

VOLUME EIGHTEEN

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

OCT 18 2013

S.C. Supreme Court

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213468

APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

ALAN WILSON
Attorney General

DAVID ALEXANDER
Appellate Defender

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

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

S. CREIGHTON WATERS
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

MICHAEL J. ANZELMO

P. O. Box 11549
Columbia, SC 29211

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

ATTORNEYS FOR RESPONDENT

ATTORNEYS FOR PETITIONER

PAGES 7,651-8,100

INDEX

INDEX.....	i

RECORD ON APPEAL FROM DIRECT APPEAL 1 - 5424

TRANSCRIPT DATED OCTOBER 18, 2001 – SCHEDULING CONFERENCE	1
TRANSCRIPT DATED MARCH 5, 2002 – SCHEDULING CONFERENCE	19
TRANSCRIPT DATED MARCH 15, 2002 – MOTIONS.....	70
TRANSCRIPT DATED MARCH 22, 2002 – JURY QUESTIONNAIRE/MOTIONS.....	251
TRANSCRIPT DATED APRIL 9, 2002 – <u>JACKSON v. DENNO</u>	315

TESTIMONY

QUILLIE WALTERS	
Direct Examination.....	320
Cross Examination	324
ALVIN MICHAEL COKER	
Direct Examination.....	341
Cross Examination	344
TIM STEPHENSON	
Direct Examination.....	348
Cross Examination	351
LARRY WILLIAMS	
Direct Examination.....	369
Cross Examination	383
Redirect Examination.....	449

VOLUME TWO

LARRY WILLIAMS	
Recross Examination.....	451

TERRENCE ARNOLD VAN DORAN

Direct Examination.....	457
Cross Examination	463

ALVIN COKER

Direct Examination.....	479
Cross Examination	482

JAMES HELMS

Direct Examination.....	500
Cross Examination	502

ALVIN COKER

Direct Examination.....	513
Cross Examination	517
Redirect Examination.....	525
Recross Examination.....	525

TERRENCE VAN DORAN

Direct Examination.....	526
Cross Examination	530

TRANSCRIPT DATED APRIL 10, 2002 – <u>JACKSON v. DENNO</u>	556

TESTIMONY

JOHN ROGER BARNES

Direct Examination.....	573
Cross Examination	592
Redirect Examination.....	607

LORRAINE CARMICHAEL

Direct Examination.....	613
Cross Examination	621
Redirect Examination.....	630

TRANSCRIPT DATED APRIL 11, 2002 – <u>JACKSON v. DENNO</u>	637

TESTIMONY

CALVIN IVORY MYERS

Direct Examination.....	639
Cross Examination	650
Redirect Examination.....	654

WILLIE J. BAMBERG	
Direct Examination.....	659
Cross Examination	668
Redirect Examination.....	669

BARBARA WALTERS	
Direct Examination.....	679
Cross Examination	712
Redirect Examination.....	714
Recross Examination.....	714

BENJAMIN SINGLETON	
Direct Examination.....	717
Cross Examination	721
Redirect Examination.....	724

MARION BOWMAN, JR.	
Direct Examination.....	727

TRANSCRIPT DATED APRIL 12, 2002 – <u>JACKSON v. DENNO</u>	891

TESTIMONY

MARION BOWMAN, JR.	
Cross Examination	893

VOLUME THREE

MARION BOWMAN, JR.	
Redirect Examination.....	965

WAYNE W. MCALHANY	
Direct Examination.....	975
Cross Examination	1003
Redirect Examination.....	1005

TRANSCRIPT DATED APRIL 15, 2002 – <u>JACKSON v. DENNO</u>	1031

TESTIMONY

DOROTHY M. BOWMAN	
Direct Examination.....	1034
Cross Examination	1048
Redirect Examination.....	1055

GLENN CHARLES LICHTENBERGER

Direct Examination.....	1059
Cross Examination	1068
Redirect Examination	1072

TRANSCRIPT DATED APRIL 17, 2002 – JACKSON v. DENNO

ARGUMENTS	1079

TRANSCRIPT DATED MAY 1, 2002 – MOTIONS 1179

TESTIMONY

TERRENCE A. VAN DORAN

Examination By The Court	1200
Examination By Mr. Bailey.....	1208
Examination By Mr. Cummings	1211
Examination By The Court	1231

TRANSCRIPT DATED MAY 2 – 2002 – JACKSON v. DENNO – RULING..... 1320

TESTIMONY

JAMIE MICHELLE ZENSEN

Examination By The Court	1322
Examination By Mr. Cummings	1332
Examination By The Court	1332

VOLUME FOUR

TRANSCRIPT DATED MAY 3, 2002 – JURY MATTERS 1380

JUROR VOIR DIRE

KIRT LAVERNE WALLACE

Examination By The Court	1383

WILLIAM E. BENSE

Examination By The Court	1389

BRENNEL SIMON

Examination By The Court	1392

JERRY FOWLER

Examination By The Court	1394

HUBERT PRINCE	
Examination By The Court	1398
MICHAEL PATTON WALLER	
Examination By The Court	1400
JIMMY SLOOP	
Examination By The Court	1403
JUROR 004 – BRIAN ALDERSON	
Examination By The Court	1412
Examination by Mr. Cummings	1415
MICHAEL P. WALLER	
Examination By The Court	1419
JUROR 160 – WALBURGA KARWINSKI	
Examination By The Court	1421
Examination By Mr. Cummings	1424
JUROR 130 – GAYLA M. HEINRICH	
Examination By The Court	1427
Examination By Mr. Bailey	1430
Examination By Mr. Cummings	1432
JUROR 310 – NITZA I. TYUS	
Examination By The Court	1439
JUROR 21 – HEATHER M. BOWERS	
Examination By The Court	1445
JUROR 63 – MARILYN J. CUMMINGS	
Examination By The Court	1449
JUROR 75 – KATHERINE M. DILLEHAY	
Examination By The Court	1453
JUROR 34 – LOLITA B. CABADING	
Examination By The Court	1454
Examination By Mr. Bailey	1459
JUROR 48 – JOANNE G. CLEMONS	
Examination By The Court	1462
JUROR 52 – STEVEN D. CONLEY	
Examination By The Court	1466

JUROR 58 – LOUIS J. CREEL	
Examination By The Court	1470
Examination By Mr. Bailey.....	1473
Examination By Mr. Cummings	1474
JUROR 67 – EARL DAVIS	
Examination By The Court	1479
JUROR 90 – JERMAINE EUBANKS	
Examination By The Court	1481
JUROR 92 – PAULA A. EVANS	
Examination By The Court	1485
JUROR 93 – CAROL M. EVERLY	
Examination By The Court	1491
Examination By Mr. Bailey.....	1495
JUROR 90 – JERMAINE EUBANKS	
Examination By The Court	1497
Examination By Mr. Bailey.....	1498
Examination By Mr. Cummings	1500
JUROR 127 – TERESA M. HATCHELL	
Examination By The Court	1508
CHERYL GRAHAM	
Examination By The Court	1515
Examination By Mr. Cummings	1517
JUROR 127 – TERESA HATCHELL	
Examination By The Court	1518
JUROR 135 – GAIL R. HESS	
Examination By The Court	1521
Examination By Mr. Bailey.....	1524
Examination By The Court	1526
JUROR 260 – TONI K. ROMANUS	
Examination By The Court	1528
JUROR 341 – MICHAEL S. WINSTEAD	
Examination By The Court	1532
Examination By Mr. Bailey.....	1546
TRANSCRIPT DATED MAY 9, 2002 – JURY MATTERS	1550

JUROR VOIR DIRE

JUROR 96 – CHARLES K. FERTIG, JR.

Examination By The Court	1553
Examination By Mr. Bailey.....	1556
Examination By Mr. Cummings	1558

JUROR 267 – CAROL O. SAWYER

Examination By The Court	1563
Examination By Mr. Bailey.....	1568
Examination By Mr. Cummings	1569

JUROR 342 – KATHY M. WOODS

Examination By The Court	1574
Examination By Mr. Bailey.....	1576
Examination By Mr. Cummings	1577

JUROR 22 – VICTORIA C. BOX

Examination By The Court	1584
Examination By Mr. Bailey.....	1587
Examination By Mr. Cummings	1588

JUROR 189 – GLORIA J. MAGWOOD

Examination By The Court	1593
Examination By Mr. Bailey.....	1598

JUROR 201 – LISA MCDONALD GIBSON

Examination By The Court	1606

JUROR 222 – LISA NICHOLS

Examination By The Court	1609

JUROR 272 – INEZ S. SHULER

Examination By The Court	1613
Examination By Mr. Bailey.....	1616

JUROR 215 – MICHAEL R. MOSKAL

Examination By The Court	1620

TRANSCRIPT DATED MAY 13, 2002 – JURY QUALIFICATION	1637

JUROR VOIR DIRE

JUROR 26 – ALBERT BRITT

Examination By The Court	1662

VOLUME FIVE

JUROR347 – GEORGE W. YOUNG, JR.

Examination By The Court	1818
Examination By Mr. Bailey.....	1828
Examination By Mr. Cummings	1829

JUROR 293 – LEO J. SULLIVAN

Examination By The Court	1841
Examination By Mr. Bailey.....	1855
Examination By Mr. Cummings	1857

JUROR 342 – KATHY M. WOODS

Examination By The Court	1864
Examination By Mr. Bailey.....	1873
Examination By Mr. Cummings	1876

JUROR 197 – CASEY A. MCCARTER

Examination By The Court	1887
Examination By Mr. Cummings	1899
Examination By The Court	1904
Examination By Mr. Bailey.....	1905

JUROR 159 – SUSAN A. JORDAN

Examination By The Court	1921

TRANSCRIPT DATED MAY 14, 2002 – JURY SELECTION	1941

JUROR VOIR DIRE

JUROR 275 – SHALAYA S. SINGLETON

Examination By The Court	1954
Examination By Mr. Cummings	1963

JUROR 232 – SYLVIA A. PERRY

Examination By The Court	1976
Examination By Mr. Bailey.....	1985
Examination By Mr. Cummings	1987
Examination By Mr. Bailey.....	1992

JUROR 68 – GENE C. DAVIS

Examination By The Court	1996

JUROR 68 – GENE C. DAVIS

Examination By Mr. Cummings	2005
Examination By Mr. Bailey.....	2009

JUROR 348 – KAREN S. YOUNG

Examination By The Court	2013
Examination By Mr. Bailey.....	2021
Examination By Mr. Cummings	2023
Examination By Mr. Bailey.....	2035

JUROR 240 – LORRAINE J. PRINGLE

Examination By The Court	2041
Examination By Mr. Cummings	2051
Examination By Mr. Bailey.....	2053

JUROR 12 – HAROLD L. BAZZLE

Examination By The Court	2065

JUROR 228 – STEPHANIE N. PELLOS

Examination By The Court	2070

JUROR 303 – RHONDA L. TOLER

Examination By The Court	2072
Examination By Mr. Bailey.....	2083
Examination By Mr. Cummings	2085
Examination By The Court	2091

JUROR 230 – RICHARD PEREZ

Examination By The Court	2099
Examination By Mr. Cummings	2108
Examination By Mr. Bailey.....	2112

JUROR 27 – ANTHONY D. BRITT

Examination By The Court	2117
Examination By Mr. Bailey.....	2129
Examination By Mr. Cummings	2133

JUROR 81 – MICHAEL W. DURR

Examination By The Court	2143

JUROR 242 – WENDY H. PROVEAUX

Examination By The Court	2147
Examination By Mr. Bailey.....	2157
Examination By Mr. Cummings	2161
Examination By The Court	2164
Examination By Mr. Cummings	2165
Examination By The Court	2166
Examination By Mr. Cummings	2167
Examination By Mr. Bailey.....	2168

JUROR 67 – EARL DAVIS	
Examination By The Court	2182
Examination By Mr. Cummings	2186

JUROR 209- MARY MILLS - HANHAUSER	
Examination By The Court	2193
Examination By Mr. Bailey.....	2204
Examination By Mr. Cummings	2206

JUROR 298 – KRIS R. TEMPKIN	
Examination By The Court	2225
Examination By Mr. Bailey.....	2242
Examination By Mr. Cummings	2247

VOLUME SIX

JUROR 280 – JONATHAN C. SMALLS	
Examination By The Court	2253
Examination By Mr. Cummings	2266

JUROR 238 – ANDRE B. PORCHER	
Examination By The Court	2272
Examination By Mr. Cummings	2284
Examination By Mr. Bailey.....	2288

JUROR 184 – ERIC P. LOWRY	
Examination By The Court	2297

JUROR 187 – LINDA LYNCH	
Examination By The Court	2310
Examination By Mr. Cummings	2323

JUROR 206 – KATHLEEN A. MCPARTLIN	
Examination By The Court	2329
Examination By Mr. Bailey.....	2340
Examination By Mr. Cummings	2343

JUROR 153 – JERYL W. JOHNSON	
Examination By The Court	2350
Examination By Mr. Cummings	2362
Examination By Mr. Bailey.....	2372
Examination By Mr. Cummings	2375

JUROR 309 – TAMRA L. TYNDELL	
Examination By The Court	2384
Examination By Mr. Bailey.....	2395

Examination By Ms. Hardee-Thomas.....	2397
JUROR 328 – MICHAEL D. WHALEY	
Examination By The Court	2402
Examination By Mr. Cummings	2412
Examination By Mr. Bailey.....	2415
JUROR 321 – MARGARET WASHINGTON	
Examination By The Court	2426
Examination By Mr. Bailey.....	2440
Examination By Mr. Cummings	2443
JUROR 72 – RAYMOND E. DEJONG, II	
Examination By The Court	2448
Examination By Ms. Hardee-Thomas.....	2458
Examination By Mr. Bailey.....	2460
TRANSCRIPT DATED – MAY 15, 2002 – JURY SELECTION	2470
TESTIMONY	
TAMMY J. RUTLAND	
Direct Examination.....	2476
Cross Examination	2479
JUROR VOIR DIRE	
JUROR 178 – EVELYN L. LEWIS	
Examination By The Court	2481
Examination By Mr. Bailey.....	2495
Examination By Mr. Cummings	2497
JUROR 144- JANICE B. HULL	
Examination By The Court	2504
Examination By Mr. Cummings	2521
Examination By Mr. Bailey.....	2531
JUROR 185 – LIANNE LUISI	
Examination By The Court	2536
Examination By Mr. Bailey.....	2546
Examination By Mr. Cummings	2550
JUROR 269 – EDWARD A. SCOTT	
Examination By The Court	2556

JUROR 44 – ANTHONY E. CLARK

Examination By The Court	2561
Examination By Mr. Cummings	2578
Examination By Mr. Bailey.....	2585

JUROR 70 – JONATHAN L. DAVIS

Examination By The Court	2611
Examination By Mr. Cummings	2632
Examination By Mr. Bailey.....	2636
Examination By Mr. Cummings	2642
Examination By Mr. Bailey.....	2645
Examination By The Court	2646

JUROR 202 – LORA S. MCDUGALL

Examination By The Court	2661
Examination By Mr. Bailey.....	2672
Examination By Mr. Cummings	2675

JUROR 271 – BELINDA H. SHAW

Examination By The Court	2680

JUROR 212 – ANTHONY P. MOLLISH

Examination By The Court	2686
Examination By Mr. Bailey.....	2689
Examination By Mr. Cummings	2691
Examination By The Court	2697

VOLUME SEVEN

JUROR 212 – ANTHONY P. MOLLISH

Examination By Mr. Bailey.....	2706
Examination By Mr. Cummings	2708

JUROR 243 – WANDA A. QUERY

Examination By The Court	2716
Examination By Mr. Cummings	2727
Examination By Mr. Bailey.....	2731

JUROR 279 – JAMES A. SMALLS, JR.

Examination By The Court	2739
Examination By Mr. Cummings	2743

JUROR 148 – RICKY JASCOMB

Examination By The Court	2746
Examination By Mr. Bailey.....	2755
Examination By Mr. Cummings	2757

Examination By The Court	2759
Examination By Mr. Bailey.....	2762
Examination By Mr. Cummings	2764
JUROR 11 – SHERRI L. BARBOUR	
Examination By The Court	2771
Examination By Mr. Cummings	2780
JUROR 167 – CATHY L. KILPATRICK	
Examination By The Court	2789
Examination By Mr. Cummings	2804
JUROR 239 – MARILYN B. PRINE	
Examination By The Court	2815
JUROR 16 – JANET R. BEST	
Examination By The Court	2825
Examination By Mr. Cummings	2837
Examination By Mr. Bailey.....	2842
Examination By Mr. Cummings	2850
JUROR 234 – MICKI LEE PITCHFORD	
Examination By The Court	2853
Examination By Mr. Bailey.....	2865
Examination By Mr. Cummings	2868
JUROR 199 – PRINCESS R. MCCONNELL	
Examination By The Court	2883
JUROR 301 – SONYA A. THOMPSON	
Examination By The Court	2885
Examination By Mr. Cummings	2899
Examination By Mr. Bailey.....	2901
JUROR 332 – SUSAN WILGOS	
Examination By The Court	2906
Examination By Mr. Bailey.....	2913
JUROR 145 – DOUGLAS A. HUTTO	
Examination By The Court	2916
Examination By Mr. Cummings	2931
Examination By Mr. Bailey.....	2933
JUROR 136 – JANIE M. HILLIARD	
Examination By The Court	2935
Examination By Mr. Bailey.....	2949

Examination By Mr. Cummings	2953
JUROR 119 – KELLY L. GREENHILL	
Examination By The Court	2961
JUROR 313 – MARILYN V. VANPATTEN	
Examination By The Court	2964
TRANSCRIPT DATED MAY 16, 2002 – JURY SELECTION	
2973	
JUROR VOIR DIRE	
JUROR 17 – SUSAN R. BISHOP	
Examination By The Court	2977
Examination By Mr. Cummings	2988
JUROR 168 – KADEDRA D. KINER	
Examination By The Court	2992
JUROR 168 – KADEDRA D. KINER	
Examination By Mr. Bailey.....	3004
Examination By Mr. Cummings	3007
JUROR 308 – LANA N. TURNER	
Examination By The Court	3016
JUROR 103 – ESPEREITA A. FORTUNE	
Examination By The Court	3022
Examination By Mr. Bailey.....	3034
JUROR 305 – BRENDA H. TORRENCE	
Examination By The Court	3037
Examination By Mr. Cummings	3049
Examination By Mr. Bailey.....	3053
JUROR 343 – LYNDA S. WOODY	
Examination By The Court	3059
Examination By Mr. Bailey.....	3064
Examination By Mr. Cummings	3065
JUROR 180 – CHRISTINA M. LOGAN	
Examination By The Court	3077
Examination By Mr. Bailey.....	3090
Examination By Mr. Cummings	3096

JUROR 272 – INEZ S. SHULER	
Examination By The Court	3101

JUROR 110 – PATRICIA N. GEORGE	
Examination By The Court	3111

JUROR 64 – MATT A. CUMMINGS	
Examination By The Court	3121
Examination By Mr. Cummings	3132
Examination By Mr. Bailey.....	3133

JUROR 295 – ROBERT T. TALLEY	
Examination By The Court	3138

VOLUME EIGHT

JUROR 295 – ROBERT T. TALLEY	
Examination By Mr. Bailey.....	3151
Examination By Mr. Cummings	3153

JUROR 31 – ROGER D. BROWNLEE	
Examination By The Court	3165
Examination By Mr. Cummings	3175
Examination By Mr. Bailey.....	3178

JUROR 288 – LISA C. STANFIELD	
Examination By The Court	3185

JUROR 205 – CHRISTINA MCKAY	
Examination By The Court	3191
Examination By Mr. Bailey.....	3203
Examination By Mr. Cummings	3210

JUROR 317 – DIANNE L. WADE	
Examination By The Court	3216
Examination By Mr. Cummings	3225

JUROR 14 – FREDERICK W. BEAVERSON	
Examination By The Court	3228
Examination By Mr. Bailey.....	3236
Examination By Mr. Cummings	3239
Examination By Mr. Bailey.....	3240
Examination By The Court	3242

JUROR 329 – LINDA L. WHEELER	
Examination By The Court	3249

Examination By Mr. Cummings	3257
Examination By Mr. Bailey.....	3262
JUROR 37 – GLEN W. CARROLL	
Examination By The Court	3266
JUROR 33 – JAMI H. BURT	
Examination By The Court	3271
Examination By Mr. Cummings	3280
Examination By Mr. Bailey.....	3282
JUROR 91 – KENNETH G. EVANS	
Examination By The Court	3287
Examination By Mr. Bailey.....	3299
Examination By Ms. Hardee – Thomas.....	3302
JUROR 60 – LYNN H. CROOK	
Examination By The Court	3310
Examination By Mr. Bailey.....	3325
Examination By Mr. Cummings	3329
Examination By The Court	3333
JUROR 253 – RALPH G. RICE	
Examination By The Court	3336
Examination By Mr. Bailey.....	3344
Examination By Mr. Cummings	3348
JUROR 124 – WALLACE M. HAMMONDS	
Examination By The Court	3356
JUROR 294 – DANNIE W. SWEATMAN, JR.	
Examination By The Court	3369
Examination By Mr. Bailey.....	3382
Examination By Mr. Cummings	3383
JUROR 203 – PAULINE E. MCELYEA	
Examination By The Court	3391
Examination By Mr. Cummings	3400
Examination By Mr. Bailey.....	3403
JUROR 325 – MANCENE D. WERTZ	
Examination By The Court	3410
Examination By Mr. Cummings	3417
JUROR 194 – PHIL D. MAYNOR	
Examination By The Court	3425

Examination By Mr. Bailey.....	3440
Examination By Mr. Cummings.....	3447
Examination By The Court	3456

JUROR 158 – TRACY L. JONES

Examination By The Court	3461
Examination By Mr. Cummings.....	3473
Examination By Mr. Bailey.....	3476

TRANSCRIPT DATED MAY 17, 2002 – JURY SELECTION/JURY TRIAL	3492

VOLUME NINE

OPENING STATEMENT BY MR. BAILEY	3646

OPENING STATEMENT BY MR. CUMMINGS.....	3659

TESTIMONY

WILLIAM HENRY KOGER

Direct Examination.....	3673
Cross Examination	3680

JOSEPH F. FOGLE

Direct Examination.....	3682
Cross Examination	3687

KEITH RIVERS

Direct Examination.....	3688
Cross Examination	3692

CAROLYN L. BROWN

Direct Examination.....	3698
Cross Examination	3702
Redirect Examination.....	3713
Recross Examination.....	3715

EDWARD WATERS

Direct Examination.....	3717
Cross Examination	3727

YOLANDA S. BOWMAN

Direct Examination.....	3734
Cross Examination	3746

TRANSCRIPT DATED MAY 18, 2002 – JURY TRIAL.....	3757

TESTIMONY

KATRINA WEST

Direct Examination.....	3761
Cross Examination	3766

DENNIS JUDY

Direct Examination.....	3774
Cross Examination	3794

GORDON B. NEWHOUSE

Direct Examination.....	3798
Cross Examination	3803

PERRY CHINNERS

Direct Examination.....	3806
Cross Examination	3811

JAMES P. KICKLIGHTER

Direct Examination.....	3819
Cross Examination	3823

ALVIN COKER

Direct Examination.....	3829
Cross Examination	3842

EDWARD A. PORTER

Direct Examination.....	3847
Cross Examination	3861
Redirect Examination.....	3873
Recross Examination.....	3873

JAMES HELMS

Direct Examination.....	3874
Cross Examination	3913
Redirect Examination.....	3930
Recross Examination.....	3931

DENNIE JUDY

Direct Examination.....	3932
Cross Examination	3934

JANICE E. ROSS

Direct Examination.....	3939
Cross Examination	3952

JAMES J. GADSON	
Direct Examination.....	3957
Cross Examination	3961
LAURIE SHACKER	
Direct Examination.....	3969
Cross Examination	3971
SHEREE BROWN	
Direct Examination.....	3972
Cross Examination	3974
DANA FOWLER SHUTT	
Direct Examination.....	3976
JAMES T. GADSON	
Direct Examination.....	3980
JAMES T. GADSON	
Cross Examination	4022
CAROLYN BROWN	
Direct Examination.....	4039

VOLUME TEN

TRANSCRIPT DATED MAY 19, 2002 – JURY TRIAL.....	4051

TESTIMONY

HIRAM JOHNSON	
Direct Examination.....	4056
Cross Examination	4070
TRAVIS D. FELDER	
Direct Examination.....	4084
Cross Examination	4102
Redirect Examination.....	4110
Recross Examination.....	4111
VALORNA SMITH	
Direct Examination.....	4112
Cross Examination	4118
TERRENCE A. VAN DORAN	
Direct Examination.....	4124

Cross Examination	4132
JAMES A. NETTLES	
Direct Examination.....	4139
Cross Examination	4143
ALVIN COKER	
Direct Examination.....	4149
Cross Examination	4154
DOROTHY M. BOWMAN	
Direct Examination.....	4160
CORDELLIA D. MARTIN	
Direct Examination.....	4163
Cross Examination	4166
KENDRA BOWMAN	
Direct Examination.....	4167
Cross Examination	4178
YOLANDA BOWMAN	
Direct Examination.....	4182
Cross Examination	4187
Redirect Examination.....	4190
DOROTY M. BOWMAN	
Direct Examination.....	4191
Cross Examination	4205
MARK SHEETZ	
Direct Examination.....	4220
Cross Examination	4222
CATHERINE M. SALLEY	
Direct Examination.....	4223
Cross Examination	4225
ALVIN COKER	
Direct Examination.....	4226
Cross Examination	4230
Redirect Examination.....	4232
Recross Examination.....	4233
ALLYSON GREER	
Direct Examination.....	4235

Cross Examination	4238
SALLY M. BOOKHART	
Direct Examination.....	4244
Cross Examination	4250
JAMES HELMS	
Direct Examination.....	4259
Cross Examination	4263
EDWARD PORTER	
Direct Examination.....	4267
Cross Examination	4276
Redirect Examination.....	4288
Recross Examination.....	4290
GRADY A. LAYTON	
Direct Examination.....	4292
Cross Examination	4300
DAVID J. COLLINS	
Direct Examination.....	4307
Cross Examination	4320
Redirect Examination.....	4330
Recross Examination.....	4332
CAROL GOODIER	
Direct Examination.....	4334
Cross Examination	4336
EARL V. ASBELL	
Direct Examination.....	4337
Cross Examination	4340
BETHANY CROOKS	
Direct Examination.....	4341
Cross Examination	4344
TRANSCRIPT DATED MAY 20, 2002 – JURY TRIAL.....	4355
TESTIMONY	
DOROTHY M. BOWMAN	
Direct Examination.....	4358
Cross Examination	4359
Redirect Examination.....	4363

Recross Examination.....	4363
MATTHEW G. FITTS	
Direct Examination.....	4364
Cross Examination	4387
Redirect Examination.....	4410
MARION BOWMAN, JR.	
Examination By The Court	4438
CLOSING ARUGMENTS BY MR. BAILEY.....	4456
CLOSING ARGUMENTS BY MR. CUMMINGS.....	4481

VOLUME ELEVEN

JURY CHARGE	4514
VERDICT.....	4564
TRANSCRIPT DATED MAY 22, 2003 – SENTENCING PHASE	4587
OPENING STATEMENT BY MR. BAILEY	4636
OPENING STATEMENT BY MR. CUMMINGS.....	4644

TESTIMONY

JOSEPH W. WIMBERLY, III	
Direct Examination.....	4653
Cross Examination	4654
DAVID L. THOMPSON	
Direct Examination.....	4657
Cross Examination	4658
JAMES HELMS	
Direct Examination.....	4660
Cross Examination	4665
JANICE E. ROSS	
Direct Examination.....	4669
Cross Examination	4674
Redirect Examination.....	4676
Recross Examination.....	4678
Direct Examination.....	4689

Cross Examination	4691
CORDILLIA MARTIN	
Direct Examination.....	4692
WAYNE MARTIN	
Direct Examination.....	4703
Cross Examination	4707
MARION BOWMAN, JR.	
Examination By The Court	4734
KENDRA BOWMAN	
Direct Examination.....	4742
Cross Examination	4748
DOROTHY BOWMAN	
Direct Examination.....	4750
MARGARET A. BAUGHMAN	
Direct Examination.....	4761
Cross Examination	4765
Redirect Examination.....	4767
JEFFREY J. YOUNGMAN	
Direct Examination.....	4769
Voir Dire Examination	4777
Direct Examination.....	4788
Cross Examination	4811
Redirect Examination.....	4826
FRANKIE MARTIN	
Direct Examination.....	4830
JAMES E. AIKEN	
Direct Examination.....	4832
Cross Examination	4846
Redirect Examination.....	4864
Recross Examination.....	4869
SHARON J. BRANCH	
Direct Examination.....	4882
Cross Examination	4888
Redirect Examination.....	4889
TRANSCRIPT DATED MAY 23, 2002 – SENTENCING PHASE	4894

TESTIMONY

ENRIQUE BADILLO	
Direct Examination.....	4902
Cross Examination	4904

TRAVIS D. FELDER	
Direct Examination.....	4911
Cross Examination	4922
Redirect Examination.....	4926

CLOSING ARGUMENTS BY MR. BAILEY	4949

VOLUME TWELVE

CLOSING ARGUMENTS BY MS. HARDEE-THOMAS.....	4975

CLOSING ARGUMENTS BY MR. CUMMINGS.....	4979

JURY CHARGE	5015

VERDICT	5051

SENTENCING	5067

TRANSCRIPT OF <u>JACKSON V. DENNO</u> HEARING DATED APRIL 5, 2002	5069

TESTIMONY

TERRENCE ARNOLD VAN DORAN	
Direct Examination.....	5074
Cross Examination	5082

ALVIN MICHAEL COKER	
Direct Examination.....	5111
Cross Examination	5120

TERRENCE ARNOLD VAN DORAN	
Direct Examination.....	5161
Cross Examination	5170
Redirect Examination.....	5189
Recross Examination.....	5190

TIM STEPHENSON	
Direct Examination.....	5191
Cross Examination	5199

TERRENCE ARNOLD VAN DORAN	
Direct Examination.....	5227
Cross Examination	5233
Redirect Examination.....	5189
Recross Examination.....	5190
INDICTMENTS	5254
ARREST WARRANT	5258
NOTICE OF EVIDENCE IN MITIGATION.....	5259
NOTICE OF INTENT TO SEEK DEATH PENALTY	5260
NOTICE OF EVIDENCE IN AGGRAVATION.....	5261
MOTION IN LIMINE REGARDING EVIDENCE.....	5262
MOTION IN LIMINE TO PRECLUDE STATE FROM CALLING AS WITNESSES MEMBER OF THE VICTIM'S FAMILY ...	5263
MOTION TO EXCLUDE PHOTOGRAPHS OF VICTIM	5265
NOTICE OF MOTION AND MOTION TO COMPEL DEFENDANT TO PRODUCE WITNESS LIST	5267
MOTION IN LIMINE TO PROHIBIT TESTIMONY REGARDING ALLEGED SUFFERING OF THE VICTIM.....	5269
MOTION FOR IN CAMERA INSPECTION OF THE PROSECUTOR'S FILE.....	5270
MOTION TO COMPLY TO INSURE STATE'S COMPLIANCE WITH DISCLOSURE	5271
MOTION FOR ACCESS TO EXHIBITS	5272
MOTION TO PRODUCE.....	5273
NOTICE OF MOTION FOR PRODUCTION OF TAPED OR WRITTEN OR VIDEOTAPED STATEMENTS	5274
MOTION FOR PRODUCTION OF PHYSICAL EVIDENCE.....	5277
MOTION TO DISCLOSE NAMES AND ADDRESSES OF STATE'S WITNESSES.....	5278

MOTION FOR INFORMATION CONCERNING POTENTIAL STATE'S WITNESSES	5279
MOTION FOR DISCOVERY OF WITNESS LIST.....	5280
MOTION FOR LIST OF PROSECUTION WITNESSES	5281
MOTION TO RETAIN EVIDENCE.....	5283
MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION	5285
MOTION TO REVEAL APPLICANTS TO BE EXECUTIONERS.....	5287
NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION.....	5289
MOTION FOR CHANGE OF VENUE	5292
NOTICE OF MOTION AND MOTION TO DECLARE THE DEATH PENALTY UNCONSTITUTIONAL	5293
MOTION TO REVEAL THE DEAL.....	5294
MOTION TO PRESERVE EVIDENCE FOR INDEPENDENT DNA TESTING.....	5296
NOTICE OF MOTION AND MOTION TO INSPECT	5297
NOTICE OF MOTION AND MOTION IN LIMINE.....	5298
NOTICE OF MOTION AND MOTION TO PRESERVE NOTES.....	5301
STATE'S NOTICE OF MOTION AND MOTION IN LIMINE TO PROHIBIT THE DEFENDANT FROM ARGUING.....	5303
STATE'S NOTICE OF MOTION AND MOTION IN LIMINE TO PROHIBIT THE DEFENDANT FROM ATTEMPTING TO INTRODUCE PENALTY PHASE "EXECUTION OF IMPACT" EVIDENCE.....	5307
MOTION TO SUPPRESS SEARCH WARRANT	5312
MOTION FOR PRODUCTION OF PHYSICAL EVIDENCE.....	5313
MOTION TO RELEASE EVIDENCE FOR INDEPENDENT SCIENTIFIC TESTING.....	5314
AFFIDAVIT OF CLEON C. MAUER.....	5316

MOTION TO PREVENT DISQUALIFICATION OF SCRUPLED JURORS DURING GUILT PHASE.....	5318
MOTION REQUESTING TRIAL JUDGE TO MAKE FINDINGS OF FACTS WHEN JURORS ARE STRUCK FOR CAUSE.....	5320
MOTION IN THE ALTERNATIVE TO MAKE RESULTS OF POLICE RECORD CHECKS OR INVESTIGATIONS OF JURY VENIRE.....	5322
MOTION TO DISCLOSE PAST AND PRESENT RELATIONSHIPS, ASSOCIATIONS, AND TIES BETWEEN THE PROSECUTING SOLICITORS AND PROSPECTIVE JURORS	5324
MOTION FOR INDIVIDUAL EXAMINATION OF PROSPECTIVE JURORS AND SEQUESTRATION OF JURORS DURING EXAMINATION	5326
MOTION TO PREVENT TRIAL JUDGE FROM ASKING CERTAIN LEADING QUESTIONS DURING VOIR DIRE.....	5329
MOTION	5331
MOTION IN LIMINE (EVIDENCE).....	5332
MOTION TO PRODUCE CHAIN OF CUSTODY OF ALL EXHIBITS.....	5333
MOTION TO SUPPRESS (STATEMENTS)	5335
MOTION IN LIMINE (STATEMENTS BY DEFENDANT)	5337
MOTION IN LIMINE (OPENING AND CLOSING ARGUMENTS BY THE STATE).....	5339
NOTICE OF MOTION AND MOTION TO SUPPRESS THE EVIDENCE, TO WIT THE TESTIMONY OF WAYNE MAURICE MOOD	5341
MOTION FOR AN ORDER PROHIBITING ANY FURTHER COMMENT	5343
NOTICE OF MOTION AND MOTION TO PROHIBIT ELECTRONIC BROADCASTING OF COURT PROCEEDING.....	5344
MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING AND AFTER VOIR DIRE	5352
MOTION TO PREVENT DISQUALIFICATION OF JURORS OPPOSED TO CAPITAL PUNISHMENT.....	5355
MOTION TO SEQUESTER THE JURY	5357

MOTION IN LIMINE TO PROHIBIT ANY REFERENCE TO THE TRUTHFULNESS OF A STATE WITNESS BY SOLICITOR.....	5358
NOTICE OF MOTION AND MOTION IN LIMINE.....	5360
NOTICE OF MOTION AND MOTION TO PROHIBIT ELECTRONIC BROADCASTING OF COURT PROCEEDING.....	5362
MOTION FOR AN ORDER PROHIBITING ANY FURTHER COMMENT ABOUT THIS CASE TO THE NEWS MEDIA, T.V. STATION OR RADIO STATIONS	5370
MOTION TO PREVENT DISQUALIFICATION OF JURORS OPPOSED TO CAPITAL PUNISHMENT	5371
NOTICE OF MOTION AND MOTION FOR RECONSIDERATION.....	5373
NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA.....	5390
NOTICE OF MOTION AND MOTION TO INSPECT	5391
MOTION TO RETAIN EVIDENCE.....	5392
NOTICE OF MOTION FOR PRODUCTION OF TAPED STATEMENTS.....	5394
MOTION FOR PRODUCTION OF PHYSICAL EVIDENCE.....	5395
NOTICE OF MOTION FOR PRODUCTION OF TAPED OR WRITTEN OR VIDEOTAPED STATEMENTS	5396
MOTION TO PRESERVE EVIDENCE FOR INDEPENDENT DNA TESTING.....	5397
MOTION TO PRODUCE.....	5398
MOTION	5399

VOLUME THIRTEEN

MOTION FOR IN-CAMERA INSPECTION OF THE PROSECUTOR'S FILE.....	5401
MOTION TO REVEAL GRANT OF IMMUNITY OR OTHER CONCESSIONS.....	5402
MOTION FOR LIST OF PROSECUTION WITNESSES	5404
MOTION TO COMPLY TO INSURE STATE'S COMPLIANCE WITH DISCLOSURE	5406

MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION	5407
MOTION TO REVEAL THE DEAL	5409
MOTION FOR INFORMATION CONCERNING POTENTIAL STATE'S WITNESSES	5411
MOTION FOR LIST OF PROSECUTION WITNESSES	5412
MOTION FOR DISCOVERY OF WITNESS LIST	5414
MOTION TO DISCLOSE NAMES AND ADDRESSES STATE'S WITNESSES	5415
NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION	5416
DEFENDANT'S EXHIBIT #3 (INVESTIGATIVE REPORT)	5419
DEFENDANT'S EXHIBIT #7 (ARREST WARRANT)	5420
DEFENDANT'S EXHIBIT #8 (ARREST WARRANT)	5421
STATE'S EXHIBIT #5 (ARREST WARRANT)	5422
CERTIFICATE OF APPELLANT	5424
DEATH SENTENCE	5425
AFFIRMATION OF DEATH SENTENCE	5426
FINAL BRIEF OF APPELLANT	5427
FINAL BRIEF OF RESPONDENT	5484
FINAL REPLY BRIEF OF APPELLANT	5558
APPLICATION FOR POST-CONVICTION RELIEF DATED APRIL 7, 2006	5568
ORDER OF THE UNITED STATES SUPREME COURT DENYING PETITION FOR WRIT OF CERTIORARI FILED JUNE 12, 2006	5575
PRELIMINARY PROTECTIVE RETURN FILED OCTOBER 2, 2006	5576
RETURN, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT FILED SEPTEMBER 1, 2006	5578
AMENDED RETURN, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT FILED MARCH 15, 2007	5616

AFFIDAVIT OF DALE DAVIS FILED JUNE 20, 2007	5670
AFFIDAVIT OF MARION BOWMAN FILED JUNE 20, 2007	5672
AFFIDAVIT OF DOROTHY BOWMAN FILED JUNE 20, 2007	5673
ORDER RELIEVING CO-COUNSEL, APPOINTING NEW CO-COUNSEL AND SCHEDULING FURTHER MATTERS FILED FEBRUARY 6, 2008	5674
FIRST AMENDED APPLICATION FOR POST-CONVICTION RELIEF FILED FEBRUARY 28, 2007	5676
MOTION FOR CONTINUANCE FILED MARCH 25, 2008	5685
SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF FILED MAY 19, 2008	5689
ORDER REQUIRING DEPARTMENT OF SOCIAL SERVICES TO PRODUCE DOCUMENTS FILED AUGUST 27, 2008	5701
RESPONDENT'S OBJECTION TO AMENDMENTS, MOTION TO STRIKE, AND MOTION TO COMPEL DISCOVERY FILED SEPTEMBER 5, 2008	5703
THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF FILED SEPTEMBER 8, 2008	5710
NOTICE OF INTENT TO RELY UPON AFFIDAVITS AND OTHER DOCUMENTARY EVIDENCE FILED SEPTEMBER 15, 2008	5727
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPTEMBER 15, 2008	5729
TESTIMONY	
JONATHAN DAVIS	
Direct Examination by Mr. Brown	5815
Cross Examination by Mr. Waters	5824
Redirect Examination by Mr. Brown	5829
JAMES TAWAIN GADSON	
Direct Examination by Mr. Brown	5847

VOLUME FOURTEEN

JAMES TAWAIN GADSON

Cross Examination by Mr. Waters	5910
Redirect Examination by Mr. Brown	5932
Recross Examination by Mr. Waters	5957
Redirect Examination by Mr. Brown	5964
Recross Examination by Mr. Waters	5965

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 16, 2008	5969

TESTIMONY

RICKY DAVIS

Direct Examination by Mr. Brown	5978
Cross Examination by Mr. Waters	5992
Redirect Examination by Mr. Brown	5999
Recross Examination by Mr. Waters	6004
Redirect Examination by Mr. Brown	6009

DAVID COLLINS

Direct Examination by Mr. Brown	6022
Cross Examination by Mr. Waters	6097

MARC DEGRAEF

Direct Examination by Mr. Brown	6132
Cross Examination by Mr. Waters	6183
Redirect Examination by Mr. Brown	6199
Recross Examination by Mr. Waters	6202
Redirect Examination by Mr. Brown	6203

DAVID COLLINS

Further Cross Examination by Mr. Waters	6211
Redirect Examination by Mr. Brown	6223
Recross Examination by Mr. Waters	6233

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 17, 2008	6246

TESTIMONY

HIRAM JOHNSON

Direct Examination by Mr. Sinclair	6251
Cross Examination by Mr. Waters	6294
Redirect Examination by Mr. Sinclair	6298

Recross Examination by Mr. Waters	6301

VOLUME FIFTEEN

DARIEN WILLIAMS

Direct Examination by Mr. Sinclair	6303
Cross Examination by Mr. Waters	6354
Redirect Examination by Mr. Sinclair	6360

MARY LEMATTY

Direct Examination by Mr. Brown	6364
Cross Examination by Mr. Waters	6376

TRAVIS FELDER

Direct Examination by Mr. Sinclair	6380
Cross Examination by Mr. Waters	6426
Redirect Examination by Mr. Sinclair	6442
Recross Examination by Mr. Waters	6457
Redirect Examination by Mr. Sinclair	6461
Recross Examination by Mr. Waters	6472
Redirect Examination by Mr. Sinclair	6476
Recross Examination by Mr. Waters	6477

TIM STEPHENSON

Direct Examination by Mr. Brown	6485
Cross Examination by Mr. Waters	6518

TERRANCE VAN DORAN

Direct Examination by Mr. Brown	6526
Cross Examination by Mr. Waters	6548
Redirect Examination by Mr. Brown	6554
Recross Examination by Mr. Waters	6556
Redirect Examination by Mr. Brown	6558

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 18, 2008	6566

TESTIMONY

TERRANCE VAN DORAN

Recross Examination by Mr. Waters	6571
Redirect Examination by Mr. Brown	6576

ALVIN COKER

Direct Examination by Mr. Brown	6580
Cross Examination by Mr. Waters	6685

Redirect Examination by Mr. Brown.....	6739

VOLUME SIXTEEN

ALVIN COKER

Recross Examination by Mr. Waters	6752

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 29, 2008.....	6766

TESTIMONY

JEFF YUNGMAN

Direct Examination by Mr. Brown.....	6785
Cross Examination by Mr. Waters.....	6843
Redirect Examination by Mr. Brown.....	6878
Recross Examination by Mr. Waters	6901

DR. CARL KISSIAH

Direct Examination by Mr. Brown.....	6909
Cross Examination by Mr. Waters.....	6927
Redirect Examination by Mr. Brown.....	6943

DALE DAVIS

Direct Examination by Mr. Brown.....	6946

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 30, 2008.....	6997

TESTIMONY

NORBERT CUMMINGS

Direct Examination by Mr. Brown.....	7001

DALE DAVIS

Cross Examination by Mr. Waters.....	7131
Redirect Examination by Mr. Brown.....	7183

VOLUME SEVENTEEN

DALE DAVIS

Recross Examination by Mr. Waters	7206
Redirect Examination by Mr. Brown.....	7208
Recross Examination by Mr. Waters	7228
Redirect Examination by Mr. Brown.....	7232
Recross Examination by Mr. Waters	7241

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED NOVEMBER 24, 2008	7258

TESTIMONY

MARVA HARDEE-THOMAS	
Direct Examination by Mr. Brown.....	7262
Cross Examination by Mr. Waters.....	7329
Redirect Examination by Mr. Brown.....	7348

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED DECEMBER 18, 2008	7358

TESTIMONY

NORBERT CUMMINGS	
Further Direct Examination by Mr. Brown.....	7361
Cross Examination by Mr. Waters.....	7499

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED DECEMBER 19, 2008	7511

TESTIMONY

NORBERT CUMMINGS	
Further Cross Examination by Mr. Waters.....	7514

VOLUME EIGHTEEN

NORBERT CUMMINGS	
Redirect Examination by Mr. Brown.....	7686
Recross Examination by Mr. Waters	7732

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED DECEMBER 22, 2008	7749

TESTIMONY

WALTER BAILEY	
Direct Examination by Mr. Brown.....	7752
Cross Examination by Mr. Waters.....	7856
Redirect Examination by Mr. Brown.....	7878
Recross Examination by Mr. Waters	7890

COURT'S EXHIBIT #1, PLAINTIFF'S EXHIBIT #28 (BALLISTICS IMAGING BOOK)	7998

VOLUME NINETEEN

COURT'S EXHIBIT #2, PLAINTIFF'S EXHIBIT #42-ID, and #47 (ALVIN COKER FILE)	8101

VOLUME TWENTY

PLAINTIFF'S EXHIBIT #1 (INDICTMENT)	8938
PLAINTIFF'S EXHIBIT #2 (MOTION)	8940
PLAINTIFF'S EXHIBIT #3 (PLEA AGREEMENT)	8944
PLAINTIFF'S EXHIBIT #4 (WARRANT)	8948
PLAINTIFF'S EXHIBIT #5 (WITNESS STATEMENT)	8950
PLAINTIFF'S EXHIBIT #6 (WITNESS STATEMENT)	8954
PLAINTIFF'S EXHIBIT #7 (POLYGRAPH)	8956
PLAINTIFF'S EXHIBIT #8 (MENTAL EVALUATION)	8957
PLAINTIFF'S EXHIBIT #9 (SENTENCING SHEET)	8962
PLAINTIFF'S EXHIBIT #10 (SENTENCING SHEET)	8964
PLAINTIFF'S EXHIBIT #11 (RICKY DAVIS MEMO)	8966
PLAINTIFF'S EXHIBIT #12 (APPOINTMENT ORDER)	8967
PLAINTIFF'S EXHIBIT #13 (NOTICE OF APPEAL)	8968
PLAINTIFF'S EXHIBIT #14 (PLEA AGREEMENT)	8969
PLAINTIFF'S EXHIBIT #15 (POLYGRAPH)	8973
PLAINTIFF'S EXHIBIT #16 (STATEMENT)	8974
PLAINTIFF'S EXHIBIT #17 (WARRANT)	8975
PLAINTIFF'S EXHIBIT #18 (WARRANT)	8977
PLAINTIFF'S EXHIBIT #19 (INDICTMENT FOR ARREST WARRANT G371372)	8979
PLAINTIFF'S EXHIBIT #20 (SENTENCING SHEET)	8980

PLAINTIFF'S EXHIBIT #21 (INDICTMENT FOR ARREST WARRANT G587667).....	8981
PLAINTIFF'S EXHIBIT #22 (DOCKET SHEET).....	8982
PLAINTIFF'S EXHIBIT #23 (DOCKET SHEET).....	8983
PLAINTIFF'S EXHIBIT #24 (RICKY DAVIS DEPOSITION).....	8984

VOLUME TWENTY-ONE

PLAINTIFF'S EXHIBIT #24-B (FIREARM REPORT).....	9012
PLAINTIFF'S EXHIBIT #25 (LAB BENCH NOTES).....	9015
PLAINTIFF'S EXHIBIT #26 (BOX 3 - 1).....	9026
PLAINTIFF'S EXHIBIT #27 (DEGRAEF C.V.)	9028
PLAINTIFF'S EXHIBIT #29 (MARGARET HAWKINS STATEMENT)	9046
PLAINTIFF'S EXHIBIT #30 (TIARA COLEMAN STATEMENT).....	9047
PLAINTIFF'S EXHIBIT #31 (DR. FRIERSON'S REPORT).....	9048
PLAINTIFF'S EXHIBIT #32 (HIRAM JOHNSON MIRANDA RIGHTS FORM).....	9053
PLAINTIFF'S EXHIBIT #33 (HIRAM JOHNSON STATEMENT)	9054
PLAINTIFF'S EXHIBIT #34 (POLYGRAPH)	9055
PLAINTIFF'S EXHIBIT #35 (STATEMENT).....	9056
PLAINTIFF'S EXHIBIT #36 (DARIEN WILLIAMS STATEMENT).....	9057
PLAINTIFF'S EXHIBIT #37 (LETTER).....	9058
PLAINTIFF'S EXHIBIT #38 (WARRANT)	9059
PLAINTIFF'S EXHIBIT #39 (WAIVER OF RIGHTS FORM)	9061
PLAINTIFF'S EXHIBIT #40 (LETTER).....	9062
PLAINTIFF'S EXHIBIT #41 (JAIL RECORDS).....	9063
PLAINTIFF'S EXHIBIT #43 (ARSON INDICTMENT).....	9067

PLAINTIFF'S EXHIBIT #44 (ACCESSORY INDICTMENT)	9069
PLAINTIFF'S EXHIBIT #45 (HANDWRITTEN NOTE).....	9071
PLAINTIFF'S EXHIBIT #46 (HANDWRITTEN NOTE).....	9072
PLAINTIFF'S EXHIBIT #48 (WARRANT)	9073
PLAINTIFF'S EXHIBIT #49 (DOCKET REPORT).....	9077
PLAINTIFF'S EXHIBIT #50 (BOOKING REPORT)	9078
PLAINTIFF'S EXHIBIT #51 (LETTER).....	9079
PLAINTIFF'S EXHIBIT #52 (LETTER).....	9080
PLAINTIFF'S EXHIBIT #53 (AFFIDAVIT).....	9083
PLAINTIFF'S EXHIBIT #55 (EMPLOYMENT HISTORY).....	9085
PLAINTIFF'S EXHIBIT #56 (BOWMAN LETTERS)	9095
PLAINTIFF'S EXHIBIT #57 (MEMO).....	9109
PLAINTIFF'S EXHIBIT #58 (MEMO).....	9110
PLAINTIFF'S EXHIBIT #59 (DAVIS LOG)	9111
PLAINTIFF'S EXHIBIT #60 (DAVIS MEMO).....	9114
PLAINTIFF'S EXHIBIT #61 (MEMO).....	9115
PLAINTIFF'S EXHIBIT #62 (DAVIS MEMO).....	9116
PLAINTIFF'S EXHIBIT #63 (SENTENCING SHEET).....	9117
PLAINTIFF'S EXHIBIT #64 (CHARLES WILLIAMS LETTER).....	9118
PLAINTIFF'S EXHIBIT #65 (IVESTIGATIVE REPORT)	9120
PLAINTIFF'S EXHIBIT #66 (NOTE).....	9121
PLAINTIFF'S EXHIBIT #67 (RICKY DAVIS INTERVIEW)	9122
PLAINTIFF'S EXHIBIT #68 (WALTER BAILEY LETTER).....	9123

PLAINTIFF'S EXHIBIT #69 (MAY 15 TH LETTER)	9127
PLAINTIFF'S EXHIBIT #70 (CUMMINGS TO MARSHALL LETTER)	9128
PLAINTIFF'S EXHIBIT #71 (INDICTMENT).....	9129
PLAINTIFF'S EXHIBIT #74 (MEMO)	9136
PLAINTIFF'S EXHIBIT #75 (LIFE PROFILE)	9138
PLAINTIFF'S EXHIBIT #76 (EMPLOYMENT APPLICATION).....	9139
PLAINTIFF'S EXHIBIT #77 (APPOINTMENT OF COUNSEL)	9140
PLAINTIFF'S EXHIBIT #78 (MOTION IN LIMINE)	9141
PLAINTIFF'S EXHIBIT #79 (HARDEE-THOMAS TO BARNES LETTER).....	9170
PLAINTIFF'S EXHIBIT #79-B (KENDRA BOWMAN PLEA AGREEMENT)	9171
PLAINTIFF'S EXHIBIT #80 (DOROTHY BOWMAN PLEA AGREEMENT)	9175
PLAINTIFF'S EXHIBIT #81 (YOLANDA BOWMAN PLEA AGREEMENT)	9179
PLAINTIFF'S EXHIBIT #82 (WALTER BAILEY TRIAL OUTLINE).....	9183
PLAINTIFF'S EXHIBIT #83 - ID (BAILEY TO BARTON LETTER)	9193
PLAINTIFF'S EXHIBIT #84 (BAILEY TO DUKES LETTER).....	9194
PLAINTIFF'S EXHIBIT #85 (DARIEN WILLIAMS INTERVIEW NOTES).....	9195
PLAINTIFF'S EXHIBIT #86 (PROPOSED PLEA OFFER)	9197
PLAINTIFF'S EXHIBIT #87 (BAILEY TO GRIMES LETTER)	9200
PLAINTIFF'S EXHIBIT #88 (BAILEY TO COOPER LETTER)	9201
DEFENSE EXHIBIT #1 (POLYGRAPH)	9202
DEFENSE EXHIBIT #2 (POLYGRAPH)	9203
DEFENSE EXHIBIT #3 (POLYGRAPH REPORT)	9204
DEFENSE EXHIBIT #4 (MARION BOWMAN STATEMENT).....	9214

DEFENSE EXHIBIT #5 (MARION BOWMAN STATEMENT).....	9217
DEFENSE EXHIBIT #6 (MARION BOWMAN STATEMENT).....	9220
DEFENSE EXHIBIT #7 (MARION BOWMAN STATEMENT).....	9222
DEFENSE EXHIBIT #8 (GADSON RAP SHEET).....	9227
DEFENSE EXHIBIT #9 (HIRAM JOHNSON RAP SHEET).....	9228
DEFENSE EXHIBIT #10 (INVESTIGATIVE FILE)	9232
DEFENSE EXHIBIT #11 (JEFF YUNGMAN REPORT).....	9274
DEFENSE EXHIBIT #12 (DALE DAVIS TIME LOG)	9282
DEFENSE EXHIBIT #13 (TRACKING DOCUMENT)	9289
DEFENSE EXHIBIT #14 (REMITTITUR).....	9291
DEFENSE EXHIBIT #15 (RICKY DAVIS COURT RECORDS).....	9313
DEFENSE EXHIBIT #16 (RICKY DAVIS COURT RECORDS).....	9324
DEFENSE EXHIBIT #17 (RICKY DAVIS DOCKET SHEET)	9336
DEFENSE EXHIBIT #18 (BAILEY TO CUMMINGS LETTER).....	9345
DEFENSE EXHIBIT #19 (BAILEY TO CUMMINGS LETTER).....	9346
DEFENSE EXHIBIT #20 (CHECK REGISTER)	9347
DEFENSE EXHIBIT #21 (MINTER BILLING SHEET)	9354
DEFENSE EXHIBIT #22 (BOWMAN POLYGRAPH).....	9356
DEFENSE EXHIBIT #23 (HARDEE-THOMAS TO CUMMINGS LETTER)	9359
DEFENSE EXHIBIT #24 (HARDEE-THOMAS TO NORRIS LETTER).....	9361
DEFENSE EXHIBIT #25 (HARDEE-THOMAS TO BOWMAN LETTER).....	9362
DEFENSE EXHIBIT #26 (CUMMINGS TO HARDEE-THOMAS LETTER)	9363
DEFENSE EXHIBIT #27 (CUMMINGS TO DAVIS LETTER)	9364

DEFENSE EXHIBIT #28 (CUMMINGS TO HARDEE-THOMAS LETTER)	9366
DEFENSE EXHIBIT #29 (BOWMAN MENTAL EVALUATION)	9367
DEFENSE EXHIBIT #30 (RICKY DAVIS NOTE).....	9376
DEFENSE EXHIBIT #31 (BAILEY TO CUMMINGS LETTER).....	9377
DEFENSE EXHIBIT #32 (CUMMINGS TO BOWMAN LETTER)	9378
DEFENSE EXHIBIT #33 (BAILEY TO CUMMINGS LETTER).....	9380
DEFENSE EXHIBIT #34 (CUMMINGS TO BAILEY LETTER).....	9381
DEFENSE EXHIBIT #35 (BAILEY TO CUMMINGS LETTER).....	9382
DEFENSE EXHIBIT #36 (BAILEY TO CUMMINGS LETTER).....	9383
DEFENSE EXHIBIT #37 - ID (BAILEY TO CUMMINGS LETTER)	9384
DEFENSE EXHIBIT #38 (HARDEE-THOMAS TO BOWMAN LETTER).....	9387
DEFENSE EXHIBIT #39 (HIRAM JOHNSON CIVIL COMPLAINT).....	9388
DEFENSE EXHIBIT #40 (HIRAM JOHNSON CIVIL COMPLAINT)	9403
DEFENSE EXHIBIT #41 (HIRAM JOHNSON CIVIL COMPLAINT).....	9409
DEFENSE EXHIBIT #42 (HIRAM JOHNSON CIVIL COMPLAINT)	9424
DEFENSE EXHIBIT #43 (BAILEY TO HARDEE-THOMAS LETTER).....	9426
DEFENSE EXHIBIT #44 (BAILEY TO CUMMINGS LETTER).....	9427
ORDER OF THE SOUTH CAROLINA SUPREME COURT CONTINUING JURISDICTION OF JUDGE LOCKEMY FILED DECEMBER 12, 2008.....	9428
LETTER FROM JOHN SINCLAIR, III, FILED FEBRUARY 4, 2009	9429
LETTER FROM JIM BROWN FILED MAY 7, 2009.....	9431
MOTION TO HOLD POST-CONVICTION PROCEEDINGS IN ABEYANCE PENDING RESOLUTION OF THE MOTION FOR NEW TRIAL IN THE COURT OF GENERAL SESSIONS FILED MAY 22, 2009	9433

ORDER GRANTING CONTINUANCE AND SCHEDULING ORDER FILED MAY 26, 2009	9436
RESPONSE TO MOTION TO HOLD POST-CONVICTION PROCEEDINGS IN ABEYANCE FILED MAY 29, 2009.....	9438
FOURTH AMENDED APPLICATION FOR POST-CONVICTION RELIEF FILED JUNE 5, 2009.....	9442

VOLUME TWENTY-TWO

APPLICANT'S AMENDED BRIEF SUPPORTING THE FOURTH AMENDED APPLICATION FOR POST-CONVICTION RELIEF DATED JUNE 12, 2009.....	9461
ORDER DENYING PETITIONER'S MOTION TO HOLD POST-CONVICTION RELIEF PROCEEDINGS IN ABEYANCE FILED JUNE 15, 2009.....	9570
POST-TRIAL BRIEF IN OPPOSITION TO APPLICATION FOR POST-CONVICTION RELIEF DATED AUGUST 10, 2009	9571
APPLICANT'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION FILED SEPTEMBER 21, 2009	9773
APPLICANT'S OBJECTIONS TO THE COURT'S INTENTION TO ADOPT THE STATE'S PROPOSED ORDER FILED SEPTEMBER 16, 2011.....	9802
ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF FILED MARCH 12, 2012.....	9820

VOLUME TWENTY-THREE

MOTION TO ALTER OR AMEND JUDGMENT, PURSUANT TO RULE 59(e) FILED MARCH 19, 2012.....	9951
MEMORANDUM IN SUPPORT OF APPLICANT'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59 FILED APRIL 25, 2012	9952
RESPONSE TO APPLICANT'S MEMORANDUM IN SUPPORT OF APPLICANT'S RULE 59(e) MOTION FILED MAY 2, 2012.....	9969
ORDER DENYING RULE 59(e) MOTION FILED NOVEMBER 5, 2012	9970
NOTICE OF APPEAL, PROOF OF SERVICE DATED NOVEMBER 19, 2012	9971
MOTION TO REMAND FOR A RECONSTRUCTION OF THE PCR RECORD FILED FEBRUARY 7, 2013	9973

RETURN TO MOTION TO REMAND FOR A RECONSTRUCTION OF THE
PCR RECORD DATED FEBRUARY 19, 2013 9984

REPLY TO THE RETURN TO MOTION TO REMAND FOR A
RECONSTRUCTION OF THE PCR RECORD FILED FEBRUARY 21, 2013.....9990

ORDER DENYING MOTION TO REMAND FOR A RECONSTRUCTION
OF THE PCR RECORD DATED MARCH 21, 2013.....9999

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

PLAINTIFF'S EXHIBIT #72 (PHOTOGRAPH)
PLAINTIFF'S EXHIBIT #73 (PHOTOGRAPH)

1 used to own, you had a .380 black and gray," right,
2 you just moved on to another subject after you
3 elicited that, correct?

4 A Correct.

5 Q All right. I'm going to show you two
6 exhibits. One is Plaintiff's Exhibit 24 right here
7 and that is the SLED report of David Collins?

8 A Yes, I've seen it.

9 Q Okay. Then I'm going to show you Defendant's
10 Exhibit 8, which is the SLED run on the gun that,
11 the .380 High Point that James Gadson had
12 purchased, legally purchased prior to the murder in
13 this case.

14 A I don't see the Rule 5 Brady stamp on it. I
15 can't say a hundred percent positive I saw this.
16 I know I saw this.

17 Q Right. Do you recall or finding out in your
18 investigation that the serial number for the gun
19 that James Gadson had purchased was in fact
20 different from the serial number of the gun that
21 was recovered from the river?

22 A Yes, sir.

23 Q Okay. So obviously, then, if it came out
24 that the two serial numbers were different, that is
25 going to significantly mute eliciting just the

1 basic fact that Gadson admits he had his own .380,
2 correct?

3 A Yes, sir.

4 Q So, I think there was an allegation, I think
5 there was an examination on the fact of not
6 cross-examining the officers on the fact that in
7 Mr. Coker's notes and I believe in a warrant they
8 referred to Gadson's weapon, at the time they
9 believed it to be the murder weapon and I guess my
10 question to you is had you done so would that not
11 have muted the question you did ask, because the
12 officers could very easily explain how they figured
13 out it was not in fact the same gun and actually
14 provided documentation to that effect?

15 A The answer to your question, yes, and I
16 really don't think there is much explanation. I
17 knew that there were two guns and I wanted the jury
18 to hear that Gadson had a gun, and I did.

19 Q You deliberately kind of stopped right there,
20 correct?

21 A Yes.

22 Q All right. I want to ask you about, okay, do
23 you recall in your investigation there was an
24 incident in the police files where the murder
25 weapon had been fired at a previous incident? Do

1 you recall that?

2 A As you asked the question, murder weapon, no.

3 A weapon was fired at the housing projects in
4 Branchville.

5 Q Okay.

6 A And I'm not trying to --

7 Q I understand. Let me say it this way,
8 putting aside any issues as to underlying science,
9 you knew in fact that the weapon recovered from the
10 river that had been matched to the casings found on
11 the Nursery Road scene had also been matched to
12 that incident a few weeks prior at the projects.
13 Correct?

14 A Correct.

15 Q I want to show you Plaintiff's 29 and
16 Plaintiff's 30. Those were the statements that
17 were generated as a result of that incident,
18 correct?

19 A Yes, sir.

20 Q Okay. And it reflects in there that, that
21 the women said that Marion pulled out the gun and
22 handed it to James Gadson who fired it in the air
23 and they then collected the casings which were
24 ultimately linked to the same gun that was used to
25 fire the casings at the Nursery Road scene,

1 correct?

2 A It specifically says that Marion Bowman was
3 with Tawain, gave him the gun to shoot up in the
4 air, that's on Plaintiff's 30. Reading this again,
5 the lady says that she learned their names but she
6 forgot what the names were. That is on Plaintiff's
7 29.

8 Q There is information in there Marion had the
9 gun, pulled it out and gave it to James who fire
10 it, correct?

11 A On Plaintiff's 30, yes, sir.

12 Q And is that the kind of thing you would have
13 wanted to have elicited at trial, would that put
14 the gun that had been linked to the trial in your
15 guy's hand?

16 A Yes. I think I argued it with counsel and I
17 apologize to him for arguing with him, but I didn't
18 want it in but it shows Marion gave him the gun at
19 the projects if you believe that testimony.

20 Q Okay. There has been an allegation made,
21 going back to James Gadson, about not
22 cross-examining him on various issues that he had
23 in his statements but didn't have in his trial
24 testimony. Some of those things were, that were
25 left out of his statement were the fact that the

1 defendant was going to pistol whip another girl who
2 owed him crack money, that they of course were
3 looking for houses to rob when they went out to the
4 Nursery Road location, that the defendant made a
5 gun sign to the back of the victim's head on the
6 way out there, that he said he was going to kill
7 the victim and that he gave the victim crack before
8 killing her. And the allegation is that you didn't
9 cross-examine the fact those particular facts were
10 in Gadson's statement but not in his trial
11 testimony. Is that the kind of thing you would
12 have wanted to elicit for that impeaching purpose?

13 A I say with all candor I was shocked that
14 didn't come out. I didn't want to go down that
15 road, open up that door, you know.

16 Q Since it didn't come out on direct, it is
17 because those facts were so egregious you didn't
18 want to bring them out yourself, correct?

19 A Right.

20 Q You thought that would do more harm to your
21 client than whatever impeachment value it might
22 have because he left those out?

23 A Right. I mean, you put it in common sense,
24 "Oh, yes, I forgot to tell you about that."

25 Q Well, I guess the allegation is that if it

1 had come out that she was going along with them out
2 to Nursery Road looking for houses to rob and then
3 she could not have been kidnapped, my question to
4 you is, is that a valid point if in fact she had
5 been tricked into believing that is what they were
6 doing, when in reality they were going out there to
7 kill her?

8 MR. BROWN: Objection. That goes to the
9 ultimate issue, the validity of that point.

10 THE COURT: When you say if, are you saying
11 that is what Mr. --

12 MR. WATERS: Let me rephrase.

13 THE COURT: That's adopted as his theory?

14 MR. WATERS: Right.

15 THE COURT: Well, he's not said he adopted it
16 as his theory.

17 MR. WATERS: Let me rephrase it. I didn't
18 ask it well, I will try again.

19 BY MR. WATERS:

20 Q Again we're talking about failure to elicit
21 that testimony from James Gadson, okay?

22 A Right.

23 Q Did you decide not to do that even though the
24 argument could have been made at that point that
25 she was not in fact kidnapped, given the fact that

1 if she was tricked on the way out there that that
2 arguably could support kidnapping as well under the
3 embagle form of kidnapping?

4 A As you state the question, correct, yes.

5 Q Okay. What about eliciting those egregious
6 facts solely to examine him on the fact he could
7 have been charged with accessory before the fact as
8 opposed to accessory after the fact? Would that
9 have been enough value for you to have wanted to
10 elicit those egregious facts or did you make the
11 decision to leave that stuff out because of the
12 egregious nature of it?

13 A I did what I did that day trying to do the
14 least amount of harm to my client I could. If you
15 want to call that trial strategy, I can't call that
16 trial strategy. All I know is am I going to
17 cross-examine a guy that just cut a deal with the
18 State and expect him to get up there and say
19 anything other than he didn't do anything? That is
20 my humble opinion.

21 Q I understand. And I believe it is true you
22 didn't know about Gadson's sentencing when he was
23 initially sentenced by Judge Hughston and brought
24 back?

25 A No, I wasn't privy to any of that.

1 Q You were asked a number of questions about
2 polygraph and in examining Mr. Gadson on the fact
3 he initially gave a statement that somewhat covered
4 for Mr. Bowman, he was polygraphed, then gave a
5 more inculpatory statement, is that correct, is
6 that your memory?

7 A Yep.

8 Q I think you said you didn't think such an
9 examination on the polygraph would be admissible,
10 is that correct?

11 A Correct.

12 Q I guess also would you agree with me that if
13 you were to bring out he failed that initial
14 polygraph all that does is confirm your guy's guilt
15 that he failed the polygraph on the initial
16 exculpatory version?

17 MR. BROWN: Objection.

18 A That is --

19 THE COURT: I will overrule the objection.
20 He said would you agree to that.

21 Would you agree with him?

22 A Yes, sir.

23 Q That is an additional consideration why you
24 would not want that out?

25 A Yes, sir.

1 Q And you were asked about not cross-examining
2 on the fact the, the officers on the fact that the
3 family witnesses had been given polygraph as part
4 of their plea agreement but it was not present in
5 Mr. Gadson, I believe Mr. Felder's plea agreements.
6 Do you recall that question from yesterday?

7 A I recall the question, yes, sir.

8 Q Okay. Is that something you thought about
9 doing or was it your opinion that just going down
10 the polygraph road was not admissible?

11 A Well, number one, going down the polygraph
12 road is not admissible. We did that here today
13 with Marion's test, if the State has learned about
14 that.

15 Q Right.

16 A Again I looked at the totality of everything
17 and tried to do what I thought was best. I don't
18 know how to give you a solid answer on that.

19 Q All right. But arguably if you had brought
20 out that the other witnesses in fact had taken
21 polygraphs and passed because they were there
22 testifying, all that is going to do is just bolster
23 their testimony that harms your client, as to the
24 throwing of the gun in the river, correct?

25 A As you state that question, yes, sir. I wish

1 I could have given some of the policemen polygraph
2 tests.

3 Q I understand that. Now, you were asked about
4 whether or not you could have cross-examined
5 Stephenson on the fact of whether Gadson lied to
6 him because as you recall Gadson had given him a
7 statement in a polygraph in which Stephenson found
8 deception. Do you recall that?

9 A Yes, sir.

10 Q Okay. Do you think that would have been an
11 admissible question you could ask, that if someone
12 lied to him, then the basis for that would have
13 been the underlying polygraph?

14 A No, sir, I don't think that was admissible or
15 proper, I did not. And further I didn't think Mr.
16 Stephenson was qualified to give polygraphs because
17 he clearly wasn't qualified to do what he did
18 during that case.

19 Q One thing you did of course, though, is bring
20 out the various different versions that Gadson had
21 told in cross-examination?

22 A Yes, sir. That is what you try to do.

23 Q I think we have already addressed this.

24 There was the issue of about whether or not you
25 recall Gadson and some of the other folks back in

1 the sentencing phase testifying about drinking but
2 in the investigation, Dale Davis and Bobby Minter,
3 whatever the case may be, of Mr. Bowman, did anyone
4 ever say to you that he was drunk that night?

5 A No, sir.

6 Q That never came to you at any point during
7 the investigation?

8 A No, sir.

9 Q All right, let's talk a little bit about
10 Travis Felder.

11 THE COURT: Are you ready to proceed?

12 MR. WATERS: Yes, sir, Your Honor. I see Mr.
13 Bailey. You all did tell him 3:00 o'clock, didn't
14 you?

15 BY MR. WATERS:

16 Q Let me show you Exhibit 32.

17 MR. WATERS: I move that in evidence, I
18 believe without objection?

19 MR. BROWN: Without objection.

20 THE COURT: Okay, what number?

21 THE WITNESS: 32, sir.

22 THE COURT: Okay, in evidence.

23 (Cummings to Bowman letter marked and
24 received in evidence as Defendant's
25 Exhibit Number 32).

1 THE WITNESS; I recognize this letter.

2 BY MR. WATERS:

3 Q Okay. That was the letter that you sent to
4 Mr. Bowman after getting word that Travis Felder
5 had signed a plea agreement or had agreed to a
6 plea, is that right?

7 A Yes, sir.

8 Q I believe you went on to again note that a
9 plea offer was still outstanding at that time.
10 Correct?

11 A I had gone back and begged, I begged Marion,
12 my own words in there, saying, "Everyone has cut a
13 deal in this case, they are all going to testify
14 against you," and I basically asked him to save his
15 own life, I did.

16 MR. WATERS: Okay. Your Honor, I have marked
17 a document Defendant's 33 that I believe I offer
18 without objection.

19 MR. BROWN: Without objection.

20 THE COURT: All right, in evidence.

21 (Bailey to Cuumings letter marked and
22 received in evidence as Defendant's
23 Exhibit Number 33).

24 BY MR. WATERS:

25 Q Is that a document from a letter from the

1 Solicitor reflecting discovery on the polygraph
2 regarding Travis Felder?

3 A It says that in paragraph one, polygraph date
4 4/17/02.

5 Q So, there is no question that you had a copy
6 of that, right?

7 A Again, I don't remember seeing a copy. I
8 know we got a letter. I'm trying to remember off
9 the top of my head. Of course Walter is sending me
10 an evidence transfer form dated 2/28/01 on 24 April
11 of '02. The letter was sent out 24 April of '02.

12 MR. WATERS: Your Honor, I have documents
13 Defendant's 34 and 35 which I offer in evidence I
14 believe without objection.

15 MR. BROWN: Without objection.

16 THE COURT: They're in evidence.

17 (Cummings to Bailey letter was marked
18 and received in evidence as Defendant's
19 Exhibit Number 34).

20 (Bailey to Cummings letter was marked and
21 received in evidence as Defendant's Exhibit
22 Number 35).

23 BY MR. WATERS:

24 Q Okay. I'm going to talk to you a little bit
25 about the videotape from the Horizon store. I want

1 to show you that letter first, from Walter Bailey,
2 and that reflects delivery of the video tapes taken
3 from the security camera at the Verizon Mart?

4 A I remember those. I don't know if Bobby
5 brought a camera up there or did something. That
6 was after I was in the case and I told them yes,
7 and the autopsy photos.

8 Q There is no question you had those
9 videotapes?

10 A Yes, sir, no question.

11 Q And 34?

12 A A letter from me to Walter thanking him for
13 meeting with us and obtaining video and
14 surveillance photos at the gas station.

15 Q Okay. So, no question that you had the
16 videos and you showed them to Mr. Bowman, right?

17 A That's my recollection, that's correct.

18 Q Okay. And there is no question that at that
19 time you knew that Travis Felder was on that tape,
20 from watching it with Mr. Bowman, correct?

