

VOLUME SEVENTEEN

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
James E. Lockemy, Circuit Court Judge

RECEIVED

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MARION BOWMAN,

S.C. Supreme Court

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213468

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

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PLAINTIFF'S EXHIBIT #73 (PHOTOGRAPH)

1 all.

2 THE COURT: Never was discussed?

3 THE WITNESS: His wife had told me she was
4 very willing to take the baby to establish a
5 relationship between them and that could have been
6 developed with her, I suppose.

7 THE COURT: You never suggested it to the
8 attorneys?

9 THE WITNESS: No. I really have never used
10 that kind of an expert.

11 THE COURT: Okay.

12 BY MR. BROWN:

13 Q But have you heard of that being done?

14 A I have heard of it.

15 THE COURT: You just don't feel that is
16 necessary?

17 THE WITNESS: Typically I feel like lay
18 witnesses are better accepted by the jury. In fact
19 not just me, other things, too, but things that
20 come from lay witnesses are better, better at that
21 kind of thing usually than an expert.

22 THE COURT: If the attorneys talked to you
23 about it you would have told them it was better to
24 use a lay witness than an expert?

25 THE WITNESS: Well, I did tell them.

1 THE COURT: I thought you said you didn't
2 discuss it. But you did tell them?

3 THE WITNESS: I didn't discuss an expert.
4 Wasn't that what he was asking me? I did not
5 discuss an expert but what I did want them to do
6 was develop that through the use of the pictures of
7 the baby and with his wife he could, that his wife
8 was willing to have, take the baby and have a
9 relationship so that she would have a relationship
10 with her daddy and she would know where her father
11 was, and I think that's important for children even
12 if he were incarcerated.

13 BY MR. BROWN:

14 Q Let me make sure I understand. You think
15 that should have come from the wife at the penalty
16 phase?

17 A Yes.

18 Q But she didn't testify at the penalty phase?

19 A I'm sorry?

20 Q She didn't testify at the penalty phase?

21 A I think it needed to come from the wife.

22 Q She didn't testify, though?

23 A She didn't. I don't think she did, no.

24 Q I know she didn't.

25 A Okay.

1 Q That is what I'm trying to find out. Who was
2 it supposed to come from? I'm a little confused.

3 A That would have been, to me, it should have
4 come from his wife.

5 Q Okay. Now, given the fact that we have these
6 witnesses who are seen as a double edged sword and
7 had been used against him in the guilt phase, does
8 that change this from a normal case when you put
9 the family up themselves, to a case where you put
10 an expert up to evaluate the situation?

11 A In that situation that would make more sense
12 because they just weren't, they did not feel free,
13 they were all worried about testifying about
14 anything, they were all worried about what would
15 happen to them if they did.

16 Q And, so, they were concerned about getting up
17 there in the penalty phase, but there is a way to
18 do it where you can have them discuss the family
19 dynamics, his parenting specifically, with the
20 expert and the expert could testify?

21 A Yes.

22 Q That is something that was discussed, let's
23 say, even Jeff Yungman talked about parenting?

24 A Yes.

25 Q Plaintiff's Exhibit 52.

1 A Yes.

2 Q And he says there is no information to the
3 contrary that the parenting would be a good topic?

4 A Yes, I think that is always an important
5 topic.

6 Q Are you aware of that being presented?

7 A No.

8 Q And was there any information to the
9 contrary?

10 A Are you saying was there any information --
11 no, there was no -- I thought you were saying
12 somebody was saying he would be a bad parent. No,
13 there was no information to the contrary.

14 Q That he was a good parent?

15 A That he was a good parent.

16 Q And, so, the information about the work would
17 have been worthy of putting up?

18 A Yes.

19 Q The information about the parenting would be
20 worthy of putting up?

21 A Yes.

22 Q And those two are virtually nonexistent in
23 this case?

24 A Right.

25 MR. BROWN: Beg the Court's indulgence.

1 Nothing further, Your Honor.

2 THE COURT: Recross?

3 MR. WATERS: Very briefly.

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1 to read, well, that was, I'm not sure why he did
2 that. That wasn't the issue, I'm not sure why he
3 did that but that was somebody that he got.

4 MR. WATERS: Nothing further, Your Honor.

5 MR. BROWN: Very briefly on the Moody
6 Mechanical records.

7 THE COURT: Okay. You had work records
8 yesterday, didn't you?

9 MR. BROWN: I did, Your Honor, they were
10 obtained by me through my investigative team.

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1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. BROWN:

3 Q I will show you Plaintiff's Exhibit 55. I'm
4 not going to suggest these are your copies of the
5 records. Does that look familiar?

6 A I don't believe I had the pay records but the
7 application, yes, because I actually used the
8 application to try to get in touch with some of the
9 other people.

10 Q The application references other places of
11 employment?

12 A Right.

13 Q Which is consistent -- how consistent is that
14 with the information, the historical reference to
15 his work from his uncle?

16 A It's consistent.

17 Q Okay.

18 MR. BROWN: Your Honor, that's all listed as
19 Plaintiff's 55, it is not in evidence but I would
20 ask that that application be moved in evidence as a
21 copy of a record that she actually did have.

22 MR. WATERS: I object on authentication and
23 hearsay.

24 MR. BROWN: She said she had a copy --

25 THE COURT: Let me see what it is. Is it

1 some information about his work we have seen
2 before?

3 MR. BROWN: Yes, sir.

4 THE COURT: But are you saying you have this
5 document?

6 THE WITNESS: I got that document at some
7 time.

8 THE COURT: How do you know, how do you know
9 you got this document?

10 THE WITNESS: Because on my release tracking
11 sheet I have where I talked to the man and I have
12 got the date I received it.

13 THE COURT: You've got the date when you
14 received this document?

15 THE WITNESS: Not the pay record, I did not
16 get the pay record.

17 THE COURT: What document here did you have?

18 THE WITNESS: The application, and this is
19 the date.

20 THE COURT: It's a Moody Mechanical fax, it
21 doesn't say what the fax is, unable to locate other
22 employees provided because similar, were not right
23 people, they did not know Marion. The last column,
24 I have 4/15 as the date you received the records.

25 THE WITNESS: It says -- I got you.

1 THE COURT: Returned, does that mean
2 received?

3 THE WITNESS: Yes, I got the records.

4 THE COURT: She says she got this
5 application.

6 MR. BROWN: If we could make a copy and enter
7 that as another exhibit number? Those are the
8 records I got.

9 THE COURT: It says September the 10th.

10 MR. BROWN: That came from the private
11 investigator hired by my firm, to my office.

12 THE COURT: So, these documents, to your
13 knowledge, she never had all these documents?

14 MR. BROWN: She says she didn't but the
15 application, she had, that is the one I want to
16 enter.

17 THE COURT: But you are saying your private
18 investigator got all these documents?

19 MR. BROWN: Yes, sir. I don't allege that's
20 a copy of the one she had.

21 THE COURT: I don't see any problem with
22 putting in the application for work.

23 MR. BROWN: I agree, Your Honor, that's all
24 I'm asking. Excuse me, that's all I'm asking, is
25 that that one come in.

1 THE COURT: All right. She said she had it,
2 said she lost it. Can you testify that was in your
3 file?

4 THE WITNESS: That was, I got it.

5 THE COURT: I will let it come in, this one
6 document. We'll get it out later.

7 MR. BROWN: Thank you.

8 (Application for employment marked and
9 received in evidence as Plaintiff's Exhibit
10 Number 76).

11 THE COURT: Any other questions?

12 MR. BROWN: Your Honor, I would like to make
13 a copy and enter that one document as Plaintiff's
14 Exhibit 76.

15 THE COURT: In evidence.

16 Any other questions?

17 Ma'am, I want to ask you a question. Were
18 you in the courtroom when Mr. Yungman testified?

19 THE WITNESS: Yes.

20 THE COURT: You were concerned, I think you
21 said, about the fact he didn't discuss very much
22 about Mr. Bowman's, I think you said, taking care
23 of his mother, sister, children, those type things?

24 THE WITNESS: I don't think that, I don't
25 think that he did. What he did was he had done a

1 report and he read it. That was essentially it.

2 THE COURT: Have you ever seen him testify in
3 any other case before?

4 THE WITNESS: Once.

5 THE COURT: Did he do the same thing?

6 THE WITNESS: Not to that extent. He did a
7 little bit but not like that, because there was,
8 the attorney had prepared him, the attorney was
9 asking questions and he was responding but --

10 THE COURT: You mean the attorney was asking
11 him questions here, too, right?

12 THE WITNESS: No.

13 THE COURT: Nobody asked him questions?

14 THE WITNESS: He qualified him, he qualified
15 him and then it was, there was a few questions but
16 in the end it just sort of felt like nobody knew
17 what was happening and he just started reading his
18 report and, I mean, he just read the report into
19 the record.

20 THE COURT: Did the State's attorney Mr.
21 Bailey ask him questions?

22 THE WITNESS: Yes.

23 THE COURT: They asked him questions?

24 THE WITNESS: Yes.

25 THE COURT: When they were doing the cross

1 exam were you sitting at the table there with Mr.
2 Cummings and Miss Hardee?

3 THE WITNESS: No. I was a point of
4 irritation to Mr. Cummings during this whole thing.
5 I think he wished I would go away.

6 THE COURT: Why would you feel that he wished
7 you would go away?

8 THE WITNESS: Because I was bringing up
9 things and trying to make things happen that I
10 think he didn't, he didn't want to do those things.
11 I mean, I can't say except that he just, he ignored
12 most of what we did. When I would make an issue
13 where it would be where he just almost couldn't
14 ignore it, he couldn't get away from it --

15 THE COURT: Give me an example of something
16 you told him and he ignored.

17 THE WITNESS: Well, I'm talking about just me
18 in general. I meant that he, when you would come
19 up, for instance, when I came in and I had supplied
20 him with all the records but I wanted to be sure he
21 had them and stuff, I brought my notebook up and
22 tried to give it to them but they wouldn't touch it
23 or look at it and just said, "Anything we need
24 we'll get from the State," and it was, that's his
25 theory, that he didn't need to get records, that he

1 didn't need to seek out records, that they would be
2 provided through discovery, any records he needed.

3 THE COURT: Well, when Mr. Yungman testified
4 the information he was testifying about was
5 basically from leads you had given him or
6 information you had given him. Right?

7 THE WITNESS: Yes, some of it was.

8 THE COURT: Did you meet with him and go over
9 it with him before he testified?

10 THE WITNESS: I had read his report.

11 THE COURT: You were satisfied with it?

12 THE WITNESS: Well, no, but I didn't know he
13 was going to read it. I mean --

14 THE COURT: Did you feel the report was
15 complete?

16 THE WITNESS: Well, I felt what the report
17 seemed to me like was a probation report, I mean.

18 THE COURT: What did you tell him about,
19 since you were the one who was a specialist and you
20 were the one gathering the information and
21 providing a lot of stuff for him to make opinions
22 on and everything else, did you tell him you had
23 concern about his report, since I'm sure you all
24 talked?

25 THE WITNESS: Well, I mean, the report

1 itself, for the attorney there wasn't anything
2 necessarily wrong because he was just reporting
3 information.

4 THE COURT: So, the information was complete,
5 he had all the information -- did he have all the
6 information in there you thought he should have?

7 THE WITNESS: I can't remember right this
8 minute what all was in there. I mean, I just don't
9 remember.

10 THE COURT: Let me ask you this. Had Mr.
11 Cummings asked him questions would you have wanted
12 Mr. Cummings, as for as information you had given
13 him, did you want Mr. Cummings to ask him questions
14 and for him to provide answers that were not on
15 that report?

16 THE WITNESS: It's hard to explain. I mean,
17 when you are developing the social worker's
18 testimony it should be a chronology similar to
19 starting with their childhood and then, and the
20 attorney's questions lead through that, rather than
21 just leaving somebody to talk or to give a long
22 dissertation about something. The attorney's
23 questions keep that on track.

24 THE COURT: But the person testifying, since
25 that person only knows what they found through

1 research or through discussions with you, really
2 needs the report to testify from because it's
3 unusual they are going to know it all in their mind
4 without some notes. I mean, are you saying that
5 you expected Mr. Yungman to know these things and
6 not have notes about it, or do you think they were
7 on the report he was reading from?

8 THE WITNESS: Well, I guess I would expect
9 him to know it without having, I mean without
10 having --

11 THE COURT: Well, from your discussions with
12 him did he seem to know it, since you were
13 preparing him?

14 THE WITNESS: I wasn't preparing him.

15 THE COURT: You said just a minute ago when
16 you get the information together to help prepare
17 the social worker.

18 THE WITNESS: I'm sorry. It is not to
19 prepare him. I'm essentially supplying him with
20 information. It's up to the attorney to, I mean,
21 I'm in on that but it, I mean, I would feel like I
22 was trying to tell somebody else, an equal or maybe
23 in a position above me and in that sense I just
24 wouldn't feel comfortable for me to be saying,
25 "This is what you should be doing, this is how you

1 should be testifying," to somebody who does this
2 all the time, I mean.

3 THE COURT: When you give the information to
4 someone like Mr. Yungman, when you provide him the
5 information what do you do to make sure that he has
6 it all ready to testify? Do you consider yourself
7 having any obligation in that regard?

8 THE WITNESS: Well, what usually happens is
9 that we would meet with the attorney and they would
10 go through the testimony, and we asked Mr. Cummings
11 to do that with him, to go through the testimony,
12 but he just wouldn't.

13 THE COURT: He refused you?

14 THE WITNESS: I'm not going to say he said,
15 "No, I'm not going to do it," but when we asked him
16 to do it he had other things and just wouldn't do
17 it, and so there was never, similarly he didn't
18 meet with the other witnesses, he didn't meet with
19 the family, he didn't meet with them before he put
20 them on the stand, he just simply didn't prepare
21 the witnesses.

22 THE COURT: Let me ask this. Once the jury
23 had made the decision of guilt and you all had
24 that, you know, the day you have in between and
25 everything else, did you all get together at all

1 after the verdict, before the penalty phase
2 started?

3 A Yes, I think we did.

4 THE COURT: You did?

5 THE WITNESS: I believe we did

6 THE COURT: Well, at that point in time what
7 information you were going to put in in mitigation,
8 did you all go over the information you were going
9 to put in in mitigation?

10 THE WITNESS: Well, I had prepared several
11 mitigation plans and presented them but I just
12 didn't get any feedback on them of who I thought
13 should testify and sort of what they were
14 testifying to.

15 THE COURT: In that one day you all had in
16 between when the total emphasis then was on the
17 penalty phase, the issue of guilt had already been
18 decided so now the emphasis was on the penalty, so
19 that period of time from the decision of guilt,
20 until the decision, until the beginning of the
21 penalty phase and throughout the penalty phase you
22 all never got together and decided what information
23 to present, what information you had, what order of
24 witnesses there would be and all that?

25 THE WITNESS: There was, there must have been

1 some order of witnesses because Jeff knew when he
2 was going up.

3 THE COURT: My question is did you all get
4 together and decide it?

5 THE WITNESS: I think we did. I don't -- did
6 that time sheet, does somebody else have the time
7 sheet?

8 MR. BROWN: I did move some things that fell.
9 I think the photos fell, too.

10 THE COURT: Let me ask you this. Do you
11 recall having any feeling of being, after the guilt
12 phase was over and you all were turning to the
13 penalty phase, do you recall having any frustration
14 with Mr. Cummings at that time, getting ready for
15 the penalty phase after the guilt phase?

16 THE WITNESS: Yes, because we had witnesses
17 in the back that were going to testify and they
18 were back here doing other things and he never, he
19 did not talk to any of them. He was going to put
20 up witnesses that he hadn't --

21 THE COURT: You all wouldn't have to be in
22 the courtroom. That would be this day period of
23 time.

24 THE WITNESS: Right. He hadn't talked to
25 them before, he hadn't gotten with them. I think

1 he had called and wanted them to come to his office
2 or something but they had difficulty with
3 transportation, I just know.

4 THE COURT: Had you talked with them?

5 THE WITNESS: I had talked to them, so the
6 day when they were going to testify that afternoon
7 I was just kind of frantic, so I went back and
8 talked to them and sort of said what I thought they
9 needed to say and wrote it down and then gave notes
10 to he and Marva with the photographs and who to
11 give the photographs to.

12 THE COURT: Did the witnesses, did they
13 testify?

14 THE WITNESS: I don't understand.

15 THE COURT: The ones in the back you wanted
16 to testify.

17 THE WITNESS: His mother and his sister
18 Kendra were the two witnesses back there.

19 THE COURT: Did anyone you wanted to testify
20 back there not testify?

21 THE WITNESS: No, I think they testified.

22 THE COURT: You've talking about two people?

23 THE WITNESS: Well, those were the two people
24 that, and I honestly, I'm sorry, I just don't
25 remember who else, if there were other people

1 testifying, but just because of the lack of
2 sophistication and some things like that, I just
3 was concerned about their testimony and it was very
4 important testimony and it just --

5 THE COURT: You had worked with Mr. Cummings
6 before?

7 THE WITNESS: I had not up until then. He
8 came on to one case I was on since then and I
9 withdrew from the case.

10 THE COURT: So, you were not happy with Mr.
11 Yungman and you were not happy with Mr. Cummings
12 nor with Miss Hardee-Thomas?

13 THE WITNESS: Well, I was not happy with Mr.
14 Cummings and I can't say necessarily I was unhappy
15 with Marva because she sort of, if you would call
16 her she would call him, she would try to get you in
17 touch with him. And with Jeff, I just, I mean, I
18 just felt like, and I don't want to say I was
19 unhappy with him but I just felt like there was no,
20 he wasn't prepared to testify, he just wasn't
21 prepared and so he felt awful, too. I mean, he
22 felt the same way I did about it.

23 THE COURT: You assume?

24 THE WITNESS: Well, he told me that.

25 THE COURT: Did Miss Hardee-Thomas interview

1 any witnesses during the course of the penalty
2 phase?

3 THE WITNESS: She did -- you mean examine on
4 the stand?

5 THE COURT: Yes.

6 THE WITNESS: She did one person.

7 THE COURT: Had you and she talked about that
8 witness?

9 THE WITNESS: No.

10 THE COURT: She didn't talk to you? I
11 thought you said she did.

12 THE WITNESS: I'm not saying -- in the course
13 of the trial we really had very little conversation
14 but she was the one that was, the pictures that
15 ended up getting, that were given to Kendra were
16 the pictures that were supposed to be given to his
17 mother. And it just all, I mean to me it was just
18 all a lack of communication.

19 THE COURT: Well, do you remember which
20 witness she handled in the penalty phase, or
21 witnesses?

22 THE WITNESS: It was Kendra, because she --

23 THE COURT: Kendra was the --

24 THE WITNESS: The sister.

25 THE COURT: -- the sister? Now, are you

1 saying that there was matters that you had
2 available that Kendra could have told the jury
3 about, that were not asked by Miss Hardee-Thomas
4 and therefore didn't come out?

5 THE WITNESS: I'm sorry, I just, yes, there
6 were but I could not tell you right this minute.

7 THE COURT: How do you know there were?

8 THE WITNESS: Because I made notes. Can I
9 look at my notes I did?

10 THE COURT: Sure.

11 THE WITNESS: One of the things that got
12 mixed up was Norb was trying to get information
13 about his Aunt Mary who was an invalid and I had
14 taken pictures and got an affidavit but he got, he
15 kept calling her by the wrong name and the aunt's
16 name he was using was in the courtroom, and so we
17 never got out with that. She gave photos intended
18 for mom to Kendra, the sister. I mean, essentially
19 just handing them to her and said that was his
20 child and it wasn't any further development of it
21 being the child, anything about her child and that
22 she wasn't prepared for questioning, she didn't
23 know anything about the information. So --

24 THE COURT: So, you are saying you and Miss
25 Hardee-Thomas, you don't feel you had adequate time

1 to talk with her to prepare for her to prepare to
2 question Kendra?

3 THE WITNESS: Well, I mean, I guess -- I
4 mean, what I think is normal is that the attorney
5 would have talked to her.

6 THE COURT: I know, ma'am. I'm getting
7 confused, I thought you said you had no problem
8 with communicating with Miss Hardee-Thomas. Are
9 you saying you did have problems?

10 THE WITNESS: Well, I'm saying when I called
11 her on the telephone she would take my call.

12 THE COURT: So, you did give her all the
13 information you needed to give her?

14 THE WITNESS: In the course of waiting, of
15 leading up to the trial, if I called her she took
16 my call. She generally wasn't able to answer the
17 questions that I asked her, what I needed, but she
18 would then in turn call Norb's office and say that
19 I was trying to get in touch with him.

20 THE COURT: I'm talking about your
21 discussions with her about witnesses that she did.

22 THE WITNESS: I didn't have any discussions
23 with her about witnesses she handled.

24 THE COURT: You never talked to her about
25 Kendra?

1 THE WITNESS: No. I just wrote the stuff
2 down on a piece of paper and handed it to them with
3 the pictures.

4 THE COURT: Let me ask you this, ma'am. Have
5 you testified in capital PCR's before where someone
6 has filed a PCR in a capital case and you were the
7 mitigation specialist during the course of the
8 trial?

9 THE WITNESS: No.

10 THE COURT: You never have?

11 THE WITNESS: No.

12 THE COURT: Have you ever testified in a
13 trial where someone received capital punishment,
14 the death penalty, as a mitigation specialist?

15 THE WITNESS: No.

16 THE COURT: Are you saying this was the first
17 and only one you have been involved in?

18 THE WITNESS: No. I have been involved in a
19 lot of other trials but I don't generally testify.

20 THE COURT: So, in none of the other trials
21 where you were the mitigation specialist and the
22 person received the death penalty you were never
23 called on the PCR to testify?

24 THE WITNESS: No.

25 THE COURT: I was just curious, I wondered.

1 THE WITNESS: I was trying to think. I think
2 there was only two other people who have gotten the
3 death sentence and one of them was a guy down in
4 Beaufort who represented himself.

5 THE COURT: I'm talking --

6 THE WITNESS: No.

7 THE COURT: I'm talking about on the PCR.

8 THE WITNESS: I'm guessing, I don't know
9 there has been a PCR on that. I have been
10 contacted about it but I have not, it hasn't come
11 up.

12 THE COURT: How many capital cases have you
13 been employed as a mitigation specialist?

14 THE WITNESS: I have worked on somewhere
15 between 25 and 30.

16 THE COURT: On 25 to 30 where they have
17 gotten the death penalty?

18 THE WITNESS: Well, many of those have pled.

19 THE COURT: Of all those that went all the
20 way through the process?

21 THE WITNESS: I think only three have gotten
22 the death penalty.

23 THE COURT: How many of them went through the
24 whole trial?

25 THE WITNESS: I think there has been, must

1 have been about eight that went to trial and I
2 think it's three got death penalty.

3 THE COURT: Okay. All right, any questions
4 from my questions?

5 MR. WATERS: Your Honor, I never got my
6 recross.

7 THE COURT: I know, you only had one
8 question. You had a question after that question?

9 MR. WATERS: I did, based on what they were
10 discussing.

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1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q I might not have a question, but she had
4 another form, a tracking form or something. I
5 wanted to see what that was.6 A This is where when I request records and who
7 I request them from, when I get them back.

8 Q What is this document right here?

9 A That's --

10 THE COURT: You have to speak louder so the
11 court reporter can hear you.12 A It's a narrative, chronology of his life
13 history.

14 Q What is the final document right there?

15 A That's the time line.

16 Q Okay. All right.

17 MR. WATERS: Your Honor, at this point I
18 would move to admit as Defendant's 13 the release
19 and subpoena tracking document she earlier referred
20 to during Mr. Brown's redirect.

21 THE COURT: Any objection, Mr. Brown?

22 MR. BROWN: If I may look at it. Although I
23 would, I believe, point out she referenced it
24 during questioning by the Court, no, Your Honor, no
25 objection.

1 THE COURT: Okay. In evidence.

2 (Release and subpoena tracking document
3 marked and received in evidence as
4 Defendant's Exhibit Number 13).

5 MR. WATERS: Again we will substitute and
6 make copies.

7 THE COURT: We'll do so.

8 THE WITNESS: You can have it. I have it on
9 the computer.

10 MR. WATERS: Thank you. Actually the witness
11 has been kind enough to give us this one.

12 THE COURT: In the three that received
13 capital punishment, you say one represented himself
14 and one was this one?

15 THE WITNESS: Uh-huh.

16 THE COURT: And the other one was about how
17 long ago, approximately?

18 THE WITNESS: I can't remember.

19 THE COURT: Less than ten years?

20 THE WITNESS: Yes.

21 THE COURT: Less than five years?

22 THE WITNESS: Probably in that range.

23 THE COURT: Okay. In that one you feel that
24 the person who was a social worker who testified,
25 or similar type person, and the information you

1 got, did you have better interaction with the
2 attorneys in that one that the guy got capital
3 punishment?

4 THE WITNESS: The one that got life, do you
5 mean?

6 THE COURT: No. You said you had three got
7 the death penalty. The other, the third one, this
8 one and the one that was representing himself and
9 then a third one, in that third one do you feel you
10 had proper interaction and a great relationship and
11 you talked a lot with the attorney then and the
12 person, if an expert did testify, social worker or
13 someone like that, psychiatrist, psychologist, do
14 you feel you had good rapport with all of them and
15 everything worked out as for as preparation wise
16 the best it could?

17 THE WITNESS: Apparently so. I just simply,
18 it is not that I like saying these things but I,
19 this was terribly frustrating.

20 THE COURT: Miss Davis, I want to talk about
21 just for a second the other one, not this one, not
22 the one that represented themselves.

23 THE WITNESS: Yes.

24 THE COURT: Therefore, in that one you all
25 had all the best communication you could have but

1 the verdict still came back or the decision came
2 back with the death penalty anyway?

3 THE WITNESS: Yes.

4 THE COURT: Anything else?

5 MR. WATERS: Your Honor, I of course did my
6 recross, I think then Mr. Brown might have some
7 questions related to your series of questions.

8 THE COURT: All right. Yes, sir, Mr. Brown,
9 go ahead.

10 MR. WATERS: I would like to go after that,
11 have my turn at that point.

12 THE COURT: Sure.

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1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. BROWN:

3 Q Very briefly. In that third case what were
4 the allegations, the underlying act the client was
5 convicted of and sentenced to death for, besides
6 murder? Do you recall?

7 A No, I don't.

8 Q The one that represented himself, there were
9 actually two police officers were killed?

10 A Yes.

11 Q With an assault rifle?

12 A Yes. That was --

13 Q A double homicide?

14 A It was a double homicide.

15 Q And double law enforcement officers?

16 A Right. And the client was crazy.

17 Q He was gagged and put in the back room and
18 for a period of time represented himself while not
19 being present in the courtroom at all?

20 THE COURT: I didn't really get into the one
21 that was representing himself. To me that is a
22 different atmosphere.

23 Q How about the third one? Who were the
24 lawyers, what was the defendant's name?

25 A I'm sorry, I cannot recall right this minute,

1 I'm sorry. My head is killing me and I'm tired and
2 I just can't remember.

3 Q Sure.

4 A I'm sorry.

5 Q And I don't mean to push you too much on it
6 but if you can't remember the client's name can you
7 remember much about the communications between you
8 and the lawyers?

9 A I just simply remember that I haven't had
10 difficulty with any others, so I'm saying that.

11 Q And not even knowing the client's name?

12 A Well, actually now I know what it was. It
13 was the State --

14 THE COURT: A little louder,.

15 A I'm sorry. Stanko, a trial in Georgetown.

16 THE COURT: That was about a year ago, year
17 and half ago?

18 A That was two years ago.

19 Q Correct me if I'm wrong. Mr. Stanko had been
20 previously convicted of other crimes?

21 A Right, something very -- well --

22 Q Help me because I'm not --

23 A Yes, he had been convicted previously of
24 assaulting and kidnapping another girlfriend, very
25 similar circumstances to this, to this woman that

1 got killed but her daughter did not get killed, her
2 daughter survived --

3 Q So, there was --

4 A -- and testified. And after that he went to
5 Georgetown and there is a death penalty trial, I'm
6 sorry, went to Myrtle Beach, there is a death
7 penalty trial pending in Myrtle Beach.

8 Q So, we have a person who is out of prison
9 following a conviction very similar to the case
10 that is tried in the capital trial, which involves
11 a killing of a lady and a serious injury of her
12 daughter?

13 A And raping of her daughter, fifteen year old
14 daughter who survived and testified.

15 Q Another alleged homicide?

16 THE COURT: I'm sorry, I'm not sure I'm
17 catching this.

18 MR. BROWN: We're trying to compare --

19 THE COURT: I wasn't trying to compare, that
20 is not the reason for my question.

21 MR. BROWN: I'm sorry..

22 THE COURT: My question was whether or not
23 she had communication, was her communication okay
24 in that trial.

25 MR. BROWN: I'm sorry..

1 THE COURT: That was the only area I wanted
2 to go into.

3 MR. BROWN: I apologize, because I thought
4 the emphasis was even when the communication was
5 good they still get death.

6 BY MR. BROWN:

7 Q But those were multiple murder cases, both
8 those other ones?

9 A Right, it was, and again in that case
10 communication was better with one lawyer than
11 another.

12 Q But you are dealing with multiple murders?

13 A Yes.

14 Q And did Kendra Hagler, that's the married
15 name of Kendra Bowman?

16 A Kendra Bowman.

17 Q You know her as Kendra Bowman? She had a son
18 named Damion who would have been Marion's nephew.
19 Does any of that sound familiar? I hate to ask
20 leading questions, I'm trying to get to a point.

21 A I think so.

22 Q And would it have been helpful about the
23 issue of his parenting and past parenting capacity
24 and emotional value if Kendra alone, without the
25 help of a psychologist, would have testified he

1 being like a father and Damion looked up to Marion?

2 A Yes.

3 MR. BROWN: Your Honor, at this time I would
4 like to show her what we sought to introduce as
5 Plaintiff's Exhibit 35, which we did notice, which
6 is an affidavit.

7 MR. WATERS: Your Honor, this affidavit was,
8 excuse me, was signed on September 15th, 2008.

9 MR. BROWN: That's true.

10 MR. WATERS: It has nothing to do with this.

11 THE COURT: I would be more interested in
12 what she had in her files from talking to Kendra
13 back then. Does she have information from talking
14 to Kendra back then?

15 BY MR. BROWN:

16 Q Do you have information about your
17 discussions with Kendra?

18 A I have got an interview, notes from an
19 interview.

20 THE COURT: I mean, that would be, what I
21 would think, we have no idea who she told those
22 things.

23 MR. BROWN: We don't but, Your Honor, first
24 of all I can't take an affidavit of a witness prior
25 to his conviction because I wouldn't have been

1 appointed the lawyer.

2 THE COURT: I know. If you want to introduce
3 something how do we know this is the conversation
4 Kendra and Miss Davis had?

5 MR. BROWN: I don't.

6 THE COURT: So, the best thing is to use what
7 she had in there with the notes of what she got
8 from Kendra.

9 MR. BROWN: I do have to say I am trying to
10 introduce this, I sought before when she testified
11 to introduce this and I did notice it, I'm relying
12 on the statute.

13 THE COURT: You want it introduced to reflect
14 what Kendra told Miss Davis?

15 MR. BROWN: No, it was what Kendra would say
16 if asked.

17 MR. WATERS: He wants to introduce it as
18 substantive evidence without cross-examination.

19 MR. BROWN: Which is allowed by statute.

20 THE COURT: I'm curious, why would you not
21 bring Kendra here?

22 MR. BROWN: I'll bring Kendra here. There is
23 nothing to hide, she's not very far away, she's a
24 very, very small witness.

25 THE COURT: Okay. Good, if she's here I

1 would rather she come, if you want to bring her.

2 MR. BROWN: The only issue is that
3 information back before Dale Davis, because -- and
4 let me go ahead and say this.

5 BY MR. BROWN:

6 Q Marva Hardee-Thomas did one witness and she
7 did Kendra Bowman, is that right?

8 A I know she did Kendra Bowman and that's my
9 recollection, that was the only witness she did.

10 Q What did you all talk about regarding the
11 preparation of Kendra's testimony regarding
12 Marion's parenting, and I use that because
13 obviously he is not a parent of Kendra's child but
14 that is the same capacity of being of emotional
15 value to young family member, what did you talk
16 about with Marva or Kendra before in preparation
17 for that testimony?

18 A I did not talk to Marva at all about it, so
19 I'm certain I didn't talk to her about it. I do
20 not know whether or not I discussed that with
21 Kendra or not. I don't know if I did or not.

22 Q And when Jeff sent you a note saying, "Maybe
23 we want to develop this idea about his being a good
24 parent," unless there is something to the contrary
25 is that something that you would have or should

1 have looked at, as to whether he was a parenting
2 figure to his nephew?

3 A Yes.

4 Q And if Kendra would have said he's been a
5 good role model, and I don't mean role model by
6 example but, "He has been looked up to by my son,
7 his nephew, and that they have a relationship," is
8 that something that a jury could rely on to say it
9 is a reason to give this man a life sentence and
10 not extinguish his life?

11 MR. WATERS: Your Honor, I object.

12 THE COURT: I sustain the objection. Let's
13 proceed.

14 THE WITNESS: Do I answer?

15 THE COURT: No. Next question.

16 BY MR. BROWN:

17 Q What mitigating information did you find
18 regarding a positive relationship between Marion
19 and his nephew?

20 MR. WATERS: Your Honor, again I would
21 object. I don't think that has anything to do with
22 the line of questioning.

23 THE COURT: I overrule the objection but I
24 thought she has already discussed a lot of this.

25 What information did you find between Mr.

1 Bowman and Kendra's son?

2 THE WITNESS: I think it would be similar to
3 his stepchildren, that he was good with the
4 children, they loved him, he cared for them, he had
5 a good relationship with them, he had parenting
6 skills.

7 BY MR. BROWN:

8 Q And if Kendra was reluctant to come to
9 testify about that relationship between her brother
10 and her son, then that may be where an expert like
11 a psychologist would come in, would it not?

12 A Yes.

13 Q You're not aware of that being done by Marva?

14 A No.

15 Q During her interview of Kendra?

16 A No.

17 MR. BROWN: Thank you.

18 THE COURT: All right, follow-up on that?

19 How do you feel, Miss Davis? How's that
20 headache?

21 THE WITNESS: I'm kind of worn out.

22 MR. WATERS: We're almost done.

23 THE COURT: Relax, we're almost through.

24 I'm sorry, I didn't ask the rest of you, how
25 are you feeling?

1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q I just want to be clear. You said earlier
4 that you advised Mr. Cummings that it might be a
5 good idea for Dorothy to, Dorothy the wife, to
6 testify, correct? Isn't that what you testified
7 earlier?

8 A I believe that is what I wanted.

9 Q And you didn't advise, though, that he, you
10 know, get any sort of family counselor,
11 psychologist or something like that?

12 A No.

13 Q Okay. And from what you said is that Mr.
14 Cummings just refused to look at your information,
15 refused to look at it?

16 A He did.

17 Q Okay.

18 A I mean, the notebook, you know, I had
19 provided that to him separately but he just
20 wouldn't touch the notebook.

21 Q And he refused to talk to Mr. Yungman?

22 A I'm not going to say he said, "No, I'm not
23 going to do it," but when we tried to get it done
24 we couldn't make it happen.

25 Q So, there was never a time where you all

1 discussed your findings with Mr. Cummings?

2 A Our findings?

3 Q Yes.

4 A No, I'm talking about going over Jeff's
5 testimony now, that is what I'm talking about, that
6 we had wanted him to go through Jeff's testimony.

7 Q So, you did have a meeting where you went
8 over all the information that you discussed and Mr.
9 Yungman's findings with Mr. Cummings?

10 A I think, I think they had that separate from
11 me. Jeff met with the attorneys separate from me.

12 Q So, you are saying you were never at a
13 meeting where you discussed what you had found with
14 Mr. Cummings?

15 A I don't think we ever discussed this at
16 meetings.

17 Q Well --

18 A I provided the information to him but I don't
19 know that we ever discussed it.

20 Q And you provided your memorandums?

21 A Yes, I provided the information to him.

22 Q All right. Now, you were asked, the judge

23 asked you, you know, some things you wished to put
24 in and you started reading from some notes. What
25 are those notes?

1 A It was some notes that I had made. When all
2 this was going on, earlier on I had been concerned
3 and I called a friend who is an attorney who does
4 death penalty work.

5 Q Don't get into anything somebody told you.

6 A Well --

7 Q The result of what you did?

8 A As a result I started keeping notes and so
9 that was when I started making the things that you
10 had that --

11 Q Who did you call?

12 A Ashley Pennington.

13 Q Ashley Pennington, so you started keeping
14 notes in anticipation of this PCR today, correct?

15 A Exactly.

16 Q Okay. All right.

17 THE COURT: Whoa. You started keeping notes.
18 Are these notes from the trial?

19 THE WITNESS: Uh-huh (Affirmative). Well,
20 they were the notes that you all had that I was
21 making as I went a long, about communication but
22 separate from that while --

23 THE COURT: I'm confused. Notes, we're
24 talking about, these are notes you just did
25 recently or notes you did back in 2002?

1 THE WITNESS: No, notes I did while the trial
2 was going on and right after the trial and then the
3 other separate ones about the communication that I
4 was keeping that were contemporaneous at the time.

5 THE COURT: Does that mean all the notes were
6 done in 2002?

7 THE WITNESS: Yes.

8 THE COURT: So, you made notes. You
9 anticipated a PCR?

10 THE WITNESS: Well, you know that sooner or
11 later it is going to come up, and like I'm having
12 difficulty remembering, that is what I thought,
13 these were things I wanted to be able to remember.

14 THE COURT: In 2002, it's understandable, you
15 made notes in case there was a PCR, you would be
16 ready to go?

17 THE WITNESS: Yes, because I made notes of
18 things that concerned me at that time.

19 THE COURT: So, back in, before 2002 you
20 talked to Mr. Pennington about that, as for as the
21 best thing to do?

22 THE WITNESS: Well, actually I was just
23 expressing frustration and as a result --

24 THE COURT: I'm not asking what he told you.

25 THE WITNESS: Right.

1 THE COURT: It was 2002?

2 THE WITNESS: Well, I don't know if it was
3 2001 or 2002. It may have been 2001 because that
4 is when the trouble communicating began, was in
5 2001.

6 THE COURT: Okay. All right, I'm sorry, I
7 wanted to make sure I understood what she was
8 talking bout.

9 MR. WATERS: That's fine.

10 BY MR. WATERS:

11 Q Did Mr. Cummings have knowledge of the notes
12 you were keeping notes [omg for the PCR coming up?

13 A No, huh-uh (negative).

14 Q You said just a few minutes ago you were on a
15 case recently with Mr. Cummings. Who else was on
16 that case?

17 A Well, it switched lawyers several times. At
18 the very end it was Walter Bailey and Mr. Cummings.
19 They kept having conflicts with lawyers and when I
20 first got on it it was a lady and then after I
21 talked to her Walter Bailey came on and then
22 something happened that she got conflicted out and
23 Mr. Cummings was on it, and I worked, did some work
24 on it but the last meeting, we had a meeting in his
25 office and it just was clear to me that there just

1 simply was not an understanding of mitigation and
2 how it was supposed to be used and so I just
3 thought it was best for the, for everybody that I
4 withdraw.

5 Q So you withdrew, is what you're saying?

6 A I withdrew

7 Q Voluntarily withdrew?

8 A Yes.

9 Q They didn't fire you?

10 A No. I wrote a letter and said I just think
11 it's best, for the best of the team, we don't seem
12 to be on the same page.

13 Q How long ago was this?

14 A It was probably in the last year, I would
15 think.

16 Q Okay.

17 MR. WATERS: Nothing further.

18 THE WITNESS: Maybe a little bit longer than
19 that.

20 MR. WATERS: Thank you. Nothing further,
21 Your Honor.

22 THE COURT: Anything else from anybody at
23 all?

24 MR. BROWN: We believe the record is pretty
25 full right now on this topic.

1 THE COURT: We need you back tomorrow at 8:00
2 o'clock -- no.

3 (Witness excused).

4 Let's make sure you all have got the
5 information that you all wanted from the file.
6 You're supposed to make a copy of this?

7 MR. BROWN: Yes, sir.

8 THE COURT: And this employment application.

9 Before we make the copies, let's talk. I
10 assume we don't want to do anything further
11 tonight.

12 MR. WATERS: Your Honor --

13 THE COURT: I know Mr. Cummings is out there.

14 MR. WATERS: Could I go tell him to go?

15 THE COURT: Well, let's first talk about our
16 reconvene date. Do you mind waiting just a minute
17 or so, Miss Davis? Do you want to go sit in the
18 audience, you might feel more comfortable, you
19 won't feel like you're on the hot-seat.

20 The only reason we're quitting now, I think
21 it is fair to every one, everyone is so tired, we
22 want to make sure we're fresh when we review these
23 very important matters.

24 Mr. Sinclair, how long is your respite?

25 MR. SINCLAIRE: I will be back Sunday

1 afternoon, Your Honor.

2 THE COURT: Okay, guys, time is getting short
3 here. What are you all looking like next week?

4 MR. WATERS: I have a death penalty oral
5 argument like Tuesday, I have a deposition Monday
6 and then I have --

7 THE COURT: Oral argument in the Supreme
8 Court?

9 MR. WATERS: Supreme Court in a death penalty
10 case out of Lexington County, then I have three
11 days, surprise, then I have three days in which to
12 complete my preparation on a case which I have been
13 unable to work on over the past probably month and
14 a half.

15 THE COURT: I was looking at maybe, I was
16 thinking, I've got General Sessions in Darlington
17 but I'm trying to think what's going on the end of
18 the week next week.

19 MR. WATERS: Your Honor, again, at the end of
20 that week I have three days to prepare on a case I
21 have not been able to work on.

22 THE COURT: You have a case beginning the
23 13th?

24 MR. WATERS: Yes, sir, another death penalty
25 PCR. That is actually the guy who killed the two

1 deputies.

2 THE COURT: Stanko?

3 MR. WATERS: No --

4 THE COURT: The guy who represented himself?

5 MR. WATERS: That's correct. I really need
6 those three days, not to whine, but I have been
7 running pretty hard and obviously I'm going to have
8 to do a lot of preparation those three days.

9 THE COURT: Well, I've got a big trial
10 October 20th in Darlington is set but they set
11 those things and it doesn't happen. Maybe, do you
12 all think we can finish this thing in two days?

13 MR. WATERS: Yes, sir.

14 MR. BROWN: Yes, sir, I do, too.

15 MR. WATERS: I think, you know, obviously at
16 this point we have Mr. Cummings, I think that is
17 going to take a long time. I don't want to say
18 that. I think we have underestimated our time
19 repeatedly in this case.

20 MR. BROWN: He knows who my witnesses are,
21 Your Honor, I will leave it at that.

22 THE COURT: The trouble is I'm not sure I can
23 come back here, that's the problem.

24 MR. BROWN: Your Honor, I have to be quite
25 candid. I haven't used this yet, but I have to be

1 honest, I received phone calls, texts and
2 everything else about my campaign and I am running
3 as the Democratic candidate for the House seat
4 against an incumbent, you know. I told the folks I
5 had this hearing, it was split, it was split in
6 half, quote, and before it was moved, they have
7 been very understanding, I had lawyer legislators
8 calling me to ask me what can I do to get this
9 thing continued until after the election, I said
10 it's not going to happen.

11 THE COURT: I tell you what let's do. Let's
12 do this. Let's tentatively look at the 6th and 7th
13 of November.

14 MR. WATERS: Your Honor, I'm starting another
15 capital PCR on the 10th.

16 MR. BROWN: And I'm starting a rape trial on
17 the 10th unless it is changed.

18 THE COURT: You know, Mr. Brown --

19 MR. BROWN: Yes, sir.

20 THE COURT: -- we only have one day or a day
21 and a half or two days worth of trial left.

22 MR. BROWN: Yes, sir.

23 THE COURT: I think, with your preparation
24 having been done --

25 MR. BROWN: I would agree. What I would

1 mainly ask is you not consider a drive to a place
2 like Darlington, necessitating a long hotel stay
3 because of the significant travel, putting me out
4 more days than just the trial.

5 THE COURT: No, I'm talking about the issue
6 regarding Judge Buckner, since this, you say you
7 have another death penalty PCR?

8 MR. WATERS: I do.

9 THE COURT: I thought you said you had
10 something the week of the 10th of November.

11 MR. BROWN: I have the rape trial that was
12 referenced with Judge Buckner and it's a life
13 without parole trial.

14 THE COURT: Good, I'm going to go ahead and
15 get you freed up from that.

16 MR. BROWN: Yes, sir.

17 THE COURT: We will then look in this, what
18 about the week of Thanksgiving, like a Monday or
19 Tuesday?

20 MR. BROWN: That's fine, yes, sir.

21 THE COURT: That way we don't have anything
22 else going on and unfortunately Mr. Daniel at that
23 time will be in his new career.

24 MR. BROWN: May we ask where he's going?

25 MR. WATERS: Your Honor, I have not received

1 a motion for a continuance from the applicant on
2 that one November 10th, I kind of anticipate one, I
3 would obviously oppose it but --

4 THE COURT: That's a bad week anyway.

5 MR. WATERS: Okay.

6 THE COURT: I have a friend who died, a
7 veteran, he is being burried in Arlington Cemetary
8 November 12 and I'm going up. And defense lawyers
9 conference starts the 13th and 14th.

10 MR. WATERS: I was referring to the 6th and
11 7th. If that does not go through, then the 6th and
12 7th might become available. I would --

13 THE COURT: I know, but I want to free him up
14 for the 10th. I want you to get with Judge Buckner
15 and say you're ready for the 10th.

16 MR. BROWN: I'm sorry, I was confused, free
17 me up so I can go to trial the 10th?

18 THE COURT: Yes.

19 MR. BROWN: I can already tell you the
20 prospective DNA expert I was talking about --

21 THE COURT: No, no, whatever happens with
22 that trial, I want it to be continued because of
23 this.

24 MR. BROWN: You don't --

25 THE COURT: Right. If Judge Buckner has some

1 other reason to continue it, fine.

2 MR. BROWN: I understand.

3 THE COURT: But I want you to let him know as
4 for as me I have released you for any matters on
5 the 10th of November and why don't we do this,
6 tentatively say 20 and 21 of November, that's a
7 Thursday and Friday. I have Marlboro County
8 General Sessions but it's usually over and we can
9 look into that.

10 MR. BROWN: I would like it better Tuesday
11 and Wednesday before Thanksgiving.

12 THE COURT: If we start on a Thursday morning
13 could we finish this thing Friday afternoon?

14 MR. WATERS: Your Honor, one last thing on
15 those two dates. I think I'm going to have an oral
16 argument in the Court of Appeals on a murder case.

17 THE COURT: I will continue that one.

18 MR. WATERS: You might be able to at that
19 point. I think it is just tentatively scheduled
20 because they sent out notices early for the 18th
21 and 19th. Unfortunately off the top of my head I
22 don't know about the 20th. I know they have a term
23 that week. If that's the case, the 20th would not
24 be a problem, otherwise it would be. I believe it
25 is just the 18th and 19th. I can't say for sure

1 right this minute.

2 THE COURT: 25th and 26th, all right,
3 November?

4 MR. WATERS: I think the 20th will work.

5 THE COURT: No, the 25th and 26th, we'll
6 reconvene the 25th and 26th of November.

7 MR. BROWN: That is a Tuesday and Wednesday?

8 THE COURT: Right, before Thanksgiving. I
9 would like to do it in Dillon if possible. Does it
10 make a difference with you all where it is? You
11 all have to drive anyway.

12 MR. BROWN: That is a very long drive for me.

13 THE COURT: What have you got going on? The
14 election is over and everything else.

15 MR. BROWN: Thanksgiving.

16 MR. WATERS: I will go wherever you want me
17 to, Your Honor.

18 THE COURT: We're going to start early on
19 Tuesday, we're not going any further than noon on
20 Wednesday, so if it's not finished by noon on
21 Wednesday we're going to probably continue and
22 finish it sometime.

23 MR. BROWN: Let me ask you, that certainly
24 accomodates the Thanksgiving. Is there a way we
25 can start on Monday? I may not have heard why not.

1 THE COURT: Will, because -- all right,
2 Monday afternoon?

3 MR. BROWN: That gives me time to drive up.

4 THE COURT: Monday afternoon, 2:00 o'clock,
5 the 24th, 2:00. And we'll go until we finish but
6 no later than noon on Wednesday. Now, in the
7 meantime, Mr. Court Reporter, I will sign any order
8 I need to sign to give you time to do this
9 transcript that we have got so far so they can be
10 reviewing it. That gives really almost two months.
11 Right now this is September 30, take up with it
12 November 24. So, any way I can help you in getting
13 some time. What I would like to see if you can
14 have the transcript to the attorneys by the end of
15 October.

16 Mr. Brown and Mr. Waters, this court reporter
17 is going to do his best to get you all the
18 transcript of what we have done so far by the end
19 of October so you all will have the transcript and
20 you all can begin reviewing the transcript of what
21 we have done so far.

22 MR. WATERS: Yes, sir, Your Honor.

23 THE COURT: All right. What do you have
24 there?

25 MR. WATERS: This is what we need to

1 substitute.

2 THE COURT: Okay. You all work all that out.
3 Court right now is just in recess on this matter.

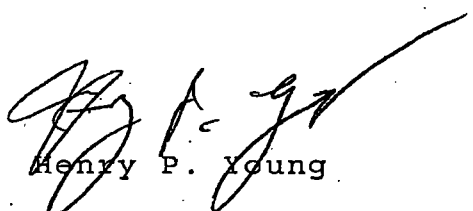
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Dorchester County, South Carolina, on the 30th day of September, 2008.

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

October 17, 2008.



Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2006-CP-18-569

COUNTY OF DORCHESTER

MARION BOWMAN,

-vs-

STATE OF SOUTH CAROLINA,

Defendant.

B E F O R E:

HONORABLE JAMES E. LOCKEMY

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

JAMES ARTHUR BROWN, JR., Esquire
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Attorneys for the Defendant

Henry P. Young
Court Reporter

VOLUME VII OF X

November 24, 2008.

1 P-R-O-C-E-E-D-I-N-G-S

2 (Reconvened at 3:00 p.m., November 24, 2008).

3 THE COURT: Let's get the petitioner in, wait
4 a second for that.

5 I assume that you all were aware of the
6 situation with Judge Knox McMahan. He's been in
7 the hospital a few weeks, they determined he had a
8 blockage and so last week he had, they had thought
9 they would do triple bypass surgery, it ended up
10 being double bypass surgery. Then after that he
11 had a few complication, a collapsed lung and
12 several other things, but they finally corrected
13 all that and he was scheduled to leave the hospital
14 today, so hopefully he will be home today. But
15 he's gone through a lot. I didn't know if you all
16 were aware of that. I know that he's in your area,
17 Mr. Waters. Of course you travel the State, so --

18 MR. WATERS: I do. I heard he was real sick.
19 I'm glad to hear he's doing all right.

20 THE COURT: I will try to get back to see
21 him.

22 Back on the matter of the petition of Bowman
23 v. State, we adjourned this matter, Mr. Court
24 Reporter, can you tell me when the last hearing we
25 had was? Does anyone know what date it was?

1 MR. WATERS: September 29th -- September
2 30th.

3 THE COURT: September 30th, and we adjourned
4 without finishing the testimony of Mr. Cummings.
5 We still have that to complete. Mr. Cummings is
6 not here this week. He has, I think he's on
7 vacation, but he is under subpoena or does the
8 Court need to give him a subpoena for the week of
9 the 15th of December to make sure there will be no
10 misunderstanding?

11 MR. BROWN: We understand him to still be
12 under subpoena and he understands and recognizes it
13 but we will serve him to be extra cautious. He's
14 available, it's our understanding from
15 conversations, for the 17th, 18th and 19th. Mr.
16 Bailey is not --

17 THE COURT: If it were to happen would he be
18 available all that week?

19 MR. BROWN: I'll have to check back.

20 THE COURT: How about getting on that after
21 we finish today?

22 MR. BROWN: Yes, sir.

23 THE COURT: And Mr. Bailey will be the
24 witness after Mr. Cummings and you intend that to
25 be your last witness?

1 MR. BROWN: Yes, sir.

2 THE COURT: All right. And the State has not
3 decided exactly yet what witnesses it's going to
4 call but many of its witnesses have already been
5 called through the petitioner.

6 MR. WATERS: That's correct, Your Honor, it
7 may not be necessary to call anyone. If I did call
8 some people it would probably be tying up some
9 loose ends and they would be very short.

10 THE COURT: Do you plan to call any of the
11 fact witnesses that he called, in essence reply,
12 again or the alleged participants, surrounding
13 people and all that?

