 16, 2005, Robertson requested a Stay of Execution to file a Post-Conviction Relief (PCR) application. Over Respondent's opposition, the Supreme Court filed a July 7, 2005 Order granting a stay pursuant to *In Re: Stays of Execution*. The Court also appointed the Honorable John C. Few to preside over this case and it directed Judge Few to hold a hearing to determine whether Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), Judge Few filed an Order Appointing Counsel For Post-Conviction Relief dated September 9, 2005, in which he appointed Michael Brown, Esquire, to represent Robertson.⁷ Judge Few held a hearing at the Greenville County Courthouse on September 23, 2005. Robertson was present at this hearing, as was Mr. Salter, who

⁶ Petitioner acknowledges that his direct appeal was dismissed in his Petition, *Petition*, p. 2 ¶¶ 9(c)-(d). However, although represented by three attorneys, he disingenuously omits that it was dismissed because he knowingly and voluntarily abandoned his appeal.

⁷ A copy of this Order is attached to this Response.

represented the State. The appointment of Mr. Brown was confirmed at that hearing.⁸ Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

C. State PCR proceedings.

1. Robertson's original PCR action. (06-CP-46-532).

Robertson filed his original and only properly filed PCR Application (06-CP-46-532) on March 1, 2006. App. 3244-51. Respondent filed its Return on October 20, 2006. App. 3252-62. Judge Few held an evidentiary hearing into the matter on January 29-31, 2007, at the Moss Judicial Center in York, South Carolina. Robertson was present at the hearing, and Messrs. Brown and Matlock, Esquires, represented him. Mr. Salter represented the State. App. 3263-3650.⁹

At the outset of the PCR hearing, Robertson amended his Application and proceeded on

⁸ The undersigned counsel has checked both its PCR files and the mail logs for counsel in the years 2005 and 2006. The transcript of the September 23, 2005 hearing is not in the files and Respondent apparently did not order this transcript because Robertson did not contest counsel's qualifications in state PCR. Pursuant to Rule 607(I), SCACR, "a court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that period." Respondent has not previously requested the transcript of the September 23, 2005 hearing and is unaware if Robertson has done so. See *State v. Serrette*, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct.App.2007) (stating the burden is on the appellant to provide an appellate court with an adequate record for review); *State v. Williams*, 321 S.C. 455, 464 n. 4, 469 S.E.2d 49, 54 n. 4 (1996). See also Rule 210(h), SCACR (an appellate court need not consider any fact which does not appear in the record).

⁹ Robertson testified on his own behalf at the hearing. He also presented testimony from his trial counsel, James William Hancock, Jr., and James W. Boyd, Esquires. The State presented the current Sixteenth Circuit Solicitor, Kevin S. Brackett; the former Sixteenth Circuit Solicitor, Thomas E. Pope, Esquire; Michael Stobbe, the Branch Chief of Inmate Records at the South Carolina Department of Corrections (S.C.D.C.); and Ms. Merry Collins, an Investigator with the Sixteenth Circuit Solicitor's Office. App. 3263-3650. The Court also had before it the trial transcript (including pretrial motions hearings); the records from Robertson's direct appeal to the South Carolina Supreme Court and the waiver of his appeal; the June 16, 2005 letter request for a stay of execution; Respondent's June 21, 2005 letter opposing the request for a stay of execution; the July 7, 2005 Order of the South Carolina Supreme Court granting the stay; the Order Appointing Counsel for Post-Conviction Relief; the York County Clerk of Court's records; the Post-Conviction Relief Application and the Return. Order, App. 3652-53.

twelve specific grounds of ineffective assistance of counsel, including the following, relevant allegations:

1. Counsel failed to present Dr. Hayne McMeekin as a witness and failed to develop evidence that Dr. McMeekin over-prescribed, Ritalin;
2. Counsel failed to present Chip Robertson as a defense witness;
3. Counsel failed to pursue a verdict of guilty but mentally ill (GBMI), either by advising Applicant to enter such a plea or by requesting a verdict of GBMI at the trial;
4. Counsel failed to spend an adequate amount of time with Applicant prior to trial;
5. Counsel never pursued a proposed plea bargain allegedly offered by the State;
6. Counsel erroneously advised Applicant not to testify in the sentencing phase of his trial;
7. Counsel failed to present evidence that Applicant is adaptable to prison;
8. Counsel failed to cross-examine Applicant's co-defendant, Meredith Moon about a statement in which she allegedly agreed to "keep quiet" about the murders in exchange for \$50,000.00;
9. Counsel failed to request removal of a juror where the juror had made statements on *voir dire*;
10. Counsel did not adequately advise Applicant before he was evaluated by the prosecution's psychologist, Dr. Geoffrey McKee;
11. Counsel failed to adequately present evidence of the Robertson family's mental health history; and
12. Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because (a) of Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; (c) counsel's failure to discover Applicant's admissions about the crime

in enough time to permit counsel to employ a different social worker;
and (d) Counsel's presentation of Ms. Cascio as a witness.

App. 3268-73. See also App. 3658-59.

Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. **App. 3652- 57.**

The Order of Dismissal addressed the claims that Robertson had raised at the PCR hearing.

Robertson timely served and filed a notice of appeal. Chief Deputy Appellate Defender Joseph L. Savitz, III, represented him in collateral appellate proceedings. Thereafter, Mr. Savitz filed a Petition for Writ of Certiorari on Robertson's behalf. The only Question Presented in the Petition was stated as follows:

Trial counsel was ineffective at sentencing (1) for advising Robertson that anything he revealed to Ms. Cascio - including theretofore undisclosed details about the crimes - was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio's notes by the State and (3) for calling Ms. Cascio as a witness under these circumstances.

Petition for Writ of Certiorari at p. 1. The State, through the undersigned counsel, filed a Return to Petition for Writ of Certiorari on July 15, 2009. The State re-stated the issues before the South Carolina Supreme Court as follows:

Whether this Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State was not presented to or ruled upon by the PCR judge and he did not seek a ruling by filing a Rule 59(e), SCRPC, motion?

Whether this Court should deny certiorari because probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness?

Return to Petition for Writ of Certiorari at p. ii.

The South Carolina Supreme Court filed a letter Order denying certiorari on October 6, 2010.

It sent the Remittitur to the York County Clerk of Court on October 22, 2010.

2. The current Application.

Robertson filed his current Application (11-CP-46-00072) on January 7, 2011. Respondent makes its Return and Motion to Dismiss.

D. The Petition for Writ of Habeas Corpus.

On October 27, 2010, Robertson filed a Motion for Stay of Execution and a Motion for Appointment of Counsel in the United States District Court for the District of South Carolina, so that he might pursue relief pursuant to a timely petition for a writ of habeas corpus under 28 U.S.C. § 2254 and 2244(d). Respondent received these motions on October 28, 2010 and made a Response thereto on November 1, 2010. The Honorable Sol Blatt, Jr., United States District Judge, entered an Order granting Petitioner's Motion for Stay of Execution. The Honorable Bruce Howe Hendricks, United States Magistrate Judge, thereafter entered Orders appointing John H. Blume, Esquire (as lead counsel); Keir M. Weyble, Esquire; and Emily C. Paavola, Esquire to represent Robertson.

Robertson filed his Petition for Writ of Habeas Corpus on January 7, 2011. He also filed a Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 7th. Respondent filed a Response to Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 24, 2011.

Respondent incorporates the following documents by reference and will provide the Court with a copy of these documents at the time of any hearing:

1. Judge Few's denied Order of Dismissal filed on March 24, 2008.

II. ALLEGATIONS

Robertson raises the following grounds for relief in the current PCR Application:

- 10(a): Applicant was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in Section 11(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).
- 11(a): Trial counsel's acts or omissions included:
- (i) Counsel failed to object to the Solicitor's improper closing argument. The solicitor encouraged the jury to rely on their own emotions and passion, rather than the evidence presented, by telling the jury that they did not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty. (Trial Tr. 1916). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).
- 10(b): Applicant was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 11 (b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).
- 11(b): Trial counsel's acts or omissions included:
- (i) Counsel failed to object to presentation of Applicant's prison disciplinary record by a single witness, who had not witnessed the presented events, in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. (Trial Tr. 2129).
- (ii) Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that the victim, Terry Robertson, was a very private person and would have been deeply upset by the revelation of her counseling records. (Trial Tr. 2792). SCRE 403.
- (iii) Counsel failed to develop and introduce evidence that the victims were opposed to capital punishment and would not have wanted their son to be sentenced to death.
- (iv) Counsel failed to object to the State's improper statements during closing

argument that Applicant's presentation of relevant mitigating evidence of his family's mental health history had been a "rape" of his mother Terry Robertson, and that this evidence had dragged Terry "through the mud." (Trial Tr. 3144, 3142). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164,166 (1998).

- 10 & 11(c):** Applicant's Sixth and Fourteenth Amendment right to a fair jury trial was violated by the solicitor's improper and prejudicial closing argument during the guilt-or-innocence phase of the trial during which the solicitor argued that the jury should not deliberate when determining whether the state had proven Applicant's guilt beyond a reasonable doubt. (Trial Tr. 1916).
- 10 & 11(d):** Applicant's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment were violated by the state's introduction of a list of Applicant's prison infractions during the sentencing phase of his capital trial. (Trial Tr. 2129).
- 10 & 11(e):** Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the solicitor's improper closing argument during the sentencing phase of Applicant's capital trial during which the solicitor argued that that the defense's mitigation presentation was equivalent to raping the victim in the courtroom. ("You know, Ms. Cascio talked about Terry being sexually abused. Terry has been raped. She was raped in this courtroom when they take her through this based on his actions.") (Trial Tr. 3144).
- 10 & 11(f):** Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the trial court's error in failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire. (Trial Tr. 425 & 1283).
- 10(g):** Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, §§ 3 and 14 of the South Carolina constitution -when appellate counsel committed the acts or omissions set forth below in Section 11(g). Appellate counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).
- 11(g):** Appellate counsel's acts or omissions included:

- (i) Appellate counsel failed to claim on appeal that the trial court had violated Applicant's Sixth, Eighth and Fourteenth Amendment rights by failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire.
- (ii) Appellate counsel failed to raise the issue whether the trial court erred by denying the defense's motion to specifically define mitigating circumstances and to question potential jurors about specific mitigating circumstances, where several potential jurors indicated that they did not understand what mitigating circumstances were even after hearing the general legal definition. (Trial Tr. 193-96).
- (iii) Appellate counsel failed to raise the issue whether the trial court erred by denying the defense's motion to limit the State's presentation of victim impact evidence to testimony from immediate family members. (Trial Tr. 1985-98). Appellate counsel's performance was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984).

III. DISCUSSION

Respondent submits that Robertson's 2011 Application should be summarily dismissed for several reasons. Initially, the Application is subject to summary dismissal because it is not verified, in contravention of the express language of S.C. Code Ann. §17-27-40 (2003). Section 17-27-40 provides, in pertinent part, that "[a] proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the conviction took place. **Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct.**" (Emphasis added). See also Blume, John H., *An Introduction To Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 SCLR 235, 250 n. 115 (Winter 1994) ("Additionally, the application must include a verification signed by the applicant which affirms that the facts alleged in the application are within the personal knowledge of the applicant and affirms the authenticity of

all documents and exhibits contained in the application"). Robertson has not verified his 2011 Application and it must be dismissed.

Second, Respondent submits that the statute of limitations applicable to Post-Conviction Relief actions bars the entire Application. See S.C. Code Ann. § 17-27-45(A) (Supp. 2011). Section 17-27-45(A) specifically provides that

[a]n application for relief 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.

See also *Peloquin v. State*, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute).

As shown above, the South Carolina Supreme Court filed an Order on June 3, 2005, in which it dismissed the appeal from Robertson's capital trial and sentencing proceeding because it agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003), it dismissed the appeal and it directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution in Capital Cases*, *supra*. Therefore, Robertson had one year from June 3, 2005, within which to file the current Application.

He did not file the Application until January 7, 2011. *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, the application is filed when received by the Clerk of Court). This is five years, seven months and four days after the South Carolina Supreme Court's June 3, 2005 Order and well

after the expiration of the one year time limit for filing the PCR Application. As a result, the Application is barred by § 17-27-45(A).

Third, the Application must be dismissed because it is impermissibly successive to the previous Application (06-CP-46-532), as amended, upon which Robertson has had a hearing and an appeal. The Uniform Post Conviction Procedure Act provides that:

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, 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.

S.C. Code Ann. § 17-27-90 (Supp. 2011). "This statute forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Supreme "Court has by promulgation of rule interpreted § 17-27-90 and the phrase 'sufficient reason' very narrowly." *Id.*

"Therefore, as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. . . . We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not." *Id.* See also *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981). The Court in *Aice* further indicated that, apart from the scenario covered by *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991),¹⁰ a

¹⁰ In *Austin*, the Court concluded that PCR applicant, who alleged that he expressed desire to seek review of denial of his first PCR application but that his counsel failed to timely seek review, stated a claim of ineffective assistance that required a remand for an evidentiary hearing on the issue of whether in fact convict requested and was denied opportunity to seek appellate review. The South Carolina Supreme Court has

successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel. *Aice*, 305 S.C. at 450-52, 409 S.E.2d at 394-95.

Robertson could have raised his current allegations in his previous PCR Application. Likewise, any supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge. As a result, he cannot raise this or any other allegation now in a successive Application. *Id.* See also *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980); *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002).¹¹ Therefore, this Application must be dismissed as impermissibly successive.

Further, laches bars relief. Laches is an affirmative defense that must be pleaded pursuant to Rule 8(c), SCRPC. See also *Adams v. B & D, Inc.*, 297 S.C. 416, 377 S.E.2d 315 (1989). It is an equitable doctrine, which "arises upon the failure to assert a known right." *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971). As the Court explained in *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005),

Laches is "neglect for an unreasonable and unexplained length of time, under

allowed successive PCR applications in only three circumstances: when the initial application was filed without the assistance of counsel, see *Case v. State*, 277 S.C. 474, 289 S.E.2d 413, 413-14 (1982) (per curiam); when PCR counsel was the same as trial counsel, see *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20, 21 (1987); and when procedural irregularities were so egregious as to result in a denial of due process, see *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833, 835 (1996). None of these exceptions apply.

¹¹ In *Ivey*, the Court of Appeals rejected *Ivey's* claim, identical to Robertson's, that the procedural bar of § 17-27-90 did not apply because lead PCR counsel was ineffective and that lead PCR counsel was not qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011). The Court found that "[e]ven if we were to agree with *Ivey* that lead counsel was ineffective, however, under *Aice* that fact alone would not be sufficient to allow the filing of a successive PCR application. Accordingly, this claim is procedurally barred as a matter of South Carolina law and is thus defaulted."

circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

In this case, Robertson did not make any challenge to the qualifications of lead collateral counsel, Mr. Brown, under § 17-27-160(B) at the September 23, 2005 hearing appointing counsel. The transcript of the September 23, 2005 hearing is not in the files of the Attorney General's Office and Respondent apparently did not order this transcript because Robertson did not contest counsel's qualifications in state PCR.

Pursuant to Rule 607(I), SCACR, "a court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that period." Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application and is barred by laches.

Furthermore, the State would note that the argument as to counsel's supposed lack of qualifications lacks merit as a matter of state law. Robertson contends that to be qualified in a capital PCR a lawyer either needs to have either previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief.

However, in her Memorandum regarding Appointment of Counsel in Capital Post-conviction

Relief Matters, dated August 13th, 2003, the Chief Justice of the South Carolina Supreme Court specifically rejected this interpretation, finding that it would lead to the absurd result that an attorney qualified to represent a capital inmate at trial would not be qualified to represent him in PCR. Thus, it was concluded that the “not less than twelve hours of CLE education” clause and the “or professional training primarily involving advocacy in capital appellate or PCR defense” clause of S.C. Code Ann. § 17-27-160(B) were independent means through which an otherwise death penalty-qualified attorney could qualify to represent a death row inmate in PCR. Accordingly, an otherwise death-qualified attorney’s twelve hours of CLE within the previous two years did not necessarily have to be in the field of capital appellate or PCR defense.

Here, Judge Few specifically relied on the statute and this memorandum to conclude that PCR counsel were sufficiently qualified. His September 9, 2005 Order appointing Mr. Brown specifically states that “[t]he defendant contends that he is indigent and in need of an attorney as contemplated by law.” Because “[t]rial judges are presumed to know the law and to apply it in making their decisions.” *Walton v. Arizona*, 497 U.S. 639, 653 (1990), the presumption is that Judge Few appointed in accordance with § 17-27-160(B).¹² Thus, there was no violation of the capital PCR qualification statute, and accordingly no basis for remanding this case and treating the proceedings that have taken place as a nullity.

Finally, Respondent would note that in *Abdiyyah ben Alkebulanyahh, #6012 v. State*, a capital PCR appeal, the state supreme court, on October 20, 2010, summarily denied a Motion to Remand for Additional Post-Conviction Proceedings filed on the petitioner’s behalf by Robertson’s lead

¹² Reliance upon the presumption would be unnecessary if Robertson had timely raised the matter in state PCR.

counsel, Mr. Blume. Thus, Robertson's counsel are well aware that the present motion is without merit.