21 A The best of my recollection, again yes.

22 Q And Mr. Bowman told you that Travis Felder
23 was on that tape, correct?

24 A Yes.

25 Q So, when you went to trial there was no, that

1 was no surprise, you were well aware of that
2 information, correct?

3 A I don't think it was any surprise.

4 Q Okay. Well, I mean was there or not?

5 A No, I mean, no.

6 Q All right. So, when Travis testified during
7 the guilt phase and did not mention purchasing the
8 gas beforehand why did you decide not to elicit
9 that from him at the time?

10 A I don't know. I can't sit here and tell you
11 why I didn't do it. I don't know. Maybe I didn't
12 want how he purchased the gas or for whom.

13 MR. BROWN: Your Honor, I object to that
14 speculation.

15 THE COURT: If you don't know you don't know.

16 Q You don't recall saying you saw no good in
17 that coming in, it was ultimately confirmatory of
18 what Felder had said?

19 A I just said a moment ago I don't recall, I
20 didn't remember if I chose not to. To answer the
21 question, I must have had a reason at that time and
22 it would be hurting, but again I really can't say
23 that today, I can't. I'm trying to go back and
24 think. I know I didn't choose certain lines of
25 questions in this case, I chose not to do that, and

1 we have been over that now for three days. To
2 answer your question in particular about that, I
3 don't recall specifically the reason why, I don't,
4 other than I tried the case as I thought
5 appropriate.

6 Q So, you don't remember, you don't remember
7 expressing to me a strategic reason for that?

8 MR. BROWN: Your Honor, this is some kind of
9 vouching or bolstering here. Now he is going into
10 a conversation they have had.

11 MR. WATERS: I did not --

12 THE COURT: He asked if he remembered. If he
13 doesn't remember he doesn't remember.

14 THE WITNESS: I really don't, sorry, sir.

15 THE COURT: He doesn't remember.

16 MR. WATERS: Okay.

17 BY MR. WATERS:

18 Q So, you don't recall ever saying you saw no
19 good in, that you saw no good in it coming in, that
20 you held it back in the guilt phase because it cuts
21 both ways but that ultimately you --

22 THE COURT: He says he doesn't remember.
23 Let's proceed.

24 MR. WATERS: I was trying to refresh his
25 recollection.

1 MR. BROWN: With a conversation they had.

2 THE COURT: Do you remember anything, Mr.
3 Cummings?

4 THE WITNESS: No, I don't. No, sir, I don't.

5 THE COURT: He doesn't remember.

6 THE WITNESS: I don't know what to say.

7 BY MR. WATERS:

8 Q Okay. Do you recall whether or not it was an
9 intentional decision at this point? I'm asking you
10 if you recall.

11 THE COURT: That's a different area.

12 A I don't believe it was intentional. I don't
13 believe I would not have asked something or if I
14 thought at the time something else was going to
15 come out about it. There was no gasoline on my
16 client's pants, I didn't want anybody tying him to
17 Felder, for Marion telling him to go buy the gas.
18 I would say that with open heart. So, if I, when I
19 was meeting with you I said something I don't
20 recall it, I don't remember. I don't.

21 Q I'm not quite sure if I understand that
22 answer, not about the memory thing, but from what
23 you were just saying there was no gas on your guy
24 and so you didn't want the videotape with Felder
25 tying him in with your guy, or I'm not sure I

1 understood?

2 A As the case flowed, of course Travis was not
3 going to testify up until recently before the
4 trial, and I was not going to call Travis in my
5 case in chief, obviously, or Gadson, so I wasn't
6 going to try to put some helping information in
7 through Gadson that everybody thinks would help and
8 in my opinion might hurt Marion because there he is
9 buying the gas for who, who told him to do it, who
10 told him why? And if you believed everybody else's
11 conversations throughout this case that he came
12 back, got Felder out of an apartment, had a party
13 late in the morning, early in the morning, and then
14 asked him for some help. I knew what the help was
15 for. I didn't want that wonder what the help was
16 for to come out. I did not.

17 MR. WATERS: The Court's indulgence one
18 moment?

19 Q All right. I'm going to show you 4622 in the
20 record on appeal. I'm going to have you read from,
21 beginning on line 25 on 4621, over to 4623, and see
22 if that refreshes your recollection about that
23 issue.

24 A "It was a chain problem with the tape and I
25 felt that might have helped us a little bit, one of

1 the ladies from the store moved to Florida. Then
2 Marion demanded the tape be shown and they were
3 very quick to say they were going to stipulate to
4 the chain."

5 Q Correct me if I'm wrong but it seems to me
6 that showing that tape for the issue about the gas
7 was kind of a personal thing that Mr. Bowman won
8 over you all's advice. Is that correct?

9 A As you asked the question, yes.

10 Q So, obviously there was an intentional reason
11 not to show it at some point. Is that not correct,
12 as reflected but this passage in the transcript?

13 A Right. That refreshes my memory about that.
14 It was a chain problem, the State couldn't put it
15 in.

16 Q All right. I'm going to show you Plaintiff's
17 17 and 18. I show you 17 first, which is the
18 warrant for Travis Felder for accessory to murder.
19 I will have you look at that real quick. And
20 specifically in the affidavit portion, down where
21 it states a co-defendant Marion Bowman, Jr.,
22 provided a written statement wherein he stated that
23 between the incident times aforementioned the
24 defendant and co-defendant James Tawain Gadson took
25 the victim to a remote area of Dorchester County

1 where they shot and killed the victim.

2 Now, obviously technically the way that reads
3 it seems to be saying that, that Gadson and Felder
4 took Kandee to the woods and shot her. Correct?

5 A As it reads that way, yes.

6 Q Okay. And that allegation I guess had been
7 raised as to why you didn't cross-examine the
8 officer on that right there. Do you recall
9 anything about that?

10 A No. Could I see the other one, please, the
11 other warrant? Let's see what that one says as for
12 as --

13 Q Sure.

14 A The same thing. If you look at it, it's the
15 same wording and then it goes on further on 18 to
16 say value of about eight-thousand dollars. That
17 was the burning of the vehicle and the body.

18 Q It appears to be a cut and paste. Is that
19 correct?

20 A Yes, as I said earlier.

21 Q So, obviously had you asked about that there
22 would have been a simple explanation that it was a
23 cut and paste and a typo, as you said. Is that
24 correct?

25 MR. BROWN: Your Honor -- I withdraw it.

1 A Not just as I saw it. I can state it right
2 here right now. I cross-examined people on
3 warrants so many times, I have gotten yelled at by
4 every Circuit Court judge I know.

5 THE COURT: Now, wait.

6 THE WITNESS: Yes, sir, except you, Judge
7 Lockemy.

8 THE COURT: I haven't fussed at you.

9 THE WITNESS: No, sir, not yet. It is an
10 arrest warrant, you can talk about it a little bit,
11 it carries no weight in the courtroom, the
12 indictment controls. If I'm wrong in that, correct
13 me.

14 BY MR. WATERS:

15 Q All right. I guess my point is that looking
16 at that and what appears to be a cut and paste, if
17 you examine, if you were to examine the officers on
18 that fact, that it's going to bring out the fact
19 that the co-defendant Marion Bowman, Jr., provided
20 a written statement. Correct?

21 A Yes, sir. Could have done that as well as
22 other things. It is an arrest warrant and I know
23 everybody wants to say why did you do this or why
24 didn't you do that? All this, he was indicted by
25 the time I got appointed and if you want to go back

1 and look at the games about how they made these
2 arrests, they argued all that through their
3 suppression motion, we did Blair hearings, we did
4 suppression hearings, we did everything we could,
5 everything from search and seizure. So, if you're
6 asking me why I didn't ask the policemen how they
7 screwed up warrants and how they couldn't even cut
8 and paste right. I think that is about as
9 insignificant as a minnow in a food chain.

10 MR. BROWN: I object because that is
11 non-responsive and that has never been the point.

12 THE COURT: That is a couple editorial.

13 THE WITNESS: Yes, sir, I apologize. I don't
14 know how to answer that anymore.

15 MR. WATERS: Your Honor, I think that is
16 particularly responsive, I thought it was
17 significant.

18 THE COURT: That is his thought. Let's
19 proceed on.

20 MR. WATERS: Thank you, Your Honor.

21 BY MR. WATERS:

22 Q Okay, we already established with that letter
23 you were aware obviously Mr. Felder had come up
24 with that plea agreement late in the process,
25 correct?

1 A Yes, sir.

2 Q All right.

3 A I sent a letter out to Marion after that,
4 begging him --

5 Q Okay. I'm going to show you 4108, starting
6 with up here, that is your cross-examination of Mr.
7 Felder on the plea agreement?

8 A Yes, sir. I asked the specific questions
9 about that. His answer was, "Around last week
10 sometime," line 4, page 4108.

11 Q So, from reading that it appears to me that
12 although the agreement was not signed at that
13 point, you had the basis of it, you had knowledge
14 of that, correct?

15 A Yes. I'm told by everybody at the eleventh
16 hour he's going to flip on my client, so I said
17 please enter a plea bargain, to try to comply with
18 the law.

19 Q Okay. This is in the sentencing phase, page
20 4909, I'm going to show you that. That is Mr.
21 Bailey talking. That is when Mr. Felder was called
22 back and that reflects that at that point the
23 written plea agreement was in fact given to the
24 defense, correct, or a copy was provided?

25 A This is in the penalty phase?

1 Q Yes, sir, when Felder was recalled.

2 A Yes, sir. I don't remember Walter talking.
3 I'm sorry, I was trying to pay attention and have a
4 little issue with my client, talking with him, so
5 I'm sorry if I don't remember Mr. Bailey standing
6 up giving his dissertation. I don't. I'm reading
7 it now. And then it does go down to line 18 on
8 that page, "I have not even signed this yet, it
9 just came in the mail, so I will sign it and run a
10 copy for them."

11 We're in the penalty phase and this is not
12 even done yet. I wasn't aware of it.

13 Q Until Mr. Bailey disclosed it at that point,
14 correct?

15 A Yes, he's talking -- I got to tell you, I
16 think I was a little bit more busy, I'm sorry, I
17 was.

18 Q No, I understand. I understand. Do you
19 remember an issue on the videotape with the guy
20 with the Jamacian voice saying somebody had said
21 something about a girl being killed out by the gas
22 pumps?

23 A Yes.

24 Q Okay. Do you recall sending Walter Mitchell
25 out trying to find out something about that, to

1 Orangeburg?

2 A Yes, sir.

3 Q Okay. Did you all ever discover anything of
4 value in the course of that investigation?

5 A No, sir.

6 Q You were asked a little bit about this
7 yesterday at the beginning but I want to make sure
8 we're clear about any sort of conflict by the fact
9 that Mr. Gadson was represented by Gene Dukes and
10 Mr. Bowman by Marva Hardee-Thomas, both being
11 Dorchester County Public Defenders. Did you see a
12 conflict in that situation just by the nature of
13 their jobs?

14 A To answer your question, no, because at that
15 time as I understood it they were independent
16 people, they didn't have a joint office, they
17 didn't share a joint anything. Miss Thomas worked
18 out of her office and Gene worked out of his.
19 That's the way I understand it.

20 Q Your understanding was they were independent
21 contractors who essentially maintained separate
22 businesses, for lack of a better word?

23 A Yes, sir.

24 Q Separate practices?

25 A Correct.

1 Q All right. All right, let me ask you a
2 little bit about Hiram Johnson. As I understand
3 it, you were unaware of anything to do with the
4 possibility of a lawsuit from him being shot in the
5 head by Orangeburg officers?

6 A I found out that John O'Leary, I believe,
7 represented Hiram. I think Mr. O'Leary was in
8 there.

9 Q Right.

10 A And Marion told me that, Marion told me he
11 was shot by a cop, okay, yes.

12 Q You said Mr. O'Leary was at the trial?

13 A No, not at the trial. I think John O'Leary
14 represented him. I know John personally.

15 Q When did you find that out? Do you recall?

16 A I don't recall but I know Marion told me he
17 was shot in the head and he wasn't all there.

18 Q All right. What about cross-examining Hiram
19 on whether or not he went to the scene where the
20 body was, from Darien Willians' claim in his
21 statement that Hiram had gone there?

22 A I cross-examined Hiram as I thought I should
23 have done. I don't know what else you gentlemen
24 want me to talk to you about. Was I supposed to
25 cross-examine him about what somebody else said?

1 Q That is just the allegation, I'm not saying
2 you should have.

3 A I didn't do it. I cross-examined him the way
4 I cross-examined him. I don't know how to explain
5 that any other way.

6 Q Can you cross-examine somebody on something
7 you know not to be true?

8 A No, sir.

9 Q Did you have any information from your
10 investigation that Hiram went to the scene?

11 A No, sir. From everything I developed, I did
12 not think that gentleman was there.

13 Q Okay. What about cross-examining Hiram on
14 whether or not Hiram thought that Marion was
15 kidding when he said, "I killed Kandee, hee, hee,
16 hee"?

17 A Again, I cross-examined Hiram as I thought
18 appropriate.

19 Q All right.

20 A I hope I cross-examined him.

21 Q Right.

22 A I don't have it in front of me, I don't
23 remember the words I used, or sentences, but I know
24 I cross-examined every witness.

25 Q Okay. Is that something you just want to

1 shoot out of the blue on, if you didn't know the
2 answer to it?

3 A Me, no.

4 Q How about examining Hiram on the fact that if
5 he had gloves on in the car that he potentially
6 could have been charged with possession of a stolen
7 vehicle if he had on the gloves in the car, thus
8 indicating he knew it was stolen? Is that
9 something you considered doing?

10 A I don't think I considered that at all, sir,
11 no.

12 Q Would you consider that useful?

13 A No.

14 Q What about calling Darien Williams, who gave
15 a number of conflicting statements, is that
16 something you considered doing?

17 A I wouldn't call him, no, sir.

18 Q And why is that?

19 A When is he going to stop lying? He told one
20 statement and then told another. I'm not running
21 that risk, putting somebody up there to hurt him.

22 Q Okay. Do you recall getting notice from the
23 Solicitor during discovery about a Wayne Mood?

24 A That's the gentleman represented by Cam
25 Marshall? We got that like late in the game and it

1 was one of the last questions Mr. Brown asked me
2 about before we took the long break to do my other
3 case.

4 Q Right.

5 A And it clicked a bell that was Cam Marshall's
6 client, because Cam worked with Jack in the Ninth
7 Circuit, Mr. Sinclair.

8 Q Okay. You in fact ultimately filed a motion
9 to prohibit him from testifying, correct?

10 A Correct. He wasn't on the witnesses list for
11 one of the reasons, I don't believe.

12 Q I'm going to show you page 5341 of the
13 record. See if that is that motion that you filed?

14 A Correct. It was done May 8th, '02.

15 Q All right. I'm going to show you page 3602,
16 starting at line 13. See if that was your
17 discussion of that motion for prohibiting Mr. Mood
18 to testify?

19 A That was the second part I just told you
20 about. He wasn't on the witness list.

21 Q Right.

22 A And of course I asked Mr. Marshall if we
23 could see his client and talk to him. He said of
24 course no, like everybody else did.

25 Q Okay. Why did you not want Wayne Mood to

1 testify?

2 A I didn't know what he was going to say. I
3 mean, I can read what he might tell the Solicitor
4 in a proffer or whatever, or allegedly say, "I've
5 got information to inculcate or exculpate," but you
6 don't really know what they are going to say.

7 Q Correct.

8 A It was late in the game, you already know
9 what is going on, he wasn't on the witness list.
10 Why all of a sudden? Mr. Mood was trying to cut a
11 deal, get time off his sentence.

12 Q Was it because the proffer had harmful
13 information to your client or is it just that you
14 didn't know what to say or a combination of both or
15 what?

16 A Everything. I mean, it is last minute, Mr.
17 Bailey knew about it for three months according to
18 what I have just read and, you know, and had been
19 told about. Why didn't I get it three months ago?
20 I get it on the eve of trial? So, it is like an
21 ambush and I'm not walking into an ambush.

22 Q Right. Obviously if it had something
23 favorable to your client you wouldn't have made
24 those motions, right?

25 A Yes, sir, but even then I still would have

1 been scared to death unless I was sure that is what
2 they were going to say. Here is a guy in jail who
3 wants to help at the last minute.

4 Q Right.

5 A Okay. Everybody knows about jailhouse
6 lawyers and jailhouse confessions, they all come
7 out of the woodwork to try to get time off their
8 time.

9 Q Okay. Do you remember we talked a little bit
10 earlier about the letters that Mr. Bowman had
11 written to his wife Dorothy? Right?

12 A I had told him when I first met that young
13 man anything, anything he says is going to get back
14 to the Solicitor. It happens in each trial, and I
15 couldn't believe the family, after I find he didn't
16 listen to me and wrote the letters.

17 Q The family what?

18 A The family turned them over to the Solicitor.

19 Q That is something you do in the course of
20 your practice, tell them?

21 A I tell them to remain silent, there is
22 jailhouse people right nextdoor, jailhouse rats,
23 Chicken George was the most famous one I remember.
24 He got his in the end. And what happens is, they
25 all want to come in and they read their paperwork,

1 they read their letters, they talk about trial
2 strategy to inmates. Inmates go tell the
3 Solicitor's investigators, everybody, it's a mess
4 and they pounce on that, and I know it's going to
5 happen so I warn them don't speak to anybody, don't
6 write anything down, if you love your wife send her
7 a card and tell her how much you love her, for
8 God's sakes don't ever suborn perjury or tell them
9 what to do with evidence.

10 Q I think we covered this but in fact one of
11 those letters where he tells his wife he loves her
12 he also suborns perjury or tells people to behave a
13 certain way with regard to evidence. That kind of
14 ruins it for you, doesn't it?

15 A I think it ruins it. The whole bit of
16 evidence comes in finally. Our Supreme Court has
17 said that You don't just get to put bits and pieces
18 in, you put it all in.

19 And I have one more issue on that one and
20 that is, for the love of me, the lady did not want
21 to help me in that courtroom. I had to fight with
22 her to get her please help him.

23 Q The wife?

24 A Yes.

25 MR. WATERS: Your Honor, we apologize, we're

1 looking for an exhibit.

2 THE COURT: Found it?

3 MR. WATERS: Yes, sir.

4 THE COURT: Everybody about ready to start?

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

6 BY MR. WATERS:

7 Q All right, Mr. Cummings, sorry about the
8 delay. I'm showing you Defendant's 36. I just
9 want to ask you if that is the cover letter from
10 Mr. Bailey sending along the statements of Ricky
11 Davis?

12 A That is what it appears to be, yes, sir..

13 Q All right.

14 MR. WATERS: I move that into evidence, I
15 believe without objection.

16 MR. BROWN: Without objection.

17 THE COURT: In evidence.

18 (Baily to Cummings letter marked and
19 received in evidence as Defendant's
20 Exhibit Number 36).

21 BY MR. WATERS:

22 Q All right. And 37 is also a letter from the
23 Solicitor?

24 A Yes. I found this letter really interesting,
25 "I late to argue with you, my friend and adversary.

1 I previously forwarded you written statements from
2 Ricky Davis. I also interviewed Wayne Mood,
3 although no statement was taken from him, and I am
4 attaching herewith notes I typed from my
5 handwritten notes in the event James Tawain Gadson
6 testifies," and 7 May, he was not going to testify.
7 This is the interview with Wayne Mood.

8 Q Okay. You recall getting that?

9 A I got that.

10 Q I understand your problem with getting it
11 late in the day. That is the stuff you got,
12 unquestionably, correct?

13 A Yes, I got that on Wayne Mood, yes.

14 MR. BROWN: Your Honor, I hate to object but
15 the word stuff makes it a little unclear because we
16 have raised the issue about item 67 which is in our
17 opinion not referenced in that letter and I don't
18 know if that answer stuff includes, whether the
19 stuff that came with the letter, with what is
20 purported to be --

21 MR. WATERS: I'm just referring to this
22 letter, Your Honor, the handwritten statement of
23 Ricky Davis that I think we all agree on.

24 MR. BROWN: Which is Plaintiff's 11,
25 Petitioner's 11.

1 MR. WATERS: Correct.

2 THE COURT: Yes. All right, let's proceed
3 on.

4 MR. WATERS: Thank you, Your Honor. Your
5 Honor, that may be about it if you will give me a
6 chance to review my notes.

7 THE COURT: All right.

8 MR. WATERS: Your Honor, nothing further,
9 thank you.

10 THE COURT: Redirect?

11 MR. BROWN: Yes, sir, may it please the
12 Court.

13

14

15

16

17

18

19

20

21

22

23

24

25

REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q Sometime the best way to go through it is kind of go back through the same way he went through, and you said you talked to an expert about what time the semen sample was placed?

A I wanted to talk about how long the semen would be in, you know, how much damage fire would have done, when it could have been there, how long it lasted, the condition the semen could be in, how long the DNA would last, and whether the State could prove at that time that that issue might have occurred on Nursery Road, with somebody leaving a sample there, yes.

Q Okay. And what was the answer?

A DNA will last as long as there are certain body conditions, temperatures. If the body is damaged by fire of course it eats it up, it will evaporate or dissipate. The way a body is moved leakage could occur. Usually time destroys liquid DNA.

Q So, nothing said that occurred on Nursery Road?

A From everything we learned.

Q Nothing from your experts, consults?

1 A Yes, because I have to give them the
2 information. I just consulted them about the match
3 and then we talked about what would happen if this
4 was done or that question, yes.

5 Q Let me show you what has been marked
6 Plaintiff's Exhibit 74 and entered in evidence,
7 which is a memo from Miss Davis. Now, one thing
8 you were asked about was your consults with an
9 expert regarding Mr. Bowman's ability to read?

10 A Right.

11 Q And I don't want to characterize the State's
12 position on that but it was a question about
13 whether that was some type of malingering or some
14 type of false statement about his reading problems?

15 A The State said he was malingering.

16 Q And does that document put you on notice
17 regarding Mr. Bowman's reading problems?

18 A This was from Miss Davis saying what Dr. West
19 said. If you will show me anything about what Dr.
20 West said I will be happy to review it. I don't
21 recall.

22 Q I'm asking did Miss Davis put you on notice
23 that --

24 A Miss Davis put me on notice what kind of
25 incompetent man I am.

1 MR. BROWN: Your Honor, I would ask it be
2 responsive.

3 A It is responsive.

4 Q That put you on notice about a reading
5 problem, I'm not talking about --

6 THE COURT: Let's ask this. Does that
7 document have --

8 A Judge, this is her comment. "According to
9 Dr. West his learning disabilities begin to catch
10 up with kids in the fourth or fifth grade. Marion
11 failed fourth grade and began having lots of
12 problems after that."

13 Q I don't mean to belabor the point. Maybe I
14 can help.

15 A All right.

16 Q Is it not true that in the fifth paragraph it
17 says that he, quote, clearly has a reading problem?

18 A From her.

19 THE COURT: She says the doctor says?

20 Q Yes.

21 A It says that at the beginning, Dr. West
22 stated Marion clearly has a reading problem.

23 Q Does that put you on notice Marion had a
24 reading problem?

25 A Yes. I discussed it Miss Hayes, yes.

- 1 Q Was she a neuropsychologist?
- 2 A No, no.
- 3 Q Was Dr. West?
- 4 A No.
- 5 Q Dr. West was?
- 6 A I don't remember his exact credentials but I
7 know he was a qualified psychologist at least.
- 8 Q Okay.
- 9 A Yes.
- 10 Q Fair enough. He had a Doctorate?
- 11 A It wasn't an M.D. or else he would be a
12 psychiatrist, right?
- 13 Q He had a Doctorate?
- 14 A Right.
- 15 Q He would be a neuropsychologist?
- 16 A Ph.D with a specialty.
- 17 Q The lady who told you he was malingering, did
18 she have a degree commensurate with a doctor?
- 19 A I don't believe that she did. I don't recall
20 her exact credentials today but I believe she at
21 least had a Master's Degree, if I'm not mistaken.
- 22 Q Why didn't you put up Dr. West?
- 23 A I didn't put him up.
- 24 Q Why?
- 25 A I just didn't do it, sir, no other reason

1 than that, I didn't put him up.

2 Q Okay. How did the jury find out about the
3 reading problem?

4 A I don't think they did.

5 Q Fair enough. Now, if you have an obligation
6 to present mitigating testimony or mitigating
7 information, to investigate and develop it in
8 mitigation it's common to delegate that duty, isn't
9 it?

10 A Yes.

11 Q The buck stops with you, doesn't it?

12 A Absolutely.

13 Q So, every time you said Miss Davis didn't do
14 something it's your shortfall, isn't it?

15 A That's correct.

16 Q All right. Now, you mentioned the fact that
17 this case was difficult because the traditional
18 mitigating witnesses were also charged as
19 co-defendants?

20 A Correct.

21 Q And although different from some capital
22 cases, that can't be the only time that that has
23 occurred in capital litigation in the United
24 States?

25 A No, sir, not in the United States.

1 Q Okay. So, what steps did you take to conquer
2 that unusual difficulty in the presentation of
3 capital proceedings?

4 A We called upon other lawyers to help, we
5 found other people like reverends or other people
6 in the community willing to come to court and help
7 portray a positive image for the defendant on trial
8 for his life. I even asked one of the sisters to
9 come back to court and testify, which she did. His
10 mom and anybody else that would be of redeeming
11 value, yes.

12 Q Why wasn't any information presented about
13 Marion's ability to be of emotional value to his
14 children if given a life sentence?

15 A I thought I did. If I didn't do it, I don't
16 believe that, I know I said what a good daddy he
17 was, he took care of stepchildren, I know I did.

18 Q And if you didn't say that?

19 A I would be wrong.

20 Q Okay. How about presenting expert testimony
21 after they interviewed any folks who would be able
22 to shed light on his parenting?

23 A There was Mr. Yungman.

24 Q If Mr. Yungman says he didn't know why that
25 information wasn't presented --

1 MR. WATERS: Your Honor, I object.

2 Q -- would that be a shortcoming of the
3 mitigation case?

4 THE COURT: If Mr. who said it?

5 MR. BROWN: Mr. Yungman said that.

6 THE COURT: But isn't that pitting one
7 witness against the other?

8 MR. BROWN: No. I'm asking if that would be
9 a mitigation shortcoming. He has already said, I
10 have set it up, are these shortcomings by these
11 mitigation people your shortcoming.

12 THE COURT: Therefore if Mr. Yungman worked
13 for him, whatever shortcomings are there, the stuff
14 he gathers --

15 MR. BROWN: He is the man in charge. He said
16 Mr. Yungman would be the person who presented this
17 information.

18 THE WITNESS: Right.

19 BY MR. BROWN:

20 Q If he didn't do it that would be a
21 shortcoming on your part?

22 A Absolutely.

23 THE COURT: Will, that's not true.

24 MR. WATERS: I object.

25 THE COURT: He said it but whether it's true

1 or not --

2 MR. WATERS: That is not even the law, Your
3 Honor.

4 THE COURT: Well, you might say it might not
5 be the law, whether someone is granted a PCR or
6 not, but he says he feels it's his shortcoming.

7 BY MR. BROWN:

8 Q Let me make sure we're clear on this. The
9 obligation to present a mitigation case is an
10 obligation of an attorney?

11 A I presented it. Yes, sir.

12 Q And Mr. Yungman, although now licensed, was
13 not an attorney, was he?

14 A No.

15 Q And the obligations of Miss Davis, she wasn't
16 an attorney, we made this clear, we have already
17 been through this?

18 A Absolutely, sir.

19 Q Okay. So, between Marva Hardee-Thomas and
20 you, you all are the only two people allowed by law
21 to stand up in front of a jury and present
22 mitigation on behalf of Mr. Bowman?

23 A That's correct, and we did. Whether or not
24 it was a shortcoming or not, sir, is an issue in
25 your argument.

1 Q Okay. Now, what are the rules regarding the
2 State's use of information obtained during an
3 evaluation at the State Hospital, against the
4 person who provides that information?

5 A Normally it's not allowed because, again,
6 normally you have a lawyer up there at that time
7 that protects the client's Fourth Amendment rights
8 and his Fifth Amendment rights in case they want to
9 do anything above blood, hair, whatever they needed
10 to have for testing to tell if his head was damaged
11 or whatever. But the Fifth Amendment clearly
12 should have been protected up there.

13 Q How about state law?

14 A Our state law follows the federal government,
15 it does, and also ours is even more stringent.

16 Q What does it say?

17 A Basically says what he says there in hopes of
18 aiding the doctors, it should not be released, that
19 is my understanding, it is not admissible in court.

20 Q Okay. Now, what are the exceptions to that?

21 A The exception is if he lies or takes the
22 stand and says different from it or we find another
23 expert that would differ from the other opinion and
24 I want to use my expert to open up the door about
25 what the doctor has tried to elicit from him.

1 Q Okay. Now, assuming that's the case, what
2 would the discussion about him being intoxicated or
3 tipsy, to use a different definition of it, on
4 February 16, 2001, how would that open the door to
5 any statement Mr. Bowman gave?

6 A Was he drunk at the time of the incident, was
7 he drinking that morning, could he reflect or
8 remember what he said in one statement or another,
9 how did he remember the details, how can he prove
10 he wasn't there. You name it. Anything could have
11 come out. There were so many statements flying
12 around and different people that I didn't want to
13 elicit that he is out there drunk at 0800 in the
14 morning.

15 Q Let's back up a little bit. Let's talk about
16 that fourth statement he gave that has been
17 suppressed as being involuntary.

18 A All right.

19 Q Explain to me your understanding of the law
20 regarding permissible use of a statement that has
21 been ruled involuntarily given by coercion, which
22 it violates not only state law, state constitution,
23 federal law, the Geneva Convention?

24 A It's against the rules of evidence to come in
25 if it is suppressed, exactly as it states, but if

1 there is anything brought out that would differ
2 from what was written in that statement they would
3 have a right to impeach him. That is my
4 understanding.

5 Q So, they can use it for impeachment purposes?

6 A Correct.

7 Q You opted in your strategy to determine what
8 questions you would ask, including this question
9 about drinking, with that understanding of the law?

10 A Not just that understanding. I didn't want
11 it to come out that Marion was drinking that time
12 in the morning, I didn't.

13 Q But more than one time there was reference to
14 that this fourth statement would be allowed in or
15 you had opened the door?

16 A You think I'm Judge Goodstein?

17 Q I'm not asking --

18 MR. WATERS: Judge, I object. I was talking
19 about the William S. Hall report.

20 MR. BROWN: I haven't asked the question.

21 MR. WATERS: Ask the question, please.

22 BY MR. BROWN:

23 Q But your understanding, the door can be
24 opened to use an involuntarily, coerced statement
25 to impeach the defendant?

1 A I believe Judge Goodstein had a hard time
2 suppressing that statement and the State argued, as
3 you guys have read, every chance he got to open
4 that back in because that would have been the nail
5 in the coffin, and I was cautioned by the judge in
6 chambers, I was cautioned don't give Mr. Bailey the
7 chance to bring it back out, I followed it. So,
8 that is what I did.

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

10 Q And I want to make sure I understand. Was it
11 your understanding of evidence and law regarding
12 the use of involuntary statements altered by the
13 judge in her instructions to you or did you always
14 believe that it could be used for impeachment?

15 A I thought once it was ruled inadmissible for
16 violations of our protections both in federal and
17 state constitutions that it would not be
18 admissible. Then I was cautioned that it could be
19 if I opened the door, and I said okay, and we
20 talked about it. There ain't no way in heck I was
21 going to open up the door for those statements.

22 Q And we're talking about, you mentioned the
23 word impeach?

24 A Right.

25 Q Okay. So, you thought it could be opened for

1 impeachment?

2 A Right.

3 Q And since you mentioned Her Honor, one thing
4 that, and I have it in my notes, I beg the Court
5 some indulgence here, when you were asked about
6 cross-examining Felder regarding, or
7 cross-examining the officers regarding Fedler's
8 warrant you mentioned that you had been yelled at?

9 A Yes.

10 Q Did the yelling by the judge limit your
11 cross-examination?

12 A She didn't yell at me in this case. No, I'm
13 saying I had that before. I attack people on
14 warrants and they will look at me and say, "Mr.
15 Cummings, you know warrants don't really count."

16 Q Okay. That is what I was going to ask. On
17 what factor did the fear of being yelled at come
18 into play?

19 A I'm not afraid of anything, I have been
20 yelled at by everybody in the world. Look at at
21 the size of me, Mr. Brown. I'm saying it don't
22 look good in front of a jury and it also doesn't
23 look good I'm beating a dead horse.

24 Q Let's talk about that. There is no way to be
25 getting in a warrant. Let's assume you didn't ask

1 the question directly regarding the warrant but
2 instead asked, just for an example, Plaintiff's 17,
3 which is the affidavit provided by Detective Coker
4 on the warrants of Travis Felder, can you not have
5 couched that in a manner where you asked Detective
6 Coker that he did not provide a sworn statement in
7 fact in a previous day?

8 A To a magistrate, sure.

9 Q A sworn statement?

10 A Excuse me. Probably a magistrate, whoever
11 signed his name. No, I did not ask him that but I
12 know every warrant read the same.

13 Q And there is weight given to a previous sworn
14 statement, isn't there?

15 A For impeachment purposes, sure. The judge
16 has already found probable cause on that.

17 Q I'm not talking about the judge's
18 determination, I don't know that's admissible.

19 A It's not.

20 Q I'm talking about the fact he's sworn.

21 A I could have asked the question, somehow I
22 didn't. You have asked me that three times. Every
23 warrant looks the same, doesn't it?

24 Q Let me stop you. Actually I disagree with
25 that. In fact, he's indicted for a different

1 charge than the warrant said?

2 A Right, which they have a right to do.

3 Q They tweaked it?

4 A They have a right to amend up to the time of
5 trial.

6 Q At some point in time they had every theory.

7 A I can tell you what the theory was, kill my
8 client for murder, that is what they wanted to do.
9 When he turned down the plea offers they wanted to
10 kill him.

11 Q Let me ask you about the issue of whether or
12 not Mr. Bowman was the basis for their theory that
13 Gadson was the shooter?

14 A I can't answer since I'm not inside their
15 head, I can't.

16 Q Now, what do you lose if the jury finds out
17 that Bowman says Gadson is the shooter, without him
18 being on the stand and subject to
19 cross-examination?

20 A How do you get this, how did he know about
21 that? Was he there, was he a principal, and also
22 whether or not I knew the word principal had been
23 mentioned by somebody previous to this.

24 Q Let's go back to the question I asked moments
25 ago. What was your theory of defense in the case?

1 A Save his life.

2 Q No, your theory of defense in the guilt
3 phase?

4 A The theory of defense in the guilt case,
5 every case, close his lips. What did I have in his
6 defense? He said he didn't do it and he couldn't
7 take the stand.

8 Q Hold on a second. You wanted more or less to
9 concede guilt?

10 A No, I did not. My client did not concede
11 guilt, I made the State prove their case.

12 Q Okay. What was your theory of defense about
13 what happened, what were you telling the jury
14 actually happened? In opposition to Walter
15 Bailey's view, what was the Norb Cummings' defense
16 view of the events of February 16th?

17 A I know you keep saying you didn't know, but
18 that is what it was.

19 Q What is your view of what happened out there?

20 A I know what happened. They went out there
21 and shot Kandee Martin and burned her.

22 Q Who is they?

23 A That young man there.

24 Q And Mr. Gadson?

25 A Yes.

1 Q The question about whether Marion says Tawain
2 was the shooter doesn't alter your theory at all,
3 does it?

4 A No. If you can find an alibi for Mr. Bowman
5 where he was other than there, that is what I'm
6 saying, there are four statements the poor man gave
7 and you rule them inadmissible? It is also a
8 statement at the State Hospital that all this stuff
9 was made up. Everybody has lied in this case
10 except who?

11 Q I want to make clear that the fifth theory
12 was that it was Tawain and Marion out on the road?

13 A Yes.

14 Q That was you all's theory?

15 A Not just theory, that was fact.

16 Q Okay. So, if the Felder warrant and the
17 Gadson warrant suggest that Felder and Gadson
18 killed her and it's based on Marion's statement,
19 then that gets evidence in of an opposing theory
20 without Marion ever having to take the stand,
21 doesn't it?

22 A Well, I'm sure somebody would have argued a
23 little hearsay since he said it to a cop who is now
24 swearing to it.

25 Q Correct.

1 A At arrest stage but not at trial.

2 Q But that takes away the sting of Walter
3 asking Coker on redirect about whether the warrants
4 was based on Marion's statements, because that
5 actually introduces hearsay and Walter may have a
6 reason not to do that, wouldn't he?

7 A I can't speculate to that.

8 MR. WATERS: Object.

9 THE COURT: Sustained.

10 A I did what I did, you know.

11 THE COURT: Next question.

12 Q Now, tell me about the concern about Marva
13 Hardee-Thomas's absence at the evaluation.

14 A It is a fundamental stage in a trial. This
15 is a murder case and the kid has been sent up there
16 for an evaluation, I would never not be with a
17 client at that stage.

18 Q Bear with me because I want to get the date
19 off the evaluation here.

20 MR. WATERS: Your Honor, I object to this
21 line of questioning. It's irrelevant, it is not an
22 issue I pled in this matter.

23 MR. BROWN: I didn't bring it in. This is
24 redirect, I'm going into the evaluation and he made
25 a statement --

1 THE COURT: Ask him the question.

2 MR. BROWN: Thank you. I'm trying to find
3 the valuation, my apologies.

4 THE WITNESS: I don't have it. All I have is
5 the arrest warrants up here. It is here somewhere,
6 I promise you I don't have it.

7 THE COURT: Is that it or a copy?

8 MR. BROWN: It's a copy, it's our copy.

9 THE COURT: Did they hand it back to you?

10 THE WITNESS: I didn't leave this building
11 for lunch, I stayed here.

12 MR. WATERS: Here it is, Defendant's 29.

13 MR. BROWN: Okay.

14 BY MR. BROWN:

15 Q If you will look at page 5 of Defendant's 29?

16 A Page 5, yes, sir.

17 Q It talks about the conduct of the interview?

18 A Yes, sir.

19 Q And Mr. Bowman expressed concern about being
20 present without a lawyer and being questioned,
21 didn't he?

22 A Absolutely.

23 Q When did you argue that issue to the Court?

24 A It wasn't going to come in because I didn't
25 put any mental health challenge to that.

1 Q Okay, bear with me. If it would have been
2 suppressed as a violation of his Fifth or Sixth
3 Amendment rights --

4 A I didn't raise that and Marva didn't, we
5 chose not to go --

6 Q My question is if it would have been
7 suppressed as a violation of his other rights
8 because his interview took place while represented
9 by counsel but without counsel present, if that
10 would have been the case, then you wouldn't have
11 had to have been worried about this coming in,
12 would you?

13 A It wasn't done with me. I wasn't in the case
14 then, number one, and as you state there, Mr.
15 Brown. Number two, he came in willingly, I see
16 that magic word, and it is up to the client to
17 invoke their Fifth Amendment right.

18 Q Let me understand, was he ever out of jail?

19 A No.

20 Q Bear with me. When Mr. Bowman was
21 transported did the guards carry guns when they
22 take him out of the facility?

23 A Absolutely. But remember --

24 Q Was he shackled and --

25 THE COURT: Let him finish his answer.

1 A Every case the client can waive his Fifth
2 Amendment right, he can talk to who he wants to,
3 counsel can be deemed useless.

4 Q I hate to get down to some tight questioning
5 here but he was incarcerated on May 7, '01, wasn't
6 he?

7 A Yes.

8 Q And incarceration excludes shackles, doesn't
9 it?

10 A Yes, sir.

11 Q And the guards have guns, don't they?

12 A Oh, yes.

13 Q And, so, willing means willing at the point
14 of a gun and shackles?

15 A He is not that way at the hospital.

16 THE COURT: Are you saying somebody pointed a
17 gun at him and forced him to go?

18 Q While in the presence of armed guards and in
19 shackles is willing?

20 A That is not how they do at the State
21 Hospital. They drop him off at the door. He is up
22 there for the evaluation.

23 Q He is charged with murder and they don't let
24 him out out front?

25 A No. If you go back and check, he was dropped

1 off there and had this interview, okay?

2 Q Wait a second.

3 THE COURT: You've covered this, I understand
4 what you're saying.

5 MR. BROWN: I hadn't got quite there yet,
6 Your Honor.

7 THE COURT: Well, make your point.

8 BY MR. BROWN:

9 Q On May 7 --

10 THE COURT: Wait a minute. We have a court
11 reporter, one person at a time. You all argue back
12 and forth, and when I speak let me speak.

13 MR. BROWN: Yes, sir.

14 THE COURT: At some point in time the point
15 has got to be over, we can't make it over and over.
16 I understand your concern regarding the fact maybe
17 there would have been a way for him not to have
18 worried about the bad parts of the report to come
19 in and get the good parts in, is what you're
20 worried about, essentially?

21 MR. BROWN: No. The report doesn't come in
22 but he can get the drinking in, which is unrelated
23 to the report.

24 THE COURT: Exactly.

25 MR. BROWN: Without the report.

1 THE COURT: I understand your point.

2 BY MR. BROWN:

3 Q And following up on that, your concern about
4 the drinking coming in the penalty phase dealt with
5 capital litigation, did it not?

6 A I agree.

7 Q All right. And at the time of this
8 evaluation on May 7th Mr. Bowman hadn't been served
9 death notice, had he?

10 A No. This was a setup.

11 Q Excellent. So, what we really know is that
12 he certainly wasn't warned that this report could
13 be used in capital sentencing against him?

14 A Correct.

15 Q And certainly he didn't have two lawyers at
16 that time to advise him, did he?

17 A No, he did not, sir.

18 Q All right. So, that is another problem with
19 using this report in sentencing?

20 A But --

21 Q Because we're clear under --

22 THE COURT: You asked him a question. Do you
23 want him to answer the question?

24 A But he was offered the opportunity to contact
25 her on the telephone but he declined. That is

1 another issue I had to take into play, whether or
2 not he really wanted to ask for his Fifth Amendment
3 right.

4 Q Hold on one second, let me go to that. Are
5 you aware of Miss Marva Hardee-Thomas writing a
6 letter saying for the jail not to let Mr. Bowman
7 call her anymore?

8 A No, I'm not.

9 Q That would color that ability to call her if
10 she has written a letter, "Don't let him call me"?

11 A If he knew that, yes.

12 Q Now, no redeeming value to the drinking?

13 A No.

14 Q But there is no question that Mr. Bowman was
15 with Mr. Gadson and was around the folks regarding
16 the birthday party, cooking around the barrel and
17 going to the club, the Allen Murray Club?

18 A Right.

19 Q And all that included information about
20 drinking, didn't it?

21 A Right.

22 Q Okay. So, the associating with drinkers
23 evidence was already presented, wasn't it?

24 A Yes.

25 Q But what was missing was whether he was

1 intoxicated, to get a mitigating charge?

2 A Right.

3 Q And let me ask you about that mitigation.

4 Mitigation is a reason to give life or it's a

5 reason not to vote for death. Isn't that kind of

6 the definition of mitigation?

7 A Right.

8 Q All right. And being intoxicated can trigger

9 by law a statutory mitigator, can't it?

10 A Correct.

11 Q All right. So, a juror who perceives

12 drinking as an aggravator instead of a mitigator is

13 a juror that by definition cannot follow the law?

14 A I asked for mitigation charge, the judge

15 didn't give it to me. She said I didn't put any

16 evidence up on it.

17 Q I understand that but the fear a juror would

18 perceive drinking as an aggravator instead of a

19 mitigator would be a fear that a juror would not

20 follow the law?

21 A You're asking me to speculate on a juror. I

22 have jurors do what they want to do anyway and they

23 are supposed to follow the law but I think we're

24 all practical people here.

25 Q But there is no question that a juror

1 following the law cannot consider drinking as an
2 aggravator but as a mitigator?

3 A Correct.

4 Q All right. Now, have you ever heard of issue
5 preclusion?

6 A Yes.

7 Q It deals with when a fact has been found
8 against a party, all right. Now, the fact of the
9 CSC was actually found against the party, the
10 State?

11 A Right.

12 Q And the evidence, the only evidence that
13 supported a CSC charge was the facts that came in
14 during the guilt phase, right?

15 A DNA, right.

16 Q All right. Issue preclusion would possibly
17 prevent that from coming in but it came in first,
18 right?

19 A Right, but I wanted it in to show they were
20 friends, they were lovers.

21 Q But you didn't put it in?

22 A No. I got it out of the State.

23 Q Let me stop and ask you that. Before you got
24 it out of them Mr. Bailey got it out of them first?

25 A He starts, remember, you know the rules of

1 court, he goes first.

2 Q Here is my question. What fact was that
3 relevant to?

4 A relevant to show that he and her were lovers
5 and friends.

6 Q I'm talking about Mr. Bailey.

7 A Mr. Bailey?

8 Q What was relevant for him to put it up at
9 all?

10 A I think he stepped over the line. I know
11 what he wanted, a black man and white woman having
12 sex, we both know what that is. I cleared it up,
13 in my humble opinion.

14 Q You made the best --

15 A I made the best of it.

16 Q Him playing dirty?

17 A That's right.

18 Q All right. Now let's talk about the work
19 record, and I ask you to take a look at Plaintiff's
20 Exhibit 76. Would you look at the dates on that
21 form, that work sheet?

22 A Yes, sir.

23 Q Now, generally what is the age somebody is
24 allowed to work?

25 A It varies, whether it's family, whether it is

1 around hostile machinery, whether it's farming. It
2 it varies, so there is not one answer.

3 Q If somebody calls your law office and said,
4 "Mr. Cummings, I'm looking for legal advice, when
5 can I start work?"

6 A Looking for legal advice or legal work?

7 Q Well, either one, what is the general rule,
8 and I would agree with you there are all kinds of
9 rules out there.

10 A I would say fifteen, sixteen.

11 Q There you go. At the time of the first job
12 listed as of January 1997, which just happens to be
13 the last job on the sheet because there are no more
14 lines to put prior employment, how old was Mr.
15 Bowman?

16 A Date of birth, I'm sorry, born 1980, he would
17 have been seventeen.

18 Q He was actually sixteen still in January?

19 A Well, okay.

20 Q By five or six months. So, he is like
21 sixteen and a half?

22 A Okay.

23 Q And, so, if he starts work at fifteen to
24 sixteen, we've got him working almost all but one
25 year that he's, or less than one year that he's

1 legally able?

2 A Right.

3 Q That's a pretty good employment record for
4 somebody who is only 21 years old at the time of
5 trial?

6 A Well, there was another reason why he didn't
7 work so long. He got arrested in Orangeburg for
8 armed robbery and I didn't want that to come out.

9 Q How about the employment with the restitution
10 center to show that he was a good inmate?

11 A For burglary?

12 Q We're talking about for the issue of -- now,
13 let's switch gears here. This work record is not
14 coming in for the guilt phase, is it, it is for
15 sentencing phase, right, that is why you have
16 Yungman looking at this stuff?

17 A Mr. Brown, you're right. You think that was
18 going to carry any weight, then I concede to you
19 that I didn't present it the right way. This is
20 two years, '98 to '97.

21 Q And even while incarcerated he continued to
22 work and be a productive citizen?

23 A Right.

24 Q That information was not presented, was it?

25 A Correct.

1 Q But the work record that was presented was
2 drug dealing?

3 A Yes. That is what Mr. Yungman talked about
4 and talked about drinking, too, and I did not get a
5 mitigating charge even though Mr. Yungman talked
6 about it, my recollection.

7 Q Look at Plaintiff's Exhibit 79, which is, I
8 believe, being introduced without objection?

9 MR. WATERS: No objection, Your Honor.

10 (Hardee-Thomas to Chief John Barnes letter
11 marked and received in evidence as
12 Plaintiff's Exhibit Number 79).

13 BY MR. BROWN:

14 Q The front page of the letter is what we're
15 introducing. It reflects a copy -- I haven't even
16 read the back page.

17 A On the front of the sheet October 10th it has
18 me copied on it, it says it's a a status
19 conference, that is not what is relevant, this back
20 part is the one relevant, right.

21 Q Well, I'm calling the front with the sticker
22 on it.

23 A Okay, I'm sorry.

24 Q The November letter.

25 A Yes, I find that very disturbing.

1 Q And basically it's placing, rightfully or
2 wrongfully, it places some limitation on the phone
3 calls?

4 A Yes, sir. And that was dated November 9th,
5 '01.

6 Q It surely was and we don't know what, that
7 is, in fact that is the letter that, two things,
8 allows him to make phone calls but then asks them
9 to limit them. It does both, right?

10 A Yes.

11 Q Okay. So, we don't really know what the
12 arrangement was before then, whether it was more
13 freely allowing phone calls or less freely
14 allowing?

15 A I can't speculate, I don't know.

16 Q Okay. Now let's talk about the phrase
17 residual doubt. Now, there is a question about
18 whether it's a valid mitigation issue but let me
19 make sure I understand the law. South Carolina
20 jurors are allowed to consider any fact mitigating?

21 A Correct, or none at all, can do it just
22 because they want to.

23 Q Excellent. They can say that something that
24 was lingering about the convincing nature of the
25 guilt of Mr. Bowman could be that any reason that

1 would cause them not to give a sentence of death?

2 MR. WATERS: Your Honor, objection. That is
3 clearly not the law in South Carolina. Residual
4 doubt is not a valid mitigator.

5 MR. BROWN: I'm a little unclear on how any
6 reason or no reason can be mitigating, which is our
7 law, but any reason does not include some any
8 reasons?

9 THE COURT: I think the area of this issue
10 was covered fully on your direct.

11 MR. BROWN: Yes, sir.

12 THE COURT: And let's proceed on.

13 MR. BROWN: Okay.

14 BY MR. BROWN:

15 Q Now, you mentioned regarding the Jim Aiken
16 testimony that adaptability was what you put him up
17 there for?

18 A Right.

19 Q All right. And the reason why I say that is,
20 your strategy clearly wasn't to let's get into
21 arbitrary issues?

22 A It wasn't.

23 Q So, the issue is arbitrary by law, you didn't
24 strategically go out to let in something the law
25 does not allow to be considered?

1 A Heck no. And again, I fought and argued it,
2 every time in every case.

3 Q Fair enough. I'm not trying to cut you off
4 but I agree with you.

5 THE COURT: All right, next question.

6 Q Now, I do have to ask you a little bit about
7 Jonathan Davis because the question was whether,
8 the juror, whether Mr. Davis, another Mr. Davis,
9 Mr. Davis and Ricky Davis, this is Juror Davis.

10 A I remember that.

11 Q I don't believe there is any relation between
12 them.

13 A No, there was not.

14 Q Between any of the three?

15 A No.

16 Q Okay. Juror Davis, there was a question
17 about whether or not you could have interviewed his
18 family ostensibly about the discussions that
19 allegedly led to the, both his disqualification and
20 the contempt finding. My question to you is could
21 you have not interviewed the folks who witnessed
22 his contemptuous conduct?

23 A We did, when he took the stand.

24 Q And here is why I say this, bear with me on
25 this.

1 A Yes, sir.

2 Q Because what I'm trying to find out is, he
3 denied it, right?

4 A Yes. The judge believed Mr. Messervy's
5 secretary from the Solicitor's office over Mr.
6 Davis, in her opinion.

7 Q Help me a little bit about how she was able
8 to overhear a conversation with the juror.

9 A She is sitting back there -- believe me, the
10 Solicitor's office controls the back part of that
11 courtroom, Mr. Brown. If you tried cases up there
12 you would know it is an old, old place like this
13 and everybody sits out back except us in the
14 courtroom working.

15 Q And her status at the time?

16 A I'm trying to remember whether she was a
17 secretary in the Solicitor's office or for Mr.
18 Messervy who was part-time as part of the
19 Solicitor's office.

20 Q So, she was the Solicitor's employee who
21 overheard a potential juror's conversation?

22 A Yes.

23 Q And then sought and successfully had him
24 disqualified?

25 A Well --

1 Q Based on that overheard conversation?

2 THE COURT: Let me ask. Wasn't it on the
3 record whether she did or didn't, whether she said
4 she did or didn't, whether there was a hearing on
5 it?

6 MR. BROWN: I'm trying to find out if this is
7 in fact the real scenario, to put it in a nutshell.

8 THE COURT: There is nothing in the record
9 says who she was and no testimony about what she
10 heard somebody --

11 MR. BROWN: I'm trying to find out if it's
12 not funny she got a juror disqualified, because I'm
13 going to go into the characteristics.

14 BY MR. BROWN:

15 Q And he was a black male juror?

16 A Yep.

17 Q And young?

18 THE COURT: We covered that in our first
19 hearing.

20 MR. BROWN: He testified.

21 THE COURT: I know.

22 MR. BROWN: But I haven't asked him and he
23 wasn't present.

24 THE COURT: Is this redirect? I mean, you --

25 MR. BROWN: It came out.

1 THE COURT: Why do you think of it now?

2 Let's proceed on, please, let's proceed. I think
3 we're covering stuff we have already covered.

4 MR. BROWN: Yes, sir.

5 THE COURT: Some stuff that is already on the
6 record, it is clear about what happened. As for as
7 whether we believe it or not is one thing but it
8 happened.

9 BY MR. BROWN:

10 Q Okay, on that note, you said on, and this is
11 exactly asking about what was asked on cross, your
12 response was, quote, we want to put him in jail and
13 take money away from him?" is there any reason you
14 would want to put him up?

15 A Yes.

16 Q Who is we?

17 A We being the defense team.

18 Q You wanted to put him in jail?

19 A No. I'm saying the State, the Judge, excuse
20 me, contempt of the court is the judge's province,
21 sir, not ours. I would like to put him back on my
22 jury after the State, and the judge clearly is part
23 of the state, it is the, you know, the protector of
24 the state and people, and he has been fined and
25 yelled at.

1 Q He might be very skeptical of the State,
2 wouldn't he?

3 A Well, no, or it could bite the other way, get
4 me out ever here, I don't care. The judge already
5 ruled. No matter what I did, I lose on that issue
6 and I'm not going to go talk to a juror and get
7 disbarred, I'm not.

8 Q I'm not asking you that.

9 A Yes, sir.

10 Q But the argument along the lines that the
11 State has got the bias in disqualifying a juror
12 that --

13 THE COURT: Aren't you really making an
14 argument about how you feel about it?

15 MR. BROWN: I'll withdraw the question.

16 A Judge, I did feel bad about losing that juror
17 and I didn't do anything, I didn't do anything to
18 lose him, I didn't.

19 Q You wanted him?

20 A I wanted him, yes. I mean, I was in the
21 courtroom working.

22 THE COURT: Are you saying you saw two ways,
23 you weren't sure which way you would go?

24 THE WITNESS: Right.

25 THE COURT: Whether he would be a friend of

1 the State's or mad at the State?

2 THE WITNESS: Yes, sir, correct.

3 BY MR. BROWN:

4 Q I don't know where item 67 is, but the Sam
5 memo right here, not to beat a dead horse but I
6 have to ask you a little bit about that. That Sam
7 memo, I want to make sure, what if you found out
8 that after Mr. Mitchell interviewed Mr. Davis and
9 came back and told you Mr. Ricky Davis was not a
10 good witness or whatever it was he said?

11 A Right.

12 Q And I assume there is no note of this?

13 A Mitch sent us back a letter on stationery or
14 he came by the office and said he was -- it should
15 have been somewhere.

16 Q What if you found out that Ricky Davis
17 reaffirmed his statement after Mitchell's
18 interview?

19 A I was never told that. All I can do is send
20 an investigator up to Leiber to go talk to him.

21 Q Now, when you cross-examined Tawain Gadson,
22 one of the things you talked about was what
23 sentence he would get pursuant to the plea deal,
24 twenty years?

25 A Yes.

1 Q Okay. Why didn't you tell, cross-examine him
2 about the fact that he faced a death sentence?

3 A You asked me that before. I cross-examined
4 him, it was murder, I didn't know if the Solicitor
5 had ever served the death penalty notice on him.

6 Q They threatened him with it?

7 A They threatened.

8 Q Why didn't you tell the jury he had been
9 threatened with his life?

10 A I guess it didn't flow from my brain at that
11 time, I'm sorry, no strategy, clearly.

12 Q Excellent. Now, what evidence did you rely
13 on to prepare a case without believing that Tawain
14 Gadson's .380 was the gun that killed Kandee
15 Martin?

16 A I relied on the SLED experts, my
17 cross-examination, on the breach markings, I relied
18 on the fact that the gun had been reported stolen,
19 there were no comparisons. Mr. Bailey and I argued
20 about that under State versus Lyle and a few other
21 things, then we did some other further arguing
22 about whether or not the gun found mysteriously in
23 Dorothy's house or chair belonged to my client or
24 not.

25 Q I want to make sure. You mentioned a couple

1 things there. So, you relied in part upon the SLED
2 report?

3 A Correct.

4 Q And apparently upon a report that the gun had
5 been stolen?

6 A Right, from Mr. Gadson.

7 Q Where was that reported?

8 A In Orangeburg County somewhere, if I'm not
9 mistaken, Branchville, Orangeburg.

10 Q Mr. Gadson filed a report of it being stolen?

11 A The best of my recollection it was somehow
12 reported stolen, yes, sir.

13 THE COURT: You all approach just a second.

14 (Unrecorded bench conference).

15 THE COURT: Somebody is going to call Mr.
16 Bailey?

17 MR. BROWN: Yes, sir. That is speaking for
18 Mr. Waters. We'll get him called.

19 BY MR. BROWN:

20 Q I was asking you about the .380. You
21 mentioned a couple things, but you're not aware of
22 any official report that it was stolen?

23 A No. I just remember hearing that there was a
24 report in Orangeburg. That's all I remember.

25 Q And would it surprise you if you found out

1 Mr. Gadson's report of it being stolen was not
2 until after his arrest?

3 A Nothing surprised me about him, no, and I'm
4 trying to remember, I just learned from law
5 enforcement that it was reported stolen.

6 Q So, after Mr. Gadson's arrest for murder in a
7 warrant that he's the shooter, then he claimed that
8 his gun was previously reported stolen but not
9 documented?

10 A Are you telling me that first impression
11 right now?

12 Q Okay. And the other factor in there was,
13 because there were two main ones, SLED reports.
14 Now, if that SLED matching of the gun to or casing
15 to another gun is not fool proof, does that chip
16 away at your confidence it was not Tawain's gun?

17 A There are a couple things that you look at.
18 Number one, you told me about the science evolving,
19 you read about everything, now it's not a hundred
20 percent, like everything else in the world, so that
21 is an issue now, not at the time. Then further I
22 think on my cross-examination I asked Mr. Gadson
23 about him having a .380 gun and I cross-examined
24 him about him holding a gun and I didn't ask him
25 about whether it was stolen or not because I wanted

1 to make sure the jury knew he had it in his hand,
2 he had a .380.

3 Q because that's a viable theory?

4 A Yes.

5 Q Excellent. All right. To go briefly into
6 what I will call the Hawkins/Coleman statement
7 about Mr. Gadson firing the gun, the Edisto River
8 gun before.

9 A I didn't know it was the Edisto River gun.

10 THE COURT: We're going to be here on Monday.

11 MR. WATERS: Here is fine, Your Honor.

12 THE COURT: What else do you want for
13 Christmas? I'm going to say it is going to be
14 here.

15 BY MR. BROWN:

16 Q Okay. The Hawkins/Coleman statements, they
17 attribute Tawain Gadson shooting a gun that at some
18 point turns out to be the Edisto River gun?

19 A Right, later on, yes, sir.

20 Q Okay. And you mentioned that, that does put
21 that gun in Gadson's hands, doesn't it?

22 A Yes.

23 Q All right. And it mentions in those same
24 statements that the gun was retrieved from Bowman
25 by Gadson and shot?

1 A As those ladies stated at the projects that
2 day, yes.

3 Q Is that not similar to the allegation Mr.
4 Ricky Davis makes that the gun was shot by Gadson
5 and then put back with Bowman?

6 A As you asked, as you ask that question,
7 again, we all don't think Ricky Davis was credible,
8 we don't think Ricky Davis said what he said,
9 even --

10 Q Did he say it in 67, do we believe that?

11 A Again, that is the typed up notes, obviously
12 I think it was work product but I will leave that
13 to you.

14 Q Do you believe he told Sam that or did Sam
15 make that up?

16 A I don't think Sam would make anything up.

17 Q Okay.

18 A But again we went back to follow up on it and
19 he said, "No, I didn't say that."

20 Q We don't know that was done -- first
21 digressing away from my question here --

22 A I don't want to --

23 Q Let's forget the August 6th statement of
24 Ricky Davis and let's look at the statement that Sam
25 memorializes about Ricky Davis.

1 A Okay.

2 Q The Coleman/Hawkins statements that Gadson
3 fired a gun and gave it back to Bowman is somewhat
4 similar to this one here, isn't it, to this one
5 here that Gadson fired that gun?

6 A Yes, sir.

7 Q It is elaborated on the August 6 memo, "And
8 gave it back to Black," as they say in that August
9 6 memo, Black being Mr. Bowman?

10 A Right.

11 Q So, twice, if they are true, that Gadson
12 would have fired the gun and given it back to
13 Bowman?

14 A Well, I think number 29 says Gadson fired the
15 gun in the projects.

16 Q What's interesting is someone has it, almost
17 has Mr. Gadson being a bad guy, hey, he is going to
18 commit a crime and make a public shooting, he is
19 going to use someone else's gun?

20 A That's a great theory.

21 Q Thank you.

22 A Yes, sir, great theory.

23 Q All right. And the last thing I'm going to
24 ask you about, that conflict stuff, there was a
25 joint office they shared, right, Miss Marva

1 Hardee-Thomas and Mr. Dukes?

2 A I'm not aware of any office sharing. At the
3 back part of our courthouse at St. George the
4 Solicitor's office took the right behind the
5 elevator, the Public Defender's office had like a
6 little waiting area in there, I don't know if they
7 kept files or not in there, if that is what you
8 call the office sharing. That is the only place I
9 knew of where maybe both of them might have been
10 together at one time.

11 Q Okay. And they had a joint screener?

12 A Yes, one person interviewed everybody whether
13 or not they were indigent.

14 Q Okay. That was an employee of the Public
15 Defender's office?

16 A That's correct, or by the county. I don't
17 know how they did it back then, sir, I'm not privy
18 to that.

19 Q But you wouldn't be surprised if it was paid
20 for by the Public Defender Corporation?

21 A I would expect it to be paid for by the
22 corporation.

23 Q So, the corporation employee looked at both
24 Mr. Bowman's case and then looks at Mr. Gadson's
25 case and decides who represents which one?

1 A Yes, sir, however they assign them, I don't
2 know.

3 Q And both Mr. Dukes and Miss Marva
4 Hardee-Thomas were subject to hiring, firing,
5 demotion and promotion by Troy Knight?

6 A By the Board, yes, sir.

7 Q By Troy Knight and the other Board members?

8 A Correct.

9 Q Same bosses?

10 A Yes, sir.

11 Q Okay. And the general public views, and we
12 have seen some letters from Miss Marva
13 Hardee-Thomas, views both Mr. Dukes and Miss Marva
14 Hardee-Thomas as Dorchester County Public
15 Defenders?

16 A Correct.

17 MR. BROWN: No other questions, Your Honor.

18 THE COURT: Okay. Recross?

19 MR. WATERS: Thank you, Your Honor, very
20 briefly.

21

22

23

24

25

1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q You were asked a little bit about Dr. West
4 and why you didn't put him up, and just so we're
5 clear, you didn't put him up because of the
6 potentiality of getting hit back by Mr. Bailey with
7 the William S. Hall report and Dr. Narayan. Is
8 that correct?

9 A That is one of the issues I had in the back
10 of my head, yes, sir.

11 Q Also the second issue I believe was that
12 there was nothing in Dr. Narayan's report that was
13 groundbreaking, to warrant that risk, is that
14 correct?

15 A Correct.

16 Q Counsel said you didn't elicit any
17 information that Mr. Bowman had involvement with
18 his family and was a good father and I want to just
19 show you, I show you page 4744 of the record --
20 excuse me one second -- 4746, and looking at lines
21 9 through 12, and in fact you introduced a picture
22 of Mr. Bowman holding a baby. Correct?

23 A Miss Thomas had that witness, sir, but yes,
24 that is correct, she did that.

25 Q Okay. You were asked a little bit about the

1 judge cautioning you about watching out about
2 opening the door with regard to the statement that
3 Mr. Bowman had made, I guess similarly in statement
4 four as well as the William S. Hall report,
5 correct?

6 A Yes, sir. It just kicked my mind a second
7 ago going through this, part of my suppression
8 motion, we talked about Marion's level of
9 education, for Her Honor to consider all the
10 relevant factors to suppress a statement, whether
11 free, voluntarily, her province, and part of the
12 issue was about whether he could read well. Her
13 Honor found he could read well. It just kicked my
14 brain on. I remember trying it that way, I got
15 slammed, Walter asked if he used to read the
16 newspaper, that is written at a sixth grade level,
17 if jurors are on a sixth grade level they can be
18 accepted for jury duty. The more we talked about
19 this from six years back, seven years back, the
20 more it's kicking.

21 Q In fact when Mr. Bailey got those letters
22 that Marion wrote his wife he actually tried to use
23 that to get Judge Goodstein to reconsider her
24 suppression decision, correct?

25 A Yes, sir. Again, I told you, I mean, if I

1 was the prosecutor I would have been kicking and
2 screaming, beating to get those letters and
3 statements in, yes.

4 Q All right. Now, I had shown you the portion
5 in the transcript where you very, I guess,
6 delicately asked for mental health mitigator but
7 you recognized you essentially danced on the side
8 of a pin, I think is the way you put it?

9 A I did.

10 Q Mr. Bailey responded, "I would just say Mr.
11 Cummings apparently has made a tactical decision as
12 part of his trial strategy not to get into any
13 potential diagnoses of any mental health conditions
14 that can create some impairment in his ability to
15 conform his conduct."

16 That's essentially an accurate statement, is
17 it not?

18 A It is.

19 Q Now, you were asked what you had to lose if
20 it came out with regard to the Gadson warrant that
21 Mr. Bowman in a statement said that Gadson was the
22 one who shot Kandee?

23 A It's a logical insinuation, like where did he
24 get his information from and does he have firsthand
25 knowledge. I was trying to avoid that.

1 Q That also could potentially cause the
2 Solicitor then to go with the first three
3 statements which were not suppressed, correct?

4 A As you asked the question, yes, and how he
5 would have done it, I don't know. But I know he
6 would have tried everything he could have.

7 Q And even though those were not the
8 inculpatory statements in the nature of the fourth
9 one they still had things in them you would rather
10 them be out rather than in, is that correct?

11 A Right. I fought hard to keep everything out,
12 at least I thought.

13 MR. BROWN: I'm a little confused about the
14 characterization of that being opening the door to
15 a statements that never had been kept out.

16 MR. WATERS: I'm talking about the first
17 three statements.

18 MR. BROWN: Right, how do you open the door
19 to the statements that are okay, admissible to
20 begin with?

21 MR. WATERS: Let me rephrase it, then.

22 BY MR. WATERS:

23 Q I'm not saying opening the door, what I'm
24 saying is, then obviously the Solicitor might come
25 back and respond by using, introducing those three

1 statements to show why that was the basis for the
2 warrant. Correct?

3 A Yes.

4 Q You were asked a little bit about page five
5 of the Hall report and understanding your concern
6 about him being there without Miss Hardee-Thomas,
7 the fact remains this report reflects that he was
8 offered the opportunity to call her, he declined,
9 he agreed to participate without her being present
10 and ultimately signed the Miranda sheet, correct?

11 A Yes.

12 Q Okay. Now, where is the, this letter right
13 here, okay? In this letter here, let's make sure
14 we get what it says here, this is a request to
15 Chief Barnes at the jail to allow Mr. Bowman to
16 make calls at a certain time because, quote, he
17 needs to be able to contact my office concerning
18 his capital case. My office has also been made
19 aware of this request.

20 Is that correct, is that what the letter
21 reflects?

22 A As we all know, they are collect phone calls
23 to the lawyers' offices. I'm not speaking for Miss
24 Thomas because I still find the letter disturbing,
25 he needs to be able to contact, true, but we

1 accepted calls whenever he called or could get to a
2 phone. That is just my philosophy that, you know,
3 we're his lawyers, and why she said what she said,
4 you will have to ask her, but I find it disturbing
5 that a client who is indigent can't make a phone
6 call when he gets to a phone. I'm sorry, that is
7 just what I believe.

8 Q I understand. I just wanted to ask if that
9 is what it said. He certainly had no problem
10 contacting your office whenever he wanted to?

11 A Again, a lot of times if I was somewhere else
12 for trial the office knew what to do but, you know,
13 we never told him not to call my office.

14 MR. WATERS: Your Honor, I have Defendant's
15 38 which I believe, which I'm moving into evidence
16 without objection, I believe.

17 MR. BROWN: Without objection, I'm sorry.

18 THE COURT: In evidence.

19 (Hardee-Thomas to Bowman letter marked and
20 received in evidence as Defendant's Exhibit
21 Number 38).

22 BY MR. WATERS:

23 Q Pretty much the same thing, right?

24 A Yes. This adds a little, expounds on the
25 letter.

1 Q That is a letter from Marva to Marion, the
2 same point, correct?

3 A Yes, sir.

4 Q Okay. Now, I think you were asked, I believe
5 you kind of led to this point about whether or not
6 if the jurors considered drinking aggravating they
7 would be violating the law, and correct me if I'm
8 wrong but is it your understanding in trying a
9 capital case that the defendant's character is an
10 issue whether the jury thinks of it as good or bad?

11 A In penalty phase everything comes in.

12 Q If a juror considers someone's drinking or
13 drug use to be sort of an aggravating thing, not a
14 statutory aggravator but a general aggravator, that
15 is not against the law, in fact the character is
16 precisely an issue in the sentencing phase, is that
17 right?

18 A Yes, you're right as you stated it.

19 Q Then it would not be true that if a juror
20 were to consider that bad that juror is necessarily
21 violating their oath?

22 A No.

23 Q Now, you were asked a little bit about the
24 work record and I think it was just a reiteration
25 of what we testified before, but ultimately that is

1 what you hired Yungman for, was to synthesize this
2 social history into the relevant points that were
3 part of his presentation, correct?

4 A Yes, sir.

5 Q Okay. You were asked a little bit about what
6 you were trying to do, I show you 3580 of the
7 transcript, is it true you even went so far as to
8 make a motion to essentially, that his excusal or
9 his disqualification had made African Americans
10 under represented in the jury pool and that he
11 could not get a fair trail. Correct?

12 A Yes, sir, that's what I did.

13 Q You pretty much took it as far as you could
14 either way, didn't you?

15 A I thought I tried this case to the best of my
16 ability. In the end, I'm sure being human,
17 whatever you gentlemen and the courts find you
18 find.

19 Q Okay. Did Marion Bowman tell you the river
20 gun was the gun at Nursery Road?

21 A No, sir, he did not tell me that
22 specifically.

23 Q Okay. What did he tell you?

24 A He didn't know how that gun got in his
25 family's house and all his family got charged, but

1 no, he never told me about the gun.

2 Q You were asked a little bit about Margaret,
3 Margaret Hawkins being the woman at the projects
4 with the shooting incident a couple weeks before
5 the crime, and Ricky Davis, obviously, we know who
6 that is. You said -- well, Mr. Brown asked you,
7 well, those two were kind of consistent, right?

8 A As the gentleman asked the question, yes.

9 Q Okay. But if Ricky Davis was going to come
10 into court and testify that Marion Bowman told him
11 to write that and made it all up and asked him to
12 write that in Mr. Bowman's behest you wouldn't want
13 that, would you?

14 A No, sir, I would not.

15 Q And in fact whether or not James Gadson got
16 the gun from Marion or not, the fact of the matter
17 is that Marion Bowman is walking around the
18 projects carrying that gun in his waistband,
19 correct?

20 A As testified to from the witnesses, yes, sir.

21 Q And you wouldn't want that?

22 A No, sir.

23 MR. WATERS: Your Honor, I have nothing
24 further.

25 THE COURT: Anything else?

1 MR. BROWN: Nothing, Your Honor.

2 THE COURT: Goodness, I can't believe you're
3 through. I think we're through.

4 THE WITNESS: Merry Christmas, sir. Good
5 luck in your next endeavor.

6 THE COURT: Thank you.

7 THE WITNESS: God bless, good luck everybody.
8 Gentlemen, thank you. Merry Christmas, everybody.

9 (Witness excused).

10 THE COURT: I have found the people
11 scheduling court, everybody is gone until January
12 5th, and now I've gotten to the third person.

13 MR. WATERS: Your Honor --

14 THE COURT: Okay.

15 MR. WATERS: I have one little evidentiary
16 issue to take care of.

17 THE COURT: What is that?

18 MR. WATERS: I have copies that were printed,
19 as you might know, that federal courts have
20 everything on line you access through your attorney
21 ID and I have copies of the complaint and order of
22 dismissal in the Hiram Johnson action that I would
23 like to introduce. I don't think there could be an
24 issue.

25 THE COURT: That issue is about what?

1 MR. WATERS: Mr. Johnson was, remember, the
2 one that got shot in the back of the head by the
3 Orangeburg officers.

4 THE COURT: Oh, yes, and he sued.

5 MR. WATERS: Right. I would like to
6 introduce, there was actually two actions, they
7 filed it initially in '03, then it was dismissed by
8 consent, then refiled in '05 and ultimately went to
9 resolution in '07. I would like to put in the
10 complaint and order from each one of those actions,
11 I believe without objection.

12 THE COURT: Okay, put then in evidence.

13 MR. BROWN: Without objection.

14 MR. WATERS: All right.

15 THE COURT: Anything else?

16 MR. WATERS: Your Honor, just give me a
17 second to handle the housekeeping on that.

18 MR. BROWN: Your Honor, I would suggest that
19 we need to have a copy of the Solicitor's file,
20 whether it be the copy from the Solicitor's office
21 two floors down or I'm assuming different copy that
22 is with the Clerk in St. George here, for
23 questioning when the former Solicitor takes the
24 stand.

25 THE COURT: Have you subpoenaed it?

1 MR. BROWN: Well, actually I have subpoenaed
2 a copy, which I have, but I would prefer to have --

3 THE COURT: What would you like for me to do?

4 MR. BROWN: Nothing, really. Maybe, I don't
5 know if it is easier for me to try to get the
6 Solicitor to bring their file upstairs or to have
7 the St. George clerk to drive the one --

8 THE COURT: Any way you want to do it that's
9 fine.

10 MR. BROWN: Let me confer with Mr. Waters.
11 We would like to have the one from St. George
12 here, not just because we would like the Clerk to
13 drive over. It is kind of a mutual agreement.