14 MR. WATERS: I don't know at this time.
15 Again it would be to tie up any loose ends that
16 presented itself. That would be the extent of it.

17 THE COURT: All right. Are you ready to
18 proceed, Mr. Brown?

19 MR. BROWN: I am, Your Honor.

20 THE COURT: All right.

21 MR. BROWN: At this time we call Marva
22 Hardee-Thomas.

23 THE COURT: Come around, Miss Thomas.
24
25

1 MARVA HARDEE-THOMAS,
2 after being first duly sworn, testified as follows:

3 BAILIFF: State your full name for the
4 record, please.

5 THE WITNESS: Marva Hardee-Thomas.

6 THE COURT: Good afternoon. If you would, to
7 make sure the court reporter can hear you, if you
8 would give us your full name and spell your name,
9 please.

10 THE WITNESS: Marva Hardee-Thomas, M-a-r-v-a,
11 H-a-r-d-e-e, T-h-o-m-a-s.

12 THE COURT: All right, your witness, Mr.
13 Brown.

14 MR. BROWN: Thank you.

15 DIRECT EXAMINATION

16 QUESTIONS BY MR. BROWN:

17 Q Miss Thomas, would you tell the Court your
18 role in this case, including what role you took on
19 when it became a capital case?

20 A I was working as a Public Defender, I was
21 assigned to Mr. Marion Bowman's case, I think
22 August of, I think I have a sign-up sheet of August
23 21st, '01.

24 Q How did you all delegate duties in the case
25 between you and Mr. Cummings when it became a

1 capital case?

2 A He indicated what I would be doing and what
3 he would be doing.

4 Q What was that, what was the difference in the
5 roles?

6 A Well, tell me what are we talking about? Are
7 we talking about witnesses or doing work?

8 Q The case. Did you divide it possibly along
9 the lines of, let's say did you divide it between
10 like one do the guilt phase, one do the penalty
11 phase, or did you decide --

12 A I think he was, he was first attorney on this
13 particular matter. Basically I remember talking
14 to, I believe -- well, cross-examining Mr. Bowman's
15 wife, I believe. Since he was the lead attorney he
16 decided, you know, who we were going to
17 cross-examine, things we were going to be doing in
18 the case.

19 Q Okay. Since he was the lead attorney he
20 decided who did what role?

21 A Yes.

22 Q Okay. And did you have any kind of list of
23 what your assignments were from him?

24 A I don't have them with me here but we both
25 had, you know, responsibilities to do in the case.

1 Q I'm going to ask you about two witnesses in
2 particular. Do you remember a fellow named James
3 Tawain Gadson?

4 A I remember him being involved.

5 Q Do you remember a fellow named Travis Felder?

6 A Yes, I remember him being involved.

7 Q Okay. And can you tell me who was in charge
8 of those witnesses?

9 A I believe Mr. Cummings was, I'm not for sure.

10 Q And then let's talk about, a little bit about
11 the mitigation part. Do you remember a lady named
12 Dale Davis?

13 A Yes, uh-huh (Affirmative), I do.

14 Q And how about Jeff Yungman?

15 A I do.

16 Q Okay. And can you tell me who was in charge
17 of working with them to make sure that they were
18 able to interview all the witnesses they needed to
19 interview?

20 A I believe Mr. Cummings.

21 Q Okay. All right. Now let's back back up to
22 one thing. You mentioned you worked in the Public
23 Defender's office?

24 A I was a Public Defender at that time.

25 Q Okay. And let's see, did you have a

1 letterhead that said Public Defender on it?

2 A Yes.

3 Q You mailed a letter out that said Public
4 Defender, if you mailed a letter to somebody in the
5 public or somebody you saw, a letter came from your
6 office, at the top did it say Public Defender?

7 A I had in my office, I was a contract Public
8 Defender and I also had a private practice, but in
9 this particular case I would have Public Defender.

10 Q Okay. And in that regard how would you
11 characterize Gene Dukes?

12 A He was also a contract Public Defender.

13 Q Okay. And if there were documents that
14 imminated from his office what would they say on
15 it?

16 A Dorchester County Public Defender and then he
17 would put his, type his name Gene Dukes. Everyone
18 had different letterhead.

19 Q Okay.

20 A However, I was responsible for getting my own
21 letterhead because I'm a contract Public Defender
22 and so was he, and so was John Loy, who was also a
23 Public Defender, contract Public Defender at that
24 time.

25 Q Did Mr. Loy serve a role in this case?

1 A I don't know of any. I believe he was
2 generally with juveniles at the time.

3 Q Okay.

4 A However, whenever there are conflicts with
5 regard to adults he may be brought in.

6 Q Do you know whether or not he had a witness
7 in this case?

8 A I do not. I don't remember.

9 Q And let me ask you about the setup in the
10 Public Defender office. Who was the boss?

11 A I believe -- in 2001?

12 Q Yes, ma'am. Well, I guess, the time period
13 we're looking at.

14 A Okay. Troy Knight may have been.

15 Q And what was his title?

16 A President of the Public Defender Corporation.

17 Q Okay. And he cut your paycheck, is that how
18 that --

19 A He signed it.

20 Q He signed the paycheck, okay. And who signed
21 Mr. Dukes' paycheck?

22 A It would have been Troy Knight, too, I
23 believe, unless there was somebody else like
24 Charlene Snow or -- what was her name? Unless
25 there was someone else on the checking account that

1 they hired to do the checking.

2 Q Okay.

3 A But more than likely the president would be
4 doing that, I believe.

5 Q How did you get cases assigned?

6 A There was a coordinator that would assign
7 cases to us individually. She would go to the
8 jail, talk to the clients and by rotation assign
9 cases.

10 Q Okay. So, who was that?

11 A I want to say Kathy at the time. I'm not too
12 sure. I know it was not Mrs. Snow.

13 Q It was not?

14 A It was not Mrs. Snow.

15 Q Gosh, bear with me one moment.

16 MR. BROWN: Beg the Court's indulgence?

17 THE COURT: Uh-huh (Affirmative).

18 Q If I can show you what has been marked as
19 Plaintiff's Exhibit 12.

20 A Kathy Rogers.

21 Q And that's the lady who did the assignments?

22 A Yes.

23 Q Okay. She had a little sheet and she decided
24 who would get what lawyer?

25 A Yes.

1 Q Did that apply across the board?

2 A Yes.

3 Q Was there any exceptions to that, that you
4 knew of?

5 A Yes. If there was a conflict and if they
6 noticed that one attorney had been assigned to
7 co-defendants, then we would have to either, at
8 that time probably go to Kathy and let her
9 re-assign that person or go to the Circuit Court
10 judge to have the judge re-assign that person.

11 Q Okay. And who took it upon themselves to do
12 that?

13 A Well --

14 Q Was it Mr. Knight, would he do it or the
15 lawyers themselves would say --

16 A I think if the lawyers found out that there
17 was a conflict where they had two co-defendants it
18 would be the lawyer going and telling the client
19 that, "I've got two co-defendant so I have to keep
20 the first one that I have been assigned to and let
21 the secretary get another attorney."

22 Q Any other conflicts?

23 A I don't understand.

24 Q Is that the only time there would be a
25 conflict?

1 A If you can tell me what you mean? I'm just
2 going on --

3 Q Well, you mentioned conflicts. Is that the
4 only example of a conflict you can think of?

5 A That's the one most common.

6 Q Like if you have somebody involved in an
7 armed robbery and a month later you got the other
8 person involved in the armed robbery?

9 A Not necessarily. Not necessarily so.

10 Q Okay. Is there any other times when there
11 might be an assignment to you that would be a
12 conflict?

13 A It could be several other aspects but I guess
14 I need to know --

15 Q I don't mind asking. Were there ever any
16 conflicts with the Public Defenders representing
17 co-defendants?

18 A With the Public Defenders representing --

19 Q You mentioned that you -- I want to go back.
20 Your letter said Dorchester County Public Defender?

21 A Right. We actually -- how can I say this?
22 We actually did our own letterhead and it had
23 Dorchester County Public Defender which we put on
24 there and we put our name on it.

25 Q Mr. Dukes would have a letterhead that said

1 Dorchester County Public Defender?

2 A I would assume he would.

3 Q You would assume? Have you ever heard him
4 referred to as Chief Public Defender?

5 A He was the Chief Public Defender.

6 Q What did that mean?

7 A He was here longer than everybody else.

8 Q Okay. He had seniority?

9 A Yes.

10 Q All right. The reason why I ask is, I will
11 be as direct as I can on this, Mr. Tawain Gadson
12 was charged initially with shooting, at least
13 alternately being involved in the death or being
14 the shooter of Kandee Martin. If it helps I can
15 show you an indictment which is listed as
16 Plaintiff's Exhibit 1. See if that refreshes your
17 recollection?

18 A Okay.

19 Q And somewhere in that indictment they allege
20 that he was involved in the death, either some way
21 or as being a shooter, the shooter or a shooter of
22 Kandee Martin?

23 A Okay.

24 Q Is that right?

25 A That is what this indictment says.

1 Q All right. And, so, Mr. Dukes represented
2 Mr. Gadson?

3 A Okay.

4 Q And Mr. Dukes presumably would send out
5 letters that would say Dorchester County Public
6 Defender?

7 MR. WATERS: Your Honor, I object at this
8 point. He's asking her what Mr. Dukes would have
9 done.

10 THE COURT: Well, I will let you answer, Miss
11 Hardee-Thomas, if you know.

12 A I don't know. I don't know anything that
13 goes on in Mr. Dukes' office. We had a Chinese
14 wall, Mr. Duke's office was across the street, I
15 was all the way in Summerville.

16 THE COURT: When you say Chinese wall, is
17 that like a Great Wall of China?

18 THE WITNESS: No, sir. Meaning we may have
19 shared offices while we were here in St. George,
20 meaning in the courthouse, because we didn't have
21 any other place to go but I wouldn't know what he
22 was doing from day to day, tomorrow.

23 THE COURT: She doesn't know.

24 BY MR. BROWN:

25 Q My ultimate question is this. If Mr. Dukes

1 sent out -- and before I get to this question, you
2 represented Marion Bowman?

3 A I was appointed to represent him, yes.

4 Q And he was charged with shooting Kande
5 Martin?

6 A Correct.

7 Q At some point in time, just to set up the
8 question I'm getting to here, at some point in time
9 Mr. Gadson turned State's evidence against Mr.
10 Bowman and testified at trial, that Mr. Gadson
11 says, "I'm not the shooter, Mr. Bowman is the
12 shooter, I witnessed it"?

13 A Okay.

14 Q And you were representing Mr. Bowman and you
15 sent out documents from your office on letterhead
16 that said Dorchester County Public Defender in your
17 representation of Mr. Bowman?

18 A Right.

19 Q How would the general citizenry distinguish
20 or note the Chinese wall if Mr. Dukes represented
21 the accuser of Mr. Bowman under the auspices of the
22 Dorchester Public Defender when you represented Mr.
23 Bowman, the accused, under the auspices of the
24 Dorchester County Public Defender?

25 A We're two separate entities.

1 Q How did the public know that?

2 A Because we are two separate entities, you are
3 you and I'm me.

4 Q My letterhead says Jim Brown, it doesn't
5 state Dorchester County Public Defender..

6 A Mine said Dorchester County Public Defender,
7 Marva Hardee-Thomas.

8 Q What did Mr. Dukes' say?

9 A I'm assuming it said Dorchester County Public
10 Defender, Gene Dukes.

11 Q Let me, okay, let me just show you the
12 closest I can get, Plaintiff's 2, and there is a
13 reference in there to Gene Dukes of the Dorchester
14 County Public Defender. Does that letter reference
15 him as the Dorchester County Public Defender on the
16 address part?

17 A Okay. This is a letter by James Gadson,
18 writing to Mr. Gene Dukes and it also has
19 Dorchester County Detention, where he's from.

20 Q And you mentioned Gene Dukes is, quote,
21 Public Defender, Chief Public Defender?

22 A Yes.

23 Q For Dorchester County?

24 A He was.

25 Q Okay. And is it not fair to say that the

1 Chief Public Defender's client testified against
2 another Public Defender's client in this case,
3 whether or not there is a Chinese wall, that that
4 is factually true?

5 A Yes. We are two separate entities.

6 Q That wasn't my question.

7 A Okay.

8 Q It's factually true that the Chief Public
9 Defender of Dorchester County's client turned
10 State's evidence and put another Public Defender's
11 client on death row through his testimony. Is that
12 not true?

13 A I believe Mr. Marion Bowman was on trial for
14 murder, which they sought the death penalty for
15 him.

16 Q And Gene Dukes --

17 A And I represented Mr. Bowman.

18 Q In your capacity as Public Defender?

19 A Right.

20 Q And in his capacity as a Public Defender, the
21 Chief Public Defender's client turned State's
22 evidence against another Public Defender's client?

23 A Okay.

24 Q Okay.

25 A He represented Mr. Gadson, Mr. Tawain Gadson.

1 Q If somebody from the public came in and knew
2 that Gene Dukes, who may well, I don't know that he
3 was here with Mr. Gadson, assisting his client,
4 representing him, if they knew that Gene Dukes was
5 representing Tawain Gadson, possibly through a
6 newspaper article, his appearance here in court,
7 the public may say, well, gosh, one Public
8 Defender's client is testifying against another
9 Public Defender's client?

10 MR. WATERS: Your Honor, I object to that
11 question.

12 THE COURT: Yes, sir, Mr. Brown, that is you
13 testifying.

14 Q Well, let me ask you. What steps were taken
15 to eliminate the appearance that the Public
16 Defender had witnesses butted against or clients
17 pitted against Public Defender clients?

18 A My question is, I guess you would have to be
19 in the courthouse to know who was represented by
20 whom unless there is a news article that came out
21 saying that Tawain Gadson was represented by Gene
22 Dukes and listed him as a Public Defender, or Mr.
23 Marion Bowman was represented by Marva
24 Hardee-Thomas and she was a Public Defender. I
25 don't remember anything like that coming out.

1 Q Would there, did you have, open ended
2 question, what concerns did you possibly have about
3 any conflicts that were raised by the more senior
4 Public Defender's witness testifying against your
5 witness when both of you all are being paid and
6 assigned the cases by the same person and paid by
7 the same person who had the ability to, I assume,
8 hire, fire, promote, demote?

9 A Well, okay, all right.

10 Q I'll break that down. What concerns did you
11 have, is the question?

12 A I had no concerns because we were separate
13 entities. Even though Gene Dukes was a Public
14 Defender, he was listed as Chief Public Defender
15 because of his seniority.

16 Q So, he wasn't your boss?

17 A No, he was not.

18 Q But you all had a common boss?

19 A Yes.

20 Q And it is not just a boss in the sense that
21 you may get a check on this case from the State of
22 South Carolina ultimately from the Comptroller
23 General's office and likewise Mr. Waters may get a
24 check that somehow or another comes from the
25 State's general treasury, filtered through

1 whichever office, it is more than that. I mean,
2 the person who can hire and fire me on the case is
3 not the same one that can hire and fire Mr. Waters,
4 is it? I mean, there is a difference here?

5 A Correct. Mr. Troy Knight controlled the
6 Public Defender's office but he didn't control what
7 we did with our cases.

8 Q But he could have?

9 A No, he couldn't have.

10 Q He could not have called you up and said,
11 "I'm firing you"?

12 A He could fire you and that is what --

13 THE COURT: Mr. Knight, who obviously has
14 passed away since then?

15 THE WITNESS: Right.

16 THE COURT: So has Mr. Dukes. Mr. Knight, he
17 was head of the Board?

18 THE WITNESS: Yes.

19 BY MR. BROWN:

20 Q And I know a lot of times there is a Public
21 Defender office where the head of the Board
22 actually hires the Public Defender who in turn
23 hires and fires Public Defenders?

24 A Will, he had that, Mr. Knight had that
25 capacity but he never intervened with regard to our

1 cases.

2 Q And one thing I want to get at, it is a
3 little different than other Public Defender Boards
4 where the Chief Public Defender hires one person
5 and that person does all the hiring?

6 A I don't know how other Public Defenders run.
7 I know that we are independent contractors, we are
8 hired to do a job. Whatever cases come in are by
9 chance, by, you know, circumstance.

10 Q Were there ever assignments outside the,
11 quote, Public Defender office?

12 A When you say assignments, from whom?

13 Q From Miss Rogers, I think was her name. By
14 the way, can you spell that?

15 A Kathy Rogers.

16 Q With a C or a K?

17 A K-a-t-h-y. This is on the --

18 Q It's on that sheet?

19 A The assignment sheet. She put KR, K-a-t-h-y,
20 R-o-g-e-r-s.

21 Q That is who assigned this case?

22 A Yes.

23 Q I assume if we pull the assignment sheet out
24 of the file which is part of this record it is
25 going to have KR on it?

1 A It should.

2 Q And then I'm assuming, again, if we pulled
3 Mr. Gadson's file and looked through it, which
4 actually I've got a copy of right here, I'm
5 assuming if we look through that file we're
6 actually going to see as well an assignment sheet
7 to Mr. Dukes that may say, have KR on it as well?

8 A It should unless both people had another
9 attorney and they just got an assignment in front
10 of the judge. If that's the case, then the Clerk
11 would do a sheet and then the Judge would sign
12 that.

13 Q I'm going to show you what is marked as
14 Plaintiff's Exhibit 77.

15 MR. BROWN: I'm going to see if we can move
16 it into evidence, the document from Mr. Gadson's
17 file.

18 MR. WATERS: No objection, Your Honor.

19 THE COURT: The other documents you're
20 showing her, are they in evidence?

21 MR. BROWN: Yes, sir.

22 THE COURT: But you have them in your
23 possession?

24 MR. BROWN: They were in this stack, I pulled
25 them out.

1 THE COURT: All right. So that is number
2 what?

3 THE WITNESS: 77.

4 THE COURT: 77 without objection is in
5 evidence.

6 (Public Defender appointment records marked
7 and received in evidence as Plaintiff's
8 Exhibit Number 77).

9 BY MR. BROWN:

10 Q And Mr. Gadson's record, Plaintiff's 77, his
11 appointment record indicates that Mr. Dukes was
12 appointed to represent him?

13 A By Kathy Rogers.

14 Q By Kathy Rogers?

15 A Yes.

16 Q For murder? For murder on this case?

17 A I can't --

18 Q For murder, for the charge of murder?

19 A Yes, this is what the assignment says.

20 Q Okay. And you weren't hired in your private
21 practice to represent Marion Bowman?

22 A I couldn't. That would be a violation of my
23 Public Defender contract.

24 Q Okay.

25 A And I don't do private practice as a criminal

1 defense anyway.

2 Q Okay, thank you. And Mr. Gadson wrote
3 statements against Mr. Bowman saying he did it?

4 A Okay.

5 Q I mean, at some point he did say he did it?
6 In fact he goes back and forth, he says Mr. Bowman
7 killed Kandee Martin.

8 A Okay.

9 Q Okay. How does Kathy Rogers know when a case
10 is too conflicted to keep within the Public
11 Defender umbrella?

12 A She doesn't. What she does is, because she
13 doesn't have any law experience, she is just a
14 regular person that goes to the jail, she's
15 assigned to talk to them to find out if they
16 qualify for the Public Defender's office, usually
17 the people in the jail do qualify, and then she
18 makes the assignment. She could have possibly
19 assigned Mr. Gadson and Mr. Marion Bowman to the
20 same person. But in talking to them she's finding
21 out, she's savy enough to ask if they are
22 co-defendant or involved in the same case or if
23 they tell her something a little about the case she
24 can differentiate they shouldn't be assigned to the
25 same person. She could talk to Mr. Gadson first

1 and then talk to someone else and then talk to Mr.

2 Marion Bowman and assign them to the same person.

3 Q And when she realizes they are co-defendants,
4 then she would assign the other Public Defender?

5 A If she doesn't realize it, then it's up to
6 the attorney to go back to her and say, "We have a
7 conflict," and sometimes she doesn't even get
8 involved with that, we have to go before the judge,
9 the Circuit Court judge.

10 THE COURT: Let me ask you about, is there
11 ever a conflict or situation where another lawyer
12 not within the Public Defender office was assigned
13 to the case?

14 A Sure.

15 Q What are those circumstances?

16 A Whenever there are several co-defendants and
17 we only have three Public Defenders, or the Public
18 Defender, you know, like John Loy may have
19 represented someone and he's conflicted out and so
20 therefore you've got two adult Public Defenders,
21 Gene Dukes and myself, and then they bring in
22 private bar to represent the co-defendants, to get
23 assigned.

24 Q Basically if you've got three Public
25 Defenders and you had more than three conflicting

1 positions in a case --

2 A Co-defendants.

3 Q -- then you would have, each Public Defender
4 would still take one and then the other one would
5 go out?

6 A Right.

7 Q Okay. Was there ever any concern -- let me
8 back up. You mentioned sharing offices. What
9 offices did you share?

10 A When we first started in 2001, right outside
11 this courthouse, I mean courtroom door there is a
12 media center which used to be the office of the
13 Public Defender and we would just go and all sit in
14 there, all three of us, and talk to our clients.
15 Now I don't know how we did it but we did. Now we
16 have an office farther in the back where they have,
17 you know, room where you can talk to your client.

18 Q Let me ask you, would you all talk at the
19 same time?

20 A We could, we could whisper.

21 Q Okay. Is there -- this is one room?

22 A One room.

23 Q And just four walls?

24 A I think it is probably fourteen feet by, you
25 know, eight or six.

1 Q There are no dividers?

2 A No dividers except for you and the client and
3 talking quietly.

4 Q What investigative staff was employed within
5 the Public Defender office?

6 A I don't believe there were any at that time.

7 Q None?

8 A None.

9 Q Okay.

10 A You would have to hire private investigators.

11 Q So, you actually had to petition on every
12 case you needed something done?

13 A That's correct.

14 Q Okay. Obviously when this became a capital
15 case, then the mechanism was more fully developed
16 in our statutes for that?

17 A Correct.

18 Q All right. But before that time did you, was
19 there protocol, did you go to, gosh --

20 A When you say protocol?

21 Q Did you go to Troy Knight and say, "I want,"
22 you know, "I'm going to be a good lawyer, run this
23 by you because I'm beginning to turn around and ask
24 the Court for money"?

25 A We would never go to Mr. Knight for that.

1 You would go to a judge and ask the judge, after
2 doing an order, and ask for an investigator or
3 anyone that you needed.

4 Q Was there ever any supervision from Mr.
5 Knight?

6 A No.

7 Q Just a check?

8 A That's it.

9 MR. BROWN: Beg the Court's indulgence?

10 Q Now, do you recall a gentleman named Ricky
11 Davis?

12 A Yes, I do now.

13 Q Okay. All right. And there are some
14 documents in evidence, I think you have been handed
15 one item?

16 A An assignment.

17 Q An assignment. So, you were Ricky Davis'
18 lawyer?

19 A Yes.

20 Q Okay. Now, if you knew Ricky Davis, if you
21 knew that one of those two charges listed on there
22 was still subject to being reviewed, what would be
23 your position about your representation of Mr.
24 Davis?

25 A I still am obligated to him.

1 Q Okay. So, if the charge is dismissed with
2 leave to restore and the State said, "We're going
3 to bring this charge back, the witness decided to
4 come back," or, "We have got new evidence," or
5 whatever it might be to bring it back, then you
6 would consider yourself to be Ricky Davis' lawyer?

7 A Not -- how do I say this? How do I say this?
8 At this point no.

9 Q Would you -- when did that change?

10 THE COURT: Change? What do you mean,
11 change?

12 MR. BROWN: When did she, her first answer,
13 she thought she would be obligated to him, which
14 I'm exploring that answer. Now, she never said it
15 changed but I'm assuming that at some point she
16 felt like she was, would have been his lawyer if
17 they revived this charge.

18 THE COURT: Are you asking her to give an
19 opinion on ethics involvement here as an expert or
20 what? If your question is if you're representing a
21 client as a Public Defender attorney and the
22 charges are dismissed on the client do you continue
23 to represent the client?

24 MR. BROWN: With leave to restore. My
25 question is if the charge came back up.

1 THE COURT: I mean, almost any of them could
2 restore. They could always go back to the grand
3 jury. If they didn't say leave to restore they
4 could go back to the grand jury.

5 BY MR. BROWN:

6 Q I'm asking this differently. If Mr. Davis
7 pled to one armed robbery charge in exchange for
8 dismissal of another charge that charge could be
9 brought back, the dismissal, short of that plea
10 agreement being busted.

11 THE COURT: All right.

12 A Okay.

13 Q But if the charge is dismissed with leave to
14 restore they can bring it back?

15 A If they want to.

16 Q Okay. And if you were assigned to represent
17 Ricky Davis on a charge that's been dismissed with
18 leave to restore and they decided to bring it back
19 against him --

20 A Technically they would assign him to someone
21 else, depending on the time period that it would
22 take them to bring that charge back.

23 Q What if they brought it back just within a
24 few months?

25 A They could assign it to someone else, too.

1 Q And why wouldn't it just go back in your
2 office?

3 A You see, that's the thing. I'm not in charge
4 of the assignment. The coordinator is, so the
5 coordinator would be given this information and if
6 she doesn't remember, she has no way of looking to
7 see whether or not, you know, this person, who they
8 were represented by, then they would assign it to
9 the next person on rotation.

10 Q Even if there is already a letter in the file
11 staying you're his lawyer on it?

12 A Could, yes, they could do that.

13 Q But you could also get it back?

14 A I could but --

15 Q Okay. And let's talk about it. But you
16 still owed him obligations, too, don't you?

17 A That's the theoretical part.

18 Q You actually have to hold his confidence a
19 secret?

20 A Exactly.

21 Q So, until, not the death of Ricky Davis but
22 the death of the attorney, those are privileged
23 matters?

24 A Yes.

25 Q I think that was one of the Whitewater cases,

1 the U.S. Supreme Court talked about the
2 attorney-client privileges survives the death of
3 the client.

4 A That is what I was thinking about until you
5 got onto something else and then I said no, they
6 assigned cases to other public defenders.

7 Q Do you recall Mr. Davis going to court
8 roughly October of 2001?

9 A We had a trial during that time.

10 Q And he got convicted?

11 A That's correct.

12 Q And he went to prison?

13 A That's correct.

14 Q Did you ever talk to him after that?

15 A Not that I remember.

16 Q Okay. And do you recall sending him any
17 documentation noting that his other charge was
18 dismissed with leave to restore?

19 A No, I don't remember doing that.

20 Q Did you ever know what happened to the other
21 charge?

22 A No.

23 Q Okay. So, in May of 2002 Mr. Bowman goes to
24 trial?

25 A Correct.

1 Q And what explanation or counsel did you
2 provide Mr. Bowman about your dual representation
3 of him and Mr. Davis?

4 MR. WATERS: Again, Your Honor, I object to
5 that question inasmuch as it establishes that she's
6 got dual representation, which I think is a
7 disputed issue in this case.

8 MR. BROWN: I'll rephrase it.

9 THE COURT: Let me make sure. As for as I
10 recall, we're talking about the charges against Mr.
11 Davis that were unrelated to this case, are we not?

12 MR. BROWN: That's correct.

13 THE COURT: The ones he ended up suing the
14 county over?

15 MR. BROWN: They are right there, referenced
16 on that appointment sheet, Your Honor.

17 THE COURT: I know, but those are the ones he
18 ended up getting in a lawsuit or something going
19 on?

20 MR. WATERS: That is Hiram Johnson. But he
21 did have armed robbery charges that were disposed
22 of in October, 2001.

23 MR. BROWN: I object. Now he's giving
24 information this witness has no knowledge of. I
25 just asked that.

1 THE COURT: Well, what charges are we talking
2 about with Ricky Davis?

3 MR. BROWN: The charges on that appointment
4 list.

5 THE COURT: What are the charges there?

6 MR. BROWN: Two counts of armed robbery,
7 different instances.

8 THE COURT: In any event they have nothing to
9 do, they are not related to this case?

10 MR. BROWN: That is correct.

11 THE COURT: Those charges were dismissed with
12 leave to restore?

13 MR. BROWN: Well, Your Honor, that has not
14 been established.

15 THE COURT: I thought you said they were.

16 MR. BROWN: I asked if they had been.

17 THE COURT: Okay.

18 MR. BROWN: In a theoretical sense because
19 now we've got a witness who I'm trying to find out
20 some information about that.

21 THE COURT: The question is does she have a
22 duty of confidentiality to Ricky Davis about that
23 armed robbery charge?

24 MR. BROWN: She answered yes on that.

25 THE COURT: Well, that is because it's true.

1 MR. BROWN: I agree.

2 THE COURT: What's that got to do with this?

3 MR. BROWN: My question was what did she
4 advise Mr. Bowman at the time that his trial came
5 up, regarding her allegiance to Mr. Davis?

6 THE COURT: About something that had nothing
7 to do with the case of Mr. Bowman?

8 MR. BROWN: Did she tell him about her
9 allegiance to Mr. Davis.

10 THE WITNESS: I do not remember talking to
11 him about anything regarding Ricky Davis.

12 THE COURT: Okay.

13 THE WITNESS: Somebody asked me, I think this
14 morning somebody asked me that. I don't --

15 BY MR. BROWN:

16 Q Who asked you this morning?

17 A I got a call from the assistant, the Attorney
18 General's office.

19 Q One of these two fellows?

20 A It wasn't him. He asked me did I represent
21 Ricky Davis. I said I don't remember Ricky Davis
22 at all.

23 MR. WATERS: I mean, Your Honor, Mr. Simon
24 called Miss Hardee-Thomas this morning just to do
25 some basic discussion or questioning, investigation

1 in preparation for her testimony today. That would
2 be the extent of it.

3 THE COURT: I'm not sure anybody is alleging
4 anything else.

5 MR. WATERS: Okay. I was getting a lot of
6 queer looks over there. That is why I stood up to
7 say that.

8 THE COURT: There has been no order you
9 couldn't talk to witnesses, has there?

10 MR. WATERS: No, sir. In fact I think it was
11 me said that the only one I can't talk to right now
12 is Norb because he's still on the stand.

13 THE COURT: Right, he's still on the stand.

14 MR. BROWN: I thought we can't talk, because
15 of sequestration, about testimony that's come up.
16 There is a sequestration order.

17 THE COURT: Has she been discussing testimony
18 that's come up?

19 MR. BROWN: Has he been discussing testimony
20 from another witness with her?

21 MR. WATERS: First of all, Your Honor, as
22 Your Honor recalls, we were specifically excluded
23 from that sequestration order because of their late
24 amendment and allowed to contact Mr. Bailey and
25 trial counsel because also they obtained the file.

1 Your Honor may recall that.

2 But regardless of that --

3 THE COURT: I recall.

4 MR. WATERS: I don't believe Mr. Simon, I
5 know I have not discussed any specific testimony
6 with any of these individuals, even though I think
7 we would be in our rights to do so.

8 THE COURT: Let's proceed on.

9 MR. BROWN: Thank you.

10 BY MR. BROWN:

11 Q And just to make sure I'm clear on this, you
12 don't recall giving any advice to Mr. Bowman about
13 any loyalty that you owed to Ricky Davis?

14 A I don't remember even discussing Ricky Davis.
15 Why would I have discussed Ricky or anybody else
16 with Mr. Bowman?

17 Q Excellent, okay. Now we got that clear.

18 Let me show you what has been marked and
19 entered as Plaintiff's Exhibit 11. Do you recall
20 that document?

21 A One second. Okay, I don't recall the
22 document but this is my writing at the bottom.

23 Q Okay. You're talking about the notary part?

24 A The notary part is my writing.

25 Q Okay.

1 A Only the notary part is my writing.

2 Q And the intent on that notary part of the
3 writing was you would have taken a statement from
4 Mr. Davis?

5 A I don't know if I would have taken the
6 statement. I know this sworn to before, this is my
7 writing.

8 Q If Mr. Davis -- you wouldn't dispute if it
9 Mr. Davis, if you heard Mr. Davis say the top part
10 was his writing?

11 A I don't know if it's his writing or not. It
12 just says Ricky Davis.

13 Q You don't dispute the top part may have been
14 his writing?

15 A I don't know. I don't dispute anything. I
16 don't know.

17 Q Okay. So, you represented Ricky Davis and
18 you notarized a document to which Ricky Davis says
19 Tawain Gadson confessed to being the shooter of
20 Kandee Martin?

21 A It wasn't completely notarized, it wasn't
22 filled in. This is my writing, sworn to before
23 this blank date of, blank, 2001, a line for the
24 notary and then it says notary expires, and it
25 would have been, if I left it like this it would

1 have been for somebody to witness but it was never
2 witnessed

3 Q Okay. But there is no question that, it is
4 obviously not the original but on Plaintiff's 11
5 there is some writing. The writing says, "I Ricky
6 Davis heard Tawain Gadson confess to killing the
7 girl," and set up Black, Black being Marion Bowman.
8 Do you recall that evidence that Tawain Gadson was
9 the shooter?

10 A I don't recall. I don't recall. I'm just
11 seeing this for the first time.

12 Q Do you recall your advice to Mr. Bowman about
13 the presentation of Mr. Davis as a witness to
14 defend against the charge that Marion Bowman should
15 go to death because he killed and shot Kande
16 Martin, instead of Tawain Gadson who served less
17 than five years in prison?

18 A No, I do not.

19 Q Looking in retrospect, does that sound
20 important?

21 A No. Something like this reminds me of going
22 to the jail and being given a document and waiting
23 on someone like a jailer to come and witness it,
24 because how would I have gotten something like
25 this?

1 Q Okay. Just hold tight with that document, if
2 you don't mind.

3 Now, how about if Sam from the Solicitor's
4 office told you that he interviewed Ricky Davis and
5 Ricky Davis recanted a confession from Tawain
6 Gadson of killing the girl Marion Bowman is accused
7 of killing? Is that significant?

8 MR. WATERS: I object to that question.
9 There has been no evidence that Sam told her
10 anything.

11 THE COURT: What is this about?

12 Q Let's back up. Would you take a look at
13 Plaintiff's 67?

14 THE COURT: Let us know when you finish
15 looking at it.

16 A I'm finished.

17 THE COURT: Okay.

18 Q Who is Sam?

19 A Who was Sam? Sam Richardson. I mean --

20 MR. WATERS: Your Honor, I object.

21 THE COURT: He asked her who is Sam.

22 Do you know who Sam is on this document?

23 A No, unless it is Sam Richardson, he's a
24 Solicitor investigator.

25 BY MR. BROWN:

1 Q Okay. Have you ever seen the item entered as
2 67?

3 A I may have but I don't remember.

4 Q Do you have your file with you?

5 A Yes.

6 Q Would you like to look for that document at
7 the appropriate time?

8 A I can look but it will take me how long?

9 Q Well, this is very important.

10 A It is important but --

11 THE COURT: Did you give her notice you
12 wanted her to see if she could find the document
13 before she got here today?

14 Q Well -- I can't tell you what Mr. Cummings
15 said.

16 THE COURT: Did you give her notice? She is
17 going to spend a lot of time looking for this
18 document, you should have asked her before she got
19 here.

20 MR. BROWN: I wish she had stated she had
21 never seen it before, then we wouldn't have to ask
22 her if it's in her file. She indicated --

23 THE COURT: What is your question?

24 MR. BROWN: My question was has she seen it
25 before, she said, "I may have."

1 THE COURT: Right. She doesn't know.

2 MR. BROWN: That is big, because we plan on
3 raising a --

4 THE COURT: After we finish her testimony
5 could she then look later on?

6 MR. BROWN: Yes, at the appropriate time.

7 BY MR. BROWN:

8 Q All right. Do you find the allegation that
9 Tawain Gadson confessed to the killing, that he
10 later stood in this courtroom and blamed it on
11 someone else, do you find that significant?

12 A It is what he indicated.

13 Q Do you find that significant?

14 A With regard to Marion Bowman it is
15 significant.

16 Q Okay. If it doesn't cause a juror to
17 hesitate to convict him it might cause them to
18 hesitate to kill him?

19 MR. WATERS: Your Honor, I object to that.

20 A I don't know.

21 THE COURT: I sustain that objection.

22 Q How did that information get to the jury?

23 A I can't tell you, I'm sorry.

24 Q What would be the best way to put that
25 information before a jury?

1 A A witness.

2 Q Which one?

3 A The witness who stated it to Sam Richardson,
4 if he took the information.

5 Q And that would be Ricky Davis?

6 A If he's the one that said it.

7 Q And that's what that indicates?

8 THE COURT: You're talking about Exhibit 67,
9 an unsigned document?

10 MR. BROWN: Yes, sir.

11 THE COURT: I mean, I will hand you the
12 document. I'm not sure, what is the question?

13 BY MR. BROWN:

14 Q My question is, I said how would you present
15 that evidence, you said through the person that Sam
16 interviewed.

17 A The person who indicated it to Sam.

18 Q And that document indicates who indicated it
19 to Sam?

20 MR. WATERS: Your Honor, I would object to
21 that. She doesn't recognize the document, he is
22 essentially trying to back door in --

23 THE COURT: The document is the document.

24 MR. BROWN: I understand that. I'm going to
25 make sure there is not a misunderstanding or I

1 don't know who --

2 THE COURT: But she says she cannot tell you
3 if she has ever seen the document or not.

4 MR. BROWN: Let me put it in an ineffective
5 assistance of counsel posture.

6 BY MR. BROWN:.

7 Q If you had seen that document who would you
8 want to speak to next?

9 A The person who wrote it.

10 Q Who?

11 A Or stated it.

12 Q Who? If you called the private investigator
13 after seeing that document, who would you ask to
14 interview, what name would you give them?

15 A Sam Richardson first because he was the one
16 that created it.

17 THE COURT: Are you sure Sam Richardson
18 created it?

19 A It says conducted by Sam at Leiber
20 Correctional Institute. I don't know who else Sam
21 would be.

22 Q But it might be hearsay from Sam, wouldn't
23 it?

24 A He is the one that wrote it.

25 THE COURT: You mean someone named Sam?

1 A Yes, someone named Sam.

2 Q And who is one step closer to the source?

3 A The person who gave him the information.

4 Q Who is that?

5 A I'm assuming it's Ricky Davis.

6 Q Okay. After reading that document would you

7 assume Ricky Davis would be the one to talk to?

8 A Sam would be the person who wrote it.

9 Q And who else?

10 A The person who gave him the information,

11 Ricky Davis.

12 Q Okay. And just to make it clear, Ricky Davis

13 did not testify. Why?

14 A I don't know.

15 Q Do you have any strategic reason for not

16 putting Ricky Davis up to testify that he heard

17 Tawain Gadson confess to shooting Kandee Martin?

18 A I don't. That would be something for the

19 head Public Defender, not Public Defender, head

20 person in the death penalty case on the defense

21 side, Norbert Cummings.

22 Q Now, this is where I think I do get to ask

23 this information. And this is not a case where you

24 held that memo from Sam but didn't tell Norb about

25 it?

1 A Sir, I don't remember this.

2 Q Okay. So, it's not a matter you knew about
3 that Norbert didn't?

4 A I don't know what he knew. You would have to
5 ask him.

6 Q I have asked him.

7 A Okay.

8 Q But I don't want to tell you what the answer
9 is. I'm going to try to find out, did you hide
10 that memo from Norbert Cummings?

11 A Sir, I have --

12 MR. WATERS: Your Honor, asked and answered.

13 MR. BROWN: She has not answered.

14 THE COURT: Let's let her answer. Did you
15 hide this document from Norbert Cummings?

16 THE WITNESS: No. I would have no reason to.

17 BY MR. BROWN:

18 Q So, Norbert made the decision about putting
19 Ricky Davis up?

20 A I guess, because I didn't make the decision.

21 Q And it wasn't something that Norbert made
22 while being shielded from item 67?

23 A I don't know, sir. That is something --

24 THE COURT: Mr. Brown, she has already said
25 she didn't hide that from Mr. Cummings. What else

1 can she say other than speculating Norbert
2 Cummings' decision process? That would be
3 speculation

4 Q Let's make clear on this. Back to Ricky
5 Davis. You held some, at the time that you
6 represented Marion Bowman, even if the charges
7 against Mr. Davis were dismissed with leave to
8 restore, you still had some confidence or privilege
9 with Mr. Davis?

10 A Correct.

11 Q That you couldn't share with your other
12 client Mr. Bowman?

13 A I wouldn't have any reason to do that.

14 Q Why?

15 A Because why would I talk to Mr. Bowman about
16 Mr. Ricky Davis?

17 Q Mr. Davis was an important witness?

18 A That is if I had this information.

19 Q If you knew that?

20 A Yes. But even so, why would I do that?

21 Q Well, here is my question. Did you ask, did
22 you ask for a waiver of any conflict, did you ask
23 Mr. Bowman to waive any conflict of interest?

24 A I didn't do that. I didn't see any reason to
25 do that.

1 Q All right. Let me just ask you a little bit
2 about what you knew about the mental health status
3 of Tawain Gadson. Do you recall anything about
4 knowing -- the reason why I ask this question is
5 that you were involved with Marion Bowman's case
6 and there was an order for a competency evaluation?

7 A Correct.

8 Q Some of that predated Norbert Cummings'
9 involvement?

10 A It did..

11 Q Okay. What did you know about Tawain
12 Gadson's evaluation?

13 A Nothing.

14 Q Okay. So, would it be important if you knew
15 he heard a voice or blacked out or had memory
16 problems?

17 A I believe -- that had to come up in trial or
18 something like that. I don't believe it.

19 Q Okay. Do you think it should have?

20 A Well, I don't remember anything like that.

21 Q How would you characterize Tawain Gadson in
22 conjunction with the State's case in the first
23 phase of the trial?

24 A I couldn't tell you, sir. I could look back
25 at the transcript, that is the only thing I can

1 tell you, but if I knew actually what to pinpoint
2 on I probably would have an answer but this is --

3 Q Is it fair to say he's the only person
4 alleging he witnessed the crime?

5 A I couldn't tell you.

6 Q You can't recall?

7 A No. If --

8 Q Tell me about Travis Felder.

9 A What do you want me to tell you? I don't
10 know what to tell you.

11 Q Do you know who Travis Felder is?

12 A I know he was involved in this particular
13 case.

14 Q Do you recall a videotape where he purchased
15 some gasoline from E-Z Horizon Mart?

16 A I remember a videotape.

17 Q Did you look at that videotape?

18 A Yes, I remember looking at it.

19 Q When?

20 A Excuse me?

21 Q When in conjunction with the trial?

22 A Outside of, you know, with Norbert Cummings.

23 Q You watched the video with Norbert?

24 A Yes.

25 Q Who did you all decide was responsible for

1 purchasing the gasoline used to burn Kandee
2 Martin's car?

3 A What do you mean? We didn't sit down to
4 talk about who, didn't come to any decision.

5 Q Okay, let me back up. What was your theory
6 of defense? That is my second question down the
7 line, I skipped all the way past that one. You
8 weren't just saying there is reasonable doubt, you
9 are saying there is a dead girl but we can tell you
10 it's not Marion Bowman, it was John Smith or Bubba
11 Jones or you have some theory to make the jury feel
12 they are not just fancying letting some guy go
13 based on another theory, right?

14 A You need to ask Norbert Cummings with regard
15 to the defense theory at this point because -- are
16 you talking about a picture at a gas station and
17 then you're saying who was getting the gas and then
18 you're saying at that point tell me what your
19 theory of defense was? I believe you definitely
20 would have to go to Norbert at that point because
21 certain things changed at certain times and he
22 would be better suited with regard to that.

23 Q Is there somewhere that you all had a little
24 flow chart saying this is our theory, these are the
25 good facts and these are the bad facts?

1 A No, sir, I do not remember that.

2 Q Did you all ever have that, let's just
3 brainstorm what helps us and what hurts us?

4 A No, we never got into that one.

5 Q What kind of strategy meetings did you all
6 have?

7 A Basically meetings to go over witnesses, the
8 State's witnesses, who would be better suited to
9 testify, but the strategy theories would definitely
10 come with Mr. Cummings.

11 Q At anytime from the time you started
12 representing Mr. Bowman, until today, you may have
13 more than one answer to this, who do you think shot
14 Kandee Martin?

15 THE COURT: Sustained.

16 MR. WATERS: Your Honor --

17 THE COURT: Sustained. I sustain the
18 objection.

19 Q Who had the opportunity to shoot Kandee
20 Martin, from your investigation?

21 A Who had the opportunity?

22 Q Yes.

23 A You had several people involved.

24 Q Who?

25 A The people you mentioned, Mr. Marion Bowman,

1 Mr. Gadson, it could be other people that weren't
2 even mentioned. Those are the two I named.

3 Q And do you remember an officer, I want to say
4 his name was Van Doran, excuse me, Coker, Detective
5 Coker?

6 A Dorchester County Sheriff's office.

7 Q Is it significant he swore under oath that
8 the shooting was done by Tawain Gadson? Is that
9 significant?

10 A It's got to be proven.

11 Q How is it not proven? Coker swears it's
12 Gadson. Is that not proven?

13 A It's in this affidavit.

14 Q Okay. That's a statement against the State,
15 isn't it?

16 A Yes.

17 Q Because they made it, and that's significant
18 enough to bring that evidence into the trial?

19 A Correct.

20 Q So, you would want to say Detective Coker,
21 somewhere or another you want to ask him that?

22 A Me?

23 Q Any lawyer for Mr. Bowman.

24 MR. WATERS: Your Honor, briefly could you
25 please ask counsel to specify what she has? I

1 don't think it has been stated.

2 MR. BROWN: I'm sorry, at the bottom.

3 THE COURT: Exhibit 4. What's the question?

4 This is the affidavit, the arrest warrant that

5 Detective Coker I think went and signed.

6 MR. BROWN: My first question was whether it

7 was significant that the detective swore that

8 Gadson did the shooting and the answer was yes, and

9 I said is that a statement against interest of the

10 State, and the answer was yes, I said wouldn't a

11 lawyer want to put that before the jury? I think

12 the answer was what lawyer and I said in response a

13 lawyer for Mr. Bowman.

14 THE COURT: The lawyer saying that there is

15 probable cause to believe?

16 MR. BROWN: No. Detective Coker swore there

17 was probable cause.

18 THE COURT: Okay. What's your question to

19 her, "Do you think it's important to show the

20 jury?"

21 MR. BROWN: That was my question, she said,

22 who, I said a lawyer for Mr. Gadson.

23 THE WITNESS: That would be a question for

24 lead counsel to answer, I'm saying Mr. Cummings at

25 the time.

1 BY MR. BROWN:

2 Q Fair enough, thank you. And how about the
3 fact that Tawain Gadson had a plea agreement
4 whereby he agreed to cooperate with the State or be
5 subject to the death penalty?

6 THE COURT: What does that mean, how about --

7 A How am I supposed to answer that?

8 Q Truthfully.

9 THE COURT: I know, but what's the question?

10 THE WITNESS: What's the question?

11 THE COURT: How about? I don't understand
12 what how about means.

13 BY MR. BROWN:

14 Q What significance do you attribute to
15 Plaintiff's 3 in relationship to your
16 representation of Mr. Bowman?

17 A Okay, Mr. Gadson had an agreement. Okay, it
18 says the murder charge, seeks the death penalty, it
19 says if he doesn't cooperate.

20 Q Okay. Is that significant, that he is a
21 little biased to be friends or curry favor with the
22 State?

23 A Sir, that would be up to him. This is the
24 thing. I mean, he got into an agreement and they
25 said if he doesn't cooperate, then he could be

1 facing these charges along with the death penalty
2 against him. That is something for him to decide.
3 Q No, no, no. I mean where the jury is
4 deciding Mr. Bowman's guilt, do you find that
5 significant to their decision?
6 A That if Mr. Gadson --
7 Q Doesn't --
8 A -- doesn't cooperate?
9 Q Doesn't cooperate, it uses that phrase,
10 cooperate?
11 A It could be. You understand I'm not in the
12 jury's --
13 Q It could be important, couldn't it?
14 A Could, but I'm not the jury.
15 Q Have you ever seen that document before?
16 A I believe I have.
17 Q All right. Now, when you saw that document,
18 what could Tawain Gadson get death for if he wasn't
19 the shooter? What would he have been doing wrong
20 back in February, 2001, to receive the death
21 penalty if he says in trial, "I didn't do one
22 thing, I was sitting there and all of a sudden
23 these shots came out," how is that, how does that
24 jive?
25 A Mr. Gadson had a murder charge against him.

1 Q The same bias, how can he say that, "I'm only
2 a witness," and the State says, "We can still kill
3 you if you don't cooperate with us"?

4 A They could try to. He had a murder charge
5 against him.

6 Q Right. But what is it that he did that they
7 could try him for?

8 A Murder.

9 THE COURT: Aren't you doing your argument to
10 me, really?

11 MR. BROWN: Well, no, because I still -- Your
12 Honor, here is the deal. I still don't understand
13 what the lawyers thought Mr. Gadson did, and I'm
14 going to ask --

15 THE COURT: Ask her what she thought.

16 BY MR. BROWN:

17 Q Today what did you think he did that would
18 make him probably guilty of murder?

19 A This.

20 Q How, let's boil down to the actual action.
21 What act did he take?

22 A Sir, all I know is that he helped with the
23 murder or participated in the muder.

24 Q How?

25 A I couldn't tell you.

1 Q Because you do know in the trial he says, "I
2 didn't have anything to do with it," and that was,
3 that stood before the jury uncontradicted?

4 A I couldn't tell you. All I know --

5 Q Wouldn't the jury want to know if he said, "I
6 didn't do anything," but you all knew he actually
7 held her arms back while she was shot, or
8 something, isn't that significant?

9 MR. WATERS: Your Honor, I object to that
10 question. There has been no testimony to that
11 effect. I think that we are hearing a lot of
12 argument. If he wants to ask her does she think
13 that's significant and is that something that she
14 would impeach with, or just get to the heart of the
15 question rather than going about it in this round
16 about way.

17 Q That is exactly the question. Is it not
18 significant, I'm going to say this, if he did
19 nothing it is not significant that the State
20 threatens the man with death for something he
21 didn't do? Is that not a bias the jury should find
22 out about?

23 A It could be.

24 Q Okay. And do you know why, is there any
25 strategic reason that that plea agreement entered

1 as Exhibit 3 was not exposed to the jury?

2 A You would have to ask Mr. Cummings.

3 Q Fair enough. Who is Wayne Mood?

4 A I don't know at this point.

5 Q Would it be significant if a gentleman named
6 Wayne Mood overheard Tawain Gadson say he killed
7 Kandee Martin?

8 MR. WATERS: Your Honor, at this point I
9 object. I have been making the relevance objection
10 to the grounds that have been raised throughout
11 this trial. I don't want to waive that.

12 THE COURT: When you say if, if, if,
13 obviously there are certain things that I guess go
14 without saying sometimes. I mean, it would be
15 significant if ten people said that, too, Wayne
16 Mood, too. Why don't you ask her if she knows
17 anything about it, does she know this person?

18 MR. BROWN: Your Honor, with all due respect,
19 we have no theory of defense, so I don't know how
20 to work in whether this --

21 THE COURT: Just ask her questions.

22 MR. BROWN: Okay.

23 BY MR. BROWN:

24 Q Here is my question. Is it significant that
25 Wayne Mood heard Tawain Gadson confess to the

1 killing?

2 A I don't remember Wayne Mood.

3 THE COURT: She doesn't remember.

4 Q Let me ask another question. Is it
5 significant that Channel 10 News heard Tawain
6 Gadson confess to this killing?

7 MR. WATERS: Your Honor, I object to that.

8 A I don't know.

9 THE COURT: She doesn't know.

10 Q Would it be significant?

11 THE COURT: She said she didn't know.

12 A I don't know.

13 Q Would it be significant if there is a
14 videotape of Tawain Gadson shooting Kandee Martin?

15 A It would if you had that.

16 Q It would be significant?

17 A If we had it.

18 Q How about if there is a videotape of Tawain
19 Gadson confessing to the killing?

20 A It could.

21 Q How about a witness hearing Tawain Gadson
22 confessing?

23 A It could.

24 Q And would it be something that you could
25 decide to investigate?

1 A Sir, I believe something like that, if it
2 occurred, it would have been investigated.

3 Q If somebody would have overheard Tawain
4 Gadson confess you would have investigated?

5 A It would have been investigated.

6 Q Okay. Who would have done the investigation?

7 A Whoever is doing our investigation at the
8 time.

9 Q Who was that on this case?

10 A I don't have that information.

11 Q Let's make sure we understand. Have you seen
12 this post conviction application?

13 A I don't have it in front of me.

14 Q Have you ever read it before today?

15 A No.

16 Q Never?

17 A I'm sure I did but I don't have it, you know.

18 Q No, I'm sorry, let me rephrase it. Have you
19 read the post conviction application before today?

20 A No. Post conviction, no.

21 Q You have never read the application for post
22 conviction relief?

23 A No. In reference to Mr. Marion Bowman or
24 anybody else?

25 Q To Marion Bowman.

1 A No.

2 Q And has the Attorney General's office ever
3 gone through the post conviction application with
4 you?

5 A Never.

6 Q Did they ever sit down and meet with you?

7 A Never.

8 Q And they called you one time today?

9 A I got a call from them today, I got a call
10 from you guys sometime in September, that's all I
11 have heard.

12 Q When you talked to us did we talk to you at
13 all about the case? Let's back up. You never
14 talked to me?

15 A I never got a chance to talk to you, I talked
16 to your representative.

17 Q That's right. You talked to a paralegal in
18 my office?

19 A Exactly.

20 Q Okay. In keeping with my policies that I
21 don't talk to witnesses under subpoena.

22 A I got you.

23 Q Okay, excellent.

24 THE COURT: You don't talk to witnesses under
25 subpoena?

1 MR. BROWN: Yes, sir. I will send out
2 investigators to do it but I won't do it.

3 THE COURT: How do you know what they are
4 going to say?

5 MR. BROWN: Because I send an investigator if
6 I care to.

7 THE COURT: That's your choice, okay.

8 MR. BROWN: Yes, sir.

9 THE COURT: I just wondered if he wrote
10 something down wrong or something?

11 MR. BROWN: Then I got to go with that. It
12 makes it a lot easier, I never suggest any answers
13 to any witnesses, categorical rule.