Moreover, this Court finds that Robertson's allegations 10 & 11(c)-10 & 11(f) do not state a claim upon which Post-Conviction Relief may be granted because each is alleged as a free-standing, substantive claim of trial court error. The jurisdiction of this Court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). Post-conviction relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). See also *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (same); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885-86 (1975) (same). Therefore, these allegations are summarily dismissed for this additional reason.

III.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, having made its Return and Motion to Dismiss, Respondent prays that the Court summarily dismiss the PCR Application for the above-stated reasons.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 
ATTORNEYS FOR RESPONDENT

March 24, 2011.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 James D. Robertson, #5067,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS


C. A. No. 11-CP-46-00072

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's Return and Motion to Dismiss, as well as a proposed Conditional Order of Dismissal in the foregoing action on counsel for Applicant by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Emily C. Paavola, Esq.
 John H. Blume, Esq.
 Keir Weyble, Esq.
 Death Penalty Resource & Defense Ctr
 P.O. Box 11311
 Columbia, SC 29211

This 24th day of March, 2011.



 WILLIAM EDGAR SALTER, III

RECEIVED

2005 SEP 22 PM 12:00

HAMILTON
COUNTY, SC

DEFENSE OF INDIGENTS ACT

FORM NO. IV

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA
COUNTY OF YORK
DOCKET NO. _____

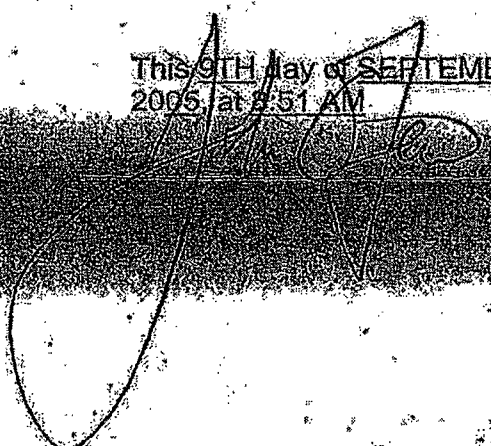
STATE OF SOUTH CAROLINA
VS.
JAMES D. ROBERTSON
DEFENDANT

ORDER OF APPOINTMENT OF LEGAL
COUNSEL OF INDIGENT DEFENDANT

The defendant contends that he is indigent and in need of services of an attorney as contemplated by law. THEREFORE, MICHAEL BROWN, Attorney-at-Law, is appointed as Counsel for the Defendant.

This 9TH day of SEPTEMBER,
2005, at 2:51 AM

FOR DEATH PENALTY
ROCK HILL, SC 29732
803-322-1200
SEE ATTACHED MEMO
FROM JUDGE FEW



STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2006CP4600532

James D Robertson vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other:
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other:

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court

ORDER OF DISMISSAL

Dated at York, South Carolina, this 7th day of March, 2008.

Court Reporter:

S/JOHN C. FEW

PRESIDING JUDGE - JOHN C. FEW

This judgment was entered on the 24th day of March, 2008, and a copy mailed first class this 24th day of March, 2008, to attorneys of record or to parties (when appearing pro se) as follows:

Michael L Brown Jr P O Box 1025 Rock Hill, SC 29731

Henry Dargan McMaster S.C. Attorney
Generals Ofc. P.O. Box 11549 Columbia, SC
29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

SCRPC APP-24/FORM 4

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

James D. Robertson, #5067,)

C. A. No. 06-CP-46-532

FILED-RECEIVED
2008 MAR 24 PM 1:01
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

)
)
)
Applicant,)

ORDER OF DISMISSAL

)
v.)

)
)
State of South Carolina,)

)
)
Respondent.)

This matter is before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed on March 1, 2006. Respondent submitted its Return on October 20, 2006. The Court held an evidentiary hearing on January 29-31, 2007 at the Moss Judicial Center in York, South Carolina.

Applicant testified on his own behalf at the hearing. He also presented testimony from his trial counsel, James William Hancock, Jr. and James W. Boyd. The State presented testimony from the current Sixteenth Circuit Solicitor, Kevin S. Brackett; the former Sixteenth Circuit Solicitor, Thomas E. Pope; Michael Stobbe, the Branch Chief of Inmate Records at the South Carolina Department of Corrections (SCDC); and Ms. Merry Collins, an Investigator with the Sixteenth Circuit Solicitor's Office. The Court also had before it: the trial transcript (including pre-trial motions hearings); the records from Applicant's direct appeal to the South Carolina Supreme Court and the waiver of his appeal; the June 16, 2005 letter requesting a stay of execution; Respondent's June 21, 2005 letter opposing the request for a stay of execution; the July 7, 2005 Order of the South Carolina Supreme Court granting the stay; the Order Appointing Counsel for Post-Conviction Relief; the York County Clerk of Court's records; and the Post-

Conviction Relief Application and the Return. For the following reasons, Post-Conviction Relief is denied.

The Applicant, James D. Robertson, presently is confined at the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) pursuant to commitment orders from the York County Clerk of Court. The York County Grand Jury indicted Robertson at the April 23, 1998 term of court for two counts of murder (98-GS-46-1020 & 1021), one count of armed robbery (98-GS-46-1022), and one count of financial transaction card fraud (98-GS-46-1023). On April 30, 1998, the State served a Notice of Intent to seek the death penalty on Robertson, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002). At that time, the State also gave notice that it would rely upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; larceny with the use of a deadly weapon; and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value, and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. See S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2007).

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock and James W. Boyd represented Robertson at trial.¹ Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motions on July 17,

¹ Thad Lee Myers was originally appointed to represent Robertson but was relieved because of a conflict of interest.

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September 22 and 25, 1998; November 2 and 20, 1998; December 4 and 18, 1998; and on February 12 and 19, 1999.

Robertson's jury trial began on March 15, 1999. The jury found him guilty of each of the indicted offenses. A sentencing phase was conducted following Robertson's exercise of the 24-hour statutory waiting period in § 16-3-20(B). In addition to the five statutory aggravating circumstances relied upon by the State, Judge Hayes instructed the jury on the statutory mitigating circumstances that Robertson did not have any prior convictions involving the use of violence against another person, that the murders were committed while he was under the influence of a mental or emotional disturbance, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and his age and mentality at the time of the crimes. § 16-3-20(C)(b)(1)-(2), (6) and (7). The jury found each of the alleged statutory aggravating circumstances and sentenced Robertson to death for both murders. Judge Hayes affirmed their decision and imposed the death sentence.

Robertson did not file a timely Notice of Appeal, but Judge Hayes entered a Consent Order granting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). At various points on appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III represented Robertson before the South Carolina Supreme Court.

On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Robertson's behalf, which presented three issues:

- I. The judge erred by forcing Robertson to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.

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2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.
 3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against Robertson.
-

4/15/02 Initial Brief of Appellant at p-1.

However, Robertson wrote the South Carolina Supreme Court on June 3, 2002 and asked the Court to relieve Mr. Savitz and allow Robertson to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme Court filed an Order on June 26, 2002, in which it remanded the matter to Judge Hayes for a hearing on Robertson's competency to appear *pro se*. Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002. Bruce M. Poore represented Robertson at the hearing. Senior Assistant General William Edgar Salter, III represented the State. Robertson was the only witness at the hearing.

On October 28, 2002, Judge Hayes signed a Report to the Supreme Court of South Carolina, in which he found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003. He presented seven issues for appellate review:

1. The judge erred in denying three separate motions for a directed verdict based on insufficient evidence and State's failure to meet the burden of proof as to first element of corpus delicti of murder at the conclusion of State's case.
2. The judge erred by forcing Robertson to submit to a state-sponsored psychological evaluation solely for the purpose of

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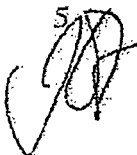

obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.

3. The judge erred by denying the jury's request to take notes while being recharged as to the law during guilt phase deliberations.
4. The judge erred in revealing the location where the jurors were sequestered, thereby denying Robertson his constitutional right to a fair and impartial jury.
5. The judge erred in not allowing defense to define "life imprisonment" as it appears in the state statute to potential jurors during *voir dire*, thereby denying Robertson a fair and impartial jury.
6. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against Robertson.
7. The judge erred in sentencing Robertson to death.

Pro Se Initial Brief of Appellant at p. 2. The State filed the Initial Brief of Respondent on December 31, 2003.

However, Robertson subsequently indicated to the South Carolina Supreme Court that he wished to abandon his right to direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing was held before Judge Hayes on February 22, 2005 at the Moss Justice Center in York, South Carolina. Robertson appeared *pro se* and testified at the hearing. Mr. Salter again represented the State. In a Report to the Supreme Court dated February 23, 2005, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order

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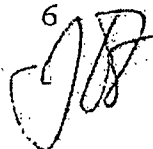
dated June 3, 2005, the Supreme Court of South Carolina agreed with Judge Hayes' finding that Robertson was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003) and concluded that

the death penalty was not the result of passion, prejudice, or other arbitrary factors, and the evidence supports the jury's finding of aggravating circumstances. The death sentence is not excessive or disproportionate to the penalty imposed in similar cases. See *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626, cert. denied, 519 U.S. 891 (1996); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997); *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116, cert. denied, 525 U.S. 1043 (1998).

Therefore, the Court dismissed the appeal and directed the Clerk of that Court to issue an execution notice pursuant to *In re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

On June 16, 2005, Robertson requested a Stay of Execution to file a Post-Conviction Relief application. Respondent opposed the request by way of a June 21, 2005 letter, but the Supreme Court granted a stay pursuant to *In Re: Stays of Execution in Capital Cases*, in a July 7, 2005 Order. In the same Order, the Supreme Court appointed this Court to preside over this case and directed this Court to hold a hearing to determine whether Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), this Court held a hearing at the Greenville County Courthouse on September 23, 2005. The Court filed an Order Appointing Counsel for Post-Conviction Relief dated September 9, 2005, in which the Court appointed Michael Brown to represent Robertson. Thereafter, the Court appointed Joseph David Matlock to assist in representing Robertson.

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Robertson raised the following ground for relief in his March 1, 2006 Application:

1. Ineffective assistance of counsel - specifics to be amended later.

Robertson amended his Application at the outset of the PCR hearing and proceeded on the following specific grounds of ineffective assistance of counsel:

1. Counsel failed to present Dr. Hayne McMeekin as a witness and failed to develop evidence that Dr. McMeekin over-prescribed Ritalin;
2. Counsel failed to present Chip Robertson as a defense witness;
3. Counsel failed to pursue a verdict of guilty but mentally ill (GBMI), either by advising Robertson to enter such a plea or by requesting a verdict of GBMI at the trial;
4. Counsel failed to spend an adequate amount of time with Robertson prior to trial;
5. Counsel never pursued a proposed plea bargain allegedly offered by the State;
6. Counsel erroneously advised Robertson not to testify in the sentencing phase of his trial;
7. Counsel failed to present evidence that Robertson is adaptable to prison life;
8. Counsel failed to cross-examine Robertson's co-defendant, Meredith Moon about a statement in which she allegedly agreed to "keep quiet" about the murders in exchange for \$50,000.00;
9. Counsel failed to request removal of a juror where the juror had made statements on *voir dire*;
10. Counsel did not adequately advise Robertson before he was evaluated by the prosecution's psychologist, Dr. Geoffrey McKee;
11. Counsel failed to adequately present evidence of the Robertson family's mental health history; and

12. Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because of (a) Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; (c) counsel's failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness.

GROUND 10(a)(1)

Robertson's first allegation is that trial counsel was ineffective for failing to present Dr. Hayne McMeekin, a psychiatrist who had seen Robertson and his family for several years, as a defense witness. Robertson contends that counsel's failure to present Dr. McMeekin was prejudicial because counsel could have established further evidence that Dr. McMeekin overprescribed Ritalin. The Court finds that Robertson has failed to prove either deficient performance or resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

Both of the attorneys who represented Robertson at trial testified that Mr. Hancock was lead counsel, but both attorneys shared the responsibility of representing Robertson. Both attorneys also testified as to their experience in handling capital and non-capital murder cases. Based upon that testimony and the reasons that follow, the Court finds that counsel were eminently qualified to represent Robertson and that they did so in a professional manner that was consistent with the requirements of *Strickland* and its progeny.

Mr. Hancock testified that counsel's investigation led them to conclude that the prosecution had overwhelming evidence of guilt, and counsel did not find anything which led to the conclusion that either Meredith Moon or anyone else committed the murder. Therefore, counsel primarily focused on the sentencing phase of the trial, and they attempted to secure a sentence of life imprisonment without parole (LWOP). Counsel obtained all of Robertson's school records which they could locate (including records from California); the records from his

Youthful Offender Act conviction for burglary; Robertson's records from an involuntary commitment to the Willis S. Hall Psychiatric Institution; Robertson's SCDC records; records from Kanawha Insurance Company; records from Piedmont Mental Health Associates; and the Robertson family counseling records from the Carolina Counseling Center, where Robertson and his family were treated by Dr. McMeekin and family and marriage counselor Julius F. "Skip" Meyer, Jr. It was Mr. Hancock's impression that the defense obtained all of Dr. McMeekin's records through Mr. Meyer.²

Mr. Meyer testified as a defense witness, and counsel was able to introduce a substantial amount of evidence relating to the mental health counseling that Robertson and his family received. Counsel also introduced Mr. Meyer's notes of the various therapy sessions as Defendant's Ex. 18. Counsel thereafter introduced a number of mental health records through Ms. Cascio. Additionally, counsel employed several defense experts with the assistance of the Center for Capital Litigation in Columbia: Dr. Jonathan Pincus (a neurologist); Dr. James Evans (a neuropsychologist); and Toni Cascio, a social worker. Each of these experts testified at trial. *See* Tr. pp. 2458-2530 (Dr. Pincus); pp. 2535-89 (Dr. Evans); pp. 2610-2736 (Dr. Morton); pp. 2852-3031 (Ms. Cascio). Mr. Hancock testified that counsel made all of the records that the defense had available to each of the experts, counsel did not deliberately withhold any records from their experts, and none of the experts indicated that he or she needed additional mental health information in order to form his or her opinion.

Mr. Hancock testified that the defense was aware that Dr. McMeekin was treating the entire Robertson family but stated that Mr. Meyer was doing most of the counseling. Counsel

² However, Mr. Hancock had previously turned over his file to Robertson and did not have his file at the time of the hearing.

did not consult a psychiatrist to determine whether Dr. McMeekin was over-prescribing Ritalin. However, counsel did consult with Dr. Morton, who was of the opinion that Robertson had never received proper treatment for his drug abuse and that Dr. McMeekin has prescribed too much Ritalin and other drugs as well. Also, counsel was aware that Dr. McMeekin had a disciplinary infraction against his license that was affirmed by an Administrative Law Judge approximately a year before Robertson's trial.

Counsel felt that the disciplinary action would create a problem for the defense if they elected to call Dr. McMeekin as a defense witness. Moreover, if counsel presented Dr. McMeekin as a witness, Dr. McMeekin would be given an opportunity to undermine Dr. Morton's opinion by explaining his treatment. Counsel made a strategic decision to present Dr. Morton and not Dr. McMeekin. In addition, both attorneys testified that they were not sure that the jury would have considered as mitigating evidence several notes from Dr. McMeekin's treatment of Terry Robertson, which made no mention of problems with her children.

Co-counsel, Mr. Boyd, testified that there was overwhelming evidence of guilt and that a mental health based defense was important to the defense. Although it was Mr. Boyd's recollection that Mr. Hancock had already lined up the various defense experts (through the Center for Capital Litigation) before he was appointed, Boyd testified that he worked most closely with Dr. Morton. He met with Dr. Morton on several occasions before Robertson's trial, and Boyd testified that the defense had made a strategic decision to call Dr. Morton as a witness. Counsel also testified that they made the strategic decision to present Dr. Morton as a witness because they believed his opinions were beneficial to the defense's case in mitigation.

Dr. Morton testified at trial that he was unclear as to whether Robertson was experiencing a manic episode at the time of the crimes. However, Dr. Morton analogized Ritalin abuse with abuse of amphetamine and cocaine. He explained, "[p]eople that use these drugs get psychotic and get paranoid." Dr. Morton also described behavioral problems associated with Ritalin abuse. Tr. pp. 2640-41; pp. 2653-56; pp. 2665-67; p. 2702.

Dr. Morton further testified that Ritalin abuse would make a pre-existing mental illness worse. Tr. pp. 2641-42. He emphasized that people who use as much Ritalin as Robertson claimed to have used on the night before and morning of the murders (30-60 milligrams as a time) can become psychotic and paranoid, and it may result in unprovoked violence. In Robertson's discussions with Dr. Morton, Robertson described a sense of a great deal of energy, some paranoia, and "he described the crime almost like he was depersonalized." Dr. Morton testified that these statements were consistent with a toxic state of Ritalin intoxication, and Dr. Morton believed that Robertson had Ritalin intoxication at the time of the murders. Tr. pp. 264-67. Dr. Morton testified that Ritalin abuse "was a major factor that influenced what happened to his parents." Tr. p. 2667, ll. 14-16. Dr. Morton concluded that Robertson did not or could not control the impulse to kill his parents. Tr. pp. 2648-51; 2667-94.³

In Dr. Morton's expert opinion,

I don't think [Robertson] ever received treatment for his drug problems. I think it was talked about. It was talked about that he should quit drinking when he came out of the state hospital. It was talked about various therapists, that he should stop drinking, he should attend an AA meeting. I don't know that he was ever given an ultimatum to go into a treatment to go into a treatment program. I don't know that he was ever forced into a treatment program with consequences, if you don't do this, then you can't do that.