14 THE COURT: You would like what?

15 MR. BROWN: There is a copy already in the
16 record.

17 THE COURT: What would you like?

18 MR. BROWN: The Clerk in St. George to bring
19 the file.

20 THE COURT: Do you want to call them tonight
21 about 10:00 o'clock?

22 MR. BROWN: We'll call them in a minute.

23 THE COURT: You can call them but if you want
24 me to tell them now I'm here three days before
25 Christmas and force them to come over I'm going to

1 put them under arrest, you may have a problem.

2 If you can get it done, that's fine.

3 MR. BROWN: I'm not asking for and/or, we
4 talked about it, it may be easier to have that one.
5 That one is actually entered in evidence.

6 THE COURT: You can have that done by my
7 blessings, not my order.

8 MR. BROWN: Thank you, Your Honor.

9 MR. WATERS: Your Honor, I believe without
10 objection, I have exhibits, Defendant's Exhibits
11 39, 40, 41 and 42, which are the orders in federal
12 actions involving Hiram Johnson, I believe those
13 are without objection.

14 MR. BROWN: Without objection.

15 THE COURT: They're in.

16 (Hiram Johnson civil complaint marked and
17 received in evidence as Defendant's Exhibit
18 Number 39).

19 (Hiram Johnson civil complaint marked and
20 received in evidence as Defendant's Exhibit
21 Number 40).

22 (Hiram Johnson civil complaint marked and
23 received in evidence as Defendant's Exhibit
24 Number 41).

25 (Hiram Johnson civil complaint marked and

1 received in evidence as Defendant's Exhibit
2 Number 42).

3 THE COURT: Do you all want to get here at
4 1:30?

5 MR. BROWN: Start at 1:30?

6 THE COURT: Yes. How long will you all take
7 on Mr. Bailey?

8 MR. BROWN: I think I will take an hour and a
9 half.

10 MR. WATERS: I probably have half that.

11 THE COURT: Then you all will do final
12 argument, better make it 12:30. I assume you have
13 no other witnesses?

14 MR. WATERS: I don't think so at this point,
15 Your Honor. Are you going to want written briefs
16 from the parties or just argue?

17 THE COURT: I would want to give you all a
18 chance to do any oral arguments you want to do,
19 then I'm going to get briefs. I will not decide
20 the matter Monday.

21 MR. BROWN: Thank you on the briefing.

22 THE COURT: If you all would rather not do
23 oral argument, do everything in brief, then that
24 would be great, we can get her at 1:30.

25 MR. WATERS: That's fine with me, Your Honor.

1 I would request, and I think this is necessary
2 because of the issues, with them raising the new
3 issues throughout the trial and raising new issues
4 at the last minute, that the only way that briefing
5 is going to be effective is to do it the way
6 appellate courts do it, have them file theirs, that
7 way I can focus and know what their issues are.

8 THE COURT: I will treat it like I'm on the
9 appellate bench.

10 MR. BROWN: We would like to do that, we
11 would agree we would like to do it that way.

12 THE COURT: I want to make sure, I'm not in
13 as much of a hurry as long as we have everything in
14 so then we're, you all are in a writing phase.

15 MR. BROWN: Yes, sir. And, Your Honor, the
16 only issue about somebody else is that Sam memo
17 because I'm assuming Mr. Bailey is going to say
18 it's Sam the investigator, because that's, as an
19 officer of the court, where we got it from was out
20 of the Solicitor's file. I do believe he is our
21 only other witness.

22 THE COURT: Mr. Bailey?

23 MR. BROWN: Yes, because I haven't subpoenaed
24 Sam. I'm assuming that is the same memo, from Sam
25 the investigator for the Solicitor.

1 THE COURT: If Mr. Bailey says that's another
2 Sam I will be absolutely surprised.

3 MR. BROWN: Thank you. 1:30. I'm assuming
4 you all want more than about fifteen or twenty
5 minutes oral argument. I'll limit you all to
6 fifteen or twenty minutes oral argument in the case
7 and you can put everything in writing.

8 MR. BROWN: Yes, sir.

9 THE COURT: Tell Mr. Bailey.

10 MR. BROWN: Yes, sir.

11 (Recessed at 4:10 p.m.).

12

13

14

15

16

17

18

19

20

21

22

23

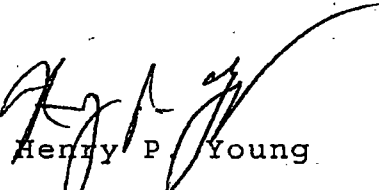
24

25

1
2
3
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 19th day of December, 2008.

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

14 December 27, 2008

15
16
17
18 
19 Henry P. Young
20 Court Reporter
21
22
23
24
25

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
Attorneys for the Plaintiff

SAMUEL C. WATERS, Esquire
ALPHONSO SIMON, JR., Esquire
Attorneys for the Defendant

Henry P. Young
Court Reporter

VOLUME X OF X
December 22, 2008

1 (Reconvened at 1:48 p.m., Decmeber 22, 2008).

2 THE COURT: Now, on the record, we have, I
3 assume at you all's request, Miss Jeffries of the
4 Clerk's office in Dorchester County has brought
5 what they have in their file on this case and I
6 informed her I would like for her to stay so that
7 she takes back with her what she brought. If there
8 is something you all need, let's agree, then, to
9 copy it so she can keep the file intact. She's
10 back there, and where did you put the file, Miss
11 Jeffries?

12 THE CLERK: Up by Katherine.

13 THE COURT: We have it right up here. Did
14 you all know we had it up here?

15 MR. BROWN: Yes.

16 THE COURT: You all looked in it, what you
17 need is in there?

18 MR. BROWN: Yes, sir. We just wanted to have
19 it here in case the Solicitor might want to refer
20 to it. That whole thing is already in evidence but
21 we thought it was easier.

22 THE COURT: Mr. Bailey, do you want to have
23 that file over here?

24 MR. BAILEY: Judge, I borrowed the
25 Solicitor's file, which ought to be essentially the

1 same thing as the copy, back when we tried this
2 case and I have it in front of me, so I don't think
3 I'll need that file.

4 THE COURT: If you need to refer to this let
5 us know and we'll go from there.

6 MR. BAILEY: Okay.

7 THE COURT: All right, as we left on Friday
8 we had completed the testimony of Mr. Cummings, and
9 the defense, not the defense, the petitioner had
10 additional witness they wished to call. So, unless
11 you need to say anything in the beginning, Mr.
12 Brown, I'm ready to proceed, with you and Mr.
13 Sinclair and Mr. Bowman in the room and of course
14 Mr. Waters is here, along with Mr. Simon, Simons or
15 Simon?

16 MR. SIMON: Simon.

17 THE COURT: All right. We're ready to
18 proceed whenever you all are ready.

19 MR. BROWN: We would call Walter Bailey to
20 the stand, please.

21 THE COURT: Come around, Mr. Bailey, and be
22 sworn. I will swear you in, if you will, please.

23

24

25

1 WALTER M. BAILEY, JR.,
2 after being first duly sworn, testified as follows:

3 THE COURT: All right, your witness, Mr.
4 Brown.

5 MR. BROWN: Good.

6 DIRECT EXAMINATION

7 QUESTIONS BY MR. BROWN:

8 Q Good afternoon, Mr. Bailey. How are you?

9 A Fine, how are you?

10 Q I want to ask you, to kind of get this
11 started, to take a look at what has been entered as
12 Plaintiff's Exhibit 67.

13 A All right.

14 Q And are you familiar with that document?

15 A Yes, I am.

16 Q And if I may, it is kind of a question out
17 there we all kind of know who it might be, who
18 prepared that document?

19 A Sam Richardson.

20 Q And is there any idea when he prepared it?

21 A There is no date on this thing. I can tell
22 from the context of it that it was fairly late in
23 the proceedings. It wouldn't have been too far
24 from the time of trial.

25 Q What I want to kind of do is go through and

1 ask you some questions kind of about a little bit
2 of what transpired in this case, and if you will
3 recall, there was an individual testified from SLED
4 regarding analysis of some pants that were
5 attributed to Mr. Bowman and it was expert
6 testimony given regarding an accelerant being found
7 on those pants. And I just wanted to ask you why
8 those pants, why the expert testimony regarding the
9 accelerant found on those pants was introduced,
10 what was the purpose of introducing that?

11 A Whenever I introduce any evidence regarding
12 forensic, fingerprints, accelerants, ballistics and
13 all that, what I generally do is elicit everything
14 that came out during that test, whether it was pro
15 or con as for as pointing to the defendant, just to
16 show that we had done a complete analysis. The
17 reason I do that is if you leave something out that
18 isn't essentially helpful it enables the defense to
19 come along and challenge the completeness of what
20 was done, so I want the jury to know that we have
21 done a complete forensic test and what the entire
22 results are, whether they help our case or not.

23 I want to point out I never presented any
24 kind of argument that the heavy petroleum was any
25 indication of guilt, that I can recall. That

1 wasn't the reason I introduced that.

2 Q The word accelerant is used. Obviously that
3 word may have a connotation that applies to science
4 different than a layman's connotation. Do you
5 recall why that word is used?

6 A Why it's used?

7 Q Or why -- the question was asked was there an
8 accelerant found.

9 A My best recollection is that's the
10 terminology that the SLED arson people use. I
11 could be mistaken but I don't have the SLED report
12 in front of me.

13 Q In that same vein, on the completeness, why
14 wasn't the information about Kandee Martin's drug
15 use introduced?

16 A If you will recall, what I was talking about
17 was forensic tests.

18 Q Right.

19 A Not everything that might have happened in
20 the context of someone's entire day or week or
21 whatever.

22 Q But the toxicology report showed she had
23 metabolites related to some drug use in her blood?

24 A Well, it had nothing to do with guilt or
25 innocence or anything else. I mean, all it would

1 have done was potentially to trash the victim, and
2 that wasn't my purpose.

3 Q Okay. And bear with me, how do we balance
4 the testimony about the accelerant that did not
5 link Mr. Bowman, by that being introduced as a
6 matter of completeness, but Miss Martin's presence
7 of drugs not being introduced?

8 A Because I didn't introduce any portion of her
9 toxicology. I mean, it had nothing to do with the
10 case.

11 Q But we do have --

12 A On the other hand, the SLED arson report had
13 everything to do with the case. It was a charge of
14 arson.

15 Q But, now, her autopsy report was testified
16 to?

17 A Absolutely, yes, sir.

18 Q And the toxicology report would have been
19 something that would have been pertinent to the
20 autopsy report?

21 A No. The autopsy reports come out generally
22 before the toxicology report comes back in. That
23 is sent to SLED and SLED sends the result to the
24 pathologist and then they may or may not, if it is
25 the cause of death, amend the autopsy report, which

1 is a separate thing.

2 Q But it is something he would get?

3 A He would get that.

4 Q The medical examiner?

5 A The pathologist would get that at some point
6 in time. Again, in my experience that's generally
7 long after they have done the autopsy and have a
8 written autopsy report.

9 Q And you kind of touched on this, sometimes
10 the toxicology report has bearing on the cause of
11 death?

12 A It could, yes.

13 Q Even in a gunshot case?

14 A In any kind of case. A toxicology report
15 could affect the ultimate wording of the pathology
16 report but generally what happens is the
17 pathologist is going to issue the written report
18 and then if something occurs later on in the
19 toxicology test it's reported back, they could
20 amend that report.

21 Q And just hypothetically if there was some
22 claim of self defense or something, whether the
23 deceased was intoxicated or high on some type of
24 crack cocaine or something of that nature might be
25 relevant to whether he was the aggressor or

1 something of that nature?

2 A Conceivably, yes.

3 Q Okay. And certainly I don't mean in this
4 case, but I guess what I'm trying to come back to
5 is that at least some of the issues regarding her
6 body were testified to?

7 A Yes.

8 Q And just like there is a forensic analysis of
9 the black pants?

10 A Uh-huh (Affirmative).

11 Q And to be complete, we put in everything that
12 we have analyzed and the results found on the black
13 pants. That's not true with the analysis of her
14 body since the drug use was kept out?

15 A Let me try it again.

16 Q Sure.

17 A Because maybe I didn't make myself clear.
18 SLED arson did a complete written report. I called
19 that SLED arson man up as an expert witness who is
20 qualified as an expert and I asked him all aspects
21 of that written report so if there was something
22 that was omitted, that I omitted, it wouldn't look
23 to the jury like we had done an incomplete job if
24 the defense cross-examined.

25 When I called the pathologist up I asked him

1 about what he found during the course of his
2 examination of that body. He would not have found
3 the toxicology stuff. That goes to SLED. It could
4 have caused him to amend his report at a later date
5 but my recollection in this case is that he didn't
6 do it, so the toxicology report was not a portion
7 of what I was eliciting from Dr. Sexton or whoever
8 it was that did the autopsy.

9 Q And I want to come back to this subject later
10 on but there is later on testimony into a finding,
11 relating to the body of the deceased, that came
12 from SLED regarding the DNA?

13 A Right.

14 Q That is not part of the cause of death,
15 though?

16 A No.

17 Q And that did -- you brought that in?

18 A I did.

19 Q Okay. Now let me ask you, was there some
20 type of limitation placed upon the drug use of
21 Kandee Martin? Was that, somehow or another was
22 there an agreement to have Tawain Gadson limit his
23 testimony?

24 A The only agreement -- no. What I wanted to
25 do was to, in the initial, the first two or three

1 witnesses, the whole thing was basically a
2 chronological order of what happened on the day of
3 this murder, the first two or three witnesses were
4 people that were hanging around a fire at this
5 guy's house with a bunch of people in and out,
6 including the defendant. And based on some
7 statements I had from some of these people there
8 some woman had happened by and Mr. Bowman made some
9 comment to the effect she owed him money for drugs
10 and he was going to mess her up. Maybe not an
11 exact quote but something of that effect.

12 My concern was if any of these witnesses who
13 were called for a different reason, primarily
14 because they saw him with what appeared to be the
15 murder weapon, that if these people started
16 blurting out other stuff that happened that could
17 connect them to drugs, at that stage that we would
18 run into a situation like the State versus Rebecca
19 Smith, where there was a homicide, ultimate death
20 penalty in that case and the Solicitor elicited
21 some reference to cocaine that had nothing,
22 according to the Supreme Court, had nothing to do
23 with the homicide and it was prejudicial, they
24 reversed the death penalty case.

25 That was, that was the only thing I can

1 recall as for as the strict testimony. My
2 recollection is we called in the first three, maybe
3 two or three witnesses, I think three, who were
4 present when your client made this comment and
5 cautioned them out of the presence of the jury not
6 to get into that.

7 Q Okay. So, it is not a case where the, for
8 lack of a better word or phrase, drug motive on the
9 killing wasn't introduced, the jury heard all that?

10 A Right.

11 Q So, at least by the time they were ready to
12 deliberate, no matter which witness it comes from,
13 the jury has heard some reference to a drug related
14 motive for Mr. Bowman to kill Kandee Martin?

15 A If that is what the record says happened
16 that's what happened. That is my recollection,
17 there was some of that, some of that evidence the
18 jury did hear, which I felt like was part of the
19 res gestae because it occurred right or about the
20 time of the killing or immediately preceding that.

21 Q Well, was Mr. Gadson ever restricted from
22 testifying about Kaneee Martin smoking crack on
23 Nursery Road?

24 A No.

25 Q There was never any statement to him that

1 said don't talk about that?

2 A Not from me, not from me and none that I know
3 of, that I can recall at this time.

4 Q Now I want to ask you a little bit about some
5 agreements that were struck with some folks who
6 testified as State's witnesses and if I may, I want
7 to show you, and get them marked here.

8 I'm going to show you what has been marked
9 Plaintiff's Exhibits 79, 80, 81. Do you recognize
10 these?

11 A Yes.

12 MR. BROWN: And I believe 79 and 80 come in
13 as copies of executed plea agreements between one
14 Dorothy Mae Bowman and one Kendra Bowman, I believe
15 it is without objection by the State.

16 MR. WATERS: That's correct, 79 and 80.

17 THE COURT: What are these?

18 MR. BROWN: Plea agreements, copies of plea
19 agreements that are executed.

20 (Kendra Martin plea agreement marked and
21 received in evidence as Plaintiff's Exhibit
22 Number 79-B).

23 (Dorothy Mae Bowman plea agreement marked and
24 received in evidence as Plaintiff's Exhibit
25 Number 80).

1 BY MR. BROWN:

2 Q If you would, Mr. Bailey, 81, do you recall
3 whether that is an accurate depiction of the
4 agreement?

5 A Yes, it's one is not signed.

6 Q Yolanda Bowman?

7 A But it appears to be prepared by my office.

8 MR. BROWN: I will offer 81 as a copy of a
9 plea agreement offered for Miss Yolanda Bowman's
10 testimony. I say that because it is unexecuted.

11 THE COURT: Did it operate as an agreement?

12 THE WITNESS: To best of my knowledge. If
13 there is no signed agreement in the file, then for
14 some reason maybe I sent this to, Ken Cooper served
15 as her lawyer, it may not have gotten signed and
16 come back to me but we did, she did testify and
17 would, she testified pursuant to this agreement.

18 THE COURT: That is an agreement your office
19 entered into?

20 THE WITNESS: Yes.

21 THE COURT: It can come in evidence. What
22 number is it?

23 MR. BROWN: 79-B and 80 are in evidence
24 without objection. I'm trying to get 81 in.

25 THE COURT: 81 is the one he just referred

1 to?

2 MR. BROWN: Yes, sir.

3 THE COURT: You object to 81, Mr. Waters?

4 MR. WATERS: My concern is it is unexecuted
5 by Mr. Bailey. I was actually looking right now to
6 see if I could put my hand on one. Whatever his
7 record reflects, I have no objection.

8 THE COURT: 81 is in evidence.

9 (Yolanda Bowman plea agreement marked and
10 received in evidence as Stat'e Exhibit
11 Number 81).

12 BY MR. BROWN:

13 Q What it reflects -- let me show you what has
14 been marked Plaintiff's Exhibit 3. It has already
15 been entered. That is the plea agreement of Tawain
16 Gadson.

17 A Okay.

18 Q And what has also been entered as Plaintiff's
19 Exhibit 14, a plea agreement of Travis Felder.

20 A Okay.

21 Q Now, Mr. Felder and Mr. Gadson were both
22 polygraphed?

23 A Okay.

24 Q If you will recall -- and originally they had
25 given statements that, that denied, at the very

1 least denied implication?

2 A Mr. Felder never gave a written statement.
3 He gave a verbal statement to law enforcement right
4 after he was interviewed that he didn't know
5 anything about anything but he got a lawyer
6 immediately after that, so there was no written
7 statement.

8 Q So, they originally denied implicating Mr.
9 Bowman?

10 A Mr. Felder denied anything, any knowledge,
11 any involvement whatsoever. Mr. Gadson, to my
12 recollection, gave a series of statements that were
13 partially true, partially false. They were kind of
14 all over the place.

15 Q Nonetheless, neither Mr. Felder nor Mr.
16 Bowman were required to be, I mean, Mr. Gadson or
17 Mr. Felder, neither one implicated Mr. Bowman prior
18 to being polygraphed?

19 A I don't recall.

20 Q Okay.

21 A Before the dates of the polygraphs as they
22 might relate to the different statements that were
23 given by Gadson?

24 Q Uh-huh.

25 Q If I showed you those documents it might help

1 you.

2 A Okay.

3 Q Plaintiff's Exhibit 7.

4 A Okay.

5 Q And Plaintiff's Exhibit 15. And both Mr.
6 Felder and Mr. Gadson eventually struck a plea
7 bargain with the State to testify against Mr.
8 Bowman?

9 A Yes, sir, that's true.

10 Q And they were not polygraphed after those
11 agreements?

12 A After the written plea agreements they were
13 not polygraphed, no.

14 Q Okay. And their plea agreements were
15 memorialized in writing and those have already been
16 entered?

17 A Yes.

18 Q All right. And the other folks who consist
19 of what we will call Mr. Bowman's family, which was
20 his wife and two sisters are the ones, 79-B, 80,
21 81, they also struck plea agreements?

22 A Yes.

23 Q Now, in those plea agreements there is a
24 paragraph that references the subject to further
25 polygraph?

1 A Okay.

2 Q Why are those provisions missing from the
3 plea agreements of Mr. Felder and Mr. Gadson
4 entered?

5 A I can't answer that at this time unless you
6 point out specifically, if you would, which
7 agreement you're talking about.

8 Q Well, 79-B, 80 and 81.

9 A Hang on just a second, let me find one of
10 them here. 81?

11 Q And 79-B and 80, it would be paragraph number
12 five.

13 A Yes, I'm looking at 79-B, paragraph five.
14 Yes, that says in part the defendant further agrees
15 to submit to a polygraph examination upon the
16 request of the First Circuit Solicitor's office,
17 said polygraph examination to be conducted by
18 Dorchester County Sheriff's Department.

19 Again, I don't have total recall of my
20 thought process back in 2001, 2002, but she had not
21 been polygraphed so we wanted to put her on a
22 polygraph if we needed to, if what she told us
23 after the agreement didn't make any sense.

24 Q Now, my question is, after Mr. Felder and Mr.
25 Gadson obviously gave an inconsistent statement

1 with their first statements why were they not
2 subject to being polygraphed?

3 A Let me take a look. The only answer I can
4 give you at this time is since they had already
5 been polygraphed I saw no need to require
6 additional polygraph. I thought there were
7 sufficient safeguards in here to make sure they
8 stayed with the truth and stayed on track. They
9 are required to give a complete debriefing and so
10 forth, give truthful testimony. That's the only
11 answer I can give you at this time.

12 Q Let me ask you about that. Did Mr. Felder
13 ever give a written statement?

14 A Felder never gave a written statement.

15 Q I'm going to show you what has been marked
16 Plaintiff's Exhibit 82.

17 A Uh-huh (Affirmative). All right.

18 Q Are you familiar with that?

19 A Yes. I prepared that as a trial outline of
20 questions I intended to ask Mr. Felder.

21 Q Those are questions related to his testimony
22 in the first phase of this trial?

23 A Yes.

24 Q And at that time what was your understanding
25 of his involvement in purchasing gasoline from the

1 EZ Horizion Mart?

2 A I had no inkling he had ever purchased
3 gasoline for Marion Bowman. I had never
4 specifically asked him that. I had no reason to
5 ask him and he never volunteered it. When I asked
6 him to tell me what happened he would tell me a
7 sequence of events but would leave that out.

8 Q He never said, "I bought the gas"?

9 A No, until I was, until after he testified,
10 then it came to light that he was shown on the
11 videotape purchasing gasoline.

12 THE COURT: After he testified in the guilt
13 phase?

14 THE WITNESS: The first time, yes.

15 THE COURT: When he testified in the guilt
16 phase, you were not aware?

17 THE WITNESS: I was never aware he had
18 purchased gasoline for Marion Bowman.

19 BY MR. BROWN:

20 Q When did you become aware afterwards? I
21 mean, you mentioned afterwards you became aware?

22 A Yes. Norb Cummings advised me he was on the
23 tape and I think that occurred maybe during the 24
24 hour break after the guilt phase was over. I'm not
25 100 percent sure of the timing but it was after,

1 after the fact.

2 Q Did you bring that to Judge Goodstein's
3 attention?

4 A I believe Mr. Cummings and I brought it to
5 her attention or maybe Mr. Cummings brought it to
6 her attention. I'm sure he wouldn't exparte her,
7 so we would have gone there together after he told
8 me about it.

9 Q How did he end up back on the stand?

10 A Mr. Cummings called him up.

11 Q And what was the purpose, if you know, for
12 him putting Mr. Felder up, oh gosh, in reality it
13 would be the last witness in a penalty phase?

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

15 THE COURT: Did you not ask Mr. Cummings
16 that?

17 MR. BROWN: I did. I'm going to see his
18 recollection of the purpose of him being recalled.

19 THE COURT: Of course he wouldn't know the
20 purpose, he would only know what Mr. Cummings may
21 have told him.

22 MR. BROWN: He may have been there when Mr.
23 Cummings may have said.

24 THE COURT: Therefore your question is, "Did
25 Mr. Cummings tell you anything about why he called

1 him?"

2 MR. BROWN: Or was it orchestrated with the
3 Court or anything.

4 THE COURT: Did you observe anything about
5 that?

6 THE WITNESS: Mr. Cummings, I knew he was
7 going to call him up obviously before he called him
8 but he never explicitly or specifically told me he
9 was calling him.

10 BY MR. BROWN:

11 Q Let me ask you, who made the phone call to
12 Charles Williams that said to call Mr. Felder and
13 bring him back to court?

14 A I don't recall.

15 Q Could you have made that call?

16 A I would have, yes.

17 Q Mr. Cummings would have asked you to call? I
18 don't know, I'm not trying to put words in your
19 mouth, I'm just asking about it?

20 A I don't recall. I could have done that. It
21 was something that if I had been asked to do,
22 bearing in mind what had been disclosed to me I
23 would have done it, or Mr. Cummings could have
24 called him or the judge's clerk, I just don't
25 recall.

1 Q And what was significant that caused the
2 concern about talking to the judge about Felder's
3 testimony and what had been learned later? What I
4 mean, why? Do you recall that?

5 A If I -- let me see if I understand your
6 question correctly, what is significant about why
7 he was called later, why Mr. Cummings called him?

8 Q And I haven't practiced nearly as long as you
9 have but it is unusual to talk to a judge about a
10 proposed witness' testimony.

11 A Mr. Cummings had discovered at some point
12 that he was on the videotape purchasing gasoline
13 after 3:00 o'clock in the morning.

14 Q And why is that significant?

15 A Because there was an arson case involving the
16 defendant and the gasoline played into that.

17 Q And he omitted that part of his testimony
18 during the guilt phase?

19 A He omitted that during the guilt phase, he
20 omitted that in both my interviews with him. It
21 was also omitted from the proffer letter from
22 Charles Williams. The first I knew about it was
23 when Norbert come and told me about it after he had
24 already testified.

25 Q Fair enough. Let me ask you, he enters a

1 plea agreement that I believe is listed as
2 Plaintiff's 14?

3 A Okay.

4 Q And I don't have the paragraph in front of me
5 but at some point in there it requires that he
6 tell, like a TV show, the truth, the whole truth
7 and nothing but the truth?

8 A Yes.

9 Q He is not allowed to omit any pertinent facts
10 when he testifies?

11 A Well, let me find this specific language
12 because I don't know.

13 Q Yes, sir.

14 A I don't know exactly what it said.

15 Q Yes, sir.

16 A Give me a minute, if you would.

17 Q Maybe paragraph 10.

18 A Yes, says he is not able to omit facts.

19 Q And I think you just testified that this was
20 of some importance because he had omitted these
21 facts?

22 A Yes, uh-huh.

23 Q All right. When was the violation of this
24 agreement judicially determined by any court to
25 revoke his benefit of the plea agreement?

1 A Never.

2 Q He actually got the benefit of this?

3 A He got the benefit of the agreement, yes.

4 Q Despite the violation of that omission?

5 A Yes. The agreement gives me the right to

6 approach the Court to try to void out the

7 agreement. It doesn't say it happens

8 automatically.

9 Q Okay. It actually says shall be judicially

10 determined, like a mandatory?

11 A I'm going to have to refer to the agreement.

12 The judge has it.

13 Q It speaks for itself, I will agree on that.

14 THE COURT: Go ahead.

15 Q Now --

16 THE COURT: What paragraph are you referring

17 to?

18 MR. BROWN: Ten and eleven, Your Honor.

19 THE COURT: Ten and eleven?

20 MR. BROWN: Yes, sir.

21 BY MR. BROWN:

22 Q When did --

23 A I'm trying to answer the first question.

24 Q I'm sorry, go ahead.

25 A Paragraph 9-B says the State of South

1 Carolina may at its option move to vacate
2 defendant's plea.

3 So --

4 Q And on eleven it says that any allegation
5 that the defendant has failed to cooperate or has
6 not at all times told the complete and absolute
7 truth, it shall be judicially determined?

8 A Okay. And again I'm referring back to 9-B,
9 which says that the State has the option to move to
10 vacate the plea.

11 Q Well, and let me back up to something outside
12 of this agreement because it's not going to escape
13 notice of the litigants here. This agreement was
14 actually not entered into at the time he testified,
15 was it?

16 A I don't believe the written agreement was
17 entered into at that time. It was possibly drafted
18 by then but we had a verbal agreement. The reason
19 for that is that Mr. Felder agreed to testify very,
20 very late in the game.

21 Q And let me ask you, was the substance of that
22 verbal agreement crystal clear that Mr. Felder had
23 the same obligation to not omit material facts?

24 A The verbal agreement would not have been this
25 implicit. It wouldn't have had all the legalise in

1 it. I did sit down with Mr. Felder and told him
2 all I wanted from him was the truth.

3 Q Would you have expected that he carried his
4 end of the bargain if you found out that he was
5 omitting material facts?

6 A I would have preferred that he give every
7 detail of what had occurred. The problem with
8 trying to hold his feet to the fire on the
9 agreement was I didn't ask him about a stop at the
10 Horizon EZ store, Mr. Cummings didn't ask him about
11 it. So, he didn't out and out lie, he just omitted
12 something that in my opinion it would have been
13 helpful for it to come out the first time.

14 Q Let me ask you, you asked him about leaving
15 the apartments in Branchville?

16 A Okay.

17 Q And --

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

19 A Then I think the next question was whether or
20 not he went out to Nursery Road, or something to
21 that effect.

22 THE COURT: By the way, before we get any
23 farther, when was the agreement executed?

24 MR. BROWN: The day he was recalled.

25 THE COURT: All right. So, it was executed

1 the day of his recall in the penalty phase?

2 MR. BROWN: Yes, sir. Although I think it is
3 clear there was some agreement that had floated
4 around, and I say that because there is reference
5 in the examination in the first phase, Your Honor,
6 reference to a plea agreement being drafted, and so
7 I'm assuming that this exact copy may have been
8 floated back and forth unexecuted. And I can't
9 attest to that but there is reference in the
10 testimony and the examination.

11 THE COURT: So, Mr. Bailey, when he initially
12 testified he was doing so without the benefit of a
13 plea agreement?

14 THE WITNESS: We had a verbal agreement. I
15 think the written agreement had been drafted and
16 sent to Charles Williams' office but I had not
17 received it back at that point in time.

18 MR. BROWN: We have no reason to doubt that
19 because it appears that way. Mr. Cummings does
20 examine about a plea agreement.

21 MR. WATERS: Mr. Bailey elicited that as well
22 at the beginning of Mr. Felder's guilt phase
23 testimony that he has a plea agreement.

24 THE COURT: Yes.

25 MR. BROWN: We're assuming it was just not

1 signed and dotted yet.

2 THE WITNESS: That is my recollection.

3 BY MR. BROWN:

4 Q Now, when you asked, before you asked about
5 leaving the club, excuse me, leaving the apartments
6 in Branchville, and I've got a copy of the
7 transcript so I think it may be best if I just gave
8 that up to you and let you look at it, follow
9 along. If you will look at page 4091, line 8, you
10 asked -- this is the direct examination of Mr.
11 Felder, you asked, "Where did you go when you left
12 the club?"

13 A Okay.

14 Q It is like the Allen Murray Club?

15 A Yes.

16 Q He says, "I went to Branchville," and without
17 a question being asked he gives a specific, "I went
18 to the store and got chips"?

19 A Uh-huh.

20 Q Then you asked what store, and he says the EZ
21 Horizon store?

22 A Okay.

23 Q The question was then, "Where did you go when
24 you left the club?" He says Branchville and
25 excludes the specifics of going by the EZ Shop?

1 A Okay.

2 Q EZ Horizon Shop. But then just maybe a
3 minute later, on 4094, line 3, you asked him, "Did
4 you leave the town of Branchville?" And he says
5 yes. And you said, "Tell the jury where you went,
6 where you followed him." You are talking about
7 Felder following Bowman?

8 A Uh-huh (Affirmative).

9 Q According to Mr. Felder's story, says, "We
10 went to McElhaney Road and Nursery Road."

11 A Okay.

12 Q He omits that he stopped at the EZ Horizon
13 and purchased gasoline?

14 A Right. And I know now he omitted that. At
15 the time he gave me the answer I did not know he
16 omitted anything.

17 Q And let me ask you this. What efforts were
18 taken to put the correct testimony before the
19 finders of the guilt phase of the trial, or to
20 correct that?

21 A None by me because I didn't know that any
22 omission had been made during the guilt phase, so I
23 can't correct something if I don't know that it
24 occurred.

25 Q Okay. And I want to make, I want to make

1 sure we're clear on what happened. At some point
2 in time it does become aware, you all become aware,
3 you and Mr. Cummings become aware that Mr. Felder
4 omitted that?

5 A Mr. Cummings became aware at some point in
6 time and informed me and when he did that I became
7 aware also.

8 Q And what steps were taken to correct that,
9 and I don't mean knowing presentation, but the
10 false presentation of that testimony from Felder,
11 how was that corrected?

12 A There was no way to correct it on my behalf
13 because I didn't know it had occurred. I don't
14 know how else to answer it.

15 Q There is no way to go back because the
16 verdict has already been handed down?

17 A Yes.

18 Q And Judge Goodstein, was she ever presented,
19 because it is not in the record, was she ever
20 presented off the record with some type of dilemma
21 of how to fix this issue about Mr. Felder omitting
22 material facts that didn't come to light until
23 after a verdict was rendered?

24 A I don't recall that.

25 Q Okay. So, Mr. Cummings was in a position

1 where he could have gone in and, I don't want to
2 say legalise, but filed some kind of motion for a
3 mistrial or to re-open the case or motion, Rule 29
4 motion based on newly discovered evidence, that was
5 all there?

6 A You would have to ask Mr. Cummings what his
7 range of options were. I don't -- I assume that
8 there are things could have been done that maybe
9 for different reasons were not done but I can't
10 speak for anybody but myself.

11 Q Okay. But that did not take place off the
12 record?

13 A Not to my knowledge.

14 Q Okay. And let me ask you about, because I
15 don't have the transcript, and Mr. Cummings, I
16 assume was not there, but Judge Goodstein actually
17 sentenced Mr. Felder?

18 A I believe so. I'm not 100 percent sure. I
19 think probably an assistant handled that
20 sentencing, I'm not sure.

21 Q Okay. And was it ever presented on behalf of
22 the State that he omitted these facts?

23 A I don't have the transcript in front of me, I
24 hadn't reviewed the transcript, I don't even know
25 who in my office handled that thing. If you have

1 got a transcript I will be happy to look at it and
2 try to answer the question based on that.

3 Q Okay. Actually I don't. And let me follow
4 up with a little bit on that. Did anybody call Mr.
5 Cummings up and tell him after Mr. Felder's
6 sentencing that despite these omissions, Mr.
7 Cummings, Mr. Felder received the benefit of the
8 plea agreement even though he violated his end of
9 it?

10 A Not to my knowledge. It would have been no
11 reason to do that.

12 Q Would that not have allowed him to come back
13 to court and say it is a fact the jury didn't find
14 out this agreement was a sham and he didn't --

15 A I don't think something that happened after
16 the fact could have any bearing on what occurred at
17 the trial. I mean, I don't see it.

18 Q Let me ask you. There was a Brady motion
19 that was filed by Mr. Cummings that said, "We want
20 all agreements and deals, even," and I think the
21 term is used, as a wink, wink deal or whatever, and
22 certainly I'm not suggesting this is part of a
23 wink, wink deal but isn't that something a jury
24 maybe should consider, whether the deal they were
25 shown through examination was not exactly the real

1 deal with Mr. Felder, that he could give testimony
2 that was not completely and absolutely the truth
3 but he is still going to get a benefit?

4 A Again referring back to the agreement, that
5 gives the State the option, if I feel like the
6 agreement is merely violated, to void that
7 agreement out.

8 Q But, now -

9 A An option that I can exercise or not exercise
10 and in this case after all is said and done in the
11 case I elected not to exercise that option. I'm
12 not sure how that relates back to undoing something
13 that's occurred during the course of the trial.

14 Q Well, let me ask you, it is not optional for
15 Mr. Felder to tell the truth and the absolute whole
16 truth, is it?

17 A No.

18 Q Okay. And he omitted, I mean, who bought the
19 gas, like who brought the gun to a murder, who
20 bought the gas in the arson case?

21 A He admitted that during the first time he
22 testified, yes, sir, and --

23 Q Okay.

24 A And again I was as surprised as anybody was.

25 Q And you used the word surprised because it is

1 significant?

2 A Yes.

3 Q Okay. And isn't the gist of all cooperation
4 agreements for the State's witness that they be
5 truthful?

6 A That's really the basis of the whole thing,
7 is that they tell the truth.

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

9 Q Let me kind of get to one thing. You had
10 reviewed the tape at some point. I'm going to show
11 you what has been marked Plaintiff's Exhibit 83.
12 There is no question roughly 2:56 on the tape
13 counter or the time on the tape, that Mr. Felder
14 had bought gasoline, excuse me, bought the chips?

15 A Can you give me a second to read that?

16 Q Oh, yes, sir.

17 A Okay.

18 Q And, so, at least six month before trial we
19 knew that it was Travis Felder buying the chips,
20 which he does testify about in the first phase of
21 the trial?

22 A Okay.

23 Q And without playing the tape here, would it
24 surprise you 20 or 30 minutes or so later from when
25 the person buys the gas, somebody wearing the same

1 clothes as Mr. Felder wore at that previous
2 purchase --

3 A The only way I can answer that is I knew that
4 Felder had been in the EZ Horizon store at least
5 two times that day so seeing Felder on the tape,
6 already knowing he had been in there twice, it just
7 wouldn't have rung a bell as anything unusual,
8 seeing him on the tape in the store. I knew he had
9 been in there twice, once earlier in the day, I
10 think after he had gotten back from some other beer
11 joint, one of the girls with him said he had gone
12 in, she had seen him buying gasoline, that was
13 earlier in the day, that he went in and got the
14 chips and drink, then he went in around 3:00
15 o'clock or so, so I knew he had been in there at
16 least twice.

17 Q When he came back in did the attendant ask
18 him where the white girl was that he was with? Do
19 you recall that?

20 A I don't recall white girl. I think I recall
21 the attendant asking him where his girl was or his
22 girlfriend or something. It might have been a
23 white girl, I don't recall.

24 Q Let me ask you about Ricky Davis, and you
25 have seen the item 67 and there is also an item 11,

1 Plaintiff's 11, excuse me. Let me show you
2 Plaintiff's Exhibit 11 which has been entered in,
3 and Plaintiff's Exhibit 45. And just, if you can,
4 tell me a little bit about how you got hold of
5 Plaintiff's Exhibit 11 and what you found out about
6 Ricky Davis.

7 A Give me a second.

8 Q Yes, sir.

9 A I got a handwritten statement from Ricky
10 Davis in August. I don't recall at this time how I
11 got it. I think it may have been mailed to the
12 Solicitor's office. I don't know how else I would
13 have received it.

14 Q And that did not come from Marva
15 Hardee-Thomas?

16 A I don't recall.

17 Q Would you, would you find it significant if
18 it did come from the defense attorney?

19 A Would I find it significant? I mean --

20 Q Would you attribute significance to that?

21 A It would depend on the context. I mean, I
22 don't know.

23 Q Let me show you what has been entered as
24 Defendant's Exhibit 37.

25 A Okay.

1 Q If you got it from Miss Thomas you wouldn't
2 have mailed it right back to her, would you?

3 A I wouldn't think so, no. You're the one told
4 me I got it from Miss Thomas.

5 Q No, I asked.

6 A I don't recall getting it from Miss Thomas.

7 Q Excellent. I'm just trying to find out. I
8 understand you don't recall how you got it but I'm
9 trying to find out if you have any recollection of
10 getting it from a defense attorney?

11 A I don't have any recollection of getting it
12 from a defense attorney or not getting it from a
13 defense attorney.

14 Q And what is, having read the letter you
15 provided to the defense attorneys somewhat close to
16 trial, do you recall, does that help you in any
17 indication of whether or not you got it from them
18 and gave it back to them or not?

19 A Well, I assume I would not have gotten
20 something from somebody and given them a copy back.
21 I would assume they would make their own copy.

22 Q Okay.

23 A But again I don't have any specific clear
24 recollection of where it came from, only that I
25 disclosed that to the defense.

1 Q And did you also disclose to the defense
2 that, well, I think it is on, the document I handed
3 up, 45, I think was the number, this one right
4 here, 45, do you recall those, that information to
5 be, the significant part being Mr. Davis was in a
6 cell with Mr. Gadson?

7 A What was your question again.

8 Q Do you recall on Plaintiff's Exhibit 45
9 letting the defense know that Mr. Ricky Davis was
10 in fact in the cell with Tawain Gadson?

11 A I have a letter in my file dated January 2nd,
12 2002, to Norbert Cummings and Marva Hardee-Thomas
13 enclosing some information, and number two is
14 handwritten notes undated, Ricky Davis. That may
15 reference this, I'm not sure, I don't know what
16 else it could be referring to.

17 Q And is that --

18 A It appears from looking at this and looking
19 at my letter that that may have been what I was
20 referring to when I made the disclosure to the
21 defense attorneys.

22 Q That he was in fact, that Ricky Davis was in
23 fact in the cell with Tawain Gadson?

24 A Well, I didn't point that out but that is
25 written here on this document.

1 Q Like it has --

2 A Apparently what I sent to them.

3 Q And is it normally something when you get a
4 letter like Plaintiff's Exhibit 11 purports to be a
5 jailhouse statement, confession, is that one of the
6 first things you do, is confirm that that could
7 have taken place?

8 A I would check it out by some means, yes.

9 Q Because --

10 A I'm not going to take it at face value and
11 subpoena that person to testify or not. I'm going
12 to follow up on it.

13 Q What was your understanding of who did you
14 think represented Ricky Davis?

15 A I don't know.

16 Q Does it cause you concern that Marva
17 Hardee-Thomas was his lawyer?

18 MR. WATERS: Your Honor, I object. I don't
19 see how that's relevant to anything.

20 THE COURT: Are you talking about, I mean, in
21 what context?

22 MR. BROWN: For his issues he was
23 incarcerated for.

24 THE COURT: I know. But are you talking
25 about something that occurred before this incident?

1 MR. BROWN: Actually after the August 6th
2 letter was written.

3 THE COURT: When do you contend Miss Thomas
4 represented Mr. Davis?

5 MR. BROWN: I actually contend she is still
6 his lawyer.

7 THE COURT: But when did she do work for him,
8 when was it that she was appointed? I forgot the
9 date.

10 MR. BROWN: She was, we have those --

11 THE COURT: Give me the general timeframe.

12 MR. BROWN: Sure. 2001.

13 THE COURT: Okay. And I know when she
14 testified there was no activity on the case, she
15 thought it been dismissed.

16 MR. BROWN: She didn't know.

17 THE COURT: But she thought it had. But
18 anyway, when is the last time she actually did work
19 on it?

20 MR. BROWN: When Mr. Ricky Davis went to
21 prison in October of 2001.

22 THE COURT: Okay. There was another
23 outstanding case still left?

24 MR. BROWN: That was noted by the Clerk to
25 dismiss with leave to restore and Mr. Ricky Davis

1 said he thought it was still pending and she was
2 still his lawyer.

3 THE COURT: Exactly. So, that's the context
4 you're thinking about?

5 MR. BROWN: That's correct.

6 THE COURT: Not talking about was she, I
7 mean, I don't want him to interpret, I don't, I
8 don't want him to interpret what the Court does.
9 Is it your question did he know there was a case
10 with leave to restore, where she had been
11 representing him and it was on the docket, were you
12 aware of that?

13 THE WITNESS: I'm not aware of it now and I
14 don't recall being aware of it back then but again
15 I don't have total recall and --

16 BY MR. BROWN:

17 Q I ask this, without a doubt Mr. Bailey is a
18 very worthy adversary in the courtroom for any
19 lawyer to go against and I say that with all
20 sincerity and, you know, as a prosecutor he is very
21 thorough about making sure that his record is very
22 complete and that any issues that might come up
23 that would undo his efforts, that he tries to make
24 sure they are touched on, and I say that again with
25 all sincerity, and I'm just trying to find out

1 whether he would have concerns about Mr. Bowman
2 being represented by the same person, and I see the
3 objection coming up, I will get the question out,
4 being represented by the same person that is
5 representing a person who gives a statement that
6 exculpates Mr. Bowman and --

7 THE COURT: Are you saying, are you assuming
8 a court would say that at the time she was still
9 representing him on the case that had been
10 nol-prosed and leave to restore?

11 MR. BROWN: We know August 6th she was
12 actively representing him because both of his armed
13 robbery cases were active at that time. At the
14 time Mr. Davis writes that statement she is his
15 lawyer, Ricky Davis' lawyer and Mr. Bowman's
16 lawyer, without a doubt.

17 THE COURT: All right.

18 BY MR. BROWN:

19 Q My question is if you would have known that
20 would that bring up concerns to be addressed?

21 THE COURT: What year, 2006?

22 MR. BROWN: 2001, August 6 of 2001, the date
23 of Plaintiff's 11.

24 THE COURT: What were you going to say, Mr.
25 Waters?

1 MR. WATERS: I withdraw the objection.

2 THE WITNESS: I'm just trying to get fixed in
3 my mind what the actual date was. I thought all
4 this occurred in 2002.

5 BY MR. BROWN:

6 Q Mr. Bowman was arrested February 17th of 2001
7 and tried May of 2002.

8 A Okay.

9 Q This letter that was Plaintiff's 11 purports
10 to have been written August 6, 2001, and I never
11 see any correction of that date so I'm assuming
12 that everyone operated at face value on that?

13 THE COURT: He's standing now.

14 MR. WATERS: I object to that last statement
15 because I don't think it is undisputed it was in
16 fact written on August 6th, 2001. That is what is
17 written on the top but the State certainly doesn't
18 say as an absolute fact that is in fact when it was
19 written.

20 THE COURT: Do you know, sir?

21 THE WITNESS: No, sir, I don't. It looks
22 like the August 6 as well as an unsigned notary
23 down here is in different handwriting and different
24 pen on this. I mean, I don't know when it was
25 written.

1 BY MR. BROWN:

2 Q Well, let me show you --

3 A I'm not trying to avoid anything. I don't
4 know.

5 Q I don't either, I don't have a video camera
6 that followed Mr. Davis around on August 6, '01.
7 But we know in October of '01 that Mr. Ricky Davis
8 left Leiber, I'm looking for Plaintiff's, excuse
9 me, Defendant's 30.

10 A Let me try to answer your question.

11 Q Yes, please. My question still is about,
12 regardless of the date, what concerns do you have
13 about the at least somewhat simultaneous
14 representation?

15 A I'm not an ethics expert but assuming a
16 lawyer, just hypothetically, has two clients she's
17 defending in two unrelated criminal cases and one
18 of those clients can say something that would
19 advance his case and also advance the other case, I
20 don't see a problem ethically as for as a defense
21 lawyer, and that seems to be something that fits
22 the scenario there.

23 Q Tell me about that. What advances Mr. Ricky
24 Davis' case by contradicting the State's theory of
25 what happened?

1 A Because if Ricky Davis, number one, this
2 would help if believed by the State, a statement
3 like this could help to defend a death penalty case
4 if it put the spotlight on somebody besides the
5 defendant as the trigger man. It could also
6 theoretically help the guy who wrote this letter by
7 ingratiating himself with the State when he has
8 charges pending against him. By the fact he is
9 cooperating and giving information, he may get some
10 kind of break from that.

11 Q Well, that kind of goes to the heart of my
12 question. What about, what about inculcating
13 Tawain Gadson as the shooter and exculpating Marion
14 Bowman as the shooter is helpful for the State on
15 August 6, 2000 and --

16 A I didn't say helpful to the State. I said
17 potentially helpful to the defendant.

18 Q Bowman?

19 A Bowman, and also potentially helpful to this
20 guy here.

21 Q Tell me how --

22 A If it turned out that this was accurate
23 information that caused the State to be very, very
24 greatful for this document, that is not the case,
25 but assuming that was the case.

1 Q Then all of a sudden would you use him as a
2 State's witness, potentially?

3 A Theoretically, if this triggered some further
4 investigation and was borne out as being accurate
5 and reliable, yes, it could help him.

6 Q Okay. Now, if your information is that
7 Tawain Gadson is not the shooter but Marion Bowman
8 is the shooter that statement contradicts your
9 case, doesn't it?

10 A Ask me that again, now, make sure I got it
11 right.

12 Q If your theory is --

13 A My theory is what, the defense --

14 Q If the State's theory is that Tawain Gadson's
15 not the shooter but Marion Bowman is --

16 A Uh-huh (Affirmative).

17 Q -- then that statement actually hurts the
18 State's case?

19 A If it was believed, if it was borne out by
20 other evidence, if it was true.

21 Q And it would not be in the defendant's
22 interest to write a statement against the same
23 entity that is prosecuting him, would it?

24 MR. WATERS: Your Honor, I would object at
25 this point. I think we have gone down this road,

1 we're essentially getting into argument through
2 testimony. I think the point has been made and I
3 would object on relevance.

4 Q Do you want to answer the question?

5 A Can you ask it again, please?

6 Q Sure. If the State's theory is contradicted
7 by that statement, that it's not something that
8 he's going to get reward for, there is an issue but
9 him giving a statement against the same government
10 entity that's prosecuting Mr. Davis?

11 A This statement theoretically, theoretically?

12 Q Right.

13 A Neither helps nor hurts the defense,
14 depending on whether or not it was ultimately borne
15 out as being a lie or being truthful.

16 Q Let's talk about that. Your information,
17 your theory in the case in this trial was that Mr.
18 Gadson was not the shooter?

19 A That's correct.

20 Q That contradicts that theory, doesn't it,
21 Plaintiff's 11?

22 A Yes.

23 Q And Mr. Davis is subject to being prosecuted
24 on that robbery that was dismissed with leave to
25 restore?

1 A Yes, yes.

2 Q By your office?

3 A I assume so, yes.

4 Q Okay. And let's kind of step away from there
5 into the --

6 THE COURT: Let me see the statement. Go
7 ahead.

8 Q Let's talk about Tawain Gadson a minute. Who
9 prepares indictments that get presented to the
10 grand jury?

11 A It would depend on the kind of case, the type
12 of case. An Assistant Solicitor in a serious case
13 would draft it. If it is something very routine
14 that is done all the time, then the secretary would
15 have a form to go by.

16 Q And in a case like Tawain Gadson's murder
17 case, murder indictment entered as Plaintiff's
18 Number 1, I will ask you do you know who drafted
19 that one?

20 A Give me a second, please.

21 Q Yes. I'm sorry, my eyes were down, when
22 you're ready.

23 A You're asking who specifically prepared it?

24 Q If you remember.

25 A I can't tell you. I might have done it, one

1 of the Assistant Solicitors may have done it.

2 Q You know, some of us folks are not really
3 privy to the grand jury process, and I mean that in
4 all sincerity, is it a case that the detective is
5 the sole presenter, I'm not trying to get anything
6 that is secret, but does the prosecutor walk in
7 with him and present the case?

8 A I never did that. Generally it would be the
9 case officer, whoever had the case.

10 Q So, whatever gets presented is, for lack of a
11 better way of describing it, is whatever that case
12 officer goes down and swears, that is the evidence
13 that's presented?

14 A Generally that's it. If there are any legal
15 questions, then we get somebody there to try to
16 answer those questions for them, but as for as
17 factual presentation it would be law enforcement.

18 Q And on that document it indicates Detective
19 Coker?

20 A Alvin Coker, yes, sir.

21 Q Okay. Assuming that it was true billed on
22 the, the allegations on the indictment, the
23 statement at least had a theory where Gadson,
24 Tawain Gadson could have been the shooter?

25 A It's presented --

1 MR. WATERS: Objection, Your Honor. He was
2 not there, he doesn't know what Mr. Coker said
3 exactly and so I don't see how he can answer that
4 question.

5 THE COURT: Do you know what Mr. Coker said?

6 THE WITNESS: No, sir.

7 BY MR. BROWN:

8 Q I will ask it a little more artfully. Your
9 name is stamped at the bottom as the ultimate
10 presenter of this theory to the grand jury, isn't
11 it?

12 A It is.

13 Q Okay. Would you assume that Mr. Coker did
14 not go in there and contradict this theory?

15 MR. WATERS: Your Honor, again I would
16 object.

17 THE WITNESS: There are two theories.

18 THE COURT: I will let him testify whether he
19 had knowledge.

20 MR. BROWN: That is what I'm trying to get
21 at.

22 BY MR. BROWN:

23 Q Your policy is you want them to find what
24 they find and not find what they don't find, I
25 understand there is two theories in there, but I

1 mean at least one theory they were assuming the
2 grand jury heard and found cause was that Gadson
3 was the shooter?

4 A Let me answer this way. The indictment is
5 presented as alternate theories, either one of
6 which would constitute murder, in my opinion, and
7 the reason for that was we wanted to maintain some
8 flexibility because we had statements all over the
9 board from all the defendants that gave information
10 and at that point in time it wasn't crystal clear
11 exactly what had occurred. We had sufficient
12 information on Bowman add Gadson to charge them
13 both with murder but all the forensics were not
14 back in yet and the indictment, as we to in many,
15 many cases, is presented on alternate theories.
16 Now, what Coker told the grand jury to cause them
17 the true bill this thing, you would have to ask Mr.
18 Coker that, I don't know, I wasn't there.

19 Q It would be against your policy for him to
20 testify against the indictment that is in issue,
21 right, that you were asked to prosecute?

22 A If he testified against the indictment?

23 Q Right. I mean, you can't prosecute a case
24 that is against the sworn testimony?

25 A I don't know how to answer. I don't know how

1 to answer the question in the context of the
2 alternative theory indictment. I don't know
3 whether the grand jury questioned Mr. Coker as to
4 whether or not we were alleging that Gadson was the
5 trigger man or not. I don't know, I wasn't there,
6 I can't answer.

7 THE COURT: Is it your duty as for as the
8 prosecutor presenting information to the grand jury
9 such that you present to the grand jury stuff that
10 you feel that there is enough evidence to require
11 the person to come to trial for the case, you're
12 not asserting that they in fact did it but there is
13 enough evidence to require them to come to trial?

14 THE WITNESS: That's correct. We're not
15 trying to prove the case beyond a reasonable doubt
16 to the Grand Jury. We're trying to present enough
17 to get a true bill.

18 BY MR. BROWN:

19 Q And tell me about what you thought Tawain
20 Gadson did to make him guilty of murder or to serve
21 as a basis for it.

22 MR. WATERS: Your Honor, again I object.
23 Prosecutorial theories, thought process, is not
24 relative to any issue in this particular
25 proceeding.

1 MR. BROWN: It is exactly relevant to the
2 claims he made.

3 MR. WATERS: In fact the law does not require
4 the prosecution to disclose theories or anything as
5 a Brady sort of thing. What Mr. Bailey believed at
6 any particular time does not advance any claim, is
7 not relevant.

8 MR. BROWN: It's --

9 THE COURT: Hold on one second. As for as
10 the way he approached the case, do you know what
11 you all would have had there as for as why, do you
12 know why you all sought an indictment against Mr.
13 Gadson?

14 THE WITNESS: Based on, I'm not trying to
15 give a short answer, just based on information in
16 the file, the cumulative effect of everything that
17 we had, which consisted of a lot of conflicting
18 statements but it pretty much all pointed to Bowman
19 and Gadson as being present when this thing
20 occurred. I mean, we had information came in
21 before the indictment, information that came in
22 afterwards, and the more the information came in
23 the more it pointed to Mr. Bowman. But I can't
24 state at this point in time specifically what my
25 thoughts were as for as relative guilt of these two

1 people at the time the indictment was presented to
2 the grand jury. I just --

3 BY MR. BROWN:

4 Q Let's fast-forward and Tawain entered a plea
5 agreement in May, for lack of a better date, May of
6 2002. In fact the plea agreement is up there, May
7 13th of 2002. What served as your basis to believe
8 Tawain Gadson was guilty of murder on May 13, 2002?

9 MR. WATERS: Your Honor, again --

10 THE COURT: Has he stated he believed he was
11 guilty?

12 MR. BROWN: He sure has.

13 THE COURT: You already testified to that?

14 THE WITNESS: I don't believe I did.

15 THE COURT: Did you testify to that today?

16 MR. BROWN: It is in that plea he signed.

17 THE COURT: Wait a minute. Let me see it.

18 Go ahead.

19 MR. BROWN: That plea agreement in pertinent
20 part says he can go back and charge him with
21 murder.

22 THE COURT: What has -- you said that he
23 believes he's guilty of it?

24 MR. BROWN: He can't charge him of it unless
25 he believes he's guilty of it.

1 THE COURT: He believes the evidence is
2 sufficient. What he personally --

3 MR. WATERS: That is my objection, his
4 personal belief is not relevant to anything --

5 MR. BROWN: I don't want his personal belief.

6 MR. WATERS: Mr. Brown, may I finish, please?
7 His personal belief over prosecutorial authority
8 under the law are not relative to any possible
9 issue whether ineffective assistance or Brady or
10 whatever, and this is just simply not anything that
11 advances any claim that's in issue.

12 MR. BROWN: If you would like to know which
13 claim it advances, it goes directly to the claim
14 regarding, if you want me to do it right now with
15 Mr. Bailey here, I will tell you which claim it is.
16 We have claim R.

17 THE COURT: Which is?

18 MR. BROWN: Conflict of interest with Marva
19 Hardee-Thomas and Gene Dukes, and we have claim S
20 and we have claim T.

21 THE COURT: What is S?

22 MR. BROWN: S is a failure to correct false
23 testimony and T is a failure to provide exculpatory
24 information under Brady, or impeachment information
25 under Brady.

1 THE COURT: So --

2 MR. BROWN: I hate to telegraph to my
3 witness --

4 THE COURT: Are you claiming the State didn't
5 provide that exculpatory information?

6 MR. BROWN: Or didn't correct Mr. Gadson's
7 false testimony, and I will lay my theory out, I
8 hate to telegraph to a witness but I don't mind
9 doing it --

10 MR. WATERS: Your Honor, I hate to object.

11 MR. BROWN: You know, he's interrupted me,
12 Your Honor.

13 THE COURT: I thought you just said what your
14 claims were, Mr. Brown.

15 MR. BROWN: And what I'm trying to tell you
16 is that the reason --

17 THE COURT: Hold on one second. Okay, you
18 want to continue on?

19 MR. BROWN: The reason why it's significant
20 is this. Mr. Gadson is threatened with murder.
21 For the record, I want to make sure we understand
22 Mr. Bailey is here while we're having the argument
23 about his testimony.

24 THE COURT: You haven't asked him to leave.

25 MR. BROWN: I think it would be better if he

1 did.

2 THE COURT: Well, then, we'll hear from Mr.
3 Waters before we do that. What were you going to
4 say, Mr. Waters?

5 MR. WATERS: The first thing I have to say,
6 he says there is a failure to correct with regard
7 to James Gadson. There is absolutely nothing pled
8 to that regard. That would be my first objection
9 to that.

10 Secondly, again Mr. Bailey's belief, what he
11 believed at any given time or prosecutorial
12 theories are not Brady material. The only thing
13 that is Brady is evidence, testimony, statements,
14 actual evidence, and what he believed at any given
15 time has nothing to do with that and could not
16 possibly be relevant to any claim in issue.

17 MR. BROWN: That is my question.

18 THE COURT: Are you alleging there was some
19 evidence that Mr. Bailey held back from Mr.
20 Cummings and Miss Thomas?

21 MR. BROWN: Not at this time. What I'm
22 suggesting is this, that there is evidence
23 sufficient to charge Mr. Gadson with murder, I
24 agree, I totally agree with that. The problem is,
25 Mr. Gadson didn't testify to that effect, which

1 makes his trial testimony false.

2 THE COURT: He didn't testify to what?

3 MR. BROWN: That he did anything wrong. It
4 is crystal clear, and it came in in a deposition
5 and in testimony at this PCR.

6 THE COURT: If you would, how about stepping
7 outside a minute. You want a break anyway. We'll
8 all take a break but we'll stay here for a minute.
9 Do not discuss your testimony, as you know.

10 (The witness was excused from the courtroom).

11 THE COURT: Now, Mr. Brown, are you arguing
12 that anytime the State alleges two people committed
13 the crime of murder and seek indictment on both of
14 them, at that time they are still seeking evidence
15 to see which one of the two did it or if they did
16 it in conjunction with each other, that once they
17 do that they are precluded from prosecuting either
18 one of them if they later get evidence that
19 indicates focus on one of them?

20 MR. BROWN: Not at all.

21 THE COURT: What are you saying?

22 MR. BROWN: What I am saying, Mr. Gadson
23 takes the stand and says, "I didn't do a single
24 thing out there, the first thing I know about this
25 murder, I hear the gunshots," and I think he said

1 he sees the fire come out of the gun. That is the
2 first time he knows anything about this, that is
3 what he says to the jury in the guilt phase, "I'm
4 the only eyewitness, I saw Mr. Bowman kill her, I
5 didn't know anything about it until I heard the
6 pops and saw the fire coming out of the gun."
7 That's not true.

8 THE COURT: So, what should have happened?

9 MR. BROWN: That it should have been
10 corrected. That's the only basis --

11 THE COURT: Corrected by Mr. Cummings?

12 MR. BROWN: Well, yes. I pled it that way,
13 and it also should have been corrected by the
14 prosecutor and I'm not asking for his personal
15 belief, I'm asking him what evidence he has to
16 serve as that basis.

17 MR. WATERS: First of all that was not the
18 question that was asked. The question was belief,
19 when did you believe.

20 MR. BROWN: No, what did you believe.

21 MR. WATERS: Again --

22 THE COURT: Let me finish my question.

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

24 THE COURT: You're stating right now on Mr.
25 Bailey, you feel Mr. Bailey had evidence of what

1 Mr. Gadson said is contradicted by other evidence
2 or statements from Mr. Gadson. Is that right?

3 MR. BROWN: If I may hand up what has been
4 marked as Plaintiff's Exhibit 84, which is a letter
5 in March of 2002 from Mr. Bailey to Mr. Gadson's
6 lawyer that says, "Due to the extent of your
7 client's admitted involvement I cannot reduce the
8 murder charge."

9 THE COURT: Okay.

10 MR. BROWN: He clearly thinks he has enough
11 guilt to be charged with murder, he is writing Mr.
12 Gadson's lawyer saying --

13 THE COURT: But what statements or evidence
14 do you contend Mr. Bailey had regarding Mr. Gadson?

15 MR. BROWN: That is what I'm going to ask
16 him.

17 THE COURT: What do you contend?

18 MR. BROWN: I don't know, but whatever it is,
19 well --

20 THE COURT: What do you contend Mr. Cummings
21 knew that he should have done something about?

22 MR. BROWN: I think Mr. Bailey should have
23 taken all this --

24 THE COURT: You told me a minute ago Mr.
25 Cummings should have done something.

1 MR. BROWN: Both of them should.

2 THE COURT: What did Mr. Cummings know about
3 Mr. Gadson that he should have taken some action
4 after Mr. Gadson testified?

5 MR. BROWN: Ricky Davis' statement.

6 THE COURT: Ricky Davis' statement that they
7 were in the cell together, that Mr. Gadson had told
8 him this?

9 MR. BROWN: And Miss Hawkins' and Miss
10 Coleman's statement.

11 THE COURT: Mr. Cummings testified that would
12 open up also that Mr. Davis also said Mr. Bowman
13 made him say that.

14 MR. BROWN: No, Mr. Bowman, if you will read
15 the --

16 THE COURT: Did Mr. Cummings say that?

17 MR. BROWN: No. He said Mr. Bowman asked him
18 to say.

19 THE COURT: I'm sorry.

20 MR. BROWN: If I was charged with a crime and
21 somebody else confessed I would be asking that guy
22 to bring it to their attention, too.

23 MR. WATERS: That is not what happened. He
24 said Mr. Bowman asked him to make it up.

25 MR. BROWN: That is not true. I want him to

1 find those words make it up. We've got the
2 transcript, if he can find it. That is not the
3 same thing.

4 THE COURT: You mean -- hold on one second,
5 Mr. Brown.

6 MR. BROWN: Yes, sir.

7 THE COURT: I have a tough time when someone
8 is talking, with you standing sometime. I'm asking
9 you what Mr. Cummings testified to last week. I
10 thought he said last week he was concerned with
11 opening the door on Mr. Boman's and Mr. Davis'
12 discussions, that he felt that, he thought, last
13 week he said he was concerned that the jury may
14 hear that it looked as if Mr. Bowman had asked Mr.
15 Davis to make something up. Just help me, did he
16 testify to that last week?

17 MR. BROWN: There was a leading question to
18 that effect from the Attorney General but the
19 answer I think was yes, I agree, I don't think he
20 ever said the words made it up.

21 THE COURT: All right. So therefore, anyway,
22 there was some evidence, there was evidence that
23 Mr. Cummings was concerned about it.

24 MR. BROWN: And --

25 THE COURT: But yet, but yet you say that the

1 concern you have about Mr. Bailey's beliefs or Mr.
2 Bailey's evidence of Mr. Gadson stems from your
3 concern about the handwritten statement of Mr.
4 Davis. Anything else?

5 MR. BROWN: And Plaintiff's 67, where Sam
6 from the prosecutor's office tells Mr. Bailey that
7 Ricky Davis overheard him say this and that Bowman
8 said, "If you heard this write it down." He didn't
9 say, he said if you heard it.

10 THE COURT: All this goes back to Ricky
11 Davis' statement. Anything else?

12 MR. BROWN: Yes.

13 THE COURT: What else?

14 MR. BROWN: Miss Hawkins and Miss Coleman
15 said that two weeks prior to that Mr. Gadson fired
16 the gun that SLED purports was used in the killing.

17 THE COURT: Okay.

18 MR. BROWN: And so, again --

19 THE COURT: We have all gone through that
20 with Mr. Cummings and you feel because of that,
21 then when Mr. Gadson testified, by the way, that
22 was not brought up in the trial, all that about two
23 weeks before. I thought it was some evidence
24 discussed --

25 MR. WATERS: Mr. Cummings testified last week

1 he simply asked Mr. Gadson if he owned a gun like
2 that and Mr. Gadson said yes, and he deliberately
3 did not go any further because that brings out
4 Margaret Hawkins would put the gun in Marion's
5 possession. That was his testimony.

6 THE COURT: And what is it specifically?
7 Those are the areas. Where is there a specific
8 question now, what is the specific question now you
9 want to ask Mr. Bailey?

10 MR. BROWN: What evidence did he have that
11 Mr. Gadson was guilty of murder.

12 THE COURT: Okay. You ask him that question,
13 what evidence he has that caused him to think Mr.
14 Gadson is guilty of murder, I don't have any
15 problem with that.

16 MR. BROWN: That's the question.

17 THE COURT: Do you have any problem?

18 MR. WATERS: That wasn't the question he
19 asked. If he wants to ask item X, I, or A,
20 item B --

21 THE COURT: I want to ask what you object to.
22 I will make the decision whether it is simple
23 enough. I will permit you to ask him what evidence
24 he had that Mr. Gadson may have committed this
25 murder as opposed to Mr. Bowman.

1 MR. WATERS: Your Honor, one last point. I
2 do have to reiterate my objection to them now
3 raising some failure to correct evidence with
4 regard to Mr. Gadson, which was not pled, because
5 here we are on the last day of hearing, Mr.
6 Cummings is gone and, you know, this is the problem
7 with me trying to defend issues when I don't know
8 what they are. I haven't even been required to be
9 told what they are as we go along.

10 THE COURT: Are you asking me to change some
11 rules or something?

12 MR. WATERS: I was asking for the rules to be
13 followed and for him to give me notice of every
14 claim to be litigated.

15 THE COURT: Are you bringing some new issues
16 up, Mr. Brown, or saying these are issues you were
17 not aware until you got responses from the
18 witnesses?

19 MR. BROWN: I didn't get a copy of the
20 documents, including Mr. Gadson's indictment for
21 murder, until I got a copy of the Solicitor's file
22 which we're talking about the week of trial. The
23 week before trial, Mr. Sinclair and I were sitting
24 in my office, we had requested --

25 THE COURT: Which was months ago.

1 MR. BROWN: Which was months ago.

2 THE COURT: And so, since then you haven't
3 sought any --

4 MR. BROWN: We do plan to.

5 MR. WATERS: That's the problem. Here we are
6 in the evidentiary hearing, he is saying he's going
7 to amend, so I'm going to find out about claims
8 afterward. As I told Your Honor at the hearing
9 back in late September, I have written down 26
10 separate claims that may or may not be arising from
11 the testimony, that they are just allowed to
12 present evidence and not tell me exactly what they
13 are alleging so I can focus on those issues as
14 well.

15 THE COURT: Mr. Waters, remember we're not in
16 that much of a hurry with this matter. In fact,
17 when Mr. Brown's case is through, if you feel
18 because of what I has asserted you need to have
19 time to put additional evidence in regarding those
20 matters you might know about, you will be able to
21 do so.

22 MR. WATERS: I understand. The only problem
23 is that, Your Honor, if he is not required to tell
24 me the issues he's going to raise, how do I know,
25 how do I know, by deduction, he is raising the

1 issue? I could be thinking of one he is not
2 thinking of and starts putting on evidence and he
3 says, "Hey, that's a good one, too."

4 THE COURT: You know more about that than I
5 do. Anyway, let's take a short break.

6 (Recessed at 3:16 p.m.).

7 (Reconvened at 3:33 p.m.).

8 THE COURT: I will permit the petitioner to
9 ask the question about what information, evidence
10 Mr. Bailey had concerning the guilt of Mr. Gadson
11 at the time of the murder.

12 All right.

13 BY MR. BROWN:

14 Q What evidence did you have pointing to the
15 guilt of Mr. Gadson to the charge of murder?

16 A We had statements from the witness. I'm
17 trying to answer your question without -- I can't
18 tick off every single item we had. This is in
19 2008, almost 2009, and these events occurred in
20 2001 and 2002. So, I can only answer that by
21 saying that we start off at the time the person is
22 indicted with whatever for we have at that point
23 and if there is any potential that someone is
24 guilty under more than one theory then we indict in
25 alternate theories.

1 And as the thing progresses from indictment
2 stage on to trial I'm constantly investigating,
3 constantly looking for new stuff, constantly
4 interviewing and re-interviewing witnesses and my
5 thought process evolves over a period of time. I
6 mean, that's all I can tell you, is that I had
7 sufficient information on Mr. Gadson where he could
8 have been guilty under accomplice liability or
9 principal, depending upon which statements were
10 correct.

11 There were numerous statements from numerous
12 defendants that were conflicted and as the process
13 went on it appeared to me that circumstantially,
14 even though I was convinced that Mr. Bowman was the
15 trigger man, that Gadson could have been tied in on
16 this thing and the murder charge would have still
17 been good under accomplice liability theory but I
18 can't give you specific details about his
19 involvement at any particular point in time now.

20 Q Did the Ricky Davis or Wayne Mood statements,
21 were those of the type that you were talking about
22 that point to --

23 A Those things I would check out to see if it
24 had any merit in it and in my opinion neither the
25 Mood or the Ricky Davis statements were credible.

1 Q Neither was credible?

2 A In my opinion.

3 Q Okay. Then what statements from what
4 witnesses were credible to support the murder case
5 against Gadson?

6 A Well, again, I mean, we're talking about six
7 or seven statements given by your client at
8 different periods of time, several statements given
9 by Gadson. We had Hiram Johnson, we had, there
10 where probably, I don't know, maybe a total of
11 thirty statements in the file by different
12 witnesses over different aspects of it. Again, I
13 can't tell you specifically at this point in time
14 exactly what information we had on Gadson. We knew
15 he was present, we knew he had intimate details of
16 what occurred, we knew that he did not come forward
17 with the information once the murder had occurred.

18 Q And that would be like a misprison?

19 A That would be like a misprison but also show
20 guilty knowledge and potential participation in it.

21 Q And I hate to kind of split the layer, but
22 beyond presence and beyond knowledge of the crime
23 while present, neither one is evidence of guilt,
24 even?

25 A No.

1 Q Mere presence, even mere presence with
2 knowledge is not guilt. If the theory was Bowman
3 was the shooter, what was the theory that Gadson
4 did it?

5 A Initially Mr. Bowman gave a statement
6 implicating Gadson as the shooter.

7 Q All right. And that's in part maybe
8 incorporated into Mr. Gadson's arrest warrant?

9 A I'm certain that was part of it, yes. We can
10 only operate on information that we have at a given
11 time.

12 Q Let me show you, let me show you what has
13 been marked as Plaintiff's Exhibit 84.

14 MR. BROWN: In fact I would move 84 into
15 evidence.

16 MR. WATERS: No objection, Your Honor.

17 THE COURT: In evidence.

18 (Bailey to Dukes letter marked and
19 received in evidence as Plaintiff's Exhibit
20 Number 84).

21 BY MR. BROWN:

22 Q This is March of '02, more than a year from
23 the arrest, and I'm going to ballpark, we're
24 talking about seven or eight months from
25 indictment, after indictment.

1 A Okay.

2 Q And in that case, or in this letter you
3 document to Mr. Dukes that his client's, I'm going
4 to put in here admitted involvement substantiates
5 the murder charge.

6 A Okay.

7 Q And what I'm trying to find out is, and we've
8 got his statement up here, Mr. Bowman's, I believe
9 Mr. Gadson's statements, what admitted involvement
10 is that that makes him --

11 A I would need to review those statements to
12 refresh my memory. I don't specifically recall at
13 this point in time.

14 Q I'm going to show you what has been marked as
15 Plaintiff's 5 and 6, statements of James Tawain
16 Gadson.

17 A All right. It starts off he admits knowledge
18 that Bowman is armed with a silver and black .380
19 semiautomatic pistol. Says Marion called him over
20 to the car, told him to get in, said he was going
21 to pull a caper, and my interpretation of caper is
22 he was going to commit some kind of a crime. He
23 talks about, "We followed that road out to
24 McElhanney Road, the crime scene, Marion was
25 pointing out the houses he wants to rob," which

1 shows knowledge he is with someone, that he is
2 voluntarily with someone who is getting ready to
3 commit a felony. Describes Bowman putting his arm
4 around Kandee Martin on the back of the seat,
5 pointing the finger at the back of her head, making
6 a gesture as if he were shooting a gun.