14 THE COURT: Okay.

15 MR. BROWN: Beg the Court's indulgence?

16 BY MR. BROWN:

17 Q Let me ask you about the Department of Social
18 Services' records in this matter. Do you recall a
19 time during the trial when Mary LeMatty came in to
20 court in response to a subpoena for Social Service
21 records?

22 A I probably did. I think I was asked about
23 that also.

24 Q Asked by who?

25 A The Attorney General's office.

1 Q Okay, great. What did you tell them?

2 A I don't remember anything. All I know is
3 about, I know Mary LeMatty, at that time she was
4 the attorney for the Department of Social Services.
5 However, she's now the Public Defender and I don't
6 remember anything with regard to those records.

7 Q I will show you Plaintiff's Exhibit 60. And
8 that's a memo looking for some records. And 61.

9 A Okay.

10 Q What records did you get from DSS?

11 A I don't remember, I don't remember any
12 records from DSS.

13 Q What information did you all have about
14 Marion Bowman being an abused child or abuse and
15 neglect being investigated by DSS?

16 A Probably only what Dale provided. I don't
17 remember anything from DSS, I just don't.

18 Q When you say Dale provided, you mean --

19 A Dale Davis.

20 Q Had she gotten a subpoena? She would have
21 had to have a subpoena to get DSS records, right?

22 A Who says it has to be DSS? She could have
23 gone to school, she could have gone to, you know --

24 Q Fair enough?

25 A -- other places.

1 Q Do you recall indications of abuse and
2 neglect allegations?

3 A No.

4 Q Does that sound familiar at all?

5 A I don't remember.

6 Q Okay. What do you recall about Marion
7 Bowman's information about him having, being a good
8 parent or having the capacity to be of emotional
9 value?

10 A What do I recall about Marion Bowman being a
11 good parent?

12 Q Uh-huh.

13 A I knew that he was married, I can't remember
14 if he had children or not. The only aspect I
15 remember about Mr. Bowman was when we were trying
16 to get records, like pictures, I don't believe his
17 mother had any. That is what I remember.

18 Q Okay. Do you recall Dale Davis being
19 concerned about not knowing about what the trial
20 strategy in the case is?

21 A I remember there was a letter that came to me
22 and I was quite shocked.

23 Q Does item 58 I handed you look like that
24 letter?

25 A Yes. You handed me 60, 61 and 58.

1 Q Does 58 look like the letter discussing the
2 trial strategy?

3 A Now, what was the question, sir?

4 Q The question was do you recall Dale Davis
5 expressing concern about not knowing what the trial
6 strategy was?

7 A I believe she had concern with regards to not
8 being able to get in contact with us and I just
9 didn't know where that was coming from.

10 Q Does that letter indicate she did not know
11 what the trial strategy was?

12 A One second.

13 A She indicates in here, "I had expected there
14 would be information sharing or brainstorming type
15 meetings so we all got an idea of strategy."

16 Q She's complaining she did not get that from
17 that meeting?

18 A It is my understanding -- I recommended Dale
19 because I believe I have worked with her in another
20 death penalty case. However, it is my
21 understanding from this particular matter that Dale
22 would bring up issues regarding attorneys so that
23 she would turn on them in a situation like this, so
24 I believe Mr. Cummings was aware of that and so --

25 Q I need you to explain that answer. She has a

1 reputation of turning on lawyers?

2 A Well, it is my understanding that, I worked
3 with her before, I don't believe I had a problem
4 with her, I believe she came in because I got her
5 before, I believe, you know, before Mr. Cummings
6 got involved, but it is my understanding that in a
7 previous case I remember she basically created a
8 scenario where she turned on trial counsel, saying
9 they weren't doing what they were supposed to be
10 doing, and that is what Mr. Cummings was concerned
11 about, so if there was any strategy that she
12 needed, she was given a job to do as for as
13 investigation and not getting into legal aspects.

14 Q Okay. I want to make sure I understand.

15 A Okay.

16 Q First --

17 THE COURT: For my information, is that the
18 April 11th letter we're talking about, that Dale
19 Davis testified about?

20 MR. BROWN: Yes.

21 Q Let me make sure I understand on this. She
22 was shielded from the trial strategy on purpose?

23 A I don't know if she was or not. I just know
24 there was a problem with regard to what she had
25 done to another attorney in a death penalty case.

1 Q I'm going to have to ask what case, who told
2 you that?

3 A I couldn't tell you.

4 Q Who told you that?

5 A It is my understanding that I believe I had
6 Marion Bowman before getting first counsel, so I've
7 got a list of people that I have dealt with before
8 and it is my understanding that I have dealt with
9 Dale before and in a previous case I was told that
10 and I couldn't tell you who told me that but I know
11 that she was always trying to get into the attorney
12 realm.

13 Q Does she need to know as mitigation
14 investigator, does she need to know trial strategy?

15 A I wouldn't know what she needs. I know she
16 was told to do certain things and if she didn't do
17 them, she would have to get back to counsel and see
18 what else she needed. I just remember that coming
19 up. That's all.

20 Q Let me make sure. There were times in this
21 case she did not do what she was asked to do?

22 A I don't know. I know that I got this letter
23 in this particular case, that I was very surprised
24 because she had two attorneys that, you know, if
25 she needed anything, if she couldn't get with Mr.

1 Cummings, I didn't see any reason why she couldn't
2 have, she could call him at anytime and ask him for
3 anything, she could call my office and ask for
4 anything and I would make sure she got whatever she
5 needed.

6 Q I will show you what is marked as Plaintiff's
7 51. Why would Jeff Yungman say he had no idea what
8 the trial strategy was in this case?

9 MR. WATERS: Your Honor, I object.

10 A I couldn't tell you.

11 Q It is not because you shielded Jeff Yungman
12 from the strategy?

13 A I couldn't tell you.

14 Q What was your strategy for the penalty phase,
15 what was your argument?

16 A You're going to have to ask Mr. Cummings.

17 Q Okay. Is there anywhere anytime you all had
18 a strategy meeting where you sat down and said
19 we're going to suggest that we respect the guilt
20 determination but urge that there is still enough
21 doubt to render a verdict less than death?

22 A I don't remember sitting down and going over
23 anything of that nature.

24 Q Okay. How about what witnesses to ask?

25 A I don't remember doing that with her or Mr.

1 Yungman.

2 Q Do you know Mr. Yungman?

3 A I don't remember.

4 Q Okay.

5 A I have a paper in front of me indicating
6 social work mitigation.

7 Q Only a couple more issues here. One of them,
8 did you watch a videotape of Mr. Bowman regarding
9 the purchase of gasoline sometime during the trial?

10 A I remember seeing him at a gas station.

11 Q Mr. Bowman?

12 A I believe. It may have been him or Mr.
13 Gadson.

14 Q Did you watch the videotape with Mr. Bowman
15 during the trial?

16 A I can't remember.

17 Q Did you all sit in a room, did you all sit,
18 the record will reflect, just a few feet from the
19 court reporter in this proceeding right now within
20 steps of the jury box and watch a videotape?

21 A Outside the presence of the jury?

22 Q Did you do that?

23 A We may have. I can't remember.

24 Q Do you recall Mr. Bowman at some point in
25 time urging the Court to notice the discrepancy

1 between Travis Felder's testimony and the
2 videotape?

3 A If he would have brought it to my attention I
4 would have written it down somewhere. I don't
5 remember, I don't remember that.

6 Q Okay. What do you remember about Travis
7 Felder being called back to court to testify in a
8 way that corrected his testimony in the guilt
9 phase?

10 A I don't remember.

11 Q Do you recall any discussions with having to
12 bring him back in?

13 A I don't remember at this point. If I can be
14 referred to the transcript I could probably do
15 that.

16 Q Well, just for the record, he does come back
17 and testify.

18 A Okay.

19 Q What I'm trying to find out is what happened
20 off the transcript. Did the prosecutor ever come
21 to you and say, "We've got to correct some
22 testimony"?

23 A Come to me, I don't remember that.

24 Q Okay. Never an offer to correct testimony?

25 A I never remember the prosecutor coming to me

1 for that.

2 MR. BROWN: Your Honor, could we approach
3 regarding my last matter of inquiry?

4 (Unrecorded bench conference).

5 THE COURT: Stay in place.

6 (Brief recess).

7 THE COURT: Okay, your next question, please,
8 Mr. Brown.

9 BY MR. BROWN:.

10 Q Miss Marva Hardee-Thomas, with all due
11 respect, have you ever had any health concerns that
12 would have tainted your ability to practice law?

13 A Health concerns?

14 Q Yes, ma'am.

15 A Health concerns?

16 MR. BROWN: There is no implication that
17 there was. It is a question that I ask to try to
18 avoid any trick questions elsewhere.

19 THE COURT: All right. Thank you.

20 Cross-examination?

21 MR. WATERS: Thank you, Your Honor.
22
23
24
25

1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q Miss Hardee-Thomas, how you doing today?

4 A That was my break?

5 Q That was your break.

6 A Yes, sir.

7 Q Just to clear up a couple things at first.

8 Did you talk to Mr. Simon today when he called to
9 ask you about a few select issues on the case, what
10 you remembered about it?

11 A Exactly.

12 Q I think he had called you a couple times in
13 the past about scheduling and things like that, in
14 that regard?

15 A That's it.

16 Q And you got the packet from the Attorney
17 General's office that has the transcript and the
18 application and all the briefs and all that stuff,
19 right?20 A Right, and I have got my file when we first
21 met in September, from the defense.22 Q That was my next question. When we came in
23 on the first day that is when you got your file
24 back from the applicant's attorneys?

25 A Right.

1 Q And you and Mr. Cummings went and reviewed it
2 at that time. Is that correct?

3 A Well, we didn't go to review it. We were
4 just told that these were our files back. We
5 wanted to make sure that we can look at something,
6 if you wanted something specific, let us know,
7 because it is a voluminous package.

8 Q Let's talk a little bit about Ricky Davis. I
9 guess it is fair to say you don't have any
10 independent recollection of Mr. Davis at all?

11 A No, not until I was reminded today. I
12 thought Ricky Davis was represented by Gene Dukes
13 and basically I called either the Clerk or the
14 Solicitor's office to find out who was his attorney
15 of record, and I find out it was Ricky Davis, Jr.,
16 and that I had represented him in an armed robbery
17 trial in October of '01 or something like that.

18 Q Okay. And I'm going to show you what has
19 been marked as Plaintiff's Exhibit 11. This is
20 that note that is attributed to Mr. Davis.
21 Correct?

22 A Yes.

23 Q Okay. You say that is your writing down at
24 the bottom where there is an unfilled out notary
25 bracket, I guess?

1 A Exactly.

2 Q Okay. And does that refresh your
3 recollection at all about going to visit him about
4 this statement?

5 A No. This is something probably that I don't
6 think I would even have gone to, I guess, visit
7 him. This is something that probably was given to
8 me and I basically say well, if this is his
9 writing, then you need to notarize it, you know, or
10 something like that. I think it was given to me in
11 the jail. By whom, I have no idea.

12 Q Okay.

13 A But I don't believe I went to him directly to
14 see him.

15 Q So, you might have filled that out at the
16 bottom and given it to your investigator and said
17 get it notarized?

18 A If it was filled out like this it had to be
19 in the jail, like to hand back to him to get it
20 notarized so that, so someone can testify that is
21 his writing. But I do not remember going to him to
22 talk about this. This might have been something
23 that I probably got in the jail, "If you want this
24 to be evidence, then make sure that this is your
25 signature."

1 Q That would have been a discussion with you
2 personally to Mr. Davis?

3 A No.

4 Q Or to the guard?

5 A Or whoever gave it to me. Whoever gave it to
6 me.

7 Q All right. That is what I wanted to find
8 out.

9 Okay. Now, if you had talked to Mr. Davis
10 and Mr. Davis said, you know, "That document is not
11 true, Mr. Bowman told me to write that, and I don't
12 know, I don't really know anything about this
13 case," would that affect how you would view using
14 that document in the course of a trial?

15 A Yes, it could. It could but my thing is, you
16 know, there is a bigger conflict that would arise
17 with regard to representation of Marion. I would
18 have to put something on the record showing
19 something, I've got something going on here, I need
20 to, you know, put this on the record so it wouldn't
21 impede Mr. Bowman's case.

22 Q Okay. Well, obviously you wouldn't have --
23 let me ask you this. Did you or would you have in
24 this particular case I guess kind of pulled your
25 punches in favor of Mr. Bowman because of your

1 representation of Mr. Davis?

2 A At that point if I'm representing him and
3 this comes up I would put the, basically try to
4 help Mr. Bowman but not hurt my aspect with Mr.
5 Davis because I still have an ethical
6 responsibility with him also.

7 Q Okay. I guess the bottom line is you just
8 don't remember?

9 A I don't remember but this right here, I do
10 not remember going to see Ricky Davis directly to
11 get something like this. This could have been
12 handed to me in the jail, and with me writing
13 something like this, I'm saying, well, if this is
14 his signature he needs to sign it saying that it's
15 his, because otherwise I would be able to call a
16 jailer there, you know, at least to notarize it, so
17 why would I just put a notary signature down and
18 just leave it out like that? If somebody gave it
19 to me and I'm saying, well, if it's valid, you
20 know, have someone sign it saying it's his
21 signature.

22 Q Okay. Do you recall Walt Mitchell, do you
23 know him?

24 A Walt Mitchell?

25 Q Yes, Walter Mitchell.

1 A Walter Mitchell?

2 Q Was he an investigator in the case?

3 A For us?

4 Q Yes.

5 A Yes.

6 Q Would you have sent him to interview Mr.

7 Davis?

8 A I sure would but the thing is, I think

9 getting something like this in the jail, I don't

10 know if he was involved yet. Do you understand?

11 Because something like this would, you know, go

12 back to someone like that but I don't glean if he

13 was involved in the case yet.

14 Q Okay. I guess what I'm asking you, you would

15 not have decided not to call Ricky Davis to protect

16 him, to the detriment of Mr. Bowman, you didn't do

17 that, did you?

18 A No, I wouldn't put anybody in that

19 predicament.

20 Q That wouldn't have been a calculation in your

21 mind, correct?

22 A No. But you see, a strategy, I'm thinking, I

23 was asked about a strategy aspect, any strategy

24 aspect would probably come from head counsel, that

25 is what I'm trying to say. I mean, it wouldn't be

1 mine to just address. It would be, okay, I got
2 something like this, I handed it back to him to
3 sign that it was really his, addressing what I
4 received, you know, it would definitely be head
5 counsel's purview to do that.

6 Q Let's talk a little bit about that. Have
7 you, at the time of this trial had you worked with
8 Norb before?

9 A Yes.

10 Q Or do you recall?

11 A Yes. We, excuse me, I think we have been in
12 several death penalty cases together, about two or
13 three.

14 Q Calvin Shuler, was that one of them?

15 A That's correct.

16 Q You have a pretty good working relationship
17 with him, correct?

18 A Yes.

19 Q He's obviously got a good bit more experience
20 than you did in those things, correct?

21 A Yes.

22 Q So, I guess it's fair to say you were very
23 deferential to him regarding the ultimate strategic
24 decisions in the case?

25 A Without question.

1 Q He would assign you various things, witnesses
2 to handle, family members to talk to and things of
3 that nature and you would do those as assigned by
4 the lead attorney. Is that correct?

5 A Exactly.

6 Q So, it wasn't a kind of you do the guilt
7 phase, you do the sentencing phase type of thing,
8 it was more he had the guiding hand over the whole
9 thing and he would assign you various tasks to do
10 during the trial?

11 A Exactly. And before.

12 Q Right. During pretrial preparations as well?

13 A Exactly.

14 Q All right. Let's talk a little bit about the
15 Public Defender's office. I think you fleshed it
16 out pretty well but it is my understanding the
17 Public Defenders were independent contractors,
18 correct?

19 A Exactly.

20 Q And you would not have direct involvement in
21 the other Public Defenders' cases and they would
22 not have involvement in your case, correct?

23 A Exactly.

24 Q You bought your own letterhead, had your own
25 office expenses and those things for the most part,

1 correct?

2 A Correct.

3 Q Essentially it was like a number of
4 individual mini law firms that were assigned cases
5 through the auspices of the board. Correct?

6 A Correct.

7 Q Okay.

8 A And what I was saying when I was saying we
9 had an office we shared back there, Gene Dukes was
10 there and he sometimes smoked in there so I
11 probably wouldn't have gone in there because I
12 don't like the smoke, so it is like, it was a place
13 that we could meet our client.

14 Q Right. And you guys, because of that, were
15 very careful to avoid crossing the line or exposing
16 confidences and things like that, that was
17 something you all were always mindfull of, right?

18 A Right. If we had three co-defendants we
19 wouldn't take them into the same office at one time
20 and talk to them even if we talked silently.
21 Usually one person was in there and if the second
22 person was in there, you know, it was something
23 unrelated.

24 Q All right. Going back to Ricky Davis, I want
25 to follow up on something you said. You said that

1 had you gone to see him personally or had some
2 direct dealings with him that at that point you
3 would have felt that, you know, you needed to put
4 something on the record. Correct?

5 MR. BROWN: I object. That is not exactly
6 what was said.

7 Q What did you say, then?

8 A I was alluding to that aspect, that if I had
9 an idea that there was like a conflict or something
10 like that where one interest would impede on the
11 other one, then I would, you know, basically want
12 to put something on the record to let someone know
13 that this is what's going on.

14 Q Right. And you don't have any recollection
15 of doing that, correct?

16 A I don't remember doing that.

17 Q All right. Let's talk a bit about Dale
18 Davis. You said you had hired her before and she
19 was known to you as someone who had a lot of
20 experience in the mitigation investigation realm?

21 A Right, I have worked with her before.

22 Q Okay. And so you of course rely on her
23 because she has the expertise, she knows what to go
24 get as for as mitigation stuff, right?

25 A Exactly.

1 Q That is precisely why you hire her, because
2 she has that understanding of the various types of
3 mitigation, the record, the family members, that
4 kind of stuff, correct?

5 A Correct.

6 Q Then there arose some issue that there was a
7 bit of concern that she might try to spike the
8 case, I guess is what you're saying?

9 A Right. I don't believe it was to put her in
10 an attorney realm, to put it that way.

11 Q She was told to do her mitigation stuff?

12 A Correct, that was explained.

13 Q And she would report that stuff back to you
14 all and Mr. Cummings would ultimately decide the
15 strategic direction to take. Is that fair to say?

16 A Exactly, as long as she got the information.

17 Q And then when she sent that letter
18 complaining that was a bit of a shock to you
19 because there had been no indication of that to
20 your mind prior to that?

21 A That was correct.

22 Q Did you ever, I mean, would you have ever
23 refused to return her calls or refused to see her
24 or anything of that nature?

25 A No. That is what we didn't understand, where

1 that was coming from.

2 Q Because it seemed kind of out of the blue?

3 A It was out of the blue, for both of us to be
4 too busy that we could not communicate with her, I
5 just, I didn't understand it.

6 Q You considered yourself available to the
7 mitigation and the other experts in the case,
8 correct?

9 A Correct.

10 Q You had an open door policy, that sort of
11 thing?

12 A Correct.

13 Q Okay. You were asked a little bit about DSS
14 records and I think you said you just don't have
15 any independent recollection of trying to get those
16 or any issues surrounding that?

17 A No. What I remember is, and this is what I
18 told the Attorney General, I don't remember
19 anything about DSS. I know Mary LeMatty and that
20 her job is to keep the evidence, I mean keep her
21 work, well, keep her items away from the Court if
22 it's not needed and that is what I remember. I
23 don't remember her coming to court, I don't
24 remember any of that.

25 Q Okay. It would have been a mitigation

1 investigator's job to determine the existence of
2 those records and then come to you all if further
3 action needed to be taken to get them, correct?

4 A Right.

5 Q That is what you all hired her for, that kind
6 of thing?

7 A Correct.

8 Q That is what you all relied on her expertise
9 in?

10 A Correct.

11 MR. WATERS: The Court's indulgence one
12 moment, Your Honor.

13 Your Honor, I have Defendant's 14, 15, 16 and
14 17 which are the Clerk of Court's records regarding
15 Mr. Davis, I think they are in evidence without
16 objection.

17 MR. BROWN: That's correct, Your Honor, no
18 objection.

19 THE COURT: They're in evidence, then.

20 MR. WATERS: Thank you, Your Honor.

21 (Clerk of Court's Ricky Davis records marked
22 and received in evidence as Defendant's
23 Exhibit Numbers 14, 15, 16 and 17).

24 BY MR. WATERS:

25 Q I'm going to show you those real quick.

1 Quickly thumb through them. I'm not going to ask,
2 I want to see if those generally reflect your
3 involvement in representation of Mr. Davis?

4 THE COURT: We just put these in evidence or
5 they have been in evidence already?

6 MR. WATERS: Those were just put into
7 evidence. They might be in a little respect
8 duplicative, but in the interest of having
9 everything.

10 THE COURT: I saw one looked like the warrant
11 on Mr. Davis.

12 MR. WATERS: Right. I think there are a few
13 that are duplicative but those are the complete
14 records of relevance and I think it would be
15 actually more convenient just to have them all
16 together as one exhibit.

17 MR. BROWN: Our only response, we only put in
18 the ones relevant, Your Honor.

19 MR. WATERS: Since it is an issue, I thought
20 completeness was better.

21 THE WITNESS: Okay, I'm finished.

22 BY MR. WATERS:

23 Q That generally reflects the --

24 A The charges.

25 Q And the resolution of the various charges you

1 handled for Mr. Davis, is that right?

2 A That's correct.

3 Q What is your understanding as an attorney and
4 as a Public Defender, once you filed the notice of
5 appeal and transfer the case to appellate defense,
6 does that --

7 A That relieves me from everything else.

8 Q That relieves you of your representation, is
9 that right?

10 A That's correct.

11 Q But with regard to confidences that you
12 gained during the course of the representation --

13 A That's protected.

14 Q Those still remain protected, correct?

15 A Yes.

16 Q Those were the understandings you would have
17 had at the time period and that is how you would
18 have operated, correct?

19 A Correct.

20 Q All right. Did you deal with Mr. Bowman's
21 family at all during this case, his wife and his
22 sisters and the like?

23 A Yes, I remember talking to them. Everybody
24 was charged so they had attorneys also.

25 Q Right.

1 A So, having to deal with the attorneys and who
2 would talk to us and those aspects, we dealt what
3 we could by communicating, like that.

4 Q Did that make it more difficult?

5 A Well, of course, because you've got to deal
6 with the attorneys first to get permission, you
7 know, to see if it's okay, not violate anyone's
8 rights with regard to, you know, talking to them
9 because they had charges also.

10 Q Were they somewhat recalcitrant in dealing
11 with you?

12 A No. They were open. It is just that, you
13 know, sometimes people don't understand their
14 rights, you have to let them know what their rights
15 are.

16 Q Right.

17 A That's all.

18 Q Do you recall any issue regarding the sisters
19 being involved in throwing the gun into the river?

20 A Correct.

21 Q Did you investigate that with them at all or
22 talk with them about that particular issue?

23 A I believe we did.

24 Q Okay. And do you recall what you found out
25 about in that regard?

1 A I believe we talked to them about it, you
2 know. To tell you what they said, at this point I
3 couldn't tell you.

4 Q Right.

5 A But I know it was discussed.

6 Q If they had given a statement and you talked
7 to them, you would have talked to them about the
8 accuracy of their statement and that sort of
9 things?

10 A Exactly.

11 Q What about Mr. Bowman's mother, was she
12 involved in helping with the mitigation
13 presentation or anything of that nature?

14 A I believe we spoke to her. My concern that I
15 remember in Mr. Bowman's case was that she did not
16 have any pictures of him. That, if anything would
17 stick out in this particular case, I remember that
18 explicitly.

19 Q That was kind of something that you all
20 noticed about the case in preparing for mitigation,
21 correct?

22 A Yes, that she had not one picture.

23 Q All right. In talking with Dorothy Bowman,
24 the wife, not the mother, did she ever tell you
25 anything about the police using metal detectors at

1 the house?

2 A I don't remember that. I just remember that
3 they charged her, too. We were very, you know, we
4 got clearances for talking to her but I'm sure it
5 came up through our investigator talking to her and
6 went over those issues also.

7 Q Do you have any independent recollection of
8 her saying that that happened?

9 A No, I do not.

10 Q Or that being an issue of much significance?

11 A No, I do not. But I remember I
12 cross-examined her.

13 MR. WATERS: The Court's indulgence one
14 moment, Your Honor.

15 THE WITNESS: I did cross or direct, it
16 wasn't --

17 THE COURT: What, now? You did what, now?

18 THE WITNESS: It was direct, not cross.

19 THE COURT: She was your witness?

20 THE WITNESS: She was my witness.

21 MR. WATERS: Your Honor, nothing further.

22 MR. BROWN: Beg the Court's indulgence.

23 THE COURT: You have nothing further, Mr.

24 Waters? I thought you were going to take an hour.

25 MR. WATERS: It went quicker than I expected.

1 THE COURT: Okay.

2 MR. WATERS: If you want, I will make up some
3 more questions if you would like.

4 THE COURT: No.

5 MR. WATERS: All right.

6 MR. BROWN: I'm probably asking what I
7 shouldn't ask.

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REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q If Ricky Davis had become pivotal in this case would you have had some issue regarding that?

A Yes, I would have.

Q Because of your representation of him and Mr. Bowman?

A Depending on what was said, yes.

MR. BROWN: Okay, I don't have any other questions.

MR. WATERS: Nothing further, Your Honor.

THE COURT: You may step down.

THE WITNESS: Is that it?

THE COURT: Apparently. One thing I need to make sure is that you know you're not to discuss your testimony with anyone, don't discuss it with Mr. Cummings or with anyone else at all.

THE WITNESS: I won't.

THE COURT: Okay, and you need to be available in case we need to call you back, so you are local, they know how to find you, right?

THE WITNESS: Yes, sir.

THE COURT: Just be available.

MR. WATERS: That will be December 16, 17, 18.

1 THE COURT: Do you know where Orangeburg,
2 South Carolina is?

3 THE WITNESS: Yes, I do.

4 THE COURT: Just be available to come there.
5 Put it in your GPS, put Judge Lockemy, Orangeburg,
6 it will go right to it.

7 THE WITNESS: Yes, sir.

8 MR. BROWN: Your Honor, there was one
9 document we asked about whether or not she had it
10 in her file, we would ask she look for it.

11 THE COURT: This was this document here that
12 had, you said it had your handwriting on the
13 bottom, right there.

14 MR. BROWN: It was the Sam document.

15 THE WITNESS: Sam the investigator.

16 THE COURT: That one.)

17 THE WITNESS: Do I have to look for that now?

18 THE COURT: Just let us know.

19 MR. BROWN: How about between now and
20 December, the week of December 15th?

21 THE WITNESS: Got you.

22 MR. WATERS: And she can look right now
23 because there are a couple more housekeeping
24 matters while we're here, if she wants to start
25 looking now, we might get lucky or not.

1 MR. BROWN: And in fact I'm sure between Mr.
2 Waters and I we can come to an agreement about her
3 response whether or not the document was in her
4 file.

5 THE WITNESS: Okay.

6 THE COURT: Do you have your file with you?

7 THE WITNESS: Yes.

8 THE COURT: While we're doing it, go ahead,
9 you can go.

10 (Witness excused).

11 THE COURT: Let's see if we have everything
12 up here in evidence that you wanted in evidence.

13 MR. BROWN: Yes, sir.

14 MR. WATERS: Your Honor, I have here two
15 things that were sealed at the trial. I believe
16 one of which contains the cover letters for the
17 discovery provided by the Solicitor, which was
18 sealed at the request, I believe, by the parties at
19 trial. We would like --

20 THE COURT: What was sealed at trial?

21 MR. WATERS: I believe it contains all the
22 cover letters detailing discovery provided by the
23 Solicitor to the defense and they asked that be
24 sealed at the trial and I have them here. We would
25 like access to them since there are a number of

1 Brady claims that are alleged.

2 THE COURT: Okay. They were sealed by the
3 Clerk of Court?

4 MR. WATERS: They were sealed by the judge.

5 THE COURT: Tell me, why was that done, what
6 would be the purpose of that?

7 MR. WATERS: Well, apparently Mr. Cummings
8 and Mr. Bailey had a practice of doing that, I
9 guess.

10 THE COURT: Because I have never done that.

11 MR. WATERS: For protection of both parties,
12 I guess, to seal the discovery that's been provided
13 for these proceedings down the road so it could be
14 determined exactly what had been provided and what
15 had not and so both sides apparently had a practice
16 of doing that. In fact, we also had the Clerk, the
17 entire Clerk's file right here.

18 THE COURT: What you have in your hand you
19 got from the Clerk?

20 MR. WATERS: They were brought up this
21 afternoon when we came in here. They are both
22 sealed and we obviously need your permission to
23 open them.

24 THE COURT: Let me look at them first but I
25 will give you and Mr. Brown permission to review

1 them.

2 MR. WATERS: Okay.

3 THE COURT: Any objection?

4 MR. WATERS: I'm guessing, from reviewing the
5 Clerk's file, I have two vanilla envelopes that are
6 marked sealed.

7 MR. BROWN: If there is any reason to keep
8 them sealed, we would just ask Your Honor for your
9 eyes only.

10 THE COURT: Let me review them myself for a
11 second. I'm here opening the first document, it
12 says sealed, confidential on the top righthand, it
13 has Marion Bowman, Jr., that can be distinguished
14 from the other envelope that just has Marion Bowman
15 on it without the Junior added to it, and this is
16 the thinner of the two envelopes that I'm opening
17 first. I'm about to open it now.

18 MR. WATERS: Your Honor, we don't think both
19 of those contain it but they were just not marked
20 any other way, so we need to offer them both.

21 THE COURT: I'm now opening the second
22 envelope. I notice it does not have the judge's
23 signature on it or initials. It just has the word
24 sealed on one, the thinner one, and the thicker one
25 has the word confidential written on the tape.

1 Nowhere does the judge's initials appear on this.

2 Looking at these documents, in the first one
3 is copies of orders signed and motions of the
4 defense requesting copies of transcripts. In the
5 second one is exparte orders authorizing money to
6 be spent for various matters, investigative
7 services, investigative services, investigative
8 services, investigative services, investigative,
9 expert services and forensic consultant. So, these
10 are obviously the exparte orders that the defense
11 did in preparing for the trial.

12 MR. WATERS: Well, they talked about it on
13 the record and Mr. Bailey advised me that was their
14 practice and Mr. Cummings seemed to remember that
15 and those are the only two things I could find.

16 THE COURT: I will be glad to let both of you
17 look at this but obviously these are the standard
18 matters where people request the Court to approve
19 funds to be spent for assistance of the defense.

20 MR. BROWN: The only thing I would ask --

21 THE COURT: Really, the confidential nature
22 of those are moot now.

23 MR. WATERS: I think --

24 MR. BROWN: We would disagree a little bit.
25 We would ask they remain right now for the eyes of

1 the litigants.

2 MR. WATERS: Sure, but I think the exparte
3 orders are relevant to claims of ineffective
4 assistance.

5 THE COURT: Wait one second. I think
6 everybody agrees to that. But I want to make sure
7 I'm not missing something. Why would that not be
8 moot, the confidential nature of those, at this
9 time? The reason for them is because the State has
10 no right to know matters of what you're getting and
11 preparing for trial.

12 MR. BROWN: And to play devil's advocate --

13 THE COURT: Please.

14 MR. BROWN: To the extent we raise a claim
15 that put into play an issue that may be relevant to
16 some privileged information, that privilege is, to
17 the extent it is not raised, it still exists and I
18 know Mr. Waters --

19 THE COURT: I know what you said but to be
20 safe with everyone you both may review it but don't
21 let it out until I give further order.

22 MR. BROWN: That's all I ask. Thank you.

23 THE COURT: Why, I don't know, but don't do
24 it.

25 MR. BROWN: Thank you, Your Honor.

1 THE COURT: It doesn't hurt anyone.

2 All right. Wait one second before we break
3 up. Miss Hardee-Thomas, were you able to find that
4 document?

5 MS. HARDEE-THOMAS: No, sir. I completed one
6 and I'm completing the other one right now.

7 THE COURT: I think we will call it off for
8 today but if you do find it we need for a statement
9 from you one way or the other, that you have it or
10 you don't have it.

11 MS. HARDEE-THOMAS: I'll continue to look.

12 THE COURT: At some point in time we need you
13 to let us know that.

14 MS. HARDEE-THOMAS: Yes, sir.

15 THE COURT: Anything else from anyone?

16 MR. BROWN: Nothing further, Your Honor.

17 THE COURT: All right, we're hereby in
18 adjournment, then, or in recess. We will
19 reconvene, we'll get together, it is either going
20 to be on Monday the 15th of December or it could be
21 the afternoon of Wednesday, the 17th. My court
22 reporter is going to be with me all week anyway,
23 the question is whether we're going to do this
24 matter until completion before I do the trial or do
25 the trial first. I thought you all had a great

1 idea this morning about doing the trial first, I
2 mean doing this first, but then here we can do this
3 even while the jury is deliberating, so it might be
4 better to do the trial first and then do this. It
5 might be a better use of time. So, it is probable
6 that we're going to reconvene around the 15th of
7 December and everyone, the 17th, and everyone
8 believes two days should be enough to complete this
9 case?

10 MR. BROWN: Yes, sir.

11 THE COURT: All right.

12 MR. WATERS: I certainly hope so.

13 THE COURT: I do, too. Thank you all.

14 MR. WATERS: Thank you, Your Honor.

15 THE COURT: We're in recess.

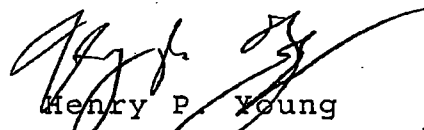
16 (Recessed at 4:47 p.m.).

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4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Dorchester County,
11 South Carolina, on the 24th day of November, 2008.

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

14 December 6, 2008
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19 Henry P. Young
20 Court Reporter
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22
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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2006-CP-18-569

COUNTY OF DORCHESTER

MARION BOWMAN,

-vs-

STATE OF SOUTH CAROLINA,

Defendant.

B E F O R E:

HONORABLE JAMES E. LOCKEMY

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

JAMES ARTHUR BROWN, JR., Esquire
JOHN SINCLAIRE, III., Esquire
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Henry P. Young
Court Reporter

VOLUME VIII OF X

December 18, 2008

1 P-R-O-C-E-E-D-I-N-G-S

2 (Convened at 11:58 a.m).

3 THE COURT: We're back on the PCR petition of
4 Mr. Marion E. Bowman. When we were last here we
5 had Mr. Cummings was on the stand, on September
6 30th, '08, he was on the stand and his testimony
7 was interrupted because we had Miss Davis who we
8 had to bring back in for another cross and then Mr.
9 Cummings couldn't be with us on our last meeting.

10 In any event, just on my recap, we had
11 discussed his involvement last time as for as being
12 lead counsel and that he had indicated it was clear
13 that the victim in the case had been murdered,
14 there was no doubt about that. He had gotten the
15 tape of Travis Felder showing that Mr. Felder had
16 bought the gas at that service station, he had seen
17 the tape from the service station. He himself
18 chose not to show the tape, mentioned thoughts
19 about why, and he knew it was Felder on the tape,
20 he says he thinks it's Felder on the tape, he
21 didn't talk to Walter Bailey as to whether Felder
22 was on the tape buying the gas. And he said at the
23 last that he thought he was aware that Felder had
24 made a deal a couple days before the trial.

25 Then we got into Mr. Brown mentioning about

1 his concern about Mr. Cummings' representation
2 because of a bias, didn't show the jury the bias of
3 Travis Felder in making a deal when he testified,
4 and discussed the issue about putting the body in
5 the car and the contradicting statements about that
6 that they had made to Detective Van Doran on the
7 polygraph situations there.

8 And then Ricky Davis, and in looking at
9 Exhibit 11, about who had done the shooting, what
10 Ricky Davis had said, whether, Mr. Davis stated Mr.
11 Bowman had forced him to say something of that
12 nature. And also the statement that Wayne -- is it
13 Mead or Mood?

14 MR. BROWN: Mood.

15 THE COURT: Mood, M-o-o-d? That is where my
16 notes end on Mr. Cummings as for as what I have
17 already have and we don't need to go over again,
18 but if you need to refresh me about something, Mr.
19 Brown, let me know.

20 MR. BROWN: That indicates where I left off
21 as well and I think the transcript will fill in any
22 gaps.

23 THE COURT: I just wanted you to know I know
24 how to take notes.

25 MR. BROWN: Yes, sir. May it please the

1 Court.

2 THE COURT: Yes, sir.

3 FURTHER DIRECT EXAMINATION

4 QUESTIONS BY MR. BROWN:

5 Q I want to ask you a little bit, kind of pick
6 it up --

7 THE COURT: For my information, after we left
8 Mr. Cummings that day we had convened again and did
9 without him, we did other witnesses.

10 MR. BROWN: We did Marva Hardee-Thomas.

11 THE COURT: That is the only thing we did, we
12 did that in Dillon, didn't we, St George?

13 MR. WATERS: St. George. We did Dale Davis.

14 THE COURT: We did Dale Davis after we let
15 him off the stand?

16 MR. WATERS: Right, correct.

17 THE COURT: Okay. All right.

18 MR. BROWN: May it please the Court?

19 THE COURT: Yes, sir.

20 BY MR. BROWN:

21 Q Mr. Cummings, kind of going back do where we
22 were, putting that back in context, if we can just
23 take up where we left after a little bit, some of
24 this is in some of my notes, I kind of want to get
25 back to Kandee Martin. You had testified about the

1 fact this was obviously a murder. One thing I
2 would ask, I want to talk about Tawain Gadson.
3 Tawain Gadson took the stand, testified, the
4 primary witness regarding the murder. Do you
5 recall the instructions that he was given about
6 testifying about Kandee Martin smoking crack on
7 Nursery Road?

8 A Instructions, no, sir, I don't remember what
9 instructions he was given other than I believe Mr.
10 Bailey starts off by saying, you know, "You're not
11 given any deals, you're here to tell the truth."
12 That is all I remember about what Walter might have
13 said. I know you will ask him that.

14 Q Did you all reach an agreement that the crack
15 smoking was not supposed to be talked about?

16 A The best of my recollection --

17 THE COURT: When you are referring to the
18 crack smoking --

19 Q I'll give a little basis. She had been using
20 drugs?

21 A There was stuff found in in her body at the
22 forensic autopsy.

23 Q The jury never heard that information?

24 A The best of my information, no.

25 THE COURT: Not even in the autopsy?

1 MR. BROWN: It was revealed in the autopsy
2 but not in the trial.

3 THE COURT: I'm saying the autopsy never came
4 in in front of the jury as for as the findings?

5 THE WITNESS: No, sir.

6 MR. BROWN: No, sir.

7 THE WITNESS: I did want to keep parts of
8 that out, you know, what the condition of the body
9 was as well as there was an issue that I was very
10 cautious of, Mr. Brown, about whether or not people
11 had ever touched Miss Kandee Martin in a certain
12 way, degrading, sexual way.

13 BY MR. BROWN:

14 Q Let's talk about that a little bit. I think
15 we had -- well, we're going to get into that. Let
16 me back up. The jury never heard anything about
17 Kandee Martin being a drug user?

18 A The best of my recollection that's correct.

19 Q All right. But you knew about it?

20 A Yes, sir.

21 Q And in fact, gosh, I late to speak ill of the
22 deceased but she, there was some general reputation
23 information she used drugs and/or prostituted
24 herself or a combination of the two?

25 A Yes, sir, and again this is as an officer of

1 the court to you, sir, and everybody in here is
2 officers of the court, hurting the victim I think
3 would have hurt Marion more, maybe helped him a
4 little bit evidentiary wise that she did dope.
5 What I was worried about, I guess, where she got
6 her dope from, and everybody in the world knew, and
7 it came out in the penalty phase also, that Marion
8 lived on the street, he was self supporting, he
9 tried to find ways to support himself and he
10 sometimes delved into something he shouldn't have
11 delved into.

12 But I also had the horrible experience
13 dealing with the Missy McLaughlin trial where that
14 lady was also accused of using her body for drugs,
15 and believe me, it didn't sit well with that jury.
16 Q And let me, I want to probe a little bit of
17 that. The jury actually found out before they
18 issued their sentence that Marion Bowman sold
19 drugs?

20 A In the penalty phase everything comes in, we
21 all know, character, bad character. The trial
22 flowed the way it flowed.

23 Q But the information that Marion dealt drugs
24 came out through you all's witnesses on direct, you
25 asked --

1 A Yes.

2 Q -- Jeff Yungman about it?

3 A How Marion lived.

4 Q How Marion made money, he said candidly he
5 had dealt drugs?

6 A The only way to get his background in at that
7 point in mitigation was to try and show that, you
8 know, for lack of a better word, he was basically
9 kicked to the curb at a young age and he would do
10 what he had to do to survive.

11 Q Right. So, here is my point. Outside of the
12 guilt phase, because I don't really know that Miss
13 Martin's drug use had anything to do with guilt or
14 lack thereof.

15 A I have never heard it in the guilt phase,
16 ever.

17 Q We're not talking about a self defense case
18 where we are saying somebody was aggressive and had
19 used drugs?

20 A Right.

21 Q In the penalty phase the jury actually hears,
22 in your openings, in your case in chief that, not
23 opening statement, excuse me, but in your case in
24 chief they hear that Marion deals drugs?

25 A Right.

1 Q And, so, my question is why didn't it come
2 out that Kandee Martin also used drugs?

3 A I didn't want to add another felony or bad
4 character to my client, that he was selling drugs
5 to Kandee. I did what I chose to do at that time.

6 Q Was there any question that Tawain Gadson
7 would have said she was using drugs on Nursery
8 Road?

9 A I didn't believe a thing Tawain Gadson said,
10 personally. I have been doing this a long time.
11 Everybody in the room, you know, the people that
12 cut deals are people guilty or guiltier. I have
13 learned that a long time ago.

14 Q Now, one of the things that a prosecutor can
15 bring out in the penalty phase, fair game is victim
16 impact?

17 A Absolutely.

18 Q One thing they indicated was that the impact
19 upon the family of Miss Martin was the loss of her
20 as a mother to her child?

21 A Yes, sir.

22 Q And in fact they traumatized the fact that he
23 killed her just before her child's third birthday?

24 A Right. "Black, please don't kill me, I'm got
25 a baby." I remember that word.

1 Q It was right before the birthday?

2 A Right.

3 Q That according to Tawain Gadson she made that
4 statement?

5 A Yes.

6 Q My question is this. Does it not present a
7 forward context of her mothering to show that she
8 was a crack addict?

9 A Again, I guess I could sit back and play
10 Monday morning quarterback now and say, you know,
11 attack the victim, the jury has already found him
12 guilty, you know, I could sit here and say that.
13 If I made an error I apologize. If I didn't
14 vigorously cross-examine to help Marion, then I
15 made a mistake and I apologize, but I flowed with
16 the case the way I thought I should have done it.
17 Whether our courts want to call it strategy or a
18 choice not to attack the victim any more than we
19 did, she's dead.

20 We also learned she had another child
21 somewhere that was given away or done something
22 else with.

23 Q Well, let me ask you about that. You did
24 hear that information?

25 A Yes, we heard it. I couldn't get any help

1 from anybody to prove it. We did our own street
2 stuff around, had investigators go to try to find,
3 you know, where the child might have been, who was
4 raising it, and that is what you do, you just try.

5 Q And bear with me a little bit. Now, this
6 child was about three years old, right?

7 A I'm trying to remember. Seven years back, I
8 would say whatever you tell me the age is, it
9 sounds about right.

10 Q The record speaks for itself.

11 A Right.

12 Q And at the time of her death she was --

13 A A young mom. I don't remember Kandee's age
14 off the top of my head.

15 Q About twenty years old?

16 A Right.

17 Q And she had been pregnant for a year, so
18 we're talking about somewhere around the age
19 sixteen that she would have been pregnant?

20 A At the very beginning, the first time in her
21 life, yes, and as a minor she should have been
22 protected.

23 Q Let me keep going with this. This other
24 child that was given away --

25 A If that is what really occurred. I know she

1 didn't have physical possession.

2 Q But there was no question she had another
3 child?

4 A In my opinion, no, sir, there was no
5 question, plus I believe Marion or the family told
6 me she might have had another baby, one of his
7 sisters maybe.

8 Q By the time she's twenty we're talking about
9 two children?

10 A I would say at least to my personal
11 knowledge, yes, sir.

12 Q Okay. Which -- and again I want you to
13 understand when I talk about this evidence coming
14 in to provide a picture about the victim impact I
15 want to make sure you're aware I'm not talking
16 about attacking her, I'm talking about being
17 truthful because it is unusual that victim impact
18 goes to a jury, in fact it is only in capital cases
19 that I'm aware of?

20 A That is the only time.

21 Q In sentencing?

22 A Right.

23 Q That actually was a change in the law however
24 many decades and a half ago that allowed this?

25 A Yes, sir.

1 Q This type evidence, the State wants it in
2 because it allows them to give a factor to impose
3 death?

4 A Correct.

5 Q Because when they weigh the appropriateness
6 of death as a punishment they can consider all of
7 those facts, including the impact that the victim's
8 loss of life has?

9 A That is what the Legislature decided, yes.

10 Q So, what it was, logically if the impact of
11 the loss of the victim's life was not as great it
12 may weigh less toward the appropriateness of a
13 death sentence?

14 A And it is almost like you're pitting
15 witnesses, or pitting their value of their lives,
16 the white girl versus the black young man who
17 allegedly shot her, and that is what you try to
18 hopefully avoid but that is what occurs 90 percent
19 of the time.

20 Q Well, let me ask you, you were a prosecutor
21 at one time?

22 A Yes, sir.

23 Q And in murder cases one of the things that,
24 that is, the victim's character, for lack of a
25 better word, is that not something that is weighed

1 when you decide to file death notice?

2 A Back when I did it --

3 MR. WATERS: Your Honor, I object to this. I
4 don't see how that is relevant, what he would have
5 done as a prosecutor.

6 THE COURT: I'll let him answer.

7 A Personally it goes against everything I
8 believe in about the death penalty. I'm an old
9 Irish Catholic, I tell people all the time I'm a
10 sinner. The first thing is one human being's life
11 is no better than anyone else. I also was a cop a
12 long time ago. I know when people kill a police
13 officer there is no redeeming value because that is
14 the last line of defense, or a judge, or one of us
15 guys doing our jobs, or lady, because that is the
16 last bastion of society or decency we have left.

17 Just like, you know, do you believe in it?
18 No but yes I understand the rationale behind it.
19 And so, yes, I have done death penalty
20 prosecutions. The issue there is should one person
21 be valued greater than the other. It happens every
22 day. The guy on the corner holds up a sign says
23 will work for food, we call him a bum. We don't
24 know the circumstances behind it. The young --

25 THE COURT: Do you want to ask a question or

1 go farther?

2 MR. BROWN: I didn't want to stop him. In
3 another hearing I was told not to.

4 A I think it is horrible to do that but I think
5 society does it. Again I think it is unfair and I
6 hope it did not prejudice Mr. Bowman at all in his
7 case.

8 Q But again, those are two facts, one fact she
9 had used drugs even if it is a minimum, there is no
10 question that she had used drugs?

11 A No question but again, and here is the
12 throwback on that, what you have to weigh. Do you
13 think somebody deserves to die, I'm not asking you
14 this question, sir, but a rhetorical question, do
15 you think somebody should die for the use of dope?

16 Q I understand.

17 A Now, there was also one underlying thing
18 here. Again this is in response to your question.
19 If you believed everybody in this case, including
20 Mr. Bowman's sister and family, that she was going
21 to be dead by dark because she was going to rat him
22 out for selling dope, so that was the biggest
23 landmine that this lawyer wanted to avoid. So, if
24 you mentioned dope it might have opened up the door
25 if I had mentioned that she was using. Who did she

1 get it from? And of course --

2 Q How about in the penalty phase, though? You
3 only get there if he has been convicted.

4 A Oh, yes, and you're absolutely correct on
5 that but in the penalty phase I still didn't want
6 to portray Mr. Bowman as being the drug dealing kid
7 that nobody cared about, that would take a life
8 because somebody ratted him out for selling dope.

9 Q Now, let me ask you, would the drug use not
10 be relevant to the issue of her state of mind in
11 the penalty phase, for the kidnapping aggravator,
12 right, it wasn't actually a grabbing kidnapping?

13 A Yes, sir. We have the broadest kidnapping
14 statute in the country as I'm aware of.

15 Q Sure.

16 A And further, if you want to argue the state
17 of mind, they were going there to do a job, that is
18 another thing that was coming out, so-called
19 burglary, you have got people burglarizing houses
20 in the neighborhood in Dorchester County. Any way
21 I turned on this thing I was stepping on a
22 landmine, and I knew that.

23 But again, if I made an error I apologize, I
24 tried that case and in the penalty phase the best I
25 thought I could get out of the mileage with what

1 was happening, every time we turned around, even
2 before Jeff Yungman got killed on the stand.

3 Q Now, let me, before I get into the other
4 penalty phase issues I want to go back and talk
5 about -- well, we talked about Ricky Davis just for
6 a second and I think it is clear, did you have any
7 conversations with Marion Bowman about Ricky Davis
8 being represented by Marva Hardee-Thomas?

9 A No, sir. I never learned of that one bit
10 until I read that in your petition.

11 Q Okay.

12 A And further, I found out, you know, we'll go
13 through the cases, you know, we talked about Mr.
14 Mood, it was Cameron Marshall, Assistant Solicitor
15 out of the Ninth Circuit at one time, it didn't
16 ring a bell until fifteen minutes after I leave the
17 courtroom, but that is where Mr. Mood came into
18 play, Cameron Marshall was trying to get him to cut
19 a deal for time on the sentence. His client was
20 willing to help.

21 Q And he would have testified in fact Mr.
22 Bowman was involved in the killing but in fact Mr.
23 Gadson was involved?

24 A Yes, sir, whatever he was going to proffer,
25 right.

1 Q Now let me transition, I think that is a
2 great lead into Tawain Gadson. I want to talk to
3 you about a couple things. First of all Mr. Gadson
4 was represented by Gene Dukes?

5 A Yes, sir.

6 Q All right. And he was a Public Defender?

7 A Yes, sir.

8 Q Did you ever talk to Marion about his status
9 as a Public Defender versus Marva Hardee-Thomas'
10 status as a Public Defender?

11 A I think without ever, God rest his soul,
12 okay, but without hurting someone else's opinion,
13 Gene was very ill, he was having a hard time with
14 life at that time, he was basically living by
15 himself, he had the little office across the
16 corner. Gene was having a hard time.

17 And I don't know, they were all independent
18 contractors, the way I understood the PD's office
19 at that time. Gene was part-time or maybe
20 full-time by pay but only really worked whatever
21 hours we had court. Marva, the same thing, had a
22 contract with the county. So, I did not know what
23 they did or who they talked to. Normally the
24 lawyer tells you, "Oh, by the way, I have a
25 conflict."

1 Q Right. And on that note did you ever talk to
2 Marion about that situation, either way, anything?

3 A I'm trying to remember off the top of my
4 head. The best of my recollection, sir, I don't
5 believe that that came up but if I did I would tell
6 him whatever I learned.