³ See Ground 10(a)(3), *infra*.

Tr. pp. 2665-66. Dr. Morton explained that, if left untreated, the results of Ritalin abuse get worse, and one might see more paranoia, which could progress to a psychotic state with time.

Tr. pp. 2666-67.

Later, Dr. Morton also expressed his opinion that Robertson did not receive appropriate treatment of his bipolar disorder:

Unfortunately, one out of three people receive appropriate treatment. That was not Jimmy; he didn't receive appropriate treatment. I'm not sure his doctor could deliver appropriate treatment. And I'm not sure that this is the place to raise who is going to deal with the doctor who prescribed all these drugs, but hopefully someone here will be concerned about what this man and his family were receiving and the amounts of drugs that they were receiving.

Tr. p. 2269, ll. 14-23.⁴ Dr. Morton later revisited this opinion and explained that "[i]n my professional judgment, he never received proper treatment for his bipolar disorder until he was ... incarcerated here."⁵

Dr. Morton further testified that the pharmacy records of the Robertson family (Defense Exs. 9-14) as well as notes from Dr. McMeekin showed that a "pretty impressive" quantity of drugs were coming into Robertson's home, including large amounts of Ritalin and anti-depressants. Specifically, Dr. Morton noted that Ritalin had been prescribed for both Robertson's father and his brother, Chip. Also, Dr. McMeekin continued to prescribe Ritalin to

⁴ The trial transcript reflects that the trial judge sustained the State's objection when Dr. Morton expressed his concern about the amount of drugs prescribed, and the trial judge instructed defense counsel to "go on and ask the next question." Tr. p. 2669, l. 24 - p. 2670, l. 4.

⁵ Dr. Morton also explained that a study had concluded that certain types of substance abuse make bipolar disorder worse, Tr. pp. 2680-83, and he later testified that Dr. McMeekin had prescribed Lithium for Robertson's bipolar disorder but had not prescribed a sufficient dosage to have a positive effect. Tr. p. 2686.

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Chip even though another doctor had taken Chip off of Ritalin after discovering Chip's abuse of the drug. Dr. McMeekin's records reflected that Chip needed Ritalin to go back to school, despite the fact Dr. McMeekin's own records reflected that Chip was snorting Ritalin. Finally, Dr. Morton reviewed the various mental health diagnoses for each of the family members that were reflected in the records he reviewed and the defense introduced a chart reflecting those diagnoses. Tr. pp. 2684-2703; Defense Ex. 15.

To establish that he received ineffective assistance of counsel, an applicant must make a two-fold showing. See *Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective at the time." *Id.* at 689. See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Further, there is a strong presumption that the actions taken by counsel were sound trial strategy. *Strickland*, 466 U.S. at 690.

Even if an applicant establishes that counsel's performance was deficient, he is only entitled to relief if he can also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. See also *Florida v. Nixon*, 543 U.S. 175 (2004); *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). In the context of a capital sentencing proceeding, the applicant must prove that "there is a reasonable



probability that ... the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 333 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (petitioner did not meet burden).

Applying these principles to the present case, the Court finds that Robertson’s argument lacks merit. The Court finds that trial counsel’s testimony concerning this allegation (and those which follow) is credible, and the Court rejects Robertson’s arguments to the contrary. Based upon the credible evidence, the Court finds that counsel’s decision to present evidence through Dr. Morton that Dr. McMeekin had over-prescribed Ritalin, rather than present Dr. McMeekin as a witness, reflects a reasonable, strategic choice under *Strickland*.

The Court finds that Dr. McMeekin’s credibility would have been subject to impeachment with the disciplinary infraction discussed at the hearing before this Court. The Court further finds that if counsel had presented Dr. McMeekin as a witness, he would have had an opportunity to explain and defend his treatment of the Robertson family and dispute Dr. Morton’s expert opinion concerning the over-prescription of Ritalin and other drugs to the various members of the Robertson family. This would have created a “battle” among the defense’s experts that could have been exploited by the State. The Court finds that it was not unreasonable to avoid presenting an expert who could undermine the defense’s case in mitigation by creating such a battle of defense experts. *Lyle v. Jordan*, 22 P.3d 666, 679 (N.M. 2001) (“Defense counsel may simply have concluded that a battle of experts would not be beneficial to



the defense or that it would have unduly emphasized or inadvertently reinforced the State's evidence"); see also *Smith v. Angelone*, 111 F.3d 1126, 1132-33 (4th Cir. 1997).

Even assuming *arguendo* that trial counsel's performance was somehow deficient, the Court finds that Robertson failed to prove that he was prejudiced by counsel's error. First, while Robertson did present evidence before this Court of portions of Dr. McMeekin's notes that were not elicited at trial, a review of Dr. Morton's testimony clearly reflects that Dr. Morton relied, at least in part, upon records from Dr. McMeekin in reaching his conclusions. The Court also finds that at least some of Dr. McMeekin's notes were also relied upon by Ms. Cascio, who prepared three charts "marking all of the psychological visits with either Skip Meyer or Dr. McMeekin for Terry and Earl during" 1995 through 1997. Ms. Cascio testified about those diagnoses, as well as a 1994 diagnosis by Dr. McMeekin that Robertson was depressed. Defendant's Ex. 25-27. *E.g.*, Tr. pp. 2882-87.

It is unclear whether Dr. Pincus, the neurologist employed by the defense, also reviewed Dr. McMeekin's records as part of "the medical records" that he reviewed (Tr. p. 2472), but it appears that he was familiar with and testified about the records of Robertson's treatment for bipolar disorder and his abuse of Ritalin. Tr. pp. 2493-99.⁶

Moreover, Dr. McMeekin did not testify at the PCR hearing. Therefore, the Court finds that Robertson cannot prove any prejudice because he did not present any evidence upon which this Court can find that there "is a reasonable probability that, but for counsel's unprofessional

⁶ Dr. Pincus testified that Robertson was abusing Ritalin, which had been prescribed for his brother, Chip, when Chip "was probably misdiagnosed as having attention deficit disorder of the kind that would respond to Ritalin." Although it did not help Chip's problems, the Robertson family "was able to get, apparently legal shipments of [Ritalin]" and Robertson abused it. Tr. pp. 2494-95.

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errors, the result of the proceeding would have been different." *Srtickland*, 466 U.S. at 694. See *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence"); *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial); *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (applicant's mere speculation what witness' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice). See generally *Beaver v. Thompson*, 93 F.3d 1186, 1195 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence through the testimony of family members, where there was no proffer of this testimony).⁷

GROUND 10(a)(2)

Robertson next alleges that trial counsel were ineffective for failing to call Robertson's brother, Chip Robertson, as a defense witness. Robertson contends that Chip could have testified concerning (1) his own involvement in the murder, and (2) the family's mental health history. The Court finds that Robertson has failed to prove either deficient performance or Sixth Amendment prejudice resulting from counsel's failure to present Chip as a witness.

⁷ This same rule applies in federal habeas corpus proceedings. "Complaints of uncalled witnesses are not favored in federal habeas review." *Murray v Maggio*, 736 F.2d 279, 282 (5th Cir. 1984). "Therefore, if potential witnesses are not called, it is incumbent on the petitioner to explain their absence and demonstrate, with some precision, the content of the testimony they would have given at trial." *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987). See also *Beaver*, 93 F.3d at 1195.

Robertson testified at the PCR hearing that he had a "fairly tenuous" relationship with his family around the time of the murders and that the family was not the typical American family that it appeared to be. He stated that most of his parent's family problems centered on him and Chip. When Chip and Robertson were on a break from school, they would use marijuana and alcohol. Later, they snorted Ritalin. Robertson indicated that Chip had a prescription for Ritalin.

Mr. Hancock testified that he did not think that anyone from the defense team spoke to Chip Robertson because Chip was represented by counsel and was being investigated in connection with the murder of his parents. Although Mr. Hancock was aware that Robertson and Chip were close at the time of the murders, he described their relationship as that of "partners in crime; in their attitude and action, their drug use and their attitudes about their parents." Counsel was unable to develop information that Chip prompted or encouraged Robertson to harm his parents.

Mr. Hancock testified that he had heard "street rumors" that Chip had taken people on a tour of the house where Terry and Earl Robertson were murdered and was having parties. Mr. Hancock felt that Chip could not help the defense because whatever information the defense could develop through him would have been more harmful than beneficial to Robertson's case. Also, Robertson did not want trial counsel to go after Chip.

Mr. Boyd testified that Chip had a drug problem at the time of the offense. Mr. Boyd approached Chip's attorney, but Chip was not cooperative with his brother's defense. In Mr. Boyd's estimation, even if they presented Chip and he testified concerning his own involvement in the murder, this would only give weak evidence of another mitigating circumstance. In fact, it would make the murders appear even more pre-planned.

The two prosecutors in the case, Solicitor Brackett and former-Solicitor Pope, testified that the State investigated Chip Robertson as a possible suspect in his parents' murders. However, the State was unable to develop sufficient evidence to indict him in connection with this case.

The Court finds that Robertson has failed to prove either deficient performance or resulting prejudice on this allegation as well. First, it does not appear that testimony from Chip concerning his involvement in the murders would have been admissible in the guilt phase of the trial because it is not inconsistent with Robertson's guilt.

In *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), the South Carolina Supreme Court set forth the rule governing the admissibility of evidence offered by the defendant to establish that someone else committed the offense with which he was charged. This rule for the admission of "third party guilt" was stated as follows:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible..... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

198 S.C. at 104-105, 16 S.E.2d at 534-35 (quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur., *Evidence* § 265, p. 254 (1939); footnotes omitted).

In *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 1733 (2006), the United States Supreme Court held that the South Carolina Supreme Court in *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001) and *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2005), vacated and



remanded, 547 U.S. 319 (2006) "had radically changed and extended the rule." The Court explained that

In *Gay*, after recognizing the standard applied in *Gregory*, the court stated that "[i]n view of the strong evidence of appellant's guilt – especially the forensic evidence – ... the proffered evidence ... did not raise 'a reasonable inference' as to appellant's own innocence." *Gay*, 343 S.C. at 550, 541 S.E.2d at 545 (quoting *Gregory*, 198 S.C. at 104, 16 S.E.2d at 534, in turn quoting 16 C.J., § 1085, at 560). Similarly, in the present case, as noted, the State Supreme Court applied the rule that "where there is strong evidence of [a defendant's] guilt, ... the proffered evidence about a third party's alleged guilt" may (or perhaps must) be excluded. 361 S.C. at 342, 605 S.E.2d at 24.

126 S.Ct. at 1733-34. The Supreme Court found that the modification of *Gregory* enunciated in *Gay* and *Holmes* rule was "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have 'a meaningful opportunity to present a complete defense.'" 126 S.Ct. at 1734 (citations omitted).

Applying the rule set forth in *Gregory*, this Court finds that it has not been presented with any evidence of Chip's involvement in the murders, which is inconsistent with Robertson's guilt, that was not already before the jury.⁸ For instance, there was no testimony presented at the PCR hearing that Chip was involved. Also, Chip had not given any statements to law enforcement,

⁸ Based upon the cross-examination of the State's DNA expert, the defense was able to argue in closing (as part of the argument that Moon's testimony was not corroborated) that a bloodstain found on a moccasin that was in the bag with the murder weapons and other items seized in Maryland, which was not matched to Robertson, might have been Chip's DNA. Also, the defense noted the absence of any testimony of Chip's whereabouts at the time of the murders. *See* Tr. p. 1938, ll. 1-21.

and the Court has not been presented with any supposed admissions by Chip. The Court has only been presented with speculation as to any involvement by Chip in the murders.

Thus, the Court finds that evidence Chip may have been involved in the murders is inadmissible under *Gregory*. See 98 S.C. at 104-105, 16 S.E.2d, at 534-535. See also *Holmes*, 126 S.Ct. at 1732-33 (recognizing that "rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged" are "widely accepted" and Constitutional).⁹

Second, and assuming its admissibility in the sentencing phase, the Court finds that Robertson cannot show deficient performance by his trial counsel because Chip was unavailable to the defense, not based upon any deficient performance on the part of Robertson's attorneys, but because his attorney refused to permit counsel to talk to him when counsel inquired. See *United States v. Kamel*, 965 F.2d 484, 497 (7th Cir. 1992) (trial counsel's failure to interview defendant's brother-in-law to determine if he and codefendant were solely responsible for fire was not deficient performance in arson prosecution, where defendant "fully and knowingly participated in the decision to adopt a joint *alibi* strategy" with co-defendant, and brother-in-law was unavailable at time of trial). Under these circumstances, the Court finds that Robertson's counsel made reasonable efforts to interview Chip and that they were ethically prevented from any further attempts to interview him after Chip's attorney refused to make him available to the

⁹ The Court further finds that Robertson had admitted his guilt to both of his attorneys, and that counsel were limited in their ability to present contrary evidence that Chip committed the murders. See Rule 407, SCACR, Rule 3.3(a) (3) (a lawyer shall not knowingly offer evidence that the lawyer knows to be false); *Lucas v. State*, 352 S.C. 1, 572 S.E.2d 274 (2002) ("an attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony"). See also *Nix v. Whiteside*, 475 U.S. 157 (1986) (criminal defendant's sixth amendment right to effective assistance of counsel was not violated when the attorney refused to cooperate with the defendant in presenting perjured testimony at trial).



defense. See Rule 407, SCACR, Rule 4.2, RPC (“[A] lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter....”).

The Court also finds that Robertson’s current allegation is inconsistent with his stated desire at the time of trial, as testified to by Mr. Hancock, for trial counsel not to go after Chip in connection with the murders. The Court further finds that what Chip would have testified to, had he been called as a witness, is unknown because, to date, he has not testified, and the Court has not been presented with any incriminating statements that he has made concerning the murders.

Moreover, the Court finds that if Chip had been asked about his own culpability as to the murders, he would have had the protection of the privilege against self-incrimination, and there is nothing in the record to suggest that he would have been willing to waive his privilege. Again, the Court finds that Robertson’s showing is merely speculative and does not entitle him to relief under *Strickland*. See *Eisemann v. Herbert*, 401 F.3d 102 (2d Cir. 2005);¹⁰ *Stewart v. Wolfenbarger*, 468 F.3d 338 (6th Cir. 2006). See also *Fletcher v. Mann*, No. 97-2137, 1998 WL 743744, at *4 (2d Cir. Oct. 21, 1998) (unpublished table opinion) (finding no ineffective

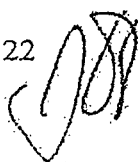
¹⁰ In *Eisemann*, a father and son were charged with various counts of sexual abuse. The father was charged with abusing a girl and her twin brother; the son was charged with abusing only the girl. The father and son hired the same attorney, Holtman. *Id.* at 105. In 1985, the father pled guilty to the charges. The son went to trial, represented by Holtman and another attorney. The jury found the son guilty on several charges. *Id.* In federal habeas corpus, the son argued that his counsel provided ineffective assistance, as a conflict of interest prevented counsel from calling the father to testify that he had committed the acts of which the son was accused. *Id.* at 108. The Second Circuit Court of Appeals, however, rejected that argument. That court first found that it was unknown what the father would have testified to, if he had been called as a witness. *Id.* at 109. Further, even if the father was asked about his own culpability as to the charges against the son, the father “would have had the protection of the privilege against self-incrimination, and nothing in the record suggests that he was willing to waive his privilege.” *Id.*



assistance of counsel where the witnesses whom counsel failed to subpoena, who counsel also represented, "were virtually certain" to invoke the right against self-incrimination).

Further, the Court agrees with Mr. Boyd's assessment at the PCR hearing that although presenting evidence that Chip was involved in his parents' murders would have given the defense another statutory mitigating circumstance, *see* § 16-3-20(C)(b)(5) ("The defendant acted under duress or under the domination of another person"), this would have been a relatively weak mitigating circumstance. On the other hand, evidence that Chip was an accomplice or conspirator would have strengthened the prosecution's case in aggravation of punishment, and it would have been inconsistent with the evidence from the experts who testified at trial that Robertson's actions were caused, at least in large part, by his bipolar personality disorder and his use and abuse of Ritalin. Therefore, the Court finds that Robertson has failed to prove that trial counsel were deficient for not presenting Chip Robertson to testify about his possible involvement in the murder of his parents. *See United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir. 1991) (there is no ineffective assistance of counsel even where the attorney chooses one reasonable strategy to the exclusion of another); *United States v. Adamo*, 882 F.2d 1218, 1227-28 (7th Cir. 1989).

Because Chip did not testify either at trial or at the PCR hearing, the Court finds that it is likewise speculative as to whether Chip would have provided information about the Robertson family background or the family's mental health history that was generally consistent with the mitigation case at trial and Robertson's showing in PCR, or whether he would testify contrary to counsel's reasonable presentation of evidence in mitigation of punishment concerning the



family's social history and mental health history.¹¹ Therefore, the Court finds that Robertson has failed to prove deficient performance on this allegation.