7 Q Let's talk about that..

8 A Let me answer your first question, if I
9 could. You asked me to detail all the things I
10 thought about would make him guilty?

11 Q Yes.

12 A Do you want me to finish answering that or
13 stop?

14 Q Oh, please. I do want to come back to the
15 pointing of the gun.

16 A Okay. He states, "We were going to rob a
17 house at the end of the road," obviously his intent
18 to commit a felony with Marion Bowman. Marion
19 tells him that he's going to kill her if she's
20 wired by the police. A car comes by and they all
21 hide in the bushes. Then he hears gunshots and
22 sees the flashes, witnessing the killing. He hears
23 her plead for her life and he shoots her again. He
24 sees the gun in his pants afterwards.

25 THE COURT: He does what, now?

1 A Sees the gun in Marion Bowman's pants
2 afterwards, after the shooting.

3 The statement he gave on the, at 10:00 a.m.
4 to Detective, I think it was Van Doran, witnessed
5 by Van Doran and Coker, he started off essentially
6 the same as the latest statement but denied being
7 present when the murder had occurred, which to me,
8 of course he has tried to remain silent but when he
9 affirms he lies about not even being there, you
10 know, that is some guilty knowledge, to me.

11 Q Let me ask you, Mr. Gadson is pointing a gun
12 shaped finger, for lack of a better word, at the
13 back of her head, offering encouragement to another
14 to commit a crime, that's some type of
15 conspiratorial agreement or active participation
16 beyond mere knowledge?

17 A Did you say Mr. Gadson was doing that?

18 Q Yes, sir.

19 A I didn't say that. I think the statement was
20 that your client was doing that.

21 Q Okay. And tell me again, I understand he has
22 knowledge, he has presence, what makes him, in his
23 own statement that makes Gadson guilty of murder?

24 A That is it but I'm coupling that statement
25 together with information from your client who

1 initially said that Gadson was the guy that pulled
2 the trigger.

3 Q Okay. And that's a belief that you held at
4 least until you wrote that letter to Mr. Dukes?

5 A I didn't say that.

6 MR. WATERS: Objection.

7 THE COURT: I don't want to know his beliefs,
8 I want to know what evidence he had.

9 Q What evidence did you have to support the
10 murder contention in March of 2002 documented in
11 the letter that has now been admitted as
12 Plaintiff's Exhibit 84?

13 A Other than the fact that afterwards, after
14 the events Gadson was voluntarily with your client
15 going to the Allen Murray Club, wearing gloves,
16 that's all I can think of right now. There may be
17 other stuff in the file. I've got like seven or
18 eight four-inch notebooks and I can't commit all
19 that to memory. I can't think of anything else at
20 this point in time.

21 Q You had a plea agreement with Mr. Gadson?

22 A Yes. We ultimately reached a plea agreement.

23 Q And the plea agreement, if violated, subjects
24 Mr. Gadson to murder and the death penalty without
25 objection?

1 A If that is what -- yes, it speaks for itself,
2 yes.

3 Q What would merit death in this case for Mr.
4 Gadson?

5 A You're asking a hypothetical. I mean, I
6 don't know at this point or at that point in time.
7 This agreement was something that is standard in
8 any agreement. If someone is charged with murder
9 as a co-defendant along with somebody else and a
10 plea agreement is reached, I mean, I always want
11 recourse to be able, if the agreement is violated,
12 to go back and not be limited on the extent of the
13 charges that I can reinstate. And what I actually
14 would reinstate would depend on, as I said earlier,
15 the evidence that I had at that point in time. It
16 may be weaker or may be stronger, I just don't
17 know, but I'm protecting myself for that
18 eventuality.

19 Q Well, in Mr. Gadson's trial testimony if he
20 says that he did nothing to make him guilty of
21 murder how do you reconcile that with the ability
22 to charge him with capital murder?

23 A Because I don't know for sure what he did.
24 I'm basing the charge on the information that I've
25 obtained from other witnesses and forensic evidence

1 and that kind of thing. Sometimes you have a
2 circumstantial case against somebody. When they
3 get up there and they testify under oath and they
4 admit to certain things and don't admit to other
5 things that I think may have happened but can't
6 prove it, then at some point in time I have to
7 accept their version of what happened unless it is
8 blatantly in conflict with something else I know to
9 be true. That is the only way I know to answer the
10 question.

11 Q And on that note, do you believe what, when
12 he testified that he didn't do anything, that is
13 accurate, that goes to my client?

14 MR. WATERS: Your Honor --

15 THE COURT: I sustain the objection.

16 Q Why didn't you correct his false testimony
17 that he didn't do anything if you believed you
18 could charge him with murder?

19 A Because I didn't know at that time, I didn't
20 know, have any reason to believe his testimony was
21 false because it coincided with everything else
22 that I knew about the case from other sources at
23 the point in time that he testified.

24 Q I'm going to ask you, then, to take a look at
25 Plaintiff's 85 and 86. Then, if you believe that

1 his testimony was truthful, take a look at that.

2 A Okay, 85 is notes of my interview with Darien
3 Williams. 86 would be some proposed offers,
4 including offers to Gadson. Yes, this is, yes,
5 summary of what I, what I had planned on offering
6 the different defendants.

7 MR. BROWN: And I would offer these in
8 evidence.

9 MR. WATERS: No objection, Your Honor.

10 THE COURT: Do you have them marked?

11 MR. BROWN: Yes, sir, 85 and 86.

12 THE COURT: Okay.

13 (Darien Willaims interview notes marked and
14 received in evidence as Plaintiff's Exhibit
15 Number 85).

16 (Proposed offers marked and received in
17 evidence as Plaintiff's Exhibit Number 86).

18 BY MR. BROWN:

19 Q In your Darien Williams notes, second
20 paragraph, you note he'll make a good witness?

21 A Okay.

22 Q And doesn't Mr. Williams inform your office
23 that Tawain Gadson put the gasoline into a two
24 liter jug or coke bottle, however he phrases it?
25 That is one, two, three, four, five down.

1 A Okay.

2 Q And that's actually not inconsistent with Mr.
3 Felder paying for the gas, is it?

4 A That part is not inconsistent with it. What
5 is inconsistent was Mr. Williams saying he rode
6 with James Tawain Gadson when the gas was put in
7 the car. To my knowledge he didn't appear on the
8 tape. Mr. Bowman never alleged that he was there
9 when they got the gas, and Mr. Felder didn't
10 either.

11 Q Now --

12 A So, there is nothing to verify that he had
13 any knowledge of what occurred there, that he was
14 with, that he was there, I mean.

15 Q Let me ask you about this. I mean, you
16 continue to assert some truth to Mr. Williams'
17 testimony as of the time of these proposed offers,
18 don't you?

19 MR. WATERS: Your Honor, again we're going to
20 the prosecutor's belief with this questioning. I
21 think the problem with this whole line of
22 questioning is that what Mr. Brown is trying to do
23 is to try to say what did you believe and when did
24 you believe it and therefore if you believed that,
25 you had to somehow correct Mr. Gadson's testimony.

1 I think the only proper inquiry, and thus I would
2 object on relevance, is did you have any concrete
3 evidence that contradicted anything in Mr. Gadson's
4 trial testimony, not whether or not statement A
5 conflicted with statement B. That just simply goes
6 to what -- he is dancing around with what I think
7 is improper, is what did you believe at point A and
8 what did you believe at point B. The only thing
9 that would really be at the heart of what gave to
10 him a duty to correct would be concrete evidence
11 that was false.

12 MR. BROWN: Withdraw that question.

13 BY MR. BROWN:

14 Q What does it say on the second sentence of
15 the document entitled proposed offer?

16 MR. WATERS: Your Honor, again, that sentence
17 is --

18 THE COURT: I know, it's in evidence. He's
19 entitled to publish something in evidence.

20 MR. WATES: Withdraw it.

21 MR. BRONW: Thank you.

22 BY MR. BROWN:

23 Q Okay.

24 A The second sentence?

25 Q The first one is, quote, charged with murder.

1 Below it, and I know it is not --

2 A Offer. This is referencing Tawain Gadson,
3 offer plea to accessory before the fact of arson
4 based on Darien Williams' anticipated testimony.

5 Q Okay. And I'm assuming this was after that
6 interview with Darien Williams where you said he
7 would make a good witness?

8 A Yes, uh-huh (Affirmative).

9 Q Okay. And so, then we get the proposed offer
10 and we still have some reliance upon Darien
11 Williams at this point?

12 A This was what I intended to offer. Now,
13 whether or not I offered this stuff here, whether
14 or not this would vary with the actual plea
15 agreement, I don't know, I have to compare each one
16 of them with what is on here. I will say my
17 reference here, this is my notes from my interview,
18 that was my impression from talking to Mr.
19 Williams, he would make a good witness, not
20 necessarily that he was telling the absolute truth,
21 but that he presented himself well and he gave a
22 good appearance, that type things.

23 Q But the effect on you as a listener to those
24 statements was to make that a basis for your plea
25 offer?

1 A It was part of a basis for my plea offer.

2 Q Thank you. You assert that right up to trial
3 as a basis --

4 A I asserted what up to trial?

5 Q That Mr. Williams would make a witness
6 regarding --

7 A No, I didn't. If I wanted to use Darien
8 Williams as a witness, and I don't even think I
9 called him. I could be wrong.

10 Q Okay. Why didn't you call Mr. Willaims?

11 A Because I didn't think his testimony was
12 truthful after comparing what he said with
13 everything else in the case.

14 Q When did you make that determination?

15 A I can't recall that. I can't tell you that,
16 I don't recall this date.

17 Q I show you Plaintiff's 87 which isn't in
18 evidence.

19 MR. WATERS: I object. It is getting around
20 the back door of what I'm complaining about.

21 MR. BROWN: I'm going to ask if he recognizes
22 87.

23 MR. WATERS: I object to introduction of the
24 document and any testimony about it.

25 MR. BROWN: If I may, Your Honor.

1 BY MR. BROWN:

2 Q Do you recognize 87?

3 A Yes.

4 Q It's a letter you wrote?

5 A A letter I wrote, yes, sir.

6 Q Okay. Does it fairly accurately depict the
7 letter you wrote to Andrew Grimes?

8 A That is the letter I wrote to Andrew Grimes,
9 a copy of it.

10 Q Andrew Grimes is Mr. Williams' lawyer?

11 A I believe so, yes, sir.

12 THE COURT: As for as the letter, what it
13 says is fine, if you want to put the letter in I
14 have no problem with it. I will be glad to look at
15 the evidence in the record regarding this matter.

16 BY MR. BROWN:

17 Q Does that letter document your effort to
18 obtain the testimony of Darien Williams?

19 A Yes.

20 Q That is within a week of the beginning of
21 this trial?

22 A Okay.

23 Q Hiram Johnson was a person who was also
24 questioned here in this case?

25 A Yes.

1 Q All right. And Hiram Johnson was at some
2 point in time charged by the State in a burglary
3 case?

4 A Unrelated burglary is right, as I recall.

5 Q Do you have any recollection of providing
6 that information to Mr. Cummings or Miss Marva
7 Hardee-Thomas?

8 A No.

9 Q And if they received a rap sheet that showed
10 no charges on it, then how would the State have
11 informed them of that impeachment information that
12 they, that he was subject to a charge and that came
13 from the very office he was testifying on behalf
14 of?

15 A Well, number one, I'm not sure he could be
16 impeached on the charge.

17 Q How about the bias of testifying for somebody
18 on behalf of the State that is also charging him,
19 because a 608 bias is always relevant?

20 A Okay.

21 Q Because that might well be --

22 A It's possible, yes.

23 Q Because you actually bring out the bias in
24 the State's witnesses, Yolando, Kendra and Dorothy
25 Mae on direct.

1 A Okay.

2 Q And they weren't convicted yet, were they?

3 A No.

4 Q Why did you bring out their charges, then?

5 A As part of informing the jury there is a plea
6 negotiation with those witnesses.

7 Q And that would show the bias?

8 A It would. It is something that if I don't
9 bring out the defense is going to bring it out so
10 I'm anticipating they will bring it out and I don't
11 want to give the appearance of hiding the ball from
12 the jury.

13 Q Did you bring out Hiram Johnson has pending
14 charges?

15 A Hiram Johnson's pending charges had nothing
16 to do with the particular case we're talking about
17 here. It was totally unrelated.

18 Q But it was related in the sense it was
19 pending with your office?

20 A It was pending in Orangeburg County. I can't
21 recall whether or not my office was handling that
22 or the AG's office was handling that.

23 Q Why would that have gone to the Attorney
24 General?

25 A Because there was a police involved shooting

1 concerning his arrest.

2 Q If I show you what has been entered as
3 Plaintiff's Exhibit 48, and the prosecutor listed
4 on that indictment, does he not work with your
5 office?

6 A It is not signed. Robbie Collins was working
7 with our office. That doesn't necessarily mean we
8 didn't send that case to the AG's office, I just
9 don't remember. We may have handled it or may not
10 have. I'm not denying that we handled it, I just
11 don't know. It's a case we could have sent to the
12 AG, maybe we did, maybe we didn't.

13 Q But there is no recollection of informing Mr.
14 Cummings or Miss Marva Hardee-Thomas that there was
15 a charge out there?

16 A Not unless it appeared on the rap sheet, and
17 from your question I assume that it probably was
18 not on the rap sheet or you wouldn't have asked it
19 that way.

20 Q And 49 would indicate that Mr. Robbie Collins
21 was actually, of your office, was actually
22 prosecuting the case?

23 A Yes, uh-huh (Affirmative).

24 Q And why wasn't he charged with possession of
25 a stolen car when he said that he was riding in a

1 car that he was told was stolen and he's riding
2 around with some brown cotton gloves on?

3 A Are you talking about Hiram Johnson and the
4 unrelated case that he was charged in?

5 Q Riding in Kandee Martin's car.

6 A Kandee Martin's car.

7 Q He gives a statement saying, "We're riding in
8 a car, I heard it was stolen and I'm wearing brown
9 cotton gloves."

10 A Because we had so many other people charged
11 in that case with more serious offenses, that I
12 just didn't think that a charge was warranted on
13 Hiram Johnson.

14 Q And is that not relevant to bias, to bring
15 out, take the sting out of the impeachment for Mr.
16 Cummings?

17 A I'm sure Mr. Cummings knew that he wasn't
18 being charged.

19 Q Okay. He knew it, then?

20 A I would assume he did, yes.

21 Q And I hate to dance around, I'm going to go
22 back to some stuff real quick on Travis Felder.

23 Travis Fedler's recall for testimony, the
24 second time he testifies he's questioned about how
25 many times he has met with you.

1 A Okay.

2 MR. BROWN: I beg the Court's indulgence.

3 Q I apologize. During the first time you all
4 met, excuse me, the first time he testified, at
5 page 4110, actually I think it may be in that
6 volume you have up there, volume nine.

7 A Okay.

8 Q And 4109, Mr. Cummings asked, "How many times
9 have you met with anybody to go over your testimony
10 today?" He said once.

11 A Okay.

12 Q Then you come up and ask him and say,
13 "Travis, we met in your lawyer's office a couple
14 weeks ago, right, and this morning we talked. You
15 actually talked to me two times?"

16 A Yes.

17 Q Now I want to ask you about this. I want to
18 make sure I get the number of times Mr. Felder
19 spoke to you, I don't know how you want me to say
20 this, authorities or agents of the State of South
21 Carolina. At the time of his arrest in February,
22 2001, February 17, 2001, he was questioned before
23 he was arrested?

24 A Are you asking how many times he talked to
25 law enforcement?

1 Q Yes, sir.

2 A Give me a second. I know he talked to
3 either, probably Alvin Coker at least one time
4 before he was arrested because I recall that
5 conversation was he knew nothing about anything and
6 he was arrested after that.

7 Q Okay.

8 A Almost immediately after that he retained
9 Clyde Dean to represent him, so we had no access to
10 him after that point. Later on he got Charles
11 Williams to represent him and shortly before trial
12 I was finally able to make contact with Charles
13 Williams to start the process to try to get his
14 cooperation.

15 Q All right.

16 A So, at least one time with law enforcement, I
17 interviewed him one time with Charles Williams in
18 his office a week or so before trial and
19 immediately before he testified I talked to him
20 again.

21 Q Okay. He was interviewed by Mr. Coker prior
22 to his arrest?

23 A I believe it was Coker, yes, before his
24 arrest.

25 Q Okay. Or at least law enforcement prior to

1 arrest?

2 A Yes.

3 Q Then he was arrested and they went to speak
4 to him and he had a lawyer?

5 A I don't know if they tried to talk to him
6 again or not, I don't recall, but I do recall that
7 Clyde Dean was retained almost immediately after he
8 was arrested. There is no written statement in the
9 file and there is no summary of any verbal
10 statement he gave other than him saying he didn't
11 do anything.

12 Q Let me ask you about the polygraph that he
13 took. I think that report in front of you there is
14 a polygraph on April, roughly the 16th, 2002?

15 A I'm sure it's here somewhere but there is a
16 lot of stuff here.

17 Q I apologize. I think it may be right here.

18 A Okay.

19 Q And that was a polygraph administered by Van
20 Doran to Travis Felder?

21 A Yes.

22 Q And there was questioning done whether or not
23 he was ever hooked up to a machine outside the
24 polygraph itself, he was asked questions?

25 A Are you asking me a question?

1 Q Well, he was asked questions at that point in
2 time, on April 16th, they questioned him about
3 issues pertinent to this investigation?

4 A You mean separate and apart from the
5 polygraph?

6 Q No. Including these questions. And I don't
7 know if there was a pre-polygraph interview or post
8 polygraph interview.

9 A I mean, I wasn't present when the polygraph
10 report was given. It speaks for itself and
11 whatever this report says occurred I'm sure it
12 occurred but I'm not sure what your question to me
13 is.

14 Q Let's talk about that. Do you recall
15 limitations being placed on the polygraph?

16 A Not by me.

17 Q Did Mr. Williams speak to you about what
18 could not be asked of Mr. Felder?

19 A I don't recall.

20 Q Well, do you recall speaking to Mr. Williams
21 before -- let me back up. At this point in time
22 this is a year after his arrest?

23 A Yes.

24 Q He's got a lawyer and you represent the
25 State?

1 A Yes.

2 Q So, it is not like Van Doran just walked down
3 there and said come on, Travis, let's talk? I
4 mean, there had to be lawyers talking before that
5 was set up?

6 A Yes, Van Doran, they were out of the picture
7 as for as Felder was concerned after Felder said,
8 "I wasn't there, I don't know anything," and he
9 lawyered up.

10 Q But did they come back in?

11 A No, no. Other than to administer the test.

12 Q Right, but I mean --

13 A Okay, how that came about was Charles
14 Williams sent me a written proffer letter.

15 Q Okay.

16 A That I read and I didn't necessarily believe
17 everything in the letter so I wanted him
18 polygraphed on some of the things in the letter and
19 I asked Charles Williams to consent to polygraph
20 and he said he would. The polygraph showed
21 deception and then I met with Charles Williams and
22 at that point in time Felder recounted in essence
23 what his testimony was during the guilt phase of
24 the trial.

25 Q Okay. Let me ask you, when did you tell

1 Marva Hardee-Thomas or Norb Cummings that Mr.
2 Felder through his lawyer had provided you a false
3 statement?

4 A I didn't specifically tell them that. I sent
5 them a copy of the proffer letter, I believe, and I
6 will need to check my file to see --

7 Q Okay. And here is what I'm getting at. If
8 you sent them, Mr. Williams sent you a proffer --

9 A Yes.

10 Q -- then you sent the proffer on to Mr.
11 Cummings and Miss Marva Hardee-Thomas?

12 A Yes.

13 Q But you had Mr. Felder polygraphed because
14 you didn't believe parts of that proffer?

15 A And they also received the polygraph --

16 Q Okay.

17 A -- report. So, whatever I got, I sent to
18 them.

19 Q But you --

20 A I got the proffer letter, I sent that to
21 them, the best of my knowledge, and then I sent the
22 polygraph report. So, to the extent the polygraph
23 report is inconsistent with what is in the proffer
24 letter, they had that information, that is the only
25 way I can answer.

1 Q Let me just ask you. I mean, you believed it
2 was false and had him polygraphed for that reason?

3 A Yes.

4 Q Okay. And did you tell Mr. Cummings and
5 Marva Hardee-Thomas that, "Hey, Mr. Felder tried to
6 lie his way into a deal with me"?

7 A I did not specifically say that but again
8 what I did was give them the same information that
9 I had so they could review it and draw their own
10 conclusions from it.

11 Q And did Mr. Felder or Mr. Williams or Mr.
12 Felder through Mr. Williams or whatever combination
13 it was --

14 THE COURT: Before you ask that, I've got
15 another judge on the phone here.

16 (Recessed at 4:24 p.m.).

17 (Reconvened at 4:31 p.m.).

18 THE COURT: Okay, what was the last question?

19 (The prior question asked was read to the
20 witness).

21 THE COURT: Okay.

22 BY MR. BROWN:

23 Q To put this in context, somehow or another
24 Mr. Felder using his attorney or through the
25 proffer tried to get a deal by telling you

1 something that wasn't true?

2 A Again, this was sort of in the nature of
3 leaving stuff out. The things that he failed the
4 polygraph on were whether or not he saw the body
5 being placed in the trunk of the car. The proffer
6 letter didn't mention that and I thought that is
7 what actually occurred. I asked for him to be
8 polygraphed. Those are the questions he was asked
9 that did he not pass.

10 Q But he had changed his story?

11 A I don't know if it was a matter of changing
12 the story or leaving part of it out. I would have
13 to refer to the proffer letter again to refresh my
14 memory.

15 Q Hold on, let me make sure I understand. At
16 trial he testifies he saw Mr. Bowman put the body
17 in the back of the car?

18 A Yes.

19 Q But he had tried to get a deal with you and
20 proffered testimony to the effect he didn't see the
21 body get put into the car?

22 A Give me a second, I can review the letter.

23 A The proffer letter says, this is again from
24 Charles Williams, not directly from Felder; it
25 says, "That they got in his car, drove Bowman down

1 to McElhanney Road, Bubba pulled up in a field, got
2 out and all of a sudden the car was set on fire.
3 Travis did not realize whose car it was. Thinks
4 Bowman is burning it to get insurance."

5 Q He didn't talk about the body at all?

6 A He does not talk about the body at all.

7 Q Okay. So, he tries to get a deal based on
8 this letter that says, "I rode out there and just
9 witnessed this arson"?

10 A Yes.

11 Q Then you confront him with the fact you
12 believe he saw the body being put in the car?

13 A Yes.

14 Q And he changes his story?

15 A Right.

16 Q And did you tell Mr. Cummings or Miss Marva
17 Hardee-Thomas that he attempted to lie a deal from
18 the State?

19 A Not to my recollection, no.

20 Q Okay. And then later on we find out that he
21 lied about buying the gas by omitting that and he
22 finally ends up owning up to that later on?

23 A Are you asking me?

24 Q Yes.

25 A Yes.

1 Q And then at the end of the process he still
2 gets the benefit of his plea deal?

3 A Yes.

4 Q After twice lying, once in April regarding
5 seeing a body, and once about buying the gas?

6 A Yep.

7 Q And that's right, this was just brought out
8 and I do have to ask this, it's not really an
9 omission when he says, "I don't know really whose
10 car it is," and later on he says, "It's Kandee
11 Martin's car and I saw her body get stuck in back"?
12 That's a lie?

13 A Yes.

14 Q Any other way to characterize that?

15 A No.

16 Q Let me ask you about Mr. Gadson, to try to
17 wrap this up. What did Mr. Gadson tell you about
18 sex occurring between Mr. Bowman and Kandee Martin
19 on Nursery Road?

20 A What did Gadson tell me?

21 Q Yes, sir.

22 A I would have to refer to his statement again.

23 Q Okay, feel free to.

24 A I don't see anything in here about sex.

25 Q He didn't tell you anything about any sex?

1 A He didn't, no.

2 Q Okay. And what information did you have that
3 suggested that Mr. Bowman had sex during the
4 commission of the murder?

5 A Well, one, his DNA was in her.

6 Q No, during the commission of the murder?

7 A During, specifically at the time of the
8 murder?

9 Q Yes, sir. What we would term the res gestae
10 of the murder.

11 A Mr. Bowman on about four occasions, and I
12 spell this out in a letter that I sent to Norb
13 Cummings giving him one more chance to take a life
14 sentence in this case, at least four times
15 referenced other people who supposedly were with
16 him at the time of the murder having sex with her
17 either after she was dead or immediately before she
18 was dead. So, he seemed fixated on sex with the
19 victim. His semen was in her. I'm not sure if
20 that answers the question. That is the best
21 information I have.

22 Q Well, without disputing the DNA, are you
23 suggesting that Mr. Bowman and Miss Martin had
24 sexual intercourse? What evidence shows it
25 occurred during the res gestae period of the

1 murder, and I don't know which way --

2 A Well, his own statement alleging that sex
3 took place between either the corpse of the victim
4 or the victim during her lifetime at about the time
5 she was dead by attributing this to other people.

6 Q Well, let's make sure. I want to kind of go
7 back on that. You had an aggravator of CSC?

8 A Okay.

9 Q And CSC has to be a live victim, because it
10 is a different charge for sex with a corpse?

11 A Okay.

12 Q So, what I'm talking about is during that
13 time period up to her death but marked in the
14 beginning by the res gestae of the murder, and I
15 don't know how you want to paint that, but what I'm
16 trying to focus in on --

17 A I'm not trying to paint anything. I'm just
18 trying to answer your questions, and your question
19 wasn't whether or not there was a CSC charge, it
20 was whether or not there was sex with the victim.

21 Q During the murder, the res gestae of the
22 murder, not whether there was sex like the day
23 before, that afternoon or that morning, because the
24 murder is alleged to have taken place at 8:00
25 o'clock in the evening.

1 A The statement he gave alleging that sex
2 occurred on or about the time, either postmortem,
3 perimortem or premortem.

4 Q And we're talking about statements that other
5 people had sex with her?

6 A Yes, in his presence, different people at
7 different times.

8 Q And what evidence substantiated the claim
9 that other people had sex with her, that other
10 people --

11 A Your client's own statement -- what evidence
12 substantiated that?

13 Q What evidence substantiated that, that other
14 people had sex with her?

15 A Nothing.

16 Q Nothing substantiated that statement, so --

17 A You're saying your client lied and what
18 evidence do I have he told the truth, none.

19 Q Well, what I'm saying, that is an
20 unsubstantiated statement, how does that prove he
21 had sex? He didn't say he did, did he?

22 A You didn't ask me what proof. You asked me
23 what evidence I had in support of the proposition
24 that he had sex with --

25 Q If I'm following this theory, the fact that

1 Travis Felder says Mr. Bowman burned the car would
2 be evidence that Travis Felder burned the car?

3 A You have lost me. You're talking about sex,
4 then you're talking about a car. I don't remember,
5 I can't answer you.

6 Q We'll back up. What evidence shows that Mr.
7 Bowman had sex during the res gestae timeframe of
8 the murder but before she expired?

9 A Okay, bear with me a second, please. In his
10 first statement he said that the victim was killed
11 by Terry Kelly, also known as Peanut, and Tarus
12 Gant. He said that Kelly then had sex with
13 Martin's corpse.

14 He next gave a statement saying that Terry
15 Kelly and James Gadson murdered Martin and her body
16 was fondled after she was shot.

17 The third statement he said Gadson shot the
18 victim and then he shot her himself, Bowman did.
19 Presumably after she is already dead. He stated,
20 further stated in that statement that Gadson had
21 sex with her corpse and that he burned the car with
22 the body in it. He next stated that Charles
23 Fralick murdered Martin.

24 So, he attributes sexual conduct to Terry
25 Kelly and James Gadson with Martin's corpse. And

1 due to the fact he gave numerous statements saying
2 that various people had sex with her after she was
3 shot and the fact that his DNA was in her, putting
4 those facts together, that's the basis of my belief
5 that there was some criminal sexual conduct
6 occurred at or about the time of her death.

7 Q Okay. And I'm sorry, I don't understand, I
8 don't understand how a statement that says somebody
9 else had sex with her is evidence that he had sex
10 with her, the pivotal part, during the res gestae
11 to murder?

12 MR. WATERS: Objection, asked and answered.

13 THE COURT: Do you want to clarify that any
14 further?

15 A I can try to. I'm not basing that on any one
16 particular thing. I'm basing that on several
17 statements in which your client alleged he either
18 had knowledge of or was present when other people
19 had sex with the victim at or about the time she
20 died and I couple that with the fact that their
21 semen is not in her, your client's semen is in her.
22 Putting that whole thing together, it formed a
23 belief in my mind that there was criminal sexual
24 conduct that occurred with the victim. Normally
25 you don't have sex with somebody, then kill them.

1 Q A couple parts to this I have a question
2 about. The part about the other people having sex,
3 I think you said was unsubstantiated?

4 A Yes.

5 Q Okay. So, Mr. Bowman had said other people
6 had sex with her, that is an unsubstantiated
7 statement?

8 A Yes. How many times do I have to say it, Mr.
9 Brown? Unsubstantiated. He's the only one said
10 it.

11 Q Is there anything else that serves as a basis
12 for belief that Mr. Bowman had sex with her during
13 the res gestae of the murder?

14 MR. WATERS: Objection, asked and answered.

15 MR. BROWN: Okay.

16 THE COURT: He has given you all he can give
17 you on that, or all he's going to give you.

18 MR. BROWN: I just have to make sure.

19 BY MR. BROWN:

20 Q Let me ask you about Tawain Gadson's mental
21 health evaluation. Did you ever provide that
22 document to Mr. Cummings or Miss Marva
23 Hardee-Thomas?

24 A I don't believe I did.

25 Q And Mr. Gadson talked --

1 A Talked about marijuana use.

2 Q And having blackouts?

3 A Yes.

4 Q And hearing a voice. Do you know what the
5 voice told him?

6 A I sure don't.

7 Q And that he heard a beeping noise.

8 THE COURT: Are you talking about information
9 within the mental health evaluation?

10 MR. BROWN: Of Tawain Gadson.

11 Q There is some impeachment value to that, to
12 his credibility?

13 A Arguably there would be some impeachment
14 value there, yes.

15 Q Okay. And it could either be that this guy
16 can't, he has blackouts, hears voices, or that he
17 lies about it?

18 A Well, I think he testified at trial that he
19 passed out in the car on the way back from Allen
20 Murray Club. He had been drinking all day, so the
21 record is replete with evidence of intoxication or
22 alcohol abuse during the time this occurred.

23 Q Let me ask you, because that is, the
24 blackouts we're talking about are blackouts like
25 loss of consciousness and I didn't read it to be

1 attributed to alcoholism.

2 A No, no. I said, I'm talking about two
3 different things.

4 Q I'm sorry.

5 A I'm talking about the trial testimony, where
6 he admitted excessive alcohol use. So, if you are
7 asking about impeachment value of this, I think
8 that would be not as great unless, you know, if he
9 said he was cold sober at the time this happened.

10 Q On page two of his evaluation which is
11 Plaintiff's Exhibit 8 he talks about, he attributes
12 suffering seizures, blackouts, passing out, having
13 periods of unconsciousness.

14 A Had a seizure around 21, had three of them,
15 okay.

16 Q So, either he's subject to some physical
17 impairment that limits his, possibly limits his
18 recall or he lied to somebody about these things.
19 Either one is of impeaching value?

20 THE COURT: That says it limits his recall.

21 Q Verbal memory impairment.

22 THE COURT: Verbal memory impairment? What
23 does verbal memory impairment mean? Is that
24 something in writing? What do you mean?

25 MR. BROWN: I'm not a psychologist.

1 THE COURT: Okay.

2 BY MR. BROWN:

3 Q But memory impairment would be significant to
4 the State's purported witness to murder?

5 A To answer your question, I think that if
6 somebody in the past had three occasions where they
7 had some type of seizure type episode, one of them
8 when he was 21 years old, a total of three of them,
9 would be of some extremely marginal value for
10 impeachment purposes, I guess. I mean, the fact I
11 had a headache three times in the past wouldn't
12 mean I had a headache at the time I'm testifying
13 now. I mean, I can see your point but --

14 Q Because there is more than that, now, not
15 just on the blackouts, but smoking six Blunts a day
16 every day.

17 A Okay.

18 Q I mean, that's somebody who might have an
19 issue regarding his memory, specially when they say
20 he has a memory issue.

21 THE COURT: Let me ask you this. I have the
22 hard working deputy clerk still here, it's almost
23 5:00. I know she's paid well but not well enough.
24 Do you all envision you all needing this file at
25 all?

1 MR. BROWN: I was going to tell Your Honor
2 that's it, I have no other questions.

3 THE COURT: Okay. Do you anticipate needing
4 this file?

5 MR. WATERS: No, sir, Your Honor.

6 THE COURT: Do you think you need anything
7 from it so far?

8 THE WITNESS: I don't believe so.

9 THE COURT: Do you want to come take it back?

10 THE CLERK: Yes, sir.

11 THE COURT: I know you would love to sit here
12 and listen further and sit back there but I thought
13 I would force you to go home.

14 MR. WATERS: Did you say you're done?

15 MR. BROWN: I'm done.

16 THE COURT: Therefore the file is being
17 returned to a high official of Dorchester County
18 all dressed in her coat and scarf looking ready to
19 go Christmas shopping.

20 THE CLERK: Thank you very much.

21 THE COURT: Thank you for being here today.

22 MR. BROWN: Thank you.

23 THE CLERK: Thank you.

24 THE COURT: All right. Cross?

25 MR. WATERS: Thank you, Your Honor.

1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q Mr. Bailey, how you doing today?

4 A Fine, how are you?

5 Q I'm doing all right. If I understand your
6 testimony, correct me if I'm wrong, you pretty much
7 covered most of the bases but I want to clarify a
8 few items. You had received no information that
9 Travis Felder was on that videotape and it was a
10 surprise to you when Mr. Cummings came to you about
11 that. Correct?

12 A I knew Felder was probably on the videotape
13 at some point because I knew he had been in there
14 to get potato chips and dip and gasoline on a
15 previous occasion.

16 Q Specifically about buying the gas --

17 A I did not have any idea he was in there
18 buying gasoline for Marion Bowman.

19 Q Was there something in particular that was on
20 that tape that you were looking for when you got
21 it, that you kind of --

22 A The main thing I was looking for was
23 supposedly a guy with a Jamaican accent that was on
24 there saying something about some guys killing a
25 girl.

1 Q Okay. Let me try to find --

2 A There is a letter, I think, that references
3 that potential.

4 Q I'm looking for Applicant's 83. Perhaps you
5 can help me. Here it is, I've got it. Okay, I
6 will let you look at Applicant's 83 which has
7 already been admitted.

8 A Okay.

9 Q That is, particularly with the number two
10 there, that's particularly what you're talking
11 about with regard to --

12 A Yes.

13 Q Okay.

14 A And this guy, to my knowledge, was never
15 located.

16 THE COURT: What number was that again?

17 MR. WATERS: 83.

18 Q As I understand it, after that lie or
19 deception or whatever you want to call it,
20 omission, we have been calling it a number of
21 different things, came to light in the sentencing
22 phase, ultimately you decided to still honor the
23 plea agreement with Travis Felder, correct?

24 A Yes. At that point in time it just wasn't
25 worth it as for as utilizing court time and for

1 whatever marginal benefit we might have gotten with
2 increased sentence.

3 Q Because ultimately you are talking about an
4 economic thing and prosecutorial discretion?

5 A It was like pulling teeth, he ultimately told
6 the jury the whole thing, so it did come out. I
7 wish it had come out the first time but it didn't.

8 Q All right. Ultimately because he did finally
9 come clean and because it would just be essentially
10 more hassle than it was worth in your judgment --

11 A I couldn't unring the bell, so I just went on
12 with it.

13 Q I guess ultimately you did get some benefit
14 from his testimony about what actually happened at
15 the Nursery Road scene, correct?

16 A Yes.

17 Q Which was your focus, is that correct?

18 A Yes.

19 Q Okay. I'm showing you 4909 of the record on
20 appeal. I apologize, this kind of fell apart, it
21 has been through a lot in the past couple months,
22 and have you start with line six.

23 A It just fell apart.

24 Q Okay. I will have you take a look at that.
25 With regard to the signing of the plea agreement

1 with Mr. Felder --

2 A Line 18 here?

3 Q I'm sorry, line six.

4 A Okay, line six, okay. Do you want me to read
5 it?

6 Q No, just read it to yourself real quick.

7 A Okay.

8 Q All right. So, at the time that Mr. Felder
9 was brought back in the sentencing phase that was
10 the time when he had ultimately signed that plea
11 agreement and you had not even signed it yet
12 yourself. Correct?

13 A That's correct.

14 Q You provided it to the defense as soon as you
15 had it?

16 A Yes.

17 Q And prior to that, prior to the guilt phase
18 you had just provided the defense with the
19 substance of that plea agreement that had been
20 verbally reached with Mr. Felder and his attorney?

21 A Yes.

22 Q Okay. Had you sent the written agreement
23 over there at that time or do you recall?

24 A I believe I had mailed that to Charles
25 Williams, I just hadn't received it back yet. I

1 don't recall when that went out, out of my office.

2 Q Your practice is of course to send it to the
3 attorney first?

4 A Yes.

5 Q And have the defendant or the witness sign it
6 before it comes back and you counter-sign it?

7 A They mail it back to me and then I'll sign
8 it.

9 Q All right. Let's talk a little bit about the
10 Sam letter, Sam Richardson.

11 A Okay.

12 Q And I believe you stated you don't have an
13 independent recollection about whether or not that
14 was disclosed to the defense or not. Is that
15 correct?

16 A I don't recall.

17 MR. BROWN: That wasn't asked, I object. I
18 intentionally did not ask that question, so I don't
19 know where that statement came from.

20 Q Is that correct?

21 THE COURT: I overrule the objection because
22 if he didn't ask him on cross he can probably come
23 back with his own witness.

24 MR. BROWN: I agree, but the question was,
25 "You stated earlier that --"

1 MR. WATERS: I must have misheard him, let me
2 just ask him flat out now.

3 BY MR. WATERS:

4 Q Do you recall writing that Sam letter to the
5 defense?

6 A I don't recall that and it doesn't have a
7 discovery stamp, Rule 5 stamp on it and I don't
8 recall seeing it. In reviewing some of the stuff
9 before trial, before this hearing, I don't recall
10 seeing a transmittal letter or anything referencing
11 that.

12 Q Okay. Is there a reason for that?

13 A Yes. Generally what I do in a death penalty
14 case, I did all the homework myself, I didn't
15 delegate a whole lot except obviously typing.

16 Q Right.

17 A I ordinarily would have interviewed this guy
18 myself but it was so close toward the trial date,
19 so much other stuff going on, that I went ahead and
20 got an investigator to do it and at that time I
21 would have looked at this as work product,
22 something that, you know, outside law enforcement
23 agency didn't interview this guy, my alter ego did,
24 somebody working for me, and I would have viewed
25 this as attorney-client privilege. In addition to

1 that, I don't, without, you know, close comparison
2 between this and the Ricky Davis statement and all
3 that, I don't think there is anything inconsistent.

4 Q All right. If there had been something
5 inconsistent, that might have triggered something?

6 A If something jumped out at me that was
7 inconsistent, yes, I would have made a disclosure
8 on that.

9 Q Let me ask you, you said it was work product.
10 Is that something, if it were in your file and Norb
11 or Marva came over and wanted to take a look at it,
12 is that something that would have been there?

13 A I have an open file policy, if they come by,
14 yes, they could have seen anything in there.

15 Q Okay.

16 Q So, you had advised them of that open file
17 policy, correct?

18 A Yes. Norb Cummings worked for me the first
19 two years I was Solicitor, so he was aware of it.
20 He has in the past come in and looked at the file.
21 I can't specifically recall whether he did that in
22 this case or not but I remember him being in the
23 office looking through my file on either this case
24 or one of two other death penalty cases he was
25 involved in when I was Solicitor.

1 MR. BROWN: May we approach, Your Honor?

2 (Unrecorded bench conference).

3 THE COURT: Proceed on.

4 MR. WATERS: Thank you, Your Honor.

5 BY MR. WATERS:

6 Q I'm going to show you what has been marked as
7 Defendant's 43. That letter isn't signed by you
8 but I wanted to see if that was something that was
9 a typical type letter that would go out in criminal
10 cases while you were Solicitor?

11 A Yes, sir.

12 Q And that is in this particular case reference
13 to the --

14 A Open file policy.

15 Q Right. Not only providing the entire file
16 but also the open file policy of the Solicitor's
17 office, correct?

18 A Yes.

19 MR. WATERS: Your Honor, I move Defendant's
20 43 into evidence, I believe without objection.

21 MR. BROWN: Without objection.

22 THE COURT: In evidence.

23 (Bailey to Hardee-Thomas letter was marked
24 and received in evidence as Defendant's
25 Exhibit Number 43).

1 MR. WATERS: Thank you, Your Honor.

2 BY MR. WATERS:

3 Q All right. Let's talk a little bit about
4 Hiram Johnson. I believe your testimony was that
5 you didn't know about a lawsuit, is that correct,
6 or what did you know?

7 A I didn't have any specific knowledge of it.
8 I was familiar with the facts of what had occurred
9 and I assumed that there might be a lawsuit, some
10 type of claim he might make but I didn't have any
11 personal knowledge of it.

12 Q Okay. Did you ever discuss that with him or
13 his attorney during the course of your dealings
14 with him?

15 A Not that I can recall.

16 Q Okay. And if you had discussed it with him,
17 this lawsuit and maybe about having some sort of
18 quid pro quo, that would have been something
19 obviously that would have been problematic,
20 correct?

21 A I know I didn't discuss a lawsuit. I may
22 have asked, you know, just in passing about the
23 incident. He was shot in the head by a law
24 enforcement officer during an arrest and I think he
25 had a scar on his head and I might have mentioned

1 something about it, how you doing or something of
2 that nature but nothing substantive.

3 Q Okay. All right. Because in your mind
4 whatever charges he had had nothing to do with this
5 particular case here, correct?

6 A Right, yes. And to my recollection, I stand
7 to be corrected by the file but there was no, no
8 plea agreement with him at all, there were no
9 charges against him, he just agreed to testify.

10 Q All right. You testified a little bit about
11 whether it had been kicked to the AG's office. Do
12 you have any independent recollection of that?

13 A Apparently it wasn't because Robbie Roberts'
14 name was on it, so we did keep it.

15 MR. BROWN: Just for clarification, was not?

16 A Was not.

17 Q That would indicate it was retained by the
18 First Circuit in Orangeburg, correct?

19 A Yes.

20 Q All right. There has been some allegations
21 about the Public Defendner's office in Dorchester.
22 What was your understanding of how they worked,
23 particularly with regard to one of the PD's, say
24 Gene Dukes, representing one co-defendant and Marva
25 Hardee-Thomas representing another?

1 A At that time they didn't have a real Public
2 Defender's office, they had some independent
3 contractors, contract Public Defenders, all had
4 private practices, all worked part-time. There was
5 no Public Defender they answered to, there was no
6 central office. They had a clerical employee I
7 think assigned cases and they were all separate.

8 Q So, it was not uncommon to have co-defendants
9 represented by the various part-time Public
10 Defenders?

11 A That is generally what happened usually when
12 you had multiple defendants who are entitled to
13 the Public Defender.

14 Q A couple general questions. In your
15 interviews with these witnesses, the various
16 witnesses in these cases did you ever suggest facts
17 to them?

18 A Never.

19 Q Did you ever provide statements from other
20 people and try to mold their testimony to what
21 other people had said?

22 A No.

23 Q Okay. Now, you were asked a little bit
24 about, about the forensic testing that was done on
25 the heavy accelerant on the pants and kind of an

1 analogy between that and a toxicology report
2 involving Kandee Martin, right? Do you recall
3 that?

4 A Yes.

5 Q I believe your explanation was, correct me if
6 I'm wrong, forensic testing of the scene, that more
7 went to identity and the case of what happened, and
8 Miss Martin's toxicology report had nothing to do
9 with any guilt phase issues as for as those
10 concerns. Is that fair to say, is that the
11 distinction?

12 A Yes. Yes, that would be the distinction, a
13 distinction, anyway.

14 Q While you were trying to make sure that you
15 could not be accused of not doing a full and fair
16 investigation with regard to the accelerant, that
17 was because that was actually related to the actual
18 cause and results of this particular crime.
19 Correct?

20 A As relates to the arson charge, yes.

21 Q And while in a certain case someone's
22 intoxication level might be relevant to the guilt
23 or innocence of the person, it was not in this
24 particular case with Miss Martin?

25 A No.

1 Q You were asked a little bit about the
2 presence of Mr. Bowman's DNA in the victim and I
3 believe you testified that there were a number of
4 statements from Mr. Bowman in which he said someone
5 else had had sex with the victim during that time
6 on the road and coupled that with the fact Mr.
7 Bowman's semen was found therein, that to you was
8 evidence it was in fact Mr. Bowman was doing what
9 he had said the other people had done. Is that
10 correct?

11 A That was my belief.

12 Q And ultimately that evidence is good evidence
13 of identify because it shows the defendant and
14 Kandee Martin were in close proximity to one
15 another?

16 A Sure, it puts them together.

17 Q Now, you were shown a couple plea agreements.
18 I'm going to show you on page 4182. Let me ask you
19 quickly. Do you recall the plea agreement that was
20 submitted from Yolanda was not signed, correct?

21 A Yes.

22 Q Do you have an independent recollection of
23 that plea agreement with her?

24 A Yes, I know we had a plea agreement.

25 Q I'm going to show you pages 4182 and 4183,

1 just have you review that real quick.

2 A Okay.

3 Q Have you had a chance to look at it?

4 A Yes, uh-huh (Affirmative).

5 Q In that particular examination there is no
6 reference to agreement. Right?

7 A No. There is a reference to earlier
8 testimony where she testified at some previous
9 point in the trial.

10 Q All right. You were asked about the fact
11 Felder's and Gadson's agreements have reference to
12 the polygraph result. Do you recall that
13 polygraph? Do you recall that?

14 A Yes.

15 Q I believe your testimony was that the wife
16 and sisters of Mr. Bowman had yet to be polygraphed
17 when their plea agreements were entered into. Is
18 that correct?

19 A That's my recollection.

20 Q So, you wanted to have that option available
21 in case what they told you was a bunch, to you
22 sounded like bunk and you wanted to be able to put
23 them on a polygraph if you needed to, correct?

24 A Yes. In my mind polygraph is more to keep
25 them honest, the threat of a polygraph being there.

1 I don't think polygraphs are all that reliable but
2 people think they are and they are more inclined to
3 go ahead and come clean if you have that hanging
4 out there.

5 Q With regard to Felder and Gadson, they had
6 given statements, they had been given polygraph and
7 they kind of came to Jesus, for lack of a better
8 word?

9 A Yes.

10 Q That was the distinction between Gadson and
11 Felder and the Bowman sisters and the wife,
12 correct?

13 A Yes, and I don't think a polygraph, I think
14 if you give it a second time there is a learning
15 curve that they go through, they are not as
16 reliable as the first time they are around. I
17 don't think SLED will give them but one time.

18 Q It is not an absolute to you, just a tool
19 that sometimes can be valuable and sometimes not,
20 correct?

21 A Yes.

22 Q You were asked a little bit about Mr. Gadson
23 and his indictment which charges him as a principal
24 first, right?

25 A Charged him as a principal first, and

1 alternative theories, being the actual trigger man
2 or being present, abetting.

3 Q I was going to ask you is it your practice to
4 charge as a principal first with the understanding
5 under the law you could ultimately convict under
6 that indictment as principal second, on the theory
7 the hand of one is the hand of all?

8 A Yes. There is no reason in your practice to
9 specify exactly what part of the law you are
10 relying on because you could get him under all
11 three. I wanted to keep the options open. As I
12 said early, things change as you go along. You
13 learn something new every time you pull the file
14 out, every witness you talk to. The dynamics of it
15 change and you think you know what direction it is
16 going in but, you know, certain aspects get
17 stronger or weaker as you go along. It's just to
18 keep those options there.

19 Q Right. And, so, because of that legal maxim
20 and the way you practice that, just simply because
21 that indictment was true billed does not
22 necessarily mean Mr. Coker went down to the grand
23 jury and said James Gadson was the one shot Kandee
24 Martin, correct?

25 A No. Again, I wasn't there and I would be

1 speculating on what he may or may not have told
2 them about.

3 Q But it doesn't necessarily mean that is the
4 only thing he told them?

5 A Not necessarily.

6 Q Okay. And in fact at that particular time it
7 was still relatively early in the investigation and
8 Mr. Bowman himself had given statements in which he
9 said Gap, or James Gadson, was the one who had shot
10 the victim?

11 A That's correct.

12 Q All you are concerned about really in the
13 grand jury is whether or not there is sufficient
14 evidence to continue the prosecution. Correct?

15 A Under some legally valid theory, yes, sir.

16 Q Okay. Now, you were asked a little bit about
17 your decision to pursue this prosecution against
18 Mr. Bowman, vis-a-vis, James Gadson, and I believe
19 you were asked about Ricky Davis and Wayne Mood,
20 and those statements, though, ultimately had no
21 effect on your decision, correct?

22 A No, those statements didn't really make a
23 whole lot of sense in comparison with everything
24 else that I knew about the file, the forensics and
25 other eyewitnesses and everything else. They were

1 checked out and then discounted.

2 Q And I guess also when you were going through
3 the trial of this case you still had Marion
4 Bowman's fourth statement in which he admitted he
5 had fired the shot that killed Kandee Martin,
6 correct?

7 A Yes.

8 Q Going in you didn't know that was ultimately
9 going to be suppressed, did you?

10 A I sure didn't.

11 Q In ultimately making your --

12 MR. BROWN: Your Honor, I would like to renew
13 our previous objections to relying upon that
14 statement for any truth due to its determination
15 that it was unreliably provided.

16 THE COURT: If he relied on it he relied on.

17 MR. BROWN: I don't want it in for any other
18 reason.

19 MR. WATERS: I have been clear since the
20 beginning.

21 THE COURT: We're only dealing with, just
22 like the other witness, how they used it. You are
23 noted.

24 MR. BROWN: Thank you.

25 THE COURT: While we have a second here, I

1 notice we're privileged to have in our presence the
2 Honorable James Williams, the resident judge here
3 of the First Circuit. I did want to let him know
4 that I have my coat today and I have my pin on my
5 coat indicating I'm a Circuit Court judge. This
6 pin was designed by James Williams when I was
7 president of the Association of Circuit Judges so
8 we would be able to have a pin to be able to
9 identify them, that only circuit judges can wear
10 them. I'm not sure after January 1st I will be
11 able to wear this pen.

12 JUDGE WILLIAMS: I have to put up with your
13 other memorabilia.

14 THE COURT: So I'm going to wear it as long
15 as I can.

16 JUDGE WILLIAMS: I just wanted to wish you a
17 Merry Christmas. I'll be back tomorrow but I hope
18 you won't be here.

19 THE COURT: Believe it or not, I'm going to
20 be in Columbia having a hearing. Thank you for
21 coming by, Merry Christmas to you.

22 JUDGE WILLIAMS Thank you.

23 THE COURT: Go ahead.

24 MR. WATERS: Thank you, Your Honor. The
25 Court's indulgence one moment?

1 BY MR. WATERS:

2 Q I'm going to show you what has been marked
3 Defendant's Exhibit 44. See if you recognize that
4 letter. Specifically with regard to disclosure of
5 the polygraph results of Travis Felder.

6 A Yes, I recognize it, it's my signature.

7 Q Okay. To your recollection is that a letter
8 in which you disclosed the polygraph report of
9 Travis Felder in which it was noted deception
10 indicated as to seeing Kandee Martin's body?

11 A Yes.

12 Q Okay. And you were asked some questions
13 about that and I guess my question to you is, is
14 that you were pretty much relying on the fact that
15 it is clearly and obviously inferrable to defense
16 counsel when you disclose the polygraph here, and
17 the plea agreement, that Mr. Gadson has been
18 involved in your office and failed the polygraph
19 but signed a plea agreement?

20 MR. BROWN: Speculative, as to whether it's
21 inferrable.

22 MR. WATERS: I'm talking about his
23 perspective.

24 MR. BROWN: Referrable is the effect on the
25 listener. He is the one making the statement.

1 THE COURT: Did you consider, you used the
2 term arguable before, how did you look at it is
3 something you did, received certain thoughts from?

4 THE WITNESS: Yes.

5 THE COURT: I will permit the question.
6 Proceed on.

7 BY MR. WATERS:

8 Q Do you understand my question?

9 A Could you ask me again?

10 Q Obviously you provided them the polygraph
11 letter. Correct?

12 A Yes, I did.

13 Q Okay. And you provided them ultimately with
14 notice of the fact Mr. Felder had entered into a
15 plea agreement. Correct?

16 A Yes.

17 Q So, from your perspective it was clearly
18 obvious or inferrable to the defense counsel Mr.
19 Felder had lied to you on one occasion but yet you
20 were still going to enter into a plea agreement
21 with him. Correct?

22 A Yes. Just the context of the --

23 MR. BROWN: The same objection, Your Honor.
24 If he's implying it, then I can understand that he
25 can ask that question, but the speaker, he is

1 asking the effect upon the listener, whether it's
2 inferrable.

3 Q Let me ask you this way. Did you think you
4 were covering anything up with regard to the fact
5 Travis Felder lied to you?

6 A No, because the polygraph report clearly said
7 he was deceptive and indicated what he was
8 deceptive on.

9 MR. WATERS: Okay, I think that's all I had.
10 I ask the Court's indulgence one moment. I think
11 we're about done.

12 No further questions, Your Honor.

13 THE COURT: All right.

14 MR. BROWN: Very briefly.

15

16

17

18

19

20

21

22

23

24

25

REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q There is a letter which is marked as Defendant's 43 and it references an open file policy. And then you also refer to the Sam memo, which is Plaintiff's 67. I have it down as work product and then attorney-client privilege. Can you explain to me, can you explain to me the distinction between work product or privileged document and non-work product or non-privileged documents in your office?

A Work product would be something that either I did or someone did at my specific direction in-house, not something that came from outside law enforcement agency, something that is done in preparation for litigation either by me or somebody else at my request.

Q And I guess the distinction I'm looking for, how is that distinguished on the privileged, on the privileged part of it? I don't know the right legal word.

A How is it distinguished from what?

Q From non-work product or non-privileged documents.

A A non-work product in my mind would be

1 something from an outside agency, law enforcement
2 or the Department of Corrections or anything
3 outside the Solicitor's office that was prepared in
4 preparation not necessarily for litigation but for
5 the purpose of making an arrest, doing the law
6 enforcement process.

7 Q We've seen some documents I referred to --
8 well, I don't know if I entered them but they are
9 kind of questions and notes that you type up?

10 A Yes. That's also work product. That is
11 stuff that I did, you know, just my outline of what
12 I intend to ask each witness or outline before I go
13 to court.

14 Q Did you give those --

15 A It's work product but it was in the file and
16 the Solicitor copied the file, knew it was in
17 there, and it wasn't, it wasn't I disclosed that to
18 the defense, I couldn't tell you at this point.

19 Q Would you have let Norb Cummings look at your
20 questions before trial?

21 A Yes. I wouldn't have mailed it to them, it
22 is work product, but at the same token it's nothing
23 I'm trying to hide. If they came in and wanted to
24 look at it and I had done it, I had already
25 prepared it, you know, they are welcome to look at

1 it.

2 Q How about your notes regarding which jurors
3 you wanted to pick or which jurors you didn't want
4 seated?

5 A I didn't look at that as part of the case
6 file. That was a separate thing. I would not have
7 given that to the defense.

8 Q Okay. So, there are some items that you do
9 not turn over or would not let them look at, I will
10 even say?

11 A The only things I wouldn't let them look at
12 as for as a case file, that I can think of right
13 now, would be some witness that was going to be in
14 danger between the time of disclosure and the time
15 of trial or something.

16 Q How about like those good juror, bad juror
17 notes? I mean, if Norb had come over during the
18 trial and said, "Mr. Bailey, can I look at your
19 notes?"

20 A No, I wouldn't.

21 Q There is a line drawn somewhere?

22 A Yes.

23 Q So, open file does not mean everything you
24 have?

25 A It means with very, very rare exceptions,

1 none of which I can think of other than what I just
2 told you about, that I have got an open file
3 policy. If any defense lawyer wants to call me up
4 and look at my file they come in, we sit down and
5 go over the file together, they look at it. Jury
6 notes and all that would be an exception.

7 Q And --

8 A It has nothing to do with the merits of the
9 case.

10 Q And this item 67, there was never a note that
11 you can find that says to the defense counsel that,
12 "There is an item that I believe may have
13 exculpatory or impeachment value"?

14 A No.

15 Q On item 67?

16 A Not I'm aware of after briefly going through
17 the file several weeks ago.

18 Q And that file has been in total entered as an
19 exhibit at the trial level with the Clerk of Court?

20 A Okay.

21 Q Does that sound right, because I wasn't there
22 for that?

23 A Yes.

24 Q Okay.

25 MR. BROWN: I beg the Court's indulgence.

1 Q And according to that document you entered,
2 you provided a statement of Ricky Davis?

3 A Okay.

4 Q That does not include the Sam interview
5 notes, does it?

6 A No.

7 Q Okay. But you thought it significant enough
8 to issue that statement over, not just included in
9 work product?

10 A Right.

11 Q Or excuse me, not just included in the open
12 files policy, you actually affirmatively gave that
13 to them?

14 A Yes.

15 Q And that was 36, Defense 36, that was the
16 January letter with Ricky Davis' statement in it?

17 A Yes.

18 Q Then May 7th of 2002 you again provide them
19 with Ricky Davis' same statement that he wrote.
20 You twice provided that?

21 A Yes, apparently so.

22 Q And you also provided them a statement of
23 Wayne Mood?

24 A Okay.

25 Q But you did not provide them with Sam's

1 notes?

2 A Apparently not.

3 Q Okay. And the Wayne Mood summary is your
4 summary that you did of an interview with Wayne
5 Mood and it is actually attached behind 37?

6 A Yes. Those are the typed notes of my
7 interview with Wayne Mood.

8 Q And it looks very similar to the layout of
9 the Sam interview, doesn't it?

10 A Probably the same secretary typed it out.

11 Q And that's an interview, the Wayne Mood
12 interview is your interview of Wayne Mood?

13 A Ask me again, now?

14 Q The Wayne Mood interview that is contained in
15 Defense 37 is your interview?

16 A Right, uh-huh (Affirmative).

17 Q The Sam memo which is Plaintiff's 67 is Sam
18 Richardson's interview with Ricky Davis?

19 A Yes.

20 Q Okay. They looks similar, one was provided,
21 Wayne Mood's was provided, affirmatively provided,
22 the other one was not?

23 A Yes.

24 Q Okay. I will show you what has been marked
25 as Plaintiff's Exhibit 88, and ask if you recognize

1 that?

2 A Yes, uh-huh (Affirmative).

3 Q And is that a fair and accurate depiction of
4 a letter you wrote to Yolanda Virginia Bowman's
5 attorney back in October, 2001?

6 A Yes.

7 MR. BROWN: I move this into evidence.

8 MR. WATERS: No objection.

9 THE COURT: What number?

10 MR. BROWN: 88.

11 THE COURT: In evidence.

12 (Bailey to Cooper letter marked and
13 received in evidence as Plaintiff's
14 Exhibit Number 88).

15 MR. BROWN: Thank you, Your Honor.

16 BY MR. BROWN:

17 Q There was a question, as fair as I can be
18 about it, there was a question about whether you
19 ever put words in people's mouths, what you wanted
20 them to hear or what you wanted them to say, what
21 you wanted to hear from a witness. Did you put
22 down there what you, that you will make an offer to
23 Miss Yolanda Bowman if she testifies truthfully
24 about a conversation in an automobile, and it
25 speaks for itself?

1 A Yes, I'm alerting her lawyer as to the topics
2 that I would seek to elicit from her and ask her to
3 tell the truth about them.

4 Q And on Plaintiff's Exhibit 86, which is your
5 proposed offers, when it comes down to Yolanda
6 Bowman you have a proposed offer to her contingent
7 upon her coming clean --

8 A Right.

9 Q -- about it?

10 A Yes.

11 Q So, it's clear that if she doesn't say that
12 she heard this conversation she doesn't get a deal?

13 A No. If she lies to me and I know she's lying
14 to me or suspects she's lying to me, then I'm not
15 going to have a deal with her. That is all it
16 means.

17 Q But there is some telegraphing of what you
18 want her to say?

19 A No. This is my notes for my benefit, what I
20 intend to do. This isn't sent to the defense
21 attorney, this is part of my work product in the
22 file, my summary of what I'm going to do and then
23 I'm going to go ahead and, you know, this would
24 refresh my memory, I dictate a letter to the
25 individual lawyer saying what the offer was..

1 Q I got to ask you. In the case of Travis
2 Felder he twice lied and got a deal?

3 A As I said earlier, yes, yes.

4 Q Because it was, the words I have that I wrote
5 down were because it was more hassle than it was
6 worth to renege on his deal because he lied twice?

7 A It wasn't worth it to me at that particular
8 point in time, after going through a death penalty
9 trial and disposing of all the related cases with
10 it, to go back and open this thing up again and
11 have the defense come up there and say, "Well, he
12 didn't disclose the whole thing but he wasn't asked
13 the question, and he ultimately, in that process he
14 did disclose everything he knew during the course
15 of that trial, therefore you have no claim," and
16 I'm arguing the other end of it, it wasn't worth it
17 to me at that point in time to go --

18 Q But the twelve jurors that --

19 A -- to go into that.

20 Q But the twelve jurors who decided Mr.
21 Bowman's guilt based upon his perjurious omission,
22 they may have thought it was worth it. Isn't it
23 their measure of that?

24 MR. WATERS: Your Honor --

25 THE COURT: I agree. They measure that but

1 what they felt, that's conjecture.

2 MR. BROWN: But they didn't know about that,
3 did they?

4 THE COURT: Know about what?

5 MR. BROWN: Know he lied before they
6 deliberated on the guilt.

7 THE COURT: If the record doesn't reflect it,
8 then the record doesn't reflect it. As for as his
9 interpretation of it, whether it was a lie or not,
10 I guess it is clear. Are we talking about the gas
11 situation?

12 MR. WATERS: Yes, sir.

13 MR. BROWN: Lying where he went.

14 THE COURT: It's clear he didn't say anything
15 about it in the guilt phase and it's clear he said
16 something about it in the penalty phase.

17 MR. BROWN: He says he went -- I want to make
18 sure.

19 BY MR. BROWN:

20 Q He says he went to McElhaney Road?

21 A Yes, yes.

22 Q But he went to, according to what he now
23 says, he went to the EZ Mart?

24 A Before he went to McElhaney Road.

25 Q When he left the apartment, when he left the

1 apartment where did he go? He says McElhanney
2 Road. Is that not where he went?

3 A That is where he went but he made an
4 intermediate stop on the way at the EZ Horizon.

5 Q If I said I left the first grade and went to
6 law school you wouldn't think that was very
7 correct, would you?

8 MR. WATERS: Objection, argumentative.

9 THE COURT: Well, is that true?

10 MR. BROWN: No, I went to second grade, third
11 grade.

12 MR. WATERS: The point of it is, it's
13 argumentative.

14 THE COURT: All right. Let's proceed. I see
15 your point, Let's proceed on.

16 BY MR. BROWN:

17 Q Because it would be kind of incredible,
18 wouldn't it?

19 THE COURT: Incredible or not, you're calling
20 it a lie. He says he just left part of whatever he
21 did out. Whether he thought it was a lie or not,
22 what difference does it make? The jury is the one
23 that heard it.

24 Q On that note, you have already, you have
25 already characterized that as a significant

1 omission in your direct examination?

2 A It was significant enough where I wished he
3 had gone ahead and gotten everything out at one
4 time and did not hold that information back for
5 whatever reason.

6 Q It wasn't the first time, this was the second
7 time that he reluctantly changes his story to
8 please the State to get that agreement?

9 A Yes.

10 MR. WATERS: Objection, asked and answered.

11 Q I think that was a yes?

12 THE COURT: Go ahead and answer it again.

13 Q We have the April 16th --

14 A I'm conceding that I wish he had told the
15 whole thing the first time. I don't know what else
16 I can say. I wish he had done it, he didn't do it.
17 When I found out about it, you know, he was called
18 back on the stand and it was -- the record speaks
19 for itself on that. I don't know what else to say.

20 MR. BROWN: Okay. No other questions, Your
21 Honor.

22 THE COURT: Yes, sir.

23 MR. WATERS: Thank you, Your Honor.
24
25

1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q As I understand this thing, this distinction
4 with the work product is the Sam letter was not
5 something that you felt needed to actively be
6 disclosed unless of course it was inconsistent
7 accounts, correct?

8 A Yes. Yes and, you know, I would have, even
9 though it is work product I probably would have
10 disclosed it. I don't know when the letter came
11 out, you know, maybe very, very late in the game, I
12 just don't know.

13 Q Okay.

14 A I mean, I can't, I don't think it was, I
15 think it is clearly work product and therefore not
16 something I've got to disclose but I have disclosed
17 similar stuff to that in the past in this case and
18 others.

19 Q I guess what I'm getting at, while you didn't
20 think it was something that actively needed to be
21 disclosed, if they came by it would have been in
22 the file, you wouldn't keep two separate files?

23 A It would have been in the file.

24 Q The file for public consumption unless there
25 was some sensitive information?

1 A There is no hidden file. Any file a defense
2 lawyer wanted to see in a death case, lawyers are
3 welcome to see it.

4 Q Unless there is a CI?

5 A Yes.

6 Q That only applies when you get to the
7 courtroom. In battle you are not just going to
8 hand them your jury notes, right?

9 A Yes.

10 Q Which is something different from actual
11 statements, in your mind?

12 A Yes. The point I would make is the jury
13 notes have nothing to do with punishment or guilt
14 or innocence, it is part of the process, not the
15 merits of the case.

16 Q Okay. I want to show you page 118 of the
17 record on appeal and this is where you all
18 discussed placing a sealed copy of the Solicitor's
19 file in the record. I would like you to start on
20 page 118, line 4, and just read the next couple
21 pages and let me know when you're done.

22 A Okay. This is me talking to the Court here.
23 "I do have a problem with copying my entire file
24 even if it's sealed. I mean, at some point it's
25 going to be unsealed, and my open file policy

1 applies to whatever I get from law enforcement and
2 other sources. It doesn't include my private notes
3 and that type thing, impressions I might write
4 down." And the Court says, "Sure, surely your work
5 product." Then I said, "I would object, that's
6 correct, Your Honor, I would object to having my
7 work product sealed, somewhere to be opened up, it
8 could be misinterpreted at some point."

9 Q It could be misinterpreted at some point,
10 that is what you said? I'm not asking you to read
11 the whole thing.

12 A Okay. That's what I said at that time.

13 Q Right.

14 A It turns out I was right.

15 Q That is kind of what we have been doing
16 today, correct?

17 A Yes.

18 Q So ultimately, though, the upshot of that is
19 that the file that was sealed at the time of trial
20 did not include the work product, correct, in this
21 particular case?

22 A As for as that particular letter it didn't,
23 apparently. I mean, I hadn't compared my file, the
24 Solicitor's file with that file now but --

25 Q So, if there was something that wasn't in

1 that court's exhibit that we had the Clerk here for
2 but ultimately did go to the applicant lawyers when
3 they copied the entire file from your office, or
4 from the Solicitor's office at a later date, that
5 would be the explanation because for purposes of
6 the exhibit at trial it did not include work
7 product there. Correct?

8 A Either that or when somebody is copying
9 thousands of pages sometimes a page will get
10 skipped or something. I mean, that is the only
11 other explanation I can think of.

12 Q Okay. All right. You were asked about the
13 fact that you did send over a copy of the
14 typewritten interview notes from Mr. Wayne Mood
15 that is reflected in Defendant's 37, correct?

16 A Yes.

17 Q And apparently for whatever reason you didn't
18 do so with regard to the Sam letter, is that
19 correct?

20 A That's correct.

21 Q At that point nothing had been disclosed
22 about Wayne Mood, correct?

23 A You mean at the point in time I got Sam's
24 notes?

25 Q No, at the point in time you sent that

1 letter, that was the first time, that was the first
2 information you got from Wayne Mood and that was
3 the first it had been disclosed in that regard,
4 correct?

5 A I'm referencing the Ricky Davis statement and
6 I'm telling him the first time I interviewed Wayne
7 Mood.

8 Q Okay, all right. So, unlike Ricky Davis, you
9 had already provided a statement on Ricky Davis,
10 correct?

11 A Yes.

12 MR. WATERS: I believe that's about it, Your
13 Honor, give me one second.

14 I think that's it, Your Honor. Thank you.

15 THE COURT: Do you have any redirect?

16 MR. BROWN: I do not, Your Honor.

17 THE COURT: Okay. Now, before I let him step
18 down, what is it you say we need to look at that
19 might be in the file?

20 MR. BROWN: Plaintiff's 67.

21 MR. WATERS: The Sam letter, but --

22 THE COURT: Now, why is it we need to look to
23 see if that Sam letter is in the file?

24 MR. BROWN: Well, I think it has come out a
25 little bit here on this examination because we're

1 trying to find out whether that was included in
2 the, what I'm going to refer to as the public part
3 of the file or the non-public part of the file.

4 THE COURT: Are we trying to determine
5 whether or not -- we know, we know Miss Thomas had
6 the letter?

7 MR. BROWN: No, she didn't, she said she
8 didn't have it.

9 THE COURT: We're trying to determine whether
10 or not this was given to Mr. Cummings and Miss
11 Thomas?

12 MR. BROWN: We believe it's clear it wasn't.
13 He doesn't recall giving it and neither one recalls
14 seeing it.

15 THE COURT: But we do know they had the
16 letter, the statement from Ricky Davis.

17 MR. WATERS: We don't contend there is any
18 evidence it was disclosed but I think the issue
19 was, was with what Mr. Bailey was saying, number
20 one, "It is my own interview, it was nothing
21 inconsistent with what had been provided to them,
22 but regardless, it would have been in my file had
23 they come by."

24 MR. BROWN: That's not clear. What is in
25 this letter, that is not the statement of Ricky

1 Davis.

2 MR. BROWN: That he gave this statement about
3 Mr. Bowman being present when he had nothing to
4 gain by lying to benefit Mr. Bowman.

5 THE COURT: That is what the guy says, he had
6 nothing to gain?

7 MR. BROWN: No, he says it because he gave an
8 interview --

9 THE COURT: I'm saying in the writing there,
10 what is in that writing, not interpretation, what
11 is in that writing there that is not in the Ricky
12 Davis statement?

13 MR. BROWN: Well, one thing is he says,
14 describes why or how he gave the statement at the
15 bequest of Mr. Bowman, because it has been implied
16 that Mr. Bowman told him to, and I don't know what
17 the State's words were but something like make it
18 up or something like that, and he doesn't make it
19 up, it says, and I don't want to, I'm not looking
20 for --

21 THE COURT: See if you all can find the
22 document, those two documents, Ricky Davis' written
23 note.

24 MR. BROWN: That's it right there.

25 THE COURT: And Sam, what is Sam's last name?

1 MR. BROWN: Right here, Sam Richardson.

2 THE COURT: Is he still working with the
3 Solicitor?

4 THE WITNESS: Yes, he is.

5 MR. BROWN: I don't want to limit it, Your
6 Honor, but it says that Davis told Marion Bowman
7 about the conversation with Gadson and Bowman said
8 he, this is in quotes, "If you heard all this write
9 it down." Which is not making it up, it's the
10 opposite, "Please help me." I mean, you know, if
11 you're in jail for something you say you didn't do
12 and somebody else says they heard somebody else
13 confess to it I would assume that the natural
14 reaction, not the guilty reaction, is please write
15 it down.

16 MR. WATERS: The problem is that, Your Honor,
17 that it is a characterization under these present
18 proceedings. What we have here is that Mr. Davis'
19 statement was disclosed both to the defense and
20 obviously the Solicitor went and talked to them and
21 did follow-up and, you know, unless there was
22 something inconsistent with what Mr. Davis said,
23 inconsistent relative to the trial issues, not what
24 we're talking about down at PCR and the rest of it,
25 then there was no obligation for further

1 disclosure.

2 MR. BROWN: The inconsistency is what is so
3 great. Mr. Davis made this up as he was being
4 threatened at Dorchester County. By the time Sam
5 interviews him he is in Leiber and my client is
6 still in Dorchester County. They are not even at
7 the same facility, there is nobody there but a
8 State's investigator, executive branch employee,
9 and he gives the same consistent statement. Now,
10 that's admissible, of an allegation of fabrication,
11 which is exactly what they are talking about, the
12 rules provide that.

13 THE COURT: At trial, did Davis testify at
14 trial?

15 MR. BROWN: No, sir. We believe that was the
16 adverse effect of the conflict, actual conflicts of
17 interest that Marva Hardee-Thomas labored upon,
18 labored under when she represented Mr. Bowman.

19 THE COURT: She said she labored upon it?

20 MR. BROWN: Labored under it.

21 THE COURT: She said she labored under it?

22 MR. BROWN: That's clear.

23 THE COURT: Did she say that or is that your
24 argument about it?

25 MR. BROWN: Well, actually she agreed that

1 she could not talk to him, Mr. Bowman, about Ricky
2 Davis because that would be a conflict.

3 MR. WATERS: What she said was it didn't
4 occur to her and she wasn't even thinking about it
5 at the time.

6 MR. BROWN: I said, "What did you tell him
7 about Ricky Davis," and she said, "I couldn't tell
8 him anything because that would be a conflict."

9 THE COURT: She didn't tell you until
10 basically your questions that she was not even
11 aware this case was still involved?

12 MR. BROWN: She did, actually I think she
13 said, "I don't even know who Ricky Davis is."

14 THE COURT: Right.

15 MR. BROWN: I said, "What did you tell Mr.
16 Bowman about the conflict that you had representing
17 him on August 6 or whenever you get these letters
18 before then?" She said, "I couldn't have talked to
19 him about it because that would have been a
20 conflict."