7 Q Okay.

8 A I wouldn't hide anything from that young man.

9 Q There is no specific recollection about --

10 A No, sir.

11 Q Okay. There is no recollection about him
12 waiving any conflict, if one existed?

13 A No. I would have had that in writing, number
14 one. Number two, I would have brought it to the
15 court's attention. The only person can appoint on
16 a death penalty case is a judge after they qualify.

17 Q What did you ever know about the mental
18 health evaluation of Tawain Gadson?

19 A I don't think I -- the best of my
20 recollection, I don't recall that. I might have
21 received a report and read it but I don't think I
22 would have been privy to that because he was
23 represented by counsel.

24 Q All right.

25 A I don't believe his competency came into play

1 as a witness.

2 Q Well, let me ask you to take a look at his,
3 what has been marked and entered as Plaintiff's
4 Exhibit 8, which is his mental health evaluation,
5 and let me ask you if you recall ever finding out,
6 I'm going to just hit a couple things, that he
7 smoked marijuana all the time, every day, and I'm
8 kind of generalizing on that, and that he also
9 suffered from blackouts and had verbal memory
10 impairment or heard beeping noises or a voice?

11 A I'm trying to remember if Marion told me
12 about him being a dooper, for lack of a better
13 word, you know, to make it quick and easy, and I
14 thought Marion told me he basically wasn't all
15 there.

16 Q And let me ask you, have you ever -- well,
17 let me --

18 A You had a question about this document. I
19 don't remember seeing this document.

20 Q Okay.

21 A All right.

22 Q Or receiving it in discovery?

23 A No, sir, I don't remember that.

24 Q Now, again, there is no question Tawain
25 Gadson is the sole claimed eyewitness to this

1 killing?

2 A Yes, sir. And in the car allegedly.

3 Q Okay. The deceased?

4 A Marion.

5 Q Mr. Gadson, he and Mr. Bowman?

6 A Yes, sir.

7 Q And, so, he testified, in keeping with that,
8 to the jury and tells them what he recalls from the
9 killing?

10 A Yes, sir, as a principal, right.

11 Q So, his recollection and credibility is
12 crucial?

13 A Yes, sir.

14 Q And if he's hearing a voice or beeping noises
15 or consumes amounts of drugs that would impair his
16 ability to recall, such as having a verbal memory
17 impairment, or his ability to recall that date
18 would have been clouded by drug use that would be
19 of some relevance regarding his credibility?

20 A Yes, sir.

21 Q Okay. Or having blackouts?

22 A Yes, sir.

23 Q All right. And, so, the decision not to
24 present that is not a strategy decision?

25 A I think I cross-examined that gentleman, as I

1 think I testified to this the first time I talked
2 to you, I tried to examine him the best I could.
3 If I failed to do that and if that is what our
4 Supreme Court says, then I apologize to Mr. Bowman.

5 Q But to be very specific, I appreciate that,
6 what I'm trying to find out, you didn't make a
7 strategy call not to use that bit of information
8 that was contained in Plaintiff's Exhibit 8?

9 A No, that would not be strategy, no, sir. You
10 are in the heat of verbal argument in there and you
11 ask questions, sometimes you wonder why you ask
12 that question, sometimes you wonder why you didn't
13 remember to ask the other one.

14 Q But you would have asked him about blacking
15 out, hearing voices?

16 A I would hope and pray I would, okay? I don't
17 know what else to say.

18 Q I just want to make clear, and I apologize,
19 Your Honor, for asking it a couple ways, I'm going
20 to make clear that he didn't make a strategy call.
21 He didn't have Number 8.

22 A I didn't.

23 THE COURT: Strategy call about what?

24 MR. BROWN: About not asking, impeaching Mr.
25 Gadson about the information contained in Exhibit

1 8, which is Mr. Gadson's DMH report.

2 THE COURT: Mental Health?

3 MR. BROWN: Yes, sir.

4 THE WITNESS: Do you want that, Your Honor?

5 It deals with Mr. Gadson, his own claim that he
6 hears voices, blacks out, I can't remember. It's
7 in the report.

8 THE COURT: Mr. Cummings made a choice not to
9 bring that up?

10 MR. BROWN: Just the opposite.

11 THE WITNESS: I hadn't seen the document. I
12 hope I would have brought that up.

13 THE COURT: You didn't know about it?

14 THE WITNESS: No, sir.

15 THE COURT: Did the State have it?

16 MR. BROWN: We finally got it from the State.

17 THE COURT: Your argument is the State should
18 have given him something that is exculpatory?

19 MR. BROWN: Yes. That is raised in our
20 third, impeaching, not exculpatory, borderline
21 exculpatory.

22 THE COURT: Why not use it to impeach him
23 rather than exculpatory?

24 MR. BROWN: In this case it would be used for
25 both, to impeach his general credibility and his

1 credibility regarding recall of that incident, so
2 it follows both prongs of Brady.

3 THE COURT: Go ahead.

4 MR. BROWN: Of course I believe we have also
5 alleged, with all due respect to Mr. Cummings, it
6 was ineffective assistance of counsel not to use it
7 but if he didn't have it or know about it I don't
8 know how he would use it.

9 THE COURT: Let me ask you, how did the State
10 have Mr. Gadson -- this is back in 2001?

11 MR. BROWN: Yes, sir.

12 THE COURT: This was done regarding his other
13 charge?

14 MR. BROWN: This murder, he was charged with
15 this murder, too.

16 THE COURT: And, so, Mr. Dukes had him
17 evaluated?

18 MR. BROWN: And Mr. Bailey knew about it and
19 of course Mr. Cummings was not a party to that
20 case. I mean, he was counsel for a co-defendant.

21 THE COURT: Okay.

22 BY MR. BROWN:

23 Q And you had testified before that what you
24 got had a Rule 5 stamp on it?

25 A Everything I would have would have a Rule 5

1 stamp, plus it also would have my office saying
2 what we got.

3 Q You don't recall this one?

4 A No, sir, not to the best of my recollection,
5 no, sir, I do not, plus I have never seen one of
6 those on a witness.

7 Q And I would concede there probably are some
8 rules, not constitutional rules, but rules
9 regarding privilege of medical records, which gets
10 into kind of a legal issue, I don't want to debate
11 it with a witness.

12 A That is what we do.

13 Q I would concede that there are rules that
14 protect the privacy of mental health records and I
15 think it would be a later question for the courts
16 whether if there were, whether a constitutional
17 duty to turn over medical records trumps Mr.
18 Gadson's right to privacy. I will leave that with
19 you. That is consistent with you not getting it?

20 A I didn't.

21 Q That's right. Okay. Have you ever seen
22 Tawain Gadson's plea agreement or indictment?

23 A Yes, sir, I saw the indictment. I'm also
24 privy to his plea, Walter sent out everybody,
25 "There is this proffer."

1 Q I will show you, that is Plaintiff's 1, which
2 is the indictment. For the Court's record, the
3 Clerk's office does not have a copy of this
4 indictment, Your Honor.

5 A Yes, sir, I have seen, I don't know if this
6 is the actual original indictment that went to
7 Madam Clerk, I remember getting an indictment from
8 Mr. Bailey of course on my client and of course the
9 other client by Brady, but again it would be in my
10 file.

11 Q And I'm going to let you keep that and look
12 at Plaintiff's 3, which is a plea agreement.

13 A Okay.

14 Q And Plaintiff's 4, which is a warrant.

15 A Plaintiff's Exhibit Number 3 signed May 13th
16 by Mr. Bailey, Mr. Gadson and Mr. Dukes, as I see
17 their signatures.

18 Q So, we're in the heat of trial?

19 A Right.

20 Q You have picked a jury at this point?

21 A Yes, and how -- this is where Marion probably
22 lost a lot of faith in me because I dragged him
23 back there along with family members, big Walt
24 Mitchell, and begged him to plead to save his life,
25 I did, I will tell you that. We took time, the

1 judge gave us extra time to go back in the back
2 room and --

3 THE COURT: What are you looking at here?

4 A I'm looking at the Plaintiff's Number 3, sir.
5 It's an agreement by Mr. Gadson to testify against
6 my client. He had not been willing to do that up
7 until the stage of trial, the eve of trial, if you
8 want to call it that way.

9 Q So, you believe you were actually provided a
10 copy of that plea agreement?

11 A Right, I'm sure Walter had it delivered to
12 the office, which is what they used to do.

13 Q Just for the record, it is in the transcript,
14 on May 13th you all are actually doing jury
15 qualification on that day?

16 A Yes, we were working.

17 Q So, you all were in the trial doing the jury
18 selection part, qualification, and Walter at the
19 same time, not simultaneously, but he goes that day
20 and strikes a deal with Mr. Dukes and Mr. Gadson?

21 A However he did it.

22 Q According to the dates on that document?

23 A Yes, sir.

24 Q Okay. But do you believe you got that? I
25 mean --

1 A Oh, yes. I mean, I had to have gotten the
2 plea deal or at least notice he was going to flip
3 and testify against my client. The best of my
4 recollection --

5 Q Bear with me, because there is a difference,
6 I understand, because you did cross-examine Gadson
7 about cutting a deal?

8 A Yes.

9 Q My question is did you actually receive a
10 copy of that plea agreement?

11 A Seven years later.

12 Q I understand that.

13 A I don't ever want to make a mistake with this
14 man's life in peril. I don't remember if Walter
15 handed me a package or walked across like you and
16 Mr. Waters would do, "Here, he's going to testify."
17 That might show up without a Rule 5 stamp. If it
18 does, then how I got it, whether or not it's in my
19 file, it would be either handed to me in the
20 courtroom or in the back room, which we commonly
21 call it, as you walk out the back way at St.
22 George, the Solicitor's office had a little office
23 back there, might hand me that and I got to go talk
24 to Marion.

25 Q Would you do me a favor at some point after

1 you have testified, look through your file to see
2 if you can locate a Rule 5 copy?

3 A You gentlemen have everything I ever had on
4 this case from what I had in my file.

5 Q But it's been returned, let's make sure the
6 record is clear.

7 MR. WATERS: Your Honor, we dispute that.
8 Remember again they kept the file and Mr. Cummings
9 did not get it back until shortly before we began
10 this hearing and I have never had a copy of Mr.
11 Cumming's file.

12 THE COURT: You mean this hearing today?

13 MR. WATERS: No, when we first began. If you
14 remember --

15 THE COURT: You had it for a while.

16 MR. WATERS: He has had it but the State has
17 never had a copy of Mr. Cummings' file.

18 MR. BROWN: I understand that. We don't have
19 a copy of Mr. Cummings' file at this point, Mr.
20 Cummings took his file back.

21 THE COURT: You gave it back?

22 MR. BROWN: That's correct.

23 THE COURT: He didn't take it back, you all
24 gave it back.

25 MR. BROWN: All I'm asking is if he can look

1 to see if he can find a Rule 5 copy in there.

2 THE WITNESS: Yes, Jack, Mr. Sinclair on the
3 way home, I kept it right by the back of my office,
4 he is welcome to go by and get those plastic bins
5 and copy them for posterity.

6 MR. BROWN: Let me put it in context. We
7 assert we never got a copy of that plea agreement,
8 that is in our claim and it is not a question, I'm
9 trying --

10 MR. WATERS: I would object to that.

11 MR. BROWN: It is not a question, I'm trying
12 to, I have asked if he would have a chance at some
13 point in time after he leaves the stand to look to
14 see if that is in there.

15 THE COURT: If what?

16 MR. BROWN: That plea agreement.

17 THE WITNESS: Plaintiff's 3, sir.

18 THE COURT: But you said you were aware.

19 THE WITNESS: Yes, they cut a deal. Now they
20 ask me whether I'm sure I saw the paper. I might
21 have just been told by Walter he's going to flip.

22 THE COURT: But did you say that your
23 knowledge of this caused you to get Mr. Bowman and
24 take him back, you wanted him to take a plea?

25 THE WITNESS: Absolutely, sir. That was in

1 writing to the gentleman and everybody there, but
2 Marion turned it down. I had his family go back,
3 his mama went back.

4 THE COURT: If you look in the file, whether
5 you find it or not, you are aware Mr. Gadson made a
6 deal to testify for the State?

7 THE WITNESS: Oh, yes, sir.

8 MR. BROWN: We concede that, because I asked
9 him about a deal, Your Honor.

10 BY MR. BROWN:

11 Q Here is where I want to try to go into a
12 little bit on that. What did Tawain, what was your
13 understanding, what did Tawain Gadson do to merit a
14 charge of murder?

15 A Well, number one --

16 Q To serve as a factual basis?

17 A Number one, if everything was true he was
18 clearly a principal, he was there.

19 Q Besides being there --

20 MR. WATERS: Your Honor, I object to --

21 THE COURT: I'll let him answer the question.

22 MR. BROWN: I'm trying to get --

23 THE COURT: If he answers it wrong, then he
24 answers it wrong.

25 BY MR. BROWN:

1 Q Besides being there, let me get this long
2 question here in, obviously being present is not
3 guilt.

4 A And involved in the allegations.

5 Q Being present at the scene of a crime is not
6 guilty in South Carolina?

7 A Mere presence isn't.

8 Q Mere presence with knowledge that a crime is
9 going to occur is not guilty?

10 A For that offense, it could be misprison of a
11 felony.

12 Q Bingo. So, more than knowledge of a murder
13 and more than presence with knowledge of a murder.
14 What did Mr. Gadson do that served as a legitimate
15 basis for prosecution as a murderer, not just in
16 February of '01, but all the way through the
17 signing of that plea agreement on May 13th, 2002,
18 during Mr. Bowman's trial?

19 A Either, A, he shot Kandee, or B, he was there
20 and helped Mr. Bowman shoot Kandee and helped
21 dispose of the body.

22 Q Okay.

23 A That is the best of my recollection.

24 Q That would be like after the fact, which is
25 basically what he pled to?

1 A Yes, sir.

2 Q It was a reduced charge. Okay, how did he
3 help him shoot her if he didn't do the shooting?
4 There is one gun, right, the ballistics suggest
5 from the State's side that there was only one gun.

6 MR. WATERS: Your Honor, I object to this
7 question. First of all he's asking him how did he
8 do it. That is asking of his on personal
9 knowledge. He can't answer. If he wants to ask,
10 "What do you believe," could you prove or not prove
11 that it is one thing.

12 THE COURT: Are you just trying to make a
13 point that Mr. Gadson not only should have been
14 examined about whether he did the murder or not,
15 but also that he had maybe obstructed justice or
16 something by holding things back? What are you
17 saying?

18 MR. BROWN: I don't know the answer, Your
19 Honor.

20 THE COURT: Ask him about --

21 MR. BROWN: Here is the gamut, to run the
22 logical gamut here, either Mr. Gadson was being
23 improperly coerced into testifying under threat of
24 death penalty for murder, because he testified --

25 THE COURT: Or?

1 MR. BROWN: Or he actually was actively
2 involved in the murder, which makes his trial
3 testimony false.

4 THE COURT: That is your viewpoint of it.
5 Does Mr. Cummings believe that? Are you asking Mr.
6 Cummings do you believe that?

7 BY MR. BROWN:

8 Q That is an even more complicated question but
9 I'll try. If Mr. Gadson testified truthfully at
10 trial that he didn't have anything to do with the
11 killing, was merely there, there with knowledge, or
12 as he said, knowledge when the bullets are fired,
13 "That is when I find out that this killing is
14 happening," otherwise he doesn't know about it,
15 then how can the State say that if he doesn't
16 testify truthfully they're going to go after him
17 for murder?

18 MR. WATERS: Your Honor, I object to that
19 question.

20 MR. BROWN: Well, I'm trying to follow up the
21 Judge's suggestion.

22 THE COURT: I'm not suggesting anything, I
23 don't guess. I hadn't said anything. Anyway, is
24 your question how could they have done what?

25 MR. BROWN: How did they --

1 THE COURT: How did they, meaning how did the
2 State?

3 MR. BROWN: How did the State, and it is in
4 this agreement, Plaintiff's Exhibit 3, paragraphs
5 eight and nine, it says here testify truthfully or
6 cooperate and if he fails to do that that they will
7 re-instate the murder charge and seek the death
8 penalty and that Mr. Gadson waives objection to
9 death.

10 THE COURT: All right. That is something in
11 that document?

12 MR. BROWN: Yes.

13 THE COURT: So what is your question? I
14 assume that you actually have read the document.

15 MR. BROWN: I studied this document and my
16 point is this.

17 THE COURT: No, what is your question?

18 BY MR. BROWN:

19 Q Okay, let me back up. What did you believe
20 was Mr. Gadson's actions that allowed the State to
21 threaten him with murder prosecution and death
22 penalty?

23 MR. WATERS: Your Honor, I object to that. I
24 just don't see how that's the a question or
25 relevant, what he thinks the State --

1 THE COURT: As for as what he thought, he
2 thought the State thought what Mr. Gadson thought.
3 Why don't you ask him what he decided to do on his
4 own?

5 MR. BROWN: Because I don't know what he
6 believed. Well, I will ask it two ways, here we
7 go.

8 THE COURT: Ask what he did. The question
9 really is what he did and whether what he did was
10 or was not ineffective assistance of counsel.

11 MR. BROWN: Fair enough.

12 BY MR. BROWN:

13 Q If Mr. Gadson did nothing and that's true but
14 he was threatened with death without objection, I'm
15 going to put that in quotes, without objection --

16 THE COURT: You're not making argument now,
17 are you, you're asking him?

18 MR. BROWN: No, I'm asking him.

19 THE COURT: You're not trying to make a point
20 to me?

21 MR. BROWN: I'm making a point to --

22 THE COURT: Why don't you wait to argue?

23 MR. BROWN: I'm trying to do it through his
24 question and answer here.

25 THE COURT: That means you're going to do it

1 again.

2 When you saw that, Mr. Cummings, what did you
3 say? Were you aware of this? How did it affect
4 your representation of Mr. Bowman, your decisions
5 regarding examining Mr. Gadson?

6 THE WITNESS: The way I looked at it, Judge,
7 Mr. Gadson was going to testify that my client shot
8 this lady, all he was out there doing under threat
9 of Marion Bowman hurting him was either, A, and I
10 say this openly, that he either helped Marion or he
11 would be dead, too, I remember words like that.

12 BY MR. BROWN:

13 Q And you knew --

14 A I can't speculate why Mr. Bailey cut him a
15 deal, what he did there. I don't like that, I got
16 caught on the eve of trial, here we go, a guy has
17 flipped against my kid, he's the only one now that
18 is going to face the death penalty.

19 Q Did Tawain Gadson deserve the death penalty
20 for being threatened and for being there?

21 MR. WATERS: Your Honor, I object.

22 THE COURT: Sustained.

23 MR. BROWN: Okay.

24 BY MR. BROWN:

25 Q Would it not impeach the credibility of Mr.

1 Gadson to show that the State was threatening him
2 with death penalty murder but he didn't do
3 anything?

4 A The way you ask that question, yes, sir.

5 Q Because like if I threatened to do something
6 to somebody but they didn't do anything wrong it is
7 just a flat threat, isn't it, it is not a deal,
8 it's a threat?

9 A It is a threat. Hopefully Mr. Dukes would
10 have -- I don't know, I don't know why Mr. Dukes
11 let him sign the sheet. I know why, it saved his
12 life, to get away from being in the possibility of
13 death penalty.

14 Q So, if he testified at trial he didn't do
15 anything --

16 A If the jury believed that, that is the next
17 thing.

18 Q But if Mr. Gadson says, "I'm just there," but
19 he did something that made him liable for murder,
20 than the fact he says, "I was just there and didn't
21 participate," that is not true, is it?

22 A You're asking me again in that arena whether
23 or not the jury is going to believe him. No, you
24 know what they believed, they believed that little
25 white girl was dead and then burned and somebody

1 did it and they wanted that somebody. That is what
2 I believe and it was horrible, it was a horrible,
3 horrible trial and I wanted to save a young man's
4 life as well as try that case, and then everybody
5 testified against Marion.

6 Q Is there not residual, then, even in the
7 penalty phase to show that Mr. Gadson was, says he
8 didn't do anything but he was threatened with death
9 murder and Mr. Bowman is going on trial for death
10 murder and Mr. Gadson is going to be in effect
11 eligible for parole in five years and gets out less
12 than five?

13 A Whatever I said in that trial, Mr. Brown,
14 again I cross-examined him, whatever I did in the
15 penalty phase I did. I don't know how to explain
16 it to you. Do I wish I would have done a better
17 job? Probably. Do I think I did a bad job? I
18 hope I didn't.

19 Q Did you know that, did you know that he was
20 threatened with re-installing the murder charge and
21 seeking death and waived objections to death? Did
22 you know all that?

23 A I'm used to proffers, I'm used to the federal
24 system, that if you change one iota they pull the
25 deal out from under you and you're back to square

1 one. The answer to that is yes, I know that. But
2 I can't sit here today and tell you as an officer
3 of this court that that document, you know, I had
4 it in my hand when I met with Marion, I just know
5 that I was told on that date or when we were
6 picking a jury that the last person is going to
7 testify against him. There was nobody else to
8 testify against Mr. Bowman, they got his family,
9 they got everybody, the only one wasn't testifying
10 against him was me.

11 Q We'll get to the family's testimony. Now,
12 you read some of the plea agreements?

13 A Absolutely, yes, the ones that were given to
14 me prior to here we are picking a jury.

15 Q Okay. The agreements, for lack of a better
16 word, with the family of Mr. Bowman all have
17 polygraph provisions, right, they required them to
18 be subject to a polygraph?

19 A Yes. And we all know about how I felt about
20 the polygraph given by the Sheriff's Department
21 down here. That is one reason why Her Honor I
22 think suppressed a lot of the statements.

23 Q Let me ask you, we know Travis Felder and Mr.
24 Gadson both failed polygraphs?

25 A Well, you pointed that out to me, yes.

1 Reading that again, I thought they were all liars,
2 between you and I.

3 Q And it is hard to believe anything a liar
4 says?

5 A I really don't want to sit here and say I've
6 gotten maybe a little more wisdom with this gray
7 hair but, you know, there is three sides to every
8 story, theirs, the other side and then the truth.

9 Q Well, let me ask you. Two people I just
10 mentioned who testified and failed polygraphs --

11 MR. WATERS: Which exhibit?

12 A Fourteen, sir.

13 Q Plaintiff's 14 and Plaintiff's 3 again, those
14 are the plea agreements of the only two people who
15 claimed to have witnessed the burning of the body,
16 which was the one charge of arson, or the shooting
17 of the person, which is the murder, they are the
18 only two witnesses to the guilt phase crimes,
19 right, Felder and Gadson?

20 A Yes, sir,.

21 Q And they both failed polygraphs?

22 A Right. May 23rd.

23 Q So, they both failed the polygraph, they both
24 said they witnessed Mr. Bowman commit these two
25 crimes. I can put this in context. They both said

1 they witnessed Mr. Bowman commit the crimes, the
2 only eyewitnesses to the two crimes?

3 A Right.

4 Q They both enter plea negotiation, 3 and 14?

5 A Right.

6 Q They both failed polygraphs but those two
7 plea agreements are missing a provision that
8 requires them to pass a polygraph, doesn't it?

9 A Again, sir, I did not do those agreements.
10 If the provision is left out, I read it, I don't
11 know what else to tell you about it.

12 Q Would you find it unusual or of value as a
13 lawyer impeaching the State's case to note that
14 these two eyewitnesses don't have a polygraph
15 provision but all the other witnesses do have
16 polygraph requirements? In other words, if you
17 implicate Marion Bowman they don't want to
18 polygraph you, or implying that. Is there not some
19 value to you impeaching the State's investigation?

20 A To answer your question, as I'm required to
21 do, yes. Now, the other issue that I have is
22 polygraphs aren't admissible. Then we get into
23 whether or not when you can impeach somebody, when
24 you can't.

25 Q I'm actually not talking about the result of

1 a polygraph.

2 A Right.

3 Q The two eyewitnesses weren't required to as
4 part of their plea agreement.

5 A I'm going to tell you I did not know they
6 were not polygraphed because usually as part of a
7 deal they always do.

8 Q They were polygraphed and they failed?

9 A Right.

10 Q But they weren't required to pass polygraph,
11 everybody else in their plea agreement was?

12 A That was Mr. Bailey's choosing.

13 Q Okay.

14 A As prosecutor.

15 Q But there is some impeaching value?

16 A Yes, sir.

17 Q Okay. Now, going back to Mr. Gadson's
18 charge, the murder charge and the warrant, the
19 warrant and the murder charge in the indictment.

20 A All the charges were a mess. You're talking
21 about our Sheriff's Department and then probably
22 the Orangeburg County Sheriff's Department, I'm
23 sure one guy sat down with one piece of paper and
24 just filled in the blanks on the lines and by the
25 time I got in the case he was already indicted,

1 served notice of death penalty, so the warrants are
2 already done.

3 Q Detective Coker swears to the affidavit in
4 that warrant, doesn't he?

5 A Yes, sir. Every warrant has to have a sworn
6 affidavit or sworn information to the judge, yes,
7 sir.

8 Q Okay. And again --

9 A Number 4.

10 Q That is Plaintiff's 4, is the Gadson warrant
11 for murder and affidavit?

12 A Yes, sir.

13 Q And Number 1, again is Gadson's indictment
14 for murder?

15 A Right.

16 Q And a witness to that grand jury presentation
17 is Detective Coker?

18 A I'm trying to see. Detective Coker, yes,
19 sir.

20 Q Same person?

21 A Right.

22 Q Both those documents say on behalf of the
23 State, that Tawain Gadson was the shooter, don't
24 they?

25 A Yes, sir.

1 Q In the initial warrant and the indictment?

2 A That's correct.

3 Q Isn't it of impeaching value to the State's
4 case, if not Gadson's testimony in particular, that
5 he was alleged to have been the shooter?

6 A Well, again I'm trying to remember my
7 cross-examination. It was seven years ago. I
8 would hope the first thing I did was point out to
9 the jury he cut a deal, he's not a believable
10 person, and I would hope to in cross tell him, "You
11 were charged with murder," and I hope I did that
12 because I, if I remember correctly, I asked, "You
13 were charged with murder, too?"

14 Q Why didn't you tell the jury the State had
15 sworn in previous proceedings that Gadson was the
16 shooter?

17 A I can't answer that today. I don't know why
18 I didn't ask it. I mean, it wasn't strategy,
19 that's for sure, and if I didn't ask it that way, I
20 thought I was cross-examining him the best way I
21 could get evidence out of him. I didn't want to
22 hurt my kid any more.

23 Q I'm not talking about Gadson, I'm talking
24 about Detective Coker, who takes the stand, because
25 your theory obviously was that Marion wasn't the

1 shooter?

2 A Right.

3 Q So --

4 A With dignity on that, yes.

5 Q But it helps, if Detective Coker informs the
6 jury that previously he had sworn that Tawain
7 Gadson was the shooter that's exculpatory evidence?

8 A I'm trying to remember now really what I
9 cross-examined Coker on. I had him on the stand --

10 Q But you did know from these sworn statements
11 Gadson was the shooter?

12 A That is what you're telling me. I don't
13 specifically remember doing that. I cross-examined
14 him for hours.

15 Q There is no strategy reason?

16 A No, sir, no strategy reason.

17 Q And it dovetails with Ricky Davis'
18 information that says, "I heard Gadson confess to
19 being the shooter"? I mean, they go hand in hand,
20 don't they?

21 A As we previously testified, if you believe
22 Ricky Davis who later on said, "No, I didn't say
23 all that." But again --

24 Q When did he say that?

25 A I sent Walt Mitchell up there to him, our

1 investigator. He said he didn't say that.

2 Q Okay.

3 A I relied on that in my defense of Mr. Bowman.

4 Q All right. On that note I want to ask you
5 about Plaintiff's 67 which you indicated you had
6 never seen this before but that would have helped
7 you on that issue, wouldn't it, where Ricky Davis
8 told the Sam, independent of anybody from the
9 defense being there, that yes, Gadson confessed to
10 him while he was with some other inmate?

11 A I wish I really would have had this because
12 Sam is probably the, I don't ever wish to bolster
13 anybody, but he is one of the politest, most
14 educated young men I have ever met in my life and
15 he was the Solicitor's investigator, if that is the
16 Sam.

17 Q He wouldn't have coerced Ricky Davis into
18 saying that?

19 A I know under Brady, Rule 5, maybe this is an
20 academic question I'm asking, like my investigator
21 is my work product.

22 Q Yes.

23 A I never saw this because it looks like work
24 product of the Solicitor.

25 Q You got it. Work product doesn't trump

1 Brady?

2 A We're all academics in here as for as what we
3 have done in life but I have never seen that.

4 Q That would have helped?

5 A You are talking about work product to an old
6 Solicitor.

7 THE COURT: Can I see that? What is that?

8 MR. BROWN: Plaintiff's 67.

9 THE COURT: In evidence already?

10 MR. BROWN: Yes, sir.

11 THE COURT: Okay.

12 BY MR. BROWN:

13 Q Again, Detective Coker's sworn statement that
14 Gadson was the shooter and grand jury presentation
15 that Gadson was the shooter and the Ricky Davis
16 jailhouse confession from Gadson that he was the
17 shooter, that all dovetailed together to support
18 the defense theory that somebody besides Marion was
19 the shooter?

20 A I think there were three arrest warrants for
21 indictment charged everybody with murder. They did
22 that under the hand of one is the hand of all,
23 right.

24 Q Let me stop you. Travis was charged with
25 murder?

- 1 A Right.
- 2 Q It would be worth impeaching Travis Felder
3 with the fact he was charged with murder, wouldn't
4 it, that he is cutting a deal to get probation from
5 capital murder?
- 6 A I didn't know about that, about the probation
7 deal. I did not know about that.
- 8 Q That's partly because Felder's agreement
9 wasn't signed until after trial?
- 10 A That's correct. You pointed that out to me.
- 11 Q Okay. But let me ask you, is it worth
12 impeaching him with the fact the deal he's cut cuts
13 him out of capital murder, I mean Felder?
- 14 A Yes, sir.
- 15 Q And there is no question he was charged with
16 murder?
- 17 A Right.
- 18 Q They said he was involved in the murder, too?
- 19 A That's correct.
- 20 Q Okay. Now, to clarify, accessory before the
21 fact of murder?
- 22 A Correct.
- 23 Q Which is murder, it's the same?
- 24 A Yes, it is.
- 25 Q To clear up that issue.

1 Let me ask you about Tawain Gadson owning a
2 High Point .380 firearm.

3 A I remember reading in reports that his was
4 supposedly stolen, it was purchased at a place and
5 stolen before --

6 Q Before the murder?

7 A Before the incident, right.

8 Q Let me ask you this. Is it your
9 understanding it was stolen from under a rock?

10 A I don't --

11 Q Or out of a car?

12 A I don't recall, sir, I don't. I just
13 remember that somehow that wasn't the gun allegedly
14 used in this case.

15 Q Before we get to whether that was the gun
16 used in this case --

17 A Right.

18 Q Before we do that, if Mr. Gadson tells you on
19 one date it was stolen from under a rock and he
20 tells you another day it was stolen from a car,
21 does it make it maybe less credible that it was
22 ever stolen at all or does it sound like he was
23 making it up, maybe?

24 A To answer your questions, yes, it would make
25 it less credible. I don't recall that specifically

1 right now, I don't.

2 Q You don't recall there being a contradictory
3 statement about where it was stolen from?

4 A No, sir, I don't.

5 Q But that is impeachment information,
6 contradictory?

7 A Yes, sir.

8 Q Unless the rock was in the car or something
9 of that nature. I mean, we presume it was stolen
10 from under a rock or brick, and stolen from a car
11 are not the same thing?

12 A No, sir.

13 Q All right. And what did you know about --
14 well, I'll start this, what did you know about the
15 ballistics?

16 A I read every SLED report, had Durandt as our
17 investigator, and nobody could say positively
18 anything matched positively. It was all more
19 likely than not or that they are the same or
20 similar circumstances. The rounds were, actual
21 bullets out of Kandee's body and in the ground were
22 too badly damaged.

23 Q How about the casings?

24 A Casings were all over the roadway, some were
25 run over. We made a motion to set aside the crime

1 scene for contamination, which was denied.

2 Q Let me ask you, are you saying it wasn't a
3 positive match of the casings?

4 A No, I said as for as we know the firing pin
5 was broke in testing, while it was in SLED's care.
6 I wanted to stay off that topic as much as I could,
7 trying not to make a mistake and help them bolster
8 anything against Mr. Bowman. I wanted to make sure
9 everybody knew the firing pin broke but the State
10 was handling it, not the defense experts.

11 Q But they matched with the breach face?

12 A Yes, the ejector port, coming out.

13 Q There was testimony at the trial by the SLED
14 experts the match was conclusionary to that gun,
15 with certainty?

16 A On the breach part, yes, on the ejector
17 rounds, shell casings, yes.

18 Q Now, if that's true, that matching is
19 accurate, do you not find it interesting that
20 shells that were collected or indicated on
21 Plaintiff's Exhibit 25 entered into evidence and
22 listed as 46 through 49, that two of these casings
23 were also linked to that same gun?

24 A I'm trying to go back and remember that there
25 was some shell casings found at the housing project

1 in Orangeburg County.

2 Q Yes, sir.

3 A And a lady complained about some shooting,
4 some random shooting out there and the police had
5 gathered some shell casings --

6 Q And --

7 MR. WATERS: Your Honor, I would ask the
8 witness be allowed to finish.

9 Q Please.

10 A I'm sorry. I think they submitted those
11 along with the ones found at the Nursery Road site
12 to SLED for comparison. That is what I remember.

13 Q And according to SLED the matching they made
14 from the gun fished out of the river was equal to
15 the casings found at the Nursery Road site and to
16 the prior shooting?

17 A That's what I remember, sir, yes.

18 Q And if you will look at Plaintiff's Exhibits
19 29 and 30 already entered into evidence, why didn't
20 you mention to the jury that Tawain Gadson had been
21 seen shooting that same gun, if you believed the
22 SLED report?

23 A I didn't do it. I mean, I don't remember
24 doing it.

25 Q No. Why not?

1 A I don't have a strategy reason for that.

2 Q Okay.

3 A Okay.

4 Q Now let me ask you this. What would you say
5 if you, if you were presented today with
6 information that there is no statistical
7 probability for matching of breach face marks on
8 casings of a gun?

9 A I have read what everybody else has what has
10 gone on with the FBI lab, people coming out now
11 saying it's not a scientific thing we should use.
12 So, there is controversy now, just like there was
13 controversy originally about fingerprints not being
14 to exclusion. Every day things change. At the
15 time of trial that was a recognized science, as I
16 understand it.

17 Q Let me ask, what is scientific about it?

18 A It is like any kind of machine markings or
19 what I call, what they call tool markings, pieces
20 of metal breaking in half, you can always go back
21 under a microscope and hopefully find the
22 imperfections in the metal at the point where they
23 break. I have just had that recently in the last
24 death penalty case I have just done.

25 Q But I guess what I'm saying is, the part

1 about science is that it's, it isn't in an
2 objective manner. In other words, you can measure
3 so many volts of electricity coming out of an item
4 or some item weighs a certain amount or in this
5 case that the stria were a certain length and
6 certain distance apart which equal a certain
7 algorithm like they do a fingerprint so they use a
8 mathematical formula to match the distance in the
9 swirls and loops?

10 If you will look at the SLED items I have
11 handed up to you?

12 A This is item number --

13 Q Those are the bench notes.

14 A 25, right.

15 Q 25. And of course the actual report on 24,
16 Plaintiff's Exhibit 24 entered in evidence, what is
17 scientific about that?

18 MR. WATERS: Your Honor, I would object to
19 this question. I think it is obviously beyond the
20 scope of his expertise. He's not a scientist here.
21 I think the only question would be, "Based on your
22 investigation or consultation with experts what did
23 you find out," and not to his scientific opinion
24 about whether --

25 THE COURT: You asked what is scientific

1 about that?

2 MR. BROWN: Yes, sir.

3 THE COURT: In a general sense?

4 MR. BROWN: Here is why I asked. He said it
5 was accepted science back in 2001, and obviously
6 lawyers not being scientists but lawyers object to
7 scientific testimony as not being science even
8 though they are not scientists, and I'm asking him
9 in hindsight, looking back on it what is really
10 scientific about somebody drawing a picture.

11 MR. WATERS: Your Honor, again I think that
12 question, that is improper. The only proper
13 question is what did he understand at the time
14 based on his own investigation and his consultation
15 with experts in the field.

16 THE COURT: I don't know that applies to the
17 question.

18 MR. WATERS: On this particular subject it
19 would be.

20 THE COURT: Let me ask, what was your
21 reaction to what you see there, sir?

22 THE WITNESS: We had hired an expert, all
23 privileges are waived in a PCR, the expert said,
24 "If this is all the SLED expert is going to do to
25 it, you take it and have a nice day. You don't

1 want me down there to testify, because it is
2 consistent." He read everything, he checked the
3 weapon and he said, "More likely than not you don't
4 want me to testify," and that is a fair and
5 truthful representation of our expert in Virginia.
6 I don't know how to put it any other way.

7 THE COURT: Do you think from that your
8 expert was going to say the bullets did definitely
9 also come from the gun?

10 THE WITNESS: The shell casings. The bullets
11 could not be matched.

12 THE COURT: I'm sorry.

13 THE WITNESS: If they could not match the
14 bullets that was a positive thing for Mr. Bowman,
15 if indeed --

16 THE COURT: In any event, you in essence had
17 your expert and the State's expert were going to
18 say the shell casings came from the gun. That was
19 your understanding?

20 THE WITNESS: Yes, sir.

21 THE COURT: You had nobody saying it was no
22 way anybody could definitely testify to that?

23 THE WITNESS: Correct, sir, and I had some
24 cross-examination questions that were suggested to
25 me by the expert, which I believe I asked.

1 THE COURT: Did you, your expert, were you
2 able to get the shell casings and look at them or
3 looked at photographs?

4 THE WITNESS: I believe, sir, he had the
5 weapon, the shell casings, the photographs,
6 everything was driven to him by the investigator
7 from the Sheriff's Department and Solicitor's
8 office so the chain of evidence would not be
9 broken.

10 THE COURT: I asked him his reaction. I
11 think it is a more appropriate question.

12 What is your next question?

13 MR. WATERS: Your Honor, as a quick
14 housekeeping matter, I believe, I don't know if it
15 was Mr. Cummings, but somebody called Mr. Bailey
16 and told him to be here at 2:30 and if we're going
17 to have lunch --

18 THE COURT: No, no, I thought we agreed we
19 were going to wait.

20 MR. BROWN: I didn't call him.

21 THE WITNESS: I did. I thought you all
22 wanted him here at 2:30.

23 THE COURT: No, no, no.

24 THE WITNESS: Do you mind me getting off the
25 stand and call him and turn him around? I thought

1 you wanted him here at 2:30.

2 THE COURT: No, no. I think you're going to
3 be our witness all day. You're going to be here
4 until 9:00 o'clock tonight.

5 THE WITNESS: I just got out of one, I will
6 see you in seven years.

7 MR. WATERS: That is why I brought it up.

8 THE WITNESS: I did, I called Walter, I
9 thought you wanted him here.

10 THE COURT: Listen, I will tell you what,
11 just like we said last time, don't discuss your
12 testimony, contact Mr. Bailey and let's try to get
13 together again in about an hour and ten minutes.

14 THE WITNESS: Sure, whatever you say, sir.

15 THE COURT: All right. Try to get Mr.
16 Bailey, tell him we'll call him if we need him
17 today. We'll take a break, everybody have a
18 sandwich.

19 Is that all right with you, Mr. Brown?

20 MR. BROWN: Okay, that's great. I'm hungry.
21 Thank you.

22 THE WITNESS: May I turn on the phone, sir?

23 THE COURT: We're in recess, you can use the
24 phone right there if you want to.

25 (Recessed at 1:01 p.m.).

1 (Reconvened at 2:25 p.m.).

2 THE COURT: Mr. Witness, you haven't
3 discussed your testimony with anyone, have you?

4 THE WITNESS: No, sir.

5 THE COURT: You're still under oath. By the
6 way, Mr. Witness, to make sure I understand, I hope
7 you remember when you did testify on today you were
8 still under oath from the last time?

9 THE WITNESS: Yes, sir, I remember.

10 THE COURT: You understand?

11 THE WITNESS: Yes, sir.

12 THE COURT: All right. Mr. Bowman is here,
13 let's wait a second and let him get seated.

14 Okay, Mr. Bailey, he knows we'll call and let
15 him know when we'll need him tomorrow?

16 THE WITNESS: Yes, sir.

17 THE COURT: All right. Mr. Court Reporter,
18 are you ready?

19 Whenever you're ready, Mr. Brown.

20 MR. BROWN: May it please the Court?

21 THE COURT: Yes, sir.

22 BY MR. BROWN:

23 Q Before we broke we were talking a little bit
24 about ballistics analysis and challenges of
25 scientific evidence, just to get back in the

1 groove. I think at the time you stated it was
2 accepted science, I'm not try to put words in your
3 mouth, but since then it's not accepted?

4 A Right.

5 Q That things came out and you had consulted
6 the ballistics examiner?

7 A Correct.

8 Q Now, would you agree with me that a
9 ballistics examiner has a vested interest in the
10 continued viability of ballistics examination?

11 A Yes, sir.

12 Q So, something that undermines the credibility
13 of the doctrine as a whole is going to be against
14 the self interest of any ballistics examiner?

15 A Yes, sir. Their job is they're supposed to
16 tell the truth on what they conduct the tests on.
17 I hope they would not put economic gain before the
18 truth.

19 Q But there is an assumption that tool marks
20 leave unique or firearms leave unique tool marks on
21 an object and that's a part of the stock in trade
22 of the ballistics examination?

23 A That's correct.

24 Q Anything that threatens that assumption
25 threatens the entire field, doesn't it?

1 A In my opinion, yes, sir.

2 Q All right. And likewise the ability to
3 attribute some kind of scientific or statistical
4 data from a marking on a gun or marking on a
5 casing, tool mark left by a gun, whether or not it
6 is actually science or produces some type of
7 readily available probability and also the science
8 or the doctrine rises or falls upon that assumption
9 that you are able to put a probability on it?

10 A Yes, sir.

11 Q All right. And at some point in time, using
12 an analogy, folks thought the world was flat and if
13 you were, and I see an objection, so before I delve
14 into this analogy I will try to address the
15 objection.

16 THE COURT: Thank you, Mr. Columbus.

17 MR. WATERS: It seems to be a matter of
18 argument but certainly relevance.

19 THE COURT: Whether the world is flat or not
20 is a matter of argument?

21 MR. WATERS: If he is going to make analysis
22 as to whether the world is flat is akin to tool
23 mark identification, yes.

24 THE COURT: Well, I see the analogy. Are you
25 trying to make an analysis to that? Whether the

1 world is flat or not, I will let you try to say
2 everyone accepted the fact the world was flat and
3 they accepted ballistics' ability to come down to
4 100 percent certainty about shell casings when
5 really we know it was not.

6 MR. BROWN: I am trying to draw an analogy
7 between the two.

8 THE COURT: Why don't we just get the shell
9 casings and ballistics --

10 BY MR. BROWN:

11 Q Here is what I'm trying to find out. The
12 reasonableness of the actions were in fact judged
13 in science by an objective yardstick?

14 A The answer to your question, sir, yes or no,
15 then if I may explain, please?

16 Q Sure.

17 A Yes, back at that time I had a SLED expert
18 and I had our own and I relied on that, on our guy
19 and also some background of Mr. Durandt. I know a
20 little bit about weapons but not everything, but at
21 that time it was a viable assistance to the jury as
22 an explainer of fact to the jury.

23 Q And just like Ferdinand MaGellan thought the
24 earth was flat, later on after Columbus' ships
25 sailed --

1 THE COURT: Counsel, I never saw any
2 reference that the world was flat. I have heard
3 most people in the world thought it was. If they
4 thought it was flat they sent Columbus off to fall
5 off the world.

6 MR. BROWN: If they did it.

7 BY MR. BROWN:

8 Q If I may back up --

9 THE COURT: By the way, we have much evidence
10 even way before Columbus fishermen from England,
11 especially the Liverpool area, had gone to the
12 Americas and been there and did some trading, that
13 is the reason why we know when Columbus, some of
14 them were holding out when he landed, some indians
15 were holding out pearls, saying, "You want to
16 trade?" We had some experience there. So, things
17 do change.

18 Q So, the flat world experts may not have been
19 reasonable during the flat world era in saying it
20 was flat, it sounds like to me, but I guess the
21 point I'm try to make here is if during the flat
22 world ear people consulted an expert in science and
23 they confirmed the world was flat it would seem
24 reasonable.

25 A If you pose that question, yes, sir.

1 Q But later on after the ships sail around the
2 world we know it is not flat?

3 A Yes, sir.

4 THE COURT: Now you're into Magellan, not
5 Columbus.

6 Q Then the world, then the world view before is
7 not as reasonable, looking at an objective
8 yardstick, we're not talking about just hindsight
9 20/20, but just holding up the real tape measure?

10 A Right, and what you're saying is, what you're
11 asking, I understand, so the answer would be yes,
12 the way you pose that question.

13 MR. BROWN: And, now, I want to mark an item.
14 (Plaintiff's Exhibit 78 was marked).

15 MR. BROWN: Your Honor, I provided a copy to
16 Mr. Waters. It is not evidence in our case in
17 chief but it is somewhat impeaching about an issue
18 I foresee coming up.

19 MR. WATERS: Your Honor, he is attempting to
20 offer an order from some Massachusetts District
21 judge in a criminal case in Massachusetts and it is
22 apparently some motions and documents and letters
23 filed from some criminal case in Massachusetts which
24 has absolutely nothing to do with this case. I
25 assume he's going to try to offer it to show that,

1 well, somebody --

2 THE COURT: That the world was flat?

3 MR. WATERS: Yes, the world was flat in 2001,
4 but we certainly would think this is irrelevant to
5 this proceeding and what some lawyer might have
6 done in Massachusetts --

7 THE COURT: Judge.

8 MR. WATERS: Well, apparently some lawyer
9 must have raised it and the judge addressed it in
10 the order. Actually this is a motion, I actually
11 don't see the judgment, it is a motion.

12 MR. BROWN: And I don't mind addressing it.
13 What I'm trying to do, there has been some
14 reference to, with all due respect to Mr. Cummings,
15 the wrongness of his actions and that it was the
16 norm at the time, and I would hand that up to show
17 that prior to Mr. Bowman's trial that a challenge
18 had been made, with all due respect, a challenge
19 had been made in federal court on the same grounds
20 that we believe now is the correct assessment --

21 THE COURT: That has no controlling effect
22 upon me, a trial court in Massachusetts. Whether
23 it's federal or state, it has no control over this
24 area.

25 MR. BROWN: Well --

1 THE COURT: Even an appellate court in the
2 federal system has no control over this particular
3 area, although I do take those matters as advisory
4 when you get to the appellate level business. Here
5 we're dealing with a trial court.

6 MR. BROWN: We agree with that, Your Honor.
7 All we're trying to show, we're talking about
8 standard of care, for lack of a better word.

9 THE COURT: I sustain the objection. Let's
10 go on. You may mark it if you want to.

11 MR. BROWN: And proffer it, Your Honor, for
12 standard of care at the time of Mr. Bowman's trial,
13 and that is all we're trying to do, actually, and
14 it is just a motion, and that one is, actually the
15 one I have marked is certified so it is the real
16 deal. You have a copy.

17 THE COURT: There is no challenge to it if --

18 MR. BROWN: If I may finish up a description
19 of the item. It was denied, Your Honor, to be
20 candid with the Court, and denial is noted at the
21 bottom of the motion and right there with the
22 judge's signature, and it's marked as item 83 out
23 of the file from the federal court up there.

24 BY MR. BROWN:

25 Q And to kind of put it in perspective a little

1 bit, there was an argument because you all brought
2 out the fact at trial that Tawain Gadson had a like
3 make and model gun?

4 A I believe I did.

5 Q There was a suggestion, whether it was an
6 explicit defense or at least what I would call a
7 shadow defense to the jury, that doubt about Mr.
8 Bowman's guilt would be raised by the fact Mr.
9 Gadson could have shot her with his make and model
10 .380?

11 A Yes, sir, I believe so.

12 Q Excellent. Doesn't the fact that the SLED
13 agent is saying that the ballistics matched the
14 casings on Nursery Road to the gun attributed to
15 Mr. Bowman to the exclusion of all other firearms,
16 that really tends to narrow down the viability of
17 that Gadson used his .380 defense, doesn't it?

18 A I disagree with you on that point. My answer
19 is no, and here's how.

20 Q Sure.

21 A He was in jail when the gun was found. I
22 raised a lot of I think proper questions and I also
23 went after everybody about how my young man is in
24 jail and they find this gun. They missed it the
25 first time and supposedly they went back, Darby had

1 a dream about someone told him where a gun was. I
2 mean, it was a mess, when you read through the
3 trial and what not, what his statements were. But
4 what I believe the proper answer would be they
5 didn't know the gun, they said that was Marion's
6 gun, and because, I mean, how did he get it?

7 Q And I agree with you. In fact I will inquire
8 on this note, that goes back to items 46 through
9 49.

10 A The shell casings.

11 Q The shell casings referenced in Plaintiff's
12 25 and the statement whereby it appears that Tawain
13 Gadson fired the gun even the State says was used.

14 A As the evidence came out it came out. But
15 also I believe Mr. Collins stated those shell
16 casings more than likely matched coming out of the
17 breach of the weapon recovered.

18 Q At trial he says it matched exclusively.

19 A Right.

20 Q Which is different than more than likely.

21 A I used more than likely. I didn't remember
22 his exact words.

23 Q All right. But the jury never found out that
24 Tawain Gadson shot that gun that matched up with 46
25 through 49?

1 A If you tell me that now seven years later, I
2 don't recall that. I would ask how they recovered
3 the shells or who got them or where and who was
4 around. I think I did that during the trial.

5 Q For the sake of expediency, assuming you did
6 not ask about shell casings 46 through 49 being
7 linked to the gun that fired the shell casings on
8 Nursery Road, and likewise being fired, the gun
9 being fired by Tawain Gadson, according to the
10 statements of Miss Hawkins and Miss Coleman that
11 have been entered in there, was there any reason
12 why you didn't bring that out to the jury?

13 A No.

14 Q Okay.

15 MR. BROWN: I beg the Court's indulgence.

16 Q And let me come back to one thing, and I hate
17 to beat a dead horse. If David Collins says that
18 the casings on Nursery Road matched the gun from
19 the Edisto River to the exclusion of all other
20 firearms but you have proof that Tawain Gadson
21 owned a different serial numbered but same make and
22 model .380, High Point .380, does Mr. Collins'
23 statement regarding the exclusivity of the match
24 eliminate the theory, the defense theory that
25 Gadson shot Kandee Martin with the other gun?

1 A The way you asked that question today is
2 this. Would Mr. Collins be able to exclude
3 Gadson's .380? He should have been able to if he
4 was a true expert and if the weapon had fired, two
5 weapons were used for the two different shell
6 casings.

7 Q You mentioned to the jury that Gadson has
8 another different serial number but same make and
9 model High Point .380?

10 A Right.

11 Q But when Collins says that the casings are
12 matched to the Edisto River gun to the exclusion of
13 all other firearms how does that not eliminate that
14 defense?

15 A Because Gadson could have had the weapon in
16 his hand and shot Kandee Martin.

17 Q How does it not eliminate the defense that
18 Gadson shot her with his own make and model .380,
19 how does it not eliminate that?

20 A It doesn't logically. To answer your
21 question, it does not logically.

22 Q It does not eliminate it?

23 A I don't think it does logically. I know what
24 you're saying. With specificity, you would have to
25 have the .380. They didn't have Gadson's gun to

1 test.

2 Q Collins doesn't say that. He says he can
3 exclusively match these shells to the Edisto River
4 gun to the exclusion of any others.

5 A I cross-examined that expert from SLED as
6 best as I thought I could and did without stepping
7 on my own mistake. The firing pin was broken.
8 They could not match the actual round that took
9 that woman's life. I mean, I don't know how to
10 answer that, Mr. Brown, any other way than I did.

11 Q Sure. Let's turn to the finding of the gun
12 for a minute. You talked about a dream?

13 A Yes, that is what people told us.

14 Q I'm with you. Those people --

15 THE COURT: Give me one minute, I'll be right
16 back.

17 MR. BROWN: Yes, sir.

18 (Brief recess).

19 THE COURT: All right. Had we completed the
20 shell casings and the issues regarding the
21 ballistics experts, Mr. Brown?