Even assuming that counsel were deficient, the Court finds that Robertson has failed to prove any prejudice. In addition to the reasons already stated, the Court finds that it is impossible for the Court to conclude that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" under *Strickland* because Robertson did not present testimony from Chip concerning his involvement in the murders or the family background and mental health history. See *Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814 ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence"); *Bannister*, 333 S.C. at 303, 509 S.E.2d at 809 ("PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial."). *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987). Particularly in light of the State's overwhelming evidence of Robertson's guilt of the murders and the statutory aggravating circumstances, the Court finds that Robertson has failed to prove that "there is a reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones*, 332 S.C.

¹¹ For the reasons stated in connection with Ground 10(a)(7) & (12)-(13), the Court finds that trial counsel's investigation for and presentation of evidence concerning the mental health history of Robertson and his family was objectively reasonable under *Strickland*, and that Robertson did not prove any prejudice resulting from counsel's performance.



at 332, 504 S.E.2d at 823 (concluding that petitioner did not meet burden).¹² Cf. *Timberlake v. Davis*, 409 F.3d 819, 824 (7th Cir. 2005) ("Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features").

GROUND 10(a)(3)

Robertson further alleges that trial counsel were ineffective because they neither advised him to plead guilty but mentally ill (GBMI) nor requested that the trial judge submit a verdict of GBMI to the jury. The Court disagrees and finds that Robertson has not met his burden of proving deficient performance or resulting prejudice as to either allegation.

As previously discussed, trial counsel employed three experts who eventually testified as to Robertson's mental state at the time of the murders. Dr. Pincus, the neurologist who performed both a neurological¹³ and physical examination of Robertson, testified that his testing revealed that Robertson had frontal lobe damage. He explained that the frontal lobes provide judgment and the inhibition of impulses. Tr. pp. 2480-91; 2509-10.

Dr. Pincus testified that his testing supported the earlier diagnosis of bipolar disorder. Robertson reported abusing Ritalin and alcohol to self-medicate, and Dr. Pincus testified that this was common for persons with bipolar disorder. Tr. pp. 2458-80; 2494-96. Dr. Pincus explained that Robertson did something on the night of the murders that he had planned for some time. Tr. pp. 2490-91.

¹² The Court further finds that evidence that Chip may have been a conspirator or an accomplice in his parents' murders would only strengthen the case in aggravation and would not lead the Court, to "conclude[] that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

¹³ Dr. Pincus saw Robertson on two occasions: on November 1, 1998, and on the morning of his testimony. Tr. pp. 2471-72. Also, he did not perform a "very complete examination," which he estimated might take "a day or two." Tr. p. 2480.

With respect to Robertson's mental state at the time of the murders, Dr. Pincus testified that:

[t]he history that he gave me indicated that he does indeed have manic depressive illness.

And the history that I found in the records confirms that. So, I believe that he is manic depressive and *he was probably having an episode of mania* ... at the time of the murder[s].

Tr. p. 2497 (emphasis added).

Dr. Pincus based his opinion on evidence that Robertson was not sleeping and had not had more than three hours sleep in the twenty-four to thirty-six hours before the murders; Robertson's history of gambling, running up debts and not being able to concentrate (even though he could concentrate when Dr. Pincus examined him); and his treatment for bipolar disorder at the time. Tr. pp. 2497-99. Dr. Pincus testified that Robertson reported using 250 mgs. of Ritalin on the night of the murders, which is "an enormous overdose of Ritalin" and ten times the amount that Dr. Pincus would prescribe.

Dr. Pincus also testified that:

The combination of the urge that he had been controlling up to that time to kill his parents, under the influence of a mania and the drug Ritalin which exacerbates the symptoms of mania, reproduces them, accentuates them, I think that is the reason that at that time he did that.

I also base that on the fact of what he did. This was no assassination; he obliterated them. He was in the grip of a colossal emotion.

Tr. p. 2699, ll. 11-20. Dr. Pincus added that Robertson had an urge to kill his parents that was stimulated by his drug use. This was "unchecked by the functioning of his frontal lobe at that

time which was not working well because of [his drug and alcohol use] and because of the status of his brain to begin with." Tr. p. 2500, ll. 6-13.

Dr. Pincus testified that his opinion would not be affected by evidence of efforts to cover up the murders. However, he admitted that if there was evidence that Robertson had written notes on the day of the murder, then "there would have to be a presumption of planning." Tr. pp. 2501-02. Also, Dr. Pincus agreed that Robertson was making choices about the medications he would take and the order he would do so at the time of the murder; and he had been advised of the effects of drug and alcohol use on his bipolar disorder. Tr. p. 2517.

Moreover, Robertson reported to Dr. Pincus that the only times he thought of killing his parents was when he was taking Ritalin, cocaine or "speed." Tr. pp. 2520-22. The Court finds that this information is inconsistent with other information available to trial counsel (and testified to by a number of State's witnesses) that Robertson often talked of killing his parents for the insurance money.¹⁴

Dr. Evans, the defense neuropsychologist, testified that Robertson's full scale I.Q. was 112.¹⁵ However, neuropsychological testing and a quantitative E.E.G. (Q.E.E.G.) administered by Dr. Evans revealed that Robertson had damage to the right hemisphere of his brain and/or frontal lobe dysfunction.¹⁶ Dr. Evans explained that Robertson had previously been diagnosed

¹⁴ For instance, his co-defendant, Moon, testified in the guilt phase that Robertson had previously told her on many occasions that he planned to kill his parents, both when he was sober and when he was drunk. Also, he explained that his motive was the insurance money, which Moon said was "a couple of million" dollars. Tr. pp. 1592-93; see also Tr. pp. 1632-33; 1642. Other witnesses testified to similar comments in the sentencing phase. *E.g.*, Tr. pp. 2155-57; 2163-65; 2177-78; 2187-89; 2202-03; 2219; 2222; 2228.

¹⁵ His verbal I.Q. was 118, but his non-verbal I.Q. was 102.

¹⁶ The frontal lobes are the portion of the brain that allows humans to have executive functioning, plan ahead and restrain impulses.



with bipolar disorder and attention deficit hyperactivity disorder (ADHD), the latter of which "most people today believe is a brain based disorder, especially with most cases being frontal lobe related." Tr. pp. 2546-69; 2577-78.

According to Dr. Evans, Robertson described having periods of disassociation, and Dr. Evans testified that both prior diagnoses of ADHD and bipolar disorder were correct and supported by his testing. However, Dr. Evans did not know what Robertson's mental state was at the time of the crime, and he could not say that Robertson had a disassociative episode at the time of the crime because Robertson never claimed that he had one when the murders occurred. Indeed, Dr. Evans did not discuss the facts of the crime with Robertson. He likewise admitted that Robertson could have fabricated the report of disassociative episodes to create a mental health defense. Tr. pp. 2569-70; 2575; 2584; 2586.

Dr. Morton, the defense expert in psycho-pharmacology, agreed with the diagnoses previously given to Robertson. He also testified that Robertson met the diagnostic criteria for alcohol abuse and dependence, as well as poly-substance abuse – based on Robertson's stimulant abuse and marijuana abuse. The primary stimulant that he abused was methylphenidate, which is sold under the trade name of Ritalin. According to Dr. Morton, "[d]rug-induced psychiatric disturbances are probably more prevalent among abusers of CNS stimulants [such as Ritalin] than any other type of drug." Tr. pp. 2613-37.

The difficulties caused by these disturbances can include manic-like states, "serious psychoses resembling schizophrenia, depressions that are almost identical to major affective disorders, especially during withdrawal, and other types of anxiety disorders. However, most of the psychotic states caused by abuse of these stimulants are transitory, "just lasting a brief period

of time, and will usually disappear, whether its hours or weeks." Tr. p. 2636. See also Tr. pp. 2638-39; 2652-67.¹⁷

Robertson reported using between 240 and 300 mgs. of Ritalin. Dr. Morton analogized Ritalin abuse with abuse of amphetamine and cocaine. He explained that "[p]eople that use these drugs get psychotic and get paranoid." Dr. Morton testified that a person would have impaired judgment, and "extreme anger with the threat of acting out aggressive behavior" may occur. Also, paranoid ideation and auditory as well as tactile¹⁸ hallucinations may occur, and Dr. Morton described behavioral problems associated with Ritalin abuse. Tr. pp. 2640-48; 2653-56; 2665-67; 2680-83; 2702.

Dr. Morton testified that he was unclear as to what affect Robertson's bipolar disorder had at the time of the crimes. However, he testified that Ritalin abuse would make a pre-existing mental illness worse. Dr. Morton emphasized that people who use as much Ritalin as Robertson claimed to have used on the night before and morning of the murders (30-60 milligrams at a time) can become psychotic and paranoid, and it may result in unprovoked violence. In Robertson's discussions with Dr. Morton, he described a sense of a great deal of energy, some paranoia, and "he described the crime almost like he was depersonalized." Dr. Morton believed that these statements were consistent with a toxic state of Ritalin intoxication, and Dr. Morton believed that Robertson had Ritalin intoxication at the time of the murders. Tr. pp. 2654-67.

¹⁷ Dr. Morton testified people that "use these drugs get psychotic and get paranoid." They have "[l]oose associations" which do not make sense, and they develop behavioral problems. Tr. pp. 2640-41.

¹⁸ Tactile hallucinations refer to a person experiencing the feeling that something is crawling on him.

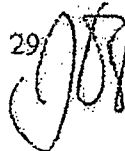
In Dr. Morton's opinion, Ritalin abuse "was a major factor that influenced what happened to his parents," Tr. p. 2667, ll. 14-16, and Dr. Morton testified that Robertson did not or could not control the impulse to kill his parents. Tr. pp. 2648-51; 2667-94. Dr. Morton based his conclusions upon his experience in treating those who abuse stimulants; Robertson's self-reporting to him about the night of the murders; and the literature concerning the effects of such large amounts of stimulants on individuals. Tr. pp. 2641-42; 2709; 2711-13; 2730-31.

Mr. Hancock testified that he thought the defense discussed the possibility of a plea of GBMI, but the State never offered such a plea.¹⁹ Also, a GBMI plea would have required that a trial judge sentence Robertson. *See State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992). Robertson, however, was never interested in a guilty plea and always wanted a jury trial. Likewise, counsel did not want Robertson to be sentenced by a trial judge. Rather, they preferred to take their chances with a jury, and they so advised their client.

Mr. Hancock further testified that he did not think the opinions of the defense experts would support a GBMI plea under the statute. Although these experts would suggest a finding of mental illness, they did not support a conclusion that Robertson had the inability to conform his conduct to the requirements of the law because of the mental illness. *See S.C. Code Ann. §17-24-20(A)* (Supp. 2006).

In addition, there is no evidence to suggest that the State would have been willing to waive its right to a trial by jury on the question of whether Robertson had the inability to conform his conduct to the requirements of the law. Mr. Boyd testified that he thought he asked

¹⁹ Both Solicitor Brackett and then-Solicitor Pope testified that the State wanted to seek the death penalty against Robertson in this case at all times and that there were never any serious offers of a negotiated plea.



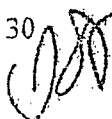
Solicitor Pope about a possible guilty plea for Robertson, but Mr. Pope said no. Also, Mr. Boyd corroborated Mr. Hancock's testimony that trial counsel wanted a jury to sentence Robertson, as opposed to a trial judge, and a GBMI plea would have taken away Robertson's right to jury sentencing. With respect to a verdict of GBMI, Mr. Boyd testified that counsel would have had to concede Robertson's guilt, and Robertson did not want to concede guilt, even though he was aware that he would be found guilty. According to Mr. Boyd, the possibility of an LWOP sentence was not appealing to Robertson. Further, Mr. Boyd would not concede that such a verdict would have been the best course for the defense but admitted it was a viable option.

Both attorneys agreed that Robertson was mentally ill. However, Mr. Hancock clearly testified that he felt Robertson knew the difference between right and wrong, and both attorneys felt like he understood their discussions with him. Also, both indicated that he admitted his guilt to them, and Mr. Hancock testified that Robertson explained why he had committed the murders.

Robertson testified that counsel never discussed a possible plea with him but admitted that he never inquired and only changed his mind about the desirability of a guilty plea to capital murder after he got onto death row. When asked questions about his guilt of the murders or any admissions which he may have made relating to the murders, Robertson invoked his Fifth Amendment privilege against self-incrimination. See Ground 10(a)(6), *infra*. Robertson did not present additional expert testimony on this issue.

Based upon the present record, the Court finds that counsel were not deficient for failing to advise Robertson to plead GBMI. In South Carolina,

[a] defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental



disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

See S.C. Code Ann. § 17-24-20(A) (Supp. 2006); see also *Wilson*, 306 S.C. at 504-05, 413 S.E.2d at 23; *State v. Bell*, 293 S.C. 391, 398, 360 S.E.2d 706, 710 (1987).²⁰ To warrant submission of a GBMI verdict, "the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A)." § 17-24-20(B).

The purposes for the enactment of the GBMI statute are "(1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society's benefit while incarcerated." *State v. Hornsby*, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997). Section 17-24-20 makes clear that a GBMI verdict is still a guilty verdict. *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872 (a finding of GBMI "does not absolve a defendant of guilt").²¹ If there is evidence of mental illness and

²⁰ In an unpublished decision, the Fourth Circuit Court of Appeals has found that counsel was not ineffective for failing to investigate adequately the possibility that a South Carolina death row inmate might possess a viable GBMI defense. See *Atkins v. Moore*, 139 F.3d 887 (4th Cir. 1998) (Unpublished) ("counsel were aware of the existence of the GBMI defense and consulted with various mental health experts regarding Atkins' mental state. These consultations revealed only that Atkins abused alcohol and that he suffered from symptoms of post-traumatic stress disorder. In short, counsel's investigation revealed nothing on which to base a GBMI claim. Under these circumstances, we cannot say that the performance of Atkins' counsel fell outside the broad range of professionally competent assistance").

²¹ As the court explained in *Hornsby*, this statute "simply recognizes the continuum in the law regarding mental illness and provides a guide for a jury when considering whether a defendant is not guilty; not guilty by reason of insanity (incapable of determining right from wrong); guilty but mentally ill (incapable of conforming his conduct to the requirements of the law but capable of distinguishing right from wrong); or guilty (suffers no mental illness)." Also, "a conviction of GBMI provides a signal to the Department of Corrections that a new prisoner may have a mental illness and should be treated before integrating him into the general prison population." *Hornsby*,

evidence that a criminal defendant lacked sufficient capacity to conform his conduct to the requirements of law, a jury must be instructed on the forms of verdict of guilty, GBMI, not guilty, and not guilty by reason of insanity. *State v. Rimert*, 315 S.C. 527, 446 S.E.2d 400 (1994) (citing S.C. Code Ann. § 17-24-30).²²

The Court finds that the only credible evidence in this case is that counsel preferred for Robertson to be tried and sentenced by a jury, rather than a trial judge, and a GBMI plea would have required a judge to impose the sentence. *See Wilson*, 306 S.C. at 502, 413 S.E.2d at 21. *See also State v. Truesdale*, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982) ("Pleas of guilty are unconditional, and if an accused attempts to attach any condition or qualification thereto, the trial court should direct a plea of not guilty"); *State v. Patterson*, 278 S.C. 319, 321-22, 295 S.E.2d 264, 265 (1982) (guilty plea and sentence vacated where "a significant inducement for entering the plea was the condition that the jury determine punishment, an impermissible condition under the statutory mandate that the trial judge alone determines punishment when a defendant pleads guilty to murder"). Also, the Court finds that, at the time of his trial, Robertson wanted a jury trial and would not have entered a guilty plea of any description. The Court further finds that there is no evidence that the State would have agreed to a GBMI plea. Instead, the only evidence is that the State was not interested in a plea bargain but wished to seek the death penalty. Therefore, Robertson has failed to prove either deficient performance or prejudice under *Strickland*.

326 S.C. at 126-27, 484 S.E.2d at 872. *See also State v. Downs*, 361 S.C. 141, 145-46, 604 S.E.2d 377, 379-80 (2004) (recognizing that the principal difference between guilty and GBMI pertains only to post-sentencing medical treatment).

²² In *Wilson*, the Court held that the "must" in § 17-24-30 concerning the submission to the jury was mandatory. In *Rimert*, the Court concluded that a GBMI form could not be waived once he raised the issue of his sanity. 315 S.C. at 530-31, 446 S.E.2d at 401-02.