21 THE COURT: I thought, the way I felt was she
22 was rather agreeing with you in the technical sense
23 that maybe there was a conflict, maybe there
24 wasn't, but at the time she was representing Mr.
25 Bowman she didn't realize it was a conflict at all.

1 MR. BROWN: I don't think that genders much
2 confidence in her representation.

3 THE COURT: I'm saying the way she testified.

4 MR. BROWN: We have it somewhere, Your Honor.

5 THE COURT: Be ready to refer to that quote
6 in your argument. Let me look at this one more
7 time.

8 Now, Mr. Cummings and Miss Thomas did have
9 this handwritten note?

10 MR. WATERS: Yes, sir.

11 MR. BROWN: Yes.

12 MR. WATERS: In fact that is Marva Hardee's
13 blank notary thing at the bottom.

14 MR. BROWN: Which is a little curious because
15 he says he doesn't believe it, Mr. Bailey says he
16 doesn't believe it came from her.

17 THE COURT: Let me ask you this.

18 THE WITNESS: I don't think I said that.

19 MR. BROWN: Let me make it clear. It may
20 have come from her, she may have --

21 THE COURT: You said he said he doubted it
22 came from her?

23 MR. BROWN: That's correct.

24 THE COURT: He said it didn't --

25 MR. BROWN: We can play it back but he did.

1 say he thought it would be unusual he would give
2 back to her a statement he got from her.

3 MR. WATERS: I think that is the problem,
4 Norb's memory seven years ago.

5 MR. BROWN: That is what he said. I'm not
6 trying to put words in Mr. Bailey's mouth.

7 THE COURT: As long as you said he said
8 unusual. Do you agree you said unusual?

9 THE WITNESS: He prefaced the question to me
10 would it be unusual for you to mail something back
11 to someone that just sent it to you, I said yes,
12 that would be unusual.

13 MR. BROWN: Let me say this to you. It may
14 be it was notarized by Miss Hardee-Thomas not in
15 the representation of Mr. Bowman but when she went
16 down to see her client Ricky Davis.

17 THE COURT: It is not notarized.

18 MR. BROWN: She filled out the notary part of
19 it, however she wrote the notary blank.

20 THE COURT: Now, let me ask you another
21 question. Before we let this witness go, before we
22 let Mr. Bailey go, let me ask you all another
23 question. Did Mr. Cummings testify last week about
24 how he used this document? I'm trying to remember.

25 MR. WATERS: He said that he had sent Mr.

1 Walt Mitchell, their investigator, to talk to Mr.
2 Davis and Mr. Mitchell came back with pretty much
3 an unfavorable report that this guy, it was bunk
4 and would not be helpful and therefore they decided
5 not to use it.

6 THE COURT: Let me look at my note.

7 MR. BROWN: And I asked him if it would
8 change his decision if he found out the Sam memo
9 was written after Walter Mitchell went down there
10 and he said it would.

11 MR. WATERS: What he said was --

12 MR. BROWN: He is not --

13 MR. WATERS: Mr. Brown, can I finish? And I
14 specifically asked him this question, that if all
15 he had was the Sam memo and Ricky Davis' memo and
16 nothing else, would that have changed his decision
17 and he said no.

18 MR. BROWN: And again, Your Honor, I asked if
19 it would have made a difference, that same memo
20 document, interview, where Ricky Davis stuck to his
21 story later in the game and he said it would, and
22 Mr. Bailey has already said he thought it came late
23 in the game.

24 THE COURT: Okay, thank you all. Most of my
25 comments about Davis goes to Miss Dale Davis. You

1 all did go very much into that.

2 MR. BROWN: Yes. Your Honor, may I ask --

3 THE COURT: It might have been, that's right,
4 it might have been the first time he testified,
5 that we're talking about Ricky Davis.

6 MR. BROWN: And for just this reason, and I
7 know you have got it set up, is there a way we
8 could do the closings after we have a chance to
9 digest what we have got because we have got
10 thousands of pages, and I'm not trying to get out
11 of being here.

12 THE COURT: No, we're going to do, you're
13 welcome to then write your closing statement, we'll
14 do anything we're going to do with the court
15 reporter right now.

16 Mr. Bailey, Thank you, sir.

17 THE WITNESS: You're welcome, Judge.

18 THE COURT: You may step down and I will give
19 back these two documents right here, make sure I
20 didn't keep those.

21 (Witness excused)..

22 THE COURT: All right, like I said last week,
23 I will give each side no more than fifteen minutes
24 in your argument, plaintiff can go, petitioner can
25 go first and last obviously. So, Mr. Brown,

1 whenever you're ready.

2 MR. BROWN: Your Honor --

3 THE COURT: Yes, sir.

4 MR. BROWN: To not fall down on the job, I
5 assume we are resting before we get to closing?

6 THE COURT: Well, are you resting, Mr.
7 Waters?

8 MR. WATERS: He hasn't rested yet.

9 THE COURT: Are you resting?

10 MR. BROWN: Subject to -- one thing I have
11 talked to Mr. Waters about, I don't have my SLED
12 proficiency testing from my ballistics, or the
13 ballistics guy at SLED, we subpoenaed it, he said
14 he left it when he testified way back in
15 Summerville, he said, "Whoops, I left it in
16 Columbia." That has never appeared again, then Mr.
17 Sinclair has made a bill to them for it, or is
18 receiving a bill.

19 THE COURT: I will keep the record open to
20 submit that.

21 MR. BROWN: Thank you. There is one page
22 from the transcript of Travis Felder that I recall,
23 roughly the 4900 area, the one page we have tried
24 to --

25 THE COURT: You all have mentioned that for

1 months.

2 MR. BROWN: And we have asked, we don't have
3 a copy of it, because it is not in our stuff. We
4 have asked Appellate Defense.

5 THE COURT: Was this his testimony during the
6 guilt phase?

7 MR. BROWN: Sentencing phase.

8 THE COURT: In the sentencing phase? Is that
9 the page where he talked about admitting going to
10 get the gas and all that?

11 MR. BROWN: It is right there in the middle
12 of that. There is one page missing. He only talks
13 like for a few pages there. Obviously we would
14 like it to be included as part of the record if we
15 can find it.

16 THE COURT: It would be part of the record.

17 MR. BROWN: So I want to point that out,
18 otherwise we do rest.

19 MR. SINCLAIRE: We have to find it.

20 MR. BROWN: That's right. We want to enter
21 it, we want to find it.

22 THE COURT: The only additional evidence you
23 would like to put in is the ballistics report?

24 MR. BROWN: SLED proficiency test for
25 ballistics, yes.

1 THE COURT: All right. Now, the petitioner
2 rests.

3 MR. BROWN: Can we make our motions?

4 THE COURT: Okay.

5 MR. BROWN: We move for --

6 THE COURT: Go ahead.

7 MR. BROWN: I don't want to, Mr. Waters, he
8 is always a worthy adversary, I don't want to get
9 hung up on not doing my job.

10 THE COURT: Go ahead.

11 MR. BROWN: So, we would move, one, we would
12 like to be able to amend our application to
13 include, and I say this, not necessarily new
14 claims, new facts and claims about Mr. Gadson
15 saying he didn't do anything wrong and then that
16 not being true and that it should have been
17 corrected because he in fact was involved in murder
18 and when he gives the testimony that he didn't do
19 anything but was merely present that is a false
20 statement. We also believe there was some
21 exculpatory information that was withheld and we
22 want to make sure that everything we have brought
23 out --

24 THE COURT: Are you really sure what you have
25 brought out here can't include all the points you

1 made as for as your grounds?

2 MR. BROWN: We do on the grounds but Mr.
3 Waters believes on the facts it needs to be
4 included.

5 THE COURT: Well, I will hear from him in a
6 second, but anyway.

7 MR. BROWN: Yes, sir.

8 THE COURT: If in fact you feel there is some
9 evidence been revealed today that, or this week,
10 this month, that cannot in any way be included,
11 then I will be glad to hear from you. Other than
12 that, argue now as if your grounds are, encompass
13 all you have had testimony about.

14 MR. BROWN: Yes, sir, and we move for
15 directed verdict on all those grounds. We believe
16 that in the light most favorable to the State that
17 we still win.

18 THE COURT: All right.

19 MR. BROWN: And I do that and I will argue as
20 specifically as you would like for me to preserve
21 my issues.

22 THE COURT: You made your motion, I would
23 respectfully deny the motion.

24 MR. BROWN: Thank you.

25 THE COURT: Any other motions from the

1 petitioner?

2 MR. BROWN: I don't believe so, Your Honor.

3 THE COURT: Okay, motion for directed verdict
4 denied.

5 All right, I assume no motions from the
6 respondent?

7 MR. WATERS: A couple matters. Number one,
8 the SLED efficiency report, my only concern with
9 that is if something that arises from that report
10 that I need testimony to explain it. I hate to,
11 given that neither one of us have seen it, I hate
12 to say sure, we admit it.

13 THE COURT: If that report does in any way in
14 my view, if you question it, if I feel you should
15 be permitted to have additional testimony I will
16 allow you to have additional testimony.

17 MR. WATERS: Thank you, Your Honor.

18 The second thing is the State wants to
19 introduce, I believe the applicant has agreed --

20 THE COURT: I only want to hear motions right
21 now. Do you have any motions?

22 MR. WATERS: I do not have any motions at the
23 end of their case.

24 THE COURT: Now I'm going to recognize you
25 for any evidence in your case.

1 MR. WATERS: Thank you, Your Honor. That is
2 what I was getting at. We introduced from the two
3 federal actions, unfortunately the Orangeburg
4 actions are in storage and we requested them but
5 they have not yet arrived, the holidays have not
6 helped that. There is a complaint filed July 10th,
7 2002, and a consent order of dismissal July 11th,
8 2003. The CP number is 02-CP-38-850, which we
9 would like to introduce as our next two exhibits
10 once they are made available, which should be if
11 not this week, probably next week.

12 THE COURT: This is the civil matter where
13 the guy was shot in the head?

14 MR. WATERS: Hiram Johnson, correct, sir.

15 THE COURT: You wish to introduce the
16 disposition in federal court regarding his claim?

17 MR. WATERS: We have already introduced the
18 two federal actions. The case was initially filed
19 here in Orangeburg Common Pleas and it was then
20 sent over to federal.

21 THE COURT: What is it you want to bring in
22 evidence?

23 MR. WATERS: I want the complaint and the
24 consent order of dismissal just like I did with the
25 two federal actions.

1 THE COURT: That was filed here in
2 Orangeburg?

3 MR. WATERS: Yes, sir.

4 THE COURT: You can't just go downstairs and
5 get it?

6 MR. WATERS: It's in storage. We have asked
7 for it and it's not going to be available until
8 they can retrieve it, which they said a week.

9 THE COURT: I will let you supplement the
10 record with the state actions regarding Mr.
11 Johnson.

12 MR. WATERS: Thank you, Your Honor. Other
13 than that --

14 THE COURT: I will include that as part of
15 your case.

16 MR. WATERS: Other than that, the State has
17 no further evidence.

18 THE COURT: The State rests?

19 MR. WATERS: Yes, sir.

20 THE COURT: Motions by petitioner? The State
21 rests.

22 MR. BROWN: We renew our motions that we had
23 previously made for directed verdict.

24 THE COURT: Based on my brief notes and
25 looking at the evidence presented I would

1 respectfully deny the motion for directed verdict.

2 Okay, anything else before we go to the
3 closing arguments?

4 MR. BROWN: We would just ask that you allow
5 us to make the arguments not necessarily
6 comprehensive but to highlight the points.

7 THE COURT: You may do so and you may
8 supplement your arguments in writing.

9 All right.

10 MR. BROWN: Thank you.

11 THE COURT: Mr. Brown.

12 MR. BROWN: May it please the Court.

13 We have heard lots of testimony regarding a
14 trial that took place years ago but there is one
15 thing that remains unchanged about this. The State
16 did not have what I would consider to be a lock
17 tight case against Mr. Bowman.

18 Now, it is a little unusual because it's hard
19 for a defendant in a murder case to run the gamble
20 of going to trial in a capital proceeding and look
21 for acquittal, and those are very rare and I point
22 that out because you have to take a look at the
23 evidence that the State put forward in their view
24 pointing to his guilt.

25 Now, obviously the primary evidence pointing

1 to his guilt was Tawain Gadson because he's the
2 only one claimed he was an eyewitness to the
3 shooting. They put forth evidence they believe
4 buttressed that guilt.

5 Hiram Johnson, who claimed he overheard Mr.
6 Bowman confess, and a couple statements where he
7 expressed malice toward the deceased Kandee Martin,
8 that came from Mr. Bowman's family. They also link
9 a gun in the river back through Mr. Bowman's
10 family.

11 Now, to kind of pick that apart some to show
12 some weaknesses in it, Mr. Gadson was first cousins
13 of Mr. Bowman and also first cousins with the
14 family members who deposited the gun in the river.
15 And, so, there was some relationship close on that
16 as well. We want to point out there was a
17 deficient examination of Mr. Gadson by trial
18 counsel, coupled with some other things that go,
19 that dovetail into the failings of this trial, some
20 of which were deficiencies of the State regarding
21 Mr. Gadson's culpability.

22 Here is what we do know. Mr. Gadson cut a
23 deal, it is undisputed cut a deal where his life
24 was, where subjecting his life to a date certain
25 was taken off the table by his testimony against

1 Mr. Bowman. The jury never heard that. They never
2 heard that his life, that he faced the death
3 penalty, they never heard that, never once. In
4 fact, the questioning from Mr. Bowman's trial
5 lawyer was, "You were not served the death notice,
6 were you," and he says no. And that doesn't imply
7 that he faces death. It's the opposite.

8 And in truth the plea agreement says that he
9 waives objection to death. I have never seen a
10 plea agreement like that. I don't know if that
11 contract would, whether it violates public policy
12 or not. But nonetheless, he signed that over, he
13 waived objection to the death penalty to cut a deal
14 to plead to twenty years, is what the jury hears,
15 but he is eligible for parole. Now, we also know
16 that --

17 THE COURT: He ultimately pled to what?

18 MR. BROWN: To misprison, accessory after the
19 fact, from fifteen and five consecutive. He got
20 the twenty years, that is what the jury heard. The
21 jury never heard he was eligible for parole after
22 five. Now, they wouldn't have known he actually
23 got out in less than five because that didn't occur
24 until later on, but they never heard that he faced
25 death or that he would be parole eligible at five

1 years, and that is deficient, given the importance
2 that his testimony took on.

3 Now, we also have to couple that with a
4 couple other pieces of evidence that for one reason
5 or another didn't get admitted, one of which was
6 Ricky Davis' statement and one of which is the fact
7 that Wayne Mood also implicated him, which was a
8 question that could be asked of Tawain Gadson, and
9 if he denied it, so be it, but one way or another
10 it is in evidnece that Wayne Mood said Tawain
11 Gadson confessed to being a shooter of one of the
12 shots that entered Kandee Martin.

13 Ricky Davis, obviously we beat that horse
14 down, he says he overheard Tawain Gadson confess to
15 this killing and he told that not only in a letter
16 that he wrote that he admits was in his own
17 handwriting, but he also told that to Sam
18 Richardson of the Solicitor's office with no
19 benefit. He tells the Solicitor there is nobody
20 else there. He goes down to the prison and tells
21 Sam Richardson, we're assuming at the last minute,
22 we're talking about the end of the road here before
23 the trial, according to Mr. Bailey, we're at the
24 very end, he tells Sam Richardson with the
25 Solicitor's office that he overheard Tawain Gadson

1 say that he shot Kandee Martin. And that was not
2 turned over and we believe the testimony from, the
3 entering of that file shows that that is not what
4 was considered to be the open file part of the
5 file.

6 And further, Your Honor, there is case law
7 that indicates open file policy does not comply
8 with Brady. Brady is an obligation to disclose,
9 not to have this passive disclosure, but to
10 actively disclose it, and we know Mr. Bailey knows
11 about the obligation because he did disclose the
12 two August, or twice disclosed the August 6 letter.

13 Now, we also know some other things about
14 Tawain Gadson. One is that he shot that gun from
15 the river, if you believe the ballistics reports,
16 and he shot it, borrowed it from Marion Bowman
17 according to these other witnesses, borrowed it,
18 shot it, then gave it back. Which is consistent
19 with the allegation that Tawain Gadson shot Kandee
20 Martin here and gave it back to Marion Bowman to
21 set him up because that is exactly what Ricky Davis
22 says and Ricky Davis has no knowledge that we know
23 of these Hawkins-Coleman statements about Tawain
24 Gadson doing the same thing, borrowing the gun,
25 shooting it and giving it back. I mean, it is not

1 that you can drive somebody else's car to commit a
2 crime or use somebody else's gun to commit a crime,
3 because then they can say, hey, it was so and so's
4 car, so and so's gun. It sure does cast the doubt
5 away from him.

6 But you know Gadson is a liar, he more or
7 less admitted it when he came into court in
8 Summerville, he tells us he had a .380, which we
9 believe the ballistics match does not exclusively
10 eliminate it as the gun because as we will submit
11 in our briefing, recently, as recent as the day of
12 our hearing a court in another federal jurisdiction
13 limited ballistics testimony to a finding of more
14 likely than not. They said anything more than that
15 had no basis. And we believe that it is definitely
16 possible Mr. Gadson used his own gun and the fact
17 he reported it stolen is not documented. He didn't
18 report it stolen until they questioned him about it
19 after his arrest. That is when he said, oh, yes,
20 he reported it stolen. Nobody could verify that
21 report. That's in the record, "I told someone
22 before it was stolen." Where was it stolen from?
23 Either a car as he said at one place or from under
24 a brick, one of the two, according to which day,
25 and I agree that is not consistent and it was not a

1 brick in a car. So, it is whatever, and again
2 without benefit of the transcript, the final draft,
3 he's not a credible witness about that gun being
4 stolen. He is not a very credible witness about
5 anything that goes along. And I say that because
6 Darien Williams does not testify in this case.
7 Darien Williams says Tawain Gadson put the gasoline
8 used to burn the car into a coke bottle. That is,
9 that is equally consistent with Travis Felder
10 buying the gas as it is not.

11 Mr. Bailey says Darien Williams would make a
12 good witness. That's months before the trial. He
13 then later on says that, one of the pieces of
14 evidence against Gadson is Darien Williams'
15 statement, and as if Darien Williams somehow or
16 another becomes a bad witness within just two days
17 of the beginning of the trial, he is writing a
18 letter, Mr. Bailey writes a letter to Darien
19 Williams' lawyer saying, "I want to cut a deal with
20 him to have him come testify."

21 Now, Gadson doesn't talk about that, Gadson
22 doesn't even talk at all about being there when the
23 body is burned, and that's significant, because if
24 Darien Williams is involved, excuse me, if Tawain
25 Gadson is involved in buying the gasoline, then

1 Travis Felder has lied yet again, and of course
2 we'll get into that later about Travis Felder and
3 his lies. But then Travis Felder and Tawain Gadson
4 may have well been the ones that were involved in
5 the burning of the body, and you have to remember
6 those are the only two eyewitnesses to the charges
7 in the guilt phase, which is Gadson says he
8 witnessed the murder and Felder says he witnessed
9 the arson. And Darien Williams put them together
10 and Mr. Bailey says that Darien Williams is a good
11 witness.

12 Now, to come back to Gadson again, we know
13 that Gadson, we also know that the conviction was
14 unreliable because of zero cross-examination
15 regarding Gadson's failings as to ability to
16 recall. What we're talking about is he can't
17 recall the event because, A, he's drinking. B, he
18 smokes Blunts all the time and he has deficiencies
19 with memory, and none of that was turned over.

20 There is no question, and you're going to
21 hear our assertion that mental health report of Mr.
22 Bowman would not be admissible against him in these
23 proceedings, that's a state law, but I do believe
24 there is a Brady obligation that arises when the
25 State has knowledge contained in Mr. Gadson's

1 mental health report and they don't turn it over,
2 and it is the knowledge that's the Brady material.

3 Now, if you turn to Travis Felder, who is the
4 other eyewitness, we know Travis Felder admits he
5 lies. Travis Felder says he told the prosecutor,
6 he says, what he tells us at the deposition, you
7 know, he vacillates on when he found out, but what
8 we do know, and this is one of our claims, is that
9 it was ineffective assistance of counsel. Norb
10 Cummings found out Travis Felder lied, that he did
11 not move for new trial. We say that because we
12 have a Rule 29 motion pending in this case right
13 now back with the trial judge and we do that
14 because within a reasonable period of time we have
15 to bring that claim. Now, we didn't bring it for
16 six years, you know, we brought it as soon as Mr.
17 Sinclair and I realized that that was something
18 that was withheld because we have operated under
19 assumption they knew he lied.

20 THE COURT: Your ineffective assistance of
21 counsel of Mr. Cummings and your motion before
22 Judge Goodstein is because of the revelation of Mr.
23 Felder getting the gasoline?

24 MR. BROWN: About lying about his
25 involvement, that's correct. And it's a material

1 lie for a couple things.

2 THE COURT: Refresh me about when everybody
3 found out about it. We know, we know that Mr.
4 Bailey didn't know about it when he testified on
5 direct. How did Mr. Cummings say he became aware
6 of it?

7 MR. BROWN: He says his client told him look
8 at the video. And of course my client is
9 represented by counsel.

10 THE COURT: I know, but the video that shows
11 Mr. Felder there getting gasoline --

12 MR. BROWN: That's correct.

13 THE COURT: Okay. Now, when did, is the
14 testimony of Mr. Cummings that -- how did Mr.
15 Cummings associate the gasoline with the burning of
16 the car?

17 MR. BROWN: Your Honor, my understanding is
18 this. Mr. Bowman reviewed the video with Miss
19 Hardee-Thomas in the courtroom during the trial
20 period, I can't tell you the exact day. That is
21 when it was pointed out that the person buying the
22 gas, there is a time line has been entered, at 3:14
23 in the morning was Travis Felder, and what is
24 interesting and I asked Mr. Bailey about it is that
25 the person in there buying the gas at 3:14, it is

1 clear, it is not clear on the face but it is clear
2 it's the same person buying the chips and dip
3 twenty minutes earlier, which everybody knows is
4 Travis Felder.

5 THE COURT: Okay.

6 MR. BROWN: Everybody.

7 THE COURT: When did this purchase by Felder
8 get associated with the crime?

9 MR. BROWN: I guess when Felder says, "Yes,
10 it was me."

11 THE COURT: When did the witnesses say, when
12 did Cummings say, "I became aware that Mr. Felder
13 had gone out there and helped burn the car, gave
14 the gas to help burn the car," when did Mr.
15 Cummings become aware of it?

16 MR. BROWN: None of them testified they were
17 aware of it until after the conviction. I think
18 Mr. Bailey said something about it during
19 deliberations.

20 THE COURT: So, Mr. Felder never testified on
21 the stand, no one knows what he is going to say on
22 the stand?

23 MR. BROWN: He testified, he committed a lie
24 about omission, or worse, it is actually a lie,
25 because they asked him where he went when he left

1 the apartments in Branchville.

2 THE COURT: I'm talking about the penalty
3 phase now.

4 MR. BROWN: In the penalty phase he admits he
5 bought the gas.

6 THE COURT: Right. So, when he was asked
7 that question you're saying no one knew what he was
8 going to answer?

9 MR. BROWN: I'm saying that they claim,
10 that's right, Mr. Cummings and Mr. Bailey claim
11 they did not know that his statement about going to
12 McElhanney Road was a lie because it omitted --

13 THE COURT: Let me ask you this. When he
14 said he bought gasoline that was used to burn the
15 car --

16 MR. BROWN: Yes.

17 THE COURT: -- are you saying no one knew he
18 was going to say that until he said it on the
19 stand?

20 MR. BROWN: They have a video of him buying
21 gas. How did they know? He said he bought the gas
22 to burn the car. They debriefed him.

23 THE COURT: Mr. Bailey said he had no idea.
24 Who knew he was going to say that answer? Why did
25 Mr. Cummings call him back?

1 MR. BROWN: Because I think he realized it
2 was him buying it.

3 THE COURT: How did Mr. Cummings associate
4 that gasoline with the gas that burned the car?

5 MR. BROWN: Because Mr. Felder says that he
6 went --

7 THE COURT: This is before he testified in
8 the penalty phase?

9 MR. BROWN: He says, yes, said, "I went and
10 bought chips and dip."

11 THE COURT: I know he did all that.

12 MR. BROWN: Bear with me.

13 THE COURT: You tell me when Mr. Cummings
14 associated him buying gasoline that burned the car,
15 when did Mr. Felder tell him that?

16 MR. BROWN: When did Mr. Felder tell him
17 that?

18 THE COURT: Or anyone tell him that before
19 Mr. Felder testified to it?

20 MR. BROWN: I think Mr. Felder told him that
21 when Mr. Cummings called him up and said, "We need
22 you to come back."

23 THE COURT: Why did Mr. Cummings want Mr.
24 Felder back, because he saw him buying the
25 gasoline? He thought why was he buying gasoline?

1 MR. BROWN: I will say this is why. He
2 testified in the beginning that he went and bought
3 chips and dip and then went home.

4 THE COURT: I'm aware of all that.

5 MR. BROWN: And that he did not leave again
6 until he left to go to Nursery Road.

7 THE COURT: And I'm aware of all that.

8 MR. BROWN: But if you watch the video,
9 fifteen minutes later he is not at the apartment in
10 Branchville, he's back buying gas.

11 THE COURT: I'm trying to get to the
12 gasoline. So, Mr. Cummings said therefore, I
13 assume he testified, therefore, since he bought
14 gasoline, that must have been the gasoline used?
15 What I'm saying is, is Mr. Cummings saying, "My
16 client told me that," when he testified, or did he
17 say, "When I saw him buying gasoline when I looked
18 at the video I just assumed that was the gasoline
19 that he used, that was used to burn the car and it
20 just hit me there just after he had testified in
21 the guilt phase"?

22 MR. BROWN: Two things about that, Your
23 Honor. Mr. Cummings says my client never admitted
24 his guilt.

25 THE COURT: All right.

1 MR. BROWN: Okay. Miss Marva Hardee-Thomas
2 says the same thing.

3 THE COURT: All right.

4 MR. BROWN: Okay. About the crimes.

5 THE COURT: Okay.

6 MR. BROWN: Never admitted the crime.

7 THE COURT: All I'm trying to determine is
8 how did Mr. Cummings, what made Mr. Cummings feel
9 or Miss Thomas feel Mr. Felder buying the gasoline,
10 bought it for the purposes of burning the car?

11 MR. BROWN: I do think Mr. Bowman urged them
12 to put his testimony up because it had been false.
13 Now, I don't know the conversation.

14 THE COURT: False about burning the car with
15 the gasoline?

16 MR. BROWN: False about buying, where he
17 went.

18 THE COURT: Right. We don't need to come
19 back to that again, you went through that 25 times,
20 I know that. I'm only talking about gasoline.

21 MR. BROWN: Okay.

22 THE COURT: What I'm trying to determine is,
23 in the testimony before us here who said, "Before I
24 called Felder to the stand I knew he was going to
25 say he bought the gasoline that went out to the

1 scene," because he testified to that, right, in the
2 penalty phase?

3 MR. BROWN: He did testify to that.

4 THE COURT: Okay. Who knew he was going to
5 say that before he testified to it?

6 MR. BROWN: All of them did because they
7 called up --

8 THE COURT: Mr. Bailey didn't.

9 MR. BROWN: They called up his lawyer.

10 THE COURT: Okay. I just wanted you to
11 refresh me. So, they called up Mr. Felder's
12 lawyer.

13 MR. BROWN: Because I asked Mr. Bailey if Mr.
14 Cummings called his lawyer or if he called him, he
15 said he believed he did.

16 THE COURT: On the phone, you're talking
17 about?

18 MR. BROWN: Yes, called Mr. Charles Williams
19 and said, "We need to bring him back."

20 THE COURT: All right. Okay. Why did Mr.
21 Cummings call Mr. Williams and say they want to
22 bring him back? I mean, he had seen the video.

23 MR. BROWN: At the insistence of Mr. Bowman.

24 THE COURT: Mr. Cummings had already seen the
25 video.

1 MR. BROWN: Well, obviously he didn't
2 identify it being the same person.

3 THE COURT: Okay. On the insistence of Mr.
4 Bowman, Mr. Cummings states that he saw this video,
5 saw him buying gas, but how did Mr. Cummings
6 associate -- was he associating buying gas with the
7 crime, or associating buying gas with lying about
8 his first statement?

9 MR. BROWN: Well, here is how I would
10 respond. He lied in the first testimony because he
11 says, "I bought chip and dip and went to the
12 apartments."

13 THE COURT: You don't have to tell me that
14 again, I heard it fifty times now. I know all
15 that. What I'm saying is, when Mr. Cummings called
16 him back --

17 MR. BROWN: Yes.

18 THE COURT: -- did he call him back because
19 he wanted to show that what he said initially
20 wasn't so?

21 MR. BROWN: Yes.

22 THE COURT: Or because he associated that gas
23 with the crime?

24 MR. BROWN: Both.

25 THE COURT: Okay. Why did he associate the

1 gas with the crime? What evidence did Mr. Cummings
2 have that he felt that gas that Mr. Felder was
3 buying was associated with the crime?

4 MR. BROWN: Because Mr. Felder says he went
5 from the chip and dip Horizon purchase to the
6 apartments and to Nursery Road, and the video
7 contradicts that. Therefore putting him on notice
8 that Felder lied and the reasonable lawyer would
9 say, "Gosh, he's buying gas twenty minutes later,
10 he must have been the one that bought the gas used
11 to burn the body," and when they asked him --

12 THE COURT: That is what Mr. Cummings said?

13 MR. BROWN: I'm assuming that is what went
14 through his mind.

15 THE COURT: I'm asking you to refresh me, not
16 what is going through his mind, what someone
17 testified to before me. Did Mr. Cummings say, "I
18 called Mr. Felder back because I figured when I saw
19 him buying this gas, knowing he had said he hadn't
20 gone back to the store when he bought the chip and
21 dip and went wherever he went, I saw then later on
22 through the urging of Mr. Bowman him buying the
23 gas, I said my goodness, he must have used that gas
24 to burn this vehicle, I'm going to call him back to
25 the stand," or did he call him back to the stand

1 just to show he lied initially?

2 MR. BROWN: I know it wasn't --

3 THE COURT: No, I'm only asking you what he
4 testified to.

5 MR. BROWN: Then I can't recall. Whatever
6 the record reflects.

7 THE COURT: So, Mr. Cummings in your memory
8 did not say why he called Mr. Felder back to the
9 stand other than he saw him buying gas, he didn't
10 know, he didn't know that was significant?

11 MR. BROWN: I think he called him back
12 because Mr. Bowman threw a fit about calling him to
13 correct his testimony.

14 THE COURT: I know, but correct his testimony
15 about buying the chips and dips and nothing else?

16 MR. BROWN: The record speaks for itself.
17 I'm saying why he called him back at the first
18 trial.

19 THE COURT: Only that he wasn't complete in
20 his first testimony?

21 MR. BROWN: Well, I can't, I don't want you
22 to misquote me, it's in the record, in fact.

23 THE COURT: When he called him back, Mr.
24 Cummings never testified, "When I called him back I
25 was going to associate the gasoline with burning

1 the car."

2 MR. BROWN: Well, I'm right here at it if you
3 will give me a chance to find it, Your Honor. It
4 is a little difficult for me to answer this because
5 I want to make sure you understand. I don't think
6 Mr. Cummings wanted to put him up and here is why.

7 THE COURT: No, no --

8 MR. BROWN: There is nothing mitigating about
9 it.

10 THE COURT: I'm only talking about what is in
11 the record, I'm not talking about you arguing.

12 MR. BROWN: I don't find --

13 THE COURT: Is there anything in the record
14 that says why Mr. Cummings called Mr. Felder back
15 other than to show he lied about his initial
16 testimony or didn't, wasn't complete about his
17 initial testimony? I mean, is there anything about
18 Mr. Cummings associating gas with the burning of
19 the car? Is there any testimony about that? I
20 don't want to know what you assume, I want to know
21 what the testimony is.

22 MR. BROWN: I can't recall it.

23 THE COURT: Don't you think it is unusual?
24 Why would you call him back? I mean --

25 MR. BROWN: Exactly why, because his client

1 said, it is in here somewhere.

2 THE COURT: Why would Mr. Bowman want him
3 called back?

4 MR. BROWN: Because he lied.

5 THE COURT: Other than to show he lied about
6 the initial thing?

7 MR. BROWN: Because he lied under oath in his
8 trial.

9 THE COURT: So therefore are you saying
10 everybody in the courtroom was surprised when he
11 said this gas was used to burn the car?

12 MR. BROWN: Mr. Bailey said, quote,
13 surprised.

14 THE COURT: What did Mr. Cummings say, I've
15 forgotten?

16 MR. BROWN: I'm not sure.

17 THE COURT: What did Miss Thomas say?

18 MR. BROWN: Not much of anything.

19 THE COURT: All right. So, you're saying
20 nobody on the, on the defendant's side testified
21 that they were aware Mr. Felder was going to say,
22 "This gas you saw me buying, which I did not
23 discuss in my initial testimony, was the gas used
24 to burn the car"? No one knew he was going to say
25 that, as for as the record at this point?

1 MR. BROWN: As for as I recall there is
2 nobody that says they knew he was going to say
3 that. Mr. Felder says otherwise. He says he told
4 Mr. Bailey that.

5 THE COURT: He told Mr. Bailey?

6 MR. BROWN: That Mr. Bailey knew it.

7 THE COURT: All right. And Mr. Cummings
8 doesn't say when he talked to Mr. Felder's lawyer
9 his lawyer told him that?

10 MR. BROWN: He never talked to his lawyer.

11 THE COURT: Who called his lawyer?

12 MR. BROWN: Mr. Bailey.

13 THE COURT: Okay. Well, then, so Mr.
14 Cummings, the only purpose he testified to about
15 calling Felder back was because his client wanted
16 him to call him back to show that he lied, or that
17 in Mr. Bowman's view he lied about the statement
18 about the store, that in fact he had bought gas
19 there later on and didn't get just chip and dip,
20 that was the only purpose, was to impeach him about
21 what he did at the store, not to any way have
22 anything to do with the crime?

23 MR. BROWN: I would want to say yes except
24 for this, Your Honor. You can't impeach somebody
25 with their testimony after the jury has delivered a

1 verdict.

2 THE COURT: I know that. I'm trying to say
3 why did he call him back? The only purpose was to
4 show he wasn't complete in his testimony initially,
5 not to show that Felder had anything to do with the
6 crime?

7 MR. BROWN: I think showing he had something
8 to do with the arson by buying the gas.

9 THE COURT: How would he show he had
10 something to do with the arson?

11 MR. BROWN: Because he bought the gas.

12 THE COURT: All right. A lot of people
13 bought gas that night.

14 MR. BROWN: Not on their way to see a body
15 burned.

16 THE COURT: Okay, but Mr. Cummings didn't
17 know, Mr. Cummings said, "I didn't know he bought
18 the gas for that purpose when I called him back."

19 MR. BROWN: Your Honor, I would say that it
20 would be preposterous to believe, preposterous,
21 whatever I'm trying to say, to believe that a man
22 leaves and lies about going to the EZ Mart a second
23 time, because he lied, he admitted that, going to
24 it the second time at 3:15 in the morning and he
25 buys gas coincidentally on his way to an arson? I

1 would say --

2 THE COURT: You need to refresh my memory.
3 He had already testified he was out there when the
4 thing burned, initially he testified he was out
5 there when it burned.

6 MR. BROWN: Yes. They knew he was out there
7 at 3:15 when it burned.

8 THE COURT: He said that in his initial
9 testimony.

10 MR. BROWN: That's correct. And he also
11 testified that he had been to the EZ Horizon on one
12 time, which means when they see him on the tape the
13 second time they know, which everybody, in fact she
14 even says, the clerk even says --

15 THE COURT: I have heard that a million
16 times. You can continue on.

17 MR. BROWN: The clerk says, "You're back
18 again?" And, Your Honor, one other thing that is
19 interesting about that, on the tape they clearly
20 say, when he comes in there the first time to buy
21 the clip and dip the clerk asks him where the white
22 girl is.

23 THE COURT: I'm not sure why you emphasize
24 that so much.

25 MR. BROWN: Here is what is interesting. The

1 only two people who admit that they were there
2 during the killing and burning are Mr. Gadson and
3 Mr. Felder.

4 THE COURT: Right, right.

5 MR. BROWN: That's the testimony at trial
6 that was admitted. Gadson says, "I was there when
7 Kandee was killed." Felder says, "I was there when
8 she's burned." They're asking where the white girl
9 is, and this is after she's dead, which puts Felder
10 with the white girl earlier, and that tape is in
11 evidence and again it's clear the same guy who buys
12 the chip and dip is the same guy buying the gas.

13 All right. And we say that because again
14 that is the second witness and only purported --

15 THE COURT: You say he should have brought
16 all that out during the guilt phase as well as the
17 penalty phase?

18 MR. BROWN: I would say this. If it's
19 assumed that Mr. Felder, I pled it both ways, if
20 it's assumed that Mr. Felder is telling the truth
21 and Mr. Bailey knew when he testified that he
22 bought the gas and instead of leaving the
23 Branchville apartments and went to the EZ Horizon
24 Mart instead of going to Nursery Road, if that's
25 the truth, then Mr. Bailey had obligation to

1 correct the false testimony. That is if you
2 believe Mr. Felder, who clearly says that he told
3 Mr. Bailey.

4 Now, if you believe Mr. Felder is a liar, and
5 there is no other way to put it because he's lied,
6 we know he's lied several times, then there is an
7 obligation upon trial counsel to bring it back. We
8 filed a Rule 29 motion. Again it has to be filed
9 within a reasonable period of time.

10 THE COURT: I will give you eight more
11 minutes.

12 MR. BROWN: I'm sorry, Your Honor?

13 THE COURT: Eight more minutes.

14 MR. BROWN: And we put it in our Rule 29
15 motion that it should also be perceived as a writ
16 of coram nobis, that it is more appropriate, which
17 is to bring a fact back to the person who rendered
18 a judgment afterward that could not have been put
19 before him before. There is no --

20 THE COURT: Should you be discussing that
21 with me? Shouldn't you be discussing that with
22 Judge Goodstein?

23 MR. BROWN: Here is why. If she determines
24 that we, we being counsel for Mr. Bowman, were
25 deficient in our filing of the Rule 29, then we

1 have alleged it's ineffective assistance of counsel
2 for Mr. Cummings not to have filed a Rule 29. When
3 we asked him if there was any reason he didn't do
4 so he said no, he didn't do it for strategy
5 reasons. Failing to file motion for new trial when
6 he found that evidence, he just didn't do it.

7 So, after that, I obviously very early on
8 asked him when he stopped being Mr. Bowman's
9 lawyer, and that was when he filed that notice of
10 appeal. And that's of interest, because Mr. Felder
11 gets the benefit of the plea bargain and we have
12 also asserted that's a fact that deserves a new
13 trial because what we have is, we have a fake
14 agreement and we have a real agreement. The real
15 agreement is this. "We don't care what you say,
16 you can lie until the cows come home and you are
17 going to get a plea deal from us so long as it puts
18 Mr. Bowman in prison on death row." That's the
19 real agreement. And that agreement was never
20 turned over to Mr. Cummings and nobody finds out
21 about that agreement until after Mr. Cummings has
22 filed this notice of appeal, and the dates are in
23 there, and Mr. Felder gets the benefit of his plea
24 bargain.

25 Now, we know why the State didn't go back and

1 renege on this agreement, because it, quote, wanted
2 this last element, and this man lied in April when
3 he was cutting a deal and his deal gets better, the
4 offers are sitting there, his deal gets better and
5 he lies again. So, he lies twice and it is clear
6 that that signed agreement, which they get signed
7 after he testifies, that isn't the real agreement
8 with the State and Mr. Cummings filed a motion for
9 all the, wink, wink, agreements, the side deal
10 agreements and, you know, nobody is going to come
11 up and say yes, we've got a side deal agreement.

12 Your Honor, that is for somebody to take the
13 circumstances, I can't prove any other way there
14 was a side deal agreement here. As long as Mr.
15 Bowman got convicted and sentenced to death Mr.
16 Felder got a deal, that's the real agreement here.
17 All that omitting facts and being absolutely
18 truthful don't matter because it's noteworthy the
19 members of the jury don't hear that.

20 What else do we know about the folks here?
21 We know the plea agreements cut with Mr. Felder and
22 Mr. Gadson did not really care about whether they
23 told the truth because there was a polygraph
24 provision and they would keep them honest with this
25 polygraph provision as long as it involved somebody

1 who they needed to implicate Mr. Bowman but when
2 they already implicated Mr. Bowman they did not
3 care to go back and polygraph them. And we see the
4 statement regarding Yolanda, she gets a deal if she
5 comes clean with testimony about a conversation,
6 and which does exactly suggest that.

7 Now, we don't believe it's proper to bring in
8 the testimony regarding the deals with the family
9 members. They were brought out on cross, and the
10 law is fairly clear that it's bolstering if the
11 government elicits testimony regarding a plea
12 agreement, and there is some implication of special
13 knowledge of their veracity and there is no
14 instruction that cautions the jury, there is no
15 instruction here. Nobody gives an instruction and
16 says these people cut deals, you need to be
17 cautious about it.

18 Mr. Bailey brings these deals out on direct.
19 At this point in time there is no indication that
20 this is going to come out that these people have
21 cut deals. We don't see that, it is not brought
22 out by the defense. So, he does that on his own.
23 There is no question he wants to come out and do
24 that.

25 And we're talking about accessory after the

1 fact of murder. If he wanted to show bias he can
2 say isn't it true you cut a deal to plead a felony
3 charge, because we all know the rules allow for
4 different things to be redacted and we see
5 redactions in the Green case and some things like
6 that that deal with when you impeach somebody with
7 a prior conviction. Things of that nature, it is
8 appropriate to redact it to keep the jury from
9 giving improper weight to something that is so
10 similar to what is at hand. The question of
11 whether there is murder, they brought these people
12 in to testify that they have cut a deal to murder
13 to show there is murder involving Mr. Bowman's own
14 family, and we believe that's improper.

15 Also we would also suggest, Your Honor, that
16 Mr. Cummings undoubtedly says Mr. Bailey brought
17 in, and this is his last witness, DNA expert to say
18 there was semen from Mr. Bowman in her vaginal
19 cavity. There is no CSC charge in the guilt phase.
20 The last witness they hear is a witness that says
21 that Mr. Bowman, a black male, had sex with a white
22 female, and this is a white female who is as pure
23 as the driven snow, according to the jurors,
24 because we cannot impune this victim. We have
25 heard everybody say, "I would never impugnh her."

1 So, there is no question she was not impugned. Of
2 course we have done that for various reasons, which
3 we think were not effective, we didn't bring out
4 her drug use to counter their victim, this goes to
5 mitigation, but we didn't bring out to counter the
6 victim's impact, we didn't bring out the fact she
7 was a crack addict because we didn't want to show
8 Mr. Bowman dealt drugs, but our own witness
9 testified he was a drug dealer and we brought that
10 on our own, without any basis for that. And we
11 didn't want to bring in evidence that he was
12 drinking because we didn't want to show he was
13 drinking even though our same expert talked about
14 him being a drug dealer, talked about him being a
15 drunk."

16 So, I'm a little puzzled why we didn't bring
17 in the specific act of drinking. That would have
18 been a mitigation issue, when we brought out he was
19 an habitual drunkard, bring out the victim had
20 drugs. Why did we just bring out he's a drug
21 dealer? So, their evidence of them having sex in
22 the guilt place has no place at all. There is not
23 one bit of evidence there was sex between Mr.
24 Bowman and Miss Martin during the res gestae of
25 murder and Mr. Gadson corroborates that. He said

1 it plain as day. We were at the hearing, we asked
2 in deposition whether there was sex between the
3 time they hit Hank Koger's house until the time
4 that alleged Kandee Martin was shot and he said no.
5 He said, "I would have said that if asked," and
6 there is no reason, listen, turning the State's
7 witness into your witness is not a strategy if you
8 can keep that State's witness from testifying at
9 all. You don't have to turn him if he doesn't get
10 to take the stand at all and he advances no
11 relevant fact.

12 Now, we're talking about the petroleum, Your
13 Honor. You have read the testimony from the, about
14 the petroleum. There is no other way about it.
15 The first questions that come out are did you find
16 any accelerant on the pants? And that may be a
17 term of art but the jury takes that as a loaded
18 word for something used to commit arson and --

19 THE COURT: Did one of the jurors testify to
20 that? That juror that testified, they didn't get
21 on the jury, how do you know the jurors thought
22 that?

23 MR. BROWN: We believe it is clear a layman's
24 perception of an accelerant in an arson case is
25 something used to burn something. There is no

1 question that Mr. Cummings does the right thing and
2 brings out it is not the same accelerant, and if
3 I'm not mistaken, that it is Mr. Cummings who comes
4 in and highlights the fact it's different, and the
5 reason why I say that is he has to do that. Mr.
6 Bailey says here's the testing, we found
7 accelerant, a heavy accelerant. A light accelerant
8 was used. Mr. Cummings gets up and says these are
9 not the same accelerants. Mr. Bailey didn't put it
10 up for the right reasons, he put it up for the
11 wrong reasons, he puts it up for the prejudice and
12 Mr. Cummings should have stopped that because
13 experts are not allowed to put prejudicial
14 testimony up, they are limited and they are
15 excluded when it's confusion, when it creates
16 confusion.

17 Now, no question Mr. Cummings had opened the
18 door and said why didn't you test those pants, that
19 would have come in but until that time we don't
20 believe that that was relevant testimony at all.

21 And when we get to the mitigation information
22 we never --

23 THE COURT: Do you believe Mr. Cummings made
24 an error by bringing up the issue of why they
25 tested the pants?

1 MR. BROWN: He brought it up. Well, not
2 after Mr. Bailey put it in. We believe the error
3 was he should have --

4 THE COURT: I thought the testimony was the
5 expert found accelerant on the pants.

6 MR. BROWN: Not the accelerant used in the
7 case.

8 THE COURT: I know that. He found
9 accelerants.

10 MR. BROWN: On the pants, an accelerant.

11 THE COURT: I know. An accelerant and we all
12 know now that accelerant was not the accelerant,
13 was not gasoline.

14 MR. BROWN: That's correct.

15 THE COURT: In fact I think the testimony was
16 it was kerosene.

17 MR. BROWN: It was kerosene.

18 THE COURT: Did you say Mr. Cummings had
19 brought up the issue by asking some witness why he
20 tested the pants?

21 MR. BROWN: I did not do that.

22 THE COURT: Okay.

23 MR. BROWN: No, what we're saying is he
24 should have moved to exclude him. When they said
25 we're going to call this petroleum guy he should

1 have stood up and said we move to exclude this
2 because he offers nothing that would educate the
3 juror on the issue in play, and the judge could
4 have said, "Okay, I'm going to exclude him but, Mr.
5 Cummings, if you argue that they didn't test the
6 pants I'm letting it back in."

7 THE COURT: Okay.

8 MR. BROWN: And again, Your Honor, we ask you
9 consider these errors taken as a whole even if
10 small errors do not lead to the second prong of
11 Strickland, that an error can be like a death by a
12 million cuts.

13 THE COURT: Thank you. Wind down.

14 MR. BROWN: Yes, sir. We're going to move to
15 the penalty phase.

16 THE COURT: You have about two or three
17 minutes.

18 MR. BROWN: Briefly, they didn't put up
19 anybody who testified about his capacity to be of
20 emotional value to others. It is crystal clear he
21 had it and it is even more so, Miss Davis and Mr.
22 Yungman write letters saying, "We need to develop
23 his good fathering," and you know, this is
24 something they talk about a long time ago, none of
25 it comes in. His wife does not testify during the

1 penalty phase, she had been called before, she
2 could be called later on, she didn't want to be
3 there, there is no doubt, she would have told him,
4 and you heard it from our own expert that he would
5 have been able to opine at the time an expert
6 opinion that he would have been able to testify Mr.
7 Bowman had capacity to be of emotional value as a
8 good parent and uncle if given a life sentence and
9 that is a reason to mitigate, reason to give a
10 sentence less than death, and they are passing
11 reference to kids of Bowman, talking about a photo
12 of Mr. Bowman holding a baby.

13 On the one hand we have expert testimony
14 showing he could be a good father and on the other
15 hand we have a photo of the child. This is
16 mitigation to save a man's life, and a photo of him
17 with a baby, don't you know how that is going to
18 convince anybody to give him life? We're talking
19 about real testimony that they knew about. That is
20 what is so bad about it, is that they are writing
21 this thing, "We need to develop this." It's in
22 evidence. Mr. Yungman says, "Hey, this is
23 something we ought to talk about," said, "I don't
24 know why nobody much brought it out, I didn't talk
25 about it," because he didn't talk about it.

1 THE COURT: Before you finish there is one
2 question I wish you would address. You all went
3 over a lot with Mr. Cummings about his lack of a
4 cordial relationship with Miss Davis, and his
5 testimony last week seemed to indicate that he felt
6 she was at fault in this and of course she
7 testified that she was amazed with their inability
8 to let her talk with them and discuss things with
9 them. What's your feelings about that, if you
10 accept either side to be true?

11 MR. BROWN: Here is one thing I would like to
12 point out, I'm glad you brought it to my attention,
13 I meant to tell you. It is undisputed for whatever
14 reason the relationship terminated, that after this
15 trial that Mr. Cummings and Mr. Bailey sought her
16 employment again on a case after this case. That
17 is undisputed testimony.

18 THE COURT: Okay.

19 MR. BROWN: Now this, he disputes over why
20 she left, because she didn't finish that case, but
21 she must not have been that bad on the previous one
22 if they come back to hire her again.

23 THE COURT: Assume for a second that what Mr.
24 Cummings says is true, did it create any
25 responsibility on his part?

1 MR. BROWN: It does in this sense. He is
2 noticed on the memos to talk about developing this
3 stuff about the children and when he is sitting in
4 court, because I have been on the other end, front
5 end of a death penalty case, when you're there,
6 when you know you don't have it, when you know you
7 have a client who has a learning disability and you
8 don't know anything about that learning disability,
9 somebody dropped the ball. I know from my own
10 personal experience I have had to pick up the
11 telephone and call principals in another state,
12 call teachers and drag them down, retired teachers,
13 and ask them when there is a mitigation person who
14 failed to do the job for me. Because I have been
15 there.

16 THE COURT: All right. So, you're saying
17 that once there was, as Mr. Cummings described it,
18 there was a difficult relationship with Miss Davis
19 his job then is to get the stuff done himself?

20 MR. BROWN: Here is the way, yes, sir, and I
21 will answer it also this way. Mr. Bowman is
22 entitled to have mitigation presented and the cases
23 are clear, the client lies about his mitigation and
24 the court said so what, you have to find out the
25 mitigation even if your client lied to you about

1 it, it's your job as a lawyer. I find it hard to
2 believe that was the law, they said your client can
3 tell you nothing happened and you have to go find
4 out whether that's true. The buck stops with the
5 lawyers.

6 THE COURT: So, your only comment about it is
7 Cummings should have done it himself, he should
8 have done it himself?

9 MR. BROWN: There is other avenues. He could
10 have fired her, fired them and hired someone else.

11 THE COURT: Okay.

12 MR. BROWN: I mean, however it is, and we
13 don't believe that's the case.

14 THE COURT: I know that but for the stake of
15 discussion, if what Mr. Cummings says is true did
16 anyone ask Mr. Cummings, "Why didn't you fire her
17 and hire someone else?"

18 MR. BROWN: I didn't ask that. I asked him
19 if the buck stopped with him and he said yes.

20 THE COURT: Maybe fire her and ask for
21 continuance, nobody thought of that possibility?

22 MR. BROWN: I didn't ask but it didn't
23 happen.

24 THE COURT: It just seems to me in your
25 discussions and Mr. Waters' discussions, you all

1 were concerned with who was right, Cummings or
2 Davis, the issue is the defendant and his rights to
3 have a mitigation case presented.

4 MR. BROWN: And I appreciate that because
5 actually that is why I didn't fight about who was
6 right, I could care less. It didn't get presented.

7 We presented some information that should
8 have been presented through his capacity to be of
9 emotional value, expert testimony, his work
10 information, which shows a steady work history, and
11 also his information about him and Kendra, which
12 dovetails in with --

13 THE COURT: Yes, sir.

14 MR. BROWN: -- the capacity to be of
15 emotional value.

16 THE COURT: All right.

17 MR. BROWN: And that's information that was
18 just readily there, Your Honor. And we would also,
19 and Your Honor, on that note, mitigation, I
20 mentioned it before, there was evidence out there
21 he had been drinking, intoxicated that day, I guess
22 the word is. I use the word intoxicated because
23 that is the trigger word for the mitigation charge.

24 THE COURT: The word tipsy?

25 MR. BROWN: Tipsy is the word used but it's

1 synonamous with being drunk and the dictionary, I
2 made a copy, it --

3 THE COURT: What else have you got? Close it
4 up, you have a minute or so.

5 MR. BROWN: Why I pointed it out, Mr.
6 Cummings says voluntary intoxication is not a
7 defense. We're not talking about a defense, we're
8 talking mitigation, which is just missing on that.

9 The allocution. It is not clear that he knew
10 he could beg for his life for no reason at all.
11 There is a qualifier put on it and there is no
12 correction and there is no assertion from Mr.
13 Cummings to correct it. He says beg for your life,
14 beg for your life, beg for your life. But I will
15 say one thing, and it should be clear to everybody
16 in the world, when the judge says what the judge
17 said it trumps what your lawyer says. The judge
18 said what is in here. And of course that's the
19 statutory mitigating --

20 THE COURT: That's it. Anything else?

21 MR. BROWN: Well, Your Honor, with the caveat
22 I can supplement in our brief.

23 THE COURT: I want you to supplment fully in
24 your brief.

25 MR. BROWN: There is a series of conflicts

1 here, and conflict in law is kind of in and of
2 itself, Marva Hardee-Thomas operated in conflict of
3 interest with Ricky Davis. That is about as --

4 THE COURT: I have heard enough on that.
5 Yes, sir?

6 MR. BROWN: And the other thing is that Mr.
7 Cooper who represented Yolando, and Andrew Grimes
8 who represented Darien Williams, and Gene Dukes who
9 represented Tawain Gadson, all sent out letters and
10 purported to be Public Defenders in Dorchester
11 County and that appearance of conflict when they
12 all testify against Mr. Bowman, I don't know what
13 else gives that appearance besides that. If they
14 all came out from the law office of Jim Brown and I
15 represented one of them and everybody else
16 represented another and we all had a little
17 different office, we all got a paycheck from the
18 same person, which they all did, that would be a
19 conflict.

20 THE COURT: Okay.

21 MR. BROWN: We don't believe it's cured by
22 claiming that they didn't talk to each other,
23 because they are all Dorchester County Public
24 Defenders.

25 THE COURT: All right. I'll let you think

1 about maybe a brief reply and I'm making sure you
2 have a right to put everything in writing and add
3 matters to your closing argument when you submit
4 things in writing to the Court.

5 Mr. Waters?

6 MR. WATERS: Thank you, Your Honor.

7 I want to start a little bit as Mr. Brown did
8 and talk about the evidence in the case. At the
9 beginning it might have been wonderful argument but
10 the statute, of course the PCR statute specifically
11 precludes the sufficiency of the evidence from
12 being a valid challenge here, but of all the things
13 that should be pointed out for any sort of
14 prejudice analysis that he failed to mention were
15 the facts of course that Kandee Martin's watch was
16 found in Marion Bowman's pants, you know, hours
17 after her body was found and also that he was seen
18 driving her car with her not in it by witnesses at
19 the club after, in the operative hours of that late
20 night and early morning by witnesses other than
21 James Gadson and Travis Felder. And then obviously
22 there was the ballistics evidence, which I
23 understand they are challenging but that is fairly
24 objective as well and exists.

25 With regard to cross-examination, I think we

1 have to point out from the start that the law is
2 very deferential on cross-examination. When we are
3 talking about sufficient performance we look at a
4 very minimum standard a lawyer has to meet to be
5 effective. There are a multitude of cases that
6 note that a lawyer in order to be found sufficient
7 doesn't have to raise every conceivable issue that
8 PCR counsel with the benefit of years and years of
9 hindsight, peering through the record and a setting
10 far different from the battlefield in which trial
11 counsel operated, can come up with and that they
12 are not required to raise every conceivable issue
13 and it has to be something extremely significant,
14 and I have a whole list of cases that I will cite
15 to you in our written materials on that.

16 So, I think in looking at the various things
17 about Mr. Gadson that they have raised, looking at
18 his examination, on a whole he raised the main
19 issues we expect in such a case and that he was
20 insufficient in that regard, but then, if he was
21 not, that you can't meet the prejudice standards
22 because you have one little issue here or one
23 little issue there you could have raised with the
24 guy already.

25 If we look at Wayne Mood, Wayne Mood was

1 mentioned and as I elicited from Mr. Cummings, he
2 was aware of that, the defense filed a motion to
3 exclude his testimony. I think the defense
4 strategically and clearly as a strategic matter
5 sought to exclude him because he also put the blame
6 on Marion Bowman, too, as the shooter as well, and
7 the defense did not want that in there. So, the
8 fact that Mr. Mood supposedly claimed that Gadson
9 also fired the weapon, Mr. Cummings was clear he
10 did not want that testimony in there.

11 With regard to Ricky Davis, Mr. Cummings was
12 clear that he got the Davis statement, he sent out
13 Walt Mitchell to investigate, Mr. Mitchell came
14 back with an unfavorable report what this guy said,
15 that it was not going to be useful to them and on
16 that basis they decided not to use him.

17 He also said, when he was showed the Sam
18 report, he said, "I wish I had had this, maybe I
19 would have investigated more, I would have liked to
20 look into the details around it," that sort of
21 thing. The fact remains is there has been no proof
22 of that. There has been no further proof, and in a
23 PCR setting you have to present that proof. You
24 can't have counsel say, "I wish I had looked into
25 it more," and that establishes your claim. You

1 have to have the actual proof of what that further
2 investigation would have garnered, and the only
3 things that we have here, the only further proof we
4 have here that was not already known by counsel is
5 the fact of Ricky Davis saying exactly on the stand
6 here exactly what he said to Walt Mitchell, "That I
7 was in the cell with Marion Bowman and he asked me
8 to write that." And that is what we have.

9 And counsel clearly made a valid strategic
10 decision in not presenting that under the obvious
11 logic that it would have looked bad if he was not
12 believed and all it did was looked like Mr. Bowman
13 was trying to cover up from the crime, which would
14 be damning and not only damning but also
15 aggravating in the sentencing phase.

16 With regard to the prior shooting, the
17 instance in which James Gadson shot the weapon,
18 again Mr. Cummings was clear that all that did was
19 place the gun in the waistband of his guy two weeks
20 prior to the shooting and he did not want to do
21 that when there was no direct testimony from
22 anybody but James Gadson that he was the one who
23 had that particular murder weapon. That's clearly
24 a reasonable strategic decision. Mr. Brown may
25 disagree and come up with a nice theory now but it

1 dovetailed with Ricky Davis that in both instances
2 James Gadson took the gun from Marion Bowman, but
3 that is not the standard, and a PCR counsel can
4 dream up an alternative theory and if you like it
5 better, if I was trying the case I would probably
6 have gone with that information, that is better.
7 That's not the standard.

8 The only standard is, is it minimally
9 adequate, is it okay for a trial lawyer to say,
10 "I'm not going to put that in there, all it does is
11 show my guy with the gun, with a gun in his
12 waistband two weeks prior to trial? That is not
13 something I want to admit in this case."

14 All right, with regard to the other court
15 case, with regard to the ballistics evidence, I
16 first would like to point out that other court case
17 was not admitted, the one that apparently is in the
18 District of Massachusetts that mentioned this thing.
19 But that is really beside the point, because we all
20 know what was going on in 2001, 2002. I don't
21 recall hearing anyone challenging the validity of
22 ballistics evidence but if people were, that
23 doesn't give a valid constitutional claim to Mr.
24 Bowman. The reason is Mr. Cummings hired two
25 forensic experts. He had Jeff Hollifield, he had

1 Don Girndt and the main thing he had was Cleon
2 Mauer, who was a firearms and ballistics examiner.
3 All counsel has to do is not be an expert in their
4 own right, all they have to do is hire appropriate
5 experts and listen to their advice and rely upon it
6 and if they do so the fact that the expert was
7 wrong or that a different expert would have given a
8 different opinion or another expert would have come
9 up with something and said you should do this or
10 should do that, counsel is insulated from that and
11 it is not a valid basis for ineffective assistance
12 of counsel.

13 Again, they come up with Dale Davis as well.
14 The issue has to be the ineffective assistance of
15 counsel, not the ineffective assistance of an
16 expert, as long as they have a reasonable expert
17 that they are relying upon to do the job. If the
18 expert messes up that's not the basis for a
19 constitutional claim. It simply isn't and the law
20 on that is clear.

21 THE COURT: I asked him, though, assuming you
22 accept what Mr. Cummings says is true and you knew
23 there was a problem with his relationship with Miss
24 Davis, why would he not have just got another
25 mitigation expert because he, you know, he

1 testified last week it seemed to be he was very
2 concerned about the bad relationship and he felt
3 that, you know, maybe she was not working in the
4 best interest of the whole team?

5 MR. WATERS: I think we have to aim at the
6 right target and what he was saying was he didn't
7 like the fact of two things: Number one, that she
8 might have been, you know, kind of backseat driving
9 and -- well, that is really the main thing, she was
10 trying to be the lawyer and he didn't like that, he
11 didn't hire her for that, he hired her to develop
12 mitigation evidence.

13 THE COURT: I'm aware of all that but he
14 mentioned, himself, there was not a lot of
15 communication between the two of them, she says
16 that she wanted to communicate with them and they
17 wouldn't let her, they wouldn't talk with her
18 enough, and he says that they wanted to talk with
19 her but they didn't.

20 MR. WATERS: Well, he specifically, you know,
21 obviously the record will speak for itself but I
22 think he testified he never had a cross word with
23 Miss Davis.

24 THE COURT: I know. He testified he wanted
25 to talk to her more and wasn't able to.

1 MR. WATERS: Again, if the record reflects
2 differently I apologize but that is not how I
3 understood his testimony. I understood his
4 testimony to say he examined her and that his, her
5 job, of course, the expertise with which he relied
6 upon her, I thought it was interesting, she said,
7 "I wasn't getting guidance on the focus of the
8 penalty face." His testimony was, "I hired her,
9 she knows the stuff, she's the mitigation
10 investigator, her job is to go get everything and
11 give it to the testifying individual," which was
12 Jeff Yungman.

13 THE COURT: I know.

14 MR. WATERS: And she was like, "I didn't have
15 any guidance," which I thought was really
16 interesting because I don't know if you recall, we
17 talked for about thirty minutes on that, me and
18 Miss Davis, she went, just went on and on about why
19 you look for that, have to look for that, what the
20 purpose of this is, what the purpose of that is.
21 In the end I said, "Miss Davis, you sure didn't
22 need a lawyer sitting next to you to give those
23 answers."

24 THE COURT: I'm saying assuming you believe
25 Mr. Cummings. With him it seems like there was a

1 relationship problem with him and Miss Davis.

2 MR. WATERS: Well, and that is why I say we
3 need to aim at the right target.

4 THE COURT: Did he not at least give an
5 indication their relationship was hurting efforts
6 to get all the mitigation in?

7 MR. WATERS: I did not take that from his
8 testimony. What I took from his testimony, sure,
9 there was a relationship problem but he saw her job
10 only as getting that evidence and he felt she was
11 doing that correctly and whether or not he liked
12 her personally or whether or not he thought she
13 should be backseat driving was beside the point
14 because he never testified, "Well, I didn't think,
15 you know, as I was getting in the information, that
16 she wasn't getting the proper mitigation
17 information." As Mr. Brown said, her reputation
18 precedes her, she knows what information to get.
19 That is all he hired her for, it doesn't matter if
20 he doesn't like her, it doesn't matter if he wasn't
21 going to listen to her advice, all she needed to do
22 is get that mitigation information and give it to
23 Mr. Yungman.

24 THE COURT: As you know, I have had problems
25 with mitigation experts before. I was curious as

1 to why Mr. Cummings just did not get another
2 mitigation expert and seek a continuance in the
3 case.

4 MR. WATERS: Because she was getting the
5 information, she was getting it. He never said she
6 wasn't coming up with the information. She was
7 coming up with the information. What he didn't
8 like was her backseat driving, that is what he
9 didn't like. As long, sure, maybe a lawyer, a
10 different lawyer could have said, you know, "I
11 don't like her, I'm going to get somebody else,"
12 but that is not really the standard. The only
13 standard is did he hire the expert to do the
14 mitigation investigation and was it a right choice.
15 There was never any indication that, you know, it
16 would have been apparent if she was not getting the
17 information, and that was the only reason he hired
18 her. He doesn't have to like her, they don't have
19 to go out to dinner or something, have a beer
20 together, they don't have to do that. there was
21 never anything to the contrary.

22 THE COURT: All right.

23 MR. WATERS: All right, moving on, going on
24 to Darien Williams, I think I expressed this in
25 objection but I think I need to say it again

1 because it has been going on throughout this case.
2 You do not create a duty to correct false evidence
3 or some sort of Brady claim from the prosecutor's
4 belief. That is not, and particularly with a duty
5 to correct false evidence, that line of cases
6 starts with something where you have a concrete
7 fact that it is false and the fact a prosecutor
8 might have at one time listened to someone's
9 statement and thought that was credible at one time
10 and then later decided, wait a minute, the other
11 person is more credible. None of that is
12 disclosable. I don't have to sit here saying I
13 Walter Bailey at this particular time thought
14 Travis Felder was more credible than Darien
15 Williams, or vice versa. That just does not
16 establish a valid claim. That is why it is so
17 important with this new claim that was alleged on
18 the very last day of this, what, ten day hearing,
19 there was a duty to correct with regard to James
20 Gadson, and it doesn't matter that at one point in
21 time if Walter Bailey wrote on an internal note
22 that Darien Williams seems like a good witness, but
23 he even went on to explain what he meant by that
24 note was, it was the very beginning, he meant this
25 individual, if he does testify, you know, presents

1 himself well, can talk and express himself. Not
2 necessarily that, "I think he's a credible
3 witness," or anything of that nature.

4 But regardless, it is not anything from which
5 a valid claim can be gotten. The main thing is
6 were the statements disclosed, was the evidence
7 disclosed, then it is up to defense counsel to deal
8 with what they want to do with it. This particular
9 case, with regard to Darien Williams, they had all
10 the statements, with regard that James Gadson they
11 had all the statements. What Bailey may have
12 believed at any point is no claim of any evidence,
13 concrete evidence.

14 With regard to the William S. Hall report,
15 the William S. Hall report isn't admissible against
16 Marion Bowman in this case. It could be admissible
17 if Marion Bowman were to assert any sort of mental
18 status defense. As we listened to Mr. Cummings,
19 after he had that statement, the fourth statement
20 suppressed, which talks about post death sex, which
21 is also mentioned in the William S. Hall report, he
22 was not going after that human victim in pretrial
23 proceedings, going to open the door where that
24 again, and it is expressed in the record, you can
25 look at, I will obviously cite it again in

1 briefing, I had Mr. Cummings look at it where he
2 specifically says, on the record says, "Your Honor,
3 as a strategic matter there is some things that I'm
4 not going to elicit because I don't want to open
5 any doors in light of the pretrial proceedings,"
6 and that is what he testified to, that is what he
7 was talking about.

8 But turn around and looking at James Gadson,
9 it is not admissible against James Gadson as
10 impeachment. The William S. Hall report is no more
11 admissible in that regard as it would be for Marion
12 Bowman in the case in chief. Not only that, there
13 is also issues about medical privacy and that sort
14 of thing. I don't think there is any legal reason
15 if the Solicitor gets a William S. Hall report,
16 which is essentially confidential medical
17 information about a defendant, that he then has to
18 just farm it out to every co-defendant that is
19 there.

20 THE COURT: I'm with your last part but your
21 other part before that, are you standing on that,
22 that I guess the tenor of the law is that report
23 was not reviewable by the different -- I mean, it
24 seems to me Mr. Gadson could very well have waived
25 all his rights when he talked to the, when he

1 talked to the mental health experts, and all that
2 could have been waived just like any other Miranda
3 situation and he was doing it pursuant to charges
4 he had. Are you saying that it is just accepted
5 principle of law that some other different counsel
6 who has a defendant that might be convicted on the
7 testimony of this person wouldn't be able to get
8 it?

9 MR. WATERS: I'm not going to say they
10 couldn't get it, but I don't know that is just a
11 standard thing that needs to go out in Brady. I
12 think you also have a HIPA concern as well, which
13 is beyond just Miranda, you have a HIPA concern as
14 well. I think that is something that --

15 THE COURT: Of course, like HIPA and
16 everything else, you have court review.

17 MR. WATERS: You can, and there are certainly
18 provisions in HIPA that allow documents to be
19 reviewed by courts. That again takes affirmative
20 action by a person wanting that, not just the
21 unilateral decision of another person. I think
22 that is something obviously both sides will brief.
23 I'm not going to concede the point that if you get
24 a William S. Hall report on somebody you can just
25 freely send it out right and left.

1 THE COURT: I think the last remark you made
2 is something you want to look into, I guess, the
3 fact how are they, how is the State going to look
4 at every witness' mental health report and send
5 them out to the defense, the difficulty in doing
6 that.

7 MR. WATERS: Right. I think ultimately there
8 is the issue of materiality and prejudice. While
9 there are some things in there about the marijuana
10 and beeping noise, If you look at James Gadson's
11 cross-examination, there is plenty of things along
12 those lines and there is obviously lots of cases
13 where you talk about, well, if you had four points
14 could you have fired off six. That is not going to
15 get through but it is pretty much kind of the same
16 thing.

17 So, as Mr. Bailey testified, you know, it was
18 freely disclosed that he was drinking throughout
19 the entire night and that he passed out at one
20 point and things of nature, so I don't think that
21 you can meet the reasonable probability of a
22 different result if you just add the fact that Mr.
23 Bailey pointed out that three times in his entire
24 life he had a seizure, so even if you do say it
25 should have been disclosed, it certainly alone is

1 not going to be able to meet the standard.

2 With regard to Travis Felder, the only thing
3 that Mr. Felder left out was that he went to buy
4 the gas and took it out to Nursery Road. He of
5 course testified to everything else, Bowman came to
6 the door, he went with Bowman, they went out to the
7 scene at Nursery Road, he watched Marion Bowman
8 drag Kandee's body, put it in the trunk and torched
9 the car. That is the part that was left out, all
10 right, no doubt about it.

11 But the question that you were asking Mr.
12 Brown that I think is of main importance is when
13 did the defense find out about it? Well, Norb
14 Cummings testified he knew all along, he knew about
15 it, they had the tape, they introduced letters they
16 had that tape early, he knew about it from his own
17 investigation, and Mr. Cummings was clear about
18 that that it was no surprise to him and that while
19 he testified now that he couldn't remember why he
20 decided not to enter it, we went around a little
21 bit but I was showing him portions of the
22 transcript and he finally said, "I obviously did it
23 as an intentional matter." He knew he knew about
24 it, okay, it was not a surprise to defense in that
25 regard. Mr. Bailey said, "I didn't know about it,

1 I didn't know that he had not told the truth," so
2 he obvioulsy didn't have a duty to correct false
3 testimony that he didn't know about, but the bottom
4 line --

5 THE COURT: Did he say as to why he didn't
6 bring it out when Mr. Felder testified in the guilt
7 phase?

8 MR. WATERS: He again didn't remember, and
9 remember I asked him, that was the question, I
10 said, "You don't remember telling me," and of
11 course Mr. Brown objected but, you know, we kind of
12 went around about it, I showed him portions of the
13 transcript, I said, "Mr. Cummings, it seems obvious
14 you intentionally had decided not to do that." And
15 part of that is later in the transcript and I will
16 show it to you, I think this is what Mr. Brown was
17 looking for, it's on page 4622 of the record, where
18 Mr. Cummings says, this is in the sentencing phase,
19 says, "Your Honor, it is pretty much what he is
20 saying, you know, my client really wants us to put
21 up this Felder again and I don't think it's
22 anything that we need to do, particularly here in
23 the sentencing phase but because he wants to put
24 him up, I'm going to put it in for whatever it is
25 worth." I will quit. You obviously read that

1 yourself, it is kind of a paraphrase, it is right
2 in the record, Mr. Cummings knew about it.

3 Another thing, when you look at the duty to
4 correct false evidence, the case law surrounding
5 that involves situations where the defense is
6 essentially helpless and had no access to the
7 evidence. That is the tenor of that line of cases.

8 THE COURT: But once again I wondered did Mr.
9 Cummings feel there was any danger examining, when
10 he cross-examined Mr. Felder in the guilt phase, in
11 saying, "Why did you leave this part out," for
12 impeachment purposes during the guilt phase?

13 MR. WATERS: Again --

14 THE COURT: Was there any danger in that?

15 MR. WATERS: Mr. Cummings, as I recall, he
16 couldn't remember why he didn't do it. He admitted
17 it was intentional, he couldn't remember why. I
18 think that, you know, if you look at why he might
19 not have wanted to have done that, is that it
20 doesn't really help his client any. It doesn't
21 help his client because it's not inconsistent with
22 the story that Felder tells. It's a detail he left
23 out about his own personal guilt, sure, there is
24 some impeaching value to that, I understand that,
25 but it does nothing to exclude Marion Bowman, to

1 provide a videotape that is affirmattory of a story
2 Travis Telder is telling the jury whatever Bowman
3 did. If you want to try to say Travis Felder did
4 it himself, it just wasn't going to fly. I think
5 Mr. Cummings did not want to just put up there an
6 actual visual piece of evidence before the jury
7 that specifically confirmed the story that Travis
8 Felder was telling about what Marion Bowman did,
9 because he is not just considering Travis Felder in
10 a vacuum, he's considering it the context of all
11 the rest of the evidence that came out at this
12 trial, from James Gadson, from the washing of the
13 pants, from the people at the club that saw him
14 drive Kandee's car after it all was over, without
15 her in it, the admission of Johnson, the
16 ballistics, the entire family being involved in
17 this conspiracy to throw the weapon into the Edisto
18 River. All that evidence is not going to help if
19 you get up there and show Travis Felder on the
20 videotape and have Travis Felder say, "Yes, I did
21 go buy the gas." All that is objective evidence
22 that confirms the whole story. Whatever dink you
23 get, Travis Felder is not worth the downside. That
24 is how I would explain it.