22 MR. BROWN: I have now moved to the topic of
23 the gun found in the river.

24 THE COURT: Right, okay.

25 MR. BROWN: Yes, sir.

1 BY MR. BROWN:

2 Q And you mentioned that there was a gun found
3 in the river and it was the one the State
4 attributed to Mr. Bowman's ownership, and what I
5 want to ask about, different family members were
6 called by the State to testify about the passing of
7 the gun through their hands and into the river?

8 A Yes, sir, and charged.

9 Q And that is my point of the story, is why
10 wasn't there an objection raised to Solicitor
11 Bailey's introduction of their guilty pleas in his
12 case in chief? Why is it admissible that they pled
13 guilty, why was it proper for Mr. Bailey to
14 introduce the fact they pled guilty, and to make
15 sure the Court is clear because it's in the record
16 of the trial --

17 A Right.

18 Q -- to accessory after the fact of murder?

19 A Marion's family is testifying against him,
20 okay, because these are --

21 Q Let's stop. Why is it against him? They are
22 just testifying there is a gun in the river.

23 A Well, there was more to it than that. The
24 sister testified about the statements in the
25 parking lot that day about Kandee.

1 Q I will agree with you on that, I will agree
2 with you on that but I'm talking about the gun part
3 of it. Try to stay focused, because I was trying
4 to portray how did this gun in the river, because
5 when my guy was in the jail these people had to
6 plead guilty, Mr. Bailey went after the whole
7 family.

8 A Mr. Bowman had no one other than yours truly
9 and Miss Marva Hardee-Thomas, his life was in my
10 hands, the whole thing, he had Norb to talk to, the
11 only other one. I told Marion this, and I will say
12 this outloud, that I was proud of, and I say this
13 as a man, not as a lawyer, was his daddy.

14 Q And I understand, his father didn't want to
15 cooperate with the State.

16 A He loved his son. He faced prison time for
17 not being anything other than a father.

18 Q But, now, I want to make clear so we're not
19 dancing around those issues, the family members
20 never said that Marion gave them the gun to get rid
21 of?

22 A That's correct. That was the main thing I
23 got out of there, he is in jail.

24 Q Now, with that context, why didn't you stand
25 up and object or in limine or to Walter Bailey

1 bringing out the fact they, I don't mean the fact
2 that they were subject to impeachment for
3 conviction of a crime, because that is one thing
4 and we know our courts let you limit impeachment to
5 certain circumstances?

6 A Right.

7 Q When prejudice may outweigh the probative
8 value or substantially outweigh it. I'm talking
9 about why did the fact that they were convicted of
10 accessory after the fact of murder, I'm not talking
11 about the fact they engaged in their conduct, but
12 why did the fact of their plea actually come into
13 evidence during Walter Bailey's direct of these
14 witnesses?

15 A I objected the way I thought I needed to
16 object. I let it in because I wanted the rest of
17 the stuff about how they went after his whole
18 family to get him. From the start of this case it
19 was all about interrogating him and it helped with
20 my getting a lot of the statements suppressed, it
21 was the totality of the situation, not just the one
22 thing.

23 Q And, so, I want to make sure I understand
24 because this is a question, you didn't mind it
25 coming in because it showed over-reaching arm of

1 the State?

2 A That was my opinion, yes, sir.

3 Q I just wanted to find out because my
4 understanding generally is that co-defendants'
5 pleas don't come in.

6 A Correct, but again this whole thing was based
7 around how he had no one to help him and what they
8 did to get this verdict, what they did.

9 Q But would you agree with me that, just like
10 in a drug case, you can't call some other guy and
11 say he pled to the drugs?

12 A No, you can't. I wish we could. Third-party
13 guilt --

14 Q You can't --

15 A Third party guilt is amazing but we're
16 limited in this state to do that.

17 Q And you can't say it's his drugs, he pled to
18 it?

19 A Right.

20 Q Likewise, though, there was at least some
21 argument you would have been able to prevent Walter
22 from discussing their pleas, not the fact they
23 committed a crime subject to impeachment, but the
24 substantive information about them pleading to
25 accessory after the fact of murder?

1 A I have answered the best way I can. I looked
2 at the totality, I wanted everybody to know that
3 everybody was charged, everybody, and the only one
4 they went after was him.

5 Q But you agree there was argument to be made
6 that you could have kept that out?

7 A Maybe. You're right, I probably could have
8 taken it out. I may have made a mistake.

9 Q I understand why you told us you didn't.

10 A Right.

11 Q Okay. One thing I forgot to ask about the
12 gun. We talked about Tawain shooting the gun a
13 couple weeks before. Just to link this up, isn't
14 it true it came out in trial that Marion had
15 actually accused Tawain the day of Kandee's death
16 of taking his gun?

17 A He did. There is one other issue here as an
18 officer of the Court and it has been sitting in
19 front of me, and this lady said Marion gave Tawain
20 the gun to shoot up in the air. I didn't want that
21 said.

22 Q I'm with you, I'm with you.

23 A Okay. So, you know, I didn't get to pick and
24 choose everything. I had to dance around a lot of
25 the minefield in that trial.

1 Q Let me make sure I understand this. The jury
2 knew during the guilt phase that Tawain Gadson, I
3 mean that Marion Bowman had some access to a gun?

4 A Yes.

5 Q All right. And Agent Collins and the
6 testimony about the family members all kind of
7 served to link this gun to Marion?

8 A Correct.

9 Q And we're talking also about the --

10 A And also the man taking the weapon from the
11 barrel.

12 Q The statements of Miss Coleman and Miss
13 Hawkins, they showed Tawain Gadson had shot that
14 gun?

15 A Right, but Marion gave it to him.

16 Q They said Tawain had shot that gun?

17 A Right.

18 Q Any also -- this is the gun from the river?

19 A In my humble opinion.

20 Q According to Agent Collins?

21 A Right.

22 Q It was the same gun from the river?

23 A Yes.

24 Q Was there any information ever introduced to
25 the jury that Taiwan Gadson had fired the gun that

1 came from the river at any point in time? The jury
2 never heard anything, did they?

3 A I don't believe so.

4 Q And they did hear that Marion fired that gun?

5 A From the co-defendants, right, who had an
6 interest in pleading, self-serving interest and
7 blame Marion, right.

8 Q Now let me ask you about the petroleum
9 products that were found on a pair of blue jeans.

10 A All right.

11 Q Why didn't you object to that information
12 coming in, and here is what I'm going to get at.
13 They didn't match the accelerants used?

14 A I made every objection I could. I moved to
15 suppress all that stuff, illegal search and
16 seizure, the judge overruled me, it's in evidence,
17 right.

18 Q I'm with you. She overruled you on the
19 search and seizure issue?

20 A She never did do anything to help my client.
21 I got everybody in the family to say it was
22 kerosene, I got the experts to say it's not
23 gasoline.

24 Q And gasoline was the accelerant?

25 A The issue then I'm trying to prove, hey, the

1 cops screwed it up, it's gasoline, it's not
2 kerosene and they had a kerosene heater in the
3 house because they're poor.

4 Q Let me ask you this, then I want to make sure
5 I understand. Now, the guy who testified was a guy
6 named Grady Layton, he testified at 4292, roughly,
7 in the trial transcript. It says that he is
8 examining a pair of jeans and found petroleum
9 product on it. And my question is this, if you
10 would have objected in limine --

11 A I did.

12 Q -- there is a fair argument -- well, I'm
13 talking about, I don't see in the record an
14 objection, because it is not probative to anything
15 that they found a different petroleum product on
16 the jeans? I mean, this is Walter's witness, not
17 yours. I mean, what did Walter put him up for? In
18 fact, the question that he asked at 4298, line 2,
19 the SLED agent, this is Mr. Bailey.

20 A A black pair of pants allegedly found at the
21 house.

22 Q He said, "Did you detect a petroleum
23 accelerant?" This is an arson trial. That sounds
24 pretty bad. Because his answer was, "Okay, one
25 second. I found the presence of a heavy petroleum

1 product," which sounds like a yes, I found an
2 accellerant, which is true.

3 But here is my question. It is not the
4 product, the product he found had no relationship
5 or relevance to the accelerant used in this case,
6 so why did that testimony come in at all?

7 A Because I wanted it to show he didn't have
8 gasoline on him.

9 Q What about no examination of petroleum
10 products coming in?

11 A He was specific and I asked that of the
12 expert. Again I'm not trying to hurt my client, I
13 was trying to help him. In my opinion, that it was
14 not gasoline found on Marion's pants, it was
15 heating oil from his house where his parents had
16 been, and his wife, we went through all the
17 suppression issues in this case and we made every
18 motion I could on suppression.

19 Q Did you didn't move to exclude his opinion,
20 did you?

21 MR. WATERS: Your Honor, if I could, on the
22 record could you identify the page you're reading
23 on?

24 MR. BROWN: Sorry. 4298.

25 MR. WATERS: Thank you.

1 A If I didn't, it was the only thing I was
2 trying to show was it was not gasoline, that is my
3 only issue.

4 Q And let me make clear we concede that you
5 impeached his testimony with the fact that the
6 accelerant found was not matched to the accelerant
7 used. My question is this.

8 A That is what you say. What I said was I
9 tried to bring it real simple to the jury it wasn't
10 gasoline.

11 Q I understand that.

12 A Okay.

13 Q The jury is still left with this when asked
14 whether he found petroleum accelerant, that sounds
15 like a loaded word, petroleum accelerant, his
16 answer is, yes, I'm paraphrasing, which it is a
17 petroleum accelerant, I understand it was not the
18 kind used in this arson but it makes it sound like
19 Mr. Bowman is walking around with accelerant on his
20 pants.

21 A That is your opinion, sir, I'm sorry, you
22 asked that question, that is your opinion.

23 Q And let me ask this. Is there any reason why
24 there wasn't an in-limine motion to exclude this
25 expert opinion as not assisting the trier of facts?

1 THE COURT: Your concern is that although Mr.
2 Bowman may have had kerosene on his pants, is that
3 right?

4 MR. BROWN: Gasoline was used in the fire.

5 THE COURT: Gasoline was used and you've
6 concerned, because you got him to say what was on
7 his pants wasn't gasoline, it was some sort of
8 accelerant?

9 MR. BROWN: The quote was, this is Mr.
10 Bailey's question, "Did you detect a petroleum
11 accelerant?" And the answer is affirmative.

12 THE COURT: But everyone, the testimony was
13 such that the, the testimony was such that whatever
14 it was, it wasn't the substance used to burn the
15 car.

16 MR. BROWN: That's correct.

17 THE COURT: You're concerned by the fact he
18 had a petroleum accelerant which in fact we know it
19 is kerosene now, that in itself was going to
20 prejudice the jury?

21 MR. BROWN: Yes, sir.

22 THE COURT: What if they said he had kersene,
23 that is an accelerant?

24 MR. BROWN: It is an accelerant, I know, that
25 is exactly my point. My point is Mr. Layton, Grady

1 Layton, Mr. Layton testified as an expert and an
2 expert is allowed to give an opinion, which he did
3 regarding the substance from the jeans. But he is
4 only allowed to give that opinion only if it
5 assists the trier of facts with an issue that is in
6 play. There is no question, nobody asserted that
7 the accelerant used in this arson was on his jeans,
8 so his testimony is no help, it actually serves to
9 confuse instead of to illuminate.

10 THE COURT: Confuse you?

11 MR. BROWN: That is our issue. My question
12 is why it wasn't excluded totally, like in a motion
13 in limine on that grounds.

14 THE COURT: And how did you answer that, Mr.
15 Cummings?

16 THE WITNESS: I answered that I used
17 everything I could to prove from that expert that
18 my man did not have gasoline on his clothes that
19 were found. I had already filed motions for
20 suppression, I did motions, as you gentlemen and
21 ladies have read, okay, I did everything I could
22 and when I got overruled on the objection I decided
23 to use their expert to show that Marion didn't have
24 the gasoline on him so that Kandee's body wasn't
25 burned by him, from this State's expert, because he

1 didn't have gasoline on his clothes and the pants
2 they found had kerosene on them and I got his wife
3 to admit, "We heat the home with kerosene." That's
4 what I used it for.

5 BY MR. BROWN:

6 Q Let me make sure we get the context right.
7 You didn't call this witness to show it was not him
8 with the gasoline?

9 A I used the State's witness to show that those
10 pants, okay, which were found, the watch and all
11 the other stuff that I believe hurt our case
12 tremendously, that the gasoline used for the
13 accelerant to burn the body in the car was not on
14 his pants, so --

15 Q Let me ask in a different way. If Mr. Bailey
16 would not have called Mr. Layton because he didn't
17 find any probative value to his testimony would you
18 have called him?

19 A Yes, probably would have, and the way I would
20 have done it, I would have put him up and said,
21 "What did you find on his pants?" "Kerosene."
22 "Thank you very much," and he sat down.

23 Q Would you call him to exclude Marion as an
24 arsonist?

25 A No. You couldn't exclude him from being an

1 arsonist, he could have dropped a match in the car.
2 I didn't want to go near that. All I said was, was
3 it kerosene found on his pants, not gasoline.

4 Q Let me ask you this. Is there a chance the
5 jury was confused about that?

6 A I can't speculate what was in their minds.

7 MR. WATERS: Your Honor, I object.

8 Q Plain and simple, it would have been simple
9 to keep Mr. Layton out, right?

10 A No, sir, because it was coming in anyway.
11 The pants were in evidence.

12 Q No, we have the pants. The presence of an
13 accelerant?

14 A They had the right to use the word
15 accelerant, you're right.

16 Q Actually they don't have the right to give an
17 expert opinion.

18 A That is what you said, that is why we're
19 here.

20 Q I understand that but I would assert that
21 they have to justify an expert's opinion or it
22 doesn't come in. They have to show --

23 A He wasn't allowed to say what type material
24 it was by either alcohol or ethanol or, you know,
25 some hydrocarbon.

1 Q Let me give you a different example. Let's
2 assume they tested the pants and they found the
3 presence of crack cocaine residue on the pants.

4 Would that have come in?

5 A No, because it was not in any way relevant to
6 the burning of this body.

7 Q What did the kerosene have to do with the
8 burning of the body?

9 A Nothing except to help exclude him. Somebody
10 burned that body in the car and the other people
11 said it was only Marion. If you am going to have
12 the other people out there and everybody is saying
13 he did it and his pants are found, her watch is
14 found in the pants, I had to show that Marion did
15 not have gasoline on his body, in my opinion. If
16 that is wrong, I apologize.

17 Q Okay.

18 A If that is an error of law, I didn't do
19 anything intentional.

20 Q No, no. It is well taken in the crack
21 scenario it is not relevant, so it is not if it is
22 not relevant we don't need it in at all, I will
23 take that point and be satisfied with it.

24 Let me ask you about the watch. We didn't
25 talk, or excuse me, in trial it never came out that

1 Miss Martin, A, at least used drugs during that
2 little window of time, and B, she had a reputation
3 of using drugs and possibly had a reputation of
4 using frequently, and C, had a reputation of
5 possibly prostituting herself for drugs, all
6 reputational evidence?

7 A Right.

8 Q Okay. The jury never heard any of that?

9 A Right.

10 MR. WATERS: Your Honor, I object, I move to
11 strike. I don't think that has ever been
12 established by anyone.

13 Q What was her reputation regarding --

14 MR. WATERS: I object. I don't think he is
15 qualified to give that reputation unless he knows
16 of his own personal knowledge.

17 MR. BROWN: He can certainly give what he
18 discovered. Reputation is not personal knowledge.

19 THE COURT: I know that but I assume he had
20 no knowledge of reputation but you did have
21 witnesses that --

22 THE WITNESS: Mainly may client.

23 BY MR. BROWN:

24 Q How about any other folks in the community?

25 A The sister knew that Marion and her were

1 close, Kendra.

2 Q How about the State's theory she was a
3 snitch?

4 A That's the main thing that was out there.

5 Q She had a reputation she was involved in the
6 drug business?

7 THE COURT: It doesn't tie it into
8 prostitution.

9 Q Well, we'll get to that. Certainly you knew
10 she had a conviction for possession of drugs?

11 A Yes.

12 Q And that she had been involved as a witness
13 in an indecent exposure case involving sex on the
14 town square of Branchville, that came out of this
15 same courthouse we're standing in?

16 A I don't recall. I think she was a witness.

17 Q I think she was the other party in the sex
18 act.

19 MR. WATERS: Your Honor, I object.

20 THE COURT: I sustain. Let's go on to
21 something else.

22 Q Here is the point I'm getting at.

23 THE COURT: Can you just ask him questions?

24 MR. BROWN: I sure can.

25 THE COURT: Obviously, remember I'm going to

1 be hearing your closing argument, I don't need to
2 hear it two or three times.

3 BY MR. BROWN:

4 Q The watch you referenced, which is a bad
5 piece of evidence?

6 A Yes.

7 Q Okay. There is no question that the watch
8 was linked to Kandee by a receipt that Kandee's
9 mother brought in and said, "I bought it at Walmart
10 and gave it to my daughter"?

11 A Yes, sir, and I asked how many watches are
12 sold at Walmart and did all that without trying to
13 hurt that mother.

14 Q Okay, sure. And let me just ask you this.
15 If the jury would have heard about her drug use,
16 even without any reference to prostitution, if they
17 had heard about her drug use would there have been
18 a fair argument from the inference and facts then
19 before the jury that she could have traded the
20 watch for crack?

21 A Yes, you could argue that, and then who gave
22 her --

23 Q Who all were her suppliers?

24 A Or the fact maybe Marion is now, and again
25 this frightened me, and I'm going to say this, what

1 social redeeming value would he have if he is a
2 drug dealer, too?

3 Q You brought that out in your own witness?

4 A I had to. Finally after everything comes out
5 I had to do it.

6 Q That was your first witness?

7 A It wasn't my first witness.

8 Q First witness in the sentencing phase?

9 A In the sentencing phase, yes. He is already
10 found guilty, now I'm really trying to save his
11 life.

12 Q That is my question, why can't we bring out
13 Miss Martin's a drug user in the sentencing phase?
14 Would it have been another felony on him the jury
15 had a chance to look at?

16 A You paint that lady dead, she's dead, she got
17 burned. This is, I'm telling you, Mr. Brown --

18 Q But --

19 MR. WATERS: I ask he be allowed to finish
20 his answer.

21 A I don't know how to say that, to paint that
22 picture to twelve people up there that don't look
23 like him.

24 Q You think it is good to have the witness
25 bring in the fact he is a drug dealer when there is

1 no charges or convictions for drug dealing but you
2 did?

3 MR. WATERS: Objection, argumentive.

4 THE COURT: I think it is going to be quicker
5 to keep going. You all seem to be arguing back and
6 forth.

7 MR. BROWN: I apologize.

8 THE COURT: Why can't you just ask him
9 question and he answer? You don't have to tell him
10 you agree or not.

11 BY MR. BROWN:

12 Q Okay. Again, the argument could have been
13 made if the watch was traded for crack they would
14 have known she was a crack user?

15 A Yes.

16 Q All right. That will keep it simple. Now,
17 one of your, let me get to these, tell me about the
18 testimony that came out at trial about you don't
19 put up an adaptability expert.

20 A Yes.

21 Q He talked about Mr. Bowman's opportunity to
22 adapt.

23 A It has been the same argument throughout the
24 last ten years in this state, what are his present
25 conditions, and the Supreme Court is coming out

1 telling the Solicitor to stop it, and defense
2 attorneys, you can't sell it to the jurors anymore,
3 that it ain't a life of a picnic anymore. For
4 God's sake, we have all tried to show LWAP means
5 life without possibility of parole, and every
6 Solicitor, and I would do it myself if I was still
7 prosecuting, he gets to watch TV, Kandee is dead,
8 he gets to eat, she doesn't, and he gets to have
9 recreation in the yard, she doesn't, and then in
10 the heat of that stuff, Mr. Bailey and I were going
11 at it, you read the transcript. You should have
12 been there.

13 Q Here is my question --

14 A You should have just been there.

15 Q Here is my question if you're finished.

16 A No, I'm finished.

17 Q Okay. We know that the court has now said
18 that it injected an arbitrary factor into the
19 sentencing procedure.

20 A Isn't that nice of them, but how else do you
21 argue about somebody having a chance to live in
22 prison? I mean, I don't argue academically.

23 Q What strategy would exist for failing to
24 object to the introduction of an arbitrary
25 sentencing factor?

1 A There is no strategy to that other than what
2 Mr. Bailey is going to argue and fight over, that I
3 got to come back with, and that is what I did.

4 Q I'm with you, and I'm not --

5 A Okay.

6 Q I'm not criticizing your --

7 A I'm not taking it as criticism because I want
8 everybody to read this record one day and say what
9 are you going to do for the guys who are in the
10 pits, who are doing this in action, with the guns
11 blazing, you're in there trying to save a young
12 kid's life and all you have to work with is trying
13 to convince twelve people he can adapt to prison,
14 and what is the prosecutor going to do?

15 Q Well, now, hold on, that is not my question.
16 My question is why didn't you object when Mr.
17 Bailey brought it out so he couldn't talk about it
18 at all anymore?

19 A Maybe I just didn't remember to do that
20 because we were still fighting with each other by
21 the side of the table, or the judge, and you have
22 to read what I was doing.

23 Q That's fine, I'm just asking if you had a
24 reason.

25 A There is no reason that a lawyer misses an

1 objection, he misses it.

2 MR. WATERS: Your Honor --

3 THE COURT: It is getting tough for the court
4 reporter. You need to ask him a question and let
5 him answer.

6 Let me ask this. What are you saying Mr.
7 Aiken said that was objectionable and that he
8 didn't object to?

9 MR. BROWN: Bear with me, I will get to the
10 exact page and reference.

11 MR. WATERS: Your Honor, this issue takes
12 place between pages 4838 and and 4876 of the
13 record. It is during the examination of James
14 Aiken. It was an issue on appeal, and Mr. Bowman,
15 of course this is the case first kind of reiterated
16 the inappropriateness of conditions of confinement.
17 Bowman, of course the appellate opinion wasn't out
18 at the time of trial.

19 THE COURT: You are saying that this has been
20 the subject of an appeal, appellate opinion, what
21 Mr. Bailey said with regard to adaptability to
22 prison would be inappropriate?

23 MR. BROWN: What happened in this case, they
24 called Mr. Aiken to testify.

25 THE COURT: The expert.

1 MR. WATERS: And then Mr. Aiken did a usual
2 spill, it doesn't matter what Mr. Bowman is like,
3 the SCDC can safely protect him the rest of his
4 life. Mr. Bailey then on cross comes back and
5 talks about security classifications and
6 opportunities that he has to move around the prison
7 and that sort of things. Then on redirect
8 examination Mr. Cummings pointed out and Mr. Aiken
9 testified that prison was not a kiddie camp, he
10 would not be coddled, it would not be a picnic,
11 that sort of things.

12 Then on recross Mr. Bailey, after asking the
13 judge, was allowed to then go into, in a very
14 limited fashion into a few things like he would
15 have the opportunity to work, he would have the
16 opportunity for recreation, things of that nature.
17 Ultimately the State Supreme Court held that
18 conditions of confinement evidence by both the
19 State or the defense is not proper in a sentencing
20 phase but in this case it was not preserved.

21 MR. BROWN: Which is why it is not a holding
22 in this case.

23 MR. WATERS: Well, they admonished the trial
24 judge --

25 THE COURT: They admonished the Bench, the

1 Bench should have on its own --

2 MR. WATERS: The Bench and the Bar. Really
3 they admonished the Bar, excuse me, that sort of
4 evidence shouldn't be in a capital trial.
5 Subsequent there was a case out of Anderson County.
6 In the Burkhardt case the prosecutor, during their
7 sentencing phase case in chief they called Jimmy
8 Sly from the South Carolina Department of
9 Corrections to testify extensively about exactly
10 what life in prison was like.

11 THE COURT: Why would that have been in the
12 case in chief? The guy had not been found guilty.

13 MR. WATERS: In the sentencing phase of the
14 case.

15 THE COURT: Okay.

16 MR. WATERS: The argument there was because
17 life without parole is what we're talking about it
18 was relevant for the jury to know exactly what that
19 meant, and the court in that case, Burkhardt is
20 really the strong case on this, came down and said
21 that evidence isn't proper and they reversed it.

22 After that James Bryant, which is another
23 appeal that I handled, this was a case where the
24 defense called James Aken and some other people who
25 testified extensively about how horrible life in

1 prison was and in the Bryant case the court
2 reiterated it was just as improper for the defense
3 to present that evidence as it was for the State,
4 and that is pretty much the history of it.

5 THE COURT: And did what?

6 MR. WATERS: Huh?

7 THE COURT: Did what in Bryant? What did the
8 court do in Bryant?

9 MR. WATERS: They rejected the issue and
10 affirmed the conviction and sentence. In Bryant
11 they alleged that the Solicitor had improperly gone
12 into the conditions of confinement, and Bryant
13 pointed out in this particular case, actually the
14 issue was very limited, it was about allowing a
15 social worker to testify that many people believe
16 that life in prison is worse than a death penalty,
17 it would be worse punishment, and they said clearly
18 that is improper. But we also --

19 THE COURT: That would have been, it would
20 have been the defense?

21 MR. WATERS: Right. What the defense tried
22 to argue on appeal in Bryant was that because the
23 Solicitor was going to go into the evidence of good
24 prison conditions, that they were entitled to have
25 the social worker testify to that and the court

1 pointed out that no, the defense had been the ones
2 that --

3 THE COURT: I know, but since the defense put
4 it up, did the court say the defense put this up
5 and shouldn't have, therefore we're not -- did the
6 State appeal that issue?

7 MR. WATERS: No. The way they tried to set
8 it up in Bryant was by saying that because the
9 State had talked about good prison conditions, then
10 it was responsive for them to have the social
11 worker testify to that fact and they said he --

12 THE COURT: Okay.

13 MR. BROWN: The defense was excluded --

14 THE COURT: Wait one second. In Bryant I
15 assume the defendant was convicted and sentenced to
16 death?

17 MR. BROWN: His evidence was excluded.

18 THE COURT: The social worker's evidence was
19 excluded?

20 MR. WATERS: Just that statement. No, the
21 defense went extensively into conditions, it was
22 all admitted, into the fact that people who apply
23 to be prison guards are mean people.

24 THE COURT: Aiken testified to that?

25 MR. WATERS: They also had a social worker

1 from Georgia.

2 THE COURT: All that stuff was in the record?

3 MR. WATERS: Yes.

4 THE COURT: On appeal they objected to that?

5 MR. WATERS: The reason why it was relevant
6 on appeal is because on appeal the
7 appellant/defendant tried to argue that the social
8 worker's testimony was relevant as to the opinion
9 that people think life in prison --

10 THE COURT: Why would he have to argue it was
11 relevant?

12 MR. BROWN: Because part of it was excluded.

13 MR. WATERS: Her opinion was the only thing
14 excluded. They tried to set it up and the Court
15 said no, you shouldn't have put in all that stuff.

16 THE COURT: The court said not only did the
17 judge do correct by not letting it in, the other
18 stuff shouldn't have come in either?

19 MR. WATERS: Right, and so that is my only
20 point.

21 THE COURT: But they also said the State
22 shouldn't have put all the other stuff in?

23 MR. WATERS: That was my only point, it
24 applies to both sides.

25 THE COURT: That is the status of the law as

1 the court stated, LWOP is LWOP and forgets about
2 discussing the particulars?

3 MR. WATERS: Right, the point being in this
4 case obviously --

5 THE COURT: Is that what you read the law to
6 be?

7 MR. BROWN: I do but I don't think it just
8 came up in Burkhardt or in Bowman, and if I may, in
9 the old Platt case which is cited in these cases
10 they said prison conditions were excluded, or
11 excuse me, sentence conditions were excluded back
12 then, and if you recall, it is a case out of
13 Beaufort; the Platt case, on a retrial they
14 subpoenaed the electric chair and actually had it
15 driven down or was going to and it was excluded and
16 that exclusion was upheld years before Bowman's
17 trial and they said you can't get into sentence
18 conditions.

19 THE COURT: I think they also said it was
20 unconscionable when you have the actual chair
21 sitting in the courtroom. But in any --

22 MR. WATERS: My only point --

23 THE COURT: Your position is that when this
24 happened in Bowman that Bryant and Burkhardt hadn't
25 been decided yet?

1 MR. WATERS: Or Bowman, but I think also the
2 position is because Platt does exist but Platt also
3 held the defense had opened the door in that
4 particular case, which we assert here, as Mr.
5 Cummings just said, I think he just said,
6 "Strategically we were saying that our strategy was
7 we wanted to show this jury that life without
8 parole was so difficult that it would be sufficient
9 punishment for Marion Bowman short of the death
10 penalty," and so since those pronouncements had not
11 come down and he was not ineffective for opening
12 the door.

13 MR. BROWN: That is not my position. My
14 position is this. Arbitrary factors can never
15 serve as justification for sentence in a capital
16 case, and if I read Pleicones' opinion in --

17 THE COURT: Justice Pleicones.

18 MR. BROWN: -- Justice Pleicones' opinion in
19 Burkhardt, he talks about how sentence in capital
20 cases are limited to circumstances of the crime,
21 victim impact and character of the defendant, and
22 those are --

23 THE COURT: Do we agree Burkhardt and Bryant
24 both had been decided already and this case may
25 have been reversed if they hadn't been decided?

1 MR. BROWN: Well, there was no objection.

2 THE COURT: All right.

3 MR. BROWN: Burkhardt, it hadn't been decided
4 yet. Burkhardt was the first one and they
5 objected, it was a direct appeal and it was
6 reversed.

7 MR. WATERS: Your Honor --

8 MR. BROWN: So, if I may, because I want my
9 argument here, my argument --

10 THE COURT: I'm not making arguments.

11 MR. BROWN: Sure.

12 THE COURT: That's the problem. I'm only
13 asking questions. I can't get answers without
14 twenty minutes of argument.

15 MR. BROWN: I believe they were ineffective
16 for not preserving it.

17 THE COURT: You do? All right.

18 MR. BROWN: Because it would have been
19 reversed.

20 THE COURT: Now, had he objected on the
21 record in this case, Mr. Waters, is it your thought
22 if we read Burkhardt and Bryant there is a good
23 chance the case would be reversed?

24 MR. WATERS: No, I don't think so, for a few
25 reasons. This case is vastly different from what

1 happened in Burkhardt and Bryant where there was
2 extensive evidence presented. Here in this
3 particular case Mr. Aiken started out by talking
4 about, as he usually does, about security
5 classifications. Here I think it was responsive
6 and so I think that the appellate decision would
7 have been the door had been opened, so that is
8 different from what happened in Burkhardt where the
9 State just unilaterally in its sentencing phase
10 case in chief came full barrel with it. I think in
11 the context of ineffective assistance we still have
12 a prejudice prong as well.

13 THE COURT: I'm sure your position is going
14 to be, Mr. Brown, that yes, he did open the door
15 and he shouldn't have opened the door?

16 MR. BROWN: Well, that is part, yes. I also
17 say this. I don't know that Strickland is the only
18 standard that applies. We have argued this in
19 another PCR.

20 THE COURT: We will also hear it a little
21 later on.

22 MR. BROWN: But briefly, a sentence outside
23 the confines of the statute, in other words, based
24 on arbitrary factors is just like a judge giving a
25 fifteen year sentence for a crime that only carries

1 ten. You cannot sentence a person outside of what
2 the statute allows, and that is prejudice in and of
3 itself, that is outside the Strickland analysis.

4 MR. WATERS: Our response to that is there is
5 no federal constitutional mandate precludes this
6 evidence, therefore there could be no federal
7 constitutional issue that would trump the
8 application of Strickland.

9 MR. BROWN: There is, the federal cases say
10 you cannot have the arbitrary factors in a death
11 sentence.

12 THE COURT: All right. Do we have more
13 questions of Mr. Cummings?

14 MR. BROWN: I do, Your Honor. I think it is
15 clear, you know, I would like to move on, I think
16 it is clear now why there was not an opening of the
17 door.

18 THE WITNESS: It was on recross and again, if
19 I made an error, if I made a mistake, that man,
20 respectfully, should get the benefit, I just want
21 to apologize.

22 BY MR. BROWN:

23 Q I wanted to make sure we're clear for the
24 finder of fact. I will move on past this.

25 Let me talk to you about allocution. Judge

1 Goodstein provided a statement to Mr. Bowman that
2 he could provide allocution but the allocution was
3 limited to the evidence or inferences therein.

4 THE COURT: In the guilt phase?

5 MR. BROWN: In the penalty phase.

6 THE COURT: I assume you said allocution, you
7 had allocution conversation with him on guilt
8 phase, too?

9 MR. BROWN: Your Honor, you're talking about
10 taking the stand. This is making a closing.

11 THE COURT: That is the guilt phase. I guess
12 there was one in that one, too?

13 MR. WATERS: Yes, sir, there is, Your Honor.
14 I think the claim here is that when Judge Goodstein
15 told Mr. Bowman that, "If you do decide to give a
16 closing statement you will be limited like the
17 lawyers, you will be limited to the evidence."
18 They are saying that was improper.

19 THE COURT: I know that but he said, when I
20 asked, he said what is obvious on the sentencing
21 phase, I assume she did it on the guilt phase, too,
22 you have no problems what she did in the guilt
23 phase?

24 MR. BROWN: That's correct, because that
25 allocution, testimony is different in the

1 sentencing, allocution in a sentencing, especially
2 in a capital proceeding, we know in South Carolina
3 the law is clear on two things. They can extend a
4 sentence of life based on mercy, and mercy not
5 meaning a reason, mercy meaning what we think
6 Biblically, just grace, which is not based on facts
7 or inference.

8 THE COURT: The judge, I'm sure, told them
9 that, too.

10 MR. BROWN: Interestingly the judge did but
11 Mr. Bowman was not told he could argue mercy based
12 on the facts, and the second thing is in South
13 Carolina --

14 MR. WATERS: Your Honor, he is testifying
15 now. There has been no testimony in the record as
16 to that.

17 THE COURT: He is saying the judge didn't
18 tell him he could argue that.

19 MR. BROWN: I'm sorry. I'm just trying to
20 answer. The second thing is in South Carolina the
21 jury can give life, quote, for no reason at all,
22 and no reason at all is not based on fact or
23 inferences from facts that are in evidence. That
24 is, for no reason.

25 So, Mr. Bowman in fact --

1 THE COURT: And your case law on this, the
2 fact the judge should have told him more about that
3 is what?

4 MR. BROWN: There is a case of State v.
5 Moore, which found it unpreserved, it is not my
6 case, I understand Mr. Moore has this same issue on
7 PCR, maybe Mr. Waters can help me because I don't
8 know about Mr. Moore's case.

9 THE COURT: Let's go back to your question of
10 Mr. Cummings' --

11 MR. BROWN: I have the page cite for her
12 charge.

13 THE COURT: What is your question?

14 BY MR. BROWN:

15 Q My question is, did you provide any further
16 explanation to Mr. Bowman, I want to make clear,
17 after Judge Goodstein's charge to him regarding
18 allocution, which for the record appears at 4943,
19 line 18, through 4944, line 22, and if so, what
20 were your instructions after she told him that?

21 A I'm going to answer your question the best of
22 my knowledge now seven years later but I know this.
23 Every time something happened I turned to Marion
24 and asked him, begged him to beg for his life, I
25 did, and he is a gentleman of his word, he will

1 tell you two good lawyers that.

2 Q Here is what --

3 A I'm coming with that, really.

4 Q Okay.

5 A So, here we have the first speech. Of course
6 the instructions from the judge about his right to
7 testify. My God, Judge Goodstein in almost
8 infinitum was telling him about his right to
9 testify. He is under oath saying, "No, I'm not
10 going to testify."

11 We talked to him at the break, would talk to
12 him during the 24 hour period, please beg for your
13 life, okay, and a lot of anger and a lot of
14 hostility, he didn't really want his mother to
15 testify. I asked her to please go back and beg for
16 his life. His sister, "Come back and beg for your
17 brother's life."

18 I wanted him to beg for his life. I told him
19 in allocution you get to stand in front of the jury
20 and talk. So, Norb told him beg for your life in
21 simple plain words. I begged for the man's life.

22 Do I believe that maybe when Judge Goodstein
23 said, "You can only testify to this or that," he
24 was allowed to get in there and talk, so if I
25 missed that objection or her words were wrong by

1 statute or law, I didn't hear it that way. All I
2 heard was he had a right to get up there and talk
3 to the jury and beg for his life in closing and he
4 got the last word in the trial. That is what I
5 did. If I didn't object, I apologize. As an
6 officer of the court I asked my client to beg for
7 his life.

8 Q I understand, I'm not trying to make an issue
9 that is not here. What I'm saying, you told him
10 that throughout?

11 A Even sitting at the table I said, "Please beg
12 for your life."

13 Q I want to make sure you understand, because
14 you know Judge Goodstein, I'm not trying to put
15 words in your mouth, you didn't stand up and say,
16 "Judge, your instructions to my client, whatever it
17 may be, "is maybe ambiguous about whether he can
18 beg for no reason at all," but given that, did you
19 correct her instructions, because it doesn't really
20 change my argument, still the Court's instructions
21 are wrong, my question is whether you, because it
22 is also different when you hear it from a lawyer
23 and a judge, but did you ever try to correct what
24 she said, assuming it was false, did you ever try
25 to correct it in Mr. Bowman's mind after that

1 instruction?

2 A Corrected as a lawyer, no. Beg for his life,
3 yes, "Please get up and talk, beg for your life."
4 And I will tell that to you to my grave.

5 Q Okay. All right, otherwise is there any
6 other recollection or notes that would assist your
7 memory of what you talked about with him in regards
8 to her instructions that appear again at pages 4943
9 and 4944? Actually it goes for another page but
10 that is where I'm citing.

11 A No. You already said in the transcript I did
12 not correct the judge and I did not object to her
13 wording because I might have been busy talking to
14 him.

15 Q Okay. Is there anything else that you would
16 like to tell us about?

17 A I don't know if Miss Thomas remembers, we
18 talked to them both together at the same time,
19 that's it, I guess that's the way it is.

20 Q Okay. And let me ask you about one of the
21 other -- well, did you ever feel like maybe that
22 statement regarding the kidnapping aggravator, that
23 the allegation was, that was a little, I know it is
24 the broadest in this country, were you, did you
25 ever think it is maybe unconstitutionally too

1 broad?

2 A I didn't believe it was a death penalty case.
3 To begin with I didn't think a car arson should
4 allow somebody to be put to death. Clearly it
5 wasn't CSC, a criminal sexual conduct, I apologize,
6 and clearly if she went voluntarily along to do the
7 job, which I don't really want to get into, but she
8 rode with two friends, that she wasn't kidnapped
9 but it can turn into a kidnapping when someone puts
10 a gun to your head or keeps you in a car or doesn't
11 let you get away. So, with all those factors in
12 mind, the jury found what they found in that trial.
13 I objected to everything that I could.

14 Q Okay. Let me ask you about this. I mean,
15 could there have been an argument made that the
16 kidnapping statute was unconstitutional as an
17 aggravator, because we already know the
18 unconstitutionally broad aspect was denied in a
19 direct appeal of the kidnapping conviction?

20 A Right.

21 Q But I'm talking about as an aggravating
22 circumstance for capital proceedings.

23 A If I didn't, if I didn't, here is what I did
24 at the end of every stage of the case, this is what
25 we're taught. I renewed every objection, you'll

1 find every time I protected the record throughout
2 that transcript.

3 Q Sure.

4 A They say all your objections are carried
5 over. However, how do we get there when the judge
6 says don't worry about it, all your objections are
7 protected, then we get up to the Supreme Court and
8 you read, oops, it's not protected and they suffer.
9 It's not right. That is my humble opinion but I
10 don't carry the authority to say that but it's
11 true. How many times --

12 THE COURT: But you carry the knowledge --

13 A Yes, sir, I do, but we remake these
14 objection, and without tiring the Court's patience,
15 sir --

16 THE COURT: -- Mr. Cummings, although the
17 trial judge maybe said you didn't need to make them
18 again, you are aware you need to.

19 A We do, usually do. If we make one error his
20 life is in jeopardy. If I'm wrong --

21 THE COURT: Continue on.

22 A I tried to make every objection I could, and
23 if I missed that, again then that's a mistake.

24 Q There was no strategic reason not to raise a
25 challenge to the broad nature of that aggravating

1 circumstance?

2 A No, and again what did I argue in closing
3 arguments and what did I do with what I had?

4 Q Sure. Okay. You know, you mentioned --
5 well, let me ask you this. He was charged with
6 murder during the commission of a robbery, murder
7 during commission of a larceny as aggravators also.
8 Was it the watch or the car?

9 A It would have been the car because the car
10 was taken, I believe, and also the watch, personal
11 property of Miss Martin. So --

12 Q Well, if I may, which one, which one did you,
13 were you put on notice that it was, the watch or
14 the car?

15 A I think it was taking the property of Kandee
16 Martin, if I'm not mistaken, it says taking the
17 property of.

18 Q Because it's not in the indictment.

19 A I wasn't going to argue that was Kandee's
20 watch, I wasn't going to stand up and say don't
21 kill him for not taking the watch because I argued
22 10,000 watches are sold from Walmart every month.
23 I also said that they can't prove he took the car
24 because the car was burned. Now, how the car got
25 there --

1 Q Right. I guess all I'm trying to find out,
2 when you were going through preparation they told
3 you these are the aggravating circumstances by
4 statute?

5 A Yes.

6 Q There is no grand jury finding on
7 aggravators?

8 A No.

9 Q And the State said they don't have to do
10 that, so how was it clear to you what, and they
11 allege both, the robbery and the larceny?

12 A Yes.

13 Q Now, there is a difference, right?

14 A Robbery is forceful taking of property.
15 Larceny is just the taking.

16 Q Bear with me. If the stuff was taken after
17 she was dead it couldn't be a robbery?

18 A It couldn't be a robbery.

19 Q If it was not the, if the taking had not been
20 initiated, in other words, if they just, after
21 she's dead they decided to take this stuff, the
22 intent is not formed, that would not suffice for a
23 robbery, would it?

24 A To answer your question, no.

25 Q All right. That would maybe be --

1 A Taking property from a dead person is still
2 stealing.

3 Q Did you think both the car and the watch were
4 the object of the robbery and both the car and
5 watch were the object of the larceny and they were
6 charged maybe in the alternative?

7 A I think they threw it all together to make it
8 just property because that was the last net. He
9 wanted either, A, you know, arson, burning the car,
10 to make it look nasty because her body was burned,
11 or B, kidnapping. That is my humble opinion of
12 what the prosecutor wanted.

13 Q They did file one of the property acts?

14 A Yes, they did. That is the one was
15 surprising.

16 Q Let's talk about the CSC. Now, you were put
17 on notice, and to make this clear, the jury doesn't
18 hear allegations of a CSC until when?

19 A Until when? Until we point out they were
20 friends.

21 Q When is the first time they even hear
22 allegation of sexual, let's take out the criminal
23 part, when do they hear the allegations of sexual
24 conduct?

25 A I'm trying to remember. I don't remember

1 when.

2 Q Sure.

3 A But it comes out lightly and it was defeated
4 and out the window it went.

5 Q And we're talking about penalty phase, you
6 all didn't go in and charge the jury at the
7 beginning of the trial that there was an indictment
8 that had aggravators in the guilt phase?

9 A Right.

10 Q Okay. And when did the alleged sexual
11 conduct, according to notice provided to you by the
12 State's service of the aggravating circumstances,
13 when were you thinking that they had alleged this
14 criminal sexual conduct to have occurred?

15 A Either before, and of course you read the
16 suppressed statements, possibly after the death of
17 this lady.

18 Q Hold on. Criminal sexual conduct can't occur
19 to a dead body.

20 A Walter was trying to pigeonhole the sex
21 occurred before, then there might have been some
22 necrophilia afterwards.

23 Q I want to make clear, now. That can't be the
24 State's position, that there was criminal sexual
25 conduct, which is sex without consent, to a person

1 that is not alive.

2 A We understand that.

3 Q Okay. So it had to have happened before she
4 died?

5 A Right. There was semen found inside her,
6 right, DNA.

7 Q But Walter cannot -- you weren't on notice
8 that it was something that happened postmortem,
9 because that is not CSC?

10 A Our forensic pathologist ruled, as for as the
11 law you're right but our forensic pathologist
12 helped us with determining they couldn't tell when
13 or what time it was placed there and I wanted to
14 make sure that they knew that.

15 Q Okay. Let's follow with this, let's just
16 make sure you understand, and with all due respect,
17 a corpse is not a person?

18 A Correct.

19 Q And CSC can only occur with a person, it
20 can't occur with an object or an animal?

21 A And if I said something wrong --

22 MR. WATERS: Your Honor, I object to this
23 line of questioning. It seems like law school
24 exams. If he wants to ask him --

25 THE COURT: Continue.

1 Q Again, CSC by its very nature has to be a
2 live person?

3 A To answer, yes, sir.

4 Q Okay. So, we're then talking about all that
5 postmortem allegations of postmortem sexual conduct
6 cannot serve as that basis?

7 A Correct.

8 Q All right. Now, the State, the allegations
9 that there was CSC premortem, when did the State
10 provide you notice that that occurred, because
11 obviously they are alleging it occurred during the
12 commission of a murder or it is not an aggravator,
13 right?

14 A Correct.

15 Q So, they are saying -- and when would you say
16 is the commission of the murder window?

17 A Nursery Road.

18 Q Okay. You got it. Any other time?

19 A I mean, right, because the car has been
20 burned, so the only evidence that the government
21 had would show that Kandee was shot on Nursery
22 Road.

23 Q So, the window of the murder is that Nursery
24 Road area?

25 A Correct.

1 Q All right. And premortem, we've got time and
2 space limitation, it's got to be before her death
3 and it needs to be in the Nursery Road area?

4 A As for as the CSC, sir?

5 Q Yes.

6 A As for as the CSC aggravator, we're talking
7 about murder during the CSC. That is what makes it
8 capital, or you have somebody, kidnap them, bring
9 them out to the road, which was talked about and
10 thought about, talked about in the office and
11 everything I did the two years to fight for this
12 thing with Mr. Bailey, you know, argue academically
13 there is no way in hike this was a CSC, they were
14 friends, no way.

15 Q Well, what were you on notice of? I mean,
16 again as for as the time, space limitations were
17 put on this box, the time is premortem on one end
18 of it.

19 A Right.

20 Q And the space is the Nursery Road area, how
21 far back did it go, according to what the State
22 provided you notice of, because they don't have to
23 plead it in the indictment?

24 A Right.

25 Q So, you had to have constitutionally adequate

1 notice of what to respond to in his trial and so
2 what were you on notice of regarding the CSC in
3 conjunction with the murder, not a rape six years
4 earlier or something?

5 A Just like we talked about.

6 Q Just Nursery Road?

7 A That was it, what we talked about.

8 Q And who does the State say was at Nursery
9 Road?

10 A Mr. Bowman, Kandee Martin and Mr. Gadson.

11 Q All right.

12 A Allegedly Mr. Felder comes back with
13 gasoline, if you believe that.

14 Q Postmortem?

15 A Right, if you believe that.

16 Q Okay. So, according to the State's theory
17 they presented, it was Miss Martin, Mr. Gadson and
18 Mr. Bowman?

19 A Correct.

20 Q Why didn't you ask Tawain Gadson about the
21 lack of sexual activity at Nursery Road?

22 A I don't know. I didn't ask it.

23 Q And if you had asked him it would have been
24 good for him to say there was no sex on that road,
25 wouldn't it?

1 A But if he did say there was sex on the road
2 it might have hurt my client more. I'm not going
3 to ask a witness a question which I don't know the
4 answer to, because the guy didn't decide to testify
5 until he flipped in that courtroom.

6 Q And let's follow up with this. And did you
7 all try to go interview him and the State deny you
8 access to their witness?

9 A No, they didn't deny access. I was going to
10 rely on what he was going to testify about, what
11 was in the statements. I talked to Gene Dukes and
12 Gene didn't want us talking to his client.

13 Q What did Mr. Dukes tell you about Gadson
14 witnessing sex on Nursery Road premortem?

15 A He didn't say. He said, "My man ain't
16 talking to you, good luck, I saved my guy."

17 Q Well, Mr. Dukes excluded you from talking to
18 a witness who was talking to the State?

19 A He told me, "My man is not going to talk."
20 He don't have to talk to me. As I understand,
21 witnesses don't have to talk to you.

22 Q Well, after they talk to the State and they
23 cut a deal, I don't know, that may be a little
24 different dynamics on that. The reason I ask, how
25 do you prepare for them?

1 A You prepare by cross-examining by their
2 written statement and by the facts you know from
3 what you learn.

4 Q Excellent. All right, let's look at his
5 written statement. And if you would, take a look
6 at what has been marked as Plaintiff's Exhibit 5
7 and Plaintiff's Exhibit 6. Do you recognize those?
8 They have been entered in evidence.

9 A Yes, sir.

10 Q Okay. Can you show me in those statements
11 where Mr. Gadson says there was sex on Nursery Road
12 between Mr. Bowman and Miss Martin?

13 A He doesn't.

14 Q Okay. So, why didn't you ask about the lack
15 of sex, why didn't you ask Mr. Gadson about there
16 being no sex between Miss Martin and Mr. Bowman?

17 A I will say I did not ask the question but
18 here is my theory and this is what I want to show.
19 Marion and Kandee were friends, they were intimate
20 friends, if I can use the words. I wanted to show
21 that this man would not hurt that little girl
22 because he cared about her and that she was an
23 intimate friend of Mr. Bowman's. So, anything that
24 the State wanted to try to show dirty about their
25 intimate relationship was that, again, black versus

1 white, white with a black male, that Mr. Bailey was
2 trying to get the ultimate penalty and yet they
3 where friends.

4 Q Hold on one second.

5 A That is what I did.

6 Q Well, now, Mr. Bowman is married to someone
7 else, isn't he?

8 A Oh, yes. We talked all about the adultery and
9 all the other stuff, and you read the transcript.

10 Q We --

11 A My partner and I, Miss Thomas and I, she is
12 chair two.

13 Q You all talked about adultery?

14 A Oh, yes.

15 Q Tell me about, to make sure it's clear, Mr.
16 Bowman is not married to Miss Martin?

17 A Not that I'm aware of. He never told us
18 that.

19 Q That would be fornication, too, wouldn't it,
20 which is another crime in South Carolina?

21 A Bigamy?

22 Q No, fornication, sex without being married.

23 A The jails would really be over populated,
24 wouldn't they? I understand.

25 Q I doubt the judge is going to concede that is

1 not a crime. Misprison wasn't charged for 150
2 years and it is still valid.

3 THE COURT: Can we not just ask questions?

4 Q Okay. Here is what I'm trying to find out.
5 So, when information about Mr. Bowman and Miss
6 Martin having sex comes in it actually tells the
7 jury, Dorchester County jury, which I would
8 consider to be a small town jury --

9 A It is.

10 Q -- that this African American man and this
11 white lady had been having sex while Mr. Bowman is
12 married to another lady and also while he is not
13 married to Miss Martin?

14 A But they were intimate friends and the only
15 way to show that he had no ill motive or reason to
16 kill this lady was that they were intimate friends.

17 Q Well, hold on a second, now. We had some
18 family members testify about Miss Martin being
19 friends with Mr. Bowman, right?

20 A Yes.

21 Q And they could have shown they were intimate
22 friends. You're talking about sex, right?

23 A Well, intimate friends means sex, I'm sorry,
24 in that context in that courtroom that day. Again,
25 sir, I used everything I could, including the

1 family, to prove he cared about that lady. Yes,
2 maybe he committed adultery, that is God's law and
3 man's law but, again, I'm trying to be here to save
4 his life.

5 Q Let's go back to that. Now, adultery is
6 against both God's law and man's law?

7 A I understand that, God's law and man's law.

8 Q Here is why I asked. CSC is charged as an
9 aggravator and that is alleged and proceeded on in
10 the penalty phase, but the last witness the State
11 presents is a gentleman name Fitts, the last
12 witness that Mr. Bailey puts up. Why didn't you
13 object to his testimony about the DNA coming in in
14 relation to the murder?

15 A Because I wanted to show he was with her,
16 that he cared about Kandee, there was no rape, let
17 the DNA come in, my man's DNA is inside her. I'm
18 sorry, maybe we differ on this, but I wanted to
19 show that they were friends, they were intimate
20 friends. Maybe she did trade the watch for sex in
21 some jurors' mind or if you read between the lines
22 here, but Fitts, I believe, was a DNA person,
23 right?

24 Q He was.

25 A Right. And he couldn't tell when the DNA was

1 put there.