The Court likewise finds that the decision not to seek a GBMI verdict at trial was reasonable under *Strickland*. The focus of the case was Robertson's mental illness and drug abuse and how the mental illness and drug abuse mitigated his conduct. Counsel made a reasonable, strategic decision to present the defense evidence in the sentencing phase. To paraphrase Mr. Hancock's testimony, if counsel had presented their evidence in the guilt phase, they would have "fired all of their guns" in the guilt phase.²³

More importantly, the Court finds that pursuit of a GBMI verdict would have required counsel to pursue a verdict that was inconsistent with their chosen strategy of not conceding guilt in the guilt phase.²⁴ Again, the strategy actually followed, as opposed to that now suggested, was consistent with Robertson's desire to receive a jury trial and sentencing. See *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872; *Strickland*, 466 U.S. at 689 (although defendant's consent to trial strategy does not alone vitiate all ineffective assistance claims, his consent is probative both of the reasonableness of the chosen strategy and of counsel's performance); cf. *Nixon*, 543 U.S. at

²³ Further, GBMI, or irresistible impulse, has never been accepted in South Carolina as a complete defense to crime. "It will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts." *State v. Levelle*, 34 S.C. 120, ___, 13 S.E. 320, 321 (1891). And the Court has further stated: "It is a matter that is not susceptible of proof, and to allow a person to escape the consequences of his criminal act by asserting that he acted under an impulse which he could not restrain, although he knew his act to be unlawful, would be dangerous, if not destructive, to the peace of society." See *State v. Bundy*, 24 S.C. 439, 445 [58 Am.Rep. 263] (1886). See also *State v. Gilstrap*, 205 S.C. 412, 32 S.E.2d 163 (1944) ("After mature consideration, we firmly adhere to the rule so forcibly expressed in *State v. Levelle*, [34 S.C. 120, 13 S.E. 320]; and we may add that the doctrine that a criminal act may be excused or mitigated because prompted by an irresistible impulse, where the offender has the mental capacity to appreciate his legal and moral duty in respect to it, has no place in the law"). Similarly, South Carolina has always rejected diminished capacity as a defense. *State v. Gill*, 346 S.C. 209, 552 S.E.2d 26 (2001) (flatly rejecting as a defense testimony that defendant's borderline intellect and antisocial personality prevented him from being able to formulate malice aforethought).

²⁴ The Court finds that counsel's strategy was reasonable even though Mr. Hancock further testified that the defense did not wish to mount such a vigorous and futile defense in the guilt phase that the attorneys might lose credibility with the jury.

189-92 (counsel's concession of guilt in the guilt phase of a capital murder trial, made after consultation with the client but without his express approval, did not constitute deficient performance where counsel's strategy was reasonable under *Strickland* and counsel's strategy did not "rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary'" (footnote omitted); *Bell v. Evatt*, 72 F.3d 421, 427-30 (4th Cir. 1995) (concluding that - given overwhelming evidence of guilt - counsel's concession of defendant's guilt to kidnapping charge and pursuing GBMI verdict for murder and kidnapping charges in spite of the defendant's denial that he committed the crime was objectively reasonable trial strategy to which defendant consented, and observing that "neither Bell nor any other aggrieved defendant can manipulate this forum to construe a reasonable, but ultimately unsuccessful strategy in his favor. Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel").

Alternatively, the Court finds that Robertson has not met his burden of proving that he was prejudiced by counsel's failure to pursue a GBMI verdict. First, the Court finds that the opinions of the three defense experts did not support a GBMI verdict. See *Laws v. Armontrout*, 863 F.2d 1377, 1389 (8th Cir. 1988) (en banc) (counsel's failure to pursue psychiatric evidence was not objectively unreasonable when "[n]othing made known to counsel during his representation of [defendant] ... suggested to counsel that presenting evidence of [defendant's] psychiatric state would be of any benefit in his defense") (internal quotation marks omitted).

Dr. Pincus testified that Robertson was "*probably having an episode of mania ... at the time of the murder[s].*" Tr. p. 2497. His opinion as to Robertson's mental state, however, is predicated upon both the mental illness and Robertson's reported abuse of alcohol and Ritalin.

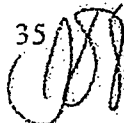
Also, neither he nor the other experts ever testified that Robertson met the criteria for a GBMI verdict, as defined as defined in § 17-24-20(A).²⁵

The Court finds that Dr. Evans could not conclude that Robertson had a disassociative episode at the time of the murders because Robertson never claimed that he had one when the murders occurred, and Dr. Evans could not give an opinion as to Robertson's mental state at the time of the murders because he did not question Robertson about the facts of the crime. Tr. pp. 2569-70; 2575; 2584; 2586.

Finally, Dr. Morton's opinion was not that Robertson "lacked sufficient capacity to conform his conduct to the requirements of the law" because of a "mental disease or defect," as required for submission of a GBMI verdict. See § 17-24-20(A). Rather, he based his opinion on the drug and alcohol abuse. While Dr. Morton testified that use of Ritalin and alcohol makes a pre-existing mental illness worse, he admitted that he is not a psychiatrist and does not diagnose. Tr. p. 2615, ll. 21-22. More importantly, he candidly admitted that he did not "know what part [Robertson's] manic depressive illness played in this." Tr. p. 2656, ll. 6-7.

Further, Dr. Morton did not testify that the Ritalin and alcohol abuse "had caused permanent and irreversible brain damage which manifests itself in a mental illness." *Contra State v. Hartfield*, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990) (defendant was entitled to present defense of insanity or attempt to obtain GBMI verdict where there was expert testimony his drug use "had caused permanent and irreversible brain damage which manifests itself in a mental illness").

²⁵ The State introduced a copy of his report at trial, as State's Ex. 284. Dr. Pincus does not indicate in that report that Robertson is GBMI.



Thus, the Court finds that none of the opinions from the defense's experts supported a GBMI verdict. See *State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995) (observing in *dicta* that even if appellant's therapist had been qualified to give expert testimony on defendant's state of mind at the time of the incident, "this testimony would not have supported a verdict of guilty but mentally ill; therefore, the trial court's refusal to allow the jury to hear it did not prejudice [defendant]" because the therapist "only vaguely opined [defendant]'s judgment was impaired and he was out of control at the time of the incident"). Cf. *State v. Thorne*, 239 S.C. 164, 121 S.E.2d 623 (1961) (upholding guilty verdict where there was no testimony the defendant was insane or mentally defective to the extent he did not know right from wrong, notwithstanding testimony he suffered from moody spells and engaged in displays of temper); *State v. Lewis*, 328 S.C. 273, 277, 494 S.E.2d 115, 116 (1997) (expert testimony that, because of his severe depression, appellant was unable to conform his conduct to the requirements of the law supported GBMI verdict).²⁶

Even assuming *arguendo* that the testimony of one or more of the experts who testified at trial would have supported a GBMI verdict, the Court finds that there is still no reasonable probability that the result of the proceeding would have been different, but for counsel's errors. *Strickland*, 466 U.S. at 694. A finding of GBMI "does not absolve a defendant of guilt." See *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872. Likewise, it would not have prevented the State from seeking a death sentence, as *Wilson* and *Bell* make clear.

²⁶ Robertson argues that Dr. McMeekin's records support a GBMI verdict. However, the records introduced by Robertson do not support this conclusion. Also, Dr. McMeekin was not presented as a witness in PCR, and there is no evidence before this Court that he ever concluded that Robertson is GBMI, as defined in § 17-24-20(A).



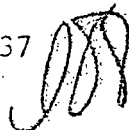
Nor would Robertson have been allowed to inform the guilt phase jury of the consequences of a finding of GBMI. *Bell*, 293 S.C. at 399-400, 360 S.E.2d at 710; *Rimert*, 315 S.C. at 530, 446 S.E.2d at 401 (trial judge was not required to instruct jury on effect of GBMI and not guilty by reason of insanity verdicts). Also, the State would have been allowed to rebut the defense's presentation of evidence concerning Robertson's mental illness by presenting Dr. McKee in the guilt phase of the trial. The defense fought hard to prevent any evaluation or presentation of Dr. McKee's opinion in the sentencing phase, and the Court finds that Robertson was not prejudiced by counsel's failure to allow this testimony to be presented in the guilt phase of his trial.

Further, the State could have exploited any inconsistencies in the opinions of Robertson's three experts, as well as Dr. Evans' concessions that Robertson "certainly ha[d] a strong motive not to tell [me] the truth," Tr. p. 2586, ll. 8-10, and Robertson could have fabricated the report of disassociative episodes to create a mental health defense. Tr. p. 2575, ll. 4-14. Therefore, the Court finds that Robertson has failed to prove any Sixth Amendment prejudice under *Strickland* and its progeny.

GROUND 10(a)(4)

Robertson maintains that his attorneys were ineffective because they failed to spend an adequate amount of time with him in preparation for the trial. However, the Court finds that Robertson has not proved either that counsel's performance was deficient or that he was prejudiced by counsel's failure to spend more time with him before the trial.

Robertson testified that his attorneys only spent approximately four or five hours discussing the case with him before his trial. He described the first interview as fairly lengthy,

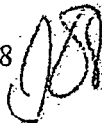


and they discussed the crimes. The remaining time counsel spent with him, they discussed the mental health history of Robertson and his family. Robertson provided them with as much detail concerning the mental health history as he could.

Mr. Hancock testified that he could not recall the precise amount of time he spent with Robertson before the trial, but he indicated it could have been approximately ten hours or so. In their conversations with Robertson, he admitted that he had murdered his parents and he explained why he had done so.

Mr. Boyd testified that he likewise did not remember how much time he spent with Robertson prior to trial but recalled that there were a number of lengthy meetings. Robertson was able to discuss matters rationally, and he understood counsel's discussions with him. Mr. Boyd recalled going over the details of what happened and the mental health history at length. Mr. Boyd also testified that Robertson admitted to killing his parents. Counsel also discussed whether Robertson should testify, and both attorneys testified that they advised Robertson not to testify.

Strickland applies great deference to decisions by defense attorneys out of concern that a rigid set of guidelines or rules would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. See also *United States v. Cronin*, 466 U.S. 648, 658 n.23, 659 n.26 (1984) (because reviewing courts must "presume that the lawyer is competent to provide the guiding hand that the defendant needs," the defendant must prove a constitutional violation which undermines competence in the outcome of his trial).



"Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise prepare for trial violates a defendant's Sixth Amendment right to counsel." *Morris v. Slappy*, 461 U.S. 1, 11 (1983). Further, Robertson's mere assertion that counsel only met with him four or five times is insufficient to overcome the presumption that counsel rendered reasonable assistance. *United States v. Henry*, 933 F.2d 553, 561 (7th Cir. 1991) (defendant's allegation that he met with his public defender for only ten to fifteen minutes before he pleaded guilty was insufficient to overcome presumption of reasonable assistance).

Moreover, the Court finds that the credible evidence is that counsel met with Robertson on a number of occasions and, following a constitutionally reasonable investigation into the facts of the case,²⁷ counsel made the strategic decision to focus primarily upon the sentencing phase of the case in mitigation. To this end, they hired a number of experts. Each expert met with

²⁷ In *Strickland*, the Court stated that "strategic decisions made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 690-91. See also *Wiggins*, 539 U.S. at 525 (further investigation is excusable where counsel has evidence suggesting it would be fruitless); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (concluding that limited investigation was reasonable because all witnesses brought to counsel's attention provided predominantly harmful information).

In addition to Robertson's admission of his guilt to counsel, counsel otherwise thoroughly investigated the facts of the case: although both attorneys had extensive major felony trial experience and had tried both non-capital and capital murder cases, they consulted other attorneys experienced in trying capital cases; they hired a DNA expert; they had an investigator and a paralegal to assist them; they reviewed the State's evidence; and Mr. Hancock went to the crime scene with the investigator and ascertained that it was possible for Ms. Moon to have heard the matters she described in her statement. Also, they employed the mental health experts referenced throughout the Order and were unable to develop evidence of insanity or GBMI.

Robertson on one or more occasions and gathered any additional information he or she felt was necessary and relevant directly from him and the various records acquired by the defense team.

The Court finds that the decision to utilize experts to gather and present information to the jury was reasonable since it is the experts who have to lay the foundation for the jury to understand Robertson's mental illness and the mental health history of his family. *Cf. Florida v. Nixon*, 543 U.S. 175, 191 (2004) ("Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. ... In such cases, 'avoiding execution [may be] the best and only realistic result possible.'... Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared." (Citations and footnotes omitted).

The Court further finds that Robertson was in apparent agreement with counsel's strategy, and, rather than voicing any objection to that strategy, he cooperated fully with the defense experts and counsel's efforts to present a case in mitigation of punishment. Nor has Robertson demonstrated anything else that counsel could have done in gathering information about Robertson or his family that they failed to do as the result of following the strategy they employed.

Yet, even if Robertson could prove that counsel were deficient, the Court finds that he has totally failed to prove any resulting prejudice. *See Strickland*, 466 U.S. at 691; *United States v. Goudy*, 792 F.2d 664, 672 (7th Cir. 1986) (counsel's failure to meet with client in months immediately preceding trial does not amount to ineffective assistance, absent a showing of

prejudice). Again, the Court finds that Robertson has not presented any evidence that the outcome of the case could have been any different if counsel had spent more time with him.

The Court further finds that Robertson's suggestion that he could have weighed in on the strategic decisions made by his attorneys if they had met with him more often is misplaced. The Supreme Court recently stated that "[A]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy ... That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Nixon*, 543 U.S. at 187 (citing *Strickland*, 466 U.S. at 688 and *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) (an attorney has authority to manage most aspects of the defense without his client's approval). See also *Faretta v. California*, 422 U.S. 806, 820-21 (1975) ("when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to counsel the power to make binding decisions of trial strategy in many areas"). Further, the Court finds, as noted, that Robertson consented to counsel's strategy and did not voice any complaint such as that raised before this Court. Therefore, he has failed to prove any prejudice on this allegation.

GROUND 10(a)(5)

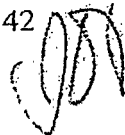
Robertson also maintains that his attorneys were ineffective for failing to pursue a supposed plea bargain offered by the prosecution, whereby Robertson would be allowed to plead guilty to the murders and receive a life sentence if his bother, Chip, agreed to donate the proceeds of their parents' estates to a charity. The Court finds that the credible evidence before it is that the "offer" referred to by Robertson was merely a comment made in jest by Mr. Brackett to Chip's attorney. Robertson has not proved that counsel was deficient or resulting

prejudice because counsel made reasonable inquiries concerning a plea, but then-Solicitor Pope was not interested in a plea and wished to seek the death penalty for the murders at all relevant times.

Robertson testified that his attorneys never discussed a plea bargain with him during his March 1999 trial. Later, he read a newspaper article stating that then-Deputy Solicitor Brackett had proposed a plea offer to Chip's attorney, in which the State would agree to allow Robertson to plead guilty to the murders and receive a life sentence if Chip would agree to donate the proceeds from their parents' estates to charity. When Robertson later discussed the matter with Chip, Chip indicated that he would not agree to such an offer.

Mr. Hancock testified that he was aware of the discussion between Mr. Brackett and Chip's attorney. He characterized this as "hall talk" and was not a serious offer. Further, Robertson was not interested in a plea and wanted a jury trial, despite admitting his guilt to his attorneys.

Mr. Boyd testified that he attempted to negotiate a plea bargain on Robertson's behalf, but no agreement was ever reached. He thought he asked then-Solicitor Pope about a guilty plea in exchange for a life sentence, but was told "no". Mr. Boyd became aware of the conversation that Mr. Brackett had with Chip's attorney. Although he did not take it as a serious plea bargain, he inquired of the Solicitor's Office during Robertson's trial, and Mr. Brackett told him that the discussion was part of a joke and was not a serious offer. Also, it was Mr. Boyd's understanding that Solicitor Pope would have had to approve any plea bargain, and there was no indication that Solicitor Pope would accept a plea.



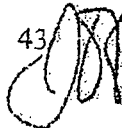
Mr. Pope testified that during the time he was Solicitor of the Sixteenth Circuit, and he had to personally approve any plea bargains in capital cases. Although he was aware of the discussions Mr. Brackett had with Chip's attorney, he characterized the discussion as a joke. He emphasized that he always intended to seek the death penalty for the murders in this case and that he never had any intention of accepting a guilty plea in exchange for a life sentence.

Solicitor Brackett testified that there were never any serious plea negotiations in this case and that the discussion alleged by Robertson was merely a joke made by him to Chip's attorney. He corroborated that then-Solicitor Pope would have had to approve any plea bargain in a capital case, and that Mr. Pope did not approve any plea bargain in this case.

Based upon the current record, the Court finds that counsel took reasonable steps to bring about a plea bargain. However, there was never any credible evidence that a plea bargain was ever offered by the State. To the contrary, the only credible evidence is that the State was not willing under any circumstances to take the notice of intent to seek the death penalty off of the table and allow Robertson to receive a sentence of LWOP. The Court further finds that the plea bargain referred to in this allegation was not meant as a serious offer by the State but was merely part of a conversation by Mr. Brackett which he intended to be humorous. Therefore, the Court finds that Robertson has failed to prove either deficient performance or resulting prejudice under *Strickland*.

GROUND 10(a)(6)

Robertson next claims that counsel was ineffective because they advised him not to testify in the sentencing phase of his trial, and that he was not allowed to make his own decision as to whether or not to testify. As to the first part of this allegation, the Court finds that



Robertson has failed to prove either deficient performance or resulting prejudice. As to his contention that he was not permitted to make his own decision about testifying, the Court finds that the allegation is not appropriate in Post-Conviction Relief because it is an allegation that could have been raised at trial and on direct appeal. *See* S.C. Code Ann. §17-27-20(b) (1985).