25 THE COURT: All right. Let's wind it up.

1 MR. WATERS: All right, I'm getting there.

2 THE COURT: You need to get there in about
3 three minutes.

4 MR. WATERS: All right. With regard to Mr.
5 Felder's plea agreement and whether or not Mr.
6 Bailey has some sort of duty to correct or anything
7 like that, Mr. Bailey was very clear and very
8 reasonable and we all know this sort of exercises,
9 prosecutorial discretion, go on all the time, to
10 say, "Gosh, I wish he had told the truth to begin
11 with but ultimately he did come clean about
12 everything. I had everything, all these charges
13 were wrapped up, it was not worth the resources,"
14 and of course not worth the hassle was kind of my
15 sort of street language for saying it, that is not
16 what Mr. Bailey said. Perhaps I was a little too
17 glib and flippent about it. What he said was, "I
18 was not going to waste the prosecutorial resources
19 when again the defense was going to have good
20 argument, in fact he ultimately did tell the truth,
21 even though it took a little prodding," and go
22 through all that.

23 With regard to the first time he lied, of
24 course that was prior to the plea agreement. That
25 was on the polygraph, so that really wasn't a lie

1 post plea agreement itself. It was actually a
2 decision that our prosecutors are entitled to make,
3 as you know, under our system of law and not
4 indicative of anything. I think it is really kind
5 of an absurdity to sit here and think that sort of
6 deal, some sort of wink, wink, deal or a side deal
7 or the real deal was, you know, "Travis, I don't
8 care what you say. So long as you put Marion
9 Bowman in prison you can say whatever you want,
10 that's our deal and I'm going to give you this
11 deal." That is just absurd. It doesn't work like
12 that and didn't work like that in this particular
13 case.

14 With regard to Mr. Bailey eliciting the deals
15 on direct examination, he's talking about some sort
16 of instruction from the judge or something like
17 that. That is not the law in South Carolina.
18 South Carolina law requires no special instruction
19 and allows the prosecutor to elicit plea deals on
20 direct in view of the inevitable defense
21 cross-examination on these plea deals, to show the
22 prosecutor wasn't hiding anything and that is
23 exactly what Mr. Bailey said, and that is State v.
24 Shuler, that is particularly what our law requires
25 as to admitting the very charges that were involved

1 here in this very case, and that is also something
2 for that same reason that the prosecutor is able to
3 admit the very charges that the person is charged
4 with because it is in this case to show, again, the
5 inevitable defense examination that, you know,
6 you're just trying to save your skin. It is
7 exactly what Mr. Cummings did. There is nothing
8 improper about the way that examination went.

9 With regard to the DNA, we can't forget, as
10 Mr. Bailey said, that just as an initial matter
11 it's relevant to identity, even if the sex was way
12 before or way after, in a guilt phase it is
13 relevant to identity because it shows those two
14 people were in close proximity to one another at a
15 time, near in time to the death. It doesn't matter
16 if there was sex before or sex after in the guilt
17 phase, all it matters is that his DNA was found
18 there. It would be admissible in any criminal
19 trial where an allegation of forcible sex was made
20 because it would put those two people together.
21 Mr. Cummings was very clear, he ultimately
22 disagrees with it, Mr. Brown obviously disagrees
23 with it. He decided to use that to show these
24 people were intimate friends and he would not have
25 killed Kandee Martin. He thought he would just

1 take it and run with it that way. That is
2 precisely what he argued, and I don't think, that
3 is not wrong. Again the question is not whether
4 you would have done it if you were the trial
5 lawyer, the question is, is it just so totally
6 unreasonable that no lawyer would do it.

7 THE COURT: Kind of interesting, Mr. Bailey
8 said an interesting remark today, he said you don't
9 have sex with someone and then kill them. Did you
10 all hear him say that today?

11 MR. BROWN: Yes, sir.

12 THE COURT: It was kind of interesting. I
13 know there are many people in prison convicted of
14 rape and murder.

15 MR. BROWN: Mr. Bowman, under his theory --

16 MR. WATERS: I think I'm arguing now.

17 THE COURT: I know. Did you hear him say
18 that? I'm saying it agrees with your view.

19 MR. WATERS: I think what he was saying, what
20 his actual quote was, it is not typical to kill
21 them and then have sex with them, that is what he
22 is saying.

23 THE COURT: Well, I will let you check the
24 record, I think he said it's not usual to have sex
25 with someone and then kill them.

1 MR. WATERS: I think Mr. Brown was of course
2 asking him a lot about what makes you think that
3 Marion Boman was the one with this postmortem sex.
4 All Marion Bowman did was say it was Gadson had the
5 postmortem sex. He said Marion Bowman was fixated
6 on this postmortem sex thing, he mentioned it in
7 every statement. The only DNA in Kandee Martin was
8 Marion Bowman. That is what makes me think he is
9 the one did that. His comment is it is pretty
10 unusual to kill somebody and then have sex with
11 them, it is usually the other way around, as Your
12 Honor points out.

13 THE COURT: No, you don't usually kill
14 somebody after you have sex with them.

15 MR. WATERS: You know waht I mean, for a
16 criminal element.

17 THE COURT: I'm saying it does happen. I
18 thought in his testimony he was trying to state his
19 having postmortem sex isn't true because you don't
20 usually have sex with someone and then kill them.
21 In any event, I thought what he was saying was
22 going toward that Mr. Cummings attempted to show
23 there was some friendly relationship between the
24 two, between the victim and Mr. Bowman.

25 MR. WATERS: Right. I think a lot of

1 everybody's, this was a surprise to everybody,
2 everything changed for both sides, both the
3 prosecution and defense, when that statement was
4 suppressed because had that statement come out,
5 then we would have been hearing about postmortem
6 sex.

7 MR. BROWN: Your Honor, now we're arguing the
8 statement that has been suppressed.

9 THE COURT: I know but there was testimony
10 about it. I'm not considering that.

11 MR. BROWN: I don't want to wavier that issue.

12 THE COURT: Mr. Cummings already stated the
13 horror he had, the fear he had he was going to open
14 the door.

15 MR. WATERS: And I would ask you to read it
16 because, like I think Mr. Cummings said, "If that
17 came out we're sunk, it's over."

18 THE COURT: I'm not going to read it.

19 MR. WATERS: It is in the William S. Hall
20 report, too.

21 THE COURT: In the Blair hearing and
22 McNaughton.

23 MR. WATERS: Right. With regard to the
24 drinking, I think Mr. Brown misses what Mr.
25 Cummings said when he says that Mr. Cummings said

1 he didn't want to bring out he was a drunk but then
2 it came out from Jeff Yungman, and Jeff Yungman,
3 the testifying social worker did bring out a number
4 of points about the alcohol abuse that was in the
5 family and that Mr. Bowman himself had as well.

6 But what he said was, and I came on redirect,
7 on recross to make this clear, there is obviously
8 nothing to be gained in the guilt phase with regard
9 to voluntary intoxication because it is not a
10 defense in the guilt phase, and so he was not going
11 to elicit that from the witnesses in the guilt
12 phase for the fact that it would in fact prejudice
13 his client and make him look guilty. That he was
14 out there drinking, it is certainly not going to
15 help with a conservative Dorchester County jury.

16 Then he said sentencing this changes and he
17 is going to try to throw in everything he can to
18 save his client's life, which is why they brought
19 out from Yungman this man drinks. He said, "One
20 thing I wasn't going to do was call back James
21 Gadson or Travis Felder or Hiram Johnson in the
22 sentencing phase to ask whether or not Marion
23 Bowman was drunk that night. Who knows what I
24 would get on cross from the prosecutor. That
25 wasn't worth the risk when I could get it out in a

1 better fashion through the testifying social
2 worker." I think that is a valid distinction,
3 there is nothing improper about that.

4 With regard to the accelerant, his testimony
5 was not inappropriate. There is nothing inaccurate
6 about it. The prosecutor did not elicit anything
7 inappropriate. He simply elicited what the results
8 of the SLED tests were, and this was an arson
9 investigator, and a lot of different things this
10 investigator testified about. He wasn't just
11 called to testify about the pants, he was
12 testifying about a number of things, but the
13 testimony was very plain and Cummings drove the
14 point home that it was not gas. There was nothing
15 to the contrary, the prosecutor never in argument,
16 as Mr. Bailey testified, never got up and made any
17 sort of prosecutorial argument that would imply
18 that that accelerant on the pants in any way showed
19 the guilt of Marion Bowman. So, it is simply a non
20 issue. It is certainly not sufficient and never
21 could get to a prejudice finding.

22 Now, Mr. Brown --

23 THE COURT: You recall Mr. Bailey said he
24 wanted to make sure, even though he didn't feel
25 that he had, wanted to make sure there was nothing

1 that he was leaving something open.

2 MR. WATERS: Right. Mr. Brown said, "Well,
3 wait a minute, he didn't have to do it because Mr.
4 Cummings hadn't gotten up and said you didn't test
5 the gas or you didn't test the pants, did you?"
6 Well, the problem with that argument is the problem
7 that prosecutors deal with all the time, if I wait
8 for that to happen it might not happen until
9 closing argument and then it's too late, it is too
10 late. We see all the time if you don't bring out
11 everything, all the tests you did, then the defense
12 gets up in closing argument when it is too late to
13 present any more evidence and says they failed to
14 test this and failed to test that, when we know in
15 fact that it was in fact tested.

16 THE COURT: I assume you have the classic
17 example is when you don't put up evidence that you
18 couldn't discern fingerprint information because if
19 the State put it up they can explain why they
20 cannot get fingerprints, instead of waiting to
21 closing argument and say they didn't get
22 fingerprints?

23 MR. WATERS: That is the classic example.
24 Many prosecutors got burned, that is why they do
25 it. You put the guy up there, you bore yourself.

1 enough, they sit there and testify about the fact
2 we found nothing. You do it to prevent the defense
3 from getting up and saying why didn't they test for
4 fingerprints, what about fingerprints, and set the
5 guy free, reasonable doubt. That is certainly the
6 kind of things you do.

7 With regard to good parenting, they did call
8 Yungman. I think the family, they were all charged
9 in the case, they were not very cooperative, but he
10 did call family witnesses and the expert they
11 called her, as you might recall my examination of
12 him, he was relying primarily on those letters that
13 Mr. Bowman wrote to his wife as indicative of this
14 sort of warm familial relationship. Mr. Cummings
15 testified he didn't want those letters anywhere
16 near the jury because they are also full of stuff
17 about him telling Dorothy tell the police, to tell
18 Hiram not to talk to the police, and if the police
19 ask you this, tell them that, if this happens,
20 don't do that, which obviously just slows somebody
21 who is trying to cover up a crime.

22 THE COURT: All right. Try and complete your
23 argument here.

24 MR. WATERS: All right. I think I have
25 already addressed Dale Davis, he was reasonable in

1 his reliance on her. That is her job, to do
2 mitigation investigation.

3 THE COURT: All right.

4 MR. WATERS: Now, with regard to the
5 allocution, I think this is about the last issue,
6 this is the last issue. Mr. Cummings was clear
7 that Mr. Bowman was not going to talk, they talked
8 with him repeatedly about that, he never expressed
9 any sort of interest to talk. There wasn't any
10 testimony before Your Honor, which I think would be
11 necessary, that yes, I was going to talk but when I
12 heard that thing from the judge about allocution,
13 that is what caused me not to do it. There hadn't
14 been any testimony to that and that would be a
15 necessary part of that claim. But regardless of
16 that, what the judge said was completely correct.
17 Allocution --

18 THE COURT: Similar to the ones where in
19 cases a few years ago the judge forgets to mention
20 you have a right to say something in the guilt
21 phase and penalty phase, and they say the penalty
22 phase and the petitioner says had I been told that
23 I would have said something in the penalty phase.

24 MR. WATERS: Exactly. We don't have that
25 here. If we did, I would submit it is just not

1 credible. I would submit he wasn't going to
2 testify or give argument at all, which is what Mr.
3 Cummings said, and beyond that, though, the judge
4 was absolutely correct, the judge told him that,
5 "Your chance at allocution in the penalty phase is
6 not just a free shot to testify without
7 cross-examination," which it is not, "You can give
8 your own argument and you plead for your life but
9 you're not going to get up here and give unsworn
10 evidence." That's valid, that's absolutely
11 correct.

12 Right before that they were talking about how
13 you can give mercy for any reason or no reason at
14 all. I don't think there is any indication here
15 whether by direct testimony or by inferrable
16 testimony that Mr. Bowman was at all confused about
17 the proper limits of what he can do in allocution.

18 I believe I have addressed the issues Mr.
19 Brown has and I also will address them further in
20 our briefing.

21 THE COURT: Do you want four minutes or five
22 minutes.

23 MR. BROWN: I don't even want that long, but
24 a couple things.

25 The videotape, I have to say this. The

1 videotape of Mr. Felder buying the gas does not
2 confirm the story he told the jury in the first
3 phase because he lies about it. So, it is not only
4 impeaching of him, but it impeaches his very
5 testimony in this case, which has the second added
6 dynamic, which is probably biggest one, the defense
7 can then turn around and say, "Ladies and
8 gentlemen, he flat lied to you in front of you here
9 in this court, because he doesn't say he went and
10 bought the gas, he says he went, showed up, saw the
11 body burning."

12 That is not the story that he later told in
13 the penalty phase. So, it does not corroborate his
14 story. If you recall, there is no statement from
15 Travis Felder, there is not a yardstick to go by.
16 In fact, we didn't really know that he flat out
17 fully lied until we deposed him, and Mr. Sinclair
18 and I quite frankly were shocked. He lied, he told
19 Mr. Bailey this.

20 Now, again I'm not putting his word above Mr.
21 Bailey and he said, "I told him that." That is for
22 Your Honor to decide which one you believe of the
23 two. Realistically I know which one I believe of
24 the two, but I have to say, you know, he has come
25 clean, more clean every time he has taken the

1 stand, and so --

2 THE COURT: You're arguing a different clean
3 every time?

4 MR. BROWN: It is more clean, I would assert
5 he comes more clean every time. I would say
6 further --

7 THE COURT: Different set of cleaners?

8 MR. BROWN: More powerful ones. But I would
9 have to say there is no story to go by because
10 there is no written statement. It is clear we have
11 looked for it, there is no written statement, there
12 is nothing that corroborates, because it doesn't
13 corroborate that Mr. Gadson, excuse me, Mr. Bowman
14 waited around back while he bought the gas until
15 after he comes to the stand and has to explain why
16 he bought the gas. "Oh, yes, that's because he
17 waited around back while I bought the gas." That
18 corroborates the later, the latest version of the
19 Felder story.

20 And just to hit briefly on a couple other
21 things, you can't open the door to the introduction
22 of an unreliable piece of evidence, and Mincey
23 versus Arizona is clear, a statement that is
24 involuntary is not admissible for impeachment and
25 the basis of it is unreliable, otherwise the

1 government would benefit in torturing any statement
2 they wanted out of somebody to prevent that person
3 from arguing something contradictory to it and it
4 would promote involuntary statements and so there
5 cannot be a fear that we might, if we talk about
6 some mitigating piece of evidence later on we may
7 trigger a door being opened even if Judge
8 Goodstein, with all due respect to Her Honor, even
9 if she tells them watch out for it, he cannot
10 follow that advice if it's wrong.

11 Now, her changing her ruling, that would
12 create different legal problems. If he acted in
13 conformity with a ruling that it was involuntary
14 and she later changed her ruling in the middle of
15 the game I think we have a different error and I
16 think that would be a problem that we would have to
17 object to and then he would get relief on it, such
18 as when a judge has advised an attorney that he
19 would charge a certain language of reasonable doubt
20 and then after the attorney argues that definition
21 of reasonable doubt the judge later on says he's
22 not going to charge that. That is found to be
23 reversible error, I think it would be similar here.

24 But that is not the case, even though he did
25 operate under that, that is not reasonable, because

1 a reasonable lawyer knows an involuntary statement
2 does not come in at all. So, there is no fear.
3 That is why that failure to present mitigation is
4 an unreasonable strategy because it is based on a
5 lack of understanding of the law. And we point
6 that out, Your Honor, this is a case where there is
7 woefully inadequate mitigation and there was
8 mitigation readily sitting there, including
9 information about intoxication, which he doesn't
10 even have to ask for the charge, it is required.
11 That information was just sitting there. Mr.
12 Gadson was very forthcoming about it, as were the
13 other witnesses who all testified, and also they
14 would testify that way if they had been asked, and
15 it doesn't concede guilt to ask whether Mr. Bowman
16 was intoxicated or not on February 16th, because
17 they can argue, they can still argue he didn't kill
18 her but he was intoxicated. The charge says under
19 the influence at the time of the crime. So, that's
20 kind of what I would point out.

21 Again we would like to brief it all for you.
22 And, Your Honor, as for as any claim that a person
23 received effective representation because somebody
24 hired a reputable person who didn't do a good job,
25 we don't believe you can pass the buck on.

1 representation. Again, in Wiggins the court is
2 very clear you can't pass the buck to your own
3 client, you can't rely on that.

4 We appreciate the opportunity to argue this
5 case to Your Honor and present the evidence we
6 have.

7 THE COURT: Let me think. Now, what I would
8 like for you all to do, obviously I want you, Mr.
9 Brown, to make sure you state clearly to me in your
10 brief, if you would, the grounds you have that you
11 feel your client is entitled to a granting of PCR.

12 MR. BROWN: Yes, sir.

13 THE COURT: But the matters that I really
14 would like you all to look at is, excuse me, not
15 is, are, regarding Felder and Gadson. Discuss what
16 about Ricky Davis' oral statement or written
17 statement, and Felder and Gadson.

18 One thing I really want to hear from you all
19 about is your comments regarding the mitigation, is
20 there any evidence of ineffective assistance
21 regarding mitigation.

22 And also, Mr. Brown, I would like to know if
23 in the best of all worlds or in the world of
24 reasonable counsel, in your view what could have
25 come out that didn't come out regarding mitigation

1 on Mr. Brown, I mean on Mr. Bowman.

2 Now, there is -- now, Mr. Waters, I also want
3 to have any comments you have regarding the
4 comments of Miss Thomas. I was trying my best
5 today to remember what she actually said and I was
6 looking at my notes. I didn't, I guess, write
7 detailed notes enough about it, but regarding her
8 concern about Mr. Davis and about that bottom area
9 where she may have put down the notary, the notary
10 though didn't notarize it. As I heard Mr. Brown
11 say, that she actually said that, "I had a conflict
12 then," and I thought I remembered her really
13 stating she never thought she had a conflict, she
14 really was proceeding on as if she did not
15 represent Mr. Davis at the time of this case and
16 had no duty to Mr. Davis. I would like to hear
17 what you have to say, Mr. Waters, about her
18 obligation, if any, to Mr. Davis.

19 And I'm looking at my notes again. It just
20 seems like I thought she said she thought her
21 involvement ended once the appeal was sent to
22 Appellate Defense on the charge that he was
23 convicted of.

24 MR. BROWN: Your Honor, I do believe she said
25 something along those lines. I would also suggest

1 she also conceded there were confidences that she
2 maintained.

3 THE COURT: Well, that is what I would like
4 to have you all discuss.

5 MR. BROWN: Yes, sir.

6 THE COURT: And in addition to that, if there
7 were anything of that nature, how that reflected
8 upon effective assistance or assistance of counsel.

9 Those things, I am concerned about the whole
10 matter as for as reviewing the whole matter, but I
11 know you all are going to review about that
12 witness, interestingly enough, his name was Davis
13 also. How many Davises do we have in this?

14 MR. BROWN: Three.

15 THE COURT: And other matters, too. Mr.
16 Coker, Van Doran and of course Hiram Johnson, but
17 if you all would, please note how you all feel it
18 does or does not, and really expand on Felder,
19 Gadson, mitigation and Thomas' role with Davis.
20 But there is other stuff, too. I won't limit you
21 to anything else. I will be glad to look at
22 everything you have.

23 And how much time do you all figure you need,
24 thirty days?

25 MR. WATERS: Your Honor --

1 MR. BROWN: Go ahead.

2 MR. WATERS: I think Mr. Brown would agree
3 with me, I would request we wait until the
4 transcript is prepared.

5 MR. BROWN: There is no question I need to
6 read the transcript. There is two matters I --

7 THE COURT: Mr. Young will have them in no
8 time.

9 MR. BROWN: He mentioned he is right on it.

10 THE COURT: One of the most proficient court
11 reporters I have ever encountered. There will
12 never be any allegations of ineffective assistance
13 of the court reporter when Mr. Young is involved in
14 cases.

15 MR. BROWN: Your Honor, that trial with Judge
16 Buckner, an appointed rape case that was down in
17 the fall has a day certain for February 23rd. I
18 have been appointed. I just found out they are not
19 honoring vouchers in noncapital cases, so I'm
20 working for free on an LWOP, my client faces 185
21 some years.

22 THE COURT: No bailout of defense attorneys
23 because of budget problems?

24 MR. BROWN: Please get me out of the case,
25 and I say that, that is on February 23rd I have

1 that case. And I also got appointed --

2 THE COURT: However, Mr. Brown --

3 MR. BROWN: Yes, sir.

4 THE COURT: -- you have a duty to Mr. Bowman,
5 as you know, and so does Mr. Sinclair, we all know
6 the longer the time passes, you have a written
7 transcript but that transcript is not as good as
8 the freshness in your mind after you finished the
9 battle.

10 MR. BROWN: I agree.

11 THE COURT: You all completed this battle and
12 I don't want you all waiting two and three months
13 to get me briefs, because if you do that I'm afraid
14 that time has passed and not only you all forget
15 many things, I do too, and I got to review the
16 transcript when everything is fresh, I have been
17 reviewing my notes as I go along, of the various
18 witnesses. I have got a pretty good amount of
19 notes but I don't want to wait two months.

20 MR. BROWN: The only reason I tell you that,
21 we get, I think like in ten days from today, it
22 would be like the 1st of January, 2nd of January,
23 if we got it in ten days and you gave us thirty
24 days that would put it due the beginning of
25 February and I have that rape trial in February and

1 that's the reason why I pointed that out, is there
2 is no question in my office there is no other
3 lawyer. And I point that out, Your Honor --

4 THE COURT: I know that, but I appreciate
5 your involvement in this case but, you know, we
6 have to do what we have to do. I just, I mean,
7 thirty days after you get this transcript, I just
8 need something by the beginning of February, I
9 really do. I can't wait until March to get your
10 briefs in this thing. You are saying March, that
11 is what I hear you saying.

12 MR. BROWN: Actually I would rather do this
13 than that other case, that is not really the
14 problem I've got.

15 THE COURT: Mr. Waters, what is your
16 position?

17 MR. WATERS: Well, Your Honor, my only, the
18 main thing of concern to me is what I expressed to
19 you when we left yesterday, that we really need to
20 do this the way the appellate courts do it because
21 of all these new issues, because of all the things
22 that have arisen, that there is just no effective
23 way for me to write a brief right now when I'm not
24 quite sure of everything they are raising and the
25 manner in which they raise it, other than just

1 writing it, if they are asserting this, X, if that,
2 Y, it would take me forever to do that. I would
3 probably miss some things. I already asserted it
4 has been unfair to let them do that, to proceed
5 through the whole case and not even file
6 amendments, but then to make me brief it without
7 knowing what they are, there is just no way for me
8 to do that. The only way to do that is to allow
9 him to brief first and me brief after that in a
10 similar amount of time, which is pushing us further
11 and further.

12 THE COURT: I agree with that. It is your
13 decision. Let's do it in early February, the 1st,
14 I believe.

15 MR. BROWN: That's fine with me. I have that
16 day certain in another case, there is still
17 evidence I don't even have, a three year old case.

18 THE COURT: Mr. Young, let me know when you
19 sent the transcript to the parties. Thirty days
20 after he sends you the transcript I need to, I need
21 your brief.

22 MR. WATERS: Then thirty days for me?

23 THE COURT: No. I'm going to give you reply
24 time of twenty days because it is not like you
25 don't anticipate much of this.

1 MR. BROWN: Your Honor, I'm not asking for an
2 order of protection but can I use this time --

3 THE COURT: Sure.

4 MR. BROWN: Thank you. Can I assume I have
5 this devoted to thirty days? I mean --

6 THE COURT: You can assume what.

7 MR. BROWN: That I can devote the thirty days
8 to this case?

9 THE COURT: You have Mr. Sinclair there,
10 too, you know, you're not a single practitioner in
11 this case. There is a purpose why you get two
12 lawyers.

13 MR. WATERS: Your Honor, can I ask if the
14 Court would inquire of Mr. Brown that after we have
15 completed the evidence, if there are any
16 allegations that aren't in there he is going to
17 waive if we haven't already done so?

18 MR. BROWN: We'll do that. We'll make that
19 clear. I did one where I did a brief with the
20 amended application with my brief, including the
21 claims we abandoned.

22 MR. WATERS: But I'm asking you to do it ASAP
23 so I can go ahead and get it started.

24 THE COURT: So, things they plan to abandon,
25 let him know so he won't have to worry about

1 getting ready to brief it.

2 MR. BROWN: May I suggest this, we do an
3 amendment now and then with my brief --

4 MR. WATERS: You can send me a letter
5 tomorrow but I would just prefer that if I am going
6 to go ahead and get started, I have the twenty
7 days, and I'm not working on issues you're not
8 going to rely on.

9 MR. BROWN: I have no problem with that.

10 MR. WATERS: All right.

11 (Concluded at 7:27 p.m.).

12

13

14

15

16

17

18

19

20

21

22

23

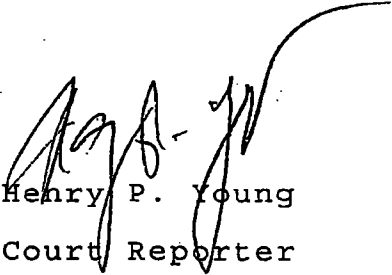
24

25

1
2
3
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 21st day of December, 2008.

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

14 December 30, 2008

15
16
17
18 
19 Henry P. Young
20 Court Reporter
21
22
23
24
25



Ballistic Imaging

Daniel L. Cork, John E. Rolph, Eugene S. Meieran, and Carol V. Petrie, Editors, Committee to Assess the Feasibility, Accuracy and Technical Capability of a National Ballistics Database, National Research Council
ISBN: 0-309-11725-9, 344 pages, 6 x 9, (2008)

This PDF is available from the National Academies Press at:
<http://www.nap.edu/catalog/12162.html>

Visit the National Academies Press online, the authoritative source for all books from the National Academy of Sciences, the National Academy of Engineering, the Institute of Medicine, and the National Research Council:

- Download hundreds of free books in PDF
- Read thousands of books online for free
- Explore our innovative research tools – try the “Research Dashboard” now!
- Sign up to be notified when new books are published
- Purchase printed books and selected PDF files

Thank you for downloading this PDF. If you have comments, questions or just want more information about the books published by the National Academies Press, you may contact our customer service department toll-free at 888-624-8373, visit us online, or send an email to feedback@nap.edu.

This book plus thousands more are available at <http://www.nap.edu>.

Copyright © National Academy of Sciences. All rights reserved.

Unless otherwise indicated, all materials in this PDF File are copyrighted by the National Academy of Sciences. Distribution, posting, or copying is strictly prohibited without written permission of the National Academies Press. Request reprint permission for this book.

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

Ballistic Imaging

Committee to Assess the Feasibility, Accuracy, and Technical Capability of a
National Ballistics Database

Daniel L. Cork, John E. Rolph, Eugene S. Meieran, and
Carol V. Petrie, *Editors*

Committee on Law and Justice
Committee on National Statistics

Division of Behavioral and Social Sciences and Education

National Materials Advisory Board

Division on Engineering and Physical Sciences

NATIONAL RESEARCH COUNCIL
OF THE NATIONAL ACADEMIES

THE NATIONAL ACADEMIES PRESS
Washington, D.C.
www.nap.edu

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

THE NATIONAL ACADEMIES PRESS 500 Fifth Street, N.W. Washington, DC 20001

NOTICE: The project that is the subject of this report was approved by the Governing Board of the National Research Council, whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. The members of the committee responsible for the report were chosen for their special competences and with regard for appropriate balance.

The project that is the subject of this report was supported by contract 2003-IJ-CX-1013 between the National Academy of Sciences and the National Institute of Justice. The work of the Committee on National Statistics is provided by a consortium of federal agencies through a grant from the National Science Foundation (Number SBR-0112521). Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the organizations or agencies that provided support for the project.

Library of Congress Cataloging-in-Publication Data

National Research Council (U.S.). Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database.

Ballistic imaging / Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database ; Daniel L. Cork ... [et al.].

p. cm.

Includes bibliographical references and index.

ISBN 978-0-309-11724-1 (pbk. : alk. paper) — ISBN 978-0-309-11725-8

(pdf : alk. paper) 1. Forensic ballistics—Atlases—Data processing—Government policy—United States. 2. Bullets—Identification—Databases. 3. Images, Photographic—Databases. 4. Electronic records—United States—Management—Data processing. I. Cork, Daniel L. II. Title.

HV8077.N38 2008

363.25'62—dc22

2008015181

Additional copies of this report are available from the National Academies Press, 500 Fifth Street, N.W., Lockbox 285, Washington, DC 20055; (800) 624-6242 or (202) 334-3313 (in the Washington metropolitan area); Internet, <http://www.nap.edu>.

Copyright 2008 by the National Academy of Sciences. All rights reserved.

Printed in the United States of America

Second printing with corrections.

Cover illustration and design by Van Nguyen.

Cover images: Gun and bullets images provided by C. Sherburne/PhotoLink ©1999 PhotoDisc, Inc. All rights reserved.

Suggested citation: National Research Council. (2008). *Ballistic Imaging*. Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database. Daniel L. Cork, John E. Rolph, Eugene S. Meieran, and Carol V. Petrie, eds. Committee on Law and Justice and Committee on National Statistics, Division of Behavioral and Social Sciences and Education; National Materials Advisory Board, Division of Engineering and Physical Sciences. Washington, DC: The National Academies Press.

THE NATIONAL ACADEMIES

Advisers to the Nation on Science, Engineering, and Medicine

The National Academy of Sciences is a private, nonprofit, self-perpetuating society of distinguished scholars engaged in scientific and engineering research, dedicated to the furtherance of science and technology and to their use for the general welfare. Upon the authority of the charter granted to it by the Congress in 1863, the Academy has a mandate that requires it to advise the federal government on scientific and technical matters. Dr. Ralph J. Cicerone is president of the National Academy of Sciences.

The National Academy of Engineering was established in 1964, under the charter of the National Academy of Sciences, as a parallel organization of outstanding engineers. It is autonomous in its administration and in the selection of its members, sharing with the National Academy of Sciences the responsibility for advising the federal government. The National Academy of Engineering also sponsors engineering programs aimed at meeting national needs, encourages education and research, and recognizes the superior achievements of engineers. Dr. Charles M. Vest is president of the National Academy of Engineering.

The Institute of Medicine was established in 1970 by the National Academy of Sciences to secure the services of eminent members of appropriate professions in the examination of policy matters pertaining to the health of the public. The Institute acts under the responsibility given to the National Academy of Sciences by its congressional charter to be an adviser to the federal government and, upon its own initiative, to identify issues of medical care, research, and education. Dr. Harvey V. Fineberg is president of the Institute of Medicine.

The National Research Council was organized by the National Academy of Sciences in 1916 to associate the broad community of science and technology with the Academy's purposes of furthering knowledge and advising the federal government. Functioning in accordance with general policies determined by the Academy, the Council has become the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in providing services to the government, the public, and the scientific and engineering communities. The Council is administered jointly by both Academies and the Institute of Medicine. Dr. Ralph J. Cicerone and Dr. Charles M. Vest are chair and vice chair, respectively, of the National Research Council.

www.national-academies.org

8002

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

COMMITTEE TO ASSESS THE FEASIBILITY,
 ACCURACY, AND TECHNICAL CAPABILITY OF A
 NATIONAL BALLISTICS DATABASE

JOHN E. ROLPH (*Chair*), Marshall School of Business, University of Southern California
 EUGENE S. MEIERAN (*Vice Chair*), Fellow, Intel Corporation, Santa Clara, California
 ALFRED BLUMSTEIN, H. John Heinz III School of Public Policy and Management, Carnegie Mellon University
 ALICIA CARRIQUIRY, Department of Statistics, Iowa State University
 SCOTT CHUMBLEY, Department of Materials Science and Engineering, Iowa State University
 PHILIP J. COOK, Sanford Institute of Public Policy, Duke University
 MARC DE GRAEF, Department of Materials Science and Engineering, Carnegie Mellon University
 DAVID L. DONOHO, Department of Statistics, Stanford University
 WILLIAM F. EDDY, Department of Statistics, Carnegie Mellon University
 GEORGE (RUSTY) GRAY, Materials Science Division, Los Alamos National Laboratories
 ERIC GRIMSON, Department of Electrical Engineering and Computer Science and Department of Medical Engineering, Massachusetts Institute of Technology
 DANIEL HUTTENLOCHER, Department of Computing, Information Science, and Business, Cornell University
 MICHAEL M. MEYER, Google, Inc., Seattle, Washington
 VIJAY NAIR, Department of Statistics and Department of Industrial and Operations Engineering, University of Michigan
 ANGELO NINIVAGGI, Plexus Corp., Neenah, Wisconsin
 DAVID W. PISENTI, Consultant, Fredericksburg, Virginia
 DARYL PREGIBON, Google, Inc., New York, New York
 HERMAN M. REININGA, Rockwell Collins, Cedar Rapids, Iowa
 JAMES K. (CHIPS) STEWART, CNA Corporation, Alexandria, Virginia
 MICHAEL STONEBRAKER, Department of Computer Science, Massachusetts Institute of Technology
 HARRY WECHSLER, Department of Computer Science, George Mason University
 JULIA WEERTMAN, Department of Materials Science and Engineering, Northwestern University (emeritus)

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

CAROL V. PETRIE, *Study Director*
DANIEL L. CORK, *Senior Program Officer*
GARY FISCHMAN,** *Director, National Materials Advisory Board*
MICHAEL SIRI, *Senior Program Assistant*
ANTHONY A. BRAGA, *Consultant*
LAWDEN YATES, *Consultant*

*Served until May 2004.

**Served as liaison member to the committee from the National Materials Advisory Board until becoming that board's staff director in March 2005.

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

COMMITTEE ON LAW AND JUSTICE 2007

- JAMES Q. WILSON (*Chair*), School of Public Policy, Pepperdine University,
 and Anderson School of Management, University of California, Los
 Angeles (emeritus)
- PHILIP J. COOK (*Vice Chair*), Sanford Institute of Public Policy, Duke
 University
- DAVID H. BAYLEY, School of Criminal Justice, University at Albany, State
 University of New York
- RICHARD BONNIE, Institute of Law, Psychiatry, and Public Policy,
 University of Virginia Law School
- MARTHA CRENSHAW, Department of Political Science, Wesleyan University
- ROBERT CRUTCHFIELD, Department of Sociology, University of Washington
- JOHN DI IULIO, JR., Department of Political Science, University of
 Pennsylvania
- STEVEN DURLAUF, Department of Economics, University of Wisconsin,
 Madison
- JOHN FEREJOHN, Hoover Institution, Stanford University
- ARTHUR GOLDBERGER, Department of Economics, University of
 Wisconsin, Madison (emeritus)
- BRUCE HOFFMAN, Edmund A. Walsh School of Foreign Service,
 Georgetown University
- ROBERT L. JOHNSON, Office of the Dean, New Jersey Medical School
- JOHN H. LAUB, Department of Criminology and Criminal Justice,
 University of Maryland
- TRACEY MEARES, Yale Law School
- TERRIE MOFFITT, Department of Psychology and Neuroscience, Duke
 University
- MARK MOORE, Kennedy School of Government, Harvard University
- RUTH PETERSON, Department of Sociology, Ohio State University
- RICHARD ROSENFELD, Department of Criminology and Criminal Justice,
 University of Missouri, St. Louis
- ROBERT J. SAMPSON, Department of Sociology, Harvard University
- JEREMY TRAVIS, Office of the President, John Jay College of Criminal
 Justice
- CHRISTY VISHER, Department of Sociology and Criminal Justice,
 University of Delaware
- CAROL V. PETRIE, *Director*

COMMITTEE ON NATIONAL STATISTICS
 2008

- WILLIAM F. EDDY (*Chair*), Department of Statistics, Carnegie Mellon University
 KATHARINE ABRAHAM, Department of Economics and Joint Program in Survey Methodology, University of Maryland
 WILLIAM DUMOUCHEL, Lincoln Technologies, Inc., Waltham, Massachusetts
 JOHN HALTIWANGER, Department of Economics, University of Maryland
 V. JOSEPH HOTZ, Department of Economics, Duke University
 KAREN KAFADAR, Department of Statistics, Indiana University
 DOUGLAS MASSEY, Department of Sociology, Princeton University
 SALLY MORTON, Statistics and Epidemiology, RTI International, Research Triangle Park, North Carolina
 VIJAY NAIR, Department of Statistics and Department of Industrial and Operations Engineering, University of Michigan
 JOSEPH NEWHOUSE, Division of Health Policy Research and Education, Harvard University
 SAMUEL H. PRESTON, Population Studies Center, University of Pennsylvania
 KENNETH PREWITT, School of International and Public Affairs, Columbia University
 LOUISE RYAN, Department of Biostatistics, Harvard University
 ROGER TOURANGEAU, Survey Research Center, University of Michigan, and Joint Program in Survey Methodology, University of Maryland
 ALAN ZASLAVSKY, Department of Health Care Policy, Harvard Medical School
 CONSTANCE F. CITRO, *Director*

NATIONAL MATERIALS ADVISORY BOARD
 2007

KATHARINE G. FRASE (*Chair*), IBM Corporate Technology and Intellectual Property, Somers, New York
 LYLE H. SCHWARTZ (*Vice Chair*), Consultant, Chevy Chase, Maryland
 JOHN ALLISON, Ford Research Laboratories, Dearborn, Michigan
 PAUL BECHER, Metals and Ceramic Division, Oak Ridge National Laboratory
 CHERYL R. BLANCHARD, Zimmer, Inc., Warsaw, Indiana
 EVERETT E. BLOOM, Metal and Ceramics Division, Oak Ridge National Laboratory
 BARBARA D. BOYAN, Wallace H. Coulter Department of Biomedical Engineering, Georgia Institute of Technology
 L. CATHERINE BRINSON, Departments of Mechanical Engineering and Materials Science and Engineering, Northwestern University
 JOHN W. CAHN, University of Washington
 DIANNE CHONG, Materials and Process Technology and Structural Technology, Prototyping and Quality, The Boeing Company, St. Louis, Missouri
 PAUL CITRON, Medtronic, Inc., Minneapolis, Minnesota (retired)
 FRONA DOYLE, Department of Materials Science and Engineering, University of California, Berkeley
 SOSSINA M. HAILE, Associate Professor of Materials Science and of Chemical Engineering, California Institute of Technology
 CAROL A. HANDWERKER, Department of Materials Engineering, Purdue University
 ELIZABETH HOLM, Sandia National Laboratories, Hoboken, New Jersey
 ANDREW T. HUNT, nGimat Company, Atlanta, Georgia
 DAVID W. JOHNSON, JR., Senior Advisor, Stevens Institute of Technology
 ROBERT H. LATIFF, SAIC, Alexandria, Virginia
 TERRY LOWE, Los Alamos National Laboratory
 KENNETH H. SANDHAGE, Department of Materials Science and Engineering, Georgia Institute of Technology
 LINDA SCHADLER, Materials Science and Engineering, Rensselaer Polytechnic Institute
 ROBERT E. SCHAFRIK, Materials and Process Engineering Department, GE Aircraft Engines, Cincinnati, Ohio
 JAMES C. SEFERIS, Department of Chemical Engineering, University of Washington
 SHARON L. SMITH, Advanced Technologies, Lockheed Martin Corporation, Bethesda, Maryland
 GARY FISCHMAN, *Director*

8008

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

Preface

The Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database is pleased to submit this final report and wishes to thank the many people who have contributed to our work over the committee's lifetime.

This project was sponsored by the National Institute of Justice (NIJ), Office of Justice Programs, U.S. Department of Justice. We are grateful for the support of NIJ staff and their participation in our meetings. We are particularly indebted to Christopher Miles, the program manager for this project, and to John Morgan, deputy director, NIJ Office of Science and Technology, for their assistance and their patience as our committee worked through this complex project.

Through a separate contract initiated by NIJ, the National Institute of Standards and Technology (NIST) was engaged to conduct experiments in support of the committee's work. As described in Chapters 7 and 8 of this report, NIST's work for the panel focused on the potential of one possible major enhancement to current ballistic imaging technology: a change from two-dimensional photography to three-dimensional surface measurements. Just as this committee required extensive collaboration between disparate units within the National Academies and representation from a breadth of disciplines, so too did the NIST experimental work for the committee draw together staff from several NIST units, and we have benefited greatly from this collaboration. Susan Ballou, Office of Law Enforcement Standards, provided excellent oversight of the NIST team, and Theodore Vorburger, Surface Metrology Division, was unstinting in his zeal for this work. NIST subcontracted and partnered in this work with Benjamin Bachrach of

Intelligent Automation, Inc., whose insights from past and current three-dimensional analysis of bullet and cartridge evidence gave shape to many of the committee's discussions. As the work developed, James Filliben of NIST's statistical unit oversaw the final experiment design and analysis plan, and he provided outstanding assistance. We are grateful to all the current and former NIST staff who worked on this project, including Dewey Foreman, John Libert, Brian Renegar, Mike Riley, John Song, James Yen, and Alan Zhang.

Throughout the panel's deliberations, we benefited from the counsel of two consultants, Anthony Braga and Lawden Yates. Braga, a senior research associate and lecturer at the Kennedy School of Government at Harvard University, provided empirical analysis and extended and elaborated on previous work on the use of ballistic imaging in the Boston area. His paper on the latter topic appears as Appendix A.

When the committee was being formed, it was decided not to include an active firearms examiner. Instead, the committee had the counsel of Lawden Yates, a former firearms and toolmark examiner and laboratory director, who also served as general counsel to the Alabama Department of Forensic Sciences and as assistant district attorney for Blount and Saint Clair Counties, Alabama. He provided invaluable information and advice to the committee on a range of technical matters.

Though motivated by questions concerning a new data collection system, this project also required a comprehensive review and assessment of the current National Integrated Ballistic Information Network (NIBIN) Program of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The ATF responded to our requests with exceptional openness and enthusiasm. In particular, we are grateful for the assistance of Benjamin Wilson, firearms project manager at ATF's Office of Laboratory Services. The committee's analyses, described in Chapter 8, required image acquisition and analysis by staff at ATF's Ammendale, Maryland, laboratory; we appreciate the effort of firearms examiner Martin Ols and the other ATF examiners who contributed to this work. We also appreciate the initial guidance to our work provided by Robert Thompson and by Patricia Galupo, former director of the NIBIN program. ATF afforded the committee and staff the opportunity to participate in a meeting of its NIBIN Users' Congress, which proved most valuable.

In March 2005, a nondisclosure agreement was negotiated between Forensic Technology WAI Inc. (FTI) and the National Academies to facilitate a site visit to FTI's headquarters in Montréal by selected members of the committee. FTI is the creator and manufacturer of the equipment and software (IBIS) used by the nation's forensic laboratories to create and maintain a database of ballistic images consisting of evidence collected from crime scenes or confiscated during arrests. The nondisclosure agreement

PREFACE

xiii

covered information about this system that FTI and the National Academies Office of Legal Counsel agreed are proprietary within the meaning of Exemption 4 of the U.S. Freedom of Information Act, 5 U.S.C. Section 552(b)(4). The meeting, which took place at FTI's offices in Montreal on March 22, provided a detailed understanding of the features and capabilities of the imaging technology developed by FTI. Only information that was not designated as proprietary information is included, referenced, or quoted in this final report. The committee is grateful to FTI for its cooperation and for the high degree of professionalism and scientific competence it demonstrated at this meeting.

We are particularly grateful for a thoughtful and candid discussion with FTI technical staff; both Michael McLean, project manager for the Integrated Ballistics Identification System (IBIS), and Pete Gagliardi, vice president of marketing and strategic planning, took special interest in the committee's work and provided much useful information. Along with McLean, Alain Beauchamp gave a useful presentation at a committee meeting and responded to other committee requests for information. We appreciate the contributions of other past and present FTI staff, including Robert Walsh, chairman and president; René Bélanger, vice president and general manager; John O'Neil, firearms examiner consultant; Michael Clamen; Cybele Daley; Tim Heaney; Serge Labrecque; and Danny Roberge.

Gerald Zeosky, inspector and director of the New York State Police Forensic Investigation Center (FIC), and John Hicks, director of forensic services for the New York State Division of Criminal Justice Services, were invited to a committee meeting to describe their state's Combined Ballistic Information System (CoBIS), a state-level reference ballistic image database. Following that presentation, both men then invited the committee and staff to the FIC in Albany to perform experimental runs on the CoBIS database. During that visit (and a follow-up visit by committee staff), FIC staff gave freely of their time and talent; for this, we are particularly grateful to Rebecca Barretta, James Campbell, Mike D'Allaird, Craig Grazier, and Mark Heller.

Similarly, a presentation to the committee by deputy chief Denis McCarthy of the New York City Police Department (NYPD) led to an invitation to visit and perform limited analyses using the NYPD's ballistic image database, which uses the same technology as the NIBIN program but is not directly linked. At that visit to the NYPD crime laboratory in Jamaica, Queens, Lt. James Kenny, commanding officer of the firearms analysis section, and detective Anthony Pellicio, firearms examiner and microscopist were extremely helpful.

Over the course of the study, every committee member visited at least one NIBIN installation at a state or local law enforcement agency, and various members also visited the ATF national laboratories in Ammendale,

Maryland, and Walnut Creek, California. We thank all involved for their time and talent. Subgroups of the committee also visited firearms and ammunition manufacturers and developers of microstamping technologies. We are grateful to all those who helped make the visits smooth and informative, including from Federal Cartridge Company, Gary Svendsen, Mike Larsen, Mike Hollen, Ken Croteau, and Rick Vickerman; from Hi-Point Firearms, Tom Deeb; and from Beretta Firearms, Jeffrey Reh, general counsel. Todd Lizotte of Hitachi Via Electronics attended a committee meeting and generously spent time discussing the microstamping of firing pins and other firearms parts at his facility in Londonderry, New Hampshire. Ammunition Coding Systems, a Seattle-based firm acting as a proponent of a methodology for microstamping ammunition that was then under active consideration by the California legislature, convened a very helpful session with the firm's staff and related contractors in Seattle for a group of committee members. We thank Steven Mace, Russell Ford, John Knickerbocker, David Howell, Patrick Grace, and Paul Curry for their guidance in that meeting. We also appreciate the participation of Randy Rossi, California Department of Justice, in the Seattle subcommittee discussion.

Ann Davis, Virginia Division of Forensic Sciences, was president of the Association of Firearm and Tool Mark Examiners (AFTE) when our committee began operations. She offered comments at our first meeting and assembled a liaison committee to interact with the committee as needed; for these contributions, we are grateful. Lucien Haag (Forensic Science Services, Inc., Carefree, Arizona) attended and participated in a panel discussion at a committee meeting in Chandler, Arizona, and subsequently discussed trials that he had performed on microstamped firing pins for a committee meeting in Washington; we thank him for the information he shared with us.

We appreciate the time taken by other experts to present issues to our committee, including Kenneth Green of the Sporting Arms and Ammunition Manufacturers' Institute, Inc., and Marianne Hinkle, former assistant U.S. attorney for the district of Massachusetts. At the committee's meeting in Chandler, Arizona—hosted by committee vice chair Eugene Meieran at Intel Corporation—we made use of the fact that several NIBIN sites are located in the Phoenix metropolitan area. Representatives of the various NIBIN-hosting law enforcement agencies participated in a very useful panel discussion: they included Judie Welch, Eric Brown, and Randy Leister of the Phoenix Police Department Crime Laboratory; Patrick Chavez of the City of Mesa Crime Laboratory; Steve Valdez of the City of Scottsdale Crime Laboratory; Dustin Engel of the Maricopa County Sheriff's Office; and Vince Figarelli and Lisa Peloza of the Arizona Department of Public Safety.

Emily Ann Meyer provided initial literature collection for the committee during her service as a research associate with the National Materials

PREFACE

xv

Advisory Board (NMAB). Michael Siri, senior program assistant with the Committee on National Statistics (CNSTAT) deftly provided logistical support to the committee in the later phases of its work; he was preceded as program assistant and coordinator for the committee's activities by Ralph Patterson during his tenure with the Committee on Law and Justice. Special thanks are due to Barbara Boyd for pinch-hitting as program assistant for one of our committee meetings during a gap in staffing and for generally providing back-up assistance when needed. Toni Marechaux, former director of the NMAB, contributed to the formation of the committee and its early work, and we have also benefited from the counsel of Constance Citro, CNSTAT director, and Jane Ross, director of the Center for Economic, Governance, and International Studies of the Division of Behavioral and Social Sciences and Education.

We were extremely fortunate to have two experienced and extremely capable individuals as staff: Carol Petrie and Daniel Cork. Carol was particularly helpful in the process of forming the committee, managing the panel's consultations with its sponsor and other external parties, organizing meetings, and stewarding this report through the Academies' review process. Dan managed much of the panel's analytic work and had primary responsibility for drafting the report. Together they organized the work of the committee and guided its evaluation of the NIBIN program and its consideration of a national reference ballistic image database. To say we have benefited enormously from their talents and knowledge and are very grateful to have had the opportunity to work with them is a considerable understatement. Regardless of the committee's expertise and commitment, this report would have significantly less value than we believe it does have, but for Carol's and Dan's contributions.

This report has been reviewed in draft form by individuals chosen for their diverse perspectives and technical expertise, in accordance with procedures approved by the Report Review Committee of the National Research Council (NRC). The purpose of this independent review is to provide candid and critical comments that will assist the institution in making the published report as sound as possible and to ensure that the report meets institutional standards for objectivity, evidence, and responsiveness to the study charge. The review comments and draft manuscript remain confidential to protect the integrity of the deliberative process.

We thank the following individuals for their participation in the review of this report: William A. Ellingson, Nuclear Engineering Division, Argonne National Laboratory; David L. Faigman, Hastings College of Law, University of California, San Francisco; Stephen E. Fienberg, Department of Statistics, Carnegie Mellon University; Barry A.J. Fisher, Los Angeles County Sheriff's Department Crime Laboratory, Los Angeles, California; David C. Hoaglin, Abt Associates Inc., Cambridge, Massachusetts; Paul

F. Johnson, Emeritus Professor of Ceramic Engineering, Alfred University, Alfred, New York; Alan F. Karr, Director's Office, National Institute of Statistical Sciences, Research Triangle Park, North Carolina; Diane Lambert, Google, Inc., New York, New York; Lyle H. Schwartz, Consultant, Chevy Chase, Maryland; Pete Striupaitis, Northeastern Illinois Regional Crime Laboratory, Vernon Hills, Illinois; Charles F. Wellford, Department of Criminology, University of Maryland; and James Q. Wilson, School of Public Policy, Pepperdine University.

Although the reviewers listed above provided many constructive comments and suggestions, they were not asked to endorse the conclusions or recommendations nor did they see the final draft of the report before its release. The review of the report was overseen by John C. Bailar, III, Professor Emeritus, Department of Health Studies, The University of Chicago, and Hyla S. Napadensky, Office of President, Napadensky Energetics, Inc., Grand Marais, Minnesota. Appointed by the NRC, they were responsible for making certain that an independent examination of the report was carried out in accordance with institutional procedures and that all review comments were carefully considered. Responsibility for the final content of this report rests entirely with the authoring panel and the institution.

John E. Rolph, *Chair*
Eugene S. Meieran, *Vice Chair*
Committee to Assess the Feasibility, Accuracy, and
Technical Capability of a National Ballistics Database

Contents

Executive Summary	1
Part I Context for Ballistic Imaging Analysis	
1 Introduction	11
2 Firearms and Ammunition: Physics, Manufacturing, and Sources of Variability	30
3 Firearms Identification and the Use of Ballistic Evidence	53
Part II Current Ballistic Imaging and Databases	
4 Current Ballistic Imaging Technology	91
5 Current Ballistic Image Databases: NIBIN and the State Reference Databases	133
6 Operational and Technical Enhancements to NIBIN	162
7 Three-Dimensional Measurement and Ballistic Imaging	186
Part III Implications for a National Reference Ballistic Image Database	
8 Experimental Evidence on Sources of Variability and Imaging Standards	199
9 Feasibility of a National Reference Ballistic Image Database	223

Part IV Future Directions

10 Microstamping: Alternative Technology for Tracing to Point of Sale	255
11 Best Standards for Future Developments in Computer-Assisted Firearms Identification	272

References	281

Appendixes

A Gun Enforcement and Ballistic Imaging Technology in Boston <i>Anthony A. Braga</i>	293
B Biographical Sketches of Committee Members and Staff	312

Tables, Figures, and Boxes

TABLES

- 1-1 Gun Homicides and Crime Gun Recoveries in 32 Cities in 2000, 25
- 4-1 Summary Results of George Study of IBIS Cartridge Case Comparison Performance, 114
- 4-2 Summary Results of Forensic Technology WAI, Inc., Benchmark Evaluation, 120
- 5-1 NIBIN Usage Data, May 2003–April 2004, 152
- 8-1 Number of Same-Gun Matches Found in Top 10 Ranks, Two-Dimensional/IBIS Analysis of DKT Exhibit Set, 208
- 8-2 Number of Same-Gun Matches Found in Top 10 Ranks, Three-Dimensional/NIST Analysis of DKT Exhibit Set, 209
- 8-3 Number of Same-Gun Matches Found in Top 10 Ranks, Two-Dimensional/IBIS Analysis of NBIDE Exhibit Set, 210
- 8-4 Number of Same-Gun Matches Found in Top 10 Ranks, Three-Dimensional/NIST Analysis of NBIDE Exhibit Set, 211
- 8-5 Summary of IBIS Comparisons for Full 144-Exhibit NBIDE Set, 213
- 8-6 Summary of Overlap Metrics for Three-Dimensional Images, 215
- 8-7 IBIS Comparison Results, DKT Exhibit Set Extract in CoBIS Database, 220

xx

TABLES, FIGURES, AND BOXES

- 9-1 Firearms Manufactured in and Exported from the United States, 2002–2004, 225
- 9-2 Values of $K(\alpha)$ for Various Configurations of N and α for the Optimistic Scenario, 248
- 9-3 Values of $K(\alpha)$ for Various Configurations of N and α for the Pessimistic Scenario, 249
- 9-4 Values of $K(\alpha)$ for Various Configurations of $n_1 - 1$, n_2 , Δ_1 , Δ_2 , and α for the Optimistic Scenario, 250
- 9-5 Values of $K(\alpha)$ for Various Configurations of $n_1 - 1$, n_2 , Δ_1 , Δ_2 , and α for the Pessimistic Scenario, 251

- A-1 Staffing Levels of the Boston Police Department Ballistics Unit, 1993–2003, 300
- A-2 Crime Types in 104 Sets of Boston IBIS-Suggested Matches, 303
- A-3 Results of Information Linked by IBIS-Suggested Matches on Investigations by Boston Law Enforcement Agencies, 2003, 305

FIGURES

- 1-1 Crimes committed with firearms, 1973–2003, 23
- 1-2 Firearms crime rates, 1973–2003, 24
- 1-3 Homicides committed with firearms, 1973–2003, 24

- 2-1 Breech faces with firing pin holes: Two firearms, 33
- 2-2 Breech face markings and firing pin impressions for three ammunition types and two firearm brands, 42

- 4-1 IBIS breech face images, 99
- 4-2 Sample “cover sheet:” Top 10 ranking report from an IBIS comparison, 105
- 4-3 Sample matched pairs of breech face and firing pin images, 119

- 5-1 Geographic distribution of NIBIN sites, 140

- 8-1 IBIS two-dimensional images and rendered three-dimensional surfaces, breech face, and firing pin impressions from one casing, 205
- 8-2 Empirical distribution of matching and nonmatching pairwise comparisons, 214

- A-1 Types of investigative information linked by IBIS-suggested matches, 296
- A-2 Boston Police Department ballistics matches, 1990–2003, 299

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

TABLES, FIGURES, AND BOXES

xxi

- A-3 Serious gun crime incidents in Boston, 1990–2003, 299
- A-4 Recovered handguns in Boston, 1991–2003, 302

BOXES

- 1-1 “Ballistics” Terminology, 15
- 1-2 Content of a Reference Ballistic Image Database, 16
- 2-1 Nonfiring Manufacturing Marks, 51
- 3-1 Association of Firearm and Tool Mark Examiners (AFTE) Theory of Identification and Range of Conclusions, 59
- 3-2 Examples of Subclass Carryover, 61
- 3-3 Highlights in the History of Traditional Firearms Identification, 62
- 3-4 Recent Court Decisions: “To the Exclusion of All Other Guns,” 83
- 4-1 “IBIS” Terminology, 94
- 4-2 CSI Ballistic Imaging, 125
- 5-1 Criteria for Participation in the NIBIN Program, 135
- 5-2 DRUGFIRE, 136
- 5-3 NIBIN Definition of “Hit,” 151
- 6-1 Recommendations from 2005 U.S. Department of Justice Inspector General Audit of NIBIN Program, 164
- 6-2 New York City Police Department “Fast Brass” Processing, 171
- 8-1 Design of Test-Fire Cartridge Sets, 201
- 8-2 Exhibit Set Tested in Work with CoBIS Database, 219
- 9-1 Tracing Guns, 228

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

Executive Summary

Since the late 1980s computerized imaging technology has been used to assist forensic firearms examiners in finding potential links between images of ballistics evidence gathered from crime scene investigations, namely, cartridge cases and bullets from fired guns. To support this effort, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) in 1997 formed the National Integrated Ballistic Information Network (NIBIN). Law enforcement agencies participating in NIBIN contribute to a database of images of bullet and cartridge case evidence recovered from (or test-fired from weapons linked to) crime scenes. This system facilitates rapid comparison with archived evidence and with evidence gathered at other crime sites; when matches look promising, the physical evidence can be retrieved for direct examination and confirmation by an examiner. NIBIN was designed as a tool for search, not for verification, which is always done by an examiner.

The rapid development of computerized ballistic imaging technology has led to speculation about its future potential. A particularly interesting proposal is to create a national reference ballistic image database (RBID) that would house images from firings of all newly manufactured or imported firearms. Proponents of this proposal argue that such a database could provide a quick investigative lead from evidence recovered at a crime scene to the underlying firearm's original point of sale. State RBIDs already exist in Maryland and New York, and wide attention was drawn to the issue when California studied the feasibility of creating its own RBID.

In 2004 the National Institute of Justice (NIJ) of the U.S. Department of Justice requested that the National Academies appoint a committee of

experts to address the issues raised by the computerized ballistic imaging technology. The Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database was asked to "assess the feasibility, accuracy and reliability, and technical capability of developing and using a national ballistics database as an aid to criminal investigations." To accomplish this, the panel's charge is to:

(1) Assess the technical feasibility, through analysis of the uniqueness of ballistic images, the ability of imaging systems to capture unique characteristics and to parameterize them, the algorithmic and computational challenges of an imaging database, the reproducibility of ballistic impressions and the ability of imaging systems to extract reproducible information from ballistic impressions.

(2) Assess the statistical probabilities that ballistics evidence presented would lead to a match with images captured in a database, whether and how the base rate can be estimated for those crimes that present bullet or casing evidence that do in fact come from a gun that produced a database entry, and the probabilities and consequences of false positives and false negatives.

(3) Assess the operational utility of ballistics evidence in criminal investigations—that is the extent to which it is used or can be used to identify crime guns and suspects and to solve specific crimes.

(4) Assess the sources of error in ballistics database matching (from examination, digitization, computer matching, chain of custody and documentation of tests, and expert confirmation), how they may be quantified, and how these errors interact.

The charge continues:

The committee's work will provide scientific and technical knowledge to inform the government's deliberations on three policy options with regard to ballistics databases:

(1) Maintain the National Integrated Ballistic Information Network (NIBIN) on ballistics recovered from crime scenes. It is operated by the Bureau of Alcohol, Tobacco, and Firearms.

(2) Enhance the NIBIN system so that it can be used to match crime scene evidence with the gun used.

(3) Establish a national ballistics database of images from bullets fired from all, or nearly all, newly manufactured or imported guns for the purpose of matching ballistics from a crime scene to a gun and information on its initial owner.

Addressing the issues raised by the tasks of the charge permitted the committee to provide guidance to NIJ on the three federal policy options. Specifically, for option 2, enhancing the NIBIN system, we address how

EXECUTIVE SUMMARY

3

to increase its effectiveness as a search tool, including changes to the basic imaging standard used by the system, and improving procedures for working with the existing hardware and software. For option 3, establishing a national RBID, the committee considers it a counterpart to NIBIN, containing images of ballistic samples from all newly manufactured and imported weapons. The committee also considered the feasibility of alternative technologies that could achieve the same goal as a national RBID. These alternative technologies include microstamping to imprint a known, unique marker on firearms parts or ammunition; analysis of such marks would complement or perhaps replace the need to examine the currently used toolmarks.

Underlying the specific tasks with which the committee was charged is the question of whether firearms-related toolmarks are unique: that is, whether a particular set of toolmarks can be shown to come from one weapon to the exclusion of all others. Very early in its work the committee found that this question cannot now be definitively answered.

Finding: The validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated.

Notwithstanding this finding, we accept a minimal baseline standard regarding ballistics evidence. Although they are subject to numerous sources of variability, firearms-related toolmarks are not completely random and volatile; one can find similar marks on bullets and cartridge cases from the same gun.

A significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness. Assessing uniqueness at, say, a submicroscopic level, though probably technically possible, would be extremely difficult and time consuming compared with less definitive but more practical and generally available methods at the macroscopic level. It is an issue of policy and of economics as to whether doing so would be worthwhile. The committee did not and could not undertake such research, nor does it offer any conclusions about undertaking such research. Although it appears to the committee that the needs for research are extensive, specifying the nature of that research was not part of the committee's charge. We also note that the committee does not provide an overall assessment of firearms identification as a discipline nor does it advise on the admissibility of firearms-related toolmark evidence in legal proceedings: these topics are not within its charge.

The committee's charge is to determine the extent to which the toolmarks left on bullets and cartridge casings after firing a weapon can be

captured by imaging technology. It is also to assess whether a ballistic image database—particularly a national RBID containing images of exhibits fired from all newly manufactured and imported guns—would be feasible and operationally useful, by which we mean capable of generating leads for follow-up and further investigation. Whether or not toolmarks are unique to a given weapon does not preclude the committee from addressing this charge. Indeed, in many situations a sufficient level of toolmark reproducibility can be picked up by imaging or other measurement systems to be useful for narrowing a search down to a set of possible weapons, as is currently done. The final determination of a “match” is made by a human examiner.

FEASIBILITY OF A NATIONAL REFERENCE BALLISTIC IMAGE DATABASE

Independent of the reliability and effectiveness of the technology used in making comparisons of images in a national RBID, there would be significant limitations in the usefulness of such a database. Most importantly, there is a huge existing supply of weapons and ammunition that would not be entered into the database. In addition, revolvers do not eject cartridge cases at crime scenes as do other handguns. Consequently, even under the best of circumstances, when random variability is kept to a minimum, the database itself would be incomplete. Finally, to implement a national RBID, national protocols would have to be created for the test firing of new and imported guns; ensuring that test-fired cartridge cases or bullets are correctly packaged with their corresponding firearm and maintaining a chain of custody for the exhibits after they are imaged would create a formidable logistical challenge.

In our detailed assessment, three additional points regarding the implementation of a national RBID have particular salience.

First, the current technology in use for automated toolmark comparison, based on two-dimensional greyscale images, is useful for gross categorization and sorting of large quantities of evidence. However, it is less reliable for distinguishing extremely fine individual marks that would be necessary to make successful matches in RBIDs in which large numbers of exhibits on file would share gross class and subclass characteristics.

Second, basic probability calculations under reasonable assumptions suggest that the process of identifying a subset of possible matches that contains the true match with a specified level of certainty depends critically on as-yet underderived measures of similarity between and within gun types. This process is very likely to return too large a subset of candidates to be practically useful for investigative purposes.

Third, the large influence of ammunition type and variability introduces a significant source of error in identification. A standard, protocol type of

EXECUTIVE SUMMARY

5

ammunition could be specified in an RBID (as it is in NIBIN), but it is likely not to correspond with the ammunition actually used in a crime; the choice of protocol ammunition, or a requirement to use multiple ammunition types, would have significant financial implications for both ammunition and firearm manufacturers, as well as on the information systems involved.

Conclusion: A national reference ballistic image database of all new and imported guns is not advisable at this time.

MAINTAIN OR ENHANCE NIBIN

By facilitating access by state and local law enforcement agencies to ballistic imaging technology, the NIBIN program provides a valuable service in helping to solve gun-related crimes. However, agencies differ in the degree to which they use the NIBIN resources and, consequently, they differ markedly in the benefits they derive in establishing links between crimes and investigative leads. The committee's principal task includes offering guidance on either maintaining NIBIN as it currently operates or enhancing it in various ways to improve its effectiveness. The former is not really a viable option: there are always opportunities for improvement in any program, particularly one as broad as NIBIN.

Conclusion: NIBIN can and should be made more effective through operational and technological improvements.

To this end, the committee offers 15 specific recommendations to improve NIBIN's performance and effectiveness. Seven of the recommendations are oriented principally at the operation of the NIBIN program itself and the practices of NIBIN partner agencies, and they address:

- priority for NIBIN entry of cartridge casings collected from crime scenes;
- ballistic imaging as a part of the criminal investigation process for state and local agencies;
- cross-jurisdictional tally of hits using the NIBIN system;
- streamlining of the ballistic image acquisition process and reporting requirements;
- development of "best practices" in using NIBIN;
- a protocol for the entry of more than one exhibit from the same crime scene or test firing; and
- allocation of NIBIN system technology.

We also offer eight specific recommendations for enhancing the current technical platform for the NIBIN program, the Integrated Ballistics Identification System (IBIS), and the hardware and software system developed by Forensic Technology WAI, Inc. These eight recommendations address:

- research on the distributions of comparison scores;
- an "audit trail" in the NIBIN system's hardware and software systems;
- ammunition brand information in NIBIN;
- the capacity for national or cross-regional searches against the NIBIN database;
- NIBIN's database partition structure;
- enhancements to the NIBIN interface;
- side-light imagery of breech face impressions; and
- the 20 percent threshold used in the IBIS.

In support of this study, the National Institute of Standards and Technology (NIST) was separately contracted by NIJ to perform experimental work at the committee's request. This experimental work considered the value of one major technical enhancement to the current NIBIN system: a change in imaging standard from two-dimensional, greyscale photography to three-dimensional surface measurement using noncontact microscopy. NIST's work included analysis of an extract of cartridges from one of the major existing studies of ballistic imaging performance as well as a new dataset of test-fired cartridges designed by the committee. The work highlights the promise of three-dimensional surface measurement, which performs comparably with—and, for some cartridge markings, often better than—the current two-dimensional methodology. However, there are major substantive challenges—among them the reduction of data collection time and the refinement of image comparison algorithms that make use of three-dimensional information but are still compatible with existing two-dimensional imagery—that need to be addressed before full consideration can be given to adopting the new standard.

ALTERNATIVE TECHNOLOGIES

The goal of a national reference ballistic image database is to provide an investigative link from ballistics evidence to the point of sale of the weapon or ammunition used in a crime. The same goal could be achieved through an entirely different approach, microstamping, which is to place a known, unique, and unalterable identifier on gun parts, cartridge cases, or bullets at the time of manufacture. These uniquely microstamped products could then be associated with their purchaser when sold. Microstamping, if

EXECUTIVE SUMMARY

7

feasible and practical, would have the advantage of imposing uniqueness as a characteristic of ballistics evidence, substituting known and fixed markings for microscopically fine, individualizing characteristics that result from random processes in manufacture and weapon firing.

A distinct advantage of microstamping is that the marks could be examined at a crime scene using equipment no more sophisticated than a magnifying glass, vastly simplifying and speeding up the process of developing investigative leads. The state of California recently passed a law, to take effect in 2010, which requires microstamping on internal parts of new semiautomatic pistols. However, the committee believes that for such a technology to be implemented successfully, in-depth investigations on several topics are needed. These topics include the reliability and durability of the marks in a variety of firing conditions, their susceptibility to tampering and countermeasures, whether it would be best to place them on guns or ammunition or both, and the cost implications and feasibility of adding a microstamping process to established manufacturing processes.

PROCESS FOR IMPROVING COMPUTER-ASSISTED FIREARMS IDENTIFICATION

The current technology used in automated examination of images of ballistics evidence is produced and maintained by a single vendor. As a result, it does not benefit from the improvements that could be gained through competition and vetting among the broader research community, and its potential for advancement and innovation is limited. The committee suggests that improvements in matching ballistics evidence be made through government procurement efforts that demonstrate best practices.

Two recent examples of government-mandated large-scale imaging system developments based on initially, nonmature technologies include systems for fingerprint identification and for facial recognition. Both systems required the creation of dedicated pattern recognition algorithms, similar to the requirements of NIBIN. Instead of relying on a single system produced by a single vendor, both systems were organized as competitions between vendors with the goal of advancing the technology as quickly as possible. Both competitions required that well-vetted datasets from several sources be made available to researchers so that the correct features could be identified for extraction. Finally, the results of both competitions were subjected to independently administered evaluations, using well-defined and published evaluation methodologies that allowed for a direct quantitative assessment of the relative strengths and weaknesses of different approaches.

This approach to procurement—removing strict dependence on a sole-source provider and ensuring government ownership of and access to

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

result data—should be applied for all work related to the improvement in ballistics evidence analysis, including large-scale two-dimensional image search engines, three-dimensional topographical techniques, and micro-stamping processes.

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

PART I

Context for Ballistic Imaging Analysis

8030

Ballistic Imaging
<http://www.nap.edu/catalog/12162.html>

1

Introduction

For decades, direct comparison of bullet and cartridge case evidence has been used to link crime incidents to other crime investigations to link specific pieces of evidence to each other and to particular weapons. Since the late 1980s, emerging technology has allowed such links to be drawn between computerized images of bullets and cartridge case evidence. The development of this technology has led to speculation about its potential to generate critical investigative leads to possibly related incidents both at the local level and across broad geographic areas. A specific question that has been raised concerns the utility of a national reference ballistic image database (RBID), which would include images from test-fired rounds of most (if not all) new and imported firearms. In concept, a national RBID would permit bullet or cartridge case evidence recovered at crime scenes to be easily and rapidly linked to a firearm's point of sale—information that is currently available only if the gun itself is recovered at the crime scene and is put through a full tracing process (see Chapter 9).

The concept of a national RBID differs from existing systems in two important ways. First, a national database of ballistic image evidence already exists, but it is not a *reference* database because it does not collect test firings from new weapons. In 1997, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) formed the National Integrated Ballistic Information Network (NIBIN); as of 2005, NIBIN connects 230 law enforcement agencies, which contribute to a database of images of bullet and cartridge case evidence recovered from (or test-fired from weapons linked to) crime scenes. The NIBIN program equips agencies with Integrated Ballistics Identification System (IBIS) equipment, developed and

manufactured by its contractor, Forensic Technology WAI, Inc. (FTI), of Montréal, Canada (see Box 4-1 in Chapter 4 for an important note on the use of the term "IBIS"). The IBIS platform acquires greyscale photographs of bullet or cartridge case evidence, scoring and ranking pairs of exhibits by deriving a mathematical signature from images. The scope of NIBIN is limited by legislative language, prohibiting it from including noncrime gun evidence in the database.

Second, RBIDs do currently exist but not at the *national* level. Two states—Maryland and New York—established RBID systems for new handguns sold in those states in 2000 and 2001, respectively. Both states use the same IBIS platform for acquiring images, but are barred from directly networking their RBID data with crime-scene-based NIBIN data. State legislation directed the California Department of Justice to study the feasibility of establishing an RBID in that state; its assessment in 2001 was that such a database was not feasible, but suggested that further study be conducted at the national level. In the wake of the October 2002 sniper shootings in the Washington, D.C., area, legislative proposals to create RBIDs were advanced or discussed in Connecticut, New Jersey, and Massachusetts (Butterfield, 2002), as well as Missouri (George, 2004a).¹

As of 2002, a national-level RBID was said to be under discussion in Belgium, and "a similar debate is going on in a number of member states of the European community" (De Kinder, 2002a:198). Recent U.S. Congresses have seen bills introduced that would create a national RBID, though none of the bills have advanced past referral to the appropriate committees.² In

¹Both chambers of the New Jersey state legislature have, at different times, passed bills requiring some form of ballistic imaging, but not the same bill. In May 2000, the Senate passed S. 2048 on a 37-0 vote; the bill prohibited sales of handguns unless a "ballistics identifier" was obtained from the gun and put in a "qualified database." A "ballistics identifier" was defined as "a digitized or electronic image of a bullet and shell casing . . . clearly showing the distinctive firing pin, ejection, extraction and land marks for that particular handgun." In November 2002, the Assembly passed A. 438 on a 48-18-10 vote; initial bill text made submissions to an image database voluntary by handgun owners, but the passed bill had been amended to make submission of identifiers mandatory for all sold handguns. The bill was not acted upon by the Senate. In the 2004-2005 session, proposed bills would have required firearms repair shops to obtain ballistics identifiers for handguns or rifles before returning them to their owners; as of September 2006, no similar bills had been introduced in either chamber. In Massachusetts, a Boston police official lauded the idea as a "great law enforcement tool," pointing to a case that had been solved using NIBIN (linking the same .22 caliber Ruger pistol to shootings of seven people in four cities," as one where an earlier investigative lead to the gun's purchaser would have been useful (Butterfield, 2002).