2 Q That's correct.

3 A And I wanted that in as part of my strategy.

4 Q And how does that change your strategy when
5 you find out from Mr. Gadson that sex didn't occur
6 on Nursery Road?

7 A I didn't care about his testimony at all.
8 Gadson was a liar and I call him that today.
9 Gadson, in my theory of the case, with my client
10 was the shooter. I didn't want to believe anything
11 the man said. My cross-examination was limited of
12 him. I kept it simple so he didn't hurt me. He
13 had an agenda to prove.

14 Q The sex is relevant to what?

15 A Intimate friendship. For the last time, Mr.
16 Brown, I know what you're trying to say. I wanted
17 to show the State was trying to do over kill here,
18 they were trying to paint it dirty, I tried to
19 clean it up.

20 Q Hold on, relevant to what element of a murder
21 charge?

22 A What element of murder? He had no malice to
23 this lady, had no reason to hurt her.

24 Q Malice is whoever pulls the trigger, right?

25 A You can infer malice. I'm talking about real

1 life issues here, not some piece of paper. He told
2 us he cared about her, I got the family to say he
3 cared about her. Everybody else said of course he
4 killed her --

5 Q Miss Bowman testified there was a statement
6 made by her brother?

7 A Yes.

8 A Right.

9 Q What did you get her to say about their
10 friendship?

11 A That they were friends.

12 Q So, did you need also to bring in that they
13 had sex out of wedlock?

14 A Yes.

15 Q In an adultrous manner?

16 A Yes, because other than that why is she
17 around him?

18 Q For drugs?

19 A Okay, right, now we dirty it up, you're
20 right, the whole thing was sex, drugs, rock and
21 roll, you're right.

22 Q Hold on one second, now. You indicated that
23 there was sex on Nursery Road?

24 A No, I did not. There was talk out there
25 about, "Hurry up and get some, it's getting cold,"

1 and I darned sure wanted to be protected about
2 that. There was a statement, okay, that's right,
3 believe me, that is one of the ones I wanted to
4 stay away from, so I was prepared to argue that.

5 Q You're talking about the statement that was
6 made during the mental health examination?

7 A Oh, yes.

8 Q Now, you do realize those statements cannot
9 come in?

10 A Yes, because guess who got them suppressed,
11 me.

12 Q I don't think the U. S. Constitution allows
13 statements to come in which are made for the
14 purposes of a mental health evaluation, and in
15 South Carolina you can't introduce that in
16 evidence. That wasn't going to come in anyway.

17 A I understand. I wanted to make sure nothing
18 was going to come in. There was also going to be
19 testimony I had to worry about maybe the
20 co-defendants talking about that.

21 Q Which one?

22 A Either Gadson or whoever might have come out
23 of the woodwork next after being interviewed and
24 saying let me cut a deal.

25 Q Would it surprise you to find out that Gadson

1 swears under oath that there was no sex on Nursery
2 Road?

3 A You know, I wouldn't be surprised if Mr.
4 Gadson said that I looked like George Bush. But
5 between you and me, I don't believe anything a
6 co-defendant says because they know they have self
7 serving purposes.

8 THE COURT: Let me get my shoe.

9 A Yes, sir, that is why I said that.

10 Q Let me also ask you this. Why was Tawain
11 Gadson not examined about Marion Bowman's drinking
12 on that night?

13 A I don't want to call my client a drunk.

14 Q Hold on one second.

15 MR. WATERS: Your Honor, I ask he be allowed
16 to finish.

17 Q Go right ahead.

18 A I didn't want anybody to hurt my kid any more
19 than was already there. He dranked. So, that is
20 another redeeming value a jury gets to hear about,
21 my client is drinking all the time from morning to
22 night?

23 Q You brought that out.

24 A I had to try it at the end, I didn't bring it
25 out in case in chief.

1 Q Great. Why didn't you call Gadson during the
2 penalty phase?

3 A To put him up to say he killed her, he shot
4 Kandee? I would never put a co-defendant up there.

5 Q Tell me, let me see if I can ask my question,
6 you have interrupted me every time. Why didn't you
7 call him during the penalty phase to talk about
8 Marion Bowman drinking the night that Kandee was
9 killed to serve as a basis for mitigation?

10 A I didn't do it, I would never have put that
11 man on the stand.

12 Q Even if he said, quote, that Marion was
13 tipsy?

14 A Voluntary intoxication is going to do what?
15 I mean, I worked for the man, I don't want --

16 Q Are you aware that that is, that's a --

17 A A mitigating factor?

18 Q Yes.

19 A I'm aware the jury has got a right to
20 consider any mitigating factor.

21 Q No, that is a statutory mitigating factor?

22 A Yes, sir.

23 Q And that the Court has to charge it if there
24 is evidence, even if you don't ask for it?

25 A I asked for every mitigating charge I thought

1 was appropriate.

2 Q And the Supreme Court denied him because
3 there was no evidence Marion had been drinking that
4 night?

5 A On that one, yes.

6 Q Why didn't Tawain Gadson serve to provide
7 that information?

8 A Because he might have served a lot more
9 damage than he did there. Mr. Brown, that's the
10 only way I'm going to answer that.

11 Q What more damage could he provide than the
12 fact he said that he shot her?

13 A He would have had plenty more time to testify
14 after he did whatever, in hearing the case, to come
15 up with whatever. I'm not going to put that man up
16 as a co-defendant.

17 Q Why didn't you ask him that during the guilt
18 phase, knowing that it would have added a little
19 evidence of guilt but it would have provided that
20 same evidence to serve as a mitigating charge basis
21 in a penalty phase should you have gotten there?

22 A I don't think I asked the co-defendant that.
23 I did not. Why I didn't do it, I don't ask
24 co-defendants to help or hurt him in that case
25 because he had just cut that deal, he was going to

1 say my guy shot that little girl.

2 Q You didn't interview him, either?

3 A No. I wasn't allowed to by his lawyer.

4 Q Did you ask Walter Bailey to interview his
5 witness, I mean Walter's witness?

6 A I asked the defense attorney, I didn't ask
7 Walter Bailey to interview the State's witness,
8 now.

9 Q And let me ask you, if Walter would have told
10 him to speak with you under this plea agreement
11 that says he has to cooperate, he would have had to
12 have spoken with you, wouldn't he?

13 A Cooperate with the defense?

14 Q Cooperate with Mr. Bailey. If Mr. Bailey
15 said talk to Mr. Cummings, then Mr. Gadson would
16 have had to do so, wouldn't he?

17 A You say that. I don't know that to be true.
18 I don't think he had to cooperate other than to
19 tell the truth and cooperate with the State to
20 provide testimony.

21 Q It says testify truthfully or cooperate,
22 doesn't it?

23 A Right.

24 Q It actually is an alternative?

25 A Yes, sir.

1 Q Okay.

2 MR. BROWN: Beg the Court's indulgence.

3 THE COURT: Yes, sir.

4 Q I want to go back and ask you one last thing,
5 one last thing about Tawain Gadson's testimony.
6 Now, he gave two different statements up there,
7 right?

8 A Yes, sir, five and six.

9 Q And if you will look at Plaintiff's Exhibit
10 7, and you will realize Plaintiff's 7, that he was
11 polygraphed and when they polygraphed him they
12 asked him about whether he was involved in the
13 shooting of Kandee Martin, and Stephenson took the
14 polygraph?

15 A Yes, sir.

16 Q I see you chuckle.

17 A I tell you, I don't find Stephenson to be
18 credible. I don't believe the man could tell the
19 time of day if a --

20 Q Having said that, could Stephenson's
21 testimony have been presented to ask him whether
22 Tawain lied about shooting Kandee Martin?

23 A No, sir.

24 Q Why is that?

25 A Polygraph is inadmissible.

1 Q I'm not talking about the polygraph.

2 A I understand. I'm going to be asking him
3 about what the other guy said. It's hearsay, isn't
4 it?

5 Q Well, it comes from a witness endorsed by the
6 State, I don't know it is.

7 A I mean, I would assume that a polygraph
8 examiner saying what the other guy said is hearsay.

9 Q How about the fact Mr. Gadson lied to him,
10 how about asking Gadson whether he lied to
11 Stephenson?

12 A This test was done on 2/18/01.

13 Q You got --

14 A When did we learn Gadson was going to testify
15 in the case in chief? May 23rd, right, from May
16 23rd --

17 Q Plenty of time to prepare for that.

18 A Okay. And no one knows what he is going to
19 say. Did we just not have a fifteen minute
20 disertation about I thought he was a liar, why I
21 wouldn't put him on the stand?

22 Q This shows he's a liar?

23 A I know he's a liar.

24 Q No, the jury is what I'm trying to find out.
25 That shows to the jury that he lied?

1 A If you believe a polygraph is admissible,
2 sir.

3 Q Not the polygraph, ask Gadson if he lied to
4 Stephenson about it?

5 A No, I did not. And that is the answer.

6 Q All right. And how about asking Mr. Gadson
7 whether he changed his statement after taking a
8 polygraph test?

9 A I asked the questions I asked of Mr. Gadson,
10 I asked him that day in the courtroom.

11 Q All right. To make sure, the first statement
12 he gives does not implicate Mr. Bowman?

13 A None of them implicated each other, the first
14 statements.

15 Q That is not my question.

16 A Right, I know, I'm just telling you the
17 facts, you asked me a question, I gave you the
18 answer.

19 Q Okay. So, to make sure I understand, the
20 first statement Mr. Gadson gives is not saying Mr.
21 Bowman shot Kandee Martin?

22 A I have to read the whole thing again. I
23 don't remember. I don't believe it said that. To
24 the best of my memory, I don't believe it said that
25 but I haven't read the thing in seven years.

1 Q Let me make sure you're not confused here.
2 You don't believe he implicated Mr. Gadson, I mean
3 Mr. Bowman, or you don't believe that he did not
4 implicate him?

5 A He does not implicate Marion other than to
6 say he heard that Marion was in jail for shooting
7 someone in Reevesville, St. George and Bowman.

8 Q Okay.

9 A I did not remember him saying that.

10 Q Okay. Why didn't you ask Mr. Gadson about
11 changing his statement after taking that polygraph
12 test? I'm not talking about the results of the
13 polygraph.

14 A I didn't ask the question, okay?

15 Q Here is why I say this, because what we have
16 got is the State taking one set of answers that
17 they are not satisfied with and then using the
18 pressure of a polygraph in getting a different
19 answer, and I want to make sure we understand, they
20 didn't polygraph him after he implicated Mr.
21 Bowman, did they?

22 A The police procedures that they used, I can't
23 speculate what they did, whether they pressured
24 him. I know they pressured my guy, that is why
25 part of the statements were suppressed.

1 Academically do I know what happened, yes. As a
2 lawyer I know what they did to these kids.

3 Q They questioned Mr. Gadson, he does not tell
4 them Mr. Bowman did it. They polygraph him about
5 whether he was involved in the shooting.

6 A I don't know what time the polygraph was
7 done. I know it is dated February 18. I don't
8 even know that is a truthful statement from Mr.
9 Stephenson.

10 Q For the fact of this questioning let's assume
11 the first statement was made and the polygraph came
12 out and the second statement was made.

13 By the way, those, that factual scenerio,
14 whatever the truth of it, has already been
15 established with the rest of the people in court,
16 so I'm saying let's assume that's the case, okay,
17 they asked him about what happens, he does not
18 implicate Mr. Bowman. They polygraph him about his
19 involvement, not Bowman's, but Gadson's own
20 involvement in the shooting. He then tells them
21 that Bowman was the shooter and they don't
22 polygraph him anymore.

23 A If you tell me that. The only thing I got is
24 stuff that says Rule 5 discovery. I don't know if
25 they gave him a third or fourth test, I don't know

1 that.

2 Q Because you were never given any other tests
3 but that one?

4 A Right.

5 Q You did get that one?

6 A This one, yes.

7 Q And then he signed the plea agreement and
8 that plea agreement is devoid of any polygraph
9 information, isn't it?

10 A Right.

11 Q Okay. So, in other words, they don't want to
12 polygraph him on whether the Bowman implication --

13 MR. WATERS: Your Honor, I don't know whether
14 they did or didn't.

15 Q But the jury never found out that scenario
16 that led to the implication of Mr. Bowman, they
17 never found out how those statements were produced,
18 did they?

19 A I cross-examined every cop that took the
20 stand, I cross-examined everybody, I went through
21 which statement, what times, Branchville, who was
22 in the room. I even found out how they got Marion
23 down from the regional jail here back down to
24 Branchville that nobody else knew about.

25 Q About the DSS taking his children?

1 A That's right, and bringing him down there on
2 a Sunday night out of jail and then lying about it.

3 Q And threatening to take his children?

4 A That's correct.

5 Q Well, let me ask you this. Did the jury ever
6 hear that?

7 A No, because the statement was suppressed.

8 Q Did the jury ever hear that the State was
9 willing to go so far as to threaten to take a man's
10 children from him?

11 A No, I didn't. I sure didn't want to have
12 somebody say I opened the door with something and
13 let the statement come in.

14 Q That doesn't allow evidence to be admitted
15 under any circumstance?

16 A I have learned a lot from you today. Ask
17 your questions, I'm glad --

18 Q I'm trying to find out, maybe they shouldn't
19 in retrospect, if the jury finds out this is the
20 manner in which law enforcement develops these
21 sterling statements of guilt against Mr. Bowman,
22 they threaten polygraphs until they get what they
23 want, then they don't polygraph anymore?

24 A I didn't --

25 Q And threatens to take children away?

1 A I don't know how to say this. I did what I
2 did in that room. I did what I had to. Every one
3 of those policemen I attacked, you know, I did not
4 do anything other than what I thought my job was in
5 there.

6 Q And to conclude asking that, there is no
7 strategy reason not to tell the jury that?

8 A There is no strategy reason. If you miss an
9 objection, there is no strategy reason for that, or
10 if I made a mistake.

11 MR. BROWN: Beg the Court's indulgence.

12 No further questions.

13 THE COURT: Mr. Waters?

14 MR. WATERS: Thank you, Your Honor. May it
15 please the Court?

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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q How you today, Mr. Cummings?

4 A You should never ask that question without
5 knowing the answer.

6 Q That's fine, I will go with --

7 A I'm fine, sir.

8 Q Good. Just to start off with, you obviously
9 didn't have your file, you gave it to those guys,
10 they had it four years, you didn't have it for four
11 years?

12 A Correct.

13 MR. BROWN: For the record, make sure it was
14 given to --

15 MR. WATERS: I'm getting to that.

16 MR. BROWN: You said those guys and pointed
17 at me.18 THE WITNESS: Whoever worked for the defense
19 team, I produced the file as an officer of the
20 court. I believe it was a lady came to my office
21 and picked up the cases, boxes.22 MR. BROWN: And if you want to reach an
23 agreement, Miss Paige Tarr picked up the file, and
24 to fill in the gap as best I can, the file ended up
25 at Charlie Johnson's office and then from Charlie

1 Johnson's office to Mr. Sinclair's office, then
2 back to Mr. Cummings.

3 THE WITNESS: Yes, sir.

4 MR. BROWN: That is pretty --

5 THE COURT: Okay, whoever it was with, it was
6 out of your hands?

7 THE WITNESS: Yes.

8 BY MR. WATERS:

9 Q It was out of your hands for a long time and
10 you actually wrote them and called them to try to
11 get it back and didn't get a response?

12 A Yes. I know Jack personally, he is an old
13 prosecutor, I would do whatever someone tells me.

14 THE COURT: Are you saying Jack is an old
15 prosecutor?

16 THE COURT: Jack is an old prosecutor, yes,
17 sir.

18 MR. BROWN: Let me make sure, now, we're
19 talking about you've known him for a long time.
20 The file --

21 THE COURT: It permits you to redirect.
22 Let's just move on.

23 THE WITNESS: I apologize.

24 THE COURT: The issue is out of his hands.

25 MR. BROWN: I haven't been appointed but two

1 years on this case.

2 THE COURT: Let's continue on, please.

3 BY MR. WATERS:

4 Q All right, let's just go to that. Shortly
5 after this PCR was filed a woman came and got the
6 file from you, correct?

7 A Yes, sir.

8 Q And you did not see it until Judge Lockemy
9 ordered it be given back to you at the beginning of
10 this hearing back in September, is that correct?

11 A That's correct.

12 Q All right. And obviously it has been a long
13 time since this trial, some seven years or so,
14 correct, nearly?

15 A Yes, sir.

16 Q And your memory is not as good as it would
17 have been then, is that correct?

18 A Yes, sir, that's correct.

19 Q About the case?

20 A It's not.

21 Q It is difficult --

22 A Seven years.

23 Q It's difficult to do these cases seven years
24 later and try to remember every little thing, what
25 you were thinking and the like, correct, or however

1 you would characterize it?

2 A I'm trying to do the best I can and tell the
3 truth. I always tell the truth but also keeping in
4 mind that I'm going to be asked questions about
5 this case one day and I was shocked that, you know,
6 it had been so long, I really was, but I'm always
7 going to try to do my best. I mean, I have no one
8 here to punish, reward, I'm just here to tell the
9 truth because now you two gentlemen are doing your
10 jobs.

11 Q I'm not criticizing you, I'm trying to get
12 you to describe from your perspective it is very
13 difficult in these complex cases to respond to all
14 these allegations so long after they have been
15 tried. Is that a fair statement? If not, correct
16 me.

17 A It is a fair statement. But again, my job is
18 to do and answer your questions as you're asking
19 me. Sometimes I'm a little high tempered and
20 verbose, I apologize to the Court.

21 Q And just very briefly, because obviously this
22 thing continues on after here, just very quickly
23 give us a quick rundown of your experience in
24 criminal practice.

25 A I basically have done criminal practice since

1 '86 and that is what I mainly do. I prosecuted for
2 up until '93. In 1993 I leave the First Circuit
3 Solicitor's office and I get appointed to Marion
4 Bowman, which is the last kid caught in the Missy
5 McLaughlin case.

6 Q You said Marion Bowman.

7 A No, Joe Gardner, I'm sorry, God rest his
8 soul. So, it started from there. I have done
9 Gardner, I did Shuler, I have done Marion's case, I
10 just finished up with Justice on Tuesday afternoon,
11 Tuesday morning, Tuesday afternoon. And then I had
12 one other kid that did not have to face the death
13 penalty, a young man named Killenbeck, that was his
14 name. I have done these back to back to back.

15 Q Is it fair to say you have done a number of
16 capital cases? Is that correct?

17 A Yes, sir.

18 Q In this case, you did file a whole lot of
19 motions in this case and I'm going to show you the
20 index to volume one of the record on appeal and
21 just here at the end, just to ask you to skim
22 those, but those are kind of a listing of the
23 number of motions that you filed in this case,
24 correct?

25 A Yes, sir. We always go up and talk to David

1 Bruck or John Blume or representatives of their
2 office because we want to make sure we're up with
3 the most recent Supreme Court thing and, you know,
4 we want to make sure that they get every chance
5 they get, everybody who is sentenced, the
6 defendant, so we go up there and we talk to the
7 experts.

8 Q David Bruck and John Blume?

9 A Blume, or the lady in his office, either Miss
10 Norris --

11 Q Teresa Norris?

12 A We always go up to try to talk to them and
13 ask them for help, experts, people who are willing
14 to take cases and not get paid until the end, you
15 know, because of the way the system is set up, and
16 we have to get court orders to get people paid, so
17 we try to find people that are willing to help, A,
18 save someone's life, B, be a part of the team.

19 Q A lot of those motions were things you have
20 developed in the course of your practice or things
21 were suggested to you in discussing with the people
22 like David Bruck and John Blume who essentially
23 made a career of this?

24 A Yes, sir, and do the trial work. The motions
25 that, you watch the trials, I was a judge's law

1 clerk for a year and of course I try to learn what
2 is being presented and what the judges are ruling
3 on and try to keep up with them.

4 Q You had alluded to this earlier, but Mr.
5 Bailey the Solicitor in this case made a plea offer
6 to your client. Is that correct?

7 A Yes, sir. And again I say this and it really
8 hurt my feelings, life was on the table seven times
9 for Marion and I begged him to take it. Of course
10 the other she is if the man is not guilty why would
11 he plead to life? But looking at the facts in the
12 totality of this case, I begged that kid, I really
13 did. I know that is not my role as a lawyer today
14 for a PCR but I really begged him to save his own
15 life, I did, and I brought every offer to him every
16 time, and I had witnesses, brought his mama back,
17 "For God's sake, beg him."

18 Q I'm going to show you what has been marked as
19 Respondent's 15, or what will be.

20 A Defendant's Exhibit 18.

21 Q Ready?

22 A Yes, sir.

23 Q I show you what has been marked as
24 Defendant's Exhibit 18, which is a letter from Mr.
25 Bailey to you dated August, 2001?

1 A Yes, sir, I'm familiar with this letter.

2 Q Okay. And to summarize that letter, number
3 one, it pointed out discovery on the DNA and also
4 reiterated the offer of a plea to life. Correct?

5 A Correct, sir.

6 Q Okay. And you communicated that to Mr.
7 Bowman?

8 A Absolutely.

9 MR. WATERS: Your Honor, I move that in as
10 Respondent's 18.

11 THE COURT: Any objection?

12 MR. BROWN: Without objection.

13 THE COURT: In evidence, 18.

14 (August 2001 letter from Bailey to Cummings
15 was marked and received in evidence as
16 Defendant's Exhibit Number 18).

17 BY MR. WATERS:

18 Q I'm going to show you now and have you review
19 a letter from Mr. Bailey marked Defendant's 19 for
20 identification, dated December 6, 2001, just have
21 you review that real quick?

22 A Yes. That's the bottom last paragraph in
23 that letter, on page two, that frightened me.

24 Q What do you mean?

25 A Well, he says, "However, since SLED forensics

1 has made a DNA match with your client and the semen
2 extracted from Martin's vaginal swabs, I believe he
3 is the one who had post-death sex with Miss
4 Martin." And he goes on to state his theory of the
5 case in this letter.

6 Q That was essentially a proffer of the State's
7 evidence and repeat of an offer to accept a plea of
8 life, correct?

9 A Correct.

10 Q They also refer to the issue of Tawain Gadson
11 firing that weapon and the casings being recovered
12 by Margaret Hawkins, correct?

13 A Yes, sir.

14 Q So, Mr. Bailey put that in this letter as
15 well?

16 A Put it in the letter, yes.

17 MR. WATERS: Your Honor, I would move this in
18 as Defendant's 19.

19 MR. BROWN: Without objection. I would say
20 it was cc'd to the trial judge, so I assume it is
21 already in the record previously somewhere in the
22 Clerk's office.

23 THE COURT: In evidence, 19.

24 (December 6, 2001 Bailey to Cummings letter
25 marked and received in evidence as

1 Defendant's Exhibit Number 19).

2 MR. WATERS: Thank you Your Honor.

3 BY MR. WATERS:

4 Q Okay, let me ask you this real quick. If
5 your theory of course was Marion Bowman was not the
6 shooter, and you said with dignity, what did you
7 mean by that?

8 A There are statements made at the State
9 Hospital that he shot her in the back. There is
10 interviews with our client, the interviews changed
11 early on, and Miss Marva was in the case way before
12 I was and Marva had told me something that would
13 infer that perhaps he was the principal.

14 Q So, that kind of put some constraints on what
15 you could do, in your mind as an attorney, is that
16 correct?

17 A Yes, sir.

18 Q You could make the State prove its case but
19 you can't suborn perjury, or how do you
20 characterize it?

21 A Exactly as you just stated it.

22 MR. BROWN: Your Honor, may we approach on
23 another matter?

24 (Unrecorded bench conference).

25 THE COURT: All right, Mr. Cummings, we'll

1 have to ask you to come back tomorrow, okay?

2 THE WITNESS: Whatever Your Honor's pleasure.

3 THE COURT: 9:00 o'clock tomorrow morning.

4 We'll adjourn until 9:00 o'clock tomorrow morning.

5 THE WITNESS: Yes, sir.

6 (Adjourned at 5:14 p.m.).

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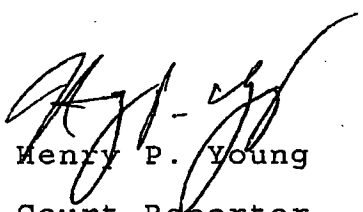
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Dorchester County, South Carolina, on the 18th day of December, 2008.

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

December 23, 2008



Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2006-CP-18-569

COUNTY OF DORCHESTER

MARION BOWMAN,

-vs-

STATE OF SOUTH CAROLINA,

Defendant.

B E F O R E:

HONORABLE JAMES E. LOCKEMY

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

JAMES ARTHUR BROWN, JR., Esquire
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Henry P. Young
Court Reporter

VOLUME IX OF X
December 19, 2008

1 P-R-O-C-E-E-D-I-N-G-S

2 (Reconvened at 9:50 a.m., December 19, 2008).

3 THE COURT: Yesterday, as we finished we were
4 on cross-examination of Mr. Cummings. And, so, if
5 you're ready, Mr. Waters, we'll continue cross
6 examination.

7 MR. WATERS: Thank you, Your Honor. May it
8 please the Court?

9 THE COURT: Okay. A new gentleman here,
10 returned with us.

11 MR. WATERS: Mr. Simon is back.

12 THE COURT: Mr. Simon, how are you doing?

13 MR. SIMON: All right.

14 THE COURT: I'm not here, by the way. I just
15 got a call, a law firm has trying to get me to
16 restore a 40(J). I told them to overnight it to me
17 here in Orangeburg, it got here Wednesday, they
18 said I left Wednesday morning, ain't been back. So
19 now I have this law firm panicking, they said,
20 "Where is he?" "He's in Orangeburg." "No, he's
21 not."

22 Glad to have you back, Mr. Simon.

23 All right. Proceed on, Mr. Waters.

24 MR. WATERS: Thank you, Your Honor. Just
25 very briefly I did want to iterate as I have

1 throughout this case that I'm not waiving my
2 objections to the new issues that have been, that
3 have been raised during the course of this
4 proceeding and I don't want to be accused of trying
5 anything by consent inasmuch as I feel I must
6 respond based on whatever Your Honor, the issues
7 Your Honor considers in the end. I just wanted to
8 put that on the record.

9 THE COURT: All right, so noted.

10 MR. WATERS: Thank you, Your Honor. Also the
11 parties have agreed, as you may recall from our
12 last meeting in St. George, that Miss Hardee-Thomas
13 was going to look in her file and see if she had
14 that note from Sam, and I think we were off the
15 record.

16 THE COURT: Yes. Is that note from Sam
17 similar to that exhibit we were looking at
18 yesterday?

19 MR. WATERS: It is one and the same, I
20 believe? And correct me if I'm wrong, she was
21 going to look and see if she had this in her file
22 and she said she did not find it. All of us heard
23 it but it was off the record, so all the parties
24 have agreed --

25 THE COURT: What is the exhibit number?

1 MR. WATERS: Plaintiff's 67, Your Honor.

2 THE COURT: So, Miss Hardee-Thomas states she
3 does not have Exhibit Number 67, a copy of that
4 exhibit in her file?

5 MR. WATERS: Correct, Your Honor.

6 THE COURT: All right.

7 MR. WATERS: Thank you, Your Honor.

8 BY MR. WATERS:

9 Q We left off yesterday, I think we were
10 talking a little bit about how this process can be
11 difficult in trying to look through your file and
12 remember things that occurred seven years ago. Is
13 that correct?

14 A Yes, sir.

15 Q And, so, I think in our first meeting,
16 though, you did have some of your billing receipts
17 when we were meeting in preparation for this case,
18 is that correct?

19 A One of the first issues that always pops up,
20 of course, is what did you do, who did you get on
21 board, you know, what were you preparing to do, so
22 I know it is easy, you know, we have to prepare all
23 the documents at the end, is to get a list, a
24 print-out in the old records that I know would be
25 on the computer or CD backup disc that shows how

1 many people that were involved in this case. Then
2 you guys have a total list of any possible
3 witnesses.

4 MR. WATERS: I'm going to have this document
5 marked as Defendant's 20.

6 Q I'm going to show you that document. Does
7 this appear to be copies of your billing receipts
8 in this case?

9 A This is my trust account, sir, where I paid
10 the experts that were consulted on behalf of Mr.
11 Bowman in this case, yes, sir, out of my trust
12 account.

13 Q Let's just kind of look through some of these
14 and just tell me who these individuals were and why
15 you hired them. I believe the first one on there
16 is Robert Minter?

17 A Yes, sir. When I got on board, remember I
18 got on board late, Miss Thomas as the Public
19 Defender was appointed first. The gentleman had
20 already been sent to the State Hospital before I
21 ever got involved in this case. Statements were
22 made, a lot of valuable time, in my opinion as a
23 lawyer, was wasted and possibly hurt Mr. Bowman and
24 maybe some decisions that were made thinking it
25 wasn't going to be a capital case at the very

1 beginning, and it turned into a capital case, at
2 least in my opinion, sir.

3 As soon as I got on board I met with Marva, I
4 went with her, we went to see Mr. Bowman, I always
5 hire an investigator to come with me because I
6 don't want to be a witness in a case, I don't want
7 to ever learn something that I can't help somebody
8 with, and I needed Mr. Minter's help, he is a
9 former police officer, he is an excellent
10 investigator, and Bobby is not afraid of anything.
11 That is another reason why I like him, he is not
12 afraid to go in the jail and work, not afraid to go
13 talk to people.

14 THE COURT: What is his name?

15 THE WITNESS: Minter.

16 THE COURT: Okay.

17 Q He was simply your investigator?

18 A Yes, sir.

19 Q You had him do anything from run down
20 forensic stuff, to go and talk to people in the
21 neighborhood and the like, is that right?

22 A Yes, sir. He served subpoenas for trial and
23 everything.

24 Q Did you hire another investigator later in
25 the case?

1 A Walter Mitchell later in the case. I asked
2 for help later on in the case because Her Honor had
3 some concerns also about whether or not people who
4 were African American may not help a private
5 investigator or help me, so we asked for additional
6 help and we were allowed to have Mr. Walter
7 Mitchell later on in the case.

8 Q Okay. Mr. Mitchell also did various
9 investigatory things as well for you?

10 A Yes, sir. He also helped me try to talk to
11 Marion and his family. That is really, in my
12 humble opinion, the greatest thing I thought Mr.
13 Mitchell would do for us, is help me try to connect
14 with the family and try to connect with my client.

15 Q Okay.

16 MR. WATERS: I will have another document
17 marked here as Defendant's 21.

18 Q I will show that, see if you recognize that
19 document?

20 A This is the, I guess a bill note from Mr.
21 Minter to me to keep track of what he has done and
22 how much he expected to be paid hopefully by the
23 Office of Indigent Defense, sir.

24 Q And that is only up to February 16th, 2002.
25 Is that correct?

1 A That is correct, that is at the top of his
2 letter, yes.

3 MR. WATERS: All right, at this point I would
4 move 20, Respondent 20 and 21 into evidence.

5 MR. BROWN: Without objection.

6 THE COURT: Okay.

7 (Minter to Cummings billing letter marked
8 and received in evidence as Defendant's
9 Exhibit Number 20).

10 (Cummings check stub register marked and
11 received in evidence as Defendant's Exhibit
12 Number 21).

13 MR. WATERS: Thank you, Your Honor.

14 BY MR. WATERS:

15 Q Let's move down, going back to the bill list.
16 The next one on, Don Girandt, who is he?

17 A Don Girandt, as stated on my ledger, crime
18 scene investigation. Don is a former SLED agent,
19 sir, he retired from SLED.

20 Q All right.

21 A He holds himself out as an expert and has
22 been qualified as an expert in crime scene
23 investigations as well as knowing the guys at SLED
24 to help us, go talk to the firearms examiners, go
25 talk to the DNA people. It is nice to have

1 somebody who used to know the code to get in the
2 door.

3 Q Right.

4 A So, that is why I hired Don.

5 Q What did you have him specifically doing in
6 this case?

7 A Basically a lot more than just crime scene
8 investigation. Talk with him, consult with him.
9 Don is also a personal friend of mine, sir, I have
10 known him for probably over twenty some years now
11 and he has been, he is used on every case I have
12 ever been on, on death penalty.

13 Q To essentially review the forensic evidence
14 and the State's evidence as a whole?

15 A Yes, sir.

16 Q And to advise you on anything that might be
17 of benefit to you?

18 A Correct.

19 Q Now we have Dale Davis, I will talk about her
20 a little bit more later but in general what did you
21 hire her for?

22 A Mitigation expert. She's a social worker and
23 they are supposed to go get us records, school
24 records, find out about mental health issues, find
25 out about what it was like for the client's life

1 and basically you depend on her to do her job.

2 Q And she was one of the first experts that you
3 hired, is that correct?

4 A I was on board later, I believe Marva had
5 already started with her, if I'm not mistaken.

6 Q All right. Flipping over to the next page,
7 Jim Aiken?

8 A Mr. Aiken was used to try to deal with
9 whether or not prison conditions would be adequate
10 for a citizen if he was given the option of life
11 without parole or death. Mr. Aiken has a big heart
12 and was a former warden, he is, in my opinion, is
13 just a wonderful gentleman.

14 Q And he was essentially your adaptability
15 expert?

16 A Right, for lack of a better word. I use him
17 more to basically talk to the client, too, and meet
18 with those guys to convince them, you know, think
19 about it, think about what you're going to do.

20 Q All right. Jeff Yungman?

21 A That was a recommendation by Dale Davis,
22 again to follow up with the life or issues of Mr.
23 Bowman.

24 Q Okay, we'll get to him a little bit more in a
25 bit. How about Dr. Brian West?

1 A He is a clinical psychologist to review
2 records, documents and make sure our client was not
3 retarded, didn't suffer from any mental
4 abnormalities that you would find as a
5 psychologist, not a psychiatrist.

6 Q Right. Okay.

7 A Unfortunately we already had the State
8 Hospital report saying Mr. Bowman was competent and
9 a lot of other issues.

10 Q We'll get to that as well. Dr. Clay Nichols?

11 A Clay Nichols is a forensic pathologist,
12 probably well known throughout the State, taught at
13 MUSC, worked at MUSC, now works at Richland
14 Memorial Hospital. I had him review everything
15 from the autopsy reports, autopsy photographs, to
16 manner of death, how to cut down on any possibility
17 that the State, particularly Mr. Bailey, would use
18 about what type of wounds and how bad they were or
19 why and whether or not she was alive at the time of
20 being burned, smoke in her lungs, et cetera.

21 Q Right.

22 A I used him completely as a friend as well as
23 a teacher about pathology and forensic pathology.

24 Q Okay. Dr. Donald Morgan?

25 A Donald Morgan is a psychiatrist, was used to

1 make sure my client was, again, not retarded and
2 deal with his mental health issues, whether or not
3 the gentleman suffered from any mental
4 abnormalities and was on the defense team to see if
5 he was competent to stand trial.

6 Q And what did he find on the competency?

7 A Mr. Bowman was competent.

8 Q And criminally responsible as well?

9 A That's the standard.

10 THE COURT: His last name?

11 A Morgan.

12 Q There is two issues, correct, criminal issues
13 and competent to stand trial?

14 A Yes, sir.

15 Q Move on to Ronald Ostnowski.

16 A He was our DNA expert, sir, and again what I
17 used him for was to make sure that the DNA that was
18 inside that lady's body did belong to Mr. Bowman
19 and review what SLED did in particular in light of
20 being able to find out what time the sample might
21 have been placed there, because that was going to
22 be a big part, looking at whether or not there was
23 ever going to be a claim of forced rape or
24 something against Miss Martin, and also to assist
25 me in the defense of the case.

1 Q Okay. How about Sally Hayden?

2 A While we were involved in this case Mr.
3 Bowman told me he was having difficulty reading,
4 understanding, this was way after we were involved
5 in the case, so I asked Miss Hayden who teaches
6 speech and reading to come in and verify whether or
7 not Mr. Bowman could read what we gave him, every
8 bit of discovery, make sure he understood my
9 letters, make sure that he could read and write and
10 understand what was happening for him. This was
11 his life, this was his case. So, I asked Miss
12 Hayden to go to the jail and work with Mr. Bowman
13 and she told me he could read and understand but I
14 wanted to check that to make sure.

15 Q That was her conclusion, that he could in
16 fact read and understand?

17 A Yes.

18 Q All right. How about Jeff Hollifield?

19 A I think he was the gentleman, the firearms,
20 if I'm not mistaken. Again, the best of my
21 recollection. I'm trying to find that right now.

22 Q There is not an entry on this particular
23 document of your trust account document but I
24 believe you did hire him, is that correct?

25 A Oh, yes, sir, that is the gentleman in

1 Virginia, the name escapes me right now but we had
2 a firearms expert out of the state of Virginia.

3 Q Was that Cleon Mauer?

4 A Cleon, yes, sir, I'm trying to remember, I
5 apologize. I know Robin Keil was our court
6 reporter.

7 Q Right.

8 A I can't recall right now, I apologize, I'm
9 drawing a blank.

10 Q On Jeff Hollifield?

11 A Yes.

12 Q We'll get back to him in just a second. I'm
13 going to show you 5316 of the record on appeal and
14 just see if that refreshes your recollection. That
15 appears to be an affidavit?

16 A Of Cleon.

17 Q Cleon Mauer?

18 A Mr. Mauer was the firearms examiner. Thank
19 you, sir, that did refresh my memory.

20 Q All right. So, you had Mr. Mauer to review
21 the SLED determinations on the firearms?

22 A And the firearm itself, as stated there.

23 Q Okay.

24 A And shell casings, excuse me.

25 Q All right. How about Erin McConnell, did

1 you, Dr. Erin McConnell, was she hired?

2 A We tried to get Miss McConnell on board, she
3 was an actual forensic pathologist at MUSC, first.

4 Q Right.

5 A And Miss McConnell was going to move on in
6 her career and at that point I had to shuffle and
7 get, I called in a friend, I asked my doctor in
8 Richland County to please come on board and he
9 graciously did.

10 Q Okay.

11 A But I tried to keep it local, it kept down
12 costs, to make sure the pathologist would have more
13 access to me and not have to drive back and forth
14 to Columbia all the time to see people.

15 Q All right. Robert Woods?

16 A I see the check in front of me. I'm trying
17 to remember who Robert Woods was. He would have
18 had to have been on a bill submitted. Sir, I can't
19 recall and I don't want to guess.

20 Q That's fine.

21 A This is an important case. No, sir.

22 Q That's fine. How about Frank Bloomingburg?

23 A Bloomingburg did a polygraph for me.

24 Q At your request?

25 A At my request.

1 Q On Mr. Bowman?

2 A That's correct, sir.

3 Q Okay. So, I guess you initially, you said
4 you were appointed and you had a, you went and met
5 with Mr. Bowman, is that correct?

6 A Yes, sir.

7 Q Okay. And he told you some things and then
8 you had him polygraphed by Mr. Bloomingburg, is
9 that correct?

10 A Yes, sir, I did.

11 Q Okay.

12 MR. WATERS: The Court's indulgence just one
13 moment?

14 BY MR. WATERS:

15 Q I'm going to show you what has been marked as
16 Defendant's Exhibit 22.

17 A Yes, I remember this.

18 Q Okay. Essentially that's Bloomingburg's
19 report to you on his polygraph, correct?

20 A That's correct, sir.

21 Q And that was reported to you that Mr. Bowman
22 had had deception indicated on the crucial
23 questions?

24 MR. BROWN: We object.

25 THE COURT: Basis?

1 MR. BROWN: For the, for any attempt to use
2 the validity of the result as proving the truth of
3 the issue tested.

4 THE COURT: I'm just assuming that Mr. Waters
5 wants this to know the state of mind of Mr.
6 Cummings as he made decisions.

7 MR. WATERS: Right.

8 MR. BROWN: And we can, to the extent we have
9 urged the same thing on the use of polygraphs to
10 show how the State's case developed, we agree with
11 that but we don't by any means consent --

12 THE COURT: I'm not asking for consent, but
13 as for as -- there has been no motion about this
14 yet, so are you making a motion to introduce it?

15 MR. WATERS: I think he objected when I was
16 asking him the question it was reported back to
17 him.

18 THE COURT: You may continue on with your
19 question.

20 MR. WATERS: Thank you, Your Honor.

21 BY MR. WATERS:

22 Q Again, what did Mr. Bloomingburg report back
23 to you?

24 A Mr. Bloomingburg's written report back to me
25 and Miss Thomas, the main two questions that boiled

1 down to this case is, "Did you shoot Kandee
2 Martin?" The answer by Mr. Bowman was no. B, "Did
3 you set Kandee Martin's car on fire?" Mr.
4 Bowman's answer, no. Then he gives his opinion,
5 sir.

6 His Honor says I can go forward? "In the
7 opinion of the examiner subject did attempt
8 deception in his responses to the above relevant
9 issue questions. During the post-examination
10 interview subject continued to deny culpability."

11 Q Okay.

12 THE COURT: Now, he doesn't do it like some
13 of the other ones, he doesn't say what particular
14 question.

15 THE WITNESS: I know this gentleman's
16 background, he was NIS --

17 THE COURT: No, no. He doesn't say what
18 questions indicated deception and what questions
19 indicated --

20 THE WITNESS: To answer you specifically,
21 sir, no, just underneath the two questions -- I'll
22 let Your Honor see what he did.

23 MR. WATERS: I believe it does actually have
24 the two questions on there.

25 THE COURT: Oh, I see, okay.

1 MR. BROWN: And again just to make clear, my
2 objection is to, we're not conceding the validity
3 of polygraph testing and we object.

4 THE COURT: Well, we will not make South
5 Carolina history today, we will not accept them as
6 to validity, more so as to state of mind as to Mr.
7 Cummings and information he had in making his
8 decisions.

9 MR. BROWN: I certainly understand that, yes,
10 sir. Thank you.

11 BY MR. WATERS:

12 Q All right. So, after that, getting that
13 report from Mr. Bloomingburg did you go back and
14 talk to your client and did that affect what you
15 felt you could ethically do in his defense?

16 A There were a lot of things that affected it.
17 When I first got on board, as I stated to
18 everybody, I got on late.

19 Q Right.

20 A Mr. Bailey, in my humble opinion, had done an
21 excellent job as prosecutor setting this up, either
22 go ahead and plead, I tell you to plead, Marva was
23 sold on the case, or here comes the power of the
24 State. And he had everything. He had all the
25 family members charged, he had done everything a

1 vigilant prosecutor could have done and I get on
2 board on the case, like the old saying, let Mikie
3 do it, and I'm in there and the first thing I try
4 to do is get caught up to speed. I met with Miss
5 Thomas and learned some things and there was an
6 issue that I read things that the State Hospital --

7 MR. BROWN: We would object to hearsay to the
8 extent we get into what Miss Thomas, I don't know
9 where it's going to go but I don't want, I
10 understand he can rely on being told something to
11 explain actions and it is not offered for the truth
12 of the matter asserted, but when he gets to the
13 point we talk about whatever it is --

14 THE COURT: Thank you. Your objection is
15 overruled. Proceed.

16 MR. BROWN: Thank you.

17 THE WITNESS: I had some concerns. What I
18 have learned --

19 THE COURT: I overruled the objection. You
20 can proceed on. I overruled his objection.

21 THE WITNESS: Yes, sir. I told you I had
22 some concerns about what I learned, what I read and
23 what Marva and I discussed about the strategy and
24 trying to help this young man. So, yes, I asked
25 for a polygraph, and I know we talked about

1 polygraph in here and I know they are not
2 admissible but they are a pretty good tool to try
3 to get your client to understand that, you know,
4 we're going to get to the bottom of this, we're
5 going to tell the truth, we're going to do
6 everything we got to do to defend you.

7 BY MR. WATERS:

8 Q Right. I think yesterday you said that while
9 in your opinion as a good lawyer, you know, you can
10 certainly make the State prove its case, you are
11 not ever going to suborn perjury or knowingly
12 submit false evidence. After this polygraph test,
13 in talking to Mr. Bowman after that did you feel
14 some ethical constraints on the things you could or
15 could not do, or how would you characterize that?

16 A I characterized it as walking on eggshells as
17 well as trying to get this young man to believe in
18 us, trust us. I had life on the table seven times,
19 I begged him to take it, with everything that was
20 involved in this case, and the gentleman said no,
21 no, and no. I begged his mama, I had Walt Mitchell
22 beg for God's sake one last time. I was telling
23 everybody I knew what was going to happen, I tried
24 my best, and again I don't want him to die, I
25 don't, I mean, you and I have argued about that,

1 sir, I have asked you please give him a new
2 sentence, go to your boss, because I don't want to
3 see him die, I don't believe that he should, he is
4 a young, young man, and again I apologize for
5 speaking to you that way, sir, but I have done
6 that.

7 Q I understand that and that's certainly not
8 the point of this proceeding.

9 A No, sir, I understand it is His Honor's
10 province, and other judges, but I have asked you to
11 do that just to try to help my client. I
12 understand now he is with two other good lawyers
13 but, you know, I still care about that kid.

14 Q All right.

15 MR. WATERS: Your Honor, at this time I would
16 move the last two in evidence, that would be 22 and
17 21, and that is the polygraph report, again only
18 for its effects on Mr. Cummings and his
19 representation, and 21 is the Minter time sheet to
20 Mr. Cummings.

21 MR. BROWN: 21 without objection and 22
22 without objection is limited.

23 THE COURT: In evidence, 21 and 22.

24 (Robert Minter letter/time sheet previously
25 marked and received in evidence as

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1 Defendant's Exhibit Number 21).

2 (Marion Bowman polygraph marked and received
3 in evidence as Defendant's Exhibit 22).

4 BY MR. WATERS:

5 Q I'm going to show you a document marked as
6 Defendant's 23 and see if you recognize that letter
7 and specifically if it refreshes your recollection
8 as to Jeff Hollifield?

9 A Yes, sir. I re-read Miss Thomas' letter to
10 me and said Jeff Hollifield was a chemist, please
11 forward him a copy of the police incident report,
12 all SLED lab reports, to include lab results and
13 gunshot residue and lab results on fibers, and his
14 address is. Marva had him on the team before I
15 really got cranked up.

16 Q So, he was kind of a trace evidence, forensic
17 guy?

18 A Yes, sir. That is why I didn't recall it.

19 Q All right.

20 MR. WATERS: At this point I would move
21 Respondent's 23 into evidence.

22 THE COURT: Any objection?

23 MR. BROWN: I'm sorry, I have been handed 24
24 and 25. Let me see.

25 No objection to 23.

1 THE COURT: 23 is in evidence.

2 (Hardee-Thomas to Cummings 12/5/2001
3 letter marked and received in evidence as
4 Defendant's Exhibit Number 23).

5 THE COURT: We're ready when you are.

6 THE WITNESS: Yes, sir.

7 BY MR. WATERS:

8 Q Are you ready, Mr. Cummings?

9 A Yes, sir.

10 Q Thank you. I'm going to show you what has
11 been marked Defendant's 24 and just have you review
12 it very quickly.

13 A This is a letter from Miss Thomas to Teresa
14 Norris at the Center for Capital Litigation. As I
15 testified to yesterday, we always go see those
16 folks, we always go up and ask for help. Every
17 lawyer needs to ask for help in cases like this.
18 We tried and we got everything that was updated,
19 new case law, things were going to happen in the
20 Supreme Court. I remember when I worked for Judge
21 John Smith he had a death penalty case going on
22 with Larry Gene Bell and a case came down during
23 the trial --

24 Q Right.

25 A -- that rendered our state correct in how we

1 did death penalty cases. So, things are always
2 happening.

3 Q And that letter reflects you all's request
4 for her, from her for various help on legal issues,
5 charges, things of that nature?

6 A Yes, sir, I do it every case.

7 MR. WATERS: At this point I would move
8 Defendant's 24 into evidence.

9 MR. BROWN: Without objection.

10 THE COURT: In evidence.

11 (Hardee-Thomas to Teresa Norris letter
12 dated 12/5/2001 marked and received in
13 evidence as Defendant's Exhibit Number 24).

14 BY MR. WATERS:

15 Q I'm going to show you what is marked
16 Defendant's 25 and ask you to review it and
17 describe it to the Court, if you would, please.

18 A This is a letter dated September 18th on Miss
19 Marva's stationary, copy to me. It basically
20 states, "Enclosed is a copy of the court order that
21 Judge Goodstein signed September 17, '01, seeking
22 services of the follow experts."

23 Q You don't need to read all that. That is
24 just a list of some of the experts that we have
25 discussed here?

1 A Yes, sir.

2 Q All right. Let's talk a little bit about
3 Dale Davis, and I think you said that she was
4 already on board when you got involved. Is that
5 correct?

6 A The best of my recollection, yes, sir.

7 Q Okay. Again, why do you hire somebody like
8 Dale Davis? Describe what she does and why you
9 hire her.

10 A They're social workers. They go out and try
11 to find out about the life of the client, they know
12 where to go get school records, hospital records,
13 and that is what you pay them to do. You go, you
14 tell them to go see the family, go get pictures,
15 photographs, how they grew up. When we get into a
16 penalty phase thing they are going to have
17 beautiful pictures of whoever was harmed, murdered.

18 Q Right.

19 A And you try to find what you can find out
20 about the defendant and, you know, you are
21 basically learning about their life.

22 Q She's a mitigation investigator?

23 A I call her a social worker but she has the
24 title of mitigation person.

25 Q And her expertise which you rely on her to do

1 is her expertise on where to gather this
2 information about a subject's history, correct?

3 A Yes.

4 Q Let me ask you, was there any point that you
5 had any disagreements with Miss Davis or she
6 expressed some concern to you about the status of
7 the case?

8 A Oh, yes. Towards the -- well, as we got
9 going towards getting ready for trial it appeared
10 that somebody had put a bad wall between Mr. Bowman
11 and Marva and I.

12 THE COURT: What?

13 A A bad wall, put up a disagreement area
14 between us, and it is my belief that Miss Davis was
15 talking to her and talking to his mother and I
16 believe it hurt my case.

17 Q At anytime did you refuse to return calls to
18 her or make yourself unavailable to her or refuse
19 to share information with her or anything of that
20 nature?

21 A No, sir.

22 Q Do you recall getting a letter in which she
23 complained about a lack of access to you?

24 A I remember us getting a letter, yes, but I
25 would like to ask her when she tried, when she

1 called to set up appointments, whatever she thought
2 she was going to do and about what.

3 Q I'm going to show you Plaintiff's 57 that was
4 previously admitted into evidence. See if you
5 recall that document?

6 A We got a letter from her, this is a memo, she
7 woke up at 4:00 in the morning worrying about
8 panic, if she had done her job, which she did
9 according to her. There is no panic.

10 Q All right.

11 A We had what we had to work with. There were
12 not a lot of things, and again we pointed this out,
13 that he was poor, his mom was poor, it was hard
14 trying to find anything about Marion's background
15 in life.

16 Q Were there ever any times she said, "I need
17 this," and you refused to get it for her?

18 A No. Anytime subpoenas were needed, whatever,
19 it was done. There is always a crisis, and again I
20 don't much want to talk bad about somebody, but it
21 just seems to be a crisis both for her getting
22 ready for the next case, what we're in now.

23 Q Was there ever a time you refused to look at
24 the records she had gathered?

25 A Of course not. Whatever was presented to us

1 we got.

2 Q Was there ever a time where you refused to
3 discuss the case with her or to talk to such
4 witnesses as she might want?

5 A No, other than how would she know who they
6 were and who we were going to put on the stand?

7 Q At any point did she tell you, "Mr. Cummings,
8 I'm keeping a log of things I don't like you did
9 for PCR down the road"?

10 A No, but I know she does.

11 Q She didn't tell you that at the time?

12 A Of course not. But I know the game and
13 unfortunately that is what it turns out to be
14 anymore.

15 Q But again, your purpose in hiring her was
16 based on her expertise in knowing how to do this
17 social history investigation, is that correct?

18 A She doesn't testify in court. Now, in order
19 to be an expert you have to be qualified by the
20 judge.

21 Q Right.

22 A You have to be qualified by the Court. That
23 lady doesn't testify.

24 Q I understand. You didn't hire her to
25 testify, you hired her because she had training in

1 how to go get the records and talk to family and
2 identify things?

3 A That's it.

4 Q That is what you hired her for?

5 A Right. She doesn't make legal tactical
6 decisions. She wants to, she worked in a Public
7 Defender's office, she thinks she's a lawyer.

8 Q Okay. All right. I'm going to show you what
9 has been previously entered as Plaintiff's Exhibit
10 58. See if you recall that letter?

11 A Here is the line that backs me up. "I had
12 hoped to get a better grasp on the direction of the
13 case in order to structure a presentation on
14 mitigation issues." This is what she wanted to do.
15 We met with the experts, went over what they were
16 to testify about. They're experts.