1. **Counsel's advice for Robertson not to testify.**

Robertson testified that he wanted to testify in the sentencing proceeding after he heard the testimony of Ms. Cascio, the social worker (*See* Tr. pp. 2852-3031) because he felt that what she had divulged was about the same as if he had testified about the crimes. However, both of his attorneys advised him not to testify, and he followed their advice. When the State asked him substantive questions about the offenses and his guilt or innocence at the PCR hearing, he invoked his Fifth Amendment privilege against self incrimination.²⁸

Mr. Hancock testified that he and co-counsel had a heated conversation with Robertson about whether or not he would testify in the sentencing phase. Although Mr. Hancock felt that some damage had been done to the defense's case by Ms. Cascio's testimony, Mr. Hancock did not think the defense stood any chance of a life sentence if Robertson testified. In his assessment, Mr. Hancock believe that Robertson – who had admitted to counsel that he murdered his parents and only he did so – would have been a very bad witness, and any cross-examination

²⁸ The only exception occurred when he was cross-examined by the State in his testimony on reply. Although he answered a question concerning his guilt or innocence, he sought to invoke his Fifth Amendment privilege with respect to the details of the murders. However, this Court found, after an objection by PCR counsel and another colloquy between the Court and Robertson, that he had not knowingly and voluntarily waived his right to assert the Fifth Amendment because he did not adequately understand the scope of it and the effect of any waiver.

by Solicitor Pope would have been devastating. Mr. Pope testified that he was prepared for and wanted Robertson to testify. Thus, his testimony corroborates that of Mr. Hancock.

Mr. Boyd testified, consistently with Mr. Hancock, that Robertson had admitted to counsel that he murdered his parents. He also corroborated that there was a lengthy discussion about whether Robertson should testify in sentencing and respond to the testimony from Ms. Cascio. He agreed that the State's cross-examination of Ms. Cascio had hurt the defense but felt that Robertson would have made a bad witness because the State could have impeached him and cross-examined him about the facts of the case.

Based upon the testimony of trial counsel and Mr. Pope, the Court finds that Robertson has failed to prove that counsel were deficient. First, it is clear that Robertson was aware of his right to testify. In addition to the testimony offered at PCR, the record reflects that Judge Hayes' on-the-record waiver of Robertson's right to testify in the sentencing phase ensured Robertson understood that this was a right personal to him -- as was his right to remain silent -- and that Robertson made a knowing and intelligent waiver of his right to testify. *See* Tr. pp. 3041-43.

Second, the Court finds that trial counsel made a reasonable, tactical decision to advise Robertson not to testify. The Court finds that it was quite reasonable for counsel to conclude that it would be unwise for Robertson to testify in the sentencing phase: he had previously admitted to counsel that he had murdered his parents and his reasons for doing so; and he would have been subject to lengthy cross-examination by the State concerning the facts of the murder. Also, counsel's decision is supported by Mr. Hancock's assessment of Robertson's demeanor and counsel's assessment of the prosecutors in the case. *See Daniels v. Lee*, 316, F.2d 477, 491-92 (4th Cir. 2003) (petitioner failed to prove either deficient performance or prejudice resulting

from counsel's failure to compel him to testify in the sentencing phase of his capital trial where counsel made a tactical decision that petitioner should not testify). *Cf. Carter v. Lee*, 283 F.3d 240, 249 (4th Cir. 2002) ("[T]he advice provided by a criminal defense lawyer on whether his client should testify is a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance") (internal quotations and citations omitted).

The Court further finds that Robertson has totally failed to prove any prejudice whatsoever arising from trial counsel's advice that he should not testify. Although he testified both in his case-in-chief and in reply to the State's case at the PCR hearing, he asserted his privilege against self-incrimination when asked any questions by the State concerning his guilt of the murders. Although the Court allowed him to assert this right, the Court can draw an adverse inference from his assertion of the privilege. *Baxter v. Palmigiano*, 425 U.S. 308, 316-19 (1976) (holding that it was permissible to draw adverse inference from inmate's assertion of Fifth Amendment privilege in prison disciplinary proceedings and observing that "[o]ur conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment does not preclude the inference where the privilege is claimed by a party to a Civil case."). *Bean v. Calderon*, 166 F.R.D. 452, 453-55 (E.D. Cal. 1996) (adverse inference could be drawn from capital defendant's invocation of Fifth Amendment in deposition by the State taken during habeas corpus proceeding). *Cf. Griffith v. Griffith*, 332 S.C. 630, 640-41, 506 S.E.2d 526, 532 (Ct. App. 1998) (it is permissible for fact-finder to draw an adverse inference in a civil case against a party invoking the Fifth Amendment privilege against self-incrimination).

Furthermore, Robertson's failure to respond to the State's cross-examination at PCR means that there is no evidence before this Court from which it can conclude that there is a reasonable probability of a different result in the sentencing proceeding but for counsel's errors under *Strickland* because he has not provided this Court with any evidence he would have offered if he had testified at trial. *See* 466 U.S. at 694. *See also Brown v. Artuz*, 124 F.3d 73 (2nd Cir. 1997) (while court could not say habeas corpus applicant was aware that he personally possessed the ultimate decision on whether to testify, applicant cannot show prejudice in any event, because his proposed testimony did not satisfy the elements of the state law self-defense); *LaVigne v. State*, 812 P.2d 217 (Alaska 1991) (defendant challenging his trial based on attorney's denial of his right to testify has initial burden of showing he would have offered relevant testimony at trial). *Cf. Engelen v. United States*, 68 F.3d 238 (8th Cir. 1995) (rejecting claim of prejudice from trial counsel's alleged ineffectiveness in failing to recommend a plea of guilty because the habeas petitioner continued to proclaim his innocence and did not indicate he would have pled guilty).

2. **Robertson was not permitted to make his own decision about testifying.**

The Court finds that Robertson's contention that counsel compelled him not to testify in the sentencing phase and he, therefore, was not permitted to make his own decision is not an appropriate ground of PCR because it could have been raised at trial and on direct appeal.

After the sentencing phase testimony of defenses witness Dr. Ronald Pryor, the trial judge addressed Robertson. He explained that Robertson had the right to present evidence of "mitigating circumstances" and he defined that phrase for Robertson. The trial judge then explained to Robertson that he would be subject to cross-examination by the State if he testified.

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However, if Robertson chose not to testify, the trial judge stated that he would charge jurors that they could not hold Robertson's exercise of this right against him, that it could not factor into their deliberations in determining the appropriate sentence to impose and they could not even discuss it in the jury room or "factor that into their own mind." Tr. pp. 2416, l. 21 - 2417, l. 24.

Robertson indicated that he understood this explanation and the trial judge's explanation of his right to make a closing argument. Robertson also indicated that he did not have any questions. Both of his trial attorneys indicated that they had discussed this with Robertson and believed that he understood it. Neither trial counsel nor the State asked the trial judge to cover anything else with Robertson at that time. Tr. pp. 2417, l. 21 - 2418, l. 23.

Following Ms. Cascio's testimony, the trial judge conducted an on-the-record waiver of Robertson's right to testify in the sentencing phase. *Accord State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991). The trial judge first explained that Robertson had the right to testify, and he had the right to remain silent and not testify. The trial judge explained that if Robertson testified, he would be subject to cross-examination by the State, he could be impeached with any prior offenses and "they can use certain things regarding your past that are indicative of your character." The trial judge further explained that, if Robertson elected not to testify, "I will again as I did in the guilt phase tell the jury they cannot consider that, discuss that or factor that into their deliberation on the punishment to be imposed in any way whatsoever." Tr. pp. 3041, l. 22 - 3042, l. 19.

The following colloquy then occurred between the trial judge and Robertson:

THE COURT: Mr. Robertson, what is your decision?

MR. ROBERTSON: I waive my right to testify at this time.

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THE COURT: You say at this time, this is the time.

MR. ROBERTSON: I waive my right to testify.

Tr. p. 3042, ll. 20-25.

Based upon the responses, the trial judge found that Robertson had "freely, voluntarily, knowingly and intelligently, understood his right to testify and his right to remain silent, waives his right to testify and exercised his constitutional right to remain silent." Tr. p. 3043, ll. 1-6.

Because there was an on-the-record waiver of Robertson's right to testify in the sentencing phase, the Court finds that the current allegation could have been raised, if at all, at trial and on direct appeal. *Cf. State v. Rocheville*, 310 S.C. 20, 24-25, 425 S.E.2d 32, 34-35 (1993) (in capital cases tried after *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991), review of whether there was knowing and voluntary waiver of right to testify is best resolved in PCR where record is silent). Because the current allegation could have been raised at trial and on appeal, it is not an appropriate allegation for PCR. *See* S.C. Code Ann. §17-27-20(b) (1985); *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel); *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983).

Even viewing this allegation as one of ineffective assistance of counsel, the Court finds that it lacks merit for the reasons described: counsel made a reasonable strategic decision that Robertson should not testify, and he agreed with that decision, albeit reluctantly, at the time of trial. Nor has he met his burden of showing prejudice for the stated reasons.

GROUND 10(a)(7)

Robertson contends that trial counsel were ineffective for failing to adequately present evidence that he was adaptable to life in prison. Again, the Court finds that he has failed to prove either prong necessary for relief under *Strickland*.

The defense did not present any witness who testified that Robertson was adaptable to life in prison. However, counsel established through Dr. Morton that Robertson's bipolar disorder and Ritalin abuse – to which all of the defense experts greatly attributed the murders – could be and were successfully treated in SCDC. Tr. pp. 2703-04. Indeed, it was Dr. Morton's opinion that Robertson had never been properly treated for his Ritalin abuse or bipolar disorder until his incarceration. Tr. pp. 2665-69; 2675-76.

The defense also presented Michael J. Stobbe, the SCDC records custodian. The defense elicited that Dr. Ed Bradley had diagnosed Robertson on September 3, 1996 as having a bipolar manic-depressant disorder. Also, Dr. Bradley's comments indicated that Robertson was not capable of vigorous physical activity. Another SCDC medical record (Defendant's Ex. 17) reflected that, as of December 12, 1998, he was in a therapy group for treatment. The records further established that he was responding favorably to the treatment he was receiving. Tr. pp. 2740-45.

Mr. Hancock testified at the PCR hearing that the defense did not present a witness to testify to Robertson's adaptability to prison life, but counsel did establish that Robertson had not misbehaved in prison since correctly diagnosed. Mr. Hancock further recalled that Robertson had several infections, and Mr. Hancock believed his mental health evidence in mitigation was strong. Mr. Boyd testified that the defense probably discussed the question of Robertson's

adaptability to prison but he did not recall the discussions. He confirmed that the defense did not present any expert testimony on this issue.

The Court finds that Robertson has failed to prove deficient performance. *Skipper v. South Carolina*, 476 U.S. 1 (1976) (evidence of defendant's food behavior in prison is admissible in mitigation of punishment as relevant to future adaptability), and the cases applying it simply hold that a capital defendant may present evidence of his adaptability to prison life in mitigation of his sentence. See, e.g., *State v. Tucker*, 324 S.C. 115, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability are relevant in the sentencing phase of a capital trial); *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986) (exclusion of expert opinion relative to defendant's adaptability to prison life constituted reversible error under *Skipper*). However, neither *Skipper* nor *Strickland* require trial counsel to present whatever evidence of adaptability counsel may find, in order to provide constitutionally adequate representation. See *Drayton*, 312 S.C. at 10-11, 430 S.E.2d at 521-22 (defendant failed to prove deficient performance or prejudice under *Strickland* resulting from counsel's failure to present evidence of adaptability where counsel had information of "unfavorable psychiatric evaluations and poor disciplinary reports compiled during Drayton's confinement as a juvenile in a detention facility as well as some accounts of misconduct during his prior incarceration as an adult."); *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997) (en banc) (rejecting ineffectiveness claim based upon failure to offer evidence of adaptability to prison and agreeing with the state PCR court that inmate's past prison record presented a "'double[-]edged sword' in that any further evidence of [inmate]'s prior federal prison experience may have detrimentally highlighted his past criminal record"). See also *Lusk v. Dugger*, 890 F.2d 332, 339 (11th Cir. 1989) (defendant did not show

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that he was prejudiced by trial counsel's failure to present evidence of his adaptability to prison based upon record which included evidence that he committed the murder for which he was on trial while in prison); *Commonwealth of Pennsylvania v. Wharton*, 811 A.2d 978, 988 (Pa. 2002).²⁹

Further, counsel is not ineffective for pursuing a reasonable trial strategy, even if that strategy is pursued to the exclusion of another reasonable strategy. See *Guerrero*, 938 F.3d at 730; Cf. *Strickland*, 466 U.S. at 690-91. Here, the Court does not find anything suspect in counsel's failure to present evidence of Robertson's adaptability. The Court finds that the sentencing phase transcript supports Mr. Hancock's recollection of Robertson's prior infractions.

As part of the State's case in aggravation of punishment, it presented evidence of Robertson's previous incarceration and evidence of his misconduct while incarcerated on that occasion. For instance, while Robertson was incarcerated at the York County Detention Center in 1996, he submitted an inmate service telephone form bearing his name (State's Ex. 200). Tr. pp. 2120-23.³⁰ Over an *in camera* objection of Mr. Boyd (Tr. pp. 2123-24), the State presented Ms. Carole Sarn, a Rock Hill resident. She identified the telephone number on State's Ex. 200 as her telephone number. She also published State's Ex. 200. On that form, Robertson listed Sarn's Rock Hill phone number, and stated that "[r]elatives were in process of moving when I

²⁹ In *Wharton*, the Court rejected the appellant's claim that his trial counsel was constitutionally obliged under *Skipper* to obtain and introduce – and, therefore, ineffective under *Strickland* for not presenting – evidence of his adaptability to prison occurring during the seven years between his first and second penalty hearings: “Properly speaking, the issue before this Court is not whether appellant's prison adjustment was relevant mitigation evidence that the trial court erred in excluding [under *Skipper*]. Instead, the issue is whether appellant's counsel was ineffective for failing to introduce evidence of that adjustment as mitigation evidence to convince the jury that he had made a positive adjustment to prison.” *Wharton*, 811 A.2d at 102; see also *Keen v. State*, 2006 WL 1540258 at *41 (Tenn. Crim. App. June 5, 2006).

³⁰ This exhibit was admitted over Mr. Hancock's objection.

was incarcerated and had not yet received new phone number and have since written with New York phone number. These relatives could be influential in helping me make bond." Tr. pp. 2125-26.

Ms. Sarn testified that the relatives listed on State's Exhibit 200 were the aunt and uncle. However, she said that she was not Robertson's aunt, that she had the telephone number for twenty-three years, and that Robertson's aunt and uncle had never lived with her. Tr. p. 2126.

The State also presented Mr. Stobbe, SCDC's records custodian.³¹ Through him, the State introduced evidence that, between Robertson's admission on September 3, 1996 and his conditional release on Youthful Offender Act parole on July 31, 1997, he had a December 15, 1996 conviction for "damage, destroying property" (State's Ex. 201); a February 11, 1997 conviction for fighting without a weapon (State's Ex. 202); a February 11, 1997 conviction for lying to an employee and damage, destroying property (State's Ex. 203); and a September 11, 1998 conviction for refusing or failing to obey (State's Ex. 204). Tr. pp. 2130-33; 2141-43.³²

³¹ The trial judge overruled Mr. Hancock's objection that the records concerning misconduct by Robertson while incarcerated were hearsay narratives. In response to an objection that the incident dated October 3, 1996 was dismissed, the State agreed to inquire only about infractions for which he was convicted. Tr. pp. 2127-30.

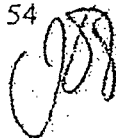
³² Mr. Hancock established on cross-examination that the charge of fighting without a weapon, reflected in State's Ex. 202, was "a minor infraction;" and that no one actually saw a fight. Rather, a correctional officer apparently heard a loud noise and, upon going into the dayroom to investigate, saw Robertson getting up off of the floor with a small cut on his cheek and swelling under his eye. There also was nothing in the report that said he hit or beat or threatened anyone else. Tr. pp. 2133-35.

Mr. Hancock's cross-examination also established that the charges in State's Exhibit 203 included possession of contraband, which was cigarettes, and the damage to property charge resulted from the fact Robertson tore a hole in his jacket so that he could hide the cigarettes. Counsel also established that the incident documented by State's Ex. 201 resulted from Robertson breaking a window on a door by knocking too hard on the door. (The trial judge sustained the State's objection when counsel attempted to establish Robertson's motive for knocking on the door was to get assistance for another inmate). Tr. pp. 2136-43.

The State also presented Scott Williams, from the South Carolina Department of Probation, Parole and Pardon Service. Mr. Williams supervised Robertson while he was on the Y.O.A. conditional release on parole. Supervision began on July 31, 1997, and was supposed to have run until August 1, 2002. However, the conditional parole was revoked on April 28, 1998, and Robertson was admitted to SCDC. Tr. pp. 2144-49. Cross-examination by Mr. Hancock established that Robertson violated parole merely by changing his residence when he moved back into his parents' home. This was only discovered after he was charged with murder. Tr. pp. 2150-51.

Further, at least some of the evidence presented in mitigation of punishment to support the mental health defense is inconsistent with the idea that Robertson is adaptable to prison because this evidence – which defense experts attributed to his mental illness, his substance abuse and the absence of proper treatment for either of these – showed that Robertson would challenge authority. *E.g.*, Tr. pp. 2828-35.

Based upon the Court's own experience in presiding over both capital trials and capital PCRs, it is the Court's conclusion that evidence of adaptability to life in prison is not very valuable as evidence in mitigation of punishment. Regardless of whether it is effective evidence in mitigation, however, based upon the present record, the Court cannot find that Robertson's attorneys were deficient for not presenting evidence of his adaptability and instead, pursuing a much-stronger mental health case in mitigation. *See Drayton*, 12 S.C. at 10-11, 430 S.E.2d at 521-22; *Wharton*, 811 A.2d at 988-89 (finding that counsel were not deficient and defendant failed to prove prejudice); *Commonwealth v. Spatz*, 896 A.2d 1191, 1235-36 (Pa. 2006).