²See, e.g., in the 108th Congress, the Technological Resource to Assist Criminal Enforcement (TRACE) Act (S. 469/H.R. 776) and the So No Innocent Person Ever Repeats (SNIPER) the Sniper Tragedy Act of 2003 (S. 1983), the latter of which incorporated the former in its entirety, as well as the Bullet Tracing Act to Reduce Gun Violence Act (H.R. 24). In the 107th Congress, see the Ballistics, Law Assistance, and Safety Technology (BLAST) Act (H.R. 5663)

INTRODUCTION

13

part, the bills did not progress because they have been caught up in the nation's ongoing gun control policy debate: Proponents see such laws as essential to reducing gun violence; opponents see them as a first step toward a national gun registry and a perceived violation of their Second Amendment right to bear arms.

In both the 107th and 108th Congresses, bills were introduced in each chamber to require that the National Academies conduct a study of the state of ballistic imaging technology.³ Independent of that legislation, but with a similar charge, the National Institute of Justice (NIJ) of the U.S. Department of Justice requested that the National Academies execute such a study.

1-A COMMITTEE CHARGE

In 2004, as requested by NIJ, the National Academies appointed the Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database. The committee was asked to:

assess the feasibility, accuracy and reliability, and technical capability of developing and using a national ballistics database as an aid to criminal investigations. To accomplish this, the [committee] will

(1) Assess the technical feasibility, through analysis of the uniqueness of ballistic images, the ability of imaging systems to capture unique characteristics and to parameterize them, the algorithmic and computational challenges of an imaging database, the reproducibility of ballistic impressions and the ability of imaging systems to extract reproducible information from ballistic impressions.

(2) Assess the statistical probabilities that ballistics evidence presented would lead to a match with images captured in a database, whether and how the base rate can be estimated for those crimes that present bullet or casing evidence that do in fact come from a gun that produced a database entry, and the probabilities and consequences of false positives and false negatives.

(3) Assess the operational utility of ballistics evidence in criminal investigations—that is the extent to which it is used or can be used to identify crime guns and suspects and to solve specific crimes.

(4) Assess the sources of error in ballistics database matching (from examination; digitization, computer matching, chain of custody and documentation of tests, and expert confirmation), how they may be quantified, and how these errors interact.

and the Bullet Tracing Act to Reduce Gun Violence Act (H.R. 422). Earlier versions of the Bullet Tracing and BLAST Acts were also introduced in the 106th Congress.

³See H.R. 3491 and S. 2581 in the 107th Congress and H.R. 2436 and S. 980 in the 108th Congress. These bills also failed to advance beyond referral to subcommittees.

The charge continues:

The committee's work will provide scientific and technical knowledge to inform the government's deliberations on three policy options with regard to ballistics databases:

- (1) Maintain the National Integrated Ballistic Information Network (NIBIN) on ballistics recovered from crime scenes. It is operated by the Bureau of Alcohol, Tobacco, and Firearms.⁴
- (2) Enhance the NIBIN system so that it can be used to match crime scene evidence with the gun used.
- (3) Establish a national ballistics database of images from bullets fired from all, or nearly all, newly manufactured or imported guns for the purpose of matching ballistics from a crime scene to a gun and information on its initial owner.

We note that the committee was specifically tasked by NIJ to consider these policy options on the basis of the scientific evidence of system performance and not to include or exclude options based solely on their cost. That is, assessing the cost-effectiveness of ballistic imaging and related techniques is not a dimension of our charge.

The wording of the charge raises a few questions. In several instances—as in the formal name of the committee—the term “ballistics” is used in an imprecise manner; see Box 1-1. The charge also provides no specific direction on how the existing NIBIN system might be “enhanced” in its second policy option. The third policy option is also somewhat imprecise in representing basic assumptions about the nature and intent of a national RBID; see Box 1-2 (see also Section 9-B in Chapter 9).

At the outset, it suffices to say that reasonable proposals for a national RBID would most likely focus exclusively on images of cartridge casings (not bullets, as described in the charge) due to the longer time necessary to recover and process test-fired bullets, and—at least at the outset—would likely be further restricted to samples from handguns and small arms. The charge also suggests that the intent of a national RBID is to provide “information on [a gun's] initial owner.” That is certainly the goal of criminal investigations that would make use of an RBID, but the RBID search itself would be intended to provide an investigative lead to a point of sale, one step removed from information on the initial owner. As with the current gun tracing system, additional investigative work based on the point of sale would be needed to determine a gun's initial ownership; as discussed in Chapter 9, the content of a national RBID does not necessarily involve entering purchaser-specific data.

⁴In January 2003, the agency was renamed the Bureau of Alcohol, Tobacco, Firearms, and Explosives, though it commonly retains the acronym ATF.

INTRODUCTION

15

BOX 1-1 "Ballistics" Terminology

"*Ballistics*, literally, is the study of the dynamics of projectiles in flight. It is not equivalent to firearms identification, though in common usage, as in the title of this committee, the word has been interpreted that way. Calvin Goddard—considered the father of modern firearms identification—was chagrined at his own role in initiating this use of language. He titled his landmark 1925 paper on the use of the comparison microscope "*Forensic Ballistics*," a name selected after long and prayerful consideration and in an effort to employ terms that would be concise and at the same time meaningful. It was, however, a title that has plagued me ever since." (Goddard, 1999:233)

"Forensic was good enough, since it means that which has to do with public disputation, and was what I meant to say. Ballistics was bad, very bad, since ballistics strictly used applies solely to projectiles in motion, and the forces that influence that motion. Thus I had never made an attempt to identify a projectile in motion and I never have to, it will be too soon, so far as I am concerned. However, the man in the street found ballistics far more interesting word, and seized upon it avidly, at the same time discarding the forensic, which, when used jointly with ballistics, partly takes the curse of the latter."

"Likewise, Hatcher (1935:20) noted the way the word ballistics has, in the past several years, become associated in the public mind with the science of firearms identification. . . . I realize fully that usage makes language, and that the recent rather extensive mis-use of the word Ballistics in this way may be a valid excuse for continuing the practice, but still it seems to me that the use of the word to describe the Science of Firearms Identification is somewhat undesirable in any case, as being loose English."

"Forensic scientists distinguish between four types of ballistics" (Rinker (2004):

- *Internal ballistics* refer to the forces—pressure, ignition, and so forth—that operate on the bullet while still inside the firearm.

- *External ballistics* closes to the literal definition of ballistics, describes the flight of a bullet between the firearm muzzle and its impact at target.

- *Terminal ballistics* describe the mechanics of impact on both the projectile and the target.

- *Forensic ballistics*, in Goddard's sense, is the analysis of bullet and cartridge case evidence and the use of that evidence to link specimens to each other and to particular weapons.

"Ballistics" is convenient shorthand but in this report—save for the committee's formal name—we try to refrain from the use of the word on its own. Our use of the adjective ballistic (as in ballistic imaging and ballistics evidence)—like any instances of "ballistics" that may still appear in the text—is properly interpreted as referring to forensic ballistics.

BOX 1-2 Content of a Reference Ballistic Image Database

A major part of our committee's charge is to assess the feasibility of a reference ballistic image database. However, many of the parameters governing the content of such a database are not specified by the charge—for instance, whether cartridge casings or bullets (or both) should be entered into the database, whether one bullet or casing is sufficient or whether multiple exhibits are needed, whether all firearm types should be covered. The bills introduced at the federal level have been worded to be as inclusive as possible. In the 108th Congress, the BLAST Act, SNIPER Act, and IMAGE Act (H.R. 5663, S. 1983, and H.R. 776, respectively) bore identical language on the nature of the envisioned database: A licensed manufacturer or licensed importer would be required to

- (A) test fire firearms manufactured or imported by such licensees as specified by the Attorney General by regulation;
- (B) prepare ballistic images of the fired bullet and cartridge casings from the test fire;
- (C) make the records available to the Attorney General for entry in a computerized database; and
- (D) store the fired bullet and cartridge casings in such a manner and for such a period as specified by the Attorney General by regulation.

The database envisioned by these bills would require both bullets and casings to be entered; it would also put the responsibility for image acquisition and exhibit archival on the manufacturers or importers. The question of whether image data would be collected for long guns as well as handguns was not directly answered.

The existing state reference ballistic image databases in Maryland and New York both made key limiting assumptions, restricting their content to cartridge

In structuring our work, we have taken the three policy options as a guide; addressing them necessarily involves addressing the issues suggested in the preceding four substantive points of the charge. Cast in language more consistent with usage in the field, we have interpreted our principal task as providing information on three different federal policy options:

1. *Maintain the NIBIN* as it presently exists—that is, retaining the restriction that only crime-gun-related evidence be included in the database.
2. *Enhance the current NIBIN system* in order to increase its effectiveness without expanding its scope to include new or manufactured firearms; such improvements could include changes to the basic imaging standard used by the system (e.g., three-dimensional surface measurement rather

INTRODUCTION

17

casings from handguns only. The enabling law in Maryland created a centrally located Statewide Shell Casing Data Base, later called MD-IBIS, and a Statewide Shell Casing Repository, both to be administered by the Maryland State Police Crime Laboratory. The shell casings in question were to be provided by dealers from all handguns sold in the state, and transmitted to the Crime Laboratory (Maryland Code 29-65-02-02). In later years, a bill to expand MD-IBIS coverage to long guns was introduced in the legislature but was not enacted. Similarly, the New York Combined Ballistic Identification System (CoBIS) database was established as the pistol and revolver ballistic identification databank (New York General Business Laws, Article 26, Section 396-f).

Any manufacturer that ships, transports or delivers a pistol or revolver to any person in this state shall include in the container with such pistol or revolver a separate sealed container that encloses: (a) a shell casing of a bullet or projectile discharged from such pistol or revolver; and (b) any additional information that identifies such pistol or revolver and shell casing.

The language of the previous federal bills notwithstanding, we generally assume throughout this report that a national reference ballistic image database would be similar to the Maryland and New York models, albeit at the larger, national scale. At the minimum, we assume that operational constraints would limit the national reference database to cartridge casings, owing to the time-consuming process of discharging weapons in a water tank or other trap so that expended bullets can be recovered in pristine condition. Whether rifles and long guns would be included in such a database is an open question; again, the Maryland example leads us to assume that initial coverage would be focused on handguns (as the major class of guns used in crime).

than two-dimensional photography), improvements to database handling, improved procedures for working with the existing hardware and software, and so forth.

3. *Establish a national reference ballistic image database*, as a counterpart to (and possibly linked to) NIBIN, containing images of ballistic samples from all newly manufactured or imported guns, in order to generate investigative leads to the original point of sale of a firearm.

1-A.1 Experimental Study by National Institute of Standards and Technology

In support of the committee's work, NIJ separately contracted with the Office of Law Enforcement Standards of the National Institute of Standards

and Technology (NIST) for experimental work with the direction and advice of the committee, on the feasibility and accuracy of identification using a national ballistic image database. In particular, the NIST work considers the relative advantages of three-dimensional metrology techniques as compared to the current two-dimensional imaging used in NIBIN. NIST's experimentation in support of this study builds on NIST's ongoing work, under other contracts, on the development of standard bullets and cartridge casings for the calibration of ballistic imaging systems. The NIST work is summarized in Chapter 8, and the full NIST report has been published separately (Vorburger et al., 2007).

1-A.2 Limitations: What the Committee Study Does Not Do

In the balance of this chapter, we provide additional basic context for the committee's work and give an overview of the structure of the report. However, we believe that it is first important to be clear on certain limitations of our work and our charge. Our task is to assess various policy options related to ballistic imaging; it is possible for this basic charge to be misconstrued or overinterpreted in at least three major ways.

First, and most significantly, *this study is neither a verdict on the uniqueness of firearms-related toolmarks generally nor an assessment of the validity of firearms identification as a discipline*. Our charge is to focus on "the uniqueness of ballistic images"—that is, on the uniqueness and reproducibility of the markings (toolmarks) left on cartridge cases and bullets as they are recorded or measured by various technologies (e.g., photography or surface metrology).

The uniqueness of firearms-related toolmarks generally is a much broader question—and a very important one—but it is not one that our committee was constituted to address. At a minimum, assessing the general validity and uniqueness of toolmark evidence would require a much wider range of gun and ammunition selections and firing conditions than was supported in our experimentation through NIST (see Chapter 9). It would also require precise quantification of the myriad sources of variability inherent in the firing of a gun (see Chapter 2). In short, it would be a major undertaking, requiring a sustained program of research over many years, and it is impossible to definitively answer the question of the uniqueness of ballistic toolmarks as a by-product of a more targeted study of the uniqueness of ballistic images.

Although a definitive statement on firearms toolmark uniqueness is not within our purview, some discussion of issues related to uniqueness—particularly the sources of variability in generating such toolmarks—are essential to our work. Chapters 2 and 3 of this report are largely dedicated to these matters, covering the sources of variability inherent in firing a

INTRODUCTION

19

gun and the uniqueness and reproducibility of firearms-related toolmarks as judged by firearms examiners using the comparison microscope. From these reviews, some readers may attempt to infer a stance by this committee, for or against the validity of firearms identification generally. From this perspective, some may argue that our narrow focus on the uniqueness of ballistic images amounts to missing the proverbial elephant standing in the room: that is, we should extend any conclusions on the strength or weakness of ballistic *image* evidence to infer the strength or weakness of ballistic toolmark evidence more globally. We reiterate that no such broader conclusion is intended by this report, which was not developed to support more sweeping statements. Rather, the examination in Chapters 2 and 3 is intended to identify major sources of variability, as well as particularly challenging (or easy) contexts for linking pieces of ballistics evidence, in order to best construct our experimental work with NIST and understand the results of ballistic image database comparisons.

Other readers may see a definitive statement on the uniqueness and reproducibility of toolmarks as a first and necessary building block to any further work: without such a statement—if firing processes and resulting toolmarks are completely random—then the basic utility of a ballistic image database (of any sort or scope) to try to suggest connections between pieces of evidence comes into question. We appreciate this argument but conclude that it is possible to speak meaningfully about ballistic image database performance without first fully accepting or concluding the fundamental uniqueness of toolmarks. In this regard, the analogy of fingerprints may be useful: to date, there exists no definitive proof that no two people can have identical fingerprints. Instead, the credence of fingerprint evidence rests mainly on the assertion that—across all the years in which fingerprints have been manually compared—no two people sharing the same individual prints has yet been found. The emergence of computerized image databases for fingerprints has served not only to facilitate links between pieces of evidence, but also to allow for further probing of basic assumptions. Searches across large databases of fingerprint images begin to add quantitative weight to the claim of fundamental uniqueness, and reconciliations between manual examinations and computer algorithms generate useful debates over how many specific points of similarity must be found before a match can be determined. In time, ballistic image databases may similarly be an important resource for evaluating the basic assumptions of firearms identification; however, development and study of image databases need not wait until those basic assumptions are definitively examined.

Second, *our work is not intended to speak to the question of whether firearms identification by a human firearms examiner can be replaced by mechanical routines.* A point that we return to throughout in the report is the distinction between systems designed for *search* and those designed

for *verification*; the two are very different, although commonly confused. NIBIN was designed as a search tool and not for verification, and as we argue, ballistic image databases are most appropriately seen as tools for search. For ballistics evidence, verification is formally made by experienced firearms examiners, who provide sworn expert testimony on evidence matches in court: hence, only direct physical examination of exhibits—and the judgment of a human firearms examiner—can certify a “hit,” or a “true” match. Our focus is on the question of whether ballistic imaging technologies perform reliably as a search tool to assist human examiners—spanning large volumes of image data and returning high-likelihood candidate matches for an examiner to consider—and not on whether computer technology can replace human examiners.

Third, *the proposal for this study explicitly precluded the committee from assessing the admissibility of forensic firearms evidence in court*, either generally or in specific regard to testimony on ballistic imaging comparisons. We note, however, that high-subjectivity branches of forensic science are now confronting growing skepticism with regard to discernible uniqueness as a result of a number of legal and scientific studies. The standard for scientific evidence created by the U.S. Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals* (509 U.S. 579, 1993) places high probative weight on quantifiable evidence that can be tested empirically and for which known or potential error rates may be calculated, such as identification using deoxyribonucleic acid (DNA) markers (Saks and Kohler, 2005; National Research Council, 1996). The legal context in which ballistic image evidence may be presented is too important to steer clear of entirely, and we briefly review some of the relevant legal issues and cases in Chapter 3. However, we do not in any way offer a determination of whether ballistics evidence should or should not be admissible in court proceedings.

1-A.3 Microstamping

Over the course of the committee’s deliberations, debates over the feasibility of alternatives to imaging technologies that would achieve the same basic goal as a national RBID—providing an investigative lead to a point of sale—have grown in prominence. Of particular interest is the use of microstamping to directly imprint firearm parts or ammunition so that known, unique markers are imparted on bullets or cartridge casings and a connection can be made to a gun (and its point of sale) without recovery of the gun itself. The technology is also sometimes referred to as “ballistic ID tagging” or “virtual serial numbering.” Just as the issue of creating RBIDs grew in prominence when it came under serious consideration in the state of California, so, too, has legislative attention in the nation’s largest state fueled debate over microstamping. Versions of bills requiring some form

INTRODUCTION

21

of microstamping passed in one chamber of the California legislature (but not both) during the 2005–2006 session. However, in September 2007, AB 1471—a bill requiring microstamping on parts of new semiautomatic handguns sold in the state after January 2010—was passed by the legislature and was signed into law by the governor in October.

Microstamping has grown sufficiently in stature that no bill before the 109th or (as of August 2007) 110th U.S. Congresses called for a national RBID; instead, one repeatedly introduced bill on ballistic imaging has been changed in focus to require the use of microstamping.⁵ Though the feasibility of a national RBID remains the committee's primary focus, we also consider the feasibility of alternative technologies to achieve the same goal.

1-A.4 Committee Activities

In carrying out its charge, the committee held six meetings beginning in February 2004, the first four of which included public sessions. Given the committee's size and the multiple subject areas contained in its charge, the committee conducted much of its work in small working groups, including one set up to provide specific guidance to the NIST experimentation portion of the study. Committee members and staff visited local NIBIN installations at law enforcement agencies and the headquarters of Forensic Technology WAI, Inc., makers of the computer platform on which NIBIN presently operates. Committee subgroups were also permitted to perform limited experimentation using New York State's CoBIS RBID and the ballistic image database maintained by the New York City Police Department, which is not actively linked to NIBIN but uses the same technology. To get a sense of sources of variability in bullet and cartridge markings, committee subgroups visited three firearms and ammunition manufacturers: Beretta USA, Hi-Point Firearms, and Federal Cartridge. Finally, committee subgroups examining alternative technologies visited developers of microstamping or tagging technologies for both firearms parts and ammunition.

1-B CONTEXT: THE GUN CRIME PROBLEM

The primary motivation for considering the implementation of a national RBID—and for the analysis and matching of ballistics evidence,

⁵See H.R. 5073, the Technological Resource to Assist Criminal Enforcement (TRACE) Act, in the 109th Congress. Introduced in April 2006, it was referred to the House Judiciary Committee but no further action was taken prior to adjournment. The same legislation was introduced in the House in the 110th Congress as H.R. 1874 on April 17, 2007, following the mass shooting at Virginia Polytechnic Institute and State University.

in general—is to reduce gun-related crime.⁶ Ballistics evidence matching is intended to assist police investigations of crimes involving firearms, thereby increasing the chance of arrest, conviction, and punishment of criminals. The desired result is the incarceration of gun-using criminals and the deterrence of gun crime: if a higher percentage of such criminals are incarcerated, it may deter other criminals from using guns, and incapacitate those who get caught from committing further crimes (see, e.g., Nagin, 1998).

Although gun crime constitutes a small percentage of violent crimes, guns are used in two-thirds of homicides. Criminal assaults with guns are more lethal in comparison with those involving other common weapons, and the misuse of guns by criminals creates a sense of insecurity, of “no safe place” for residents of a neighborhood where gunfire is common. The social costs of gun violence in the United States include both the direct damage of injury and death to victims and the indirect damage to the larger population whose quality of life is reduced by the threat of gun violence (Cook and Ludwig, 2000). In general, property values, business location decisions, commuting routes, and other lifestyle choices are influenced by the public’s perception of the threat of gun violence. The Washington, D.C., sniper attacks of 2002 are an extreme example that directly affected an entire metropolitan area; for some inner-city neighborhoods, gunfire is a routine occurrence that places the public in fear and distorts day to day living (Cook and Ludwig, 2002). The total annual social cost of gun crime is estimated to be \$80 billion (Ludwig and Cook, 2001). Thus, tools, such as ballistic imaging technology, that can assist police in solving gun-related crime have a clear benefit for the population at large, particularly if they have some deterrent effect on gun violence.

The Federal Bureau of Investigation’s Uniform Crime Reports (UCR) program provides yearly data on the number of firearm crimes known to the police. The UCR figures are based on counts of the number of murders, robberies, and aggravated assaults committed with firearms. In 2003, there were 282,641 reported total firearms crimes comprised of 137,657 (48.7 percent) robberies with firearms, 135,346 (47.9 percent) aggravated assaults with firearms, and 9,638 murders with firearms (3.4 percent).⁷ As shown in Figure 1-1, the yearly number of crimes committed with firearms in the United States fluctuated between 300,000 and 400,000 between 1973 and 1988, increased over the next 5 years to a peak of 581,697 in 1993,

⁶The nature of gun-related crime and the adequacy of existing data related to it are comprehensively reviewed in National Research Council (2005).

⁷Separate estimates for 2003 by the National Center for Injury Prevention and Control of the Centers for Disease Control and Prevention indicate approximately 47,000 nonfatal gunshot injuries for which the intent of the injury was violence-related. The data are generated from the center’s National Electronic Injury Surveillance System; see <http://www.cdc.gov/ncipc/wisqars> [accessed February 2008].

INTRODUCTION

23

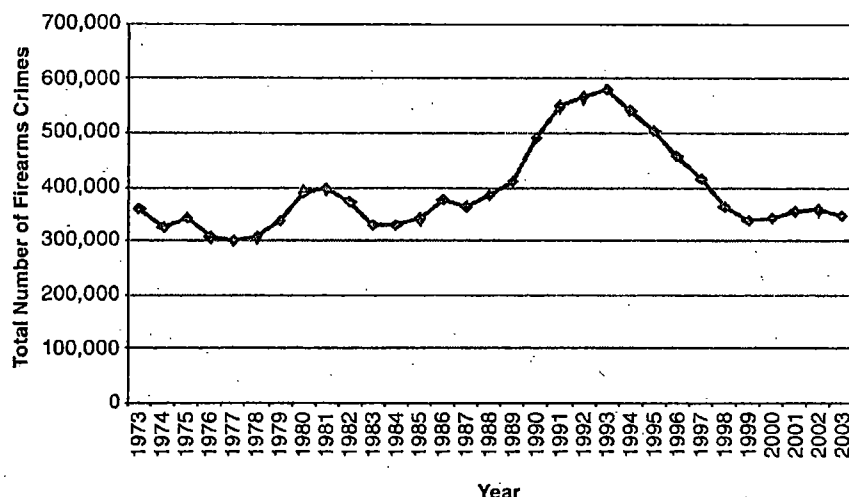


FIGURE 1-1 Crimes committed with firearms, 1973–2003.

SOURCE: Federal Bureau of Investigation, *Crime in the United States* (annually; see <http://www.ojp.usdoj.gov/bjs/> [accessed February 2008]).

decreased dramatically over the course of the 1990s, and remained stable through 2003. Firearms crime rates per 100,000 U.S. residents followed the same trajectory; see Figure 1-2.

UCR data on the yearly number of homicides committed with firearms between 1973 and 2003 follow the same trajectory as the total number of firearms crimes per year; see Figure 1-3. However, the peaks and valleys were more pronounced in the gun homicide trend data. Gun homicides peaked in 3 years: 1974, 1980, and 1993. After 1993, there was a steep decrease to 1999. Gun homicide rates follow a similar trajectory; however, when population size is considered, the 1974 and 1993 peaks are the same (6.6 gun homicides per 100,000). The steep increase in gun homicides beginning in the 1980s and peaking in 1993 was largely driven by minority youth in urban settings (Cook and Laub, 2002; Blumstein, 1995). The youth gun violence epidemic was further concentrated among highly active criminal offenders who tended to be involved in street gang or illegal drug activity (Braga, 2003; Kennedy et al., 1996). In most cities, gun violence problems remain concentrated among a small number of criminally active youth who are involved in gangs or criminal groups (Braga et al., 2002).

Cities vary widely in the amount of gun crime they experience and

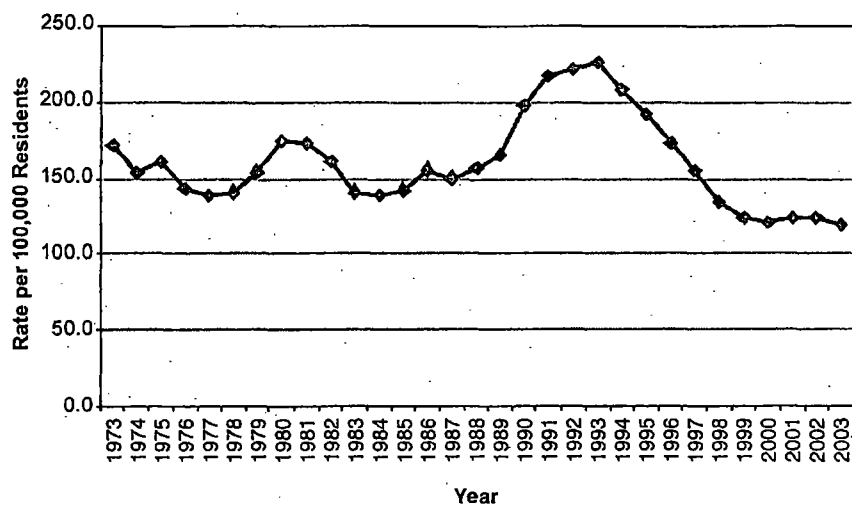


FIGURE 1-2 Firearms crime rates, 1973–2003.

SOURCE: Federal Bureau of Investigation, *Crime in the United States* (annually; see <http://www.ojp.usdoj.gov/bjs/> [accessed February 2008]).

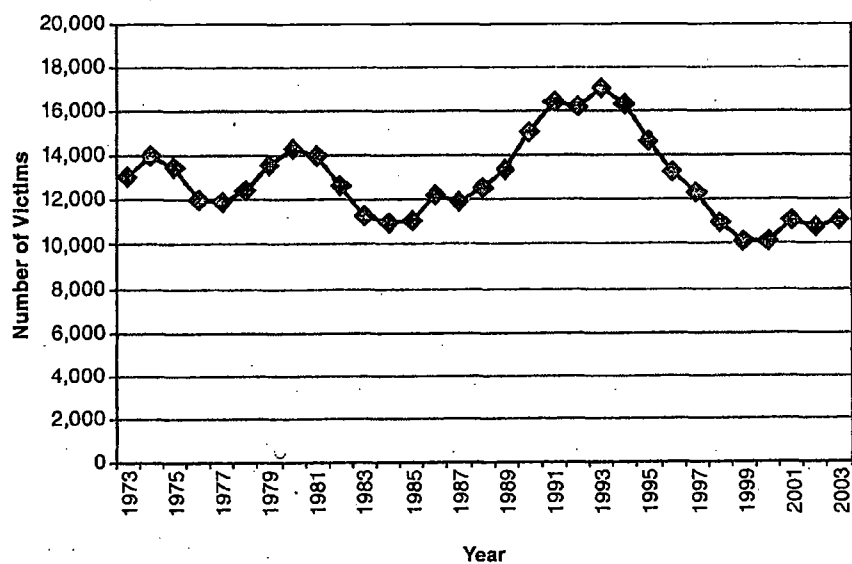


FIGURE 1-3 Homicides committed with firearms, 1973–2003.

SOURCE: Federal Bureau of Investigation, *Crime in the United States* (annually; see <http://www.ojp.usdoj.gov/bjs/> [accessed February 2008]).

INTRODUCTION

25

the numbers of crime guns local police departments recover. Table 1-1 presents gun homicide counts and rates, as well as the number of crime guns recovered, for 32 cities that participated in ATF's Youth Crime Gun Interdiction Initiative (YCGII) in 2000 and were judged by ATF to be submitting all recovered firearms for tracing (U.S. Bureau of Alcohol, Tobacco,

TABLE 1-1 Gun Homicides and Crime Gun Recoveries in 32 Cities in 2000

City	Gun Homicides	Homicide Rate per 100,000	Gun Recoveries
Atlanta, GA	108	25.9	1,141
Baltimore, MD	202	31.0	4,295
Baton Rouge, LA	33	14.5	1,068
Boston, MA	26	4.4	896
Camden, NJ	17	21.3	165
Charlotte, NC	57	9.1	2,041
Chicago, IL	415	14.3	8,570
Cincinnati, OH	7	2.1	877
Dallas, TX	177	14.9	3,005
Gary, IN	56	54.5	792
Houston, TX	165	8.4	3,909
Indianapolis, IN	67	8.4	3,592
Los Angeles, CA	430	11.6	3,877
Louisville, KY	33	12.9	1,637
Memphis, TN	110	16.9	3,244
Milwaukee, WI	90	15.1	2,283
Minneapolis, MN	38	9.9	949
Nashville, TN	56	10.5	2,297
New Orleans, LA	175	36.1	1,965
New York, NY	434	5.4	6,284
Newark, NJ	40	14.6	584
Oklahoma City, OK	24	4.7	856
Philadelphia, PA	259	17.1	3,041
Phoenix, AZ	110	8.3	4,778
Piedmont Triad, NC ^a	38	7.7	699
Portland, OR	14	2.6	857
Richmond, VA	53	26.8	1,109
Salinas, CA	16	10.6	327
San Antonio, TX	45	3.9	1,294
San Jose, CA	8	0.9	1,476
St. Louis, MO	90	25.8	2,612
Tucson, AZ	49	10.1	2,135

^aGreensboro, High Point, and Winston-Salem, NC.

SOURCES: Gun homicide data from FBI Supplementary Homicide Reports, 2000; see <http://www.icpsr.umich.edu> [accessed February 2008]. Gun recovery data from U.S. Bureau of Alcohol, Tobacco, and Firearms, 2002.

and Firearms, 2002; see Box 9-1). Not surprisingly, large cities—New York, Los Angeles, and Chicago—report the largest numbers of gun homicides. However, there are smaller cities that experience dramatically higher rates of gun violence relative to the large cities. Gary, Indiana, had the highest rate of gun homicides per 100,000 residents with 54.5, followed by New Orleans with 36.1 percent, and Baltimore with 31.0 percent. Because of the variability in gun crime rates by locality, different localities may have different baseline needs for ballistic imaging technology (and, potentially, different levels of benefit from its refinement).

1-C BALLISTIC IMAGING, FIREARMS IDENTIFICATION, AND "BALLISTIC FINGERPRINTING"

Analysis of ballistics evidence may provide a link between two shooting incidents if it is determined that the same weapon was fired in both. That information may be helpful to investigators since it suggests that the incidents involved the same shooter, or involved two shooters who were linked by the transfer of the gun in question. Alternatively, the ballistics evidence match can provide a link between a shooting incident and a particular gun, perhaps one that has separately been found and placed in police custody; this information may be helpful to the investigation if the identity of the owner or possessor of that gun is known or could be determined through further investigation.

It is important to clarify several terms and the distinctions among them. First, *ballistic imaging* is not identical to *firearms identification*. Traditional firearms identification techniques, relying on the direct viewing of specimens under a comparison microscope by a trained firearms examiner, have been used in investigations for decades. As discussed in Section 1-A.2, the identification and confirmation of fired bullets or cartridge cases as having been fired from a specific firearm is the responsibility of human examiners. Ballistic imaging is a means of searching across a large number of exhibits—in greater numbers and across broader expanses of geography than a human examiner could possibly achieve—to suggest possible matching candidates. Ballistic imaging would more accurately be described as a form of *computer-assisted firearms identification*.

The unique innovation that ballistic imaging technology has added to the field is the "cold hit"—the generation of possible links between specimens and cases arising only through querying a database. A cold hit can be particularly valuable for furthering the investigation of shooting crimes that lack an obvious suspect or even any clear leads. Research on police clearance of homicide cases (Wellford and Cronin, 1999, 2000) suggests that the availability of witnesses (who can identify the offender or victim and who may be able to suggest the whereabouts of the offender) and swift

INTRODUCTION

27

action by the first officers on the scene are major contributors to success in closing a case. By comparison, crimes for which eyewitness testimony is not available (or where witnesses may be unwilling to come forward), such as is common in drug-related homicides, are harder to solve. In cases for which witnesses and early data on possible suspects are lacking, a cold hit on ballistics evidence generated through a routine database search could provide an important investigative lead.

Generally, ballistic imaging offers the opportunity for more rapid searching across a high volume of candidates than is possible using conventional techniques. In traditional firearms identification, a firearms examiner's cognitive task in examining specimens under a comparison microscope is to form a mental pattern of identifying marks and features on bullet and cartridge case evidence and to match that pattern against those from other exhibits. Accordingly, searching through large amounts of ballistic evidence and verifying a match can be a very labor-intensive and time-consuming task. Making connections between different cases relies on the visual memory of the firearms examiner or—if all exhibits are not viewed and remembered by the same person—recognition of features from photographs in open case files or posts on bulletin boards. Ballistic imaging technology allows images of bullets or casings to be cataloged, indexed, scored, and ranked. A firearms examiner can visually compare high-ranked pairs of images on the screen, much as a radiologist might read a digital mammogram or other X-ray, and the physical evidence items for promising matches can then be requested as appropriate for confirmation.

The general ballistic imaging methodology we describe in this study has been popularly referred to as *ballistic fingerprinting*, a term that carries both positive and negative connotations and that is misleading in a very important sense. Most commonly used in relation to a national reference ballistic image database, with the idea of logging a newly sold gun's "fingerprint" before or as a condition of sale, "ballistic fingerprinting" naturally suggests a connection to the more widely known practice of recording human fingerprints. What is fundamentally misleading about equating "ballistic imaging" and "ballistic fingerprinting" is the point of reference—a human fingerprint is an attribute of that human, and a determined match between a latent fingerprint found at a crime scene and a fingerprint in police files suggests a direct connection between a crime and a suspect. However, the markings imparted to fired bullets and casings are attributes of a firearm, not the person who fires it.⁸

⁸Though "ballistic fingerprinting" has become a popular term in recent years, references to ballistic toolmarks as mechanical fingerprints date back to the formative days of firearms identification. Hatcher (1935:265, 275), one of the seminal texts in the field, notes that "these [toolmarks] are what might very aptly be described as the 'finger prints of the firing pin and

Absent other evidence, firearms identification and ballistic imaging do not automatically generate a mapping from ballistics evidence to a possible perpetrator. We return to this point in Section 3-A, but it is important to note here that fingerprint (and DNA) evidence refer to attributes of a particular person, but they do not necessarily point to that person as the criminal *offender*. That is, the presence of this evidence can place a person at the location of a crime, but not necessarily demonstrate that they were there at the time of the crime or that they committed the act in question. The intent of a national RBID is to provide a relatively quick connection between recovered ballistics evidence and a point of sale. However, additional work from a national RBID “hit” would still be necessary to derive a person’s name from the point of sale and that this person—the original purchaser of the firearm—is not necessarily the person who used the gun in crime.

1-D OVERVIEW OF REPORT

Part I of this report describes the context for ballistic image analysis. Chapter 2 describes the toolmarks imparted on bullets and cartridge casings as a result of firing, reviewing the sources of variability inherent in the manufacture of firearms and in the process of firing a gun. Chapter 3 describes the nature of ballistics evidence in more detail, focusing on traditional firearms identification techniques and the studies that have been performed on the uniqueness and reproducibility of firearms-related toolmarks as discerned using conventional microscopy.

Part II deals with the current state of ballistic imaging and the existing national image database, NIBIN. Chapter 4 discusses the technology used for acquiring images and scoring and ranking them, focusing on the IBIS platform used by the NIBIN program. Chapter 5 describes the evolution of the NIBIN program and its structure and summarizes what is known about the NIBIN system’s performance. Drawing from both these chapters, Chapter 6 outlines operational and technical enhancements that could improve NIBIN.

Part III addresses the basic titular charge to the committee, describing evidence on variability in ballistics evidence and the implications for a national reference ballistic image database. Chapter 7 introduces a major technical enhancement that the committee chose to explore as an option

breech block on the primer.” If all the gross, class marks are the same between two bullets, “this does not, however, prove in any way that [a suspect bullet] came from that particular gun as there are hundreds or even thousands of guns of each type manufactured. . . . Fortunately, however, each and every barrel has its own ‘finger prints’ which it leaves on a bullet, and identification by these marks is just as certain as identification of a criminal by his finger prints.”

INTRODUCTION

29

for either the current NIBIN program or a wide-scale national reference database. That enhancement is the replacement of two-dimensional photography with three-dimensional topography, and we briefly describe that technology along with historical alternatives to photography in firearms analysis. Chapter 8 reviews the experimental efforts conducted by NIST in support of the committee's work, as well as limited experimental work using the New York State CoBIS database. Chapter 9 builds from the new experimental evidence and from studies (described in Chapter 4 and elsewhere) in articulating the arguments associated with creating a national reference database.

Part IV, on future directions, begins in Chapter 10 by discussing alternative technologies to achieve the same goal as a national reference ballistic image database. In particular, we review proposals to microstamp firearms parts or individual pieces of ammunition with unique etched identification codes. Chapter 11 closes the report with general guidance on the process of developing systems for image search, retrieval, processing, and scoring, suggesting "best practices" for development of any such program (whether advancing current two-dimensional photography techniques or changing to three-dimensional topography).

Appendix A offers additional detail on the use of ballistic imaging technology in Boston, one locale where the current NIBIN system appears to be well used and well supported.

2

Firearms and Ammunition: Physics, Manufacturing, and Sources of Variability

A firearm is a dynamic system for delivering maximum destructive energy to a target, in the form of a high-velocity bullet, with minimum delivery of energy to the shooter. To that end, the firing of a firearm and the subsequent generation of ballistic toolmarks are the end results of processes that are simultaneously characterized by high uniformity and great variability. Modern firearms and ammunition manufacture relies heavily on the uniformity and interchangeability of component parts, yet each step in the production cycle presents an opportunity for microscopically fine differences from part to part. Likewise, the firing of a gun depends on the rapid and repeated performance of numerous mechanical steps that is designed to produce combustion, done in a controlled manner yet still not creating exactly identical conditions in repeated firings.

In this chapter, we summarize the basic parts of firearms and ammunition (Section 2-A) and describe the physical processes that take place when a trigger is pulled and a gun is fired (2-B). These sections are not intended to be comprehensive examinations of the history and features of firearms and ammunition nor a complete catalogue of firearms products in current use. Rather, they provide context for the principal focus of this chapter: describing the types of toolmarks left on ballistics evidence by firing (2-C), particularly those that are typically imaged and input into ballistic image databases.¹ We close in Section 2-D with brief descriptions of concepts in the manufacture of both firearms and ammunition. A general understanding of manufacturing is essential not only for an appreciation

¹More detailed information and images are available at <http://www.firearmsid.com>.

FIREARMS AND AMMUNITION

31

of the sources of variability in ballistic toolmarks, but also in assessing the feasibility of implementing technologies like wide-scale ballistic imaging or microstamping.

2-A ANATOMY OF FIREARMS AND AMMUNITION

2-A.1 Firearms

Firearms come in a wide array of designs and specific makes, and each represents a complex assemblage of numerous constituent parts. In this section we focus on the parts most central to the basic firing assembly since the interest is in toolmark creation. Due to their widespread use in crime, we also discuss some terminology in the specific context of handguns, as in differentiating between revolvers and pistols.

Barrels

Gun barrels are manufactured from solid pieces of steel whose composition is carefully selected for its chemical and metallurgical properties. A first step of the process, drilling, results in a comparatively rough hole of uniform diameter extending from one end of the barrel to the other. Next the barrel is bored with a reamer, designed to produce as smooth a surface as possible on the inside of the barrel. The interior surface or bore bears numerous scars and scratches from this drilling process; it is these random imperfections—more so than subsequent steps—that are said to account for individual characteristics on fired bullets (Heard, 1997:124–125).

Barrels are further subjected to a rifling process, creating a pattern of grooves on the inside the barrel. This rifling is essential to the firing accuracy of the weapon; as it is forced out of the barrel by gas pressure, the bullet impacts with the barrel rifling and is given a rotation—somewhat akin to the spin on a thrown football—that gives the bullet a more direct flight. Some weapons, typically shotguns, have no rifling (“smoothbore”). Most handguns and rifles have a spiral pattern of rifling to improve their accuracy. The rifling may be created by forcing a carbide button through the reamed barrel; it is the normal wear on this button, as many riflings are performed, that is said to impart individual microscopic variability in markings in the barrel (along with residual scars or imperfections from the original drilling). Additional steps in the process to finish a barrel include heat treating (to impart hardness) and cleaning.

Across manufacturers, barrels can vary in two fundamental features, each of which are basic class characteristics (see Section 3-B.1). The first is the *direction* in which the grooves in the barrel twist, whether left- or right-handed. Most U.S. makers use a right twist, although Colt revolvers

are known for their left twist (Rinker, 2004:128). The second is the number of *grooves* that are cut into the barrel—normally at a depth of 0.004–0.006 inch—to create the rifling, and, correspondingly, the number of raised *lands* between those grooves. Historically, “no standard was established and makers used, normally, six, seven, or eight grooves”; this remains the usual range, although firearms have been fielded with as few as 2 and as many as 24 grooves (Rinker, 2004:130, 131).

Barrels also vary in the degree of twist in the rifling, which affects how much rotation is put on bullets as they pass through the barrel and exit. Rinker (2004:127) observes that “few people agree on what is the proper twist. Some people want an over stabilized bullet from a fast twist. They claim best accuracy at all ranges. Other shooters believe a fast twist builds pressure and heat and they want a slow twist for minimum stability, and they have claims to back their theory.”

Some firearms differ from conventional rifling with square-edged grooves, using *polygonal* rifling instead. “Polygonal rifling has no sharp edges,” and instead the raised lands in the barrel have a smooth, “rounded profile which can be difficult to discern when looking down the barrel. This type of rifling is almost exclusively manufactured using the hammer or swage process” (Heard, 1997:123).

Chamber, Breech Face, and Firing Pin

The rear section (away from the muzzle) of the barrel bore is known as the chamber; it is designed and sized to fit a specific caliber of cartridge (see Section 2–A.2). The part of the firearm against which a cartridge sits when it is placed in the chamber is the breech, and the whole assembly may be referred to as the breechblock or breech bolt.

The specific surface of the breech that makes contact with the base of the cartridge is the breech face; Figure 2-1 depicts the breech faces of two firearms. The exact steps used to form the breech assembly can vary by manufacturer, and the breech face may vary in terms of the amount of filing or polishing done on it and whether any paint or other materials is applied to it. Basic filing can create gross striation marks in linear arrangements; in others, a rotary milling operation may be applied to the breech face surface, creating a pattern of concentric circles (American Institute of Applied Science, 1982:77). These steps are crucial to the theory of firearms identification as it is random imperfections created in these machining and filing processes that is said to make the surface (and the negative impressions of said surface, left on fired cartridge casings) unique.

A hole drilled through the breech assembly holds the firing pin, a very hard steel rod that can be forced to protrude from the breech to strike the primer of a cartridge seated in the chamber. While most firing pins have a

FIREARMS AND AMMUNITION

33

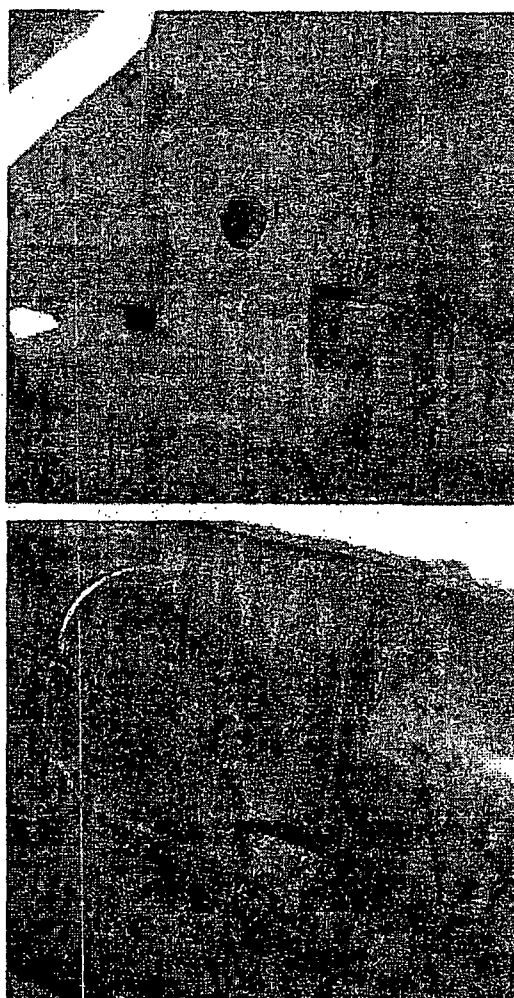


FIGURE 2-1 Breech faces with firing pin holes: Two firearms.

NOTES: The top image is the breech face of a Smith & Wesson firearm; the bottom image is the breech face of a Glock firearm. The shape of the firing pin hole for the Glock firearm indicates its characteristic rectangular firing pin.

SOURCE: Excerpted from Tulleners (2001:Fig. 3-3).

small rounded end or nose, some have more distinctive shapes; in particular, Glock firearms are known for a rectangular firing pin. Firing pins are generally made on a standard screw machine. Like the breech face, the tip of the firing pin is subject to machining and filing steps that impart microscopic imperfections.

Revolvers and Pistols

Handguns may be divided into two basic types—revolvers and pistols—by the manner in which ammunition is loaded and cycled through the firearm.

In a revolver, “the supply of ammunition is held in a cylinder at the rear of the barrel with each round having its own chamber,” and a ratchet mechanism is then used to cycle the cylinder to the next position (Heard, 1997:18). Revolvers may be further subdivided by the manner in which this cycling is performed. In *single-action* revolvers, the shooter manually cocks the hammer, pulling it back and setting the ratchet action in motion. A trigger pull then causes the hammer to drop and commence the firing process. More complex—and more common—*double-action* revolvers save a step: “A long continuous pull on the trigger cocks the hammer, rotates the cylinder, then drops the hammer all in one operation” (Heard, 1997:18).

By comparison, pistols are self-loading, making use of ammunition “contained in a removable spring-loaded magazine housed within the grip frame.” Pistols have a single chamber, and individual rounds of ammunition are cycled into the chamber by mechanical means; pulling back the slide rearward until the breech face is behind the top round in the magazine, and then releasing it, forces the round forward and into the chamber for firing. After firing, the spent cartridge case is ejected “through a port in the side, or occasionally top, of the slide. At the end of its rearward motion, the spring-loaded slide moves forward[,] stripping a fresh round off the top of the magazine and feeding it into the rear of the barrel” (Heard, 1997:19).

Pistols are often referred to as *semiautomatic* pistols (or semi-automatics); they are semiautomatic in that they are self-loading but require separate, distinct trigger pulls to fire different rounds. “Automatic” is used to describe “a weapon in which the action will continue to operate until the force is removed from the trigger or the magazine is empty.” Though a few fully automatic pistols have been marketed, they are rare “due to the near impossibility of controlling such a weapon [for accurate shots]. . . . Each shot causes the barrel to rise during recoil and before the firer has time to reacquire the target within the sights, the next round has fired”; consequently, “even at close range it is unusual for more than two shots to hit a man-sized target” (Heard, 1997:17, 18).

For the objective of the recovery of ballistics evidence and imaging

FIREARMS AND AMMUNITION

35

thereof, the distinction between revolvers and pistols is vital: while pistols forcibly eject spent rounds, revolvers do not. Hence, casings may only be recovered at a crime scene involving a revolver if they are specifically emptied by a shooter (e.g., for reloading).

Extractor and Ejector

Both revolvers and pistols make use of an extractor, typically a small arm that fits over the rim of the cartridge. As the name implies, the extractor serves to pull a spent cartridge from the chamber so that a new cartridge can take its place. In a revolver, the extractor—which can remove all cartridges simultaneously by depressing the ejection rod (or extractor rod)—also has ratchet notches that advance the cylinder to the next chamber. In a semiautomatic pistol, however, the extractor removes the cartridge so that it makes contact with the ejector, typically a fixed protuberance that strikes the rim of the cartridge. Because these steps are performed very quickly, and with some speed and force, both the extractor and ejector mechanisms can leave marks on expended cartridge casings.

2-A.2 Ammunition

Modern ammunition takes the form of integrated, self-contained *cartridges*, integrating three key elements in one unit:

- a *bullet*, the actual projectile that is expelled from the firearm's barrel;
- *propellant*, which generates the force and pressure needed to put the bullet in motion and into flight; and
- a *primer*, which in modern usage is a volatile and pressure-sensitive chemical mixture that is responsible for igniting the propellant.

Historically, with firearms of the 18th century, shooters had to assemble these components manually in order to reload, inserting black gunpowder, wadding, and a spherical lead ball into the gun's barrel. With the intent of making reloading faster, early cartridges featured premeasured and prepackaged charges of powder, in small bags, but they still required an external source to provide a thermal "flash" to ignite the powder and fire the projectile. The innovation of the breechloader, by which the ammunition is loaded at the rear of the gun's barrel, made modern integrated ammunition possible. Modern ammunition links these three components together, placing them inside an outer *case*.

Ammunition is commonly identified based on the diameter of its bullet, for proper fitting with firearms barrels. The original designation of ammu-

nitition size was by caliber: The unit of measurement was hundredths of an inch (e.g., .38 caliber corresponding to a bullet with diameter 0.38 inches). However, such caliber labels are only approximations, for example, a .38 caliber is actually 0.357 inches in diameter and a .40 caliber is actually 0.429 inches in diameter. Ammunition (and corresponding gun barrels) are also now identified using the metric system, such as 9mm or 10mm.²

Ammunition cartridges are primarily divided into two categories—rimfire and centerfire—depending on where the primer is located (and, correspondingly, where the gun's firing pin strikes the cartridge during firing). We explain the distinction in the next section.

Primer

The use of a chemical primer to ignite the propellant dates back to the development of the percussion cap in the early 1800s, when it was discovered that striking a cap containing fulminate of mercury created a flame that could then move into the main charge of powder. Today, the exact chemical composition of primer mixtures can vary and remains proprietary. "Lead styphnate is the main ingredient," generally, although individual primers may also include some of the following: "[trinitrotoluene (TNT)], lead or copper sulphocyanide, lead peroxide, sulfur, tetryl, barium peroxide, and barium nitrate" (Rinker, 2004:19). Ground glass may also be added as a "sensitizer," to create friction when impacted by the firing pin (Matty, 1987:10). A primer mixture is a high explosive; working with it and placing the primer in the case are extremely sensitive parts of the ammunition manufacture process.

Rimfire cartridges were first developed in the 1800s, and rimfire ammunition remains in heavy usage in .22 caliber cartridges. As the name implies, "the primer composition is spun into the rim of the cartridge case," putting it in immediate contact with the powder propellant (Rinker, 2004:19–20). By comparison, *centerfire* ammunition has a cylindrical cap seated in the cartridge head that contains the primer mixture. The cap consists of a cup-

²Care is needed with the use of the word "caliber." Here, "caliber" is shorthand for the *nominal caliber* of the ammunition, which refers specifically to the diameter of the bullet. However, *specific caliber* of ammunition "refers to a name given to a cartridge representing the entire design of the cartridge as intended by the manufacturer, [including not only] the diameter of the bullet but the entire shape and size of the cartridge" (Moran, 2000:235). That is, a nominal-caliber ammunition group may include a wide variety of specific varieties that can vary significantly in their length, case design, powder charge, and so forth. Both "nominal caliber" and "specific caliber" are used to describe and label firearms as well, referring to the "group of firearms which share the same bore diameter" and the "name given to a firearm representing the specifically designed cartridge which will fit into the firearm," respectively (Moran, 2000:235).

FIREARMS AND AMMUNITION

37

and-anvil combination and a pellet of primer mixture. During firing, the firing pin “compresses the primer composition between the cup and anvil,” causing a flame that passes through a hole or vent to ignite the propellant charge (Rinker, 2004:19). Practically, the development of the centerfire system “was the great milestone in weapon and ammunition development;” with it, “only the primer cup needed to be soft enough to be crushed by the firing pin,” freeing the main body of the cartridge case to be harder, providing “a gas seal for much higher pressures than could be obtained with rimfire ammunition” (Heard, 1997:11). Centerfire cartridges also developed, in part, due to the desire to reuse “the most expensive part of the cartridge, the case”; the centerfire configuration permits new primer assemblies to be inserted into expended casings (Matty, 1987:8).

Given its purpose, the primer assembly must meet specific criteria. The primer mixture “must always have a uniform flash that is hot enough without being too violent. In other words, it must always consistently produce the proper amount of heat” (Rinker, 2004:20). Likewise, the material holding the primer—either the cartridge brass of the rim in a rimfire cartridge or the cup in a centerfire primer—must withstand the impact of the firing pin, the detonation of the primer, and the expansion of gas from the ignited propellant without rupturing. Centerfire primer cups are typically brass or nickel.

Propellant

Though it derives from centuries of development, a critical part of ammunition is subject to popular misunderstandings and mislabelings. It is commonly referred to as *powder*, tracing from ancient formulations of black powder and more modern incarnations of smokeless gunpowder. As Hatcher (1935:96) observes, powder “originally meant, and still does mean, fine dust; but at the present time we find substances called powder which do not in any manner resemble dust and which are not even finely divided.” *Propellant* is a more generic and more apt term for the substance used in modern ammunition. The individual particles of propellant may still be referred to as grains, even though they may not have a gritty or granular texture; however, the common use of *grains* to describe the exact quantity or charge of propellant in a cartridge has nothing to do with texture (a grain is a measured weight equal to 0.0648 grams).

Fundamentally, a propellant is not devised to *explode* violently: It is designed to *burn*, and burn rapidly. As Rinker (2004:21) summarizes, “all gunpowder produces the force to move a projectile as the result of 3 things. (1) When it burns, it produces a huge quantity of gas. (2) As it burns, it produces a huge amount of heat. (3) After ignition, it creates its own oxygen and needs no outside air. All three are required. At first, the need

for heat may not be as obvious as the other two, but hot gas expands and requires more space than cold gas," heightening the buildup of pressure in the gun's chamber.

Modern propellants are a form of nitrocellulose, first discovered in 1846 when cotton, nitric acid, and sulfuric acid were mixed. One pound of nitrocellulose-based powder contains 1.2–1.5 million foot pounds of stored chemical energy, in comparison with about 600,000 foot pounds of stored energy in one pound of the traditional saltpeter, charcoal, and sulfur combination of black powder (Rinker, 2004:23). "If ignited in an unconfined space," nitrocellulose propellant will burn gently; if, however, combustion occurs in a confined space—as in a cartridge—"the heat and pressure built up will accelerate the rate of combustion exponentially" (Heard, 1997:76). The charge of propellant utilized in cartridges is carefully tuned to the caliber, bullet weight, barrel length, and desired performance of the ammunition. Chemical "moderating" agents or other additives (e.g., graphite or barium nitrate) are often used to control the burn rate of the propellant, and the mixes used in final propellants are "very tightly-controlled trade secrets" (Heard, 1997:59).

Cartridge Cases

Cartridge cases have traditionally been manufactured from brass, an alloy of copper and zinc, although other materials have been used; in particular, steel casings (coated with copper or a lacquer) were developed during World War II due to brass shortages, and steel cases remain in use in some countries because of their lower cost. Cartridge brass is almost universally of the same composition: a 70-to-30 or 75-to-25 alloy (in percentage of weight) of copper and zinc, respectively. This combination was developed, along with methods for working with it, as a result of the physical demands put on the case during the firing of a gun. As described below, a cartridge case expands during firing, pressing against the chamber walls to create a seal and containing the high-pressure gases created in firing. To accomplish this *in situ* deformation, the hardness of the cartridge brass must be precise so that the case retains its original shape and can be readily extracted from the breech. Too hard a starting brass and the case may crack during firing; too soft and it will expand and deform too much and be difficult to extract. Although there are a number of manufacturing processes currently used to produce cartridges, the salient features of the general manufacturing process are similar. Within the same case, thickness must also vary in particular ways, tailored to suit various tasks: maximum hardness in the rim (of a centerfire cartridge) in which the primer cap is seated, medium hardness with good elasticity in the central walls of the case, and softest at the neck or mouth end where the bullet is seated.

FIREARMS AND AMMUNITION

39

One modern manufacturing process for producing a centerfire case starts with brass rod or wire, in coils. A machine called a cold header, similar to the one used to make common nails, feeds in the rod or wire, cuts off a piece large enough to make one case, and transfers it to a cavity in the machine, where it is struck by a punch. This process forms the irregularly shaped cylindrical piece into a precise sort of button shape. The button is annealed (heated and then cooled) to reduce its hardness, and is then fed into a two-stage transfer press that transforms the cartridge blank into a low, wide cup. The half-formed cup is next pushed through a die or series of dies that draw the blank to its final shape and dimensions. Additional annealing, cleaning, and forming steps are done sequentially until the blank is in the final shape of the cartridge case.

Bullets

The last major component of the cartridge is the bullet or projectile. Bullets in modern ammunition can consist of a variety of metals. There are bullets made entirely of aluminum, steel, and sometimes brass; nonmetallic substances like rubber and wood have also been used to make bullets. However, to provide the needed weight for improved accuracy and performance, bullets most often contain some amount of lead.

Bullets are designed for two basic purposes—penetration on impact with a target and perforation and expansion to increase damage—and the exact composition and construction of bullets are tailored to those purposes. An all-lead bullet is very soft and therefore expands rapidly on striking a target. Indeed, “pure lead is not used for lead bullets” precisely because “it is too soft [and] damages too easily in handling and loading”; antimony is most commonly added to lead as a hardening agent, though tin has also been used (Frost, 1990:27). Better penetration power at greater distances and accuracy can be attained by covering a lead core with a full jacket or partial jacket composed of a copper alloy. High-velocity, fully jacketed bullets are designed to penetrate deeply, while lower velocity jacketed bullets may tumble within the target and cause additional damage due to expansion. Mushrooming or expanding bullets, such as hollowpoints, are designed to transfer a maximum amount of energy to the target and to penetrate but not exit. The composition and design of bullets—along with what materials they do or do not strike—are important to forensic ballistics analysis as they affect what condition a recovered bullet will be in and hence how difficult it is to match to other evidence.

A lubricant is applied to bullets before they are seated in cartridge casings; it acts to cut down on metal fouling of the bore, the deposition of particles or residues from the bullet (Frost, 1991:31). In centerfire cartridges, where “grease grooves” are created in the case by knurling, the

lubricant is usually a wax or heavy grease type; due to its placement, it must be a substance that will neither contaminate the powder nor react with lead or copper plating.

2-B THE FIRING OF A WEAPON: INTERNAL BALLISTICS

The general concept of "ballistics" can be divided into separate stages; see Box 1-1. External ballistics (the flight path and behavior of the bullet between its exit from the barrel and its arrival at its target) and terminal ballistics (behavior of the bullet on striking a target) are both critical to complete firearms investigations.

Our primary focus is on internal ballistics—the actions that occur between the pulling of the trigger and the bullet's exit from the barrel of a firearm. Internal ballistics is "a series of actions or operations that every firearm must go through, whether .22 caliber revolver or a .50 caliber machine gun," all of which occur in a time span on the order of 0.003 seconds (Rinker, 2004:1, 2). The trigger pull starts the mechanical process of allowing the firing pin to strike the primer of the chambered cartridge. The pressure from the firing pin creates a dent in the primer surface of the cartridge; more significantly, it causes a small explosion, the heat from which passes through the hole in the primer cap and into the main body of the cartridge. There, the charge of powder burns rapidly in a confined space, converting from a solid to a gas and exerting great pressure against all surfaces. "When the pressure has built up to a sufficient level, known as *short shot*, the bullet will start to move because the pressure is greater than the holding force of the case neck." As the powder burn continues, "the pressure increases and the neck and body walls of the case expand to meet and grasp the inside chamber walls," creating a seal and increasing the pressure acting on the bullet's base, propelling it forward (Rinker, 2004:1). The bullet, being slightly larger than the barrel diameter, is forced to seat into the rifling (the lands and grooves) on the bore of the barrel, picking up rotation as it passes down the length of the barrel.

While this sequence of events drives the bullet through the barrel and out of the firearm, forces are also at work on the head of the cartridge. Hatcher (1935:270, 272) describes the processes for a centerfire cartridge:

When a primer is struck by the firing pin, the very brusque and powerful mixture that it contains explodes with violence, [causing the flame that ignites the powder charge]. But the explosion of the primer mixture also reacts in a backward direction onto the primer cup itself, and blows it part way out of the primer pocket, unless the primer is strongly crimped in place, as is done with some kinds of rifle ammunition. Then when the main charge ignites, the powder pressure inside the case forces the case

FIREARMS AND AMMUNITION

41

back sharply against the breech face or recoil plate, and this action seats the primer again. . . .

When the material of the primer is very soft, or the breech pressure is very high, or more particularly if the soft primer has a very strong mixture in it and the vent hole is small, the metal forming the surface of the primer cup often is forced back more or less into the firing pin hole in the breech block, thus leaving a raised rim all around the firing pin impression.

The firing pin is often not fully retracted, and so it may impact the casing multiple times (Krivosta, 2006:42). Likewise, the firing pin may scrape or drag somewhat against the edge of the surface.

Also emitted from the barrel as a result of firing is gunshot residue, a mixture of partially burned and unburned particles of propellant, leftover primer mixture, and particles of metal and lubricant from the release of the bullet and its passage through the barrel. Some residue may also remain in the barrel and possibly on other internal surfaces of the gun; with time, and in the absence of cleaning, these residues can build up and alter the surface to which the bullet and cartridge case are exposed during firing.

2-C BASIC TOOLMARKS ON BALLISTICS EVIDENCE

2-C.1 Cartridge Case Markings

Breech Face Marks

Gas pressure created during the firing process exerts pressure in all directions, including forcing the head of the cartridge against the breech face. Hence, the surface area of the cartridge head may pick up negative impressions of any linear striations or other features left on the breech face when it is filed and machined. Some of these marks may register on the relatively hard cartridge brass that forms the outer ring (head stamp area) of the cartridge case, but most of the features show up in the softer surface of the primer cap. Hence, what is known as the breech face mark is the pattern of linear striations and other textural features on the surface of the primer, surrounding the indentation of the firing pin impression. Figure 2-2 illustrates the breech face marks and firing pin impression for two different firearms, one Glock and one Smith & Wesson.

Hatcher (1935:265-266) provided an early description of the breech face mark and recognized the mark's importance as a potentially identifiable feature:

In both [semi]automatic pistols and revolvers there are certain fine tool marks or scratches left on the breech face or the metal against which the

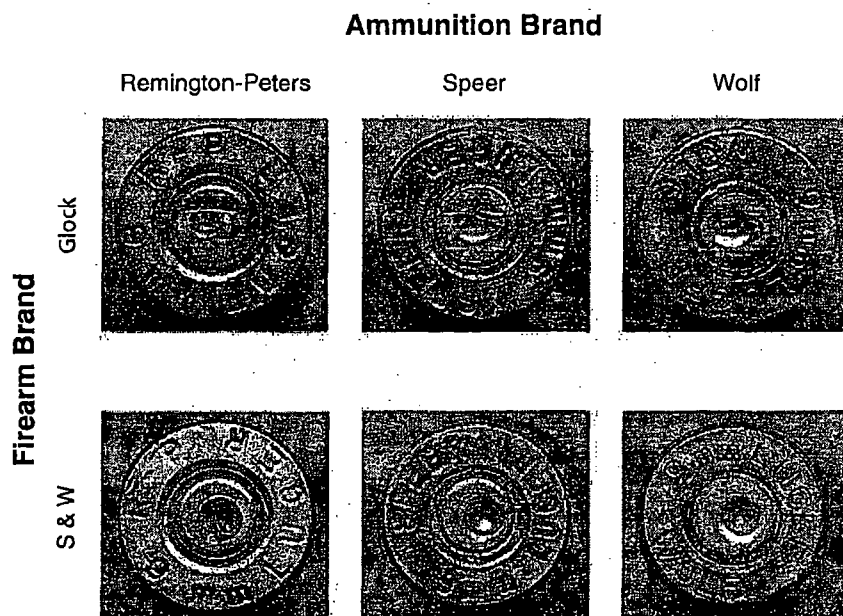


FIGURE 2-2 Breech face markings and firing pin impressions for three ammunition types and two firearm brands.

NOTE: S & W = Smith & Wesson.

SOURCE: Adapted from Tulleners (2001:Fig. 3-4).

cartridge presses when it is being fired. These marks are quite pronounced on metal surfaces that have been finished by a file as is commonly done on the breech face of the average [semi]automatic pistol or revolver. Examined under a microscope this surface appears to consist of a number of ridges or scratches, and when the cartridge is fired, the primer, being of copper or brass, which is much softer than the steel of the breech face, will take the impression of these fine ridges.

In gross appearance, features in the breech face impression may fall into some general categories depending on the specific filing or polishing steps used by the manufacturer. Straight filing creates linear features; other breech face impressions may feature cross-hatching or circular patterns. For example, Kennington (1995) documents the class of 9mm pistols for which the rotary cutting tool used in milling the breech face not only leaves distinctive arched markings that are impressed on the primer surface, but

may also be evident elsewhere on the cartridge head. Kennington suggests that the rifling characteristics from bullet evidence at a crime scene can be combined with evidence of arched markings on cartridge casings to rapidly identify the pistol make in question.³

Because breech face impressions are created by the pressure of firing, Tulleners (2001:3-2) notes that their detail "is dependent on cartridge chamber pressure and the type of breech face manufacture/condition. [Chamber pressure varies within caliber and depends on such factors as the bullet size and weight and the powder charge contained in the cartridge.] Lower pressure cartridges are not expected to consistently produce decent breech face impressions." He adds that cartridge chamber pressure, bullet weight, and primer hardness "can vary to such an extent that an examiner will not be able to identify test 1 to test 2 when different ammunition is used in the same gun;" hence, "one of the cardinal rules in firearm examination is to test fire the gun with similar ammunition as the evidence ammunition if at all possible" (Tulleners, 2001:3-3).

Firing Pin Impressions

The firing pin impression on the surface of the primer provides important information on the general class of the firearm that discharged a casing. The shape of the "pit" marking the firing pin's strike indicates the shape of the firing pin in the firearm (e.g., round, elliptical, rectangular). The firing pin impression will also bear the marks created by filing or smoothing the tip of the firing pin. "The point of the firing pin will have small ridges, and no two . . . firing pin points will be exactly alike," conjectured Hatcher (1935:266). However, Burrard (1962:113) notes that "great caution is necessary" in distinguishing individual markings from grosser features of firing pin marks, which "often take the form of a number of small concentric rings." Yet individual imperfections on the tip of the firing pin can be telltale: "Another by no means rare feature of a [firing pin] is the presence of a small 'pimple' on the extreme end," and so the presence of a corresponding mark on one cartridge and the absence on another "would be proof positive that the [second] cartridge could *not* have been fired" from the same weapon as the first.

For some guns and some firings, the firing pin impression may not be a clearly defined indentation on an otherwise flat surface. Instead, primer "flowback" may occur: a larger crater is created as the primer material

³However, he cautions that "the arch-producing machine process . . . may not be the final breechface treatment at the factory. The breechface can still be broached, filed, sandblasted, tumbled and/or plated," and residue buildup as a result of firing can obscure the arch markings.

around the pit is forced outward by gas pressure, partially flowing into the aperture in the breech from which the firing pin emerges. Though "flow-back" is commonly attributed to firearms in which excessive pressure can build during firing, Kreiser (1995) suggests other explanations that also correspond to characteristics of the particular make of firearm. Among these is the diameter of the firing pin aperture: the wider the aperture, the more primer surface is unsupported (not positioned directly against another object) during firing and hence more likely to crater outward.

In some firings, the firing pin may scrape against the surface of the primer as it is withdrawn. In these cases, the firing pin impression is not purely a mirror of the shape of the firing pin (e.g., circular) but has a drag mark trailing away from the main impression. Because drag marks may be repeated—that is, they may be a function of the behavior of the firing pin in a particular gun—they become important landmarks for traditional firearms identification and ballistic imaging alike, providing a benchmark to orient casings consistently. It is also important to note that the mechanics of firing is such that there is variability in the exact position where the firing pin impacts the cartridge across different firings; the pin may wobble slightly and strike at slightly different points and angles.⁴

In rimfire weapons, the firing pin strikes the brass of the outer rim of the cartridge head. As Hatcher (1935:68) observed, "[rimfire ammunition] takes a good impression showing the shape of the firing pin, but it does not often take a clear impression of the fine file marks and other irregular scratches on the breech block, which form the 'finger-prints' of the gun." Accordingly, he noted that "when an empty rim fire cartridge is found at the scene of a shooting, it is often easy to say what type of arm was used; but it is seldom possible to identify a rimfire cartridge to a definite individual gun by the impression of the file marks it left on the head, as is so often done in the case of a center-fire cartridge."

Ejector Marks

The ejector arms in automatic or semiautomatic firearms can vary in shape (e.g., rectangular, round, or triangular) and size; the footprint of the ejector determines the size and shape of the mark left by the ejector on the rim of the spent casing. Ejector marks can vary from tiny divots to

⁴Fadal (1995) provides an unusual but vivid example of the difference that placement and angle of the firing pin strike can have on the resulting marks. The Hi-Standard Model DM-101 is a .22 caliber derringer handgun that is double-barreled; however, the same rectangular firing pin is used to initiate the firing in each of the two barrels. The difference in the way the same pin hits the (rimfire) casings in the two barrels—one using the top part of the pin and the other the lower—is sufficiently large that an examiner cannot match firings from one barrel to firings from the second barrel on the firing pin marks alone.

FIREARMS AND AMMUNITION

45

more substantial indents on the cartridge head near the rim. Analysis of ejector marks can be made more difficult by the fact that the rim of the cartridge head is also where ammunition makers put their headstamp (brand identifier) and information on the size and caliber of the cartridge. These heavy-set alphanumeric characters are inscribed on the cartridge brass and—depending on where the ejector happens to hit—parts of the stamp may bleed into the ejector mark.

In addition to the shape of the ejector mark and any individual scrapes or textures therein, ejector marks also serve the same important purpose as a firing pin drag mark: They provide a point of reference for proper orientation of cartridge cases relative to each other in comparison.

Other Markings

During the firing process, gas pressure works on all surfaces, forcing the material of the cartridge against the chamber of the weapon; particularly in semiautomatic weapons, other firearms parts are used to circulate ammunition through the weapon and eject spent casings. These actions and parts can lead to a host of marks on the cartridge case that—though not imaged using current techniques—are sometimes used by examiners studying matches between pieces of evidence.

Chamber marks are parallel striated marks along the outer walls of the cartridge case, impressions from the scraping used to bore or ream the chamber (along with the rest of the barrel) from a solid piece of alloy. The extractor in a pistol that helps move a spent cartridge out of the chamber is typically a small arm that fits over the rim of the casing, holding it as the breech assembly slides backward. Accordingly, the extractor can leave marks where it makes contact, either on the edge of the rim of the cartridge head or on the neck separating the head from the main body. The slide that moves back and forth in semiautomatic pistols, allowing ejected casings to move away from the weapon, may leave a scuff mark on the edge of the cartridge head and a rough drag mark along the cartridge wall. As individual cartridges move from a magazine into chamber, a mark on the outer wall of the case may be caused by the magazine lip.

2-C.2 Bullet Markings

Hatcher's (1935:255) seminal text on firearms identification referred to "the fine ridges and grooves on the surface of the bullet, parallel to the rifling marks," as "the most important individual characteristics which are used" in the field. These marks on the bullet—known as striations or striae—"are caused by its passage over surface irregularities and rough spots on the interior of the gun barrel that got there principally during

the machining operations of reaming the bore and rifling the grooves. Any such machining operation will leave the bore at least slightly rough, and each rough spot will leave a mark on the bullet during its passage through the bore."

The rifling carved into the barrel takes the form of grooves separated by raised areas, known as lands. These lands and grooves create corresponding engraved areas—dubbed land engraved areas and groove engraved areas (and commonly abbreviated as LEAs and GEAs)—on the bullet surface, separated by shoulders. The land engraved areas, being the part of the bullets that scrape against the raised lands on the barrel, are the principal areas of interest for observing striations.

The pattern of land and groove engraved areas on recovered bullets can be used to determine basic information about the rifling characteristics of the gun that fired them, in order to identify a class of guns from which it came. Specifically, the number of lands is an important class characteristic, as is the direction of twist evident from a side view of the bullet. Bullets (and corresponding rifling characteristics) are commonly labeled by these two pieces of information—e.g., 5R for five lands and a right-hand twist. A recovered bullet can also be measured to suggest the caliber of the ammunition and weapon. However, this is not always possible—nor is a full analysis of striation marks—due to the condition of some bullets recovered from crime scenes (and victims).

Bullets fired through weapons using polygonal rifling create special difficulties. Compared to conventional, square-edged rifling, polygonal rifling has key advantages: it reduces metal fouling, and it increases bullet velocity by reducing friction as the bullet passes through the barrel (Heard, 1997:123). However, the smoothness and subtlety of polygonal rifling can make it difficult to discern even gross features on recovered bullets—the shoulders defining lands and grooves—much less fine individual detail. Heard (1997:131) concludes that "generally speaking it is possible, although extremely difficult, to match bullets from polygonally rifled barrels."

2-D THE MANUFACTURING OF FIREARMS AND AMMUNITION

The underlying theory of firearms identification depends critically on manufacturing processes, positing that the tools used to form component parts wear with use so that each part may share the same gross features yet differ in microscopic (and, presumably, uniquely individual) ways. Manufacturing processes are also essential to consider in assessing the costs and benefits of wide-scale ballistic imaging or alternatives such as microstamping. Introducing stages to the process of producing firearms or ammunition—for example, systematic test-firing to produce exhibit cases, imaging of exhibits in large batches, or laser-etching a unique mark on the

base of a bullet—can have major impacts on the cost of production and, perhaps, the feasibility of compliance with proposed changes.