17 Q That was going to be my next question. Did
18 you meet with Jeffrey Yungman before he testified?

19 A Yes, sir.

20 Q Did you discuss his proposed testimony?

21 A Yes. Met at Marva's office and talked,
22 talked until everybody was done talking.

23 Q You felt you had sufficiently prepared him to
24 present his testimony?

25 A Yes.

1 Q Okay.

2 A All you got to do is tell the truth.

3 Q Right. When looking for him to testify, you
4 wanted him, correct me if I'm wrong, you wanted him
5 to just, you know, express his opinion kind of
6 freely and not look like you were dragging stuff
7 out of him. Is that correct?

8 A That's a fair way to say it. He basically
9 did the social work job that the mitigation expert
10 couldn't do or wouldn't do.

11 Q So, his job was to take the information that
12 she provided and then he was going to synthesize it
13 and testify to it in court, is that correct?

14 A He talked a little bit, talked about what it
15 was like for him and what happened and tried to put
16 some rationale to the jury about what makes people
17 do certain kinds of things.

18 Q And that was his expertise, that is what you
19 relied on, what you hired him to do?

20 A Right, his testimony is his evidence. That
21 is what we heard and that is what I expected.

22 Q And the reason why you hired him was to take
23 this social history and kind of put it in context
24 and synthesize the issues about his life that you
25 could present to the jury, that might be

1 mitigating?

2 A Marion was not going to testify.

3 THE COURT: What was that?

4 A Mr. Bowman was not going to testify, Marion
5 Bowman was not going to testify. Everything that
6 Mr. Yungman presented was learned from the files,
7 learned from Mr. Bowman, learned from Miss Dale
8 Davis and any other records or documents he relied
9 on.

10 Q Did Jeffrey Yungman ever call you up, contact
11 you and say, "Hey, I need this thing, I need help
12 getting that," and you just ignored it or refused
13 to respond to it?

14 A Not to my recollection. If he called Marva I
15 didn't know about it.

16 Q I'm going to show you what has been marked
17 Defendant's 26 and have you review that very
18 quickly.

19 A Sir, it's a letter from me to co-counsel and
20 Miss Dale Davis, October 25th, '01.

21 Q All right. And this letter reflects you
22 addressing a letter to both Marva Hardee-Thomas and
23 Dale Davis requesting a meeting to discuss the
24 case, is that correct?

25 A Yes, sir. Charleston, a Charleston jury had

1 just come back, a Beaufort jury had just come back
2 with a life sentence on a case and Dale was
3 bragging about the work she did, the team they had.

4 Q Correct.

5 A So I congratulated her for it, for saving a
6 human being's life and wanted to get working and do
7 what we can here for Mr. Bowman. That is the
8 intent of my letter.

9 Q All right.

10 MR. WATERS: At this time I would move
11 Defendant's 26 into evidence.

12 MR. BROWN: Without objection.

13 THE COURT: In evidence.

14 (Cummings to Hardee-Thomas 10/25/01 letter
15 marked and received in evidence as
16 Defendant's Exhibit Number 26).

17 MR. WATERS: Thank you, Your Honor.

18 BY MR. WATERS:

19 Q I'm going to show you what has been marked
20 Defendant's 27 and have you review that very
21 quickly.

22 A It's a letter to Miss Thomas and of course
23 Miss Davis, whatever date she wants to come meet
24 with me other than a specific time period I asked
25 for protection.

1 Q So, this was another letter in which you were
2 contacting Miss Davis and said, "Let's get
3 together, let's talk about the case," correct?

4 A Yes, sir.

5 MR. WATERS: I move Defendant's 27 into
6 evidence.

7 MR. BROWN: Without objection.

8 THE COURT: In evidence.

9 (Cummings to Hardee-Thomas and Dale Davis
10 12/25/01 letter marked and received in
11 evidence as Defendant's Exhibit Number 27).

12 THE COURT: As I recall, this was December,
13 the trial was set in May?

14 MR. WATERS: In May, Your Honor.

15 THE WITNESS: Yes, sir.

16 BY MR. WATERS:

17 Q I'm going to show you what has been marked
18 Defendant's 28. See if you recognize that and
19 describe it for the Court if you would, please.

20 A January 11, '02, a letter to Miss Thomas. "I
21 am in receipt of a fax from Jeff Yungman. Let's
22 get him on board as soon as possible, he's a former
23 cop." I asked Marva to prepare the order for the
24 monies from the Judge and get him on board.

25 Q And again, Jeff Yungman was suggested by Dale

1 Davis, correct?

2 A Of course.

3 Q And you got his resume' and it looked good to
4 you as for as somebody to testify, correct?

5 A Correct, sir.

6 Q And that is what this letter reflects?

7 A Miss Davis wanted him on the team and I will
8 do anything I can to help Mr. Bowman, if it was
9 going to help.

10 Q And being a former cop you thought that would
11 make him less than some sort of defense oriented
12 guy and might give him a little bit more
13 credibility before the jury as a more objective
14 arbitor, is that fair to say?

15 A Yes, sir, correct.

16 MR. WATERS: At this point I would move
17 Defendant's 28 into evidence.

18 MR. BROWN: Without objection.

19 THE COURT: In evidence.

20 (Cummings to Hardee-Thomas 1/11/02 letter
21 marked and received in evidence as
22 Defendant's Exhibit Number 28).

23 BY MR. WATERS:

24 Q Going back to Dale Davis, were there
25 witnesses that she wanted to call that you believed

1 wouldn't work well before a Dorchester County jury?

2 A Yes. And also I don't let the mitigation
3 lawyer, person, so called mitigation person, social
4 worker, tell us how to try a case. I'm sorry, I
5 mean, they can give input but she's not a sworn
6 member of the Bar, and I have heard all her war
7 stories and everybody has. Certain people can
8 testify and certain people shouldn't testify. And
9 again it was a dividing wedge between Mr. Bowman
10 and Miss Thomas and I, especially toward the end of
11 this case.

12 Q I guess it's fair to say again you relied on
13 her job and what you hired her for and her
14 expertise in gathering the records and family
15 information but you weren't very interested in her
16 directing your legal strategy?

17 A I'm not interested in her directing a legal
18 strategy, correct, because we have certain ethical
19 issues that she doesn't have.

20 Q Right. What about the former part of the
21 question? Your reliance on her was to gather that
22 information and the social history?

23 A Let's go find out about the life of the
24 client and family, you know, find out what happened
25 to him, if he fell off a bicycle at age two and had

1 a brain aneurysm, something.

2 Q She had a lot of experience doing that, to
3 your knowledge, correct?

4 A To my knowledge, yes.

5 Q Now, you mentioned a little bit about
6 Dorchester County juries. How would you
7 characterize them in general as a trial lawyer who
8 has practiced in front of them for years?

9 MR. BROWN: I would object. It calls for
10 speculation.

11 MR. WATERS: I'm asking him --

12 MR. BROWN: I mean rank speculation.

13 MR. WATERS: I'm asking him as a trial lawyer
14 who practices in front of the Dorchester County
15 juries all the time, when he looks at these jurors
16 how does he see them.

17 THE COURT: How he sees them?

18 MR. BROWN: Well, I think the original part
19 of the question is how would you characterize the
20 jury.

21 THE COURT: The question is now how does he
22 see the jury?

23 MR. BROWN: I'm assuming he is asking the
24 process of assessment.

25 THE COURT: Whatever he means, whatever you

1 do, that would not be speculation, what you do.
2 Tell me how you assess them.

3 THE WITNESS: It's a Republican county.

4 MR. BROWN: I'm sorry, I object.

5 THE COURT: Whether that is true or not, that
6 is what he thinks.

7 MR. BROWN: But his question calls for him to
8 speculate about that.

9 MR. WATERS: No, I'm asking him --

10 MR. BROWN: My objection was speculation.

11 THE COURT: Okay, don't speculate, tell us
12 how you feel, what your impressions of the jurors
13 are and what you think. Whether it is true or not,
14 that is a different thing.

15 THE WITNESS: Very conservative jurors in
16 Dorchester County, sir.

17 BY MR. WATERS:

18 Q From your experience in trying cases, how
19 long in Dorchester County --

20 A Since 1987

21 Q And, so, your experience in doing that, part
22 of the job of a trial lawyer is of course to know
23 your jury pool and how things are going to work
24 before them that you are likely to get, correct?

25 A Yes, sir.

1 Q And your assessment of Dorchester County
2 juries in general was?

3 A Very conservative jurors.

4 Q Okay. All right. And let me move on. Let
5 me ask you a little bit about Mr. Bowman's mother.
6 Did you have any issues or difficulties with her in
7 getting her to come to court or testify?

8 A I don't want to sit up here and ever say
9 anything bad about Marion's mom because that was
10 one thing he was adamant about, because the lady
11 had a hard time meeting with us, wouldn't meet with
12 us. I offered to meet with her at one of the
13 little steak places in St. George, Marva asked her
14 to meet with me, begged her to come.

15 I read her testimony. I have never seen a
16 woman without emotion to beg for a child's life.
17 You would have to beat my mother off me if you were
18 going to take me out that door, you know, just to
19 be angry at me. I mean, we begged her, we begged
20 everybody.

21 Q What about family or friends, were there
22 difficulties with them, were they particularly
23 cooperative, other family and friends?

24 A As you know, everybody in his family was
25 charged.

1 Q That posed an impediment to you initially?

2 A I think you read the transcript. I begged
3 Dorothy, his wife, answer my questions, if you
4 don't like me, don't want to answer the questions,
5 please, but she was reluctant to talk to me in the
6 courtroom. That is the academia of everything, you
7 gentlemen read this.

8 Q Because many of the family members had been
9 charged in the disposal of the gun, that presented
10 an obstacle to you being able to use them in
11 mitigation, is that fair to say?

12 A Yes.

13 Q Okay. Now, you said something about Mr.
14 Bowman didn't want you calling his mother or
15 calling his family members or expressed concern
16 about that?

17 A He expressed great concern about it, didn't
18 want his family hurt. That is one thing about that
19 gentleman, he wanted his wife and children
20 protected, even the ones weren't his biological
21 children, he wanted them protected and he wanted
22 them not to be hurt and not to hurt his family. He
23 loved his family.

24 Q Okay.

25 A That is all he had.

1 Q Did you all consider any sort of physical
2 abuse or anything, any type of mitigation in this
3 case, or did you have a concern about how that
4 works in Dorchester County, I guess I should ask?

5 A I had a concern about everything about the
6 case. Marion said there was a gentleman his mom
7 had dated, stepfather or something that was cruel
8 to him. I remember that specifically. And, again,
9 whatever record Miss Davis got through her social
10 work, but Marion was very reluctant to tell us
11 anything about him being hurt or bothered as a
12 child, at least in my recollection.

13 Q Okay. Let's talk a little bit about Kandee
14 Martin. You had some testimony, and again you
15 answered this to some degree, I want to make sure
16 it is clear for the record. If you had information
17 that Kandee was a prostitute or had traded sex for
18 drugs is that anything that you would want to use
19 as a strategic matter in the penalty phase of this
20 trial?

21 A I may be wrong, I may have been below the
22 standard of care as an attorney, I didn't see
23 getting any mileage out of attacking that lady for
24 a misdemeanor in her life or bad conduct. I really
25 didn't have any solid proof on who was going to say

1 that on the stand, who I would bring in to say
2 that. The other fellows, the fellows, the people,
3 we got everything we could out of it. I didn't see
4 attacking that victim. I have learned, I have been
5 to seminars, death penalty seminars, that attacking
6 the victim is like you putting a nail in the
7 coffin.

8 Q The concern is there will be a backlash from
9 the jury if you did such a thing to the person that
10 they have already convicted your client of
11 murdering, correct?

12 A Everybody has got to remember that Missy
13 McLaughlin, Joe Gardner case, everybody wanted to
14 attack that girl.

15 MR. BROWN: Your Honor, I object to
16 comparison to another case, unless we want to open
17 that door.

18 THE COURT: Unless he compared it.

19 MR. WATERS: This is part of his thought
20 process.

21 THE COURT: That is part of his process in
22 making a decision. Do you object to him saying
23 what he used to make his decision?

24 MR. BROWN: No. We'll open the door to that,
25 that's fine.

1 THE COURT: Do you will want the question?

2 MR. WATERS: I don't think I'm opening the
3 door to anything other than what he has
4 internalized from his experiences and how they
5 affected his decisions in this case. That's all
6 I'm asking.

7 THE COURT: Go ahead.

8 THE WITNESS: I believe that attacking that
9 lady would not have gotten any mileage for us.

10 BY MR. WATERS:

11 Q You said not only from going to seminars but
12 experiencing this in previous trials, but you don't
13 have to get into any detail but is that fair to
14 say?

15 A Yes.

16 Q Okay. I guess you had talked a little bit
17 about this yesterday but I guess strategically you
18 thought it was better to show, to use the State's
19 evidence to show that Kandee and Marion Bowman were
20 friends and indeed as you characterized it as
21 intimate friends?

22 A Yes, sir, that is what I said yesterday, yes.

23 Q And you felt that was more beneficial to the
24 defense than potentially worrying about the
25 supposed bad act of extramarital fornication, as it

1 was characterized yesterday?

2 A Yes, sir.

3 MR. WATERS: The Court indulge me one moment,
4 Your Honor?

5 Q I'm going to show you the portion of the
6 transcript this is from, volume ten. I show you
7 page 4547, starting at line 21, and ask you to just
8 read that briefly with regard to an issue of DSS
9 records arising during the penalty phase of the
10 trial.

11 A I'm trying to remember. I don't see the date
12 on this page but we're in trial, Dale Davis comes
13 back from a day off at a funeral, away from me,
14 comes back and says she learned there is more
15 records at DSS in Dorchester County. She had been
16 on the case almost two years, just learned of a DSS
17 record.

18 Q That is what you were relying on her to do,
19 to get those kind of records?

20 A Absolutely.

21 Q She had never come to you previously and
22 said, "There are some DSS records out there, I
23 hadn't gotten them yet"?

24 A There it is right there, come to light.

25 Q Answer my question, she had never come to you

1 previously and said anything along these lines,
2 "You need to get this," is that correct?

3 A Correct.

4 Q Okay. I think you also, at line 24 on page
5 4547 you say something has come to light most
6 recently through great reluctance of his family.
7 What did you mean by that?

8 A That the family did not want to get involved.
9 They had all been charged, they had all been
10 threatened, they didn't want to cooperate.

11 Q And so it was tough to get such history
12 information from them, correct?

13 A Yes. I mean, yes, sir, but that was not part
14 of my job specifically to go take interviews but we
15 did. Also the investigators did. Miss Davis was
16 supposed to go out and get records, go find out
17 social history.

18 Q All right. Let's talk a little bit about Dr.
19 West. He again was someone, a psychologist you
20 hired, is that correct?

21 A Consulted on the defense team.

22 Q To assess Mr. Bowman, right?

23 A Correct.

24 Q And what did you ask him to do, just
25 generally at first?

1 A I asked him to conduct an investigation, find
2 out any psychological issues about my client, to
3 look at him, look at all the notes, the records and
4 evaluate Mr. Bowman in a psychological manner.

5 Q Okay. That was in the hopes that potentially
6 some sort of mitigation might develop from that, is
7 that correct?

8 A First to find out, learn to see if it could
9 be used in mitigation.

10 Q All right. Did he ever, did Dr. West ever
11 ask you for any information or access and you
12 didn't provide it?

13 A The best of my recollection, whatever that
14 gentleman asked me for I gave him. Whatever he
15 wanted he got, and he worked, again, through Miss
16 Davis.

17 Q Okay.

18 MR. WATERS: The Court's indulgence one
19 moment, Your Honor?

20 Q I'm going to show you again volume ten, this
21 is page 4935, and have you start reading at line
22 four in the trial, and describe to the Court what
23 was going on with that.

24 A It starts back on page 4936, I stand up and I
25 say about mitigating factors, I --

1 Q You don't have to read it. Just review it
2 and then I will ask a couple questions about it.

3 A I was asking the judge about in particular,
4 the last one, the jury may consider any mitigating
5 factors or mercy without any reason, I wanted
6 everything I could get for Mr. Bowman in Her
7 Honor's charge.

8 Q Right. And then go on, specifically with
9 reference to --

10 THE COURT: What page is that on?

11 A 4936 and 4937, Your Honor, on volume ten of
12 eleven.

13 Q And I'm specifically looking at the
14 discussion of mental health mitigators.

15 A There were certain things that were ruled
16 upon.

17 Q Let's be specific. Tell me exactly what was
18 going on.

19 A Statements made by Mr. Bowman allegedly, as
20 well as written documents, and I'm arguing with the
21 judge to give a mitigation charge so that -- I felt
22 that it might place my client in greater jeopardy
23 to have gone down that road, maybe a slip off the
24 wire.

25 Q Let's be specific about that. You had again,

1 as we mentioned before, you had the four statements
2 suppressed at the beginning of this case, correct?

3 A After long hearings, yes, sir.

4 Q And in that particular statement there were
5 some particularly egregious claims made by Mr.
6 Bowman, correct?

7 A Yes, sir.

8 Q Okay. So, obviously you had gotten that
9 excluded. Were there also similar egregious claims
10 made in the William S. Hall report?

11 A Yes, sir. You read a letter from Mr. Bailey
12 yesterday to defense counsel or you, sir, I don't
13 remember now, at the bottom, about sex with the
14 dead girl in his statement.

15 Q You had had statements from Mr. Bowman in
16 that regard excluded. Is it fair to say the last
17 thing you wanted to do is open the door for that to
18 come back in? Is that correct?

19 A Yes.

20 MR. BROWN: Your Honor, I have to object.
21 Mr. Waters knows unreliable pieces of evidence is
22 never admissible to --

23 MR. WATERS: Your Honor, I'm talking about
24 the William S. Hall report which --

25 MR. BROWN: It is not admissible by law.

1 MR. WATERS: That would not necessarily be
2 the case. If Mr. Cummings had presented a mental
3 health defense, then the State obviously would be
4 entitled to call Dr. --

5 THE COURT: Whether or not it was admissible,
6 if Mr. Cummings is arguing with the judge to make
7 sure the judge didn't admit it, he was arguing to
8 the judge, whether or not that was correct and the
9 judge wasn't going to do it or not, was doing it,
10 what is the dispute?

11 MR. BROWN: Well, maybe I don't need to
12 object because if the strategy was based upon an
13 inaccurate understanding of the law, then maybe
14 that proves an ineffectiveness but I --

15 THE COURT: I'm sorry, is the judge on the
16 record saying, "Mr. Cummings, you don't need to ask
17 me, the law is clear, those things don't come in
18 anyway"?

19 MR. WATERS: No, sir.

20 MR. BROWN: There is no discussion about
21 whether these things come in at all?

22 THE COURT: He said he had a discussion with
23 the judge, he said argument with the judge about
24 it.

25 MR. WATERS: Your Honor, what that passage

1 reflects Mr. Bowman says, excuse me, Mr. Cummings
2 says, "My client has inquired about those mental
3 health mitigators but because of some certain
4 pretrial rulings that Your Honor is very familiar
5 with, I realize we haven't presented any specific
6 evidence on those because I didn't want to open the
7 door," and then the Court recognizes that and even
8 Mr. Bailey comes back and says, "It seems here
9 counsel is making a strategic decision here not to
10 open the door." That's what that passage reflects.
11 If Your Honor would like to read it, I have it
12 right here.

13 MR. BROWN: Your Honor, at this point I would
14 ask to be allowed to amend the application to
15 include a claim the failure to submit this
16 mitigation was inaccurate reading of the law
17 regarding statements involuntarily made and
18 statements given in mental health. I mean, I
19 didn't bring this issue up at trial and it has been
20 brought up by the AG and now we'll go into it,
21 that's fine, I will withdraw my objection but I do
22 make a motion now to go into this, both in my
23 application and in my examination.

24 MR. WATERS: I object to that, first, Your
25 Honor. Secondly, I think it is particularly

1 responsive to the issues alleged in the
2 application.

3 THE COURT: Your motion to amend is denied,
4 let's proceed.

5 MR. WATERS: Thank you, Your Honor.

6 BY MR. WATERS:

7 Q Let's go about this a different way, see if I
8 can get there. I'm going to show you --

9 MR. BROWN: You can't show it to him yet.

10 MR. WATERS: I showed him a document I marked
11 for identification.

12 MR. BROWN: Okay.

13 BY MR. WATERS:

14 Q I'm showing you a document -- before you look
15 at it, because there may be an objection -- I'm
16 showing you a document marked Defendant's 29, and
17 that is a William S. Hall report on Mr. Bowman, is
18 that correct?

19 A The answer to your question, yes, sir, this
20 is a William S. Hall report.

21 Q Okay. And that is on his criminal
22 responsibility and competence to stand trial,
23 correct?

24 A Yes, sir. This was done before I ever got
25 appointed on the case, it was only sent to Miss

1 Marva Hardee-Thomas.

2 Q I understand. But you ultimately got a copy
3 in the course of your representation, right?

4 A Yes, sir, I did.

5 MR. WATERS: Your Honor, at this point I
6 would move Defendant's 29 into evidence. Of course
7 it is already a court's exhibit but I would like to
8 move it in evidence for this hearing.

9 MR. BROWN: We object to hearsay.

10 MR. WATERS: I'm obviously moving it in for
11 its effect on Mr. Cummings in his representation.

12 THE COURT: Let me see the document.

13 THE WITNESS: I'm sorry, sir.

14 THE COURT: This is documents you and Miss
15 Thomas had to consider regarding Mr. Bowman, right?

16 THE WITNESS: Yes, sir.

17 THE COURT: Your objection is hearsay?

18 MR. BROWN: Yes, sir. My understanding, we
19 gladly call Dr. Narayan, I find him to be an
20 interesting witness.

21 THE COURT: Why would you need to call him?

22 MR. BROWN: To talk to him about his report.
23 I understand he's in California.

24 THE COURT: I don't understand. If this is
25 just something, in every criminal case of this

1 magnitude you have reports like that as lawyers and
2 in every criminal case you consider those reports.
3 So, you are saying you object to Mr. Cummings being
4 able to testify he considered this report and its
5 full representation in his representation or --

6 MR. BROWN: I'm objecting to the report being
7 introduced because it's hearsay.

8 THE COURT: All right. So, you don't want me
9 to believe what the reports says is accurate, is
10 what you're concerned with?

11 MR. BROWN: I don't want it entered for that
12 reason, because he has offered it as a piece of
13 evidence.

14 THE COURT: He tells me he is offering it to
15 show what matters Mr. Cummings had in his decisions
16 in the trial.

17 MR. BROWN: And to the extent it relies upon
18 the truth of the matters asserted in the report,
19 then I object to it.

20 THE COURT: But that truth of the matter,
21 you're concerned about me accepting it as true.
22 Whether Mr. Cummings accepted it as the truth or
23 not is not an objection. Anyway, your objection is
24 noted, I will permit it to be introduced in
25 evidence in regard to Mr. Cummings' consideration

1 of the document, and Miss Thomas.

2 MR. BROWN: With the limitation?

3 THE COURT: That is what I just said. That's
4 it. Let's proceed.

5 MR. WATERS: Thank you, Your Honor.

6 (Marion Bowman mental evaluation marked and
7 received in evidence as Defendant's Exhibit
8 Number 29).

9 BY MR. WATERS:

10 Q In that record it's reflected, I'll show you
11 over here, and this is on page six of the report,
12 it begins on page six and goes to seven, criminal
13 responsibility. Is it fair to say Mr. Bowman in
14 that part of the report told the doctors much of
15 the egregious information that was in his fourth
16 statement you had excluded?

17 MR. BROWN: Objection, this goes straight
18 into hearsay, what did Bowman tell the doctors
19 according to the reports.

20 THE COURT: I assume you mean from what you
21 saw, you felt --

22 MR. WATERS: First I'm just trying to get him
23 to --

24 THE COURT: I'm not going to accept whether
25 Mr. Bowman did or didn't. I'm only going to accept

1 what Mr. Cummings felt from reviewing it.

2 MR. WATERS: That is all I'm offering it for,
3 what he read in that report and how it affected his
4 representation.

5 MR. BROWN: Well, the report -- okay. The
6 only thing, I think we're all clear on what my
7 objection is. In the statement it appears to be,
8 "Well, Mr. Bowman said," according to the report,
9 which is exactly hearsay.

10 THE COURT: Thank you. Overruled. Proceed.

11 BY MR. WATERS:

12 Q Is that correct?

13 A Yes, sir. A lot of things in here that when
14 I learned of this, my first concern was why Miss
15 Thomas had not gone up in this vital stage of this
16 case to be with her client, and as you read in
17 here, Mr. Bowman was not very happy with Miss
18 Thomas.

19 Q Again, though, asking about that --

20 A I know, I'm just giving you the full picture,
21 okay?

22 Q I understand, that's fine.

23 A And this thing is deadly.

24 Q Okay. So, was there a point where you had an
25 in-chambers conversation with the Solicitor and

1 Judge Goodstein in which the possibility of opening
2 the door was discussed?

3 A Yes.

4 Q As to this?

5 A Not just this, yes, anything.

6 Q Well, describe what happened.

7 A Well, again, Her Honor wanted to make sure
8 Mr. Bowman was protected, Her Honor wanted to make
9 sure that in my zealous, sometimes verbose manner
10 of attacking people or presenting things that I did
11 not open up the door. She had suppressed these
12 matters but warned me, told me, "You make a
13 mistake, it may come in." And Mr. Bailey was like,
14 was like a hawk waiting on lunch.

15 Q In fact Mr. Bailey said that?

16 A He wanted that in there so bad that that
17 young African American male wanted to go play with
18 a dead girl, oh, my God, think about that. Okay?
19 All he -- he wanted that desperately.

20 Q Your assumption if it came out?

21 A Oh, it's over.

22 Q So, your concern was if you admitted evidence
23 of a mental health nature the State could respond
24 and call Dr. Narayan and some of that report could
25 come in?

1 A I look at --

2 Q Answer yes or no.

3 A Yes. I relied on my experts telling me,
4 Morgan and the rest of them saying, "I can't help
5 you."

6 Q Well, let's talk about that. They had
7 reviewed him and they didn't have anything of
8 significance of mental health value?

9 A Right. There is nothing in any medical
10 records, there is no abnormalities, Morgan checked
11 him, Morgan met with him, we did tests. No, there
12 was nothing there in our humble opinion, my
13 opinion, that would have helped.

14 Q So, you had things of minimal value you got
15 from your expert, and on the other hand you had a
16 very substantial risk what was in the Hall report,
17 is that right?

18 A In my evaluation that is correct, sir.

19 Q That is precisely what you were aiming at on
20 the page 4937?

21 A I was trying to dance on a pinhead, I wanted
22 a mitigating charge, I was asking for a mitigating
23 charge. Believe me, I knew people would ask me
24 seven, ten, fifteen years from now, "Why didn't you
25 ask for that mitigating charge?" I asked for

1 everything I could do, and again it is up to the
2 boss to say, the Judge, to rule whether you can or
3 can't have it. I didn't want to make a tragic
4 error and hurt my client, and if that fell below
5 the standard of care, then I know there is a remedy
6 for that.

7 Q All right. Okay. Were you concerned also
8 that if you went down the mental health route in
9 the penalty phase that it might open the door or
10 cause the Solicitor to introduce those letters that
11 Mr. Bowman had written to his wife?

12 A Yes, sir. That was another thing that
13 happened. Again, Marion lost faith in us and I'm
14 telling everybody out here now he didn't trust
15 Marva, it's reported that he didn't trust me at the
16 end of the case. I can't help, I can't help but
17 imagine why.

18 Q I'm going to show you what has been
19 previously marked as Applicant 56 and see if you
20 recognize this?

21 A Yes, sir. These are letters that were
22 written by Mr. Bowman and turned over to the
23 Solicitor's office by his family.

24 Q Okay. And these were letters from Mr. Bowman
25 to his wife, correct?

1 A Correct.

2 Q And in there, there is a number of instances
3 where he essentially asks her to conceal evidence
4 or tell people to say something to the police and
5 things of that nature. Correct?

6 A Correct, sir.

7 Q Is there any instance in the guilt phase or
8 sentencing phase you wanted these letters to come
9 in evidence before the jury?

10 A I would never want those letters coming in.

11 Q How about to show that Mr. Bowman had love
12 for his wife, then it would bring out the fact he
13 was hiding evidence and concealing things, would
14 you want that?

15 A I don't believe so.

16 MR. BROWN: Your Honor, I object to the
17 characterization. We certainly don't say he was
18 hiding evidence.

19 THE COURT: So, you will not characterize
20 anything yourself in your questions?

21 MR. BROWN: I try not to, yes, sir.

22 THE COURT: You try not to?

23 MR. BROWN: Thank you.

24 THE COURT: I have a feeling that ruling will
25 have no effect.

1 MR. BROWN: I will make a conscious effort.

2 BY MR. WATERS:

3 Q I'm going to read you a passage from it.
4 Here we go. "It's important that you tell your
5 lawyer that you found that gun after someone put
6 that blood in that house."

7 THE COURT: Not too fast.

8 Q Thank you. "After someone put that blood in
9 that house. Tell Hiram that if the police ask him
10 what kind of gun he saw in my lap it was a revolver
11 shaped like a .32 cal or .38 cal."

12 And that is just an example of the first
13 letter. Is that the kind of thing that would be
14 damaging to your client inasmuch as it shows a
15 concealment of evidence or trying to get witnesses
16 to testify falsely?

17 A Maybe I'm not as brilliant as a lot of people
18 think they are, but I can't see how that is not
19 trying to suborn perjury or obstruct justice.

20 MR. BROWN: Speculation.

21 THE COURT: Go ahead. He was the attorney,
22 whether he's correct or not, that is what he
23 thought.

24 Q Finish your answer.

25 A That is what I thought, as well as why was my

1 client trying to tell his wife to tell other people
2 what to say?

3 Q How about the second letter, "If the police
4 ask you about me and a knife tell them nothing"?
5 Is that similar, that is not the kind of things you
6 want to come out?

7 A Correct, sir.

8 Q Okay. So, even if these letters might have
9 had some good interaction between him and his wife,
10 you were more concerned about this concealment of
11 evidence or subornation of perjury, correct?

12 A Correct.

13 Q Let's talk a little bit about intoxication.
14 I think you testified in the guilt phase that you
15 did not want any evidence that he was a drunk
16 coming out. Is that correct?

17 A Correct.

18 Q Is that correct?

19 A Correct.

20 Q Okay. But then in sentencing phase you
21 obviously felt like it was necessary at that point
22 to present Mr. Yungman, the testifying social
23 worker, to get that full social history, which
24 included of course some of his alcohol abuse in the
25 past?

1 A Right.

2 Q At that point it is begging for his life, you
3 are begging for his life.

4 A Correct.

5 Q And I think you were asked did you consider,
6 though, at that point, then, calling back some
7 individuals like James Gadson or Travis Felder and
8 to ask them about whether or not Mr. Bowman was
9 drunk on the night this crime occurred?

10 A No, sir, I did not think to do that nor would
11 I have called the people who testified against him
12 to try to convict him to then come back and help
13 him.

14 Q Because your concern is that would be more
15 risky than any value you might get?

16 A Well, as you all know, you don't ask a
17 question you don't know the answer to.

18 Q Okay. And let's talk a little bit, you did
19 call Travis Felder back but --

20 A I was directed, I mean, Mr. Bowman demanded
21 it, Her Honor gave us extra time to have Mr.
22 Williams produce his client again and at that
23 point, again, Marion wanted something done and I
24 tried to do what I could for that man and we called
25 him back, yes, sir.

1 Q In fact that is even in the transcript where
2 you say pretty much that, "It is not really
3 something I want to do but my client is asking me
4 to call him back on the video tape," correct,
5 Travis Felder?

6 A That's correct.

7 Q All right. Was there a concern that if you
8 did bring up drinking on the, or being drunk, not
9 just drinking but being drunk at the time of the
10 crime, and requesting those three mental health
11 mitigators, that it again potentially might open
12 the door to reputation by the State with the
13 William S. Hall report since those three mitigators
14 obviously go straight to substantial impairment and
15 mentality of the defendant at the time of the crime
16 and things of that nature?

17 A To answer your question yes or no and if I
18 would be allowed to explain?

19 Q Please.

20 A Yes. And then further you look at the
21 totality of this case and at least in my opinion
22 you're looking at the faces of those jurors, what
23 redeeming social value, human value do you have if
24 all you do is get up in the morning, pop the top of
25 a 40 Cal beer, 45, whatever it is, start drinking

1 from that morning until that night, and what else
2 are you going to do with your life other than what,
3 break the law, hurt people, commit crimes? What
4 other picture do you want to paint at that point in
5 the game? Do you want to talk about drugs, selling
6 drugs, do you want to talk about how you make a
7 living? Go ahead.

8 Q All right. Thank you. Now let's move on a
9 little bit. We're going to talk about Don Girndt
10 and the accelerant. I think you addressed this
11 yesterday, I hate to reiterate things but I want to
12 make sure the record is clear. You had Don Girndt
13 review the pants for the accelerant, correct?

14 A I wanted to ask Mr. Woods, you know, and
15 again I'm not trying to speculate, again Don looked
16 over everything with us, yes.

17 Q Right.

18 A I'm not sure if that was Mr. Woods. Also
19 that was a chemist or the other gentleman we
20 mentioned a minute ago.

21 THE COURT: I thought Mr. Girndt was the
22 shell casings?

23 A Crime scene guy.

24 Q Mauer was the --

25 THE COURT: Girndt is just a former SLED guy?

1 A Yes, sir. I don't know about Mr. Girndt
2 being the guy that could do the spectrometer and
3 tell whether or not its ethanol or gasoline, I
4 don't believe he does that, sir.

5 Q All right. Whoever it was, you had an expert
6 who was advising you on that, correct?

7 A Correct.

8 Q And that expert told you that if all the
9 State was going to say that it was a heavy
10 accelerant on that, that was good for you because
11 that was not the same as gas, correct?

12 A Correct.

13 Q So, you wanted to elicit that testimony, is
14 that correct, as a strategic matter?

15 A I wanted to elicit it, yes, sir. If you want
16 to call it strategy, I wanted to get it out that
17 there was no gasoline on him. The kerosene, that
18 is how they heat their home, these are very poor
19 people, yes. Therefore I took the State's witness
20 and made it mine, make him mine. Now, again if the
21 jury hung up on the word accelerant, then I will
22 defer to you gentlemen on that.

23 Q All right. I think you also elicited from
24 Dorothy as well, the wife, that they used a
25 kerosene heater to heat the home. Correct?

1 A Correct.

2 Q And that would be consistent with the fact
3 that what was on his pants was kerosene, perhaps
4 from the space heater, not from the scene which of
5 course used gas, which was a different kind of
6 accelerant, right?

7 A Right. His pants were in the house,
8 Dorothy's house, and Her Honor overruled my
9 objection about allowing the trousers to come into
10 evidence.

11 Q All right. Let's talk a little bit about the
12 gun and the firearms issues. Did you talk to Mr.
13 Bowman about that weapon once it was recovered from
14 the water?

15 A We talked about everything.

16 Q Okay. Did he tell you that was the gun?

17 A No, sir.

18 Q Okay. Did you discuss the manner in which
19 the gun had been placed in the water and his family
20 members specifically?

21 A Yes, sir, we did that.

22 Q Okay. And did that discussion again sort of
23 place any sort of ethical limitations on how you
24 went about your representation, what you felt you
25 could adequately do?

1 A The one thing I knew, sir, to answer your
2 question, was that Marion was in jail when this gun
3 was found.

4 Q Right.

5 A And one of the things that everybody tried to
6 point out is the police couldn't find a gun in the
7 house when they stayed I don't know how long in the
8 house tearing it apart and then mysteriously, when
9 you look at the totality again of this, his wife
10 gets a vision, or somebody does, the cousin,
11 sister, I don't remember exactly, and the next
12 thing you know the gun is found while he's in jail.

13 Q Right.

14 A And so we start there and Marion said, "I
15 didn't put the gun there, it ain't my gun."

16 Q Okay. You obviously had your expert review
17 the gun as we previously pointed out from that
18 reference in the transcript, right?

19 A Correct.

20 Q Did he offer any contrary information to what
21 the State's expert had found or anything helpful to
22 the defense?

23 A No, sir, other than just talked to me about
24 the crime.

25 Q He confirmed what the State said, correct?

1 A Oh, my expert, yes, I'm sorry. I was
2 thinking about Marion, I apologize.

3 Q On the firearms analysis he confirmed what
4 the State said, correct?

5 A Correct.

6 Q That was of no value to you?

7 A Absolutely. He told me the firing pin is
8 broke, he can't use it, can't identify it. The
9 rounds, the actual lead was too badly damaged, they
10 couldn't say what weapon it came out of, and the
11 ejector port, and made a certain marking on the
12 breach and he concurred, correct.

13 Q He concurred with the markings on the breach?

14 A Yes.

15 Q Okay. Did he tell you, "By the way, you
16 should challenge the whole underlying discipline of
17 firearms and toolmark identification"?

18 A No, sir, he did not.

19 Q Okay. Did he tell you that this was not a
20 valid discipline and that you should move to have
21 it excluded from court in its entirety?

22 A No, sir, the expert did not.

23 Q So, you hired a recognized and qualified
24 expert in firearms and he reviewed the evidence and
25 said he concurred with the State's findings?

1 A Yes, sir.

2 Q Is that a fair characterization?

3 A Correct.

4 Q What did your expert say, I think you already
5 said this, but what did you say about the expert,
6 he said the markings were insufficient for
7 conclusion of identification, correct?

8 A Right.

9 Q What about the bullets from the victim?

10 A I'm trying to recall off the top of my head.
11 I would like to see the report, I don't want to
12 guess. I don't remember what SLED actually said on
13 it right now, I don't.

14 Q That's fine. All right, let's talk a little
15 bit about the supposed conspiracy to hide the gun
16 that was introduced at trial from Mr. Bowman's
17 family. You were asked about objecting to it in
18 its entirety and did you see any basis for
19 challenging the admissibility of that testimony as
20 to how the gun was found?

21 A I did not.

22 Q Okay. I think you were asked also whether or
23 not it was admissible that the individuals had
24 already pled in the case, is that correct?

25 A That is my recollection, yes, and they were

1 waiting to be sentenced.

2 Q Right. Is it your understanding of the law,
3 though, that a prosecutor in a situation where you
4 have a State's witness who has a plea agreement,
5 that the prosecutor is entitled to bring that out
6 on direct --

7 MR. BROWN: We would object to that being the
8 status of the law. There is a Fourth Circuit case
9 exactly the opposite.

10 MR. WATERS: I'm asking him what he knows.

11 THE COURT: Let me ask you, let me hear your
12 question.

13 MR. WATERS: My question is, is it his
14 understanding of the law that the prosecutor is
15 entitled to, when they have a State's witness who
16 has a plea agreement, that the prosecutor is
17 entitled to bring that out on direct to anticipate
18 the inevitable cross-examination by the defense on
19 that?

20 THE COURT: Is that your understanding?

21 MR. BROWN: That is different.

22 THE COURT: I know. I was wondering how
23 could that not be the law. It doesn't mean you
24 can't cross examine him.

25 MR. BROWN: You can bring it out --

1 THE COURT: That is his question, whether the
2 prosecutor can draw it out in anticipation, do you
3 object to that question?

4 MR. BROWN: About whether the prosecutor is
5 entitled --

6 THE COURT: That which he just asked.

7 MR. BROWN: Which is whether the prosecutor
8 can draw it out in anticipation --

9 THE COURT: Ask your question again so he can
10 hear you. Obviously he forgot your question.

11 BY MR. WATERS:

12 Q Is it your understanding of the law where
13 there is a State's witness with a plea agreement
14 the prosecutor may question the witness about the
15 plea agreements on direct in anticipation of
16 inevitable defense cross-examination on that
17 agreement?

18 A Yes, sir --

19 THE COURT: Do you object or not?

20 MR. BROWN: I don't object to that question.

21 THE COURT: Answer the question.

22 A Yes, sir. I used to do it myself.

23 Q Okay. And in fact you tried the Calvin
24 Shuler case, right?

25 A Yes, sir.

1 Q I believe in the Calvin Shuler case you
2 objected to the Solicitor bringing out his plea
3 agreements on direct and that was ultimately an
4 issue that was decided adversely to you on direct
5 appeal in that case. Is that correct?

6 A Yes.

7 Q Is that correct?

8 A Yes, sir.

9 Q That case was obviously before this one, is
10 that correct?

11 A Yes.

12 MR. WATERS: The Court's indulgence just one
13 moment, Your Honor.

14 Q All right, let's get back to it. I think you
15 were asked about the fact that whether or not it
16 was improper to admit the fact they had already
17 pled and I just want to point you to a couple
18 aspects of the transcript here. And this is your
19 cross, this is direct examination on page 3735, for
20 the record, of Yolanda Bowman. I would like you to
21 start reading it, not outloud, on line 18.

22 A It starts by saying, "Okay, and through your
23 lawyer Mr. Cooper have you worked out a plea
24 agreement with the State of South Carolina?"

25 Q Again, you don't have to read it outloud. I

1 just wanted you to read it.

2 A I apologize.

3 Q Okay, two things about that. Number one,

4 there is no reference to a defendant's plea at that

5 point, just a plea agreement, correct?

6 A Correct.

7 Q Two, do you make the objection on bolstering,

8 correct?

9 A Correct.

10 Q All right. Let's move on to another one.

11 I'm going to show you on page 4160 on the record on

12 appeal, excuse me, on 4161, and again starting at

13 line 13.

14 A Yes, sir.

15 Q That's Dorothy, correct?

16 A Correct.

17 Q The wife, correct?

18 A Correct.

19 Q Then again it talks about a plea agreement,

20 not a plea, correct?

21 A Correct.

22 Q I'm going to show you 4168. This is direct

23 examination of Kendra, and start at line 5, I'll

24 have you look at that real quick.

25 A Yes, sir.

1 Q Okay. And again that refers to a plea
2 agreement, not to a plea. Correct?

3 A Correct.

4 Q All right. And your understanding, again, of
5 the law, whether you like it or not, the State was
6 entitled to do that, correct?

7 A Yes, sir. And I objected and the judge ruled
8 as she ruled.

9 Q I think once you objected the first time the
10 Solicitor said, "All right I'm going to move on,"
11 correct?

12 A That is how I read it, sir.

13 Q I'm going to show you beginning on page 4212,
14 excuse me, 4213, starting at line one, and that is
15 your cross-examination of Dorothy the wife,
16 correct?

17 A Yes.

18 Q Okay. And there again you're examining her
19 on the fact the police had come to her house and
20 had locked her up for accessory after the fact,
21 correct?

22 A Correct, sir.

23 A There is also the heater.

24 Q That is the portion of the transcript where
25 you examined her about the kerosene heater, is that

1 right?

2 A Correct.

3 Q All right. We've been over this but I want
4 to make sure the record is clear. Let's go a
5 little bit to the seminal fluid, and do you recall
6 testimony from Frankie Martin that he said that,
7 you know, this was prior to earlier in the day, on
8 the day of the incident that at one point Kandee
9 and Mr. Bowman went to the bathroom? If you don't,
10 I will be glad to show it to you.

11 A Please, I would like to refresh my memory on
12 that.

13 Q Okay. Page 4831, pretty much starting at
14 line one, you can start there.

15 A Yes, sir, Miss Thomas was asking questions
16 and she came back to the table to confer with me.
17 Like we always did before we ever sat down we would
18 talk with Marion and beg the Court's indulgence and
19 questions.

20 Q Yes.

21 A I wanted to get off the topic quick.

22 Q Right, I understand. That reflects testimony
23 earlier in the day Mr. Bowman and Kandee went to
24 the bathroom together for a few minutes?

25 A Yes, sir, they were in the bathroom, on line

1 12.

2 Q Let me ask you something else real quick.

3 When you were testifying yesterday you were not
4 being shown any transcript portions, were you?

5 A No, sir.

6 Q You were just kind of going on memory kind of
7 cold, correct?

8 A Yes, sir. When you gentlemen advised me this
9 case was going to go I read everything you guys
10 gave me, I went back and re-read it when I got the
11 stuff from the defense team.

12 Q Right.

13 A I read, you know, I hadn't just put this
14 thing on the floor and left it alone. This is his
15 life, I'm trying to do everything I can from
16 memory. I don't have a document in front of me
17 today, because I went through my files last night
18 as the judge asked, I tried to dig up any personal
19 notes I had. A lot of stuff is gone.

20 Q It is?

21 A Yes. I mean, every one of my notes -- not
22 every one of my notes got back to me. I don't know
23 what happened. I mean, I used to keep, every time
24 I went to the jail to visit I put the date down and
25 the time. There is also jail logs that people

1 could have gotten to show how many times we went to
2 see Mr. Bowman.

3 Q Are you saying portions of your file are
4 missing?

5 A My handwritten notes are sometimes. I always
6 document when I go someplace, I write down, you
7 know, date and where I go and what I do, so this
8 way, number one, matches with the bill. I would
9 never want to do something I didn't do, or bill the
10 State for something I didn't do, plus it also shows
11 how many times we meet and what we do. I can't
12 find all those.

13 Q Okay.

14 MR. BROWN: Your Honor, I don't know how we
15 as officers of the Court want to deal with this but
16 I think now, because we have raised Brady concerns
17 about what has been turned over and there are a
18 couple principal pieces of evidence that I would
19 have introduced, which we claim were not in their
20 file, this opens up Charlie Johnson coming to court
21 to testify, and Paige Tarr coming to court to
22 testify about the integrity of that file. It never
23 was in my office and so this is the first I have
24 heard today that they are missing parts in the
25 file.

1 THE COURT: I want to find out. Are you
2 telling me, Mr. Cummings, that the file as you got
3 it back does not contain things in there when you
4 let it go to the petitioner's attorney?

5 THE WITNESS: Yes, sir. I have legal pads
6 full. Every time we take notes or go places I
7 would always do that. And I can't find legal pads
8 from certain portions. If I went to the jail, I
9 know we would meet on Sundays with Marion's mom, I
10 would take notes at the table and sit down and talk
11 to him.

12 THE COURT: Are you saying there are some
13 things you can't find?

14 THE WITNESS: The one thing I always do in
15 every case, Your Honor. From reading the
16 transcript, I filed that motion, the Solicitor's
17 file, it's sealed in camera and Judge Goodstein
18 granted that. So, the prosecutor's file would have
19 been sealed, we have done that in every case, sir.

20 THE COURT: I'm not so sure how it might
21 affect this case. You might be concerned what he
22 is making allegations on, but how does it affect
23 this case?

24 MR. BROWN: Right now I haven't seen the
25 sealed documents. What we opened had something to

1 do with something totally different.

2 MR. WATERS: If you recall at the last
3 hearing we had that big box which was the
4 Solicitor's file.

5 MR. BROWN: You had the judge to open a
6 sealed envelope.

7 MR. WATERS: Two sealed envelopes.

8 THE COURT: What did the clerk do with those
9 two sealed envelopes I opened, give them to the
10 court reporter?

11 MR. WATERS: The Solicitor's file was in that
12 box, remember?

13 THE COURT: I remember when I opened them up
14 I thought they were things, I thought I opened the
15 request for funding that he had.

16 MR. WATERS: Right. We had the Solicitor's
17 file there that was in the big box and in the
18 Solicitor's file was the two envelopes that we
19 specifically had you open. The Solicitor's box,
20 that file, or is that not accurate?

21 THE COURT: I opened what I thought was his
22 funding requests.

23 MR. SIMON: Well, the two envelopes you
24 opened came out of the Clerk's file. There was a
25 separate box that was the Solicitor's file that

1 looked to be the old notebooks, the Solicitor's
2 notebooks.

3 THE COURT: I don't recall opening those.

4 MR. BROWN: I don't recall those being opened
5 either, from their seal, which I have heard
6 testimony about.

7 THE COURT: I recall opening the sealed files
8 that were in the Clerk's office.

9 MR. WATERS: We had the Solicitor's box
10 brought up there and it was in the, it was there on
11 the table, I know Mr. Sinclair looked at it as
12 well and it remained in the custody of the clerk.
13 I know that we have looked at it and --

14 MR. BROWN: I'm curious how the sealed, maybe
15 I'm using sealed as in under seal, but I'm
16 interpreting it meaning sealed, literally sealed.

17 THE WITNESS: I always make sure here is the
18 complete record.

19 MR. BROWN: We have documents here that were
20 physically sealed.

21 MR. WATERS: Those were physically sealed
22 and, Jim, excuse me, we had that box up there. It
23 was on the table at the hearing in St. George the
24 last time and we had the Clerk bring it up and that
25 was what we had, Walter Bailey had a copy of his

1 file marked as a court exhibit and it was to remain
2 in the custody of the clerk. It was there.

3 MR. BROWN: Just a couple things.

4 MR. WATERS: We talked about it.

5 MR. BROWN: We talked about it, I never, it
6 was never opened, it never was unsealed. Obviously
7 I'm interpreting sealing to be different, you know,
8 my understanding of sealing, I have never worked as
9 a clerk or anything but they actually literally do
10 seal items, sealed so eyes don't accidentally look
11 at it.

12 MR. WATERS: Right. Well, perhaps I made a
13 mistake. The envelopes were sealed but the box was
14 not.

15 THE COURT: Listen, you all are discussing
16 things now. I'm not sure how it affects me right
17 now.

18 MR. BROWN: Well --

19 THE COURT: Whether he does have his notes
20 there or not, that is another issue. Do you all
21 want to take a break now or ask any more questions?
22 I'm ready to keep going. Do you want to take a
23 break?

24 MR. BROWN: I need a bathroom break.

25 THE COURT: All right. We'll take a break,

1 then, we'll step off.

2 MR. BROWN: While we do this can we also ask
3 that that Solicitor's file make it on its way over
4 here?

5 THE COURT: Who has it?

6 MR. WATERS: The Orangeburg Clerk does, the
7 Dorchester Clerk.

8 THE COURT: Well, why don't you make a call
9 to see if it's over there.

10 MR. WATERS: Thank you.

11 THE COURT: We'll take a break.

12 MR. BROWN: Thank you.

13 (Recessed at 11:30 a.m.).

14 (Reconvened at 11:45 a.m.).

15 THE COURT: How far along are we on cross?

16 MR. WATERS: Getting close to halfway.

17 THE COURT: All right. That's fine. It will
18 take all day. We'll go until 1:00, then take one
19 hour and come back at 2:00. As for as Mr. Bailey's
20 presence, whatever you all want to tell him is fine
21 with me, whatever time you want him here. I have
22 to be at a wedding in Columbia at 6:00, I need to
23 leave here about 4:30.

24 MR. WATERS: Yes, sir.

25 THE WITNESS: Evening traffic.

1 MR. WATERS: I made it here probably in about
2 an hour even, maybe a little less, but I do 80.

3 MR. BROWN: He has a badge. I'm sorry.

4 THE WITNESS: And a diesel car.

5 MR. BROWN: I had to.

6 THE COURT: I'm going to plan to leave around
7 4:45. What we don't finish today, what about
8 Tuesday if we don't finish?

9 You will be finished.

10 THE WITNESS: I need to tell you Judge
11 Goodstein has ordered the other client we just
12 finished up with to be sentenced on Tuesday.

13 MR. BROWN: Mr. Bailey is on that?

14 THE WITNESS: Yes, sir.

15 THE COURT: What time on Tuesday?

16 THE WITNESS: I haven't gotten the official
17 word.

18 THE COURT: We'll work around what time she
19 has. If it's morning we'll do it the afternoon.
20 If it's afternoon we'll do it in the morning.
21 Right now let's continue on. If you all need to
22 call Mr. Bailey, I can't tell you any more than you
23 all know.

24 MR. BROWN: I was going to say I'm
25 anticipating --

1 THE COURT: Redirecting on items of cross
2 examination?

3 MR. BROWN: I've got them listed right here.
4 I would say an hour, I'm going to ballpark, it
5 could be less.

6 THE COURT: We might get an hour of Mr.
7 Bailey in today. Let's try to get an hour of him
8 in anyway. Why don't you have Mr. Bailey show up
9 at 3:00, okay?

10 MR. SINCLAIRE: Yes, sir.

11 THE COURT: Let's proceed on.

12 MR. BROWN: Thank you.

13 MR. WATERS: Thank you, Your Honor.

14 BY MR. WATERS:

15 Q Going back, Mr. Cummings, to what I was
16 trying to get to before we got to the final issue,
17 yesterday when they were questioning you they
18 weren't showing you, Mr. Brown wasn't showing you
19 portions of the transcript. Correct?

20 A No, sir.

21 Q Today I have been doing that, like for
22 example, when we were just talking about the
23 cross-examination or the direct examination on the
24 family members who had plea agreements. Correct?

25 A Yes, sir. I understand you're supposed to

1 testify from memory, then if you need to refresh
2 it.

3 Q I understand that, but I have been showing
4 you that and obviously seeing the transcript
5 refreshes your recollection, so inasmuch as you may
6 have testified yesterday that you had no strategic
7 reason for not objecting to introduction of pleas,
8 now you're refreshed by the transcripts and that
9 shows that never actually happened, correct?