Alternatively, the Court finds that Robertson has failed to prove that he was prejudiced by trial counsel's failure to present evidence of his adaptability to prison life because he failed to present any evidence at the PCR hearing which demonstrates that he is; in fact, adaptable to prison life. To the contrary, Robertson admitted on cross-examination by the State at the PCR hearing that he had been convicted of several disciplinary infractions while on death row,³³ and he only disputed a charge of loan sharking. Therefore, the Court finds that the only evidence in the record is that he has not been able to adapt to incarceration, even though housed in the strict confines of death row.

Also, trial counsel did establish that much of the State's evidence of misconduct in prison involved relatively minor offenses. *Id.* See also *Bell v. State*, 879 So.2d 423, 444 (Miss. 2004) (trial counsel not deficient for failing to present mitigating evidence regarding defendant's adaptation to prison in sentencing phase of capital murder trial, where defendant failed to cite what evidence of good behavior in prison should have been presented and how such evidence would have affected the outcome of his sentencing proceeding); *Crawford v. State*, 867 So.2d 196, 217-18 (Miss. 2003); *Cf. McNeill v. Polk*, 476 F.3d 206, 217 (4th Cir. 2007) (petitioner could not prove prejudice resulting from counsel's presentation of evidence of an infraction he committed while in prison, where petitioner did not present any admissible evidence in support of his position that he did not commit the infraction, and the infraction was presented in the context of overwhelmingly positive testimony regarding McNeill's time in prison).

³³ For instance, he admitted that he had been found guilty of several charges of possession of contraband (including marijuana) and or being under the influence. The Court disallowed extrinsic evidence concerning his disciplinary history.

In light of the evidence before the jury (both in aggravation and mitigation of punishment), the Court finds that it is highly unlikely that the sentencing jury would have been swayed to impose a life sentence based upon Robertson's evidence of "adaptability." This is particularly true since the State did not argue Robertson's future dangerousness, See Tr. pp. 3125-72 and, instead, focused upon whether the jury believed the defense's case in mitigation or that Robertson was "the spoiled rich kid who could not wait to receive his inheritance." Tr. p. 3134, ll. 4-14. Based on his failure of proof, he cannot prove a reasonable probability of a different result but for counsel's failure to present evidence of his adaptability. See *Drayton*. See also *Strickland, supra*. See also *Wilkinson v. Polk*, ___ F.3d ___, 2007 WL 1051436 at ** 8 n. 3 (4th Cir., April 5, 2007) (Unpublished).³⁴

GROUND 10(a)(3)

Robertson further alleges that trial counsel were ineffective because they failed to impeach his co-defendant, Meredith Moon, with a statement that she allegedly made, in which she agreed to "keep quiet" about the murders in exchange for \$50,000.00.³⁵ The Court finds that Robertson has failed to establish deficient performance or prejudice under *Strickland, supra*.

First, the Court finds that there is no credible evidence that Moon ever made such a statement. There was absolutely no evidence this statement was ever made to a member of law

³⁴ In connection with this allegation, the Court would note that the South Carolina Supreme Court has recently cautioned both the prosecution and the defense bar about the presentation of evidence concerning prison confinement unrelated to the specific defendant. See *State v. Burkhardt*, ___ S.C. ___, 640 S.E.2d 450 (2007); *State v. Bowman*, 366 S.C. 495, 623 S.E.2d 378 (2005).

In light of these cases, it is clear that any evidence of adaptability must be strictly confined to evidence pertaining to the specific defendant, as to prison condition, generally. Again, the only evidence presented at PCR was that Robertson is not adaptable to confinement.

³⁵ The trial transcript reflects that Mr. Hancock cross-examined Moon in the guilt phase of Robertson's trial. Tr. pp. 1618-39; 1644-46.

enforcement or that counsel should have learned of the statement after a reasonable investigation. Also, Robertson did not present a taped, handwritten or typed copy of this alleged statement. The only evidence that such a statement exists comes from Robertson, and the Court finds that his testimony is not credible.

The Court further finds that Robertson has not proved any prejudice resulting from counsel's failure to impeach Moon with the alleged statement. First, while cross-examination of Moon about this alleged statement would have provided some additional impeachment of her testimony,³⁶ the statement would have further strengthened the State's case in aggravation of punishment. Second, Robertson did not present Moon as a witness at the PCR hearing. Therefore, the Court finds that there is no indication of how she would respond if asked whether she, in fact, made the statement attributed to her by Robertson. In the absence of any evidence as to how she would testify, the Court finds that Robertson has failed to prove a reasonable probability of a different result, but for trial counsel's failure to impeach her with the alleged statement. See *Glover*, 318 S.C. 496, 458 S.E.2d 538 (1995); *Beaver*, 93 F.3d 1186 (4th Cir. 1996).

GROUND 10(a)(9).

Robertson has specifically waived his contention that counsel were ineffective for failing to move for dismissal of a petit juror based upon comments made by the juror. The Court finds that he has freely and voluntarily made a knowing and intelligent decision to abandon this allegation.

³⁶ Robertson has not alleged counsel's cross-examination was otherwise deficient, and the Court does not find any deficiency. Further, counsel did impeach Moon within the permissible parameters of ethical representation, given Robertson's statement to counsel admitting that he murdered his parents and telling counsel why he did so.

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GROUND 10(a)(10)

Next, Robertson contends that trial counsel were ineffective for failing to adequately and properly advise him before he was evaluated by the State's psychologist, Dr. Geoffrey McKee. The Court, again, finds that he has failed to prove any deficiency in counsel's performance or, more importantly, any resulting prejudice.

At a September 25, 1998, motions hearing, the State noted that the defense had not yet provided notice of whether it would rely on either insanity or GBMI as a defense.³⁷ Robertson's counsel argued that the State's request was "somewhat premature" because the defense had not yet determined whether it was going to rely upon either defense. Counsel stated that a neuropsychologist had examined Robertson on the previous day and that there was a defense psychiatrist who had to review the records before they could make this determination. Tr. pp. 67-72.

The State then argued that the purpose of requiring notice of an insanity defense was to allow the State to prepare and respond to it. Because of the amount of mental health records involved in the case, the State asked the trial judge to determine if Robertson needed to be evaluated.³⁸ In response to the trial judge's inquiry, counsel indicated that he could determine

³⁷ The State had filed a motion requesting notice of insanity or GBMI on July 8, 1998. Tr. p. 69. It had previously indicated at a September 22, 1998 motions hearing that it intended to ask the trial judge to consider a court-ordered competency evaluation. Tr. p. 55.

³⁸ The State explained that Robertson had "intermittently" seen a psychiatrist between 1993 and 1997; he had been involuntarily committed to the William S. Hall Psychiatric Institute in 1995; and other witnesses said that Robertson had previously boasted of being able to malingering and convince psychiatrists of their findings. Tr. pp. 74-76.

whether GBMI or insanity were at issue by November 1, 1998. The trial judge deferred ruling until then. Tr. pp. 74-77.³⁹

The issue was revisited at a November 20, 1998 hearing, wherein the State argued its November 19, 1998 motion to request an independent psychiatric and/or psychological evaluation for purposed of determining Robertson's mental condition.⁴⁰ Defense counsel argued that counsel had not received ten days notice of the State's motion and stated that competency was not yet at issue. The trial judge gave Robertson ten days within which to respond, 11/20 Tr. pp. 24-25, and counsel responded on November 30, 1998.

The trial judge heard further arguments on the issue at a December 4 motions hearing. Counsel conceded that S.C. Code Ann. § 44-23-410 (Supp. 1998) allowed the trial court to order an evaluation but only upon a showing that was not met in this case, since Robertson had not asserted a mental health defense or asserted that he was incompetent to stand trial. Counsel argued that this was a fishing expedition to determine Robertson's mental state; and that if any such information came in during the sentencing phase, it would violate his Fifth Amendment privilege against self-incrimination. Also, counsel argued that he State's experts could perform a competency evaluation within ten minutes. Tr. pp. 103-05.

³⁹ The issue was again raised by the State at a November 2, 1998 motions hearing, but the trial judge did not rule because he felt there must be a showing first. Tr. pp. 86-87.

⁴⁰ The State argued that the defense had not yet disclosed any reports by its experts and that under *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982), Robertson had a right to refuse to submit to an evaluation. However, he would waive his right to present experts concerning his mental status if he did so because he could not interject a mental health issue and prevent the State from either confirming or rebutting his evidence. Further, the State asserted that it would take time to have an evaluation done and for the State to adequately review it. Also, it would be impractical to allow the evaluation to take place during the course of the trial when Robertson finally introduced his mental health evidence. Finally, the State claimed that the matter was one of fairness and the State's opportunity to prepare. 11/20 Tr. pp. 4-5; pp. 21-23.

The State asserted that § 44-23-420 recognizes the inherent power of the trial court to order a competency or insanity evaluation.⁴¹ Further, the only way for the State to effectively cross-examine the defense experts on mental health issues was to require an evaluation on competency, *McNaughten*, and GBMI. The State disputed the claim there had not been a showing that required an evaluation, noting Robertson's prior involuntary commitment. Also, the State maintained that a "chain of evaluations" by his experts had taken place and that mental health issues were present. Again, the State argued that an evaluation was necessary as a matter of justice, and so that the case could progress in a timely fashion, while protecting both Robertson's and the State's rights. Tr. pp. 105-10.

Defense counsel again asserted that the State's motion was premature because he had not yet received the reports from his experts. He noted that mental health issues may arise in the sentencing phase but not in the guilt phase, and asserted Fifth Amendment problems with a court-ordered evaluation. The trial judge observed that Robertson's response during the interview could be prohibited. However, he took the matter under advisement and said he would issue a written order. Tr. pp. 110-115; p. 120.

The trial judge initially denied the State's request in an Order filed on December 18, 1998. However, he entertained the State's motion to reconsider his previous ruling at a hearing on February 12, 1999. The State argued that Robertson had indicated he would potentially use at least three experts who had evaluated him, including Dr. Pincus, Dr. Evans and Ms. Cascio (who had prepared a psycho-social history). The State stated that it had yet to receive copies of reports from any of these experts, and it again noted that at the time of the previous involuntary

⁴¹ Again, the State recognized that Robertson could refuse to cooperate in the evaluation but under *Sloan* would be barred from presenting expert testimony in mental health issues.

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commitment in August 1995, Robertson was diagnosed as having bipolar disorder, manic; the potential for acting out; and depression. The State requested an evaluation, so that it could either confirm or rebut what the defense may present at trial, and asserted that it was logistically impractical to keep a jury sequestered and have an evaluation during the course of a trial. The State also presented a copy of a psychiatric report (introduced as Court's Exhibit 1 at the hearing) and asserted that this exhibit alone warranted a court ordered evaluation. 2/12/99 Tr. pp. 8-15. Trial counsel, once again, opposed the State's motion to reconsider and asserted that an evaluation would violate Robertson's Fifth Amendment privilege against self-incrimination. The trial judge agreed to take the matter under advisement. 2/12/99 Tr. pp. 14-16. Both parties then briefed the issue.

On February 17, 1999, the trial judge filed an Order for Evaluation as to Competency and Criminal Responsibility, in which he reconsidered the previous Order and ordered Robertson to submit to an independent psychiatric examination relating to his mental capacity by examiners designated by the State. *See State v. Locklair*, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000) (rejecting defendant's argument the trial judge abridged his Fifth Amendment rights by ordering him to submit to a psychiatric examination where he did not assert an insanity defense and did not give notice that he would plead GBMI and holding that "[t]he trial judge in this case has the inherent, discretionary authority to order an independent psychiatric evaluation of Locklair if he believed Locklair was not fit to stand trial or if he believed that Locklair's mental competency would be an issue at trial. The mental competency of the defendant to stand trial is a baseline inquiry by the court. In order to protect the legal process and preserve the integrity of the trial, a trial judge has the authority to order a psychiatric evaluation of the defendant when his or her



competency may be in question"). Judge Hayes based his decision upon his review of records relating to the involuntary commitment to the Hall Institute in 1995, as well as trial counsel's representation that the defense may present testimony relevant to Robertson's mental status through Dr. Pincus, Dr. Evans and Ms. Cascio, in either the guilt or penalty phase of the trial.⁴² Judge Hayes further found that fundamental fairness dictated that the State be allowed the opportunity to verify or rebut evidence presented by defense experts regarding Robertson's mental status; that an adequate rebuttal could not be made without independent examination; and that an independent psychiatric examination under these circumstances "is a distinct aid in the determination and the administration of justice in order to confirm a claim of mental illness, discover fraudulent claims or to rebut psychiatric testimony which can only reasonably be accomplished by the presentation of expert testimony."

The trial judge further ordered that any report from the evaluation be made to the State and the trial court within five days of the completion of the examination and that it should contain a diagnosis of Robertson's mental condition, as well as clinical findings bearing on the issues of (1) whether Robertson was competent to stand trial; (2) whether Robertson was criminally responsible at the time of the offense under *McNaughten*; and (3) whether or not Robertson was GBMI at the time of the offense. The trial judge further ordered that neither the results of the examinations nor any communications by Robertson during the evaluation should be admissible in any criminal proceedings against him unless the defense first interjected his mental status as an issue in either the guilt or sentencing phases of the trial or the evidence was necessary to rebut testimony or evidence offered by Robertson. Finally, the trial judge's order

⁴² However, he observed that Robertson had asserted that he did not intend to present GBMI or insanity "at this time."



stated that "[n]othing in this Order shall be construed to abridge the defendant's Fifth Amendment right to remain silent."

Dr. Geoffrey McKee, a forensic psychologist, thereafter examined Robertson pursuant to this Order and later testified -- in response to Robertson's mental health witness -- as a reply witness in the sentencing phase of the trial. Tr. pp. 3059-72; 3079-83.

Before Dr. McKee's testimony, Mr. Boyd unsuccessfully renewed his objection *in camera*, and the trial judge held an *in camera* hearing to determine the admissibility of any statements Robertson made to Dr. McKee during the evaluation. Tr. pp. 3044-55. The trial judge found that the statements made by him were admissible. The trial judge further found that Robertson had been advised of his rights under the Fifth and Sixth Amendments and advised as a constitutional safeguard provided by *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial judge also found that, before the interview took place, counsel had represented Robertson for some time; and that counsel was aware of the interview and its potential use at trial. He further found that Robertson was aware of his right to remain silent as well as his other *Miranda* rights but intelligently waived those rights. Therefore, the trial judge found that the evidence could be presented in rebuttal. Tr. pp. 3055-57.

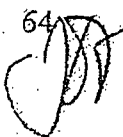
Dr. McKee testified that he reviewed witness statements, incident reports, statements by people who were in or around the scene at the time of the murders, medical reports and medical records before he saw Robertson. Specifically, he reviewed Robertson's medical records from his pediatrician, a psychiatrist that Robertson had seen, the records from the 1995 commitment to Hall Institute and records of medical and psychiatric treatment while Robertson was incarcerated for the present crimes. He then saw Robertson for a clinical interview and administered a

psychological test on March 5, 1999. He later saw Robertson for a four hour interview and administered three other psychological tests. Tr. pp. 3059-63.

Dr. McKee advised Robertson of his *Miranda* rights before they began the interviews; and it was Dr. McKee's opinion that he understood his rights. Dr. McKee testified that Robertson did suffer from bipolar disorder; manic, but without psychotic features.⁴³ Also, the bipolar disorder was in full remission at the times he interviewed Robertson. Likewise, Robertson also suffered from alcohol dependence, which was also in remission. Robertson relayed a history of marijuana and amphetamine (specific Ritalin) abuse prior to his arrest for the murders and had a history of poly-substance intoxication, including cocaine, LSD, Xanax and inhalants. He also had a history of ADHD. Also, it was Dr. McKee's opinion that Robertson had features of borderline antisocial personality traits. Tr. pp. 3062-64.

Dr. McKee testified that there is no difference between a psychosis resulting from a severe mental illness, such as schizophrenia or bipolar disorder, and a drug induced psychosis. Both types of psychoses are similar in that "there's a presence of delusions and/or hallucinations." However, he testified that Robertson was not experiencing a psychotic episode at the time of the crimes on November 25, 1997. Robertson did have bipolar disorder during this time, but Dr. McKee testified that Robertson was not experiencing the symptoms of his bipolar disorder at the time he committed the offenses. Dr. McKee testified that the facts relayed to him

⁴³ Dr. McKee explained that psychoses is the presence of symptoms of delusions (fixed false beliefs); and hallucinations (false sensory experiences). Tr. pp. 3065-66.