We have already touched on some aspects of manufacturing in describing the anatomy of firearms and ammunition earlier in this chapter, and aspects of manufacture will arise in Chapter 3 as well (particularly in discussing challenging issues for firearms identification, generally). This section introduces basic issues but is not a comprehensive discussion.

2-D.1 Firearms

The manufacturing of most guns is highly automated and generally efficient, and as many as 5 million new firearms (domestic and foreign) enter the U.S. market each year. Befitting its historical development, dating to Samuel Colt's popularization of interchangeable parts and production line assemblies, the modern firearms industry remains one that is characterized by solid process control. That is, the process of mass-producing firearms is one that can be well partitioned: constituent parts of a new firearm can be drawn from large bins of fairly standardized parts and automatically fitted together with low yield loss, resulting in weapons of reasonably identical properties in terms of size, weight, and performance.

Yet individual manufacturers differ on the exact steps used in machining and assembling firearms, and choices on the amount of filing or polishing to do on firing pins or whether to apply paint to the breech face can have an impact on the resulting toolmarks. In addition, some manufacturing techniques affect the type and quality of marks created in firing. Champod et al. (2003:307) argue that "machining marks made by grinding, filing and some other machining methods are random and hence we expect no repeatability between tools." In comparison, "machining marks made by stamping, some cutting processes such as broaching, and some forging processes may be repeatable."

Various manufacturing techniques used by Lorcin Engineering drew interest in the 1990s, as firearms produced by the firm became more widely used in crimes;⁵ they serve as useful illustrative examples. Thompson (1996:95) found two Lorcin L9MM semiautomatic pistols, bought at the same time, that produced sufficiently similar breech face markings that a match could be made to either weapon on that mark alone; they could, however, be distinguished by sidewall and extractor marks. Similarly, Matty

⁵In 2000, the Lorcin L380 semiautomatic pistol was the most traced firearm after recovery from juvenile possessors, and a Lorcin .25 caliber pistol ranked seventh. The L380 was also traced with high frequency after recovery from older offenders, ranked second among firearms recovered from 18–24-year-olds, and ranked third among firearms recovered from adults aged 25 and older (U.S. Bureau of Alcohol, Tobacco, and Firearms, 2002:15–16).

(1999:134) reports on a case where a search on a DRUGFIRE database—an initial competitor to the current Integrated Ballistics Identification System (IBIS) for ballistic imaging (described in Chapter 4)—suggested enough similarity to cause the physical evidence (both test-fired cartridge casings and the recovered Lorcin L9MM that produced them) to be retrieved from storage. On more detailed examination, “the breech face signatures were similar, but there was insufficient detail for an identification”; however, chamber and extractor marks failed to coincide at all.

“The heavy black ‘paint’ that adhered to the breech face” was originally believed to be a cause of this phenomenon (Thompson, 1996:95).⁶ Ultimately, though, it was attributed to the fact that the breech faces for that model being formed by stamping, with no further grinding. In earlier Lorcin models, “the breechface area would become battered during firing as [a relatively soft alloy slide] hit the rim of a cartridge in the magazine as it fed the cartridge into the chamber”; this caused the breech face markings to be unstable and to change from firing to firing (Matty, 1999:135). Lorcin revised its process—in newer models, “a solid stamped steel insert is placed into a non-ferrous alloy slide”—but this stamped steel insert is prone to have marks that “can carry over from one steel insert to another” (Tulleners, 2001:3-4). (This phenomenon is an example of subclass carry-over, discussed in fuller detail in Section 3-B.1.)

More generally, Collins (1997:498) observed that “the bullets and casings of the [Lorcin] L380 [.380 caliber semiautomatic] pistol are easy to characterize. The bullets exhibit slippage⁷ and/or extremely shallow land impressions that often make even shoulder location difficult to determine,” and even “breech face marks are either non-existent or change from shot to shot.” Collins’ specific inquiry into the manufacturing pistol was based on attempting (unsuccessfully) to replicate crescent shaped marks observed in some firings, imprinted directly below the firing pin impression and believed to be caused by peening of the breech face surface under repeated firings.

Another example of manufacturing processes that can directly affect the marks left by firearms and the ability to match them is the button rifling technique used by some manufacturers, notably Hi-Point (Roberge and Beauchamp, 2006:166):

⁶A thick coat of black paint was also judged to be the probable cause of highly similar breech face marks produced by two different 45 ACP Haskell semiautomatic pistols; individual characteristics would emerge on the breech face marks for each gun with repeated firings, as the paint chipped and wore off (Tulleners, 2001:3-4).

⁷“Slippage” means that a bullet does not fully grip the rifling on the barrel interior; hence, it can wobble and shift, rather than following the clear path of the rifling (and having marks carved into the side of the bullet as it passes through).

This process creates the grooves in the barrel by compressing rather than removing the excess material resulting in a relatively shallow barrel groove. Another distinct characteristic of the Hi-Point barrels is the metal tailings left along the shoulder of the groove. The combination of button rifling and metal tailings creates a relatively smooth barrel with very coarse shoulders. With each shot fired, all or part of the metal tailings break off changing the coarse stria on the fired bullet. The shallow rifling also allows a great deal of slippage to occur. Furthermore, the crowning⁸ of these barrels can add additional subclass characteristics.

All newly manufactured firearms are required to bear a unique serial number, and this number may be stamped or etched on various parts of the firearm frame and assembly. However, guns with consecutive serial numbers are generally not consecutively manufactured in full. Production of firearms is typically an assembly line process, drawing various preconstructed parts from large bins for assembly into a finished weapon. Hence, two firearms that bear consecutive serial numbers may have rolled off the line in sequence, but their frames, barrels, firing pins, and so forth need not have been manufactured right after each other. There are some exceptions to this rule; for instance, Lardizabal (1995) found that consecutive serial numbers in a set of Hechler & Koch 9mm USP semiautomatic pistols meant that the slide for these weapons had in fact been consecutively manufactured.⁹

2-D.2 Ammunition

Like firearms, ammunition cartridges are the result of numerous tooling and machining operations, and individual manufacturers vary in the specific techniques they use. It is standard practice for manufacturers to apply a head stamp, engraved on the rim of the cartridge head, to identify the manufacturers and perhaps the specific make of the ammunition; they may also use colored paints or other indicia to differentiate between specific makes and calibers. Ammunition manufacturers also vary in some post-processing steps, such as the application of a lacquer sealant to the primer surface. "Primer sealants are routinely applied to centerfire cartridges to increase the power and reliability of the ammunition," "placed at the junction between the primer and the primer cup [to] create a water and airtight

⁸"Crowning" is a finishing step on the muzzle or discharge end of a barrel, rounding or grinding the mouth so that it is flush or recessed slightly and thus providing no obstacle to the bullet's exit.

⁹Lardizabal (1995:50) found that firings from a set of these pistols with similar serial numbers could not be distinguished from each other by any mark, and this "persistence of detail" continued through 250 firings. A pattern of striations was observed on the breech face itself, above the firing pin hole; this mark appeared to have been created after a chemical finishing process.

seal [and prevent] oil and other foreign matter from entering the cartridge.” The sealant also makes the cartridge resistant to moisture. However, while “most ammunition manufacturers limit the application of the sealant to the junction of the primer and primer cup,” some (primarily European) manufacturers “apply the sealant so that it extends across the entire surface of the primer.” The Czech-made Sellier and Bellot ammunition, in particular, is known for a red lacquer sealant over the entire primer (Hayes et al., 2004:139). The lacquer can act as a cushion, “absorb[ing] and dissipat[ing] a greater amount of energy” when involved in a collision (compared with metals), and consequently “reduc[ing] the amount of energy that reaches the metal surface of the primer” (Hayes et al., 2004:142).

The specific techniques of a manufacturer can combine with more ornamental and postprocessing steps to leave distinctive marks on the cartridge. Box 2-1 reviews these nonfiring manufacturing marks—features that are present on the cartridge before firing and traces of which may endure after firing. In comparing exhibits, firearms examiners must compensate for the presence of these nonfiring marks, lest they lead to a false identification or exclusion. While many of these nonfiring marks are deliberate design choices, others arise inadvertently due to other steps in manufacture. Yborra and McClary (2004) report finding distinct striated markings near the edge of the primer surface on a batch of 115 grain Remington 9mm Luger ammunition. The marks appeared to be due to manufacturing and not firing: when a pair of casings was rotated so that identifying marks in the firing pin impression were in the same orientation, the extractor marks on the cartridges also lined up but the newly found striated marks on the primer surface were 90 degrees out of alignment. Remington managers indicated that they had never previously experienced such a phenomenon but suggested that a possible cause might be the way the primer is seated in the cartridge. Two separate punches drive the primer to its final position about 0.002 to 0.005 inches below the level of the cartridge head; “a misalignment or damage to one of these punches MAY have caused the observed [marks], and being machine-based, would be consistent” (Yborra and McClary, 2004:309). But no such defect could be found; nor could similar marks be detected on other boxes of ammunition from the same lot. The punches used in primer seating were also suspected of causing parallel markings near the edge of the primer on some Winchester 9mm ammunition (Flater, 2002:315); it was also suggested that the die used to flatten the surface of the primer cup could also have impressed such a mark.

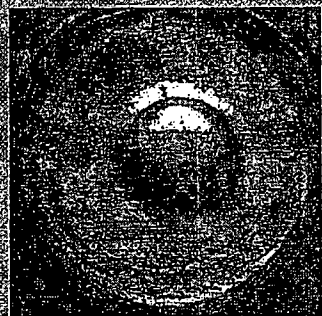
BOX 2-1 Nonfiring Manufacturing Marks

Nonfiring manufacturing marks on ammunition are features created by individual firms' manufacturing processes. They are not defects, in that they do not diminish the ammunition's performance or otherwise detract from the ammunition's quality. However, they may be mistaken for textures or striations created by the firing of a gun or that may complicate the determination of a pattern match between exhibits. Amassing knowledge of these marks—and developing the skill to adjust for their presence—is an important part of the experience of a firearms examiner.

Cataloging these nonfiring manufacturing marks (Jamy 2001) suggests a rough typology based on their impact on the determination of a match between evidence: (1) marks that are not expected to cause a problem for identification (or exclusion); (2) marks that may cause problems but can be compensated for with some effort; and (3) marks that are problematic for comparison and difficult to analyze.

In the first class, there are marks that would easily be overwritten by firing-related marks, as in extremely fine pre-existing parallel marks on the primer surface. Other marks—being relatively simple and known in advance—are not problematic because the examiner can mentally compensate for their presence (e.g., A-V-shaped or other stamped mark on the primer surface used to indicate certain brands). Other marks that may fall into this category are those that are on areas of the cartridge not typically considered for ballistic imaging or routine analysis, such as unique marks on the rim of the cartridge.

For the second class, manufacturing marks that may cause problems, Jamy (2001) suggests that these features can be overcome by simple procedures. Marks in this class include thick striation-like parallel marks across the primer surface; these may obscure texture patterns in the breech face impression and may extend into the firing pin impression. Russian-made Wolf ammunition is well known for these marks, which have also been observed in other ammunition types. An IBIS image (using side light) of a fired round of Wolf ammunition is shown below; most of the visible horizontal parallel marks on the primer surface existed prior to firing.



Side-light IBIS image of fired casing using Wolf ammunition; heavy horizontal lines are preexisting manufacturing marks.

continued

BOX 2-1 Continued

Reitz (1975:103) observed "matchable striations on unfired primers of exhibits from particular lots of Winchester .38 special cartridges. These marks were attributed to a particular punch used during the primer seating process, which had not been produced to the same smoothness as is typically the norm. These markings remained prevalent even after firing, which could be perilous to comparison examinations by unwary examiners." Similarly, Robinson (1996:164) observed Russian-made ammunition with primers that, before firing, "had parallel marks like one might find as a result of breechface impressions." Finding that "the marks continue around the curve of the primer into the sides, which were not visible," he concluded that "the only way that marks could have gotten there was by the rollers in the brass mill where the sheets of brass were made."

The third class of marks (those that are problematic for comparison) include ammunition types with existing distinct parallel and cross marks on the primer surface making difficult to discern when textual features were created by firing. Murray (2004:14) reports on tool marks on the primer surface of Flocchi 25 Auto ammunition whose cause is unknown; the manufacturer suggested that they might be attributed to a rare imperfect configuration of the feeder during the process in which the primer is sealed in the empty shell. The marks were problematic because they were not consistently prominent across the whole primer surface. When, as in the Wolf ammunition tool marks, the markings span the whole primer, an examiner can compensate for them because they can be traced from the face of the primer into the pit of the firing pin impression. Maruoka (1994a; see also Maruoka and Ball, 1995) had previously noted parallel marks on the primer surface of some Flocchi ammunition, but those marks did span the entire surface. But these inconsistent marks offer no such traceability, so that differentiating these marks from breechface marks would be very difficult, if not impossible (Murray, 2004:14). Some ammunition may also bear random marks on the rim of the cartridge that could be mistaken for ejector marks.

3

Firearms Identification and the Use of Ballistics Evidence

This chapter provides a key context for the next part of the report by examining the nature of ballistics evidence itself and the ways it has been analyzed and used over the past century. Since the primary focus in this study is the ability of computer-based systems to discern unique characteristics in ballistics evidence on the basis of images of different sorts, it is useful to first consider how uniqueness and reproducibility of characteristic marks have been discerned through the particular media of the comparison microscope and the human eye.

We briefly describe the general nature of toolmarks as evidence (Section 3-A) and then outline the basic history and theory of firearms identification (3-B). Section 3-C summarizes the literature on the uniqueness, reproducibility, and permanence of marks as detected by traditional methodology. The circumstances of firing a weapon, the manufacture of firearms and ammunition, and measures taken (or not taken) by firearms users can all pose various complications to the identification and linking of ballistics evidence; we review some of these issues in Section 3-D. Section 3-E offers key commentary on the scope of the committee's work in the context of the material in this chapter. The final section (3-F) briefly describes the general role of imaging and photography in firearms identification, as a prelude to the next section of the report.

3-A TOOLMARKS AS EVIDENCE

Various branches of forensic science—dealing with the analysis of evidence as diverse as handwriting samples and soil or mineral samples—are

increasingly compared with one of their sister branches: the analysis of deoxyribonucleic acid (DNA) markers and identification based on those markers. As we note in Section 1-C, the term “ballistic fingerprinting” has also come into common (albeit somewhat inaccurate) usage to describe some features of firearms identification, suggesting a comparison with fingerprint evidence.

Firearms toolmark evidence differs from DNA and fingerprint evidence due to their basic point of reference: the former links to a particular firearm while the latter two link to a particular person. Links between pieces of ballistics evidence can point to a common gun from which exhibits were fired, but not necessarily to the same person pulling the trigger. A potential match suggested by a national reference ballistic image database could suggest a link from a piece of crime scene evidence to an original firearm point of sale, but that link is at least doubly indirect: the link is only to the location of the transaction and not immediately to the firearm’s purchaser, and subsequent identification of the purchaser does not necessarily mean that the purchaser still possesses the gun (or fired the shot in a crime). However, it is important to consider that—alone, absent any other evidence or knowledge of circumstances—even person-specific fingerprint and DNA evidence is necessarily one step removed and indirect. It is possible for fingerprint or DNA evidence to be present and retrievable at crime scenes without its source person having been the crime’s perpetrator. Forensic evidence can be used—in combination with other investigative findings—to develop a theory of what transpired at the scene and who may have committed the crime, but the link to any specific person from the ballistics evidence alone is necessarily indirect.

Toolmark evidence and DNA evidence are markedly different in another crucial respect, which is the subjectivity inherent in the analysis. Firearms identification ultimately comes down to a subjective assessment—specifically, a subjective probability statement (although practitioners often render these as absolute statements). Firearms examiners observe concrete, objective phenomena, but—as Thornton and Peterson (2002:24–25) observe, “there is an incredible amount of difficulty attached to the development of a statistical basis for evidence evaluation” in forensic science fields like firearms examination:

Behind every opinion rendered by a forensic scientist there is a statistical basis. We may not know what that basis is, and we may have no feasible means of developing an understanding of that basis, but it is futile to deny that one exists. . . . The most common and coherent theory of forensic identification is that where there is a high degree of variation among attributes (of toolmark striations, writing, friction ridges on skin, and so on), then where a “match” is observed the probability that the match is

FIREARMS IDENTIFICATION

55

coincidental rather than reflecting a shared source will be very small. . . . Forensic individualization sciences that lack actual data, which is most of them, have no choice but to either intuitively estimate those underlying probabilities and calculate the coincidental match probability from those subjective probabilities, or simply to assume the conclusion of a miniscule probability of a coincidental match (and in fact they do the latter).

In the specific context of firearms and toolmark examination, derivation of an objective, statistical basis for rendering decisions is hampered by the fundamentally random nature of parts of the firing process. The exact same conditions—of ammunition, of wear and cleanliness of firearms parts, of burning of propellant particles and the resulting gas pressure, and so forth—do not necessarily apply for every shot from the same gun. Ultimately, as firearms identification is currently practiced, an examiner's assessment of the quality and quantity of resulting toolmarks and the decision of what does or does not constitute a match comes down to a subjective determination based on intuition and experience. By comparison, DNA analysis is practically unique among forensic science specialties as having a strong objective basis for determination and as being amenable to formal probability statements.

Thornton and Peterson (2002:Fig. 1) rank various forensic science subfields on a continuum of relative subjectivity. On the low end of that scale is DNA analysis, along with serology (blood type determination) and drug and narcotic identification. They identify firearms and toolmark identification as having relatively high subjectivity, on par with fiber identification. They identify blood spatter interpretation, voiceprint analysis, and bite-marks as a group of forensic science specialties just slightly more subjective than toolmark identification, and handwriting and hair identification as a cluster slightly more subjective yet.

3-B TRADITIONAL FIREARMS IDENTIFICATION

Smith (2004:130) succinctly summarized the basic task of a firearms examiner in making an identification between pieces of evidence:

Before a microscopic comparison begins, a foundation is built by measuring and comparing available class characteristics, such as General Rifling Characteristics (GRCs). These objective criteria are used to narrow the pool of candidates for determining a common source. Once an available foundation has been established, a common source often can be determined by evaluating individual microscopic marks of value using pattern recognition.

In traditional firearms identification—part science and part art form, still carried out today using the same basic tools that gave rise to the field

in the 1930s—the firearms examiner faces the formidable cognitive task of forming a mental pattern of identifying marks and features on bullet and cartridge case evidence. That pattern must then be matched to those from other exhibits.¹

3-B.1 Individualization and Identification: Class, Subclass, and Individual Characteristics

The label “firearms identification” is another instance in which language can be a bit elusive. Although “the terms ‘identification’ and ‘identity’ are used constantly by practitioners” of criminalistics, or the forensic analysis of evidence, Kirk (1963:236) argued that the usage is an “unfortunate failure of nomenclature.” Rather than identification (as that term is commonly understood), Kirk argues that “criminalistics is the science of individualization:”

The criminalist does not attempt identification except as a prelude to his real function—that of individualizing. The real aim of all forensic science is to establish individuality, or to approach it as closely as the present state of the science allows. . . . What was actually done was not the identification of the fingerprint, but rather the individualization of a person as the one who left the fingerprint. . . . [Likewise,] if the firearms examiner said that the bullet was a Colt 45 A.C.P. but could not individualize the gun that fired it, his value would be relatively slight.

Thornton and Peterson (2002:8, 9) further differentiate between the two terms: “Individualization is the process of placing an object in a unit category which consists of a single unit. Individualization implies uniqueness; identification, strictly speaking, does not require it.” They also note the frequent use in forensic science of “identification” when “individualization” is meant, but recognized that “it is a constraint imposed by our language”; relying on the term “individualize” would likely lead to public confusion. “It should be appreciated, however, that the process of identification means one thing to the forensic scientist, and another thing to the botanist or the zoologist.” (See also Champod [2000:1077] on “individualization” versus “identification.”)

The phrasing of “individualization” as the act of associating an object

¹Further information on current practice in firearms identification and images connected with that work are available through resources at the Association of Firearm and Tool Mark Examiners (<http://www.afte.org>) and the Scientific Working Group for Firearms and Toolmarks (<http://www.swggun.org>). Additional information and images—and tools for simulating the use of the comparison microscope for comparing bullet and cartridge evidence—are accessible at <http://www.firearmsid.com>.

FIREARMS IDENTIFICATION

57

with a category that contains only one unit is a useful one in addressing the basic approach of firearms examination. Firearms examiners typically give testimony to the effect that *this particular gun*, and not any other gun in the world, was used to fire particular shots. Yet even in the profession's earliest days, Hatcher (1935:266) anticipated a common reply to this type of argument:

The firearms witness may expect to be asked how he can be sure of his findings, in view of the fact that he can have examined only a few of the countless thousands of guns that exist. But how does [an eyewitness to the crime] that identified the prisoner know that some other person may not look exactly like him? He will say that he has seen enough people in his life to know that the rule is that all people look different, and that the chances are overwhelmingly against finding two people who look so much alike that they cannot be told apart.

In precisely the same way, the firearms expert, who admittedly cannot have actually examined more than the tiniest fraction of a percent of all the guns in the world, can still have had enough experience to be well aware of what differences do occur, and to know that the chance of finding two bullets from different guns that are exactly alike in every detail of their surface markings is infinitesimally small. The same thing applies with equal force to the finger-print method of identification.

Subsequently, he posited this idea more succinctly: "It may be quite common for two or more prominent individual marks on bullets from two entirely different guns to match exactly, but the chance that there will be a correspondence of a great many of the individual characteristic marks on two bullets that came from different guns is so remote as to amount to a practical impossibility" (Hatcher, 1935:288).

The basic approach to identification in forensic science developed into the concept of *class characteristics* and *individual characteristics*. Thornton and Peterson (2002:5-6) define these concepts:

Class characteristics are general characteristics that separate a group of objects from a universe of diverse objects. In a comparison process, class characteristics serve the very useful purpose of screening a large number of items by eliminating from consideration those items that do not share the characteristics common to all the members of that group. Class characteristics do not, and cannot, establish uniqueness. Individual characteristics, on the other hand, are those exceptional characteristics that may establish the uniqueness of an object. It should be recognized that an individual characteristic, taken in isolation, might not in itself be unique. The uniqueness of an object may be established by an ensemble of individual characteristics. A scratch on the surface of a bullet, for example, is not a unique event; it is the arrangement of the scratches on the bullet that mark it as unique.

In the context of examining bullet and cartridge case evidence, such parameters as caliber and the number of lands and grooves are class characteristics that can be used to screen or filter out possible comparisons that could not possibly have been fired from the same gun. Other class characteristics include firing pin shape (for instance, the distinctive rectangular firing pin impressions left by Glock firearms²) or pronounced "drag marks" that can be caused by firing pins as the cartridge case goes through the ejection process. Individual characteristics—the fine striations on a bullet's surface or peculiar microscopic textures in the firing pin impression, for instance—allow for the set of possible guns from which an exhibit could have been fired to be narrowed.

However, a binary split between class and individual characteristics proved too limited to describe the full range of phenomena observed by experienced examiners. In 1985, the Association of Firearm and Tool Mark Examiners (AFTE) convened a committee to develop a consensus document on a theory of toolmark identification and a range of basic conclusions that could be reached from comparison of toolmark evidence. The result, produced in 1989 and unanimously approved by the organization's membership, is reproduced in Box 3-1. Importantly, the 1989 standard also added a new term to the firearms identification lexicon: *subclass characteristics*, defined as follows (Moran, 2002:228):

Discernable surface features of an object, which are more restrictive than "class characteristics" in that they are

- Produced incidental to manufacture
- Significant in that they relate to a small group source (a subset of the class to which they belong)
- Can arise from a source which changes over time

Caution should be exercised in distinguishing subclass characteristics from individual characteristics.

As a middle ground between class and individual characteristics, subclass characteristics covered marks or features that—arising from specific manufacturing techniques, or flaws in said techniques—could induce similar marks on pieces of evidence even though they originated from different

²Rectangular firing pin marks were a telltale sign of Glock pistols "prior to the introduction of Smith & Wesson's Sigma Series, Model SW40F, semi-automatic pistol," the design of which is very similar to Glock standards. Nichols (1995:133, 134), in documenting the similarity between this firearm's marks and the known Glock characteristics, notes that the two highly similar gun types can be distinguished by ejector and extractor marks, as well as a characteristic "dimple on the [casing] head above the firing pin drag" on Glock rounds.

BOX 3-1
Association of Firearm and Tool Mark Examiners (AFTE)
Theory of Identification and Range of Conclusions

Theory of Identification as It Relates to Toolmarks

- A. The theory of identification as it pertains to the comparison of toolmarks enables opinions of common origin to be made when the unique surface contours of two toolmarks are in sufficient agreement.
- B. This "sufficient agreement" is related to the significant duplication of random toolmarks as evidenced by the correspondence of a pattern or combination of patterns of surface contours. Significance is determined by the comparative examination of two or more sets of surface contour patterns comprised of individual peaks, ridges, and furrows. Specifically, the relative height or depth, width, curvature, and spatial relationship of the individual peaks, ridges, and furrows within one set of surface contours are defined as compared to the corresponding features in the second set of surface contours. Agreement is significant when it exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with the agreement demonstrated by toolmarks known to have been produced by the same tool. The statement that "sufficient agreement" exists between two toolmarks means that the agreement is of a quantity and quality that the likelihood another tool could have made the mark is so remote as to be considered a practical impossibility.
- C. Currently, the interpretation of individualization/identification is subjective in nature, founded on scientific principles and based on the examiner's training and experience.

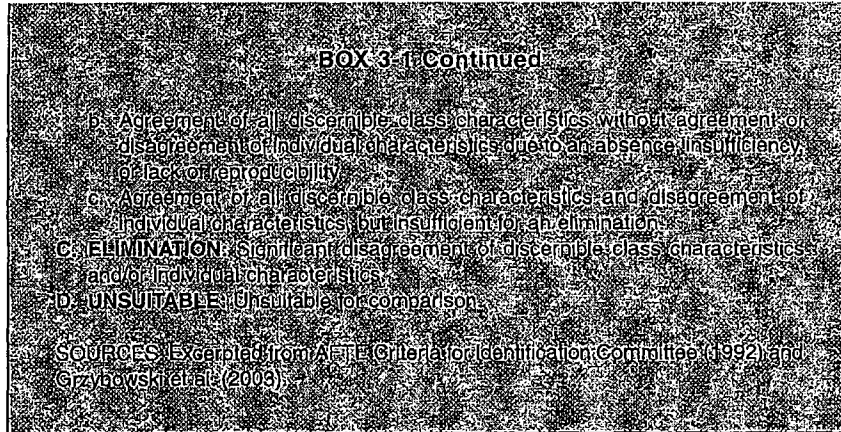
Range of Conclusions Possible When Comparing Toolmarks

The examiner is encouraged to report the objective observations that support the findings of toolmark examinations. The examiner should be conservative when reporting the significance of those observations.

The following represents a spectrum of statements:

- A. IDENTIFICATION:** Agreement of a combination of individual characteristics and all discernible class characteristics where the extent of agreement exceeds that which can occur in the comparison of toolmarks made by different tools and is consistent with the agreement demonstrated by toolmarks known to have been produced by the same tool.
- B. INCONCLUSIVE:**
 - a. Some agreement of individual characteristics and all discernible class characteristics, but insufficient for an identification.

continued

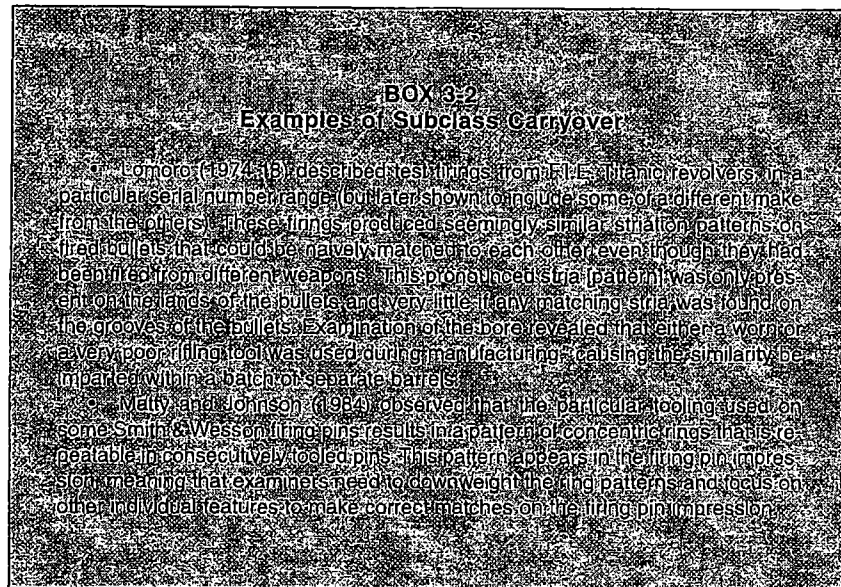


sources. Two examples of carryover of subclass characteristics are described in Box 3-2.

The AFTE theory of identification is rooted in the recognition that “the interpretation of individualization/identification is subjective in nature.” However, it melds that recognition with more objective, quasi-quantitative benchmarks—“sufficient agreement,” “significance,” “likelihood . . . so remote,” and agreement in both “quantity and quality”—but no specific empirical definition is given for these terms. Importantly, the AFTE theory does set up two cognitive thresholds that must be crossed in order to arrive at the conclusion that two exhibits share the same source, to the exclusion of all others. In describing the comparison of fingerprints, Stoney (1991; quoted in Moran, 2002:233) wrote of the basic cognitive process:

When more and more corresponding features are found between two patterns, scientists and lay person alike become subjectively certain that the patterns could not possibly be duplicated by chance. What has happened here is somewhat analogous to a leap of faith.³ It is a jump, an “extrapolation,” based on the observation of highly variable traits among a few characteristics, and then considering the case of many characteristics. Duplication is inconceivable to the rational mind and we conclude that there is absolute identity.

³The “leap of faith” involved in extrapolating to all possible sources in the world was echoed, in specific reference to firearms identification by Rowe (1991). Understandably, some firearms examiners have objected to some overtones of the “leap of faith” phrasing; for instance, Miller and McLean (1998:17–18) “respond [to the phrasing] by stating that the published data which does exist, certainly presents enough statistical data to indicate more substance to the identification theory than a ‘leap of faith.’”



He continues that this “leap” occurs—in fingerprinting, as in other branches of forensic science, “without any statistical foundation.”

In a sense, the AFTE theory of identification requires two extrapolations: first, that marks are sufficiently consistent with true matches (produced by the same tool) to have come from the same source, and, second, that the quality and similarity of corresponding features exceed the best known apparent agreement between true nonmatches (produced by different tools). It follows that both of these extrapolations—but particularly the latter—require considerable experience in comparing exhibits and training in recognizing significant features.⁴

3-B.2 Historical Evolution

Some of the major advances in the field of traditional firearms identification are described in Box 3-3. Calvin H. Goddard, a founder of the Bureau of Forensic Ballistics in the New York City Police Department, is typically credited as the “father” of forensic ballistics in the United States;

⁴Biasotti and Murdock (2002:219–220) advocated the addition of the known nonmatch criterion, beginning with their conclusion in 1984 that “existing research was insufficient to validate the quantitative objective criteria necessary to conclude that a working surface is unique.” The known nonmatch criterion “added a quantitative dimension” to the mix.

BOX 3-3

Highlights in the History of Traditional Firearms Identification

1900: The *Buffalo Medical Journal* published "The Missile and the Weapon" by Albert L. Hall, commenting on his observations that firearms of different mark impart different striated marks and impressions on fired bullets.

1907: 30 cartridge case evidence was examined as part of the investigation of the 1906 Brownsville, Texas, riots in which black soldiers allegedly fired upon a white crowd in retaliation against racial slurs. Thirty-nine cartridges were recovered; all but six were matched to four rifles, based on examination of enlarged photographs of firing pin impressions. (Examiners concluded that no identifications could be made on the basis of recovered bullet evidence.)

1916: Charles Stielow, an illiterate farmer in New York state, was convicted and sentenced to death for killing his employer and the employer's housekeeper in a slaying of whom was found dead on the door step of Stielow's nearby home. Stielow's conviction was due in part to testimony by an examiner who claimed to find nine abnormal scratches on the recovered bullet that corresponded to particular defects in the alleged murder weapon. However, a more careful subsequent analysis of the evidence by Charles Waite concluded that Stielow's revolver could not have been the murder weapon. Stielow was pardoned and released from prison.

1925: Philip Gravelle was credited with the development of the comparison microscope for side-by-side comparison of ballistic evidence. In Calvin Goddard's article "Forensic Ballistics" in *Army Ordnance*, Goddard used the technique in the article, and the comparison microscope technique grew in popularity after the *Saturday Evening Post's* two-part "Finger-Printing Bullets" article. In 1926 profiled New York City's Bureau of Forensic Ballistics, which Goddard, Gravelle, and Waite helped found.

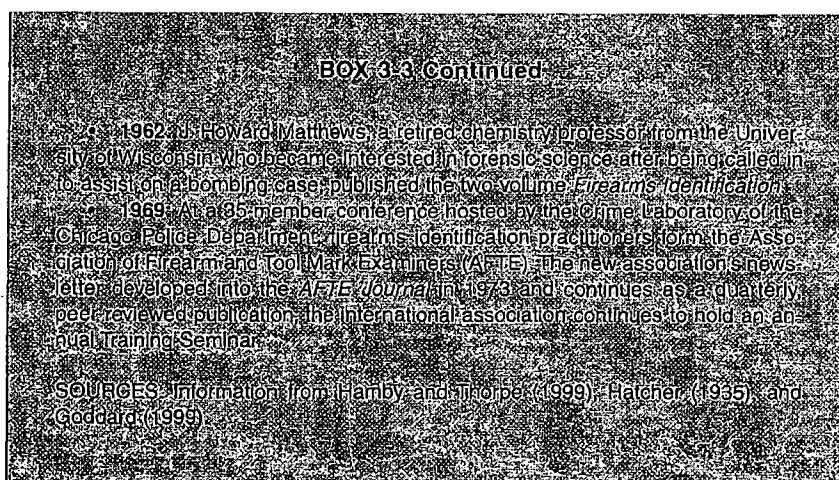
1929: On February 14, six members of George "Bugs" Moran's North Side gang (and one acquaintance) were brutally killed in a Chicago warehouse by six men impersonating police officers, believed to be operatives of rival Al Capone's South Side gang. In what quickly became known as the St. Valentine's Day Massacre. As part of the investigation, Goddard prepared a detailed examination of recovered bullet and cartridge case evidence, connecting them to two Thompson submachine guns and a 12-gauge shotgun. Goddard—considered the father of modern firearms examination—subsequently left New York City to establish the Scientific Crime Detection Laboratory of Chicago, affiliated with Northwestern University.

1934–1935: First editions of two seminal texts on firearms examination were published: Gerald Burrard's *The Identification of Firearms and Forensic Ballistics* and Julian Hatcher's *Textbook of Firearms Investigation, Identification and Evidence*.

1956: John Davis' *An Introduction to Tool Marks, Firearms and the Striagraph* argued for the use of the striagraph, an early tool for direct measurement of the surface contours of ballistic evidence. Though the striagraph never advanced beyond the research stage, it was a precursor to the use of imaging and profilometry techniques for firearms identification.

FIREARMS IDENTIFICATION

63



the text by Hatcher (1935) is generally considered the text on which the modern field of firearms and toolmark examination is based (Nichols, 2003).

The modern field of firearms identification owes much to the development of the comparison bridge, a system of mirrors or prisms that permits the views from two separate microscopic lenses to appear side by side in the same field of view. The device equipped with this optical bridge, called the comparison microscope, was not designed for analysis of bullet or cartridge case evidence, nor was it first used in such forensic applications (see, e.g., Thornton, 1978; Goddard, 1980). Even early advocates of forensic firearms analysis cautioned against making too much of the technology at hand, noting that the comparison microscope, on its own, has limitations. Foreshadowing some contemporary claims about the capability of ballistic imaging systems, Burrard (1962:131–132) lamented:

The most fantastic claims have been put forward for, and the most ridiculous descriptions of, [the comparison microscope] which are enough to suggest that it has magical properties, and that it automatically, and wholly of its own accord, rings a bell or utters some similar warning, when the two cartridge cases under examination exhibit the same [individual markings]. Unhappily there is no foundation for this comforting belief. In the hands of a trained microscopist the comparison microscope can be of great value in determining the identity of fired bullets; but for cartridge cases I have come to the conclusion that a high-class single instrument is preferable. . . . And even for fired bullets the comparison microscope offers

difficulties in illumination which are never encountered when using a single instrument, for the illumination of opaque objects such as the surfaces of fired cartridge cases and bullets is a far more difficult problem than the illumination of transparencies, fibres or spermatozoa.

Nevertheless, the application of the comparison microscope to firearms evidence analysis led the field of firearms identification to flourish and reinforced the analysis of ballistics evidence as a critical part of criminal investigations.

In recent years, as the increased workload of state and local law enforcement forensic laboratories has created a shortage of firearms examiners, placing increased attention on the training and recruitment of examiners. Noting that "there is no college degree a firearms examiner can pursue to reach true proficiency in firearms identification," and that the core of training activities consists of "extended on-the-job training," the Bureau of Alcohol, Tobacco, and Firearms (ATF) established a National Firearm Examiner Academy in 1998. The original plan for the academy was for a "16-week intensive program . . . to train candidates to become apprentice firearms examiners" and a pairing of apprentice examiners with participating law enforcement agencies (Ethridge, 1998:703, 704).

3-B.3 Pattern Matching and "Line Counting"

Traditional firearms examination is, fundamentally, one whose central task is pattern matching.⁵ Moran (2002:227) summarizes the approach:

Toolmark examiners (and examiners in other comparative evidence disciplines) in the United States approach the interpretation of evidence by employing a combination of their cognitive ability to recognize agreement between patterns that in their "minds eye" constitutes an identification or "match" between a questioned pattern or toolmark and toolmark patterns produced from known tools. . . . This traditional "pattern match" approach (for a lack of a better term) relies on art (the cognitive ability to recognize agreement of pattern) and science (supporting the uniqueness of tool surfaces as a means to establishing an identification between a questioned toolmark and the tool that produced it).

Hayes et al. (2004:139-140) add: "In traditional pattern recognition methodology, the details used to determine a match include the height,

⁵Technically, "pattern matching" in forensic science may further be differentiated into two categories, pattern fit and pattern transfer. Pattern fit is akin to a jigsaw puzzle, determining whether pieces or fragments of some object were once part of a whole object. Firearms toolmarks follow the pattern transfer form, in which patterns are created by the interaction of more than one object (Biasotti and Murdock, 2002:208).

FIREARMS IDENTIFICATION

65

weight, depth, spatial relationship and consecutiveness of the class and individual characteristics. When viewed as a whole, these components become significant."

Pattern matching—aided by the dual, side-by-side inspection made possible by the comparison microscope—has been the historical norm since the field of firearms identification emerged into prominence in the 1930s. As the AFTE theory of identification indicates (Box 3-1), the standard of identification is "currently . . . subjective in nature." In the late 1950s, two important developments were made in order to provide the field with a more objective and quantitative basis. The first, mentioned in Box 3-2, was the development by Davis (1958) of an instrument he called a "striagraph" to quantitatively measure the microscopic markings left by firearms on bullets and cartridge cases. The striagraph made traces of the contours of a bullet's surface using a stylus to record depth. Though the instrument was never developed commercially, it marked the first attempt to develop an explicit "signature" from pieces of evidence for comparison with each other, foreshadowing the signatures that are the basis of today's ballistic imaging systems.

A more significant development was a study by Biasotti (1959) that formed the foundation for what is now known as the consecutive matching striations (CMS) approach to identification. Nichols (2003:299) relates that this approach has developed and emerged to the point that a "fray appears to have developed within the discipline," pitting "the old school tradition of 'pattern matching' versus the new school of 'line counters.'"

Biasotti's (1959:34) work was motivated by what he described as "an almost complete lack of factual and statistical data pertaining to the problem of establishing identity in the field of firearms identification." Accordingly, he sought to "conduct a direct statistical count of the elements which actually form the basis of the identity; e.g., the individual characteristics;" he did so using a set of test firings from .38 Special Smith & Wesson revolvers. For each pair of bullets, Biasotti (1959:37-44) conducted a complete inventory of all striations; from this inventory, he noted that same-gun bullets yielded a greater number of corresponding marks than different-gun bullets, but he cautioned that a simple percentage of matching lines is an inappropriate measure of similarity:

The average percent match for bullets fired from the same gun ranged from 36 to 38% for lead bullets and from 21 to 24% for metal-cased bullets. For bullets fired from different guns . . . 15 to 20% matching lines per land or groove mark was frequently found. Relatively speaking, this data indicates that even under such ideal conditions [as the experimental test firings] the average percent match for bullets from the same gun is low and the percent match for bullets from different guns is high, which

should illustrate the limited value of percent matching lines without regard to consecutiveness. As frequently happens in actual practice, when there is a preponderance of non-matching lines and only a few land and groove marks available for comparison, the total number of matching lines is often no higher or even less than the number which could occur. [These results, along with those of Burd and Kirk (1942) on toolmarks generally] should dispel the erroneous conception of the "perfect match" which is actually only a theoretical possibility and a practical impossibility.

What Biasotti (1959:44) found compelling, though, was evidence of runs or series of consecutive matching striations:

It should be obvious that consecutiveness; viz., the compounding of a number of individual characteristics, is the very basis of all identities. When individual characteristics are grouped or related by the criteria of consecutiveness, which is a simplified means of expressing a correspondence of contour, the chance occurrence of even a very small number of consecutive matching lines (e.g., more than 3 or 4) is for all practical purposes impossible except as the result of a common agent, e.g., same gun.

Based on subsequent research, Biasotti and Murdock (2002:224–225) formalized a set of "conservative quantitative criteria for identification:"⁶

(1) In three-dimensional toolmarks when at least two different groups of at least three consecutive matching striae appear in the same relative position, or one group of six consecutive matching striae are in agreement in an evidence toolmark compared to a test toolmark.

(2) In two-dimensional toolmarks when at least two groups of at least five consecutive matching striae appear in the same relative position, or one group of eight consecutive matching striae are in agreement in an evidence toolmark compared to a test toolmark.

For these criteria to apply, however, the possibility of subclass characteristics must be ruled out.

These criteria differentiate between three-dimensional marks, which Biasotti and Murdock (2002:208) characterize as contour or impression, and two-dimensional marks, described as surface or imprint. That is, two-dimensional marks are "striae lacking depth and therefore appearing two-dimensional" (Biasotti and Murdock, 2002:224), giving rise to the "line

⁶The Biasotti and Murdock criteria were first published in 1997; no changes were made in 2002, though it was noted that in the intervening years "no known non-matching (two- or three-dimensional) toolmarks were found in [any follow-up] studies which exhibited agreement" of the conservative criteria (Biasotti and Murdock, 2002:225).

counting” appellation that has been applied to CMS methods. Recently, as surface metrology techniques have been applied to studying bullets—particularly the development of a three-dimensional-analysis system for bullets by the manufacturer of the Integrated Ballistics Identification System (IBIS) currently in use—this distinction has come under some question (see, e.g., Thompson, 2006). Striated toolmarks necessarily have depth, however slight; the availability of detailed measures of surface contours invites the question of significance levels in determining whether corresponding striations match. (We revisit the two-dimensional and three-dimensional distinction in Chapter 7.)

3-B.4 Legal Context of Firearms Examination

In order to testify to their findings at trial, firearms experts are subjected to qualifying questions in the *voir dire* process. If they are favorably ruled on by the trial court judge, the expert must testify to matches (or nonmatches) of ballistics evidence based on what is ultimately a subjective assessment. Molnár (1970:39) described the pressures that come with that task:

[Serious criminal] cases very often never get off the ground until the firearms examiner has made a finding, which incidentally has to be correct, at which time the police file charges and the wheels of justice begin to grind. There is no second or reanalysis to be made, no excuses, no bad or spoiled reagents. The examiner’s area of conclusions is more often either black or white, hardly ever the grey area enjoyed by other criminalists. Others may come along to say that he was wrong, or that they can’t arrive at the same conclusion, but the firearms examiner has to be RIGHT and has to say so FIRST.

Consequently, firearms examiners may often express their findings in bold absolutes—matches made to the same gun, to the exclusion of all other firearms in the world—yet they tend to be conservative in reaching their opinions. If a firearms examiner is impeached through the *voir dire* process, his or her ability to testify in other cases can be severely affected; being associated with an error or misidentification can tarnish reputations. Thornton and Peterson (2002:21) argue that this belief—which they note “is not entirely without justification”—makes forensic science, in general, resistant to proficiency testing of examiners; “the potential exists that in court, counsel for the opposing side will in a self-serving fashion misconstrue, pervert and abuse a missed proficiency test.” The AFTE range of conclusions (Box 3-1) envisions four possible outcomes when an examiner is asked to compare pieces of evidence. Regardless of which of these options the examiner deems

fit after careful consideration, it is in keeping with the nature and weight of their testimony—and the adversarial nature of courtroom questioning—that their findings are expressed as unequivocal and unyielding.

An examiner's conviction in the findings about the interrelationship of evidence, and the basic admissibility of that evidence in court, depends critically on the careful maintenance of the "chain of evidence." This begins at the crime scene itself, where the site must be preserved until an evidence technician can collect it in a safe and timely manner, maintaining its integrity. Collected evidence must not be allowed to be contaminated, lest its credibility be undermined; physical custody must be maintained and monitored throughout the laboratory examination, and processing steps should not be destructive or injurious to the physical evidence. Any break or delay in the sequence of events, or any miscommunication, may lead investigations to stall, crimes to remain unsolved, and prosecutions to lose key support.

Like other branches of forensic science, firearms and toolmark identification has had to grapple with the question of how well the field fits emerging standards for scientific evidence in legal proceedings. In 1923, *Frye v. United States* (293 F. 1013, DC Cir) observed that:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The ruling established a "general acceptance in the field" standard that became the basis for subsequent decisions.

In 1993, the U.S. Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals* (509 U.S. 579) concluded that the legislatively enacted Federal Rules of Evidence superseded the *Frye* "general acceptance" standard. Justice Harry Blackmun's majority opinion tasked judges with a gatekeeper role, "assess[ing] whether the reasoning or methodology underlying the testimony is scientifically valid [and] whether that reasoning or methodology properly can be applied to the facts in issue." More concisely, the task is the assessment of reliability and relevance. Though the opinion expressly noted that "we do not presume to set out a definitive checklist or test," it also identified five criteria for reliability that have since become known as the *Daubert* standard: (1) "whether the theory or technique has been subjected to peer review and publication," (2) "whether it can be (and has been) tested" or falsified, (3) the techniques "known or potential rate

FIREARMS IDENTIFICATION

69

of error,” (4) “the existence and maintenance of standards controlling the technique’s operation,” and (5) the *Frye* criterion of “general acceptance” by the scientific community. Due to its grounding in the Federal Rules of Evidence, the *Daubert* standard is not binding on individual states, about half of which continue to use the *Frye* test.

Branches of forensic science like toolmark evaluation are increasingly concerned with how their fields fit either standard, cognizant that the precedent of a single ruling of inadmissibility could jeopardize future proceedings. That question has grown ever greater with the Florida Supreme Court’s December 2001 ruling in *Ramirez v. State of Florida* (No. SC92975). In that ruling, the court reversed the 1983 murder conviction (and death sentence) of Joseph Ramirez by excluding testimony on the toolmarks left by the knife on human cartilage. The ruling summarized the critical issue under review:

Ramirez asserts that the trial court erred in allowing the State’s experts to testify that the knife found in Ramirez’s car was the murder weapon to the exclusion of every other knife in the world. He contends that [the toolmark examiner’s] identification method is novel and untested and the State has failed to present sufficient proof of its reliability.

Moran and Murdock (2002:215) note that the court “reviewed testimony of five AFTE members who provided traditional justification for the identification of striated toolmarks throughout these proceedings based only on qualitative criteria established through ‘training and experience.’ The court found that these explanations did not satisfy Florida’s rigorous [*Frye*] standards for *reliability*.”⁷ The court’s ruling concluded that “the record does not show that [the examiner’s] methodology—and particularly his claim of infallibility—has ever been formally tested or otherwise verified, [nor has it] ever been subjected to meaningful peer review or publication.” They concluded further that that the examiner’s claim of a match lacked documentation or substantiation and that “the error rate for [the examiner’s] method has [never] been quantified.”

For reviews in the firearms examiner literature on the applicability of *Daubert* criteria in the field, see Grzybowski and Murdock (1998) and Rosenberry (2003), among others. More recently, Schwartz (2005) extends what was originally an *amicus curiae* brief into a fuller argument as to why firearms and toolmark evidence should be ruled inadmissible in legal proceedings, to which Nichols (2005) offers a response.

⁷Florida is one of the states in which the courts have elected to continue applying the *Frye* “general acceptance” criterion rather than the *Daubert* standard. However, as the quotations from the ruling suggest, the *Ramirez* court considered elements of the *Daubert* criteria.

3-C UNIQUENESS, REPRODUCIBILITY, AND PERMANENCE OF MARKINGS IN TRADITIONAL FIREARMS IDENTIFICATION

In recent years, several review articles have summarized the findings of individual studies on the basic principles of firearms and toolmarks—the uniqueness, reproducibility, and permanence of individual characteristics, as seen by trained examiners using comparison microscopy. Most of these studies are limited in scale and have been conducted by firearms examiners (and examiners in training) in state and local law enforcement laboratories as adjuncts to their regular casework. The review articles attempt to piece together major themes from decades of such studies, most having been published in the *AFTE Journal* but also in other forensic science publications. Nichols (1997, 2004) contributes a two-part narrative with the goal of characterizing the state of the field. Bonfanti and De Kinder (1999a, 1999b) review a broad array of experimental studies—on the influence of manufacturing techniques (e.g., consecutive tooling) and the endurance of marks over repeated firings, respectively—distilling the studies as entries in extensive summary tables. We draw from these review papers in this section and excerpt additional detail from individual studies, as appropriate.

3-C.1 Uniqueness of Markings

A fundamental assumption in firearms identification is that individual firearms vary microscopically in ways that leave unique markings on bullet and cartridge case evidence. Accordingly, the “gold standard” for demonstrating the uniqueness of toolmarks in ballistics evidence would be sets of firearms that are consecutively manufactured—that is, more than one gun where every constituent part is subjected to identical tooling and machining operations (e.g., minimizing the wear on cutting tools between different pieces). This is difficult to achieve in practice given the assembly-line nature of firearms manufacturing, where individual parts may be made in advance (and not necessarily at the same facility) and are drawn from bins prior to assembly. Due to the time and manufacturer cooperation needed to ensure consecutive manufacture, those studies that have been done—as summarized by Bonfanti and De Kinder (1999a)—deal with small numbers, typically less than 15.⁸ It is also typically the case that only one part (or

⁸One entry in the tables in Bonfanti and De Kinder (1999a) stands out: amidst studies with small numbers of firearms with some level of consecutively manufactured parts, Grooß (1995) is reported as having examined 3,704 Walther P5 pistols. The entry is misleading in its placement in the tables—Grooß makes no claim of consecutive manufacturing or serial numbering—but the study is still interesting as a case study of a wide-scale search of evidence using conventional microscopy rather than being assisted by imaging methodology; see footnote 17 in this chapter.

very few) of the guns in these studies are consecutively manufactured—e.g., consecutively reamed barrels or machined breech faces.

Several of the studies documented by Bonfanti and De Kinder (1999a) deal with firearms that have sequential serial numbers. That is, the weapons effectively came off of the assembly line consecutively. Lutz (1970:24) reiterated that “mere serial number sequence has no significance [in assessing the similarity of firearms], because firearm manufacturers usually have assembly line procedures that join the various weapons parts, without regard to actual manufacturing sequence.” Still, depending on the manufacturer and where in the process serial numbering occurs, guns that have similar serial numbers may have at least some components that were manufactured in close temporal proximity; hence, it remains popular as a weak proxy for consecutive manufacture.⁹

Bonfanti and De Kinder (1999b:Table 1) profile 27 separate studies of bullets from firearms with some indication of consecutive manufacture (or close serial numbering); these studies spanned a variety of calibers and barrel rifling techniques.¹⁰ From their review, they conclude that “for all types of rifling no problem occurs concerning the identification of the individual firearm if certain criteria are followed.” Some firearms cannot be identified correctly solely by examination of the bullets (e.g., Churchman, 1981; Lomoro, 1974; Matty, 1985), but Bonfanti and De Kinder (1999b:5) explain some of these results through their suggested criteria: “correspondence between fine striation lines in (the central part) of the land impressions must be sought,” as striations on the edges of the land engraved areas or in the groove engraved areas “may display subclass characteristics” that could be confused with individual features. For instance, Lomoro’s (1974:18) test firings from different but close serial-numbered F.I.E. Titanic revolvers were very similar in groove markings but more readily distinguishable by markings in the land areas. Among more recent efforts, Brundage’s (1998) set of 10 consecutively rifled Ruger barrels is prominent because it was conducted as a blind study—that is, a test set of firings from the barrels, without indication of the circumstances of the underlying barrel manufacture, was given to various firearms examiners for comparison. More recently, a set of bullets fired through consecutively manufactured Hi-Point

⁹This concept arises in discussing experimental results in Chapter 8. In addition to being a weak proxy for consecutive manufacture, sequential serial numbers may also suggest large batch purchases of firearms, such as the deployment of new duty firearms among police officers. In our analyses of the New York CoBIS reference ballistic image database, we encounter runs of consecutively serial-numbered firearms with similar IBIS comparison scores.

¹⁰This count excludes the Grooß (1995) study (see footnote 8 in this chapter) and the Biasotti (1959) study profiled in Section 3-B.3, neither of which made explicit claims of consecutiveness. They are included in the Bonfanti and De Kinder (1999b:Table 1) table but have no entry in the “Particularity” column.

barrels (described in Beauchamp and Roberge, 2005), has become a similar proficiency test of sorts.

For markings on cartridge cases, Bonfanti and De Kinder (1999b: Table 3) summarize 13 studies with some indication of consecutive manufacture.¹¹ The conclusion that they derive from these studies is more nuanced than for bullets: "Depending on the firearm that was used, different results were used [and] in a number of cases a correct identification was difficult to perform." Among these problematic cases were the studies of Matty and Johnson (1984), Uchiyama (1986), and Lardizabal (1995), which we describe elsewhere in this chapter and in Chapter 2. Bonfanti and De Kinder found it hard to classify these problematic cases by manufacturing technique, but offered as "a probable solution to this problem" a common theme that recurred in several of the studies. Specifically, individual examiners noted remarkable similarities on some of the marks but found that they could make identifications using the full range of markings on the cartridge cases, not just the firing pin impression or breech face mark. Hence, Bonfanti and De Kinder (1999b:5) suggested making use of all applicable marks, including ejector and extractor marks, since "it is less likely that all these parts are manufactured consecutively and that they all bear subclass characteristics."

3-C.2 Reproducibility and Permanence of Markings

To be useful for identification, the characteristic marks left by firearms must not only be unique but reproducible—that is, the unique characteristics must be capable of being deposited over the multiple firings so that they can be found on recovered evidence and successfully compared with those on other items. This requirement is not the same as saying that every individual mark must be registered with equal clarity on every firing; as described in Chapter 2, the firing process depends on combustion processes and gas pressures that are inherently variable, and so will influence the exact conditions under which marks are imparted from shot to shot. But it is crucial to the theory of firearms identification that the unique marks of a firearm have a certain endurance (if not permanence) and do not change from shot to shot or change as the gun is subjected to increasing levels of wear.

Bonfanti and De Kinder (1999a) summarize 10 studies from the firearms identification literature that addressed the effect of wear or repeated use of a firearm on the markings it left on evidence; most of the studies con-

¹¹Again, this excludes Grooß (1995), which is listed in the Bonfanti and De Kinder table, as well as a few other studies in which the firearms parts in question are described as being randomly selected from production runs.

FIREARMS IDENTIFICATION

73

centrated on the effect on the striations left on bullets, while four included consideration of the markings left on cartridge cases. The numbers of shots fired in these studies range from 20 to 5,000.

From the 10 studies, Bonfanti and De Kinder (1999a:319, 321) conclude that the major cartridge case markings are relatively less vulnerable to change: "no substantial change in characteristics left by the breech face of the weapon can be discerned" over repeated firings; firing pin impressions and extractor marks are subject to "slight variations," while "in one study the ejector marks were seen to vary more strongly." Bullets, by comparison, showed more dramatic effects due to wear; this is not greatly surprising given that a firearm's barrel is subject to the most fouling (deposition of firing residue) and the most metal-against-metal scraping (as the bullet travels out of the barrel) of the firearm's internal surfaces. "Changes consist of disappearing fine and coarse striation lines," with the fine striations being more variable over time than the coarser. The composition and design of the bullet makes a great difference; simple lead bullets may be unmatchable to a first shot after 50 firings while the identifying stria left on jacketed bullets have been observed to endure for 500 or 5,000 shots.

Most of these studies either compare the first to the last firings in sequence or focus on a sample of the firings: for instance, the Ogihara et al. (1989) study retained 69 bullet and cartridge case sets from the total of 5,000 firings, and their major conclusions concern the comparison between firings 1 and 5,000.¹² Likewise, Hamby (1974) retained bullets from firings 1, 101, 201, 301, 401, and 501 from a M16A1 rifle; these were compared with each other in sequence (e.g., 1 to 101 and 101 to 201), as well as comparing shot 1 to shot 501.¹³

More recently, Vinci et al. (2005) examined a set of exhibits consisting of every 100th round in a sequence of 2,500 firings of 230 grain FMJ Giulio Fiocchi Lecco ammunition through a .45 caliber HP (ADLER customized) semiautomatic Springfield Armory pistol. Batches of 100 firings were performed at separate times; "the pistol was disassembled, cleaned and oiled after each 100 round firing session in respect of findings previously reported that accumulated residue on the weapon can affect the [breech face] marks on cartridges" (Vinci et al., 2005:369, citing findings from Molnar, 1977; see Section 3-D.1). Vinci et al. (2005:371) concluded that "there was a slight observable modification in the quality of the marks" over the long firing, but that "the gun could still be identified" even in the late-stage

¹²Ogihara et al. (1989) retained every 10th shot from firings 1-100, every 50th shot from firings 150-1,000, and every 100th shot from firings 1,100-5,000.

¹³Hamby (1974) chose the particular rifle because it was known to generate high pressures during firing, "which should hasten the barrel wearing process." The specific gun had already been fired "approximately 40,000 times." The barrel was not cleaned at any point during the test firings.

exhibits. However, the breech face marks were "not useful for matching any of the 2500 cartridges to the weapon" because the presence and clarity of these marks were inconsistent. Firing pin impressions proved more useful although, "after round 70, the nose of the firing pin was beginning to lose its imperfections resulting in a small flattened circular area at the bottom of the marks. Although firing pin drag marks were not consistently produced throughout the 2500 round firing sequence, the last 200 rounds did contain sufficient stria to match the cartridges to the weapon." Meanwhile, the value of ejector marks to making identifications "was enhanced" over repeated firing; the size and depth of the ejector mark increased "after firing 600 rounds."

In comparison with these longevity studies, Uchiyama et al. (1988) completed a rarer study of actual shot-to-shot variability for a string of 100 firings. Specifically, they collected bullets and cartridge casings from each of the 100 test firings, divided between four different combinations of gun brand and caliber. Each mark—land areas on the bullets and breech face and firing pin marks on the cartridges—was examined separately by examiners to assess the quantity of unique, individualizing lines or features. Each mark was then assigned an identifiability score of 1, 2, or 3; 1 indicated few or no identifiable features and 3 indicated sufficient features to support an identification based on that mark alone. Each bullet and casing was then assigned a score corresponding to the maximum identifiability score of its constituent marks. The analysis stopped short of true shot-to-shot comparison of features, although this was done for some sequences of well-marked (identifiability score 3) bullets.

For centerfire cartridges, they observed an approximately 10–50–40 percent division across identifiability grades 1, 2, and 3, respectively. Breech face marks generally showed higher identifiability scores than firing pin marks, which Uchiyama et al. (1988:378) attribute to the greater surface area of the breech face marks; however, for firings from a .38 Special Smith & Wesson (for which "the surface of the breech face is rather smooth and the firing pin is large and has irregular markings"), firing pin marks outperformed breech face. Identifiability scores dropped markedly for rimfire cartridges, with only about 5 percent having score 3 and 35 percent score 1; none of the breech face markings for rimfire casings was judged to have identifiability level 3. For bullets, identifiability level 3 ranged from 20 to 60 percent across the different gun/caliber combinations, and Uchiyama et al. (1988) judged that none of the test-fired bullets fell into identifiability level 1.

Blackwell and Framan (1980:16) cite discussions with an examiner at the Los Angeles Police Department in suggesting a "reproducibility spectrum," a continuum of manufacturing standards and firearms user practices that can affect the reproducibility of individual marks. At one extreme are police officers, for whom a firearm is such a vital part of their equipment

FIREARMS IDENTIFICATION

75

that they “[develop] pride and interest in maintaining it in superior working condition.” However, this “constant attention to cleaning and polishing” serves to “completely obliterate many, if not all, of the original identifying imperfections in the bore.” “Many officers mount their pistols in a drill press and actually wire-brush the bore to the point that individual features originally in the bore are removed, and new ones created.” Military small arms represent the other end of the spectrum:

These firearms, because of the nature of mass production, frequently retain their identifying characteristics for the life of the firearm. During manufacture, the bores are not carefully polished or lead lapped and the small blemishes that cause striations are retained virtually unchanged. Subsequent perfunctory or even diligent cleaning frequently does not obliterate them.

“The firearms that most frequently find their way into the firearms identification laboratory” fall in between these two extremes.

From the available studies of the reproducibility and endurance of firearms toolmarks, it is difficult to conclude that any of the markings are inherently more reliable than others. De Kinder (2002a:200) argued that “the breech face of the firearm seems to provide the most stable trace on the components of the fired round” and hence suggested that it might be the primary mark collected in a large-scale reference ballistic image database (RBID). However, he also observed that “important similarities were seen between marks left by the breech faces of subsequently manufactured firearms”—that is, the breech face may be prone to subclass carry-over effects—and so an RBID would likely have to include other marks like the firing pin. Likewise, Tulleners (2001:3-2) wrote that, “for automated imaging, the only areas used are the firing pin impressions, breech face marks, and ejector marks” because “these are the marks that are typically repeatable.” However, “in most cases the firing pin may not leave sufficient detail for analysis and most examiners rely on the breech face marks” to make identifications (Tulleners, 2001:3-2).

3-D. CHALLENGING SITUATIONS IN FIREARMS IDENTIFICATION

Over the course of years of analysis, forensic firearms examiners encounter numerous situations that complicate identification. These may be deliberate measures taken by the shooter—countermeasures to identification—but they may also be mechanical problems in firing. Smith (1971) cataloged 24 such situations, which he dubbed “jokers” in the field of firearms identification. He suggested that the top 10 such complications, “in the approximate order of frequency of occurrence,” are:

- automatic pistol bullets fired from revolvers;
- pistol bullets fired from rifles by using adapters;
- pistol bullets fired from rifles after being handloaded into rifle cartridge cases;
- revolver-type bullets fired from automatic pistols;
- replacement of barrel of an automatic pistol with another;
- replacement of firing pin in automatic pistol;
- refiling of breech face of automatic pistol or revolver;
- refiling firing pin of automatic pistol or revolver;
- replacing revolver barrel (which is more difficult than with more modular semiautomatics); and
- relining a pistol or rifle barrel with a new rifled liner.

Other complications include “firing a bullet of one caliber through an arm chambered for a larger caliber” (“such a bullet will show sketchy and erratic rifling marks which will be of little help in establishing identification”) and “firing a pistol or revolver cartridge through a smooth bored barrel” (“the bullet will obviously show no rifling marks”).

In this section, we briefly review what has been discussed in the firearms identification literature about some of these challenging situations. It is not an exhaustive list but covers particular topics that are more germane to RBIDs containing images from new firearms.

3-D.1 Condition of Evidence: Damage, Corrosion, and Cleanliness

In forensic laboratories, firearms can be discharged into water tanks (or other nondestructive trap mechanisms) so that bullets may be recovered with no damage other than those left by the firing process; similarly, cartridge casings may be quickly and safely retrieved following controlled test firings. A basic, fundamental challenge of firearms identification is that crime scenes are not necessarily such controlled settings. The task of pattern matching between pieces of bullet or cartridge case evidence—considering which microscopically fine markings may be unique to the source firearm, filtering out other marks, and evaluating various possible alignments of the exhibits (including, for bullets, all possible rotations of the exhibit pairs)—is already a difficult one. But it can be made more difficult by the nonpristine nature of crime scene evidence. Bullets can strike wood, asphalt, human tissue and bone, or other substances and, consequently, can be seriously warped, deformed, or fragmented; they can be lodged such that even their recovery for analysis can cause damage. Likewise, cartridge casings expelled onto the ground may be crushed underfoot or exposed to the elements. The possible differences between pristine exhibits and crime-scene samples are a continuing challenge for conventional firearms identification and ballistic

imaging techniques, particularly in the context of an RBID for which the basic point is the comparison of crime scene evidence with a pristine sample from a gun in brand-new condition. Because the basic theory underlying firearms identification is that fine microscopic imperfections on the surface of internal parts of a firearm impart those marks on bullets and cartridge cases fired in them, it also follows that abrasion and erosion of the firearm's internal parts can change the unique marks left on ballistics evidence. Gun users vary in the degree of care and maintenance they give to their firearms, from meticulous cleaning to neglect. Hence, guns generally—and the subset of guns used in crime—are subject to different levels of residue and dirt build-up and to different levels of corrosion. Corrosion “is the rusting or the eating away of the metal by some chemical action. This condition is usually due to firing ammunition loaded with corrosive primers and to improper care of a gun between the times it is used” (American Institute of Applied Science, 1982:81).

Fouling and barrel cleanliness are prominent concerns in the analysis of bullet striations, given the tendency for residue and metal scrapings to build up in the barrel. It might be expected to be a relatively minor concern for the markings on cartridge cases, but Molnar (1977:21) advised examiners that this is not necessarily the case. “An examination of the breech face is in order” in cases where “you are having trouble with a firearm that is not reproducing breech face marks on the primer or cartridge cases on your tests,” he wrote. “On many occasions the fouling of previous shots have built up to such an extent that the accumulated crud obliterates the breech face mark configurations to such an extent that their impressions on the primers are affected and sometimes precluded. On small caliber guns with low chamber pressures, even a few unburned powder granules adhering to the breech face can cause amazing differences in registrations, even altering some characteristics.” Tulleners (2001:3-2) makes a similar observation, noting that “dirt or lead build up on the breech face can reduce the detail of breech face impressions.”

Hess and Moran (2006:112) observed that, “periodically, firearms examiners and [IBIS] technicians receive requests to examine firearms that have been oxidized (rusted) and/or corroded due to a variety of factors.” This corrosion can be so pronounced as to make it difficult to operate and test fire the weapon. Moreover, “any test firing conducted while the firearm is in this condition risks permanent alteration of the weapon’s signature on these working surfaces for purposes of IBIS entry and future comparison,” and test-fired evidence from a corroded weapon may not match evidence already on file in databases. They conclude that, “given the backlog that most agencies are facing in this time of budget restraints, increasing caseloads, and understaffing in firearms units across the country, the probability that firearms received in corroded condition will not be test

fired at all is likely,” missing possible hits. Corrosion is also problematic because some means of dealing with it—including scrubbing with metal or other brushes—may also damage the weapon for the purposes of generating matchable marks.

Corrosion is a concern not only for the internal parts of firearms, but also for recovered ballistics evidence. Though it is certainly ideal to process and collect evidence from crime scenes rapidly, such is not always possible. Bullet and cartridge case evidence may be exposed to the elements for days, weeks, or months until they are found and recovered, and bullet evidence may be irretrievable from shooting victims because rapid extraction could be harmful to their health. See Larrison (2006) for a study of the rate of degradation of bullets and cartridges—monitored every 6 months over 2 years—in four different and demanding environmental conditions: soil, water, open air, and an animal carcass.

3-D.2 Countermeasures

Smith’s (1971) listing of “jokers,” which introduced this section, includes some deliberate countermeasures that might be taken by criminals—perhaps after firing a lethal shot—to try to mislead investigators. Aside from Smith’s rough ordering of situations by frequency and the rough impressions formed by examiners over their years of experience, there are no firm and systematic data on the frequency with which criminals deliberately alter firearms parts (or attempt to obliterate serial numbers) in order to avoid detection.

Some countermeasures, like crude filing of the barrel, are relatively easy to perform (if not always effective).¹⁴ As Smith (1971) articulates in fleshing out his list of problematic situations, some countermeasures are particularly rare because they are inherently more difficult to perform. The barrel of a revolver, for instance, is a more integrated part of the firearm assembly than the more modular barrel of a semiautomatic, so swapping out a revolver barrel requires special tools and considerable knowledge.

With expert knowledge, the range of countermeasures that might be taken is immense. For instance, Schechter et al. (1996:97) concluded that it was possible to replace the entire breech block of a SIG Sauer P226 9mm Luger pistol, so that “only the ejector will remain to give possible individual marks on the cartridge case base area from the ‘original’ weapon.” However, the registration of “good ejector and chamber marks on weapons

¹⁴Of course, it is possible for quick measures to be very effective at changing toolmarks. At the committee’s December 2004 meeting, firearms examiner Lucien Haag shared an evocative presentation entitled “New Bore and Breechfaces in 60 Seconds,” which suggests two quick ways in which a knowledgeable user could rapidly alter the striations left by the barrel or the breech face markings left on cartridge casings.

FIREARMS IDENTIFICATION

79

of this quality can be poor to non-existent,” and this technique would not be immediately obvious on inspection of the weapon. But the issue is how often people who use guns in crime would go to such lengths, akin to the proverbial question of why more criminals do not wear gloves while committing crimes (given the ease of leaving fingerprints).

Smith (1971:18) argued that replacing pistol barrels “may happen not infrequently;” he personally reported having seen two such cases in criminal cases.¹⁵ He, however, “never personally encountered [a case of replacing a firing pin in an automatic pistol], and it is obvious that such replacement of other parts, (extractor and ejector), refiling of breech face exists, still the possibility of the replacement of this part alone must be kept in mind” (Smith, 1971:19). Refiling the breech face is problematic, but “much refiling would leave the breech surface bright & fresh in appearance”; for full concealment, “it would be much simpler to discard the arm entirely and replace it with another, rather than go to the effort” to make it appear that an arm with a refiled breech face had not been altered (Smith, 1971:19).

It should be noted that while some countermeasures may successfully alter the “signature” markings left on ballistics evidence, they also serve to create new sets of markings—and, in some instances, prominent signs of the alteration—that can be used to match to evidence from later cases. Konior (2006) describes a case in which three cartridge casings and a pistol were recovered in investigating a homicide. The evidence casings did not appear to match test firings from the firearm; the latter all showed much greater levels of flowback around the firing pin impression. Subsequent analysis determined that an attempt had been made to alter the firearm by drilling the entire length of the pistol’s barrel; however, the person attempting the modification apparently inserted the drill bit into the firing pin aperture, widening the hole but also damaging the tip of the firing pin. The flowback and a new distinctive mark in the firing pin impression could be attributed to this attempted modification.

3-D.3 “Settle-In” Effect

From the standpoint of establishing an RBID, a phenomenon of extreme interest is what might be called a “settle-in” or “breaking-in” effect: the notion that it takes several firings for a firearm’s unique, characteristic markings to stabilize. When the settle-in effect has been documented, it

¹⁵In this context, Smith (1971:18) notes that the interchangeability of barrels was made vivid “in the famous Sacco-Vanzetti case.” Specifically, “the barrel of the fatal arm was, following a demonstration before the court by an expert for the defense, found present in one of the two other arms of the same type which had been introduced as exhibits, all three having been disassembled and reassembled in the course of the demonstration.”

has been almost exclusively in the context of the striations left on bullets and not on markings left on cartridge cases. This—in addition to the time-intensive process of firing into a water tank or other nondestructive trap and retrieving individual bullets—is a major reason that the restriction of RBIDs to cartridge case entries is sensible.

Murdock (1981:90) analyzed 10 test-fired bullets from each of three new and consecutively rifled barrels. He found that, “in general, the comparison between the first, second, and third firing from any one barrel failed to result in an identification. Some good agreement was present, however. The third, fourth, and fifth test firings from any one barrel could, however, generally be identified as having been fired through the same barrel.” From this, “it became obvious that each barrel needed to have a few bullets fired through it before it began marking in a reproducible, identifiable manner.” Similar work by Hall (1983:43) using a set of consecutively reamed polygonal barrels noted “rapid change during the first few shots,” so that firings 1 and 2 from the same barrel looked much different compared to each other than did firings 19 and 20. Hall found a “lack of identifications where bullets from any of the first five shots were compared to any others.” Matty (1985:65) noted similar behavior but was not as precise in suggesting the number of firings after which individual characteristics were discernible; instead, he observed that “it was not possible to make a conclusive match between test bullets #1 and #2 [from the same barrel, but] bullets #9 and #10 . . . were very similar in appearance.”

From these and other works, Bonfanti and De Kinder (1999a:5) concluded that “about five to nine shots” are needed “so that [barrels] transfer a signature to a bullet.” They note that the studies of consecutively manufactured barrels that they summarize in their review meet this standard. However, at least one of those studies—work by Lutz (1970:25) using two new and consecutively manufactured .38 Special Smith & Wesson barrels—began with the barrels in a completely unfired state and downplays any settle-in effect. Indeed, Lutz described the completely unfired nature of the barrels as the key advantage of the study, as it “offer[s] the ultimate as far as similarities between two successive barrels. It is certain that the similar markings visible now would become less prominent after being subjected to normal firing, cleaning, and wear.” Even though all the test firings Lutz examined were among the first 12 uses of the barrel, “sufficient matching individual striae were noted on the bullets to enable the examiners to easily identify the barrel of origin for each of the bullets. Similarities in class characteristics were noted; however, microscopic comparison of the bullets revealed that each barrel had caused different markings to such an extent that each land and groove impression on each of the bullets had a great number of individual identifying striae.”

Though a prominent settle-in effect for the breech face or firing pin—