10 A Correct, but I didn't have a strategic
11 reason.

12 Q Well, you wouldn't need one, obviously, if
13 there was nothing inadmissible about it, correct?

14 A Correct.

15 Q And that is what you testified to, that under
16 your understanding of the law the prosecutor was in
17 a limited fashion allowed to bring out plea
18 agreements on direct in anticipation of inevitable
19 defense cross-examination?

20 A Yes, sir.

21 Q Okay. Now let's talk a little bit now about
22 the DNA evidence and the seminal fluid. Correct me
23 if I'm wrong. I think you testified because your
24 client was not going to testify you were using that
25 evidence to show that the defendant and Kandee were

1 friends and therefore he would not have killed her.

2 Correct?

3 A Yes, sir.

4 Q Okay. And correct me if I'm wrong but I
5 believe you weren't worried about that evidence
6 because, number one, he wasn't charged with
7 criminal sexual conduct in the guilt phase,
8 correct?

9 A Correct.

10 Q Correct?

11 A Correct.

12 Q Okay. And you also, in your opinion you
13 didn't think that Mr. Bailey was going to be able
14 to prove CSC as an aggravator in the sentencing
15 phase, correct?

16 A Correct.

17 Q Now, you were examined extensively about
18 whether or not you should have cross examined James
19 Gadson to have him say there was no sex at the
20 Nursery Road scene. Do you recall that examination
21 from yesterday?

22 A Yes, sir.

23 Q Okay. But it's true also that Mr. Gadson
24 never said there was any sex on either direct or
25 cross, did he?

1 A That is correct, sir, as you asked that
2 question.

3 Q So, there was no testimony in the record that
4 there was sex at that scene, correct?

5 A Correct.

6 Q So, there was no reason for you to then
7 broach the subject, was there?

8 A No, sir.

9 Q Okay. I'm going to show you 4717 of the
10 record on appeal, and this is your directed verdict
11 motion in the sentencing phase, starting at line
12 18. I ask you to read that, not outloud, to
13 yourself very quickly and see if that refreshes
14 your recollection about your argument on CSC as an
15 aggravator?

16 A Correct.

17 Q And in fact you did in fact make a directed
18 verdict motion in the sentencing phase using the
19 argument that Gadson had never testified there was
20 any sex at the Nursery Road scene, correct?

21 A I'm trying to remember. I'm reading this
22 right here. "There has been no testimony in this
23 room whatsoever about anything dealing with sex by
24 my client." Correct, I guess that included Mr.
25 Gadson.

1 Q He was the only person who testified as to
2 what actually took place at Nursery Road when
3 Kandee was actually killed?

4 A Right. I made it all inclusive trying to
5 cover it.

6 Q I understand. All right, there was an
7 allegation that you should have, after the jury did
8 not find the CSC aggravator, that you should have
9 then made a motion to re-open the guilt phase. Is
10 there any basis of law that you're aware of that
11 would allow you to do that?

12 A Not that I'm aware of, sir.

13 Q That is just not something you considered
14 doing?

15 A No, sir, I didn't. And if that is in error I
16 apologize. I made the motions I thought I was
17 trained to do.

18 Q All right.

19 A Taught to do.

20 Q I want to ask you real quick about metal
21 detectors being used when Dorothy's house was
22 searched. Do you recall that coming up?

23 A I have read the petition and other documents,
24 I have read back through Coker's reports and the
25 incident reports of a number of policemen who were

1 there. You had at least four agencies, from my
2 personal recollection, sir. One was Branchville
3 P.D., actually where Marion lived. Two, Orangeburg
4 County. Branchville is in Orangeburg. Three,
5 Dorchester County. Four, possibly SLED or anybody
6 who came down to assist.

7 Q Right.

8 A Now, they, being three, the police
9 departments, searched that house. Dorothy gave
10 them permission. We argued that, whether they
11 needed a search warrant, whether they didn't, and
12 again the academias have ruled on all that. As for
13 as metal detectors specifically, I don't remember
14 if the policeman told me he had one in his hand
15 when he went through it. I don't see where a metal
16 detector would have shown it because a couch or
17 chair is usually made with metal springs in it.

18 Q Right.

19 A So, it would have showed metal in the
20 springs.

21 Q Did Dorothy ever tell you that, that you
22 recall?

23 A No, sir, not to the best of my recollection.

24 Q Okay. There has been an allegation made
25 about Mr. Bowman's work record not being submitted

1 to the social worker, and correct me if I'm wrong
2 but that is what you relied on Dale Davis to get,
3 correct?

4 A Yes, sir, and it wasn't a big work history.
5 There wasn't, he's young and there wasn't a big
6 work history.

7 Q So, you didn't intercept the work record and
8 stop it from going to Jeff Yungman, did you?

9 A No, sir, I did not.

10 Q You didn't -- to your knowledge, Jeff Yungman
11 would have considered that, correct, if it was
12 gathered?

13 A Whatever he would have considered was based
14 on the totality of the whole thing, talking with
15 Marion, his dealings with him, talking to Miss
16 Davis, reading files, reading the notes and reports
17 that were submitted. I mean, this is what I do.

18 Q And you never, again, they never complained
19 to you that, you know, "We're trying to get
20 something and we can't get it"?

21 A No, sir, no. We asked Marion, hand us
22 handwritten notes, whatever, his work history, age,
23 everything.

24 Q Right. Was there a concern about going to
25 far down the road with Mr. Bowman's employment as a

1 drug dealer?

2 A As you state that question the answer is
3 obviously yes.

4 Q Now, you were asked a little bit yesterday
5 about Mr. Yungman and the fact that he, his
6 testimony was obviously in the vein that obviously
7 Mr. Bowman has already been convicted so we're
8 going to look at it as to what are the factors in
9 his life that might have caused or led him to that
10 fateful decision?

11 A Correct.

12 Q That was a strategic judgment on your part
13 that you would have rather addressed with Mr.
14 Yungman's testimony as to possible causation of Mr.
15 Bowman's decision, as opposed to maintaining some
16 sort of amorphous residual doubt. Is that correct?

17 A The jury convicted him, now it's time to try
18 to save his life. We lost credibility with the
19 jury. Once they're found guilty they're guilty.
20 If you go back and re-argue that at that point it's
21 fruitless academically but it also is something you
22 have now got to try to convince the jury that
23 please don't put him to death and here is why.
24 There is two sides to every story, really three,
25 but please, now, you have two choices, here is the

1 reason you ought to give him life.

2 Q Right.

3 A You try to paint the picture like they do for
4 the victim, they grew up, there is a high school
5 photo, here is the confirmation photo, here is the
6 baptismal photo, try to do the same thing with
7 Marion, paint him as a human being.

8 Q So, your strategic decision is to attack the
9 finding of guilt or to recognize the finding of
10 guilt and then attack the sentencing phase head on
11 rather than trying to keep some sort of residual
12 doubt alive. Is that correct, sir?

13 A Right. That's what I did. And again if that
14 was in error I apologize to my client. It is his
15 life, not mine.

16 Q As a matter of law is it your understanding
17 the residual doubt, whether residual doubt is even
18 a valid mitigator anyway?

19 A It's not.

20 Q Now, I know I have already asked you this but
21 we talked a little bit about Jeff Yungman. I think
22 you said you wanted him to be up there and just
23 kind of talk freely rather than just be responding
24 to questions like a machine. Is that a fair
25 assessment?

1 A Yes, sir

2 Q Okay. Is there a reason for that? What's
3 the reason?

4 A I think it just looks a lot cleaner, for lack
5 of a better word. Maybe for an analytical argument
6 here, it is kind of like dealing with a highway
7 patrolman for a DUI. The worst thing you can do is
8 ask him questions other than good morning, your
9 name and will you please tell the ladies and
10 gentlemen of the jury what you did on this date,
11 this time. They are going to give it out. And it
12 looks so clean and so fresh. The only elements of
13 DUI, are they operating a motor vehicle on a public
14 highway, having some intoxicants, dah, dah, dah,
15 materially and appreciably impaired in their
16 ability to drive a motor vehicle. They will do it.
17 It doesn't look like anything, it looks like boom,
18 boom, boom.

19 Q So, by analogy you consider that?

20 A I don't mean to make it that simple, please,
21 everybody in the room, I'm not trying to associate
22 this case with that, but this young man, I wanted
23 him to be a human being, speak from the heart, talk
24 about it, talk about Marion, okay?

25 Q All right. Now lets move to Jim Aiken and

1 the good prison condition issue.

2 A Okay.

3 Q And I think, as you said before, I think you
4 said Jim Aiken kind of has a script, correct?

5 A Yes, and the worst thing you can do is try to
6 throw him off his script, because even when Mr.
7 Bailey crossed him, the same thing, barbwire fence,
8 concertina wire, three hots and a cot, he has it
9 done, and I think he comes across as like a
10 reverend or a preacher to the jury.

11 Q Right. And pretty much his point in all
12 these cases is that it really doesn't matter what
13 Marion Bowman is like, the South Carolina
14 Department of Corrections has sufficient procedures
15 and security measures in place that he will not be
16 a threat to society again. Is that a fair
17 assessment?

18 A Right, life without parole means life without
19 patrol, correct.

20 Q So, then, after that testimony was elicited I
21 think Mr. Bailey on cross started talking about the
22 various security procedures that existed, correct?

23 A Right.

24 Q Okay. And I guess at that point he felt that
25 that was fair game because of what Mr. Aiken had

1 earlier testified about the security procedures,
2 correct?

3 A He's attacking my expert Mr. Aiken, he is
4 trying to show the ladies and gentlemen of the
5 jury --

6 MR. BROWN: Your Honor, I object to
7 speculation about what Mr. Bailey was doing.

8 Q My question was, you felt --

9 A I was in the room, I heard that.

10 MR. BROWN: The record speaks for itself on
11 the actual words that came out of Mr. Bailey's
12 mouth but I object to the characterization.

13 MR. WATERS: My question was --

14 THE COURT: Ask the question again.

15 BY MR. WATERS:

16 Q My question was, after Mr. Aiken had
17 testified on your direct as to the security
18 procedures did you feel like then that it was fair
19 game for Mr. Bailey to then start talking about
20 these security procedures on cross?

21 A Yes.

22 Q Okay. So, you didn't see a basis for
23 objection there?

24 A I think I did object to Walter going out of
25 line, I think I did. If I didn't, I missed it.

1 Q Ultimately, though, he did mention escape but
2 that is when you objected, correct?

3 A Yes.

4 Q All right. Then on redirect you came back
5 after Mr. Bailey had talked about the security
6 procedures and I believe you extensively asked
7 James Aiken about the fact, and I'm going to quote
8 you, that he couldn't work outside the prison, he
9 wouldn't be going to kiddie camp if he was given
10 life, he would not have picnic lunches, he would be
11 around a dangerous predatory, violent population,
12 that he would be in a very small supermax cell and
13 that despite all that he could still attempt to pay
14 back society and do something good for himself
15 within the prison? Do you recall that?

16 A Yes, sir.

17 Q What was the point of that, what was your
18 focus there, strategic focus in eliciting that
19 information?

20 A It is to try to give the jury an option that
21 this is not going to be, you know, he is not going
22 to be able to -- I don't know how to say it. You
23 got to give them a reason to want to put him in
24 prison. We can all sit in here right now, it's
25 nice, but there is only two punishments and I did

1 everything I thought I could to show them that it's
2 going to be miserable for him in prison. It is.

3 Q So, that was your strategy?

4 A Yes, and again everybody in the world knows
5 now that everybody stays away from it, okay, I
6 guess I'm at the foray of why they do that now.

7 Q But your whole point now is to say, look,
8 jury, this is going to be so horrible the rest of
9 his life that that is going to be sufficient
10 punishment and you don't have to give him death.
11 Is that a fair assessment?

12 A Yes.

13 Q In fact, even in your arguments you refer to
14 Bailey's own argument as, quote, reward of prison,
15 correct, that was consistent with that strategy,
16 right?

17 A Yes.

18 Q And you argue that while it's easy to try to
19 paint prison as reward in this case, a line forms
20 back there if anybody wants to spend the rest of
21 their life in prison, correct?

22 A Correct.

23 Q Is that consistent with that strategy?

24 A Yes, sir.

25 Q You argued to the jury it was wrong or an

1 injustice if they were going to consider life in
2 prison a reward, correct?

3 A Yes.

4 Q You argued that a life sentence would
5 actually be worse than death for a young person
6 such as Mr. Bowman, that was consistent with that
7 strategy?

8 A I did argue that, yes, sir.

9 Q You argued that he should get life in prison
10 so he would have to remember what he did to Kandee
11 for the rest of his life and suffer with that, is
12 that right?

13 A Yes, sir.

14 Q Is that consistent with that strategy?

15 A Yes.

16 Q You argued that prison is going to be a
17 dangerous place, that was going to be punishment
18 for him as well for the rest of his life?

19 A Yes, sir.

20 Q So, your focus there, all of that strategy
21 and all of that argument was to essentially
22 discount this idea that if the jury returned a
23 verdict in your favor that somehow they were doing
24 a favor for Mr. Bowman. Is that correct?

25 A As you used the words, yes, sir, to answer

1 your question. The other thing is trying to get
2 him so he would not die, yes, okay, whatever I had
3 to do.

4 Q And once the law -- you are familiar with how
5 the law has developed recently, in the last eight
6 or nine years with the charging of life without
7 parole, right?

8 A Yes, sir.

9 Q Once that was mandatory charged that was
10 something you could strategically use with these
11 arguments to make that he's never leaving prison
12 again and it's going to be a horrible place,
13 correct?

14 A Yes, sir. The only way it gets expanded or
15 expounded, people like we're all doing it here
16 today, how do you, it is so stacked on the side of
17 the State in a death penalty case, you scare the
18 heck out of jurors, they get these 350, 400 people
19 that get a questionnaire that thick, what do you
20 believe, do you believe in God, do you drink, do
21 you go to church? By the time they come in the
22 door they know it's a death penalty case. That is
23 my whole opinion, the most unfair thing in the
24 world. I think a death penalty case is not a fair
25 system with one jury instead of two, one for guilt,

1 then one for another time. They hear fresh facts,
2 but again that is an academic argument.

3 Q I understand.

4 A The Supreme Court, you know, you have your
5 academic believers on the subject but I guess I was
6 kind of focusing on the fact that since you knew
7 you were going to be getting that life without
8 parole charge, you considered in sentencing your
9 best shot was to convince this jury that life in
10 prison was going to be just as bad if not worse for
11 Marion Bowman than giving him the death penalty?

12 A Yes, it is. I'm not trying to be cruel to
13 Marion. Yes, I don't know how long his natural
14 life is going to be but every day you're in a six
15 by eight cell, you can't go get an ice cream cone
16 when you want one and you darn sure are not going
17 to enjoy any of the benefits of this earth. You
18 are in a cell, you are behind wire and you're
19 living with whatever is nextdoor, whatever he's in
20 for nextdoor, and I just had a case with a guy,
21 sliced and diced and killed another man in prison,
22 22 year old kid. It is a predatory place. So,
23 yes, paint a picture, paint it nasty for them.

24 Q And before a Dorchester County jury, in your
25 opinion that is actually a better argument or

1 better strategy than the more typical abuse or
2 typical situation?

3 A Yes. I had a forelady on the jury who I
4 believe was eighteen years old and she voted to
5 kill somebody? We wanted her, we did the jury
6 thing together, we wanted the young lady, and she
7 was appointed foreperson, and she would vote to
8 take -- excuse me.

9 Q Right. So, after you came back on redirect
10 and made those examinations that we talked about,
11 about how tough it was going to be and it wasn't
12 going to be kiddie camp and that sort of thing,
13 then I believe Mr. Bailey started to ask about
14 escapes and you successfully objected on that.
15 Correct?

16 A Well, you said objected successfully. I
17 objected, right.

18 Q Well, the judge sustained your objection on
19 that?

20 A Yes.

21 Q I believe the records are present, I will be
22 glad to show it to you.

23 A No, sir. What you say is correct on that, I
24 know I objected.

25 Q And then at that point Mr. Bailey then said,

1 "Well, look, then since Mr. Cummings went into life
2 in prison wasn't going to be kiddie camp and he
3 wasn't going to be molly coddled, I think I should
4 be allowed to ask some of the other things about
5 prison." Correct, the judge agreed to let him do
6 that?

7 A Absolutely.

8 Q Now, at the time, and this was obviously
9 before this recent decision, at the time did you
10 think that that was fair, opening the door?

11 A Did I think it was fair?

12 Q Did you think you had opened the door in that
13 regard?

14 A No, I really didn't think I really opened up
15 the door. I was trying to show adaptability and
16 why somebody could get LWOP, life without
17 possibility of parole, and give the jury an
18 alternative sentence. Of course now that's in
19 error.

20 Q I guess what I'm asking, though, when he
21 said, "Well, Mr. Cummings had gone into all this
22 information, I want to go into a little bit of that
23 same topic just on the other side of the coin,"
24 what would your objection have been at that time
25 prior to Bowman, this case obviously, and Burkhardt

1 and Bryant coming out?

2 A The only objection I had would have been him
3 talking about things that were outside the scope,
4 that being escape or --

5 Q You had already been sustained on escape?

6 A Right. Well, to make sure Walter wasn't
7 going down that way again. It is true you do get
8 to ask whether or not they get to eat in prison, I
9 mean, I knew he was going to do that. He has done
10 it in the past.

11 Q Right.

12 A So, I knew it was coming, I took a calculated
13 risk, I made a decision. If it is wrong, again I
14 apologize and the courts will correct any errors I
15 made, I hope.

16 Q I guess that is where I'm going to. You made
17 the calculated decision that it was better to go
18 down the road of saying life in prison is so
19 horrible that it's good enough punishment for
20 Marion Bowman, knowing full well there was a risk
21 that Mr. Bailey might come back a little bit and
22 say, "Well, you know, prison ain't as bad as all
23 that"?

24 A Mr. Waters, to answer your question, yes, but
25 please I would like to explain.

1 Q Sure.

2 A I want to argue and differ with you on this.

3 Q Okay.

4 A Yes, I made a calculated risk, I did, I made
5 that choice to try to give the jury an alternative.
6 I think it is wrong for the State to be allowed to
7 go into saying he's still alive, still breathing
8 and could eat, watch television and Kandee can't.
9 I believe that's horrible, because why do we give
10 the jury an LWOP choice if we're not going to let
11 them know what prison is like, without painting the
12 rosey picture he can go get a chalkboard and write
13 home.

14 Q That is my point. Under your view at this
15 point in time prior to those decisions, under your
16 view that was a subject you're willing to take on
17 because you think that can work to the benefit of
18 your client in trying to describe to the jury just
19 what kind of future Marion Bowman would face, get
20 life without parole in South Carolina Department of
21 Corrections, correct?

22 A Yes, sir. I understand from the Attorney
23 General's position that if I called that strategy,
24 I told you I took a calculated risk, it might cure,
25 cure an error I might have made. I don't want to.

1 do that to you, sir, I'm just telling the truth.

2 Q I understand.

3 A I did that, made that call and God all
4 mighty, I argued, because I watched those jurors'
5 faces and everything, everybody says in here, I was
6 in that pit and I'm watching those jurors over
7 there looking at their watch, "When do we go home?"
8 They were done.

9 Q So, given that, you thought this was your
10 best shot because maybe you could try to convince
11 them that this was going to be worse?

12 A Yes, absolutely correct.

13 Q And that he was never coming back from life
14 without parole?

15 A That's right. And as we sit here today,
16 Marion looks like he has adapted, he's polite, he's
17 kind, the guards and everything, I have seen them
18 walking in here, what a cordial young man.

19 Q Right. And I guess, though, we kind of
20 touched on this a little bit, I guess this case was
21 kind of on that new frontier, we had just recently
22 had the life without parole charges were mandatory
23 in every death penalty case, so we're kind of on
24 the frontier in dealing with that and how it could
25 be litigated and used by both the State and the

1 defense in the sentencing phase of the capital
2 trial.

3 Is that a fair statement?

4 A Yes, sir.

5 Q Okay. So, given that frontier, you objected
6 and did what you did, given that you were kind of
7 on that frontier of how to address or how could you
8 best use that life without parole charge in the
9 sentencing phase?

10 A Yes, I did try to push the envelope, I did.

11 Q All right. You were asked a little bit
12 about, yesterday about the judge's instruction on
13 allocution. Bear with me one minute. I will try
14 to find what volume that's in. All right, I'm
15 going to show you page 4942. You were asked about
16 it. I think it's fair, you get a chance to re-read
17 the Court's instruction, it begins on page 4942.

18 A Yes, sir.

19 Q Okay. And it's fair to say in that
20 instruction Judge Goodstein advised Mr. Bowman that
21 he had an absolute right to speak to the jury but
22 that like the lawyers in argument, he would not be
23 able to testify to new facts but as an evidentiary
24 matter it was limited to that in the record
25 already, correct?

1 A That is what Her Honor said, yes.

2 MR. BROWN: That's not what she said.

3 A I'm sorry,. Says, "You can simply --"

4 MR. BROWN: I'm sorry, objection. I mean --

5 THE COURT: Is that what the transcript says?

6 MR. BROWN: He gives a paraphrase and says,

7 "That's what she says. I don't know, I guess it is

8 not my duty to make sure the testimony is correct,

9 but --"

10 THE COURT: Let's just say what does the
11 transcript show? I don't know if he's interpreting
12 what she said or what she actually said.

13 BY MR. WATERS:

14 Q Let me just ask you this. After reviewing
15 that do you see any legal error in what Judge
16 Goodstein says there?

17 A Legal error?

18 THE COURT: Does he see the legal error?
19 Does that matter?

20 MR. WATERS: Well, there was a reason, if
21 there was a reason to object.

22 THE COURT: All right.

23 A It doesn't end there, because Her Honor goes
24 on further and on page 4944 and says, starting on
25 line one, "Now, obviously, and your lawyers I'm

1 sure will go over with you your right, your ability
2 to talk to this jury about penalty. You certainly
3 are entitled to do that and I want you to feel free
4 to do that."

5 So looking at the totality again, she didn't
6 just cut you off, saying you only stick to the
7 record, she came back and said you got a right to
8 talk about penalty, I'm sitting at the table
9 telling him to beg for his life. It is not just
10 one line.

11 Q You didn't see anything objectionable?

12 A No. The judge came back further and said
13 talk about the penalty. What else are we there
14 for?

15 Q In fact, even prior to that, prior to that
16 charge starting you were even talking to the judge
17 about the fact a jury in a capital case could find
18 mercy for mercy's sake, correct?

19 A Correct.

20 Q So, was there any question that Marion Bowman
21 understood that is how it worked? You explained
22 that to him in you all's discussion, correct?

23 A Yes, sir.

24 Q Okay. I think you have mentioned on a couple
25 occasions that you all asked Mr. Bowman to beg for

1 his life and he did not want to. Is that fair?

2 A That's correct.

3 Q Okay. Did Mr. Bowman ever say, "Well, you
4 know, I kind of wanted to do it but it was only
5 after I heard Judge Goodstein say I would be
6 limited to the record and now I'm not going to do
7 it"?

8 A Obviously I don't need to read to this good
9 Judge or you gentlemen. On 4946 and 4947 the Court
10 takes great detail in his waiving or being freely
11 and voluntarily made.

12 Q There is a colloquy with Mr. Bowman about
13 that?

14 A Her Honor did that.

15 Q I'm asking you about your own personal
16 conversation. Did Mr. Bowman ever say to you,
17 "Well, I was going to speak to the jury but then
18 they told me I was limited to evidence in the
19 record and I decided I wasn't going to"?

20 A No, sir. I don't think, you know, looking at
21 everything there, everybody knew what the judge
22 said, but again, if I made an error I apologize, I
23 hope you folks correct it.

24 Q So, there was never any point, guilt phase,
25 sentencing phase, any point during this trial that

1 Mr. Bowman had expressed an intention to want to
2 testify or talk to the jury or anything like that.
3 Is that correct?

4 A That's correct.

5 Q Let's move on and talk a little bit about the
6 jury selection. And do you recall an issue with a
7 juror named John Davis who had been overheard
8 allegedly making a phone call?

9 A Yes, sir.

10 Q Okay.

11 A I remember that well.

12 Q All right. And ultimately Judge Goodstein
13 found him in contempt. Is that correct?

14 A I don't recall that but I remember that the
15 young lady who brought it to the Solicitor's
16 attention used to work for an Assistant Solicitor
17 named Jimmy Messervy, and it just seemed to be, you
18 know, that it was overheard by her and then brings
19 it to the Court's attention?

20 Q I'm going to show you --

21 A I'm sorry, I just don't remember a contempt
22 thing.

23 Q Well, let me ask you this. Ultimately she
24 did disqualify him for cause based on that
25 conversation, correct?

1 A Correct.

2 Q I'm going to show you 3557 of the record on
3 appeal, beginning at line 17. See if that
4 refreshes your recollection about whether Judge
5 Goodstein ultimately found Mr. Davis in contempt of
6 court when she addressed this issue that ultimately
7 had him excused, disqualified?

8 A Yes, sir, she held him in contempt and he got
9 a fine of \$50.

10 Q All right. With regard to that issue, I want
11 to ask you a little bit about how you go to try to
12 rehabilitate somebody in this regard. Would it be
13 appropriate for you to, in this situation where
14 you're dealing with a juror who is in the courtroom
15 and the issue has been raised, would it be
16 appropriate for you to go talk to that juror prior
17 to the hearing?

18 A No.

19 Q Would it be appropriate for you to send an
20 investigator to go talk to that juror?

21 A No.

22 Q Would it be appropriate for you to call up
23 his family and ask about this juror?

24 A No. And I'm not going to have somebody on
25 the jury anyway that is found, held by the Court

1 for contempt. He is there to do a public service,
2 she is going to put him in jail or take money from
3 him? Yes, I want that kind of juror.

4 Q There are some allegations he made a comment
5 on the phone about what he would do if he was on a
6 jury. You can't really go out and investigate this
7 juror and talk to him about that?

8 A Everything I have ever learned is those
9 jurors are sacrosanct, you don't touch them, you
10 don't approach them. That is a great way to be
11 disbarred, number one, and number two, to obstruct
12 justice. I'm not doing that. They get to go do it
13 afterwards.

14 Q Right.

15 A Not before.

16 Q In the PCR process they can depose the jury,
17 testify, all that. That is not something you can
18 do at the time of trial?

19 A No, sir, you're not allowed to do that.

20 Q Essentially you are talking about asking
21 questions you don't know the answer to, all you can
22 do is get up there and ask questions, poke around a
23 little bit and see what you get?

24 A We're only allowed voir dire in death penalty
25 cases. The rest of the time it's the judge, the

1 boss gets to ask questions.

2 Q I'm talking about on the hearing that she
3 disqualified him.

4 A One more problem, one more thing that sprung
5 up, okay?

6 Q So, there is really no investigation you
7 could do, the best you could do was try to ask the
8 questions that you did and you did the best that
9 you could with what you had?

10 A Right. I'm sure somebody would have done
11 something different or done something better, I'm
12 sure.

13 Q Just as a general matter, when you're talking
14 about rehabilitating jurors in capital cases, I'm
15 talking about rehabilitation, there is the sense of
16 trying to move a type one or type two over to a
17 type three, that is a pretty tough thing to do,
18 isn't it?

19 A Yes, sir.

20 Q All right. Let's talk a little bit about
21 Ricky Davis.

22 The Court's indulgence just one moment,
23 please?

24 I'm going to show you what has been marked as
25 Plaintiff's Exhibit 69 and have you take a look at

1 that.

2 A A letter that I sent quickly May 15th to Mr.
3 Mitchell so that he would go out and interview Mr.
4 Davis at Leiber Correctional.

5 Q Okay. So, you sent Walter Mitchell --

6 A Sent Mitch.

7 Q He goes by Mitch sometimes?

8 A Yes, sir.

9 Q All right. You sent him out to Leiber to
10 talk to Ricky Davis. Correct?

11 A Yes, sir.

12 Q And what did Mitchell report back to you?

13 A The best of my recollection again, saying
14 that Ricky Davis didn't say it, he ain't going to
15 cooperate, he never said what he allegedly said,
16 recanting what Mr. Bowman allegedly did. Again
17 that is the best of my recollection. I would have
18 relied on what Mitch told me at that time seven
19 years ago.

20 Q All right. So, you were aware, of course,
21 that Mr. Davis had given, had written that little
22 handwritten statement? I'm sure you have seen it.

23 A That, yes.

24 Q What you said, James Gadson said he was the
25 one shot Kandee?

1 A Right.

2 Q You sent Mitch out to talk to Davis and Mitch
3 came back and said, "It's not going to do us any
4 good"?

5 A Yes.

6 Q You ultimately made the strategic decision it
7 was not worth it to call Ricky Davis?

8 A Right.

9 Q If Mr. Davis had gotten up on the stand and
10 said, "Marion Bowman told me to write that letter
11 and I don't know anything about it," it would have
12 made your client look like he was concealing
13 evidence, right?

14 A Also convict my client of being a shooter.
15 Now I got another guy saying it.

16 Q He was trying to get somebody to lie for him
17 and say somebody else was the shooter, correct,
18 kind of make him look devious and ultimately
19 confirm his guilt, correct?

20 A Yes, sir.

21 Q So, strategically you decided that just
22 wasn't the road you wanted to go down?

23 A Correct.

24 Q If you had gotten information, if you thought
25 this guy was going to be a good witness that would

1 have been a different story, correct?

2 A Correct. Or if I ever seen that note that
3 looked like work product from the Solicitor that
4 would have really shed a different light.

5 Q That --

6 MR. BROWN: Please let him finish.

7 A That would have shed a light a long time ago
8 of a different aspect.

9 Q What is the different aspect, the note that
10 says Sam on it? That is just the same thing, the
11 note you have, it's the same story, correct?

12 A I would have known the State thought he was
13 of evidentiary value early on. I mean, at least in
14 my humble opinion, yes, sir. The only reason the
15 prosecutor talks to people is to get another
16 witness. That is just the rules of evidence and
17 game.

18 Q But what I'm asking, though, is that you had
19 Ricky Davis' handwritten statement, right?

20 A Yes.

21 Q Okay. And you reviewed the same document, I
22 can't put my hand on it right now, but you reviewed
23 it, correct?

24 A Yes, sir.

25 Q That just pretty much says the same thing as

1 was in the handwritten note, correct?

2 A Yes, but I would have liked to have known
3 Sam, excuse me, the Solicitor's investigator went
4 out there, went to Leiber to get him. I would have
5 done it a lot quicker and I would have known about
6 it and perhaps had time to learn other things, that
7 maybe the guy who was in the cell with Ricky Davis
8 might have overheard something else. It would
9 have, there is always a chance of something going
10 somewhere.

11 Q Right. You're saying you might have been,
12 might have investigated that. Let's just limit it
13 to the evidence we have. You have Ricky Davis'
14 handwritten statement and you have the Sam document
15 that says the same thing and ultimately, though,
16 you sent out --

17 MR. BROWN: I object to the characterization
18 of the same document saying the same thing.

19 Q Well, let's find it.

20 MR. BROWN: He is not saying it's the same
21 thing. He is saying it would have changed his
22 mind.

23 MR. WATERS: I ask counsel not to put words
24 into his mouth.

25 THE COURT: Let's wait a second and let him

1 find something he would like to use to make the
2 question maybe more to the point. What are you
3 showing him?

4 BY MR. WATERS:

5 Q This is Plaintiff's Exhibit 67.

6 A Yes, sir.

7 THE COURT: Is that the note from Sam?

8 A Yes, sir.

9 Q That's the Sam note, the one you said looks
10 like work product from the Solicitor, right?

11 A Right. The second line above the last
12 paragraph, "Bowman never admitted he shot anyone."
13 But again I would have liked to have seen this one
14 from the State. This is three weeks before August
15 the 6th of '01, I'm trying to remember when Mr.
16 Bowman went to the State Hospital without me being
17 on the team, and it should have the date on that
18 document, I don't remember.

19 Q Just so you can look at the two, this is
20 another copy of the handwritten Ricky Davis letter
21 that has been previously admitted, that is not the
22 actual one but counsel agrees it is a copy, so you
23 can compare the two so you have a chance to look at
24 them.

25 A Right. All right. Rule 5 discovery, I got

1 this.

2 MR. BROWN: Let's make clear that that is the
3 same as, not 67, but the same as, I believe it is
4 Number 11.

5 MR. WATERS: Yes, Applicant 11.

6 THE COURT: Does that document you have in
7 your hand have a number on it?

8 MR. WATERS: No, Your Honor. Instead of
9 having to look for this actual exhibit, I just
10 showed it to counsel. I was just showing him
11 another copy.

12 MR. BROWN: All I want to make clear --

13 THE COURT: What you have in your hand is
14 what is Exhibit 11?

15 MR. WATERS: Yes, sir.

16 THE COURT: Exact copy of Exhibit 11, not 67?

17 MR. WATERS: In substance he was just
18 reviewing Applicant's 67 and Applicant 11. Is that
19 right?

20 MR. BROWN: That's correct. My qualification
21 has to do, I don't want that put -- I want to enter
22 that now, he says it has Rule 5 stamp on it and I
23 want to make sure that the Rule 5 stamp is on the
24 notes similar to Applicant's 11. There is nothing
25 that says Rule 5 stamp on anything similar to

1 Applicant 67.

2 MR. WATERS: All right, Your Honor, I offer
3 this.

4 MR. BROWN: So there is no confusion.

5 MR. WATERS: I offer this, then, as Exhibit
6 30 for the respondent.

7 MR. BROWN: Without objection.

8 THE COURT: Exhibit 30 is in.

9 (Ricky Davis note was marked and received in
10 evidence as Defendant's Exhibit 30).

11 MR. WATERS: For housekeeping matters I
12 believe without objection I'm entering Respondent's
13 25 as well.

14 MR. BROWN: Without objection.

15 THE COURT: Okay, 25 is in.

16 (Hardee-Thomas to Bowman letter marked
17 and received in evidence as Defendant's
18 Exhibit Number 25).

19 BY MR. WATERS:

20 Q Okay, I believe you just testified it would
21 have been nice if you had gotten this same
22 document, the Solicitor's work product you are
23 assuming right now, right?

24 A Yes.

25 Q Because that might have led you to do some

1 more investigation or something like that, right?

2 A Yes. I know Sam personally and I know he is
3 a thorough investigator so, yes, it might have
4 kicked a little something else in me, or might have
5 kicked Bobby Minter to go quicker or to have Walt
6 Mitchell go do it.

7 Q I understand that. Let's say all you had was
8 the Ricky Davis handwritten statement which you
9 said Gap said that he shot Kandee and the police
10 told him to say Black, just say Black did it,
11 correct?

12 A Right.

13 Q And Black was Marion Bowman, right?

14 A Yes.

15 Q And all you had then was the Sam thing that
16 pretty much says the same thing but adds a little
17 bit more detail, correct?

18 A Yes, sir, especially at the bottom.

19 Q I understand but let me just say those were
20 the only two things you had and you tried to do
21 some more investigation and nothing else came up,
22 right?

23 A Right.

24 Q But then you sent Mitch out to talk to Ricky
25 Davis and Mitch came back with the same

1 information, he says it's bunk and Marion told him
2 to write it?

3 A Yes.

4 Q You would still be in the same boat, right,
5 if you had nothing else?

6 A To answer your question that way, yes, sir,
7 that's correct.

8 Q Okay, let's talk a little bit about James
9 Gadson.

10 MR. WATERS: Your Honor, I have a document I
11 have marked as Exhibit 31. I offer it in evidence,
12 I believe without objection.

13 MR. BROWN: Without objection.

14 THE COURT: Exhibit 31 is in evidence.

15 (Bailey to Cummings letter was marked and
16 received in evidence as Defendant's Exhibit
17 Number 31).

18 BY MR. WATERS:

19 Q I show you a document from the Solicitor
20 dated May 9th, 2002.

21 A I see the letter. I don't see the little
22 Brady stamp on it, Rule 5, Brady. Further, it's a
23 letter to Walter. I'm not sure where I was on May
24 9th and I'm trying to remember the dates we were
25 actually in court.

1 Q You don't recall this letter?

2 A Off the top of my head I don't recall the
3 letter. I don't -- I'm sure it was sent, I don't
4 remember what date, I don't know where we were, I
5 really don't, not today.

6 Q Okay. That letter refers to, it's
7 essentially notice that James Gadson had reached a
8 plea agreement and that he was going to fax you a
9 copy of the plea agreement, right?

10 A Yes, sir, that is what it says, yes.

11 Q You don't have a recollection?

12 A I don't. It goes on further to say, "I
13 drafted the proposed plea agreement that I will fax
14 to you as soon as all parties have signed it." I
15 guess he was attempting to put me on notice he was
16 going to flip against my client.

17 Q What was the date on that, again?

18 A The date on this letter says 9 May, '02.

19 Q Okay. Let's take a look at the transcript a
20 little bit. I think you were asked yesterday, the
21 question was you did not have a copy of James
22 Gadson's plea agreement when you were
23 cross-examining him. Correct?

24 A I don't remember. I think what I said
25 yesterday was I did not have it or I wasn't

1 familiar with it or what the terms was going to be.

2 Q Okay. Let me show you page 4023 of the
3 transcript of evidence and just read that and tell
4 me if that refreshes your recollection about
5 whether or not you had a copy of that plea
6 agreement when you in fact were cross-examining Mr.
7 Gadson.

8 A "On May 13th you signed a plea agreement, did
9 you not, with the State?" "Yes."

10 Q Do you want to keep reading? Does that
11 refresh your recollection as to whether or not you
12 actually had a copy in hand?

13 A I asked him a question -- obviously I was put
14 on notice of a plea agreement. Whether it was in
15 my hand or not, I don't recall but I had enough
16 facts that I could ask about what his sentence was
17 going to be, so I absolutely had, A, the letter by
18 that time, or B, the actual plea agreement.

19 Q Okay. Let me show you -- let me ask you
20 this.

21 A I mean --

22 Q If you had known there was a signed agreement
23 that had already been signed you would have asked
24 for a copy, right?

25 A I would hope the Solicitor would send me that

1 under Rule 5 and Brady discovery but I think I
2 would have had enough sense to ask, say can we see
3 it.

4 Q In your general practice, in your general
5 method of doing things, if you didn't have it in
6 your hand when you were cross-examining Mr. Gadson
7 you would have said wait a minute, Your Honor, I
8 need a copy of this before we go forward?

9 A I hope I would have done that. I think I had
10 asked enough questions to have the context. Either
11 that or I learned of it from Gene, Mr. Dukes, I'm
12 sorry.

13 Q Start right there. Does that refresh your
14 recollection about whether you had a copy of James
15 Gadson's plea agreement?

16 A "I met over in the jail with James Tawain
17 Gadson and his attorney Gene Dukes and we did
18 arrived at a plea agreement. I provided Mr.
19 Cummings with a copy of the agreement." That is
20 Mr. Bailey, I believe.

21 Q Yes.

22 A Right. It doesn't say what date but he says
23 he gave it to me.

24 Q Okay.

25 A Okay. Then we get into the issue of the

1 letter.

2 Q So --

3 A Whatever date we got the letter I'm sure we
4 got the plea agreement.

5 Q So, looking at that, looking at the nature of
6 how you examined him and looking at what Mr. Bailey
7 says on the record, it pretty much seems like you
8 had a copy of the plea agreement, correct?

9 A As I testified to yesterday and today, yes,
10 or at least a letter or at least Mr. Dukes
11 explaining to me what it was, one of those three
12 things, because I had some information to
13 cross-examine him on.

14 Q What Mr. Bailey had said under oath as an
15 officer of the court, "I gave Mr. Cummings a copy
16 of that agreement," and he hadn't --

17 A I don't believe Mr. Bailey would have done
18 that. I believe Marva or I had it in our hand, and
19 again I'm trying to recall from back then, to not
20 make an error, but I had enough information, sir,
21 to at least ask the gentleman on cross the terms of
22 his plea, plea agreement, excuse me.

23 Q Now, when you were examining Mr. Gadson --
24 let me preface that. You were asked a little bit
25 yesterday about a portion of the plea agreement in

1 which it says that if Mr. Gadson cooperated he
2 wouldn't get the death penalty but if he doesn't
3 cooperate the death penalty is back on the table,
4 correct?

5 A That is the question I was asked, yes.

6 Q I want to show you on page 4204 and let you
7 review your examination again. The fact of the
8 matter is you did in fact examine Mr. Gadson on the
9 fact he had been charged with murder but he was not
10 ever served with notice of intent to seek the death
11 penalty, correct?

12 A Yes, sir, I would hope I cross-examined the
13 gentleman. What I did on those pages -- do you
14 want me to read it?

15 Q No, just if that helps refresh your
16 recollection.

17 A I try to cross-examine people thoroughly, I
18 would hope I did.

19 Q That is what the record reflects, isn't it?

20 A That is what the record reflects.

21 Q All right. I'm going to show you your
22 argument on page 4494 of the record. And that is
23 your closing argument. In fact you did also argue
24 that James Gadson had cut a deal for himself so
25 that Marion Bowman would be the one that got the

1 death penalty. Correct?

2 A Yes, sir.

3 Q After you review that let me know if that was
4 the substance of your argument, okay?

5 A The way I phrase that, Mr. Waters, is if he
6 admitted doing it he would be in trouble, he was
7 facing trial. This is line eleven. Sorry with the
8 noise.

9 THE COURT: As long as the court reporter can
10 hear, we'll continue.

11 A "Folks, he has pled to a maximum sentence of
12 two charges of twenty years. Do you think he has a
13 motive of bias or reason to want to testify at the
14 last moment? What date did that gentleman cut that
15 deal? That deal was cut so this young man would
16 face the ultimate charge, you can't dispute that.
17 It's not nice, you don't want to hear it but it's
18 the truth. It is the truth of what he did signing
19 that plea agreement on the 13th."

20 Q Okay.

21 A And that letter from Walter was May 9th, so
22 it took four days, respectfully.

23 Q No, I understand that you wish you had gotten
24 it earlier.

25 A Oh, yes, and how.

1 Q But it appears you had it, right, you had it,
2 right?

3 A Yes, sir.

4 Q It appears you raised the issue of the
5 treatment Gadson was getting in return for his
6 testimony?

7 A Sure.

8 Q All right.

9 A But I was very careful in how I argued that.

10 Q All right. Let me ask you this question.
11 Going back now when this case first developed and
12 what your understanding and memory is from the
13 discovery and the documents that you had it was
14 true that Marion first gave a series of statements
15 in which, including one he said it was James
16 Gadson, at least implied as much, that James Gadson
17 was the one who shot Kandee, correct?

18 A There were so many statements and -- there
19 were a lot of statements, yes, sir, from everybody.

20 Q I'm going to show you what has been marked
21 Defendant's 6. This is essentially Marion Bowman's
22 third statement. He kind of puts it on Gap a
23 little bit there, doesn't he, Gap being James
24 Gadson?

25 A Yes, sir.

1 Q Is it your recollection, again from reviewing
2 this discovery and preparing this case, that once
3 Marion kind of gave a statement saying Gap did it,
4 that the police went out and picked up and arrested
5 Gap, correct, with this arrest warrant right here?

6 A I'm not sure how they chronologically did it.
7 My understanding was, yes, they were feeding off of
8 each other and I know that, again we talked about
9 this yesterday, the Sheriff's Department was sloppy
10 and the warrants all looked the same, they are
11 probably sitting in Branchville at one computer.

12 MR. BROWN: Your Honor, I would have to call
13 for objection to speculation here.

14 THE COURT: Didn't he start with you don't
15 know?

16 MR. BROWN: That is exactly why I say that.

17 THE COURT: Ask your next question.

18 MR. WATERS: I'll move on, Your Honor, thank
19 you.

20 BY MR. WATERS:

21 Q Let me show you Plaintiff's Exhibit 4 which
22 contains the Gadson warrant and have you review the
23 affidavit, starting with the word investigation,
24 about midway through, and see if that refreshes
25 your recollection as to why the officers went out

1 and arrested James Gadson?

2 MR. BROWN: Your Honor, I don't know how he
3 would ever know why the officers did something.

4 MR. WATERS: This is obviously --

5 THE COURT: Well, in your preparation of the
6 case did you form an opinion as to why the officers
7 did it?

8 THE WITNESS: Yes, sir, and reading the
9 warrant, it said Marion --

10 THE COURT: What opinion do you form, whether
11 it's true or not?

12 THE WITNESS: Marion gave a statement that
13 implicated Mr. Gadson.

14 BY MR. WATERS:

15 Q Okay.

16 A And others.

17 Q Again, not offering it for the truth of the
18 matter asserted but in your familiarity with these
19 documents and your preparation, what happened was
20 Marion gave a statement that said Gap was
21 responsible and the officers went out and picked up
22 Gap with this arrest warrant, Plaintiff's 4,
23 correct?

24 A Mr. Gadson, yes, sir.

25 Q All right.

1 THE COURT: Gap is Gadson?

2 A Yes, sir.

3 Q Yes, sir.

4 THE COURT: You thought that Mr. Gadson had
5 been arrested because Bowman said he did it?

6 A Yes, sir.

7 Q Okay. All right. You were asked why you did
8 not examine the officers with this document in
9 which they have Gadson arrested. Now, the easy
10 explanation for that would be, "Well, the reason
11 why we did that was because we had gotten a
12 statement from Marion Bowman," a statement that was
13 not suppressed but that Walter for whatever reason
14 decided not to use. Is that something you would
15 have wanted to do, and if that question is too long
16 I will rephrase it?

17 A No, it is not too long. It goes right to the
18 heart of the matter about standing on that wire.

19 Q So, that is not something you would want to
20 do?

21 MR. BROWN: I don't know that is responsive
22 to what he asked.

23 A I tried to answer the question the best way I
24 can.

25 A I don't know how to explain anything else. I

1 read that statement you just showed me, Marion
2 admitted shooting her in the back. I mean --

3 Q Let's be clear, then. There were four
4 statements Mr. Bowman gave, correct?

5 A Four that I'm aware of in writing.

6 Q Right. Four written statements?

7 A Then we have the State Hospital.

8 Q Right. Let's just talk about the four
9 statements. The last one was the biggy, the one
10 that you had suppressed as involuntary, correct?

11 A Correct.

12 Q With all the egregious information in it?

13 A Correct.

14 Q For whatever reason Mr. Bailey ultimately
15 decided -- after that was suppressed he didn't put
16 in any of them, correct?

17 A Well --

18 Q I'm not asking you to speculate why.

19 A I'm not going to speculate.

20 Q That's what happened, correct?

21 A I'm going to say Walter was shocked Her Honor
22 suppressed those statements, and you read the
23 transcript, you heard the argument back and forth,
24 and once the judge rules it's over, you make one
25 objection and sit down.

1 Q Right.

2 A But throughout the period of the case Mr.
3 Bailey kept coming back saying, "I want to put
4 these in, I need to put them in." So, you're
5 right, I can't be in his head but if I was a
6 prosecutor I would want those statements in
7 somehow, some way.

8 Q So, if you had brought up, if you had tried
9 to cross-examine the officers on why they sought a
10 murder indictment warrant against James Gadson the
11 easy explanation is, "Because your guy said he did
12 it," that was not a road you wanted to go down,
13 correct?

14 A "Are you relying on the first statement, the
15 second, the third, fourth? When are you going to
16 start telling the truth?" How about with opening
17 up the door, how about the policeman taking three
18 or four statements, and what happened on this one,
19 who lied on this one, who told on this one?

20 Q Okay.

21 A Come on, you're sitting in here, arrest
22 warrants don't count anyway. Until you get to the
23 courtroom they can be amended, changed, the
24 indictment supersedes them.

25 Q Let's talk about Plaintiff's 1, which is the

1 indictment, and you can take a look at it, it's
2 right there in front of you, if you want to, or
3 please take a look at it.

4 A Murder.

5 Q Your understanding of the law is they can
6 indict a number of individuals as principals even
7 if ultimately they were not the shooter, they can
8 be convicted under various theories?

9 A Correct.

10 Q So, did you consider examining the officers
11 on that charging decision?

12 A I don't know. After all this time I thought
13 I cross-examined the officers on everything, I
14 thought I did. It wasn't any strategy if I didn't
15 ask them a question or if I did ask.

16 Q Do you think it would be admissible to
17 cross-examine an officer on a prosecutorial
18 charging decision?

19 A Oh, not on that. But to ask him, you know,
20 what they did, I think I did, though, "Who did you
21 arrest, what did you do?" If I didn't, I didn't do
22 it. I was trying to get them to tell the truth.

23 Q And again going back to 4023, in your
24 examination of James Gadson you did point out he
25 had in fact been charged with murder in this case,

1 correct?

2 A yes, sir, I did.

3 Q All right. Let me take that back real quick.
4 Let's talk about -- let me ask you this. You were
5 asked a little bit about investigating James Gadson
6 and I believe you testified you never had an
7 opportunity to talk with him personally prior to
8 his testimony. Correct?

9 A That's correct.

10 Q Because he had a lawyer, right?

11 A That's right. Mr. Dukes.

12 Q And Mr. Dukes didn't want you talking to him,
13 which was your understanding was his right,
14 correct?

15 A That's correct.

16 Q So you had to rely on the statements and what
17 your client told you, correct?

18 A Right.

19 Q And that is what you did?

20 A Correct.

21 Q And this of course is, we're talking about
22 pretrial in criminal cases and under normal
23 circumstances, you can't go and say, "I want to
24 depose Mr. Gadson prior to trial," correct?

25 A There is no discovery.

1 Q Unlike the applicant's attorneys are able to
2 do, they are able to depose him prior to hearing,
3 that is not an option to you, correct?

4 A Correct.

5 Q So, when you're operating in the arena that
6 you operate in it's a little bit different thing
7 than what they are doing, correct?

8 A Correct.

9 MR. WATERS: Your Honor, it's 1:00 o'clock.
10 I'm kind of moving on to another subject, if you
11 want to break?

12 THE COURT: We'll break and start back at
13 2:00 o'clock. I'll be right here if you all want
14 to start back earlier. We'll break right now.

15 Please don't discuss your testimony, please,
16 sir. We'll break, everybody have lunch, have a
17 sandwich, let's get started back.

18 MR. BROWN: Your Honor, before my paralegal
19 leaves for the weekend, are we saying it is,
20 because I do have appointments set up on Tuesday,
21 actually I meet with my bookkeeper for the end of
22 the year meeting for my law practice, do I need to
23 get him to change for all that?

24 THE COURT: We're going to get together next
25 week, it depends on whether you want to do it

1 Monday afternoon or Tuesday.

2 MR. BROWN: I would prefer to do it Monday.

3 THE COURT: Are you available Monday?

4 MR. WATERS: Yes, sir, to get this done,
5 either Monday or Tuesday, whatever you work out
6 with everybody else. I think that is probably
7 better because we know we're going to have
8 problems.

9 THE COURT: I'm trying to think if I set
10 anything up for Monday afternoon. All right, let's
11 plan tentatively for Monday afternoon. We'll plan
12 right now Monday afternoon.

13 MR. BROWN: Thank you, Your Honor, that helps
14 me with the schedule.

15 THE COURT: I got to see if I can find a
16 court reporter now. She was looking for one for
17 Tuesday, we need one for Monday and Tuesday.

18 MR. BROWN: Do you think Tuesday as well?

19 THE COURT: No, I have other cases. You all
20 have a good lunch.

21 (Recessed at 1:03 p.m.).

22 (Reconvened at 2:00 p.m.).

23 THE COURT: All right, let's now proceed with
24 further cross-examination. You said you were ready
25 to begin another topic, Mr. Waters?

1 MR. WATERS: Yes, sir, thank you, Your Honor.

2 BY MR. WATERS:

3 Q Let's talk about Gadson and the fact he had
4 his own .380 pistol. Do you recall that as well?

5 A Yes.

6 Q Okay. And I believe, and I'm going to show
7 you page 4031 of the transcript. You in fact --
8 actually let me back up, I apologize. Do you
9 recall asking Mr. Gadson about the fact he had a
10 .380? Before you read that, do you recall that?

11 A I remember arguing with Solicitor Bailey
12 about where I might go on my questioning on the gun
13 and trying to point out there were two guns and
14 other guns and, yes, sir, I was trying to do, what
15 I was trying to do --

16 Q You asked Gadson if he ever owned a .380 High
17 Point, at which point the Solicitor objected and
18 ultimately the judge overruled the objection,
19 correct?

20 A Correct.

21 Q Okay. And then I want to show you page 4031
22 and that is where you actually asked the questions,
23 lines five to eleven. Right?

24 A Yes, sir.

25 Q Okay. And you just very simply said, "You