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by Robertson were virtually identical to those in the notes of Robertson's social worker, Ms. Cascio. Tr. pp. 3066-67.⁴⁴

Dr. McKee further testified that Robertson knew right from wrong at the time of the crimes. Dr. McKee based this conclusion upon evidence that Robertson put socks over his hands before the crimes in order to cover his fingerprints; he took the phone off the hook in his mother's bedroom before attacking her; he waited until his father was in the shower before attacking his mother; during the attack on his mother, he went and checked to see if his father was still in the shower on two separate occasions; he waited outside his father's bathroom door with a bottle of Tilex and with a hammer to use it when his father came out of the shower; and he sprayed his father with Tilex before hitting him with the hammer. Also, after the incident, Robertson told Moon to put the bloody clothes, socks, the bat and the knife in a bag; he showered for approximately twenty-five minutes to remove blood from his person; he checked to see whether his neck was scraped because of his concern there might have been blood if his father scraped his neck; and he decided to use his father's credit card rather than writing checks because he was worried that he and Moon might be observed on bank cameras. Following the offense Robertson poked a hole in the glass on the door in an effort to make the incident appear as if it were a robbery; he took the bag of clothes, bat and knife with him; he placed his bag in the trunk of the car and disposed of it in a dumpster in Maryland; and, once on the road, he called back to his house and got the answering machine. This indicated to Robertson that someone had placed the phone back on the hook, and that made him anxious. Each of these actions in Dr.

⁴⁴ Trial counsel withdrew a previous objection when it became clear that the information related by Dr. McKee - although consistent with Robertson told Ms. Cascio - came from his own notes. Tr. pp. 3073-75.

McKee's estimation indicated that Robertson could distinguish right from wrong. Tr. pp. 3067-70.⁴⁵

Dr. McKee testified that Robertson had the capacity to conform his conduct to the requirements of the law because these same actions showed that Robertson could control any impulse, as did evidence that Robertson discussed his plan with Moon; he obtained two knives, a hammer, a baseball bat and Tilex before the crimes. Also, following the attack on his father but before using a baseball bat on him, Robertson had gone and checked to see if his mother was still alive; and after his assault of his father, he twice returned to assault his father after hearing his father breathing. Again, his conduct after the incidents reflected a capacity to conform his conduct to the requirements of the law. Tr. pp. 3071-72.

Finally, Dr. McKee stated "And then at arrest [he had] enough control to not make a statement during his interrogation." At that point, Mr. Boyd objected, and, during an *in camera* hearing, moved for a mistrial. The trial judge denied the motion for a mistrial but agreed to give a curative instruction, Tr. pp. 3072-75, which he subsequently gave to the jury. The trial judge instructed jurors that Robertson "had an absolute constitutional right to remain silent, and the

⁴⁵ Any alleged impropriety of Dr. McKee's testimony about the information he received from Robertson under *Hudgins v. Moore*, 337 S.C. 333, 524 S.E.2d 105 (1999), is not properly before this Court because the trial judge overruled trial counsel's objection, and ruled that the statements made by Robertson were admissible. See Tr. pp. 3044-57. Thus, the question of his ruling could have been raised on direct appeal and is barred in PCR. See §17-27-20(b); *Drayton*, 312 SC at 9, 430 SE2d at 520 (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel). Alternatively, the Court finds that there was no violation of *Hudgins*.



exercise of that right cannot and must not be used against him in any fashion whatsoever. So, disregard [Dr. McKee's] statement." Tr. p. 3078, ll. 13-22.⁴⁶

Robertson testified at the PCR hearing that his attorneys met with him before the evaluation by Dr. McKee. They advised him that he should meet with Dr. McKee and talk with him. Otherwise, they would not have a defense. Robertson later spoke to Dr. McKee.

As to Robertson's claim that counsel should have advised him not to discuss the facts of the case with Dr. McKee, the Court finds that the credible evidence presented before it is that trial counsel made a strategic decision to present a mental health defense and eventually presented extensive evidence concerning the mental health history of Robertson and his family. Moreover, Robertson agreed with this decision to present such a defense. The Court further finds that counsel met with Robertson and explained that the State had the right to have him evaluated if the defense wished to present evidence of his mental health in mitigation, *see Sloan*, 278 S.C. 435, 298 S.E.2d 92, and that Robertson consented to the evaluation by Dr. McKee.

Also, the Court finds that Robertson was well aware of his right to remain silent. Apart from evidence concerning the advice that counsel gave him, the transcript clearly reflects that Dr. McKee advised him of his *Miranda* rights, including his right to remain silent, before Dr. McKee evaluated him. However, Robertson nevertheless voluntarily discussed the facts of the crimes with Dr. McKee. Also, his statements to Dr. McKee were consistent with Ms. Cascio's notes of her conversations with Robertson. Therefore, the Court finds that Robertson failed to prove either deficient performance with respect to the advice given by counsel or any resulting prejudice.

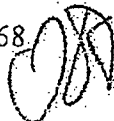
⁴⁶ On appeal, Robertson initially raised the failure to grant a mistrial as his second Issue. However, he voluntarily abandoned his direct appeal.

Robertson further contends that, following their advice to him, counsel should have done more to ensure that Robertson did not discuss the facts of the case with Dr. McKee. The Court, however, rejects this argument as well. Counsel could not have been deficient in this regard because the trial judge's Order authorizing the evaluation by Dr. McKee did not permit counsel to be present during the evaluation. Here, counsel did all that they could when they gave their advice to Robertson before Dr. McKee's evaluation. Further, the Court finds that there is no probability of a different result but for counsel's alleged error, since Dr. McKee also administered *Miranda* warnings to Robertson before speaking to him. Robertson was, therefore, aware of his right to remain silent but knowingly, intelligently and voluntarily waived it and discussed the facts surrounding the murders with Dr. McKee.⁴⁷

Moreover, while Dr. McKee's testimony was clearly relevant to rebutting Robertson's case in mitigation, Dr. McKee was limited to giving his opinion that Robertson was neither insane nor GBMI at the time of the murders; that he was not psychotic at the time; and giving the reasons for these opinions. Dr. McKee was not permitted to answer the State's questions concerning whether Robertson's behavior was consistent with a layman's understanding of "psychopath." Tr. pp. 3075-78.

Also, the defense experts did not dispute that Robertson was not GBMI. Thus, the trial judge's ruling in this regard was consistent with *Sloan* and *State v. Locklair*, 341, S.C. 352, 363-65, 535 SE2d 420, 426-27 (2000). Finally, the Court finds that the statements attributed to

⁴⁷ Because the trial judge ruled that Dr. McKee could testify concerning the statements Robertson made to him in answering questions related to Robertson's mental health status at the time of the murders, the propriety of his ruling is not properly before this Court. Rather, it could have been challenged on direct appeal, but for Robertson's decision to abandon his appeal.



Robertson by Dr. McKee were cumulative of the testimony of Ms. Cascio. *See* Tr. pp. 3010-31. Therefore, Robertson has failed to prove prejudice under *Strickland*.

GROUND 10(a)(11)

Robertson further contends that counsel were ineffective because they did not introduce sufficient evidence of the mental health history of the Robertson family. The Court finds that this claim is without merit, and that Robertson has not met his burden of proving either prong for relief under *Strickland*.

It was clear from reviewing the trial transcript that each of the defense's mental health experts – Drs. Pincus, Evans and Morton – relied upon the various records they received. Also, none of these experts testified that he had an insufficient amount of information to reach his opinion as to Robertson's mental illness and drug and alcohol abuse.

Further, counsel presented Skip Meyer as a defense witness. Tr. pp. 2750-2817. Mr. Meyer testified about his counseling of Robertson and his parents. Mr. Meyer testified that the most of his counseling "was done in connections with [Robertson]." Tr. p. 2753, ll. 8-11. He thereafter testified at length concerning his counseling of Robertson and his family. While most of his testimony centered on therapy sessions with Robertson and Terry Robertson and their mental health issues, he did testify about several sessions that involved Earl Robertson, Sr. *See* Tr. pp. 2759-65.

Among the matters covered by the defense in Meyer's testimony, he testified:

- Robertson's dislike of his father because his father was verbally abusive towards him;
- Robertson's report that Earl, Sr.'s parents were planning to reduce the amount of their estates that they would leave to him and increase the amount that they will leave to Robertson and Chip;



- Robertson's manic behavior and the effects of it on his parents;
- The disagreement between Robertson's parents on how lenient to be with him;
- Mental health problems Terry had, which first surfaced in childhood, and Meyer's suspicion that she may have been sexually abused;
- Robertson's efforts to maintain employment, as well as the effects of his manic states on his work (principally, this resulted in his working exceptionally long hours at a time and having impaired judgment of what he could do because of his extremely positive self concept);
- That conflicts within the family seemed to arise when Robertson and Chip got together;
- Earl, Sr.'s frustrations with his children's irresponsible behavior;
- Earl's worry that the family was falling apart and the financial and psychological cost of his children's behavior on him and Terry;
- The anger, embarrassment, shame and humiliation he felt as the result of his children's behavior;
- Earl's feeling that his life had been ruined by Robertson;
- Terry's depression resulting from her belief that "she has bad children;"
- The movement of the Robertson family to Michigan, California and back to South Carolina;
- Terry's statement that the children overwhelm her, and her fear and guilt of not being able to say "no" to them;
- Various problems between Robertson's parents stemming from their relationship as husband and wife -- including a horrible fight(s) (which Meyer thought was isolated);
- Suicidal thoughts and superficial suicide "attempts" by Terry;
- Violent behavior of Earl, Sr. toward Chip when the family was on a vacation;
- Obsessive-compulsive behavior and depression by Terry; and

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- That Terry had been diagnosed as bipolar – and at times had described visual hallucinations (which may have been caused by medications that she had been taking).

Tr. pp. 2753-89.

Further, Mr. Meyer described Terry as a “very depressed person.” This resulted from her having very strict parents, her mother’s illness, conflicts in the home, the father not being emotionally available, being an only child, and the pressure of the lifestyle she and Earl had lived. Mr. Meyer described Earl as a good person that was troubled by “[w]hat was going on with his family.” Tr. pp. 2789-90. Finally, trial counsel introduced a copy of Mr. Meyer’s notes as Defendant’s Ex. 18. See Tr. pp. 2806-07.⁴⁸

Ms. Cascio testified as the last expert called by the defense. Ms. Cascio gave a detailed social history assessment of Robertson. Tr. pp. 3852-3031. To do the assessment, she “looked at medical and psychological records from all members of the family.” Also, Ms. Cascio interviewed Robertson, and she “examined Earl Robertson’s work documents; some of [Robertson’s] incarceration documents; personal notebooks of Terry Robertson. And I also conducted about 13 interviews with people from a variety of areas in [Robertson’s] life.” Tr. p. 2857.

Ms. Cascio testified that she “found that Jimmy came from a very chaotic home” and there “were a variety of things going on. For example, physical abuse and emotional abuse. And there is definitely mental illness throughout the family.” Tr. p. 2858, ll. 4-8. Ms. Cascio then gave a detailed history of each member of the family. Ms. Cascio described the various

⁴⁸ The State’s cross-examination of Mr. Meyer also elicited further evidence of his counseling of Earl, Sr., and problems Earl, Sr., had with his sons. Tr. pp. 2797-99.

problems that Terry had within her family as a child, including conflict with mother, Terry's emotional and psychological problems, and Cascio testified that "a variety of indicators ... suggest that Terry was sexually abused as a child." Much of Ms. Cascio's testimony concerning Terry's childhood was corroborated, in her opinion, by excerpts of Skip Meyer's notes. Defendant's Exs. 21-22; Defendant's Ex. 28; Tr. pp. 2858-65; 2882-84.

With respect to Earl, Sr., Ms. Cascio testified that he was very bright but ambitious and "very confrontational." She also testified that, in 1989, Spring Industries decided that he "was not leadership material." Also, many people to whom she spoke described him as "pushy and kind of domineering". Tr. pp. 2865-67.

Ms. Cascio indicated that Robertson's grandmother described him as "a very happy outgoing child although he did have some delayed development." In particular, he was "slow to talk." She indicated that "there seemed to be poor attachment between Jimmy and his parents ... [a]t a very young age." Ms. Cascio explained that children who are unable to form emotional attachments "have a lot of problems later on in life." Usually, they have "difficulty forming relationships because they just don't have a basis for it." Also, they "tend to be mistrustful" of others. They likewise tend to be angry and aggressive and after have self-control problems. Tr. pp. 2867-69.

Ms. Cascio testified that Robertson began banging his head when he was one or two years old, and she explained that this was "often a sign of poor attachment." Tr. p. 2869.⁴⁹ Ms. Cascio further testified that "there is a very strong association between maternal depression," such as that experienced by Terry, and a child's poor attachment because depressed mothers tend

⁴⁹ In her opinion, this is usually seen in children who are raised in institutional settings and orphanages.

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to be less responsive to the child's needs and more involved with their own problems. Depressed mothers also do not spend as much time with a child; they use "more negative language," are more hostile, more irritable, and are more harsh or arbitrary in their discipline. Children, however, need consistency. Tr. pp. 2869-73.

Ms. Cascio further testified that she "found indications of physical abuse" with Robertson. These included scars on his back and buttocks which he did not have a memory of receiving. Also, "both children confirmed that they were routinely beaten with a belt several times a week when they were "pre-school and [in] grade school." Further, Robertson said that Earl, Sr., would often beat him with a belt to make him stop banging his head. She likewise relayed other incidents in which Earl, Sr., was physically abuse to Robertson and Chip. One incident with Chip was documented in Skip Meyer's notes, which was introduced as Defendant's Ex. 23. Robertson's pediatric records from 1988 reflected that he was seen because he had been hit with a fist. Tr. pp. 2873-76.

Again, the multiple physical abuses, combined with psychological abuse, tend to create "negative outcomes for the children." Through Ms. Cascio's testimony and the extracts from Mr. Meyer's notes, the defense established that: (1) Terry was afraid of Earl's temper and did not feel like she had done enough to protect her sons; (2) there was a great deal of psychological abuse in the home;⁵⁰ (3) the sons may have witnessed domestic violence by Terry attacking Earl; (4) there was evidence that Chip hit women; (5) Robertson had problems with his memory, which can be an indicator of trauma; and (6) "everyone in the family had a history of mental

⁵⁰ This abuse included degradation and name calling; Terry telling Robertson that she wished he had never been born; and verbal abuse by Terry of both sons.

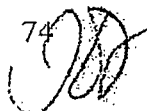
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illness.”⁵¹ Tr. pp. 2876-81. *See also* Defendant’s Ex. 24. All of these factors “set the stage for something to go wrong in adolescence.” Tr. p. 2885, ll. 10-16.

Likewise, counsel introduced three charts (Defendant’s Exs. 25-27), which reflected psychiatric visits by the victims. These charts showed that Terry was seen in therapy roughly 170 times between 1995 and 1997, with a variety of problems, including hallucinations; self-mutilation, obsessive-compulsive disorder and suicide attempts. Tr. pp. 2881-86.

In addition to Robertson’s problems that she had previously discussed, Ms. Cascio testified that Robertson “was often an outcast in school.” Other students teased him and did not quickly accept him. By the ninth grade, he was suicidal. He started using illegal drugs while he was at Georgia Tech University and was “very suicidal” at that time as well. He also started engaging in behavior that was consistent with mania, such as spending large sums of money and gambling. Ms. Cascio also discussed Dr. McMeekin’s 1994 diagnosis that he was depressed and his involuntary commitment to William S. Hall, following the 1995 D.U.I. At that time, he was diagnosed as bipolar, alcohol dependent and “having mental illness with severe family strife.” Also, he did not have many friends. Ms. Cascio testified that “all of these factors [discussed by her], I believe, led him to start relying more heavily upon drugs which then in turn led to what happened later on.” Tr. pp. 2886-88. She later explained on cross-examination that, in light of the various factors she found in Robertson’s life, “he might have felt [at the time of the murders] that [violence] was [his only alternative]” *See* Tr. pp. 2949-52.

⁵¹ Terry was diagnosed as having severe depression, bipolar disorder and obsessive-compulsive disorder. Earl was diagnosed as having depression, panic disorder and ADD. Robertson had bipolar disorder and ADD; and Chip had ADD and possibly bipolar disorder. Tr. pp. 2881-82.

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Ms. Cascio further testified that Robertson and Chip had a "close relationship," and they often did things together, including criminal activity. She testified that Chip had similar problems with substance abuse, and he had experienced physical and psychological abuse. She also testified that Chip was incarcerated at the time of Robertson's trial. Tr. pp. 2888-90. Finally, the defense introduced several excerpts from Terry's "notebook," which were contained in Mr. Meyer's notes; and Ms. Cascio testified to the substance of the extracts. Tr. pp. 2892-95; Defendant's Exs. 30-32.

As discussed in Ground 10(a)(1), *supra*, Mr. Hancock testified that the defense attempted to get all of the records concerning Robertson that they could locate. They got all of Robertson's school records which they could locate (including records from California); the records from his Youthful Offender Act conviction for burglary; Robertson's records from an involuntary commitment to the Willis S. Hall Psychiatric Institution; Robertson's SCDC records; records from Kanawha Insurance Company; records from Piedmont Mental Health Associates;⁵² and the Robertson family counseling records from the Carolina Counseling Center, where Robertson and his family were treated by Dr. McMeekin and family and marriage counselor "Skip" Meyer, Jr. It was Mr. Hancock's impression that the defense obtained all of Dr. McMeekin's records through Mr. Meyer. Counsel were assisted in their efforts to garner records by their social worker, Ms. Cascio.

Mr. Hancock testified that the parents began therapy after their sons started acting out. He was aware that Dr. McMeekin was treating the family and that Skip Meyer was doing the counseling. Although he could not remember why he did not extensively examine Mr. Meyer

⁵² The State introduced two Orders requiring the production of records from Kanawha Insurance Company and Piedmont Metal Health Associates as Respondent's Exhibits 3 and 4, respectively.